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# Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?

Joel Feinberg\*

Seventy-five years after *Lochner v. New York*<sup>1</sup> most of us are prepared to cheer Holmes' famous quip that the Constitution does not enact Herbert Spencer's *Social Statics*. But does the Constitution stay neutral with respect to all conflicting social philosophies? Until recently, the direction of United States Supreme Court decisions encouraged many liberals to think that perhaps the first amendment enacts John Stuart Mill's *On Liberty*. In addition, philosophers might suggest (if we were not so diffident) that the eighth amendment incorporates Immanuel Kant's philosophy of punishment, and the fourteenth amendment presupposes the framework of Aristotle's theory of justice. Holmes' sarcastic term "enact," of course, is misleading as a name for the relation between the Constitution and a particular social philosophy. Politically impotent philosophy professors may be entitled to their power fantasies, but they are not so deluded to think of themselves as actual legislators of the law of the land. It would be much less misleading to claim only that the Constitution, insofar as it uses fundamental ethical terms without explicitly stating how to interpret them, tacitly incorporates some particular moral theories, namely the most plausible ones. The idea is that certain philosophical accounts of liberty, justice, equality, and fair dealing are closer to the objective truth than others, and the Constitution embodies the *correct* accounts of these moral notions, whatever they should happen to be. You will not be surprised to learn that, as a professional philosopher, I am disposed to be sympathetic to this approach, despite some obvious difficulties, since it makes moral philosophy the foundation of constitutional jurispru-

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<sup>1</sup> 198 U.S. 45 (1905). In *Lochner*, the Supreme Court held that a New York statute limiting employment in bakeries to sixty hours a week and ten hours a day was an arbitrary interference with the freedom to contract guaranteed by the fourteenth amendment. The statute, the Court held, could not be sustained as a valid exercise of the state's police power to protect the public's safety, morals, or welfare.

dence, so that one cannot fully understand the latter without studying the former.

In these two lectures, I propose to look at a moral concept that the Supreme Court has found lurking in various shadowy crevices of the Bill of Rights, and that the Court has said to be presupposed somehow by the rights that are explicitly guaranteed in that document. The Court itself has used the unfortunate term "privacy" for this foundational idea, but philosophers, reading between the lines of the leading judicial opinions, have had no difficulty identifying it as the concept we have often called personal autonomy<sup>2</sup> or self-determination—a notion that has puzzled philosophers for centuries and divided them into contending schools. I would like to suggest a different way (I hesitate to say a "new way"—nothing seems new in this well-trampled field) of looking at and applying this moral concept. Whether my approach, or any purely philosophical approach, can have any utility for constitutional interpretation, I must leave for others to say.

## I. Autonomy as Sovereignty

### A. *Personal Autonomy Conceived on the Model of National Sovereignty*

The word "autonomy" is derived from the Greek stems for "self" and "law" and means literally "the having or making of one's own laws." Its sense therefore can be rendered at least approximately by such terms as "self-rule," "self-determination," "self-government," and "independence." These phrases are all familiar to us from their more frequent, and often more exact, application to states and other political institutions. Indeed it is plausible to suppose that the original applications and denials of these notions were to states and that their attribution to individuals is derivative, in which case "personal autonomy" is a political metaphor.<sup>3</sup>

2 Cf. Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, and Hyman Gross, *Privacy and Autonomy*, in NOMOS XIII: PRIVACY 56-70 & 169-81 (1971) (Beardsley characterizes autonomy as one distinct facet of privacy; Gross treats autonomy and privacy as separate, but easily confused, concepts).

3 The Oxford English Dictionary lists three senses of "autonomy." The first and oldest is political, the other two are biological and social. The first is: "Of a state, institution, etc.: The right of self-government, of making its own laws and administering its own affairs." The earliest cited use of the word in English is in this sense (1623). Plato, when referring to "the ruling part of the soul" in THE REPUBLIC, quite self-consciously creates a political metaphor. C.S. Lewis writes that the Greek *eleutheria* and the Latin *libertas*, which are usually translated as "freedom," were used in ancient times "chiefly, if not entirely, in reference to the freedom of a state. The contrast implied is sometimes between autonomy and subjection to a foreign power; sometimes between the freedom of [within] a republic and the rule of a despot." If

When applied to individual persons the word "autonomy" can refer to either (i) the *capacity* to govern oneself, which of course is a matter of degree; or (ii) the actual *condition* of self-government and its associated virtues; or (iii) an *ideal of character* derived from that conception; or (iv) (on the analogy to a political state) the *sovereign authority* to govern oneself, which is absolute within one's own moral "boundaries."<sup>4</sup> This fourth sense of "autonomy," the one to which we shall devote our attention here, is suggested by the language of international law in which autonomous nation-states are said to have the sovereign right of self-determination. It has become common in recent years, however, for "autonomy" and "sovereignty" to be distinguished in political discourse. Great Britain is a sovereign nation which may under certain circumstances be willing to grant more "local autonomy," but never full sovereignty, to its constituent parts, Wales and Scotland. Similarly, Egyptians and Israelis negotiate greater "autonomy" (or home rule) for the west bank Palestinians. Sometimes the word used for the granting of limited "autonomy" is "devolution" in the sense of "the delegation of portions or details of duties to subordinate [local] officers or committees."<sup>5</sup> In any case, whatever the word used, the concept is sharply contrasted with that of full national sovereignty. If Scotland were to win sovereignty, it would become an entirely separate and independent nation.

Sovereignty and (mere) political autonomy seem to differ in at least two respects. First, autonomy is partial and limited, while sovereignty is whole and undivided. The autonomous region governs itself in some respects but not in others, whereas the sovereign state does not relinquish its right to govern entirely when it delegates au-

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Lewis is right, one of the oldest, if not the original, sense of "free" is "autonomous" as applied to a state, a sense which still survives. See C.S. LEWIS, *STUDIES IN WORDS* 124-25 (1961).

4 Note that corresponding to these families of meanings of "autonomous," there are parallel senses of the term "independent": the *capacity* to support oneself, direct one's own life, and be finally responsible for one's own decisions; or the *de facto condition* of self-sufficiency which consists in the exercise of the appropriate capacities when the circumstances permit; or the *ideal* of self-sufficiency; or the sense, applied mainly to political states, which refers to *de jure sovereignty* and the right of self-determination.

The word "free" is more complicated, but it too has an ambiguity similar to that of "autonomous" and "independent," especially when applied to nations and states. When colonies achieve independence of an imperial power they are said to have won their freedom, though their citizens may not be any freer as individuals. When we speak of people as (generally) free or unfree, we can mean either that they are generally capable of acting or omitting to act as they please (*de facto* freedom) or that they are independent, "sovereign" beings, persons in actual and/or rightful control of their own choices. See J. FEINBERG, *The Idea of a Free Man*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 3-29 (1980).

5 THE SHORTER OXFORD ENGLISH DICTIONARY 497 (2d ed. 1936).

tonomy. When the state grants home rule to a regional section, its own ultimate authority is not diminished, since in devolution sovereignty is not something given away in divisible parcels. (On the other hand, if the state intends to give away some of its sovereignty it has a sovereign right to do *that* too, as the United Kingdom did when it recognized the independence of India.)

A more important difference is that the authority of the sovereign state is a right, whereas the authority of the autonomous region is a revocable privilege. The sovereign grants autonomy freely at his pleasure and withdraws it at his will. Local autonomy is delegated; sovereignty is primal and underivative. Sovereignty is, in a sense, an ultimate source of authority.

Because of the special sense assigned to the word "autonomy" in political discourse, I prefer to borrow the stronger term "sovereignty" for what is often called "moral autonomy"; but where I do use the word autonomy in what follows, I intend it simply to mean "personal sovereignty," not something analogous to the weaker kind of "local autonomy." Now we can proceed to examine carefully the analogy between sovereign nations and "sovereign persons."

Most theories of sovereignty are about the concept of sovereignty *in* the state rather than our concern, the sovereignty *of* the state. According to the theory deriving from Bodin and Hobbes and developed by Blackstone, Austin and Dicey, there is (on some versions) or ought to be (on others) a determinate source of ultimate authority and/or power in every state—a monarch, council, legislature, or electorate. This sovereign person, or body of persons, is the "uncommanded commander" of society. This theory has had more and more difficulty in its applications to modern states with their constitutional checks and balances, their universal electorates, and counterpoised social classes. But while the concept of the determinate internal sovereign has fallen out of favor, the concept of national sovereignty *vis a vis* external powers continues to be applied routinely in international forums. Sovereignty in this sense is what one nation "recognizes" in another when it acknowledges that the other is an independent nation, as opposed to an empty territory, or land occupied only by roving tribes without stable political institutions, or a regional segment or colony of another country.

Empty territory is not a state, but a political state is territory and more. The additional element is best expressed by the term "jurisdiction." A sovereign state is territory under a kind of unconditional and absolute jurisdiction. The assertion that "the state is

sovereign," according to Bernard Crick, is "usually a tautology, just as the expression 'sovereign state' can be a pleonasm. For the concept of 'the state' came into use at about the same time as the concept of sovereignty, and it served the same purpose and had substantially the same meaning."<sup>6</sup> The state is the juridical entity that maintains sovereignty over a territory, no matter how its own internal lines of authority are organized, and sovereignty is the form of legal control a state exercises over its territory. Thus we mention "sovereignty" in the very definition of a state, and we mention "state" in the very definition of sovereignty.

Perhaps the concept of a "nation" can take us further toward an understanding of the conceptual complex "sovereign-state." Here we must proceed with caution for the word "nation" is treacherously vague and ambiguous. Sometimes it is still used interchangeably with "state"; "France" is the name of both a nation and a state. That is probably its original usage,<sup>7</sup> but it can now be used also to refer to the entity that can acquire its own state, and can be said to deserve to be a state even before it actually is one. We can refer to that second, and still obscure, sense of "nation" as the "prepolitical" sense. In this sense a "nation" may exist before it acquires its own state, or after it loses it, or it may exist in numerous states, as talk of "the Arab nation" testifies. On the other hand, people of distinct ethnic, linguistic, and religious backgrounds can co-exist as citizens of the same nation because they use still other criteria for identifying their fellow nationals. Such criteria include a shared focus in a common national self-image for sentiment and loyalty, or an extended history of faithful support and collaboration.<sup>8</sup> Thus, "French, German, and Italian-speaking Swiss are simply three sorts of Swiss: their national image transcends or embraces linguistic differences, and it

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6 Bernard Crick, *Sovereignty*, 15 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 77 (1968).

7 See S.I. BENN & R.S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE (1959). They write there:

"The nation" is a relatively modern conception, just as nationalism is a modern political ideal. In the Middle Ages, men did not think of themselves as Englishmen, Frenchmen, or Germans, but as vassals of their overlord, subjects of their king, and ultimately members of a universal order of Christendom. Gradually the monarchs of Western Europe strengthened themselves against the Emperor and the Pope on the one side and their barons on the other, each building up an increasingly centralized structure of political authority, and becoming a more important focus for loyalty than any competitor. At this stage the idea of nationality [nationhood] was co-terminous with political allegiance.

*Id.* at 247.

8 *Id.* at 249.

would be odd to make distinctions of nationality where they make none themselves."<sup>9</sup>

Where does a sovereign right of political independence come from: dispensations? contracts? conquests? There is no single obviously correct answer for a question of this generality. Suffice it to say, for our purposes, that apart from philosophical skeptics, nobody in practice seriously questions that Peru is a sovereign nation with the exclusive prerogative of governing its own territory, and the same is true of all the other established national states. That is just what a nation naturally is: a collection of individuals given a high degree of unity by common cultural elements who in fact occupy a territory over which they have established a system of law or authority. Nations need to become states if they are to survive and flourish as nations. And the phrase "sovereign state" is a redundancy.

If there is an analogous kind of personal sovereignty, where does *it* come from? One way of looking at individuals is to regard them, in a parallel way, as just naturally persons, and the phrase "sovereign person" might also be a redundancy. In fact the word "person" has an ambiguity directly parallel to that of the word "nation." "Nation" can refer, as we have seen, either to a judicial entity, the state, or to a collection of individuals united by various kinds of cultural bonds into a cohesive group. Similarly "person" can refer to the sort of entity that is a proper subject of such moral predicates as "right" and "duty,"<sup>10</sup> or it can refer to the unity imposed on a diversity of psychic elements—memories, loyalties, preferences, opinions—which puts on them all the stamp of a single self.<sup>11</sup> "One self" is the ana-

9 *Id.* at 251.

10 I discuss this sense of "person" under the rubric "normative personhood" and contrast it with "descriptive" or "commonsense personhood" in *Abortion*, in *MATTERS OF LIFE AND DEATH* 186-217 (T. Regan ed. 1978), and *Human Duties and Animal Rights*, in *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY* 191-93 (1980).

11 *Cf.* R.B. PERRY, *REALMS OF VALUE* 62-63 (1954). We are persons (in the non-juridical sense), according to Perry, to the extent that our interests are integrated:

That which makes a man a person is the integration of his interests, both time-wise and space-wise. The person can look ahead, and plan accordingly; he can launch upon trains of purposive activities; he can relate his past to his future fortunes, and the distant to the near; he can keep his bearings; he can manage the household of his diverse interests; he can put first things first; he can hold in mind the wood, despite the trees; and all this he can do because of his cognitive capacities.

. . . .

A man is a person insofar as there is a central clearing-house where his interests . . . take account of one another, and are allowed to proceed only when the demands of other interests are consulted, and wholly or partially met.

*Id.* Note how similar things might be said about the extent to which a group of people is "a people," a "community," or a "nation."

logue of "one people"; it provides the sense of "person" analogous to the pre-political "nation." Indeed, most normal people have achieved a degree of personal integration far stronger than that social integration that unifies national groups. If anything, one would expect the case for a "natural" personal sovereignty to be even stronger than that for its political counterpart. The other sense of person ("an appropriate locus of rights and duties") is essentially juridical. It refers to a moral agent and possessor of rights, as "naturally sovereign" over its self as the state is over its territory; and just as some have argued that *pre-political* nations need to be (sovereign) states, so one might argue, do integrated individual selves *need* to be (juridical) persons.

A word of caution is required at this point. The system of nation-states has not always served the world well, as its sorry record of wars attests. The walls of national sovereignty may weaken and crumble as a sense of world community grows, nourished by increasing cultural homogeneity and spurred by a common dread of nuclear holocaust. The case for individual sovereignty conceived on the national model, however, as we have seen, may well be stronger than the partial analogy between persons and nations suggests, for where that analogy fails, the differences tend to strengthen rather than weaken the attribution of individual sovereignty. There are cases, and not merely hypothetical ones, in which a sovereign state chooses to exterminate a part of its own population, just as a sovereign individual person might choose to have one of his own limbs or organs removed. But the morally crucial difference between these cases is obvious. The "parts" of persons are themselves nonpersons: desires, values, purposes, organs, limbs. The "parts" of nations, however, are themselves persons with their own sovereign rights. A state may intervene in a neighboring state's internal affairs to protect the lives of sovereign persons threatened with extermination, but a second party may not interfere, in a parallel way, in a sovereign person's "internal affairs" to protect the "rights" of desires, organs, and the like, for the latter, being nonpersons, have no rights of their own. This is another example of a difference between nations and persons that strengthens the concept of personal sovereignty even as it weakens the concept of national sovereignty which served as its model. What I have been proposing here simply is that the individual be thought of in the terms in which *for better or worse* we have thought of nations in the past, and even if we cease thinking of nations in that way in the future.



### B. *Domain Boundaries*

It must remain a matter of debate whether a concept of personal sovereignty like that sketched above has any proper application to individuals in the real world. I can only hope to show that the concept makes sense, that it stands ready for use as a tool of our moral judgments if we want it. I shall now attempt to render it more explicit while still preserving its fit with a familiar segment of our moral discourse in which something implicitly like it seems to be presupposed. In so doing, I shall be sketching as coherent a doctrine as I can of sovereign self-rule applied to individuals. Obviously, argumentative uses of the doctrine both in law and morals will be effective only to the degree that the doctrine itself is persuasive. Demonstration of the doctrine is not possible, but the reader may find that it resonates with something in his most fundamental moral attitudes—particularly some of the attitudes he holds toward himself.

Consider then once more our basic political analogy. In what ways might the autonomous individual be analogous to the autonomous state? The politically independent state is said to be sovereign over its own territory. Personal autonomy similarly involves the idea of having a domain or territory in which the self is sovereign. But whereas international conventions and treaties have long since defined the idea of “national territory” with some precision, the “boundaries” of the personal domain are entirely obscure and controversial. To be sure, even the territorial boundaries of nations are subject to some dispute and uncertainty, for example over how far up into the atmosphere they extend, and how far off shore. But the concepts of political “sovereignty” and “territory” are clear enough to permit international lawyers and diplomats to work on such problems in nonarbitrary ways with every hope of success. In the case of personal autonomy, no attempt to adjudicate “boundary disputes” can even be made until agreement is reached on the conceptual question of what a “personal domain” consists in.

The easiest answer is the one that takes the territorial metaphor most seriously. A sovereign nation’s territory is a geographical entity measured in miles or kilometers, and coordinates on maps. Perhaps the personal domain is also defined by its spatial dimensions. Perhaps it consists simply of a person’s body. We do speak of an inviolate right which is infringed whenever another person inflicts a harmful or offensive contact on one’s body without one’s consent—an unwanted caress, a slap, a punch in the nose, a surgical operation, or even a threatening move that provokes the reasonable apprehension

of such contacts. That must be part of what we mean by personal autonomy. After all, we speak of "bodily autonomy," and acknowledge its violation in cases of assault, battery, rape, and so on. But surely our total autonomy includes more than simply our bodily "territory," and even in respect to it, more is involved than simple immunity to uninvited contacts and invasions. Not only is my bodily autonomy violated by a surgical operation ("invasion") imposed on me against my will; it is also violated in some circumstances by the withholding of the physical treatment I request (when due allowance has been made for the personal autonomy of the parties of whom the request is made). For to say that I am sovereign over my bodily territory is to say that I, and I alone, decide (so long as I am capable of deciding) what goes on there. My authority is a discretionary competence, an authority to choose and make decisions.

If a man or woman voluntarily chooses to have a surgical operation that will render him or her infertile and a physician is perfectly willing to perform it, then the person's "bodily autonomy" is infringed if the state forbids it on some such ground as wickedness or imprudence. If no other interests are directly involved, the decision is the person's own and "nobody else's business," as we say, or "a matter between the person and his/her doctor only." To say that one's body is included in one's sovereign domain then, is to say more than that it cannot be treated in certain ways without one's consent. It is to say that one's consent is both necessary and sufficient for its rightful treatment in those ways. The concept of a discretionary competence implies both negative rights (e.g., the right *not* to have surgery imposed on one against one's will) and positive rights (e.g., the right to have surgery performed on one if one voluntarily chooses—and the surgeon is willing).

Still taking the territorial model seriously, we might enlarge our conception of the personal domain to include not only one's body (that is, one's right to decide by one's own choice insofar as that is possible what happens in and to one's body), but also a certain amount of "breathing space" around one's body, analogous perhaps to offshore fishing rights in the national model. You can violate my autonomy without actually touching my body, by entering and remaining, uninvited, in my personal space, or by transmitting into that space unwanted spectacles, sounds, or odors. My right to determine by my own choice what enters my experience is one of the various things meant by the "right of privacy," and so interpreted that right is one of the elements of my personal autonomy. My personal

space, however, diminishes to the vanishing point when I enter the public world. I cannot complain that my rights are violated by the hurly burly, noise, and confusion of the busy public streets; I can always retrace my steps if the tumultuous crowds are too much for me. One difference, then, between personal and national "territory" is that the former but not the latter shrinks and expands with differing circumstances. After all, national territories are not in constant movement across the surface of the earth (except for the snail's pace of continental drift which hardly affects the point). Where one has one's domicile, however, and where one owns land, there one has space that is entirely one's own, where uninvited intruders (with certain necessary and well understood exceptions) may not enter. Thus contractual possession and land ownership are also defined by discretionary rights and form a part, but by no means the whole, of our personal autonomy. On my land, apart from emergencies that bring the public interest sharply into play, and comparable rights of my landowning neighbors, I and I alone am the one who decides what is to happen.

Even discretionary control of body, privacy, and landed property together do not exhaust a plausible conception of personal autonomy. The kernel of the idea of autonomy is the right to make choices and decisions—what to put into my body, what contacts with my body to permit, where and how to move my body through public space, how to use my chattels and physical property, what personal information to disclose to others, what information to conceal, and more. Some of these rights are more basic and more plausibly treated as indispensable than others. Put compendiously, the most basic autonomy-right is the right to decide how one is to live one's life, in particular how to make the critical life-decisions—what courses of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children, and so on.

The first difficulty for a conception of a sovereign personal domain is the question of whether the imposing concept of "sovereignty" applies to the myriad options of lesser significance, the choice of whether or not to fasten a seat belt, for example, or whether to wear a red or green shirt while hunting. If we take the model of national sovereignty seriously, we cannot make certain kinds of compromises with paternalism. We cannot say for example that interference with the relatively trivial self-regarding choices involves only "minor forfeitures" of sovereignty whereas interference with the basic

life-choices involves the virtual abandonment of sovereignty, for sovereignty is an all or nothing concept; one is entitled to absolute control of whatever is within one's domain however trivial it may be on a scale of significance or harmfulness. In the political model, a nation's sovereignty is equally infringed by a single foreign fishing boat in its territorial waters as by a squadron of jet fighters flying over its capital city. Both are equally violations of sovereign rights, though the one, of course, is a more serious or important infringement than the other. If the offending nation respects the sovereignty of the other nation, it respects all of it, and will not think of *justifying* its infringement on the ground that the invasion of sovereignty was relatively trivial and counterbalanced by considerations of convenience or efficiency. Only a nation's own sovereignty (in the guise, say, of "self-defense") may ever be placed on the scales and weighed against another nation's acknowledged sovereignty, for sovereignty decisively outweighs every other kind of reason for intervention.

If the liberal wishes to abandon his quarrels with the paternalist over statutes requiring seat belts, red shirts, and other trivial things, and build his wall against paternalism on more serious issues, he is well advised then not to say that the relatively trivial statutes are only minor invasions of autonomy, and that autonomy-infracture is a matter of degree suitable for the weighing scales. It would make better sense conceptually to draw the boundaries of personal sovereignty differently in the first place, so that they confer their absolute protection only on the critical life-decisions.

My personal domain then consists of my body, privacy, landed and chattel property, and at least the *vital* life-decisions, perhaps among other things. But where exactly are its "territorial boundaries" drawn? A natural starting place for the attempt to draw domain boundaries is that suggested by the famous "harm to others" principle of John Stuart Mill.<sup>12</sup> According to this principle, as Mill expands it, we may locate within the personal domain all those decisions that are "self-regarding," that is, those decisions that primarily and directly affect only the interests of the decision-maker. Outside the personal domain are all those decisions that are also other-regarding, that is, these decisions that directly and in the first instance affect the interests of other persons. Clear examples of wholly self-regarding decisions are not easy to come by because "no man is an island," and every decision is bound to have some "ripple-effect" on the inter-

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<sup>12</sup> J.S. MILL, *ON LIBERTY* (Bobbs-Merrill Co. 1956). This work was originally published in 1859.

ests of others. As Mill pointed out,<sup>13</sup> however, a rough and serviceable distinction, at least, can be drawn between decisions that are plainly other-regarding and those that are "directly," "chiefly," or "primarily" self-regarding. There will be a twilight area of cases difficult to classify, but that is true of many other workable distinctions, including that between night and day.

In an earlier work I commented favorably on Mill's contention<sup>14</sup> that no one should be punished simply for being drunk but that a policeman should be punished for being drunk on duty. In contrast to Mill's policeman (or for that matter a drunken driver), I considered

a hard working bachelor who habitually spends his evening hours drinking himself into a stupor, which he then seeps off, rising fresh in the morning to put in another hard day's work. His drinking does not *directly* affect others in any of the ways of the drunk policeman's conduct. He has no family; he drinks alone and sets no direct example; he is not prevented from discharging any of his public duties; he creates no substantial risk of harm to the interests of other individuals. Although even his private conduct will have some effects on the interests of others, these are precisely the sorts of effects Mill would call "indirect" and "remote." First, in spending his evenings the way he does, our solitary tippler is *not* doing any number of other things that might be of greater utility to others. In not earning and spending more money, he is failing to stimulate the economy (except for the liquor industry) as much as he might. Second, he fails to spend his evening time improving his talents and making himself a better person. . . . Third, he may make those of his colleagues who like him sad on his behalf. Finally, to those who know of his habits he is a "bad example."<sup>15</sup>

All of these indirect effects together are insufficient to warrant our locating the solitary tipping of the bachelor outside the boundaries of his sovereign domain. (Note how preposterous it would be for one nation to intervene forcibly in the internal affairs of another on the grounds that it is not sufficiently stimulating the world economy; it is not sufficiently improving its own culture; it makes other nations sad on its behalf; and it sets a bad example for "emergent nations"!)

What plausible alternative is there to using the distinction between self-and-other-regarding decisions, such as it is, as a guide to the mapping of the boundaries of personal autonomy? One alternative answer is provided by the view I call "legal paternalism," the

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13 *Id.* at 99-100.

14 *Id.*

15 J. FEINBERG, *SOCIAL PHILOSOPHY* 32 (1973) (emphasis in original).

theory that it can be morally legitimate for the state to interfere with an individual's liberty on the sole ground that the intervention is necessary to prevent the individual from harming or risking harm to himself, even though no third party interests are threatened by his conduct. If we interpret legal paternalism as having no conception of its own of personal sovereignty, then insofar as we are committed to some intuitive notion of our own sovereign domain, we must hold paternalism under grave suspicion. If, on the other hand, legal paternalism has its own conception of personal autonomy, its associated domain boundaries must be defined not by a person's primarily self-regarding choices, but rather by his own true interests or real good.

C. *The Challenge of Legal Paternalism: One's Right Versus One's Good*

Perhaps the fairest way of putting the presumptive case against legal paternalism is to say that even when conjoined with other principles, it has at best a very limited conception of personal autonomy. Even though it is consistent with the recognition of a person's right of self-determination, it subordinates that *right* to the person's own *good*.

The concept of person's "own good" is analytically linked to the concept of his personal interest, but interests may vary considerably among persons so that there is no one conception of a personal good that applies to everyone. Nevertheless, most philosophers have been sympathetic to the idea of "natural interests" that grow out of our inherited constitutions as human beings, and which can be characterized in a fashion that is sufficiently formal or abstract to accommodate individual differences. One traditional view identifies a person's good ultimately with his *self-fulfillment*—a notion that is certainly not identical with that of autonomy or the right of self-determination. Self-fulfillment is not the same as achievement and not to be confused with pleasure or contentment, though achievement is often highly fulfilling, and fulfillment is usually highly gratifying. Other conceptions of a person's own good identify it with achievement, or contentment, or happiness (in the sense of predominant pleasantness or conscious satisfaction). On all these accounts one's good is conceptually distinct from one's right of self-government.

No one would deny, however, that a person's good and the exercise of his autonomous right are closely related, at least instrumentally. If one holds that the good is self-fulfillment and, like Mill, that development of the basic human faculties of choice and reasoned decision are components of self-fulfillment, then one must embrace the conclusion that the right to the unhampered exercise of choice is an

indispensable *means* to one's own good.<sup>16</sup> Moreover, if one holds, also like Mill, that in the majority of cases an individual knows better than any outsider what is good for him,<sup>17</sup> then it follows that the policy of allowing individuals to choose whenever possible for themselves, even to choose risky courses, is the policy most likely to promote their personal fulfillments, even though in some cases individuals may predictably exercise their autonomous choices unwisely.

There are only four standard ways of treating the relation between personal autonomy and personal good. The first of these is especially attractive to the paternalist, namely to derive the right of self-determination *entirely* from its conducibility to a person's own good (usually conceived as self-fulfillment). That right then is not a *sovereign* right, not ultimate, basic, or "natural," but entirely derivative and instrumental. On this view we may exercise a right to self-determination only because, and only insofar as, it promotes our good to do so. Nevertheless, an instrumental conception of the right of self-government, if strong enough, will differ only in rare instances, when applied to particular cases, from a conception of that right as basic and sovereign. John Stuart Mill's *On Liberty* is an instructive case in point. Mill insists that a given normal adult is much more likely to know his own interests, talents, and natural dispositions (in

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16 This is the famous "moral muscles argument," developed in the first eight paragraphs of Chapter III of *ON LIBERTY*. In effect the argument proceeds as follows:

(i) (The explicit departure from hedonism): The highest good for man is neither enjoyment nor passive contentment, but rather a dynamic process of growth and self-realization, in which uniquely human faculties—perception, judgment, discriminative feeling, powerful human emotion, mental activity, and moral preference—are progressively perfected.

(ii) These powers, like the muscular powers, are improved only by being used (exercised).

(iii) Exercise of the moral muscles requires constant choice-making, which in turn requires freedom to make even foolish (self-regarding) choices, freedom not only from legal coercion but also from the tyranny of custom.

(iv) Therefore, interference with free choice hampers the development of distinctive human propensities in whose fulfillment consists a person's good.

J.S. MILL, *supra* note 12, at 67-76.

17 This is a quite distinct argument from the "moral muscles argument." It is found in several places in *ON LIBERTY*. Sometimes the emphasis is on the actual likelihood of error when an outsider presumes to know a person's interests better than he: "[T]he strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly [mistakenly] and in the wrong place." *Id.* at 102. In other places the emphasis is on the advantages of the individual over others in knowing his own interest: "[W]ith respect to his own feelings and circumstances the most ordinary man or woman has means of knowledge immeasurably surpassing these that can be possessed by anyone else." *Id.* at 93.

the fulfillment of which consists his good) than is any other party, and much more capable therefore of directing his own affairs to the end of his good than is a government official or a legislator. The individual's advantages in this regard seem so great that for most practical purposes we could hold that recognition and enforcement of the right of self-determination is a causally necessary condition for the achievement of the individual's own good. Thus Mill argued in *On Liberty* that the attempt even of a genuinely benevolent state to impose upon an adult an external conception of his own good is almost certain to be self-defeating, and that an adult's own good is "best provided for by allowing him to take his own means of pursuing it."<sup>18</sup>

It is logically open to Mill to argue (as he sometimes seems ready to) that the relation between a person's right of self-determination and his good of self-fulfillment is not merely a strong instrumental connection but an invariant correspondence. On this second view, whatever harm a person might do to "his own good" by the foolish exercise of his free choice would in every case necessarily be outweighed by the greater harm done by interference and the substitution of outside direction. This is the position that would enable Mill to maintain his utilitarian commitment to the reduction of harms and his exceptionless opposition to paternalism *both*, so it must have had some appeal to him. Moreover, he has shown impressively that there is always and necessarily a cost to a person whenever outside judgment is forcibly substituted for his own choice, and that in an overwhelming preponderance of cases the intervention will be self-defeating, but he has not and could not show that necessarily in *every* case the cost will be greater than the harm prevented and that the intervention will defeat its own purpose. For the most part, therefore, Mill seems prepared to acknowledge that the correspondence between self-direction and self-fulfillment is contingent and subject to infrequent exceptions (the first view). In those rare cases where we can *know* that free exercise of a person's autonomy will be against his own interest, as for example when he freely negotiates his own slavery in exchange for some other good, there, Mill concedes, we are justified in interfering with his liberty in order to protect him from extreme harm. At that point, Mill is finally ready to admit paternalistic reasons into his (otherwise) liberal scheme of justification.

A third standard interpretation of the right of self-determination holds that it is entirely *underivative*, as morally basic as the good of

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18 J.S. MILL, *supra* note 12, at 125.



self-fulfillment itself. There is no necessity, on this view, that free exercise of a person's autonomy will promote his own good, and even where self-determination is likely, on objective evidence, to lead to the person's own harm, others do not have a right to intervene coercively "for his own good." By and large, a person will be better able to achieve his own good by making his own decisions, but even where the opposite is true, others may not intervene, for autonomy is even more important a thing than personal well-being. The life that a person threatens by his own rashness is after all *his* life; it *belongs* to him and to no one else. For that reason alone, he must be the one to decide—for better or worse—what is to be done with it in that private realm where the interests of others are not directly involved.<sup>19</sup> This is the interpretation that follows from a pure conception of individual sovereign autonomy, and anyone who holds such a conception, tacitly or explicitly, can find no appeal in—indeed is logically precluded from holding—legal paternalism.

A fourth way of regarding the adult's right of autonomy proposes a compromise. It thinks of autonomy as neither derivative from nor more basic than its possessor's own good (self-fulfillment), but rather as coordinate with it. In the more plausible versions of this view,<sup>20</sup> a person's own good in the vast majority of cases will be most reliably furthered if he is allowed to make his own choices in self-regarding matters, but where that coincidence of values does not hold, one must simply do one's best to balance autonomy against personal well-being, and decide between them intuitively, since neither has automatic priority over the other. This compromise, of course, will not satisfy the liberal adherent of personal sovereignty since it restricts individual authority to some degree even in the wholly self-regarding domain; but it is consistent with a kind of legal paternalism, for its proponent can concede that paternalistic considerations, where they apply, are always relevant as reasons of some weight, even when they conflict with reasons of other kinds and may not be decisive. This modestly paternalistic theory allows room for personal autonomy but does not conceive of it on the model of territorial sovereignty, since it permits it to be balanced against other considerations, and thereby deprives it of its trumping effect.

I cannot conceal my own preference, at least initially, for posi-

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19 This third interpretation of autonomy rights is defended in my essay *Legal Paternalism*, 1 CANADIAN JOURNAL OF PHILOSOPHY 105-24 (1971), and also in my *Freedom and Behavior Control*, in 1 ENCYCLOPEDIA OF BIOETHICS 93-100 (W.T. Reich ed. 1978).

20 See, e.g., J. GLOVER, CAUSING DEATH AND SAVING LIVES 74-85 (1977); J. KLEINIG, PATERNALISM (1984 forthcoming).

tion (iii). As the only view consistent with a conception of personal sovereignty, it accords uniquely with a self-conception deeply imbedded in the moral attitudes of most people and apparently presupposed in many of our moral idioms, especially when used self-defensively ("my life to live as I please," "no one else's business," etc.). In those rare cases where the exercise of a person's sovereign right and what is truly good for him conflict, (iii) defends the choice nevertheless. If that seems an absurd result, the reader should put himself in the position of the person interfered with. Presumably, if he genuinely chose the alternative that is in fact bad for him, he did not choose it because *he* believed it was bad for him. That would be so irrational that it would put the voluntariness of his choice in doubt. If he chose that alternative because *he* believed it good (or at least not bad) for him, then either the difference between him and his would-be-constrainers is over some matter of fact about which he is simply mistaken, in which case he would welcome being set right, or it is about the nature of his self-interest, or the reasonableness, given his values, of the risks he wishes to assume. In that case, the disagreement would be more intractable, and the reader would not welcome the overruling of his own judgment, or the substitution of the "better values" of others for his own.

There is still another possibility. The person may have chosen to act as he did believing the consequences would be bad for his self-interest, but to act *despite* that expectation, not because of it. Perhaps he wishes to sacrifice "his own good," or some part of it, for the sake of others, or for some treasured cause; or perhaps he deliberately values short term good over his future good through the long run. Identifying with the person in one of those cases, can the reader genuinely prefer "repression for his own good" over facilitation of his own fully informed choice? If not, how then can he have a different preference for others? Even in the cases where the person subsequently regrets his choice, he may not regret that he had not been forcibly prevented from making it. There must be a right to err, to be mistaken, to decide foolishly, to take big risks, if there is to be any meaningful self-reliance; without it, the whole idea of *de jure* autonomy begins to unravel.

#### D. *Autonomy Contrasted With Liberty and De Facto Freedom*

A particularly perplexing form of the conflict between one's sovereign right and one's own good is that which arises when a person exercises his sovereignty to alienate some of his own liberty at some future time. Does one's future liberty lie beyond the boundaries of

one's sovereignty so that others may interfere with present choices for its protection? Discussions of this question from Mill to the present have been marred by a failure to distinguish with consistent clarity between *de jure* autonomy (or sovereignty) and *de facto* freedom. For that reason, we shall linger over that conceptual distinction before applying it to the substantive question about domain boundaries.

The extent of our *de facto* freedom of *action* is determined not by any characteristics or powers of ourselves. Rather it is entirely a function of the circumstances in which we find ourselves. Insofar as those circumstances contain open options, just to that extent do we have freedom of action. A person has an "open option" in respect to some possible action, *x*, when nothing in his objective circumstances prevents him from doing *x* if he should choose, and nothing in his objective circumstances requires him to do *x* if he should choose not to. What he wants to do, what he actually chooses to do, what he believes his options to be, how aware he is of his surrounding circumstances, are all quite irrelevant to the question of what options he actually has, just as they are irrelevant to the question of what the temperature of the surrounding air is. What options are open to him is entirely a function of the existence and location of external barriers and obstacles. (And if it is specifically *political* freedom we are talking about, that is wholly a matter of the existence and location of specifically political or legal barriers.) Freedom of action then is understood the way the "unsophisticated person" in Schopenhauer's account understands it: "I can do what I will: if I will to go to the left, I go to the left; if I will to go to the right, I go to the right. This depends entirely on my will; therefore, I am free."<sup>21</sup>

Schopenhauer, however, quickly raises another question: I can (sometimes) do what I will, but when if ever am I free to will otherwise? What does it mean to be free of interference to *choose* as I wish? The alcoholic, for example, may have an intense desire to choose not to have another drink, but when his host returns with the bottle, he finds himself, to his despair, choosing contrary to his own wishes. Such a person may have freedom of action (for whatever that is worth), including political liberty (the law neither required nor prohibited another drink), but he lacked freedom of choice.<sup>22</sup> He was free to act as he chose, but not free to choose as he wished. He suf-

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21 A. SCHOPENHAUER, *ESSAY ON THE FREEDOM OF THE WILL* 19 (K. Kolenda trans. 1960).

22 For an ingenious elaboration of this "second level" account of freedom to will, see Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *THE JOURNAL OF PHILOSOPHY* 5-20 (1971).

ferred from no lack of opportunity to abstain, but he succumbed anyway, because of impaired psychological *capacities*.<sup>23</sup> His option to choose was closed even though his option to act was open. It is as if there were a network of railroad tracks within each person's psyche with switches open to some possible choices and locked closed to others. Our freedom of choice on balance is a function of the number and fecundity of such options left open, including those options we would never wish to exercise.

So construed, freedom is an important good in human life. Most people have a welfare interest in maintaining an essential minimum of freedom, and a security interest in having more open options still. Some people even have a kind of "accumulative interest" in enjoying as much freedom as possible, well beyond necessity or security. Minimal liberty is an essential good for most of us, much like economic sufficiency or health. Greater amounts of freedom are for many of us goods to be treasured like art objects, natural beauty, adventure, achievement, power, or love. But it is very important to recognize that freedom is one kind of good among many, that people have been known to get along well with very little of it, that rational persons are often willing to "trade" large amounts of it for goods of other kinds, including simple contentment, that philosophers have proclaimed the "dreadfulness" of the burden of too much of it, and that sometimes the "price" of an increment of freedom, as measured in other goods, is a bad bargain. The *de jure* autonomous person will surely reserve the right to "trade-off" his *de facto* freedoms for goods of other kinds, as measured on his own scale of values and determined by his own judgment.

There is no paradox then when a morally autonomous person exercises his sovereign right of self-government to diminish his own *de facto* freedom of action. Provided only that his consent be free and informed, he might even submit to manipulative treatments designed to close some of his options to *choose*. It will be instructive to examine how those treatments, often called "behavior control," sometimes are, and sometimes are not, consistent with *de jure* autonomy. These manipulative techniques can be employed either to close or to open a

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23 Impaired psychological capacities are not the only cause of closed choice-options. When persons undertake moral commitments they may be "morally bound" not to choose in the way they would (otherwise) prefer to. A person with powerful scruples may find that he "cannot bring himself" to act in the way he intensely wants to act. It is not plausible to treat integrity as "an impaired psychological capacity," but the honorable person, nevertheless, has fewer open choice-options than the dishonorable person. One can, therefore, have too much of a good thing called "free will."

person's options to choose either with or without his consent. Each of the four combinations has its own effect on freedom, and its own reflection on *de jure* autonomy.<sup>24</sup>

Where manipulative techniques are used to open a person's options with his voluntary consent, there is an enlargement of freedom and no violation of autonomy; hence, this is the least troublesome category. A harder case is that in which a person consents to behavior control which closes some options irrevocably for the sake of a good he has come to value more than his freedom. Respect for autonomy requires noninterference with such choices provided they are genuinely voluntary and fully informed. On the other hand, manipulation of a person without his consent in order to close his options restricts freedom *and* violates autonomy too. This third category is the most obviously impermissible kind of case. The most troublesome and controversial kind of case, in contrast, is that in which a person is manipulated without his consent for the benign purpose of enlarging his future freedom of choice, but even here, the doctrine of personal sovereignty requires that a person's moral right to govern himself within his sovereign domain be given precedence even over his future *de facto* freedom.

#### E. *Autonomous Forfeitures of Liberty and Autonomy Itself*

Given the contrast between *de facto* freedom and *de jure* autonomy (personal sovereignty), there is no conceptual incoherence in the idea of an autonomous forfeiture either of the good of freedom or the right of self-government itself. Not only can such forfeitures occur; they are beyond the legitimate powers of others to prevent, provided that they are voluntary, and that personal sovereignty covers a domain whose boundaries are drawn in accordance with self-and-other-regarding criterion. If we assume with John Stuart Mill (excluding his occasional lapses) and the grand liberal tradition that the domain of the sovereign individual consists of all his activities that do not seriously impinge on the important interests of other people, than we can say that *respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him*. Whenever a person is compelled to act or to omit acting on the grounds that he must be protected from bad judgment in the ordering of his own goods and values even though no other people are endangered, then his autonomy is in-

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<sup>24</sup> The following paragraph draws on my article *Freedom and Behavior Control*, in 1 ENCYCLOPEDIA OF BIOETHICS 93 (W.T. Reich ed. 1978).

fringed. From the moral point of view, this is just as if one sovereign state invaded the air space or off-shore fishing waters of another, or sent armies to occupy a part of its land, or otherwise violated its sovereignty. Whether interference with an autonomous person's liberty is done in the name of his own good or welfare, his health, his wealth, or even *his future open options*—which are themselves constituents of his well-being—it is still a violation of his personal sovereignty. After all, sovereign political states do not claim the right to impose their benevolent interventions on other sovereign states; how then can autonomous individuals coerce other autonomous individuals into conduct deemed conducive to their own long-range good?

The point applies just as much to coercion of another designed to increase his *de facto* freedom (open options) as it does to compulsions and prohibitions aimed at promoting any other element of a person's well-being. It is of course the right and the duty of a parent forcibly to prevent a small child from harming his own future interests, even without the child's consent. It is a duty of parents to keep as many as possible of a child's central life-options open until the child becomes an autonomous adult himself, and can decide on his own how to exercise them.<sup>25</sup> But it is paternalism in an objectionable sense forcibly to prevent an autonomous adult from voluntarily trading some of his own "open options" for preferred benefits of another kind. A rational adult could have very good reasons for giving away all of his worldly goods, or even terminating his own life, or in the most extreme hypothetical case, even for selling himself into slavery, and thus perhaps irrevocably closing his most fecund options. And even if we do not think much of his reasons, we may have to concede that he is making a perfectly genuine voluntary choice of his own, albeit an unreasonable one by our standards. Such a choice might seem unreasonable to us; it might be one that we could never make. But it need not be an insane or nonresponsible choice. In some cases we might better think of it as saintly, heroic, courageous, adventurous, romantic, or just plain odd. In any case, if the chooser is an autonomous adult deciding voluntarily, the choice must be his to make and not ours, and the responsibility too is his to take. That is what follows from our description of him as an autonomous person with sovereign control over his own domain. A perfectly autonomous person would have, in Mill's words, the "*power of voluntarily disposing of*

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25 See my essay *The Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124-53 (W. Aiken & H. LaFollette eds. 1980).

*his own lot in life*,"<sup>26</sup> even if that involved forfeiture of his *de facto* freedom in the future.

The point applies equally to voluntary refusals to increase one's own freedom. If we hold fast to our distinction between one's balance of *de facto* freedom construed in terms of the number and fecundity of the options actually open to a person, on the one hand, and personal autonomy interpreted as the sovereign right to decide within one's own proper domain, on the other, we can make sense out of Rousseau's infamous phrase "forced to be free" (though probably not the sense Rousseau intended).<sup>27</sup> But though that notion be intelligible and coherent, no advocate of personal sovereignty can rest content with efforts to justify invasions of autonomy by citing the increase in *de facto* freedom thereby brought about. It is possible to have the area of one's freedom to act enlarged by force, and when this happens, some of one's options are closed by a violent or coercive act that at the same time causes many more options, or options of greater fecundity, to open. Thus a person might be dragged struggling and kicking over the border from a cruel police state into a liberal democracy. He may have resisted out of mere habit, or family loyalty, or because he genuinely preferred tyranny to freedom. Not everyone appreciates having open options and the difficult burden of having always to choose for oneself what one shall do. But whatever a person's motives for resisting the expansion of his options, the condition so described is one of greater freedom of action. It is important to note, however—and this has been my primary thesis thus far—that benign as our motives might be, insofar as we force a person against his will into a condition he did not choose, we undermine his status as a person in rightful control of his own life. We may be right when we tell him that greater freedom of action is for his own good in the long run, but we nevertheless violate his autonomy if we force our better conception of his own good upon him.

Does a person act within the proper boundaries of his personal sovereignty when he voluntarily forfeits *de jure* autonomy itself? As we have seen, there is neither conceptual nor (necessarily) moral difficulty when a political state renounces some part of its sovereignty. Imperial powers forfeit their right to rule over colonies, and federal states grant full independence to locally autonomous regions. It is

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26 J.S. MILL, *supra* note 12, at 125 (emphasis added).

27 JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 16-18 (8th ed. 1960). See also the criticism in Isaiah Berlin's *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 131-34, 147-48 (1969).

very difficult to think of an analogous way in which a person could renounce "a part" of his sovereignty unless we think perhaps of a master relinquishing his claim to "rule" over a slave through an act of manumission, or in a more far-fetched example still, an organ-donor forfeiting his "sovereignty over" a kidney, or another "regionally autonomous part." It is easier to think of individuals renouncing *total* sovereignty, and simply "going out of business" as independent persons, much as a state might decide through some legitimate parliamentary body to dissolve itself.

Consider then the hypothetical example of a sovereign national state voluntarily relinquishing its own autonomy. If the Canadian Parliament, following its own constitutional rules, voted unanimously to accept an American invitation to become the fifty-first state, but was then prevented from doing so by threats of military intervention by the Soviet Union, boycott by the British Commonwealth, and condemnation by the United Nations, Canada might well claim that its autonomy had been violated by the coercion that prevented implementation of its own sovereign will. It might charge that coercion had prevented it from "voluntarily disposing of its own lot in the future," no less an infringement of present sovereignty for being a protection of future independence. Such a claim, I think, would be both coherent, and in this political case at least, well founded.

What this example shows is that the idea of sovereign renunciation of sovereignty is a coherent one in the political arena where the concept of sovereignty has its original home. It is neither unstable, contradictory, nor paradoxical. If we transfer the whole concept of sovereignty from the nation to the person, then we should expect the same implications for the personal forfeitures of autonomy. Of course, it is open to one to deny that the idea of sovereignty applies to persons in the first place, but if one is friendly to that notion, one must face up to its implications.

## II. Privacy as Autonomy

### A. *Is Autonomy Alienable? The Riddle of "Voluntary Slavery"*

What would a total and irrevocable forfeiture of freedom or autonomy look like? The example that has most frequently come to the minds of philosophers is a rather extreme form of the institution of chattel slavery in which slave-holders "own" their slaves in something like the same way they own tables and chairs, cows and horses. The owners have exclusive and permanent proprietary rights over



the slaves, who in turn have no enforceable rights against their masters.<sup>28</sup> The point of the practice is to provide inexpensive labor for the owner; the slave has the dubious advantage of assured (but not contracted) sustenance and the "security" of life tenure. The latter advantages have almost always been insufficient to induce people to become slaves voluntarily. Rather slaves are captured in war, or forcibly abducted, or treacherously lured from their prior condition of freedom, and kept in their servitude by stern and, if necessary, violent measures. If nevertheless, untypically, two persons signed an agreement whereby one would become the permanent slave of the other, that compact, as Mill reminds us, "In this and most other civilized countries . . . would be null and void, neither enforced by law nor by opinion."<sup>29</sup> The question raised by this bizarre example is on what grounds this universal nullification rests. If the only reasons that seem always available are those provided by legal paternalism, then the liberal must either allow, at least in this one extreme case, that paternalistic reasons may be morally valid grounds for legal policies, or else he must deny that the firm policy against "voluntary slavery" is morally well-founded.

There is, of course, a strange artificiality in the example. In the first place, it is not an example of a direct criminal prohibition. Entering into a slavery contract is not in this and other civilized countries the name of a *crime*. The state simply refuses to offer, as a kind of service, a mechanism for creating legal obligations of the appropriate kind, just as it refuses to provide the legal mechanism for producing homosexual or bigamous marriages. Homosexual couples and bigamous trios might complain that their *liberty* is infringed thereby, but such a complaint would not be convincing. A legal disability consequent on the state's failure to produce a service (or confer a "legal power") is not the same as a legal duty to desist enforced by the threat of punishment for disobedience. How can one "disobey" the nonpossession of a legal power? Furthermore, as John Hodson points out, "the law's refusal to enforce slavery contracts does not prevent anyone from living in *de facto* slavery,"<sup>30</sup> just as, I might add, the law's failure to provide legal devices that enable two people of the same sex, or two people of one sex and one of the other, to be legal spouses, does not prevent people in these combinations from

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28 Hardly any actual instances of slavery, at least in historical times, have been quite this extreme, but this description will serve well as an hypothetical example—all the better for being so extreme.

29 J.S. MILL, *supra* note 12, at 125.

30 Hodson, *Mill, Paternalism, and Slavery*, ANALYSIS 61 (1981).

cohabiting on intimate terms. If the parties to these *de facto* arrangements wish, in addition, to bind themselves morally to one another, there is no force to stop them.

The law's refusal to recognize slavery contracts does have indirect consequences, however, for the criminal law. If a third party "liberates" the slave by abducting him, that would be a crime against the slaveholder's property analogous to theft. Moreover, if the owner has the slave's legally effective consent, in advance, to anything he might do—a kind of irrevocable blank check, so to speak—then the owner has a legal privilege to mistreat the slave in ways that would otherwise be crimes. By not recognizing the slavery contract as valid, the law thereby undermines the slaveholder's defense to charges of false imprisonment (if he should lock the slave in his quarters), assault and battery (if he should use corporal punishment on the slave), or murder (if he should destroy his "property"). On the other hand, if the slavery arrangements were merely *de facto*, then there would be legally enforceable limits on what the owner could do to the slave with or without the slave's prior blanket consent. That would constitute a limit on the slaveholder's liberty, but not an *additional* restriction, so he has not been deprived of a liberty he formerly had.

Would the refusal of legal recognition of the contract interfere with the *slave's* liberty? Hodson says no, on the ground that the slave may still subject himself to the will of his master "in all the ways associated with slavery; he may act only on the command or with the permission of another and his life may be devoted to doing the bidding of this other person,"<sup>31</sup> even though the arrangement is only *de facto*. Only those actions of the master that are crimes are actions the slave is not free to submit to (in the sense that the master is not at liberty to perform them). But then the master would have no reason to punish, incarcerate, or destroy the other person if the other is his wholly willing slave in any case. The only point in ever doing these things would be to exercise sheer wanton cruelty—sadism, if you will, so it would seem that in failing to recognize the slavery contract, the state restricts only the sado-masochistic options of the would-be slave. But these were options closed to the person before he even entered *de facto* slavery, so the state has not deprived him of liberties he once had. The only new liberty *contractual* slavery would confer on him would be the liberty to be locked up, beaten or killed, pointlessly and wantonly, when or if his master so chooses. His own "choice" in ad-

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31 *Id.* at 62.

vance to submit to those kinds of treatment would be of suspect voluntariness, unless of course he "genuinely loved Big Brother" and wanted nothing more than faithful prostration before his omnipotent will.

Mill took the problem to be one of protecting the would-be slave, rather than the would-be owner, from the consequences of his own voluntary agreements, and insofar as his solution would justify a legal policy (of non-validation) on those terms, it is paternalistic in spirit. Let us focus on the possible motives of this hypothetical odd duck, the voluntary would-be slave. Why would anyone in his right mind ever want to enter into such a relationship with another? (Insofar as someone is *not* in his right mind, just so far does his agreement fall short of the voluntariness required for valid consent, in which case the state can refuse to enforce it without infringing his autonomy.) Possible motivations can be divided into two categories. Either the would-be slave finds the prospect of slavery intrinsically appealing or he is willing to endure it for the sake of other benefits to be conferred by the owner as contractual "consideration." If the former, he may have a powerful psychological need of atonement for some sin, or for the achievement of perfect self-discipline through a kind of self-abasement, or he may feel a philosophical imperative to lose his sense of self-centeredness altogether through devoted service and unconditional commitment to another, or a religious need to achieve genuine humility through the lowliest status he can acquire. Some of these motives will be of doubtful genuineness, and should no doubt be checked carefully for voluntariness before the contract is validated, but it would be dogmatic to insist that necessarily and in each case, all motives in this category must fail the test of voluntariness. Voluntary self-enslavement for some of these reasons seems no crazier than the solitary forms of holy asceticism, like choosing the life of an anchorite in the desert, wearing sackcloth and ashes, and mortifying the flesh.

If the would-be slave's motives fall into this first category, then there is hardly any reason why he needs a legal contract from a willing would-be owner. If he wants *de facto* slavery there is no legal barrier to his goal. If he wishes irrevocability, he is free to make his own binding commitment both to himself and to the other, just as unmarried lovers might vow lifelong unmarried fidelity to one another without benefit of legal enforcement. So, with the exception of the protection against otherwise criminal mistreatment which would be waived in a legally recognized slavery contract of the extreme

kind, there is really no point or need, from the point of view of the would-be slave, in having such a contract. And there are additional reasons which he might or might not share with the state, for not having such a contract. In the unlikely future event that the *slave* changes his mind and wants to leave the arrangement, then in the absence of an irrevocable contract, he may do so, and that would be to his advantage. If, in the more likely event that he never changes his mind (and the master remains willing) he may continue in the arrangement without benefit of contract. At the most he would need a contract to protect him from the master's change of mind, but if his motive is instant and total obeisance to his master's will in all things, it would not be likely that he would wish to impose himself on the master *against* the master's will.

What protection would a legal contract offer the slave-holder, still assuming the slave's motives are of the first category, and no additional consideration has been contributed by the master? In the first place, it would be a very odd contract indeed if it enforced only promises from the slave to the owner and imposed no reciprocal obligation on the owner. But even assuming the legal coherence of such a supposition, the legal guarantees enforced by the state would be utterly otiose, for by hypothesis, the owner has made no investment in the arrangement to be "protected." He has contributed no *quid pro quo* and made no reciprocal promises. Enforcing a promise to him when he has made none in return—and an irrevocable promise at that—would not be to "protect" him, so much as to dump a huge gratuitous advantage on him. One does not have to be a legal paternalist to find reasons against such an absurd policy, especially when the alternative does not, in any usual sense, infringe anyone's liberty.

The more plausible category of possible motives of the would-be slave is the second one. He is willing to take his chances with inescapable servitude to this particular master, not because of its intrinsic appeal, or his philosophical or religious imperatives, but because of some *offer* the would-be owner makes him as an inducement. If we are still speaking of the most extreme form of chattel-slavery, in which the slave loses *all* his rights, then the consideration presumably is to be paid in advance while the would-be slave is still a free negotiator. If it were a promise of future wages or minimal working conditions, on the other hand, then once the slave had lost his rights, the promise could be broken with impunity. Very likely the consideration would be paid in advance to a third-party, who would maintain his own right to the benefit after the would-be slave had become an actual

slave, and lost all his own rights. We can imagine any number of intelligible (though not attractive) motives in this category for entering irrevocable rightless slavery. A person might agree to become a slave in exchange for ten million dollars to be delivered in advance to a loved one or to a worthy cause, or in payment for the prior enjoyment of some supreme benefit, as in the *Faust* legend. (It is more difficult, but not impossible to imagine corresponding motives of the purchaser.) We are imagining now a would-be slave who is no pathological masochist, not neurotic, not obsessed with guilt, not even eccentric in his values, but rather (say) a genuinely benevolent person who wants to provide for a sickly widow's children, or do what he takes to be the maximal good with his life by contributing an immense sum to medical research, or to a favored political cause. He has no independent desire for self-sacrifice, but he is willing to assume a dangerous risk of future damage to his self-interest for the sake of the contribution he can make now. Is that example, in its bare description, any stranger than risking one's life and limb to race motorcycles or climb mountains?

When payment has been made in advance, the purchaser *can* then in theory be protected by a legal contract. Otherwise, if his slave runs away, he has lost his ten million and the slave too. Enforcement in this case would, therefore, have the point (its sole point, I think) of protecting the owner at the expense of his slave in that special contingency where the slave has a change of mind. But it takes little imagination to think of countervailing reasons for nonenforcement. What would enforcement consist in? Forcible return of the escapee in irons; civil suits against all who may have assisted him; organized manhunts, either by private parties with legal permission and cooperation, or by the police; prosecution of diverse third parties for such crimes against property as incitement to escape, aiding and abetting escape, withholding information about escapees, and so on. Such activities would be a demoralizing public spectacle, analogous to tolerating the starvation on the public streets of poor wretches who had gambled unwisely with their lives in other ways. And they would trample grossly on the interests of many third parties. These are but some of the many possible nonpaternalistic reasons for the refusal to recognize slavery contracts.

What were Mill's reasons for the refusal to validate slavery agreements? Virtually his entire argument is expressed, with admirable succinctness, in the following oft-quoted passage:

The ground for thus limiting his [i.e. the would-be slave's] power of

voluntarily disposing of his own lot in life is apparent, and is very clearly seen in this extreme case. The reason [in general] for not interfering, unless for the sake of others, with a person's voluntary acts is consideration for his liberty. 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. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free, but is thenceforth in a position which has no longer the presumption in its favor that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free.<sup>32</sup>

The first and most natural interpretation of this argument is as an appeal not to a sovereign *right* to "dispose of one's own lot in life" but to a person's own *good* in the long run, or more precisely to one element of his good, his overall freedom. On this interpretation Mill is faithful to his own promise in Chapter I to forego appeal to natural rights and restrict his arguments to utilitarian considerations.<sup>33</sup> The appeal in this case is to each *individual's* own good and not necessarily to the public good (social utility), but it is at least consistent with an overarching utilitarian scheme of justification, as appeal to an underivative sovereign right would not be. *De facto* freedom, on this interpretation, is one good or benefit—indeed, a supremely important one—among many, and its loss, one evil—indeed, an extremely serious one—among many types of harm. The aim of the law being to maximize beneficial goods and (especially) to prevent harms of all kinds and from all sources, the law must take a negative attitude, in general, toward forfeitures of, as well as interferences with, freedom. Still, by and large, and in all but the most extreme cases, Mill is saying, legal paternalism is an unacceptable policy because in attempting to impose upon a person an external conception of his own good, it is very likely to be self-defeating. The key to this interpretation is Mill's language in this crucial passage: "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

32 J.S. MILL, *supra* note 12, at 125. The remainder of this paragraph is devoted to the problem of irrevocable contracts in general, and argues that "there are perhaps no contracts . . . except those that relate to money" that should preclude possibility of retraction. He explicitly advocates no-fault divorce (as it has since come to be called) in this passage.

33 *Id.* at 14: "I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility."

take his own means of pursuing it."<sup>34</sup> "Evidence" is not necessity, and "on the whole" means "in most but not all possible cases." Contrast this cautious instrumental approach with Mill's more absolutistic language in other places where he decrees that protection of others is "the sole end" warranting legal coercion, and its "only rightful purpose," and that in self-regarding matters, the individual's "independence is of right, absolute," and over himself "the individual is sovereign."<sup>35</sup> If he had consistently followed the approach suggested by the absolutistic language, Mill's opposition to hard paternalism would have conceded *no* exceptions. If he had committed himself to (instead of merely flirting with) the principle of unqualified respect for a person's voluntary choice *as such*, even when it is the choice of a loss of freedom, he could have remained adamantly opposed to paternalism even in the most extreme cases of self-harm, for he would then be committed to the view that there is something more important (even) than the avoidance of harm. The principle that shuts and locks the door leading to legal paternalism is that every person has a human right to "voluntarily dispose of his own lot in life" whatever the effect on his own net balance of benefits (including "freedom") and harms.

One interpretation of the quoted passage takes it to be a simple aberration from the main drift of Mill's argument in *On Liberty* which, as is indicated in Mill's frequent use of political metaphors like "sovereign," "dominion," "reign supreme," and so on, is profoundly respectful of *de jure* autonomy. There are other places in the same chapter where Mill reveals his familiarity with, and firm grasp of, the distinction between *de jure* autonomy and *de facto* freedom, although he nowhere used the word "autonomy." Richard Arneson calls our attention to Mill's discussion of Mormon polygamy,<sup>36</sup> where he expresses a surprisingly permissive attitude. Arneson points out that

Mill characterizes polygamous marriages as "a riveting of the chains of one half of the community." Much like a benighted person who voluntarily contracts himself into slavery, except on a smaller scale, the Mormon wife relinquishes her freedom over the long run. Mill explicitly traces his "disapprobation" of Mormon polygamy to his understanding that this institution constitutes a "direct infraction" of the principle of liberty. But while a Mormon wife does not live freely, she does live autonomously, if *she is living*

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34 *Id.* at 125 (emphasis added).

35 *Id.* at 13.

36 *Id.* at 111.

*out a fate she has chosen for herself without compulsion or coercion.* Of Mormon marriage, Mill says, "It must be remembered that this relation is as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of the marriage institution." Mill's hesitation in this quotation must stem from a doubt as to how voluntary can be any person's choice to marry when the only alternatives society tolerates are one form of marriage or spinsterhood.<sup>37</sup>

My only quibble with Arneson in this passage is over the phrase "live autonomously." In some hypothetical examples (whether true of polygamy or not) one can autonomously choose a life in which all further *de jure* autonomy is forfeited. It would be misleading to describe the career consequent upon that choice as one of "living autonomously," but it would be an autonomously chosen life in any case, and to interfere with its choice would be to infringe the chooser's autonomy at the time he makes the choice, that is to treat him in a manner precluded by respect for him as an autonomous agent. I suspect that Arneson would agree.

If one's very autonomy can be alienated, is there nothing then that an autonomous agent may not alienate? The answer to this question, I think, is that even an autonomous person cannot effectively alienate certain duties, and the responsibility for what he does. Suppose that *A*, the slave-holder, commands *B*, his voluntary slave, to murder *C*, an innocent third party. To obey the command, *B* would have to violate his own duty to *C* (not to kill him), which is logically correlated with *C*'s right against him (not to be killed). For *B* to alienate that duty would be for him to alienate one of *C*'s rights, which is absurd. Even an autonomous being cannot give up what was not his in the first place. If after the murder, *B* pleads in his own defense that he was a mere instrument in *A*'s hands with no will of his own, and that "instruments don't kill people, only people kill people," the excuse is unacceptable for the same reason that obedience to a higher authority cannot excuse atrocities. No man can make himself into a *mere* instrument of another's will. Even an autonomous agent cannot alienate his ultimate accountability.

#### B. *Less Extreme Forms of Irrevocable Commitment: Deciding For One's Future Self*

Slavery contracts are theoretically interesting constructs with which to test theories, but otherwise of very little practical interest.

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37 Arneson, *Mill versus Paternalism*, 90 *ETHICS* 470, 476 (1980) (emphasis added).



There are more familiar examples, however, of irrevocable commitments that purport to bind one's own future self as well as other parties. These purported commitments are irrevocable, but unlike slavery, they are neither total nor necessarily permanent, since the committed performances or forbearances are often dated for a specific future time. They can result from contractual agreements, as when the seller of a business agrees not to open a competing business in the same city with the buyer, or from extracted promises, as when *A* gets *B* to promise to enforce *A*'s current resolution, if necessary, against *A*'s own future self.

These cases provide important tests for a theory of autonomy, since they show how an adequate conception of personal sovereignty must not only mark the "spatial" and topical boundaries of the personal domain, but must also provide for the shifting "temporal boundaries" as well. Individuals often knowingly exercise their autonomy at a particular time in a way intended to diminish their freedom at some future time, and sometimes when that future time comes, the same sovereign self has second thoughts and demands his freedom back. In some cases the earlier forfeitures were understood all along to be tentative and revocable, but in other cases the earlier self had either bound himself contractually not to revoke, or else issued explicit instructions to an agreeable party to disregard any contrary instructions from one's future self. Does my sovereignty at the present time reign over my future selves? Can I cancel now their right to a change of mind? Or is their freedom in this respect the one thing I cannot be free to alienate, as Mill claimed?

We can make a start toward separating the easy from the difficult cases by asking which request, that of the early self to bind the later, or that of the later self for a release, is closer to being a genuinely voluntary one, or one that reflects the settled disposition of the chooser as an enduring self over time. The problem will be relatively easy when either the future self's choice or the later's is substantially less than voluntary. There are various homey examples of later choices that are defective in this way. Suppose, for example, that I ask a friend to wake me at five in the morning and urge him to pay no heed to my future self's protests at that hour. When five o'clock comes along, and wakened from a sound sleep I announce a change of mind, the friend is entitled to give greater weight to the clear-headed, deliberate resolution of the earlier self, than to the incoherent, sleepy mumblings of the later one. Similarly, if I have a drinking problem, and I urge my host not to pour me more than two

drinks at next week's party "no matter what I say at the time," and he promises to do so at my request, then when my compulsive, excited, abandoned future self renounces my earlier request, the party host should think of the earlier request as the controlling one.

Similarly, a second party can sometimes confidently support the earlier self when its will conflicts with that of the later self, on the grounds that the later self's contrary "choice" is the result of coercion or fraud, and hence is not wholly voluntary. Those reasons were certainly the ground of the decision of Odysseus' sailors not to unbind him, despite his urgent requests, when he was under the influence of the Sirens.<sup>38</sup> Odysseus was warned by Circe, before his ship departed from her island, that he is headed on a dangerous course, first of all to the place of the Sirens, whose beautiful singing literally enchants all those who hear it, and leads them to their deaths. Following Circe's advice, Odysseus has his sailors plug their ears so that they won't be enchanted, but he himself wants to hear the beautiful music without being trapped, so Circe directs him to have his sailors bind him to the mast, and order them *not* to release him until safely out of harm's way, even if he should command them to do so. Under the alluring influence of the Sirens, Odysseus does "change his mind," but his sailors wisely keep the promise they made to his earlier self, rightly inferring that the earlier self was the real Odysseus.

On the other hand, there are occasions on which one might judge retrospectively that the instructions of the earlier self were less voluntary than the contrary preferences of the later self. Perhaps the earlier self had been "beside himself" with rage or some other judgment-clouding emotion, whereas his later self is calm and convincingly reasonable. Or an earlier self, in a deep but temporary depression induced by a shocking event, or perhaps even by a drug, extracts a promise from a friend not only to do something at a future time but to treat the request as irrevocable, and then the later self, having recovered his calm and thought the matter over, asks to revoke the earlier request. Once more, to honor the later request over the earlier would not be to violate the autonomy of the whole person over time.

The hardest case is that in which the conflicting decisions of earlier and later selves appear to be equally voluntary. Which takes precedence then? The answer to which we are committed by our

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38 HOMER, *THE ODYSSEY OF HOMER*, Book XII, 36-58, 144-200. In the verse translation of Richmond Lattimore (New York: Harper and Row, 1965), the passages are on pages 186-90.

discussion so far seems to favor the earlier self in that case, but we shall have to retest that answer against intuitively difficult examples. First, however, I shall restate the position toward which a theory of personal sovereignty seems to incline us. Where the earlier self in a fully voluntary way renounced his right to revoke in the future (or during some specified future interval), or explicitly instructed another, as in the Odyssean example, not to accept contrary instructions from the future self, then the earlier choice, being the genuine choice of a sovereign being free to dispose of his own lot in the future, must continue to govern. After all, the earlier self and the later are identically the same self, not morally distinct persons, but rather one person at different times. Talk of "the earlier self" and "the later self" is only a useful *façon de parler*. If it is taken literally as referring to two distinct beings, it can only generate mystery and confusion, for then we shall have no way of explaining how one fully autonomous person can bind another fully autonomous person without the latter's consent. All of our ordinary notions of responsibility, as well as such basic moral practices as promise-making, presuppose a relation of personal identity between earlier and later stages of the same self. Without that presupposition, very little of the idea of personal autonomy can be salvaged either. If I am not free to forfeit future liberties for present benefit, my lifelong "supply" of liberties may thus be maximized (against my present will), but since I am not permitted to decide, *now*, on how liberties and other benefits are to be distributed over the future course of my life, the domain of my self-government has been diminished severely in its temporal dimensions, and the *de facto* "freedom" left to my future selves may seem small compensation (especially since I shall pass on to *them* my present frustrations and resentments).

We could leave the matter at that and proceed to our next business, but caution dictates that we pause first, and examine the case for the other side. What does the contrary argument look like?<sup>39</sup> It employs, in the first place, a quite different conception of personal identity. On its terms, when an earlier self voluntarily agrees or resolves that his later self do something and that the agreement be irrevocable, and his later self, equally voluntarily, wishes to revoke the earlier agreement, the case is not always to be treated as one sovereign person "changing his mind" later, but at least sometimes as a

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39 For the best statement of such an argument, see Donald Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* (University of Minnesota Press, R. Sartorius ed. 1983 forthcoming).

close conflict between two equally sovereign persons. Not every "later self," of course, simply in virtue of being later than an earlier one, is therefore distinct in identity from that earlier one, but only a later self who has undergone a thorough sea-change of basic values. The seller who, after an interval of a year, comes to think that his earlier irrevocable agreement not to reopen a business in competition with the purchaser was unwise is not on that ground alone a "different person" from the man who made the original agreement. A convicted murderer, however, who after seven years on Death Row has acquired an education, achieved genuine repentance, and reconstructed his personality and character, might well be described seriously (and not just as a *façon de parler*) as "not the same person" as the vicious savage who committed the murder seven years earlier.

The second part of the case against irrevocability where earlier and later selves conflict would be to invent or discover convincing examples for which the "two distinct sovereign selves" interpretation seems plausible. Donald Regan proposes several examples of distinct personal identities that seem unconvincing to me if only because the "changes of mind" involved do not seem sufficiently thorough. He suggests that in restraining a would-be smoker we protect *another* person, namely, his later self, who having contracted lung cancer, may have renounced his earlier habit and become thereby, for moral purposes, "a different man." Again—

What about the [motor] cyclist who rides without a helmet? What makes her a different person after her accident? The answer, I think, is that the cyclist is a different person, in the relevant respect, if she is no longer the sort of person who would ignore her future well-being for the sake of small increments of personal utility. Of course it is not certain that having the accident will produce any such change in the cyclist. But it seems likely to. In many cases, I should think, the cyclist will not merely wish she had behaved differently in the past. She will have a new appreciation of the virtue of prudence and will alter her attitude toward risk in the future. If the cyclist changes in this way, then she is a different person, who deserves protection against the foolish behavior of her earlier self.<sup>40</sup>

Of course, the cyclist is not literally a different person after her accident. Even Regan would admit that she does not get a new name, a new license, a new police record, that her marriage is not annulled, and her debts are not cancelled. She is a different person, Regan suggests, in "some respects" or "for some purposes" but not for

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40 *Id.* (pagination unavailable).

others. But this seems mere word play if it means no more than "she used to be reckless but now that she has been hurt she sees the point of being more careful and has become more careful." In every other way, including deep and important ways, she is still the same old Mary Jones. It is one thing to tell the earlier Mary Jones that she must be forced to do what she doesn't want to in order to protect a second party, but quite another to justify the interference in that language while meaning only that if or when she becomes more prudent she will not or would not regret the interference. The more overtly paternalistic language seems much less contrived and more honest.

Even the example of the reformed murderer, in whom deep and pervasive character changes have occurred, fails to be convincing, and for still another reason. Certain important descriptions of the gentle sensitive person in Death Row presuppose for their intelligibility an *identity* with the savage beast who earlier committed a murder, and a continuity of development of the same self. If he is "reformed," for example, he has *changed himself* in centrally important ways from what he used to be, and that is quite another thing than dying and being reborn. Genuine repentance as well as such states as contrition, remorse, the feeling of guilt, and the desire for atonement, all require some sense of continuity with the past and self-identity with an earlier wrongdoer. The essence of these states is the deliberate taking of *responsibility* for an earlier doing. To deny one's identity with the wrongdoer is to evade or deny responsibility for his crimes, quite another thing from repentance. When multiple murderer Paul Crump's death sentence was commuted to life imprisonment without possibility of parole, Illinois Governor Kerner wrote, "The embittered, distorted man who committed a vicious murder no longer exists. . . . Under these circumstances it would serve no useful purpose to take this man's life. . . ." I take that to be a rhetorical way of saying that since Paul Crump is no longer embittered and distorted, there is no good reason to take his life.<sup>41</sup>

The closest thing to a persuasive example of changed personal identity is also the most ingenious one, that invented by Derek Parfit in his much discussed paper *Later Selves and Moral Principles*.<sup>42</sup> Parfit's example is also directly relevant to our present purposes since it involves an irrevocable commitment binding on an unwilling later self:

41 See R. Bailey, *Facing Death, A New Life Perhaps Too Late*, LIFE, July 27, 1962, at 28-29, reprinted in PHILOSOPHY AND THE HUMAN CONDITION 324 (T. Beauchamp, W. Blackstone & J. Feinberg eds. 1980).

42 D. Parfit, *Later Selves and Moral Principles*, in PHILOSOPHY AND PERSONAL RELATIONS 137-69 (A. Montefiore ed. 1973).

Let us take a 19th century Russian who, in several years, should inherit vast estates. Because he has socialist ideals, he intends, now, to give the land to the peasants. But he knows that in time his ideals may fade. To guard against this possibility, he does two things. He first signs a legal document, which will automatically give away the land, and which can only be revoked with his wife's consent. He then says to his wife, "If I ever change my mind, and ask you to revoke the document, promise me that you will not consent."<sup>43</sup>

We can imagine then that "Boris" (the name provided by Donald Regan) does undergo a change as he grows older, and eventually abandons his socialist ideals for more conservative (and self-serving) principles, just as his earlier self had feared. When he finally inherits the estates, he implores his bewildered wife to consent to a revocation of the earlier agreement. If she stands firm she will be honoring her solemn promise to the earlier Boris; if she gives in, she will retroactively restrict the earlier Boris' liberty to determine his own lot in life. The early Boris, when he made his agreement with her, was in deadly earnest, acting on his principles, freely, with his eyes wide open to the possible consequences. "The root idea of autonomy," says Arneson, "is that in making a voluntary choice a person takes on responsibility for all the foreseeable consequences to himself that flow from this voluntary choice."<sup>44</sup> If Mrs. Boris reneges she will be releasing Boris from responsibility for his fully voluntary and autonomous commitment. On the other hand, the later Boris has also chosen voluntarily. His request too is a genuine reflection of his governing principles. Why should he, an autonomous person, be governed, he asks, by the dead hand of an earlier self who no longer exists? What then should Mrs. Boris do?<sup>45</sup>

Mrs. Boris put herself under a solemn obligation when she freely made the promise while well aware of the risks. Boris waived his right at that time to release her, so his subsequent change of mind cannot nullify her duty. Even on Regan's theory of personal identity, the duty stands, for even if the early Boris is now dead, the promise once made to him is still in force. Obviously, promises can remain in force after the death of the promisor; otherwise, how can

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43 *Id.* at 145.

44 Arneson, *supra* note 37, at 475.

45 It is too late for Mrs. Boris to refuse to make a promise or to argue that her husband put her in an unreasonable position when he extracted the promise in the first place. For the sake of the example, let us suppose that young Mrs. Boris shared her husband's strong socialist convictions and willingly played her role in supporting them. It is morally irrelevant whether the old Mrs. Boris has changed her political beliefs.

we account for the moral incumbency of wills and insurance policies? But Boris is not dead; he is simply different—very, very different, to be sure, but different in precisely the ways the young Boris foresaw as a danger when he resigned his right ever to release the promisor. The contingency that provided the whole reason for the irrevocability clause in the first place can hardly be invoked after the fact as the reason for revoking. The commitment then remains binding, and Mrs. Boris' duty is plain.

Perhaps, nevertheless, Mrs. Boris ought to relent, and deliberately decline to do her duty, out of pity, or from simple humanity. Renouncing an obligation is a morally serious thing, not to be done routinely whenever performance would lead to hardship. In extreme cases, however, after giving due weight to honor, the sanctity of agreements, and the necessity of trust, it may be true that a person, albeit with grave misgivings and deep reluctance, ought to renounce a genuine obligation. In these cases, it does not follow that the rightly renounced obligation could not have been a true obligation in the first place.<sup>46</sup> It much better serves the cause of moral clarity to call a spade a spade. To invent a theory of personal identity that permits one to say that the later self is not the same self as that to whom the promise was made, is to evade responsibility for what one is doing. Candor requires that one confess that one has broken faith with a promisee because in the circumstances other factors had even more weight than fidelity. There is more to morality than the legalistic realm of rights and duties, central as that realm is. If Mrs. Boris' refusal to consent to revocation would plunge Boris into permanent and severe misery, then that fact is a reason for relenting, though it will be very difficult for Mrs. Boris to determine whether it is a decisive reason. Hers is a hard decision, but the problem is better described as a conflict between her plain obligation and other types of moral reasons rather than as a conflict between obligations.

Mrs. Boris' dilemma is very much like that we all face when the "born losers" in society, having gambled irrevocably with their own futures in some way, and lost, must either be rescued, or allowed to pay the full cost of their earlier recklessness. In Boris' case, and in that of the hypothetical "voluntary slave" who repents of his earlier irrevocable contract, to intervene contrary to the earlier commitment would be inconsistent with respect for personal autonomy. But the alternative, to stand by powerless to prevent abject suffering—to let

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46 See my *Supererogation and Rules*, in *DOING AND DESERVING* 4-9 (1970).

the loser sleep in his own bed or stew in his own juices—may be inhumane to such a degree that it cannot rightly be done.

### C. *Constitutional Privacy*

The United States Supreme Court in recent years appears to have discovered a basic constitutional right suggestive of our “sovereign personal right of self-determination,” and has given it the highly misleading name of “the right to privacy.” Descriptions of the right vary from case to case, but one common element it seems to share with “personal sovereignty” is the notion that there is a domain in which the individual’s own choice must reign supreme.<sup>47</sup> On the boundaries of this “zone” is a “wall” against state interference: in respect to protected choices, “the state shall make no law . . . .” The first criminal statute to be invalidated by the Court on the ground that it penetrated the protected zone was a Connecticut statute prohibiting the use “by any person” of contraceptives, and permitting any doctor who counsels their use to be prosecuted and punished as if he were the principal offender. In the famous case of *Griswold v. Connecticut*,<sup>48</sup> in which Dr. Griswold and another physician associated with the Planned Parenthood League of Connecticut appealed their convictions for counseling birth control, all the justices agreed with Justice Stewart that this statute was (at the least) “an uncommonly silly law,” but there was some hesitation about striking it down since there is no explicitly named right in the Constitution that it could plausibly be said to contravene. Justices Stewart and Black found “uncommon silliness” to be an insufficient ground for unconstitutionality and dissented from the majority who found the right of privacy implied, though not explicitly named or defined, by various constitutional guarantees.

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47 The territorial metaphor is spelled out quite explicitly by Milton R. Konvitz, who writes of constitutional privacy:

Its essence is the claim that there is a sphere of space that has not been dedicated to public use or control. It is kind of space that a man may carry with him, into his bedroom or into the street. Even when public, it is a part of the inner man; it is part of his “property.”

M. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROB. 279-80 (1966). Thomas Emerson takes the idea of a privileged zone further:

It [the right to privacy] seeks to assure the individual a zone in which to be an individual, not a member of the community. In that zone he can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world. The right of privacy, in short, establishes an area excluded from the collective life, not governed by the rules of collective living.

T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 545 (1970).

48 381 U.S. 479 (1965).



Justice Douglas offered an explanation of how the unnamed right was "implied" by the explicit ones. As I interpret him, the explanation has two parts. In the first place, the implied right is a necessary condition for the fulfillment of the explicit right; and secondly, the unnamed right is presupposed by the only coherent rationale that can be provided for the explicit right. Thus, we could have no effective right of free speech, unless in addition to the right to utter or to print (that is, the explicit core right), we also had "the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach. . . ."<sup>49</sup> These implied rights are a long way from the strict letter of the law, but without them constitutional rights would not be such powerful guarantees and the shrunken core rights themselves, like "free speech," would be insecure. Without the peripheral rights, moreover, the core right would stand stripped of coherent rationale or explanation. Justice Douglas then pointed to other examples of rights not named in the Bill of Rights but without which the explicit rights would lack meaning or sense. In a metaphor that is now famous he referred to the "penumbra" (shadowy area) surrounding each explicit right in which implied rights may (or must) be inferred.

In Justice Douglas' usage, the Constitution contains various "zones" (note the plural) of privacy, each implied by a primary right as part of its "penumbra." Justice Douglas' examples indicate that he means by "zone of privacy" simply zone of individual discretion. The individual's right of association creates a zone in which he and only he may decide with whom he shall associate or affiliate; his fourth amendment right against unreasonable searches and seizures implies his exclusive right to live as he pleases within his own home. At other places Justice Douglas speaks as if there were *one* zone of privacy, perhaps that formed by the complicated intersection of the various enumerated discretionary rights. In any case the right of married couples to their own sex lives and procreational decisions "lies within the zone of privacy created by several fundamental constitutional guarantees."<sup>50</sup> Presumably, free speech, free association, and the security of the home, among others, would make less sense, and be less secure, without it.

Justice Douglas then turns to another line of argument that not only seems to undercut the first but shows why the penumbral right established by the first is not well named "the right of privacy." He

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49 *Id.* at 482.

50 *Id.* at 485.

points out that the Connecticut statute is *overbroad* in any case. He seems to concede implicitly, as the remainder of his colleagues grant explicitly, that "safeguarding marital fidelity" is a proper state purpose, and that *arguendo*, there is some "rational," that is, plausibly inferred, connection between that purpose and the statute in question. But even granted all that, Justice Douglas writes that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."<sup>51</sup> Douglas questioned whether "we [would] allow the police to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives."<sup>52</sup> Certainly that *would* be a violation of *privacy* in the familiar everyday sense of the word! But Justice Douglas implies that this constitutional deficiency would be avoided by a statute that did not forbid the *use* of contraceptives, but only regulated their manufacture or sale.<sup>53</sup> That alternative statute could be enforced without any peeking into private chambers. As the least intrusive way of implementing a "legitimate" state purpose, Justice Douglas may be implying, such a statute would not violate marital privacy.

In effectively preventing married couples from using contraceptive devices, however, the less intrusive legislation would infringe the autonomy of married couples, and diminish their capacity to decide for themselves in what would otherwise be a zone of discretion, that of choices related to marital sexual intimacies and reproductive decisions. That zone of sovereignty has nothing to do with privacy in the ordinary sense (a liberty to enjoy one's solitude unwitnessed, unintruded upon, even unknown about in certain ways); but it is central to the constitutional doctrine of privacy-as-autonomy that Justice Douglas had seemed to be working out in his first line of argument. If he had continued on his first path, he would have declared even the less intrusive hypothetical legislation to be a violation of marital autonomy, and he would have taken a much more skeptical look at the allegedly "proper state purpose" it would so economically subserve. Justice Goldberg, in his concurring opinion, emphasizes the argument from unnecessary intrusion and even concedes that "[t]he State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication.

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51 *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

52 *Id.*

53 *Id.*

These statutes," he adds, "demonstrate that means for achieving the basic purpose of protecting marital fidelity are available to Connecticut without the need to 'invade the area of protected freedoms.'" <sup>54</sup> The logic of this passage implies that the constitutional right of marital privacy, for Justice Goldberg, covers only the right to be unintruded upon, unwitnessed, and undisclosed in one's solitude, that is, privacy in the familiar pre-technical sense. The deeper right to discretionary control, so reminiscent of *de jure* autonomy, which was suggested at the beginning of Justice Douglas' opinion, by that route goes down the drain. I suspect that if the word "autonomy" had been used in the first place, instead of "privacy," the dangers of equivocation would have been obviated, and these confusions avoided.

If there is truly a doctrine of personal *autonomy* in recent Supreme Court decisions under the label of "privacy," what are the boundaries of the posited autonomous domain? For a time, the line of decisions following *Griswold* and extending its right of privacy to new areas encouraged many liberal observers to suspect that the "privacy" protected by the Court was really personal autonomy, and its domain boundaries those determined by the self-and-other-regarding distinction, just as John Stuart Mill might have wished. The right to marital privacy bestowed in *Griswold* was extended in *Eisenstadt v. Baird*<sup>55</sup> from married to unmarried couples. In *Loving v. Virginia*,<sup>56</sup> it was used to strike down the miscegenation statutes used by southern states since the Civil War to restrict the right to marry whomever one wishes, regardless of race. In *Stanley v. Georgia*,<sup>57</sup> the right to privacy

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54 *Id.* at 498 (Goldberg, J., concurring) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

55 405 U.S. 438 (1972). In *Eisenstadt*, the Supreme Court invalidated a Massachusetts statute that prohibited distributing contraceptives to unmarried persons. The Court held that the statute's separate treatment of married and unmarried persons violated the equal protection clause.

56 388 U.S. 1 (1967). The State of Virginia had banned interracial marriages by statute. Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia and then moved to Virginia. The Supreme Court reversed their convictions pursuant to this statute on the basis of both the equal protection clause and the due process clause of the fourteenth amendment. The Court concluded that the fourteenth amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination.

57 394 U.S. 557 (1969). Mr. Stanley was indicted and convicted for possessing obscene films, which were confiscated from his bedroom pursuant to a search warrant for bookmaking activity. He argued that the Georgia obscenity statute, insofar as it punished mere private possession of obscene matter, violated the first amendment. The Supreme Court agreed with Stanley and reversed his conviction. The Court recognized as a fundamental right the right to be free from unwarranted government intrusion into one's privacy.

discovered in *Griswold* was held to support the sanctity of the home, including the right to witness pornographic movies in one's own bedroom. In *Moore v. East Cleveland*,<sup>58</sup> the Court struck down zoning restrictions on the rights of extended families to live together in a single dwelling. In *Roe v. Wade*<sup>59</sup> the Court granted to all pregnant women the discretionary right, derived from the right of privacy, to decide whether to continue or to terminate their own pregnancies, free from repressive criminal legislation, at least in the first two trimesters.

The decisions take a zig-zag path, but they do exhibit a pattern. The zone of privacy is extended from the essential intimacies of the marital relation, to heterosexual intimacies generally, to decisions about whom to marry, to decisions about "family planning," child-rearing, modes of family living, and finally to decisions about the termination of pregnancy. One feature these various rights seem to have in common is that they are concerned with areas of individual and collective (family) conduct that are essentially self-regarding in Mill's sense.<sup>60</sup> "From the first, the Court's development of a right to privacy has suggested to philosophically minded commentators the possible elevation to constitutional status of Mill's principle of liberty," wrote one philosophically minded commentator,<sup>61</sup> but as it turned out his enthusiasm was premature, for the Court then did a turnabout, and in a series of illiberal decisions, ruled that privacy does *not* extend to couples living in "open adultery," or to certain self-regarding but idiosyncratic life-styles, or to the use and cultivation of marijuana even in the "sanctity" of one's own home, or to the consensual viewing of pornographic films in places of public accommodation, or to the length and style of policemen's hair, or to homo-

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58 431 U.S. 494 (1977). In *Moore*, a city zoning ordinance specified the categories of relatives that could live together. The ordinance made it a crime for a grandchild to live with his grandparent. A grandmother, Mrs. Moore, was convicted of a violation when she failed to remove her grandson from her home. The Supreme Court reversed, holding the ordinance violated the due process clause of the fourteenth amendment. The governmental interests advanced and the extent to which they were served by the ordinance were insufficient to uphold the ordinance.

59 410 U.S. 113 (1973). *Roe* was a class action brought by a pregnant woman to challenge the Texas abortion laws, which allowed abortion only to save the mother's life. The Supreme Court held that the statute violated the fourteenth amendment's due process clause because it was an invasion of privacy (which includes the right to terminate pregnancy).

60 Of course, if the fetus is a person with its own right to life, then the decision to terminate pregnancy is *not* a wholly self-regarding one, hence not within the zone of the pregnant woman's sovereignty. The crucial issue in the abortion controversy is not a legal one, or even a primarily moral one, but a metaphysical (or conceptual) issue, one about the status of the fetus.

61 THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* (New York: Random House, 1983 forthcoming) (pagination unavailable).

sexual intercourse between consenting adults in private. Now liberal critics, stripped of their earlier hopes, charged that the Court was arbitrary and erratic in its mapping of domain boundaries and that "once it began to protect the rights of 'consenting adults' in *Griswold*, it could not without gross and apparent inconsistency stop short of reading into the Constitution some version of Mill's principle."<sup>62</sup>

A closer reading of the opinions even in the earlier favorable cases, however, would not have encouraged the hope that a doctrine of personal sovereignty with Millian domain boundaries was being read into the United States Constitution. It is true that the right of privacy discovered in the penumbra of primary constitutional rights is meant to be a personal autonomy and not merely "privacy" in the more accustomed sense of rightful solitude or anonymity. But the interpretations of the right by the judges who discovered it would have disappointed Mill in at least two ways: their notion of what is a "proper state purpose," and their definitions of domain boundaries. The Court at the time of *Griswold* had long since endorsed a formula for balancing restrictive legislation against individual rights. The personal liberties involved are either relatively unimportant or else "fundamental." (Undoubted constitutional guarantees like free speech and free exercise of religion are clearly fundamental.) If the encroachment by the statute on personal liberties is relatively insignificant, or the liberty itself not fundamental, then the offending statute will pass constitutional muster provided only that (1) it is meant to effect some legitimate state purpose, and (2) it has some "rational relationship" to the achievement of that purpose, that is, that there is some minimally plausible, even if unproven and unlikely, instrumental connection with that purpose. The test is much stricter, however, when the liberty restricted is a fundamental one (as the constitutional right to privacy may be presumed to be). In that case the state interest must be more than "proper"; it must be *compelling*. And the statute's relationship to that purpose must be more than "rational"; it must be *necessary*. The Connecticut anti-contraceptive statute clearly was not necessary for achieving its avowed purpose, but that purpose, the discouragement of adultery, Justice Douglas implies, and Justice Goldberg states (in an opinion joined by Chief Justice Warren and Justice Brennan), is a legitimate state policy.<sup>63</sup> (Goldberg does not say that the state interest in marital fidelity is "compelling," and implies that it is not, but nevertheless he finds the

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62 *Id.*

63 *Griswold*, 381 U.S. at 498.

constitutionality of criminal statutes prohibiting adultery and fornication "beyond doubt."<sup>64</sup>)

In an earlier Connecticut birth control case, *Poe v. Ullman*,<sup>65</sup> Justice Harlan, in a manner that would please Lord Devlin more than Mill, also concedes in a dissenting opinion the legitimacy of a state interest in the "moral welfare of its citizenry," and speaks with cautious tolerance of Connecticut's view that the morality of its citizens may be protected "both directly, in that it considers the practice of contraception immoral in itself, and instrumentally, in that the availability of contraceptive materials tends to minimize 'the disastrous consequences of dissolute [adulterous] action' "<sup>66</sup> (presumably venereal disease and unwanted pregnancy). He makes it plain that even the right of privacy may be restricted where necessary to promote a legitimate state interest. "Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal enquiry, however privately practiced. . . ."<sup>67</sup> What is the difference between these regulations and those that are barred by the right of privacy? Harlan answers thus:

It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.<sup>68</sup>

Justice Harlan then, and most of his colleagues and successors, recognized the very anti-Millian interest in "enforcing the requirements of decency" as a constitutionally legitimate one so long as it is not pressed unnecessarily beyond the proper boundaries of privacy. Other justices on the Court have drawn those boundaries rather more widely than Justice Harlan. But I have found none who has boldly employed the Millian formula. It is not simply in virtue of being primarily self-regarding that decisions involving marital sex and family planning fall within the zone of constitutional privacy. If that were all, then decisions whether to wear protective helmets, seat belts, and life preservers would be similarly protected. Rather, the Court, in its various ways, has circumscribed as "private" those decisions that involve the most *basic* of the self-regarding decisions. Chief

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64 *Id.*

65 367 U.S. 497 (1961).

66 *Id.* at 545 (Harlan, J., dissenting).

67 *Id.* at 552 (Harlan, J., dissenting).

68 *Id.* at 553 (Harlan, J., dissenting).

Justice Burger summarized the earlier decisions accurately in 1973 when he stated that privacy envelops "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. . . ."<sup>69</sup> It encompasses use of pornography in one's home, but not drug taking even in one's home (a difficult distinction), and not voluntarily watching "obscene movies in places of public accommodation."<sup>70</sup> The boundary line, in short, tends to follow, however erratically, the line of those liberties which are most fecund, those exercised in the pivotally central life decisions and thereby underlying and supporting all the others.

As we have seen, one could similarly draw more narrowly the boundaries of the domain of personal sovereignty. There could well be some advantages in such a conception over the "self-and-other regarding" test of more orthodox liberalism. The liberal could then abandon his quarrel with the paternalist over relatively trivial safety restrictions such as requirements that seat belts or life preservers be worn in the appropriately dangerous circumstances. But instead of arguing like Gerald Dworkin that "[i]n the final analysis . . . we are justified in making sailors take along life preservers because this minimizes the risk of harm to them at the cost of a trivial interference with their freedom,"<sup>71</sup> the liberal could argue that such interference is no infringement whatever of personal sovereignty since domain boundaries are not drawn around all primarily self-regarding choices but only those self-regarding critical life-choices that "determine one's lot in life." In that way the liberal can take his stand on such issues as marriage and career choices, experimental life styles, food and drug use, sexual freedom, dangerous sports that play a central part in the life plans of some people (e.g., mountain climbing), suicide, and euthanasia. He can argue for an inviolable personal sovereignty that is not affected by minor safety regulations because he has drawn the boundaries of the sovereign domain more narrowly so as

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69 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The State of Georgia sued for a civil injunction to stop the showing of two allegedly obscene films. The Georgia Supreme Court found that the films were obscene and therefore fell outside the protection of the first amendment. Georgia's civil standards, however, did not conform to the Supreme Court's obscenity test established in *Miller v. California*, 413 U.S. 15 (1973). The Supreme Court remanded the case for proceedings consistent with *Miller*.

70 *Id.* at 66.

71 Gerald Dworkin, *Paternalism: Some Second Thoughts*, in *PATERNALISM* (University of Minnesota Press, R. Sartorius ed. 1983 forthcoming) (pagination unavailable).

to protect only the life choices that matter, those whose manner of exercise reflects the kind of self the person is in some essential and fundamental way. This move would be analogous to drawing the off-shore limits of national sovereignty at three miles instead of twelve or fifteen. An international fishing treaty by which all signatories accept a three mile limit would not be a violation of national sovereignty, not even a "small" or "insignificant" one. Sovereignty would still be sacrosanct and unviolated unless (say) a given small country is forced by a powerful fishing nation to agree unilaterally to a line drawn in its case twelve miles *interior* to the shore. That might be analogous to a statutory regulation of marriage choices or private sexual conduct, and no amount of juggling with definitions of domain boundaries could justify it.

Perhaps there is a strategy here for the tired liberal theorist who does not wish to quarrel over such trivial issues as seat belts, but does not want to abandon his basic principles either. But it is a strategy full of hazards and difficulties. Many writers have complained that Mill's self-and-other-regarding test is a difficult one to make precise and workable,<sup>72</sup> but its difficulties are minor compared to those involved in giving application to the criterion of "central," "pivotal," or "fecund" interests, or those "inseparable from the concept of ordered liberty," or those that express a person in "some essential and important way." As the experience of the Supreme Court has shown, it is difficult to apply a restricted concept of personal sovereignty in ways that do not seem arbitrary. (So, for example, our "privacy" permits us to view pornography in our own homes, but not to use forbidden drugs there, and it includes heterosexual but not homosexual relations between consenting adults in private.) The correlative of vagueness in a criterion is arbitrariness in its application.

Again, individual differences create great problems for the narrower boundary lines. Perhaps most motorcyclists who prefer not to wear helmets think of that preference simply as a matter of comfort and convenience. An imposed minor inconvenience is, as Dworkin put it, "a trivial interference with their freedom." There may be many others, however, for whom motorcycle expeditions are essential elements in a chosen life-style, and who view helmets as hated symbols of the nitpicking prudence they emphatically reject as they take to the open road, spirits soaring, their hair blowing in the wind. Can

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<sup>72</sup> For thorough discussions of these charges, and interpretations or reinterpretations of Mill's self-and-other-regarding distinction, see J.C. Rees, *A Re-reading of Mill on Liberty*, 8 POLITICAL STUDIES 113-29 (1960), and C.L. TEN, MILL ON LIBERTY 10-41 (1980).



we justify permitting others their dangerous adventures in racing cars and on mountain slopes, yet deny the motorcyclist his romantic flair? Without trying to settle all the vexatious questions raised by mandatory safety regulations, I can emphasize here the point that if a philosopher is operating with a concept of *de jure* autonomy, and not mere *de facto* liberty or freedom, he may not compromise as Dworkin does, and balance "trivial interferences" against great increases in safety. There is no such thing as a "trivial interference" with personal sovereignty; nor is it simply another value to be weighed in a cost-benefit comparison. In this respect, if not others, a trivial interference with sovereignty is like a minor invasion of virginity: the logic of each concept is such that a value is respected in its entirety or not at all.

I, for one, would be pleased if we could find such an absolute value in the United States Constitution, though I admit that the consequences of absoluteness are so sobering that perhaps a prudent judge should hesitate. On the other hand, if the privacy concept already attributed to the Constitution is not identical to personal sovereignty, what can it be?