The MORAL LIMITS

VOLUME THREE

NEW YORK OXFORD

of the CRIMINAL LAW

Harm to Self

JOEL FEINBERG

OXFORD UNIVERSITY PRESS 1986

3201133

701 CC 7600 F299-3

Oxford University Press

Oxford London New York Toronto
Delhi Bombay Calcutta Madras Karachi
Petaling Jaya Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland

and associated companies in
Beirut Berlin Ibadan Nicosia

Copyright © 1986 by Oxford University Press, Inc.

Published by Oxford University Press, Inc.,
200 Madison Avenue, New York, New York 10016

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
electronic, mechanical, photocopying, recording, or otherwise,
without the prior permission of Oxford University Press.

Library of Congress Cataloging in Publication Data
Feinberg, Joel, 1926–
The moral limits of the criminal law.
Includes index.
Contents: v. 1. Harm to others— v. 2. Offense to others—
v. 3. Harm to self.
1. Criminal law—Philosophy. 2. Criminal law—
Moral and religious aspects. I. Title.
ISBN 0-19-503746-4

Univ.-Bibliothek
Regensburg
7395985

Printing (last digit): 9 8 7 6 5 4 3 2 1

Printed in the United States of America
on acid-free paper

Contents

VOLUME THREE: HARM TO SELF

17. Legal Paternalism, 3

1. Diverse meanings of "paternalism," 3
2. Types of paternalistic coercive laws, 8
3. Hard and soft paternalism, 12
4. What makes a restriction paternalistic?, 16
5. Legal paternalism, the harm principle, and "garrison thresholds," 21
6. Presumptive cases for and against legal paternalism, 23

18. Autonomy, 27

1. Conceptions of personal autonomy, 27
2. Autonomy as capacity, 28
3. Autonomy as condition, 31
4. Autonomy as ideal, 44
5. Autonomy as right, 47

19. Personal Sovereignty and its Boundaries, 52

1. Domain boundaries, 52
2. One's right versus one's good, 57
3. Autonomy contrasted with liberty and *de facto* freedom, 62
4. Autonomous forfeitures of liberty and autonomy itself, 68
5. Total and irrevocable forfeiture: the riddle of voluntary slavery, 71
6. Alternative rationales for not enforcing slavery agreements, 79
7. Deciding for one's future self: commitment and revocability, 81

8. Personal sovereignty compared with constitutional "privacy," 87
9. Alien dignity: some animadversions on Kantianism, 94

20. *Voluntariness and Assumptions of Risk, 98*

1. The soft paternalist strategy, 98
2. Some preliminary distinctions, 99
3. Voluntariness, reasonableness, and rationality, 106
4. The elusive model of a "perfectly voluntary choice," 113
5. Variable standards of voluntariness: some rules of thumb, 117
6. The presumption of nonvoluntariness, 124
7. Examples: dangerous drugs, 127
8. Examples: protective helmets, 134

21. *Failures of Voluntariness: The Single-Party Case*, 143

1. Direct injury: suicide and self-mayhem as crimes, 143
2. Circumstantial and personal coercion: analogies and differences, 145
3. Classification of voluntariness-reducing factors, 150
4. External compulsion in risk-taking, 153
5. Ignorance and mistake in risk-taking, 159
6. Neurosis, 162

22. *Consent and its Counterfeits*, 172

1. The soft paternalist strategy for two-party cases, 172
2. The nature and effect of consent, 176
3. When consent is problematic, 180
4. Summary and transition, 186

23. *Failures of Consent: Coercive Force*, 189

1. The spectrum of force, 189
2. Second party coercion; intent and control, 195
3. Differential coercive pressure: how coercive is coercive enough?, 199
4. Other measures of coercive pressure, 203
5. Subjective and objective standards, 210
6. Moralistic theories of coercion, 213
7. Coercive proposals: offers and threats, 216
8. Norms of expectability, 219

24. *Failures of Consent: Coercive Offers*

1. Coercive and noncoercive offers, 229
2. Noncoercive enticements, 233
3. Coercion and exploitation: the Zimmerman solution, 242
4. Coercion and exploitation: summary and conclusions, 245
5. Unequal bargaining positions: unconscionability, 249

6. Coercion, voluntariness, and validity, 254
7. Applications to criminal law problems, 262

25. Failures of Consent: Defective Belief, 269

1. Division of categories, 269
2. Misunderstanding over what is being agreed to, 270
3. Ignorance or mistake about background facts, 273
4. Mistaken expectation of future occurrences, 277
5. Limits to the assumption of risk, 280
6. Fraud: false pretense and false promise, 285
7. Fraud in the *factum* versus fraud in the inducement, 291
8. False belief and degrees of voluntariness, 300
9. Informed consent in medicine, 305

26. Failures of Consent: Incapacity, 316

1. Forms of moral and legal incapacity, 316
2. Incompetent status, 322
3. Immaturity, 325
4. Intoxication, 332
5. Illness, pain, and distracting emotion, 340

27. The Choice of Death, 344

1. Voluntary euthanasia, 344
2. Rachels' modest proposal, 347
3. Whose life is it anyway?, 351
4. Understandable depression, 354
5. Alternating moods, 362
6. Living wills and their problems, 367
7. Durable power of attorney, 372

Notes, 375
Index, 413

nalism," while muttering, from time to time, in *sotto voce*, that soft paternalism is really no kind of paternalism at all.

4. What makes a restriction paternalistic?

Both coercive statutes threatening punishment, on the one hand, and noncriminal statutes and policies that levy taxes, invalidate and nullify contracts, impose legal disabilities and civil liabilities, withhold recognition of certain defenses in civil cases, or compel lifesaving medication, surgery, or indefinite hospitalization, on the other hand, are sometimes called "paternalistic." What is it that all these legal mechanisms, criminal and noncriminal, have in common? They all restrict the liberties or powers of persons, in the case of criminal laws by direct threat of punishment, in the noncriminal examples by other means, sometimes including punishment as a "back-up sanction," and purport to do this for "the good" of, or more commonly to prevent harm to, the very persons whose liberties are restricted.

But when is the paternalistic reason the "real reason" for the rule in question? There are two kinds of reasons why this question can sometimes be difficult. The first is that most paternalistic rules are "mixed paternalistic laws." They are supported by reasons of a number of kinds, including the need to protect the directly restricted party himself, but also to protect third parties from indirect harm, and even the general public from a kind of diffuse harm. When these reasons seem plausible in a given case they reenforce one another, creating a kind of multiple rationale which is only partly paternalistic. We shall consider some of the problems raised by mixed rationales in §5 below.

Another difficult problem is raised by rationales that are understood to be alternative rather than conjunctive. Sometimes a legislature passes a law for one kind of reason and decades later it is justified by a quite different sort of reason. One of these reasons may seem to pass muster and the other may seem illegitimate. In that case how do we tell what the "real reason" is?

Here we must distinguish among "conscious reasons," "deep motivations," "implicit rationales," and "true justifications." A legislator might honestly cite one factor as "his reason" for voting for a bill, when unknown to him there may be a better reason that in fact supports the bill. Alternatively, he may know about the better reason, but reject it as a poor reason. "*The* reason" for the law, the reason that in fact supports it, may not then be the reason that impelled a legislator to vote for it. And even among the majority of legislators who vote the bill into law, there may be a large number of operative reasons, so that no one of them is the conscious reason of the legislative majority, much less the whole legislature, for creating the law. There may, in short, be a reason for a law which was not the legislature's

reason for making it law. The conscious rationale of a legislator then might not be the rationale that truly justifies his vote. It might not even be the reason which accurately explains his vote, for the factors that motivated him on a deep level to vote for the bill might be different reasons still. His true motivation, in that case, does not coincide with his cited reason.

What then is "the true reason" for the law? Sometimes we can construct an implicit rationale for the law that need not necessarily coincide with anyone's actual reasons or deep motives for supporting it, but that nevertheless provides it with a plausibly coherent rational reconstruction. "This is how the law actually functions in our society; this is the job it is tacitly understood to be doing; this is what people assume it is for." Whether or not the implicit rationale of the law coincides with the factors that truly legitimize or justify it is an open question, depending on the law. If we are liberals we may find the implicit rationale to be paternalistic and therefore unacceptable. On the other hand, the implicit rationale may appear at first sight to be paternalistic, but closer examination may disclose other functions of the law that lend it coherence and truly justify it. Indeed the paternalistic rationale may collapse as a realistic account of how the law is enforced and defended in practice.

Consider some examples of laws with alternative rationales. Gerald Dworkin lists sixteen examples of "paternalistic interferences" but at least three of them, as they actually function in most legal systems, are more plausibly subject to nonpaternalistic interpretations. The first of these are: "Laws regulating certain kinds of sexual conduct, for example homosexuality among consenting adults in private."[19] In this country, at least (and I suspect in most Western nations), those who wish to use the law to harass and punish adult homosexuals have no benevolent concern whatever for "the good" of the parties themselves. They find the bare thought of the "crime against nature" so repugnant and/or threatening that they take that to be reason enough for making even private, consensual, deviant conduct criminal (the offense principle). Or they hold on biblical or other grounds that homosexuality is inherently sinful regardless of its circumstances or consequences, and that its wickedness alone is sufficient warrant for its criminal prohibition (pure legal moralism). Surely J. F. Stephen was not being "paternalistic" when, speaking of homosexuality, he ranted that "there are acts of wickedness so gross and outrageous that they must be prevented at any cost to the offender . . ."[20]

Neither were those American state legislatures paternalistic who made homosexual "sodomy" a capital offense! In fact whenever the criminal penalty for violating a statute is far more severe than the harm to self risked by the offender, it is difficult to explain the law as an expression of protective solicitude toward prospective violators. When the penalty for smoking one marijuana cigarette is up to thirty years in prison,[21] clearly the law is more

plausibly interpreted as an expression of moral abhorrence or of fear of catastrophic public harm, than of "parental" concern for the health or safety of vulnerable youths. One would expect *unmixed* paternalistic laws to have more gentle penalties than laws with different rationales. Parents, after all, do not imprison or hang their children for their own good, for the harms thus inflicted are greater than the harms meant to be prevented, rendering the protective rationale senseless.

The second dubious example from Dworkin are "laws compelling people to spend a specified fraction of their incomes on the purchase of retirement annuities (Social Security)."[22] Here there *is* a possible paternalistic rationale. Purchase of the annuities is both prudent and compulsory. I suspect that the assumption behind the legislation, however, was that few citizens would be compelled to save against their will, so that the law functions less to compel the unwilling than to *enable* the vast majority to do what they desperately want to do (make their old age and that of their parents and loved ones secure), and cannot otherwise do efficiently. The economic assumptions behind social security programs, on this interpretation, were that profit-making private companies are unable to achieve an adequate level of benefit for an adequately low level of cost, and that without compulsory participation the government could not do it either. The loss to the great majority would be a harm to their interest in security, and the compulsion of the others is meant to protect the majority from this harm. That is not paternalistic treatment of anyone. The unwilling are told in effect: "You must participate even if you think it is not in *your* interest to do so, because it is manifestly in the interests of all the others, and the public interest too, that you do so. The compulsion is for their sakes, not yours."[23]

A final example from Dworkin is still more difficult: "Laws against dueling."[24] If we think of the historical setting for this prohibition in a certain way, the laws will surely seem paternalistic. Think of duelists as a specifically delineated cult of sportsmen and adventurers, much on the model, say, of motorcycle racers and mountain climbers. Imagine the legislator speaking to the prospective duelist in this way: "What you propose to do is extremely hazardous to your health. Therefore, for the sake of your own safety, you may not do it." Violation of the law would carry a severe penalty of its own, and if the opposing duelist is maimed or killed, his prior consent, or assumption of the risk, would not be accepted as a defense to criminal charges of mayhem or homicide.

That model, however, does not fit the facts. Nearly all of us are happy that the practice of dueling has been stamped out, as were our ancestors, no doubt, when the original prohibitions came into force. Even many of the tiny minority of dissenters must have been secretly relieved. We don't have perfect unanimity, of course, on this or any other social issue, but we are close

enough to that state to bring another, quite nonpaternalistic, model so close to the facts that it can serve as an "implicit rationale" for the prohibition. I refer to that proposed by Richard Arneson in a recent helpful article:

> Consider . . . restrictions on dueling. Suppose every person in a society prefers most of all not to be confronted with dueling situations, and second prefers to preserve his honor by making the conventionally appropriate response to dueling situations when they arise. Assume that a legal ban on dueling prevents any dueling situations from arising. On these assumptions, and assuming further that persons have no other desires that are relevant to the issue of dueling regulations, a legal ban against dueling would be nonpaternalistic, since nobody's freedom is being restricted against his will. Of course, in any actual society not everybody will have this pattern of desires, but if it is this pattern of desires that generates reasons for forbidding dueling, then the antidueling law (even if it is unfair or unjust) is nonpaternalistic.[25]

Again, the proper analysis is not that a vanishing minority of persons desiring to challenge and/or respond in defense of their "honor" are denied the right to do so out of concern for their own safety, but rather that almost all of us wish to be protected against potential harassment of a peculiar kind, even those who would otherwise respond in the traditional way. The implicit rationale seems to invoke the harm to others principle.

Most of Dworkin's dubious examples (I exclude the sex-crime one), and many others like them, are instances of good reasonable laws that most of us would be loath to change. If, therefore, they are taken to rest exclusively or mainly on a paternalistic basis, then the liberal argument against paternalism is undermined. So it is useful to look for an "implicit rationale" that is not paternalistic, so that the contest between the liberal and the hard paternalist, at least at this early stage, is still open. Later we shall look at some other *prima facie* "paternalistic statutes" that are reasonable, and continue the argument. At this stage it is sufficient to note that many examples presented by defenders of hard paternalism as instances of "justified paternalism" may be clearly justified, but not clearly paternalism.

Arneson's general strategy in the face of examples of "justified paternalism" contains two interconnected elements. First, his definition of "paternalism" makes it a necessary condition that the coercive rule be applied *against the will* of those subject to it. Second, in determining whether a given statute is paternalistic, he asserts that we must look at the actual motives and purposes of those who legislate, interpret, and enforce it.

His definition of a paternalistic rule or policy (note that it is not the definition of a "liberty-limiting principle", although one can easily be derived from it) is lucid and precise—"Paternalistic policies are restrictions on a person's liberty which are justified exclusively by consideration for that person's own good or welfare, and which are carried out either against his present will (when his present will is not explicitly overridden by his own

prior commitment) or against his prior commitment (when his present will is explicitly overriden by his prior commitment.)"[26] Our earlier definition covers the case in which the person subject to the rule has it carried out against his will, in virtue of the clause "whatever he may think of the matter" and the proviso that consent has no effect. To the paternalistic legislator, it is a matter of indifference whether a subject's will is in harmony with, or in opposition to, the law. In virtue of the law's generality it applies to both classes alike. Thus, if ninety-nine percent of the citizens share the negative attitudes toward dueling described so well by Arneson, then the law against dueling (on his definition) is not paternalistic as applied to them. But it is paternalistic if applied "against their will" to the dissenting one percent. This, it seems to me, is an unnecessary relativizing of the concept of "paternalism", at least as it applies to *general* coercive rules and policies. But Arneson's ingenious arguments against classifying as "paternalistic" certain obviously reasonable statutes is sufficiently supported by the second element of his approach, the appeal to actual motives, or as I would prefer to understand it, to actual "implicit rationales."

When most of the people subject to a coercive rule approve of the rule, and it is legislated (interpreted, applied by courts, defended in argument, understood to function) *for their sakes*, and not for the purpose of imposing safety or prudence on the unwilling minority ("against their will"), then the rationale of the rule is *not* paternalistic. In that case we can attribute to it as its "purpose" the *enablement* of the majority to achieve a collective good, and not, except incidentally as an unintended byproduct, the enforcement of prudence on the minority. Depending on the collective good involved, the costs and benefits, and the comparative sizes of the majority and minority, the statute may be fair or unfair, wise or unwise, but in either case, it will not be "paternalistic."

Arneson has no difficulty showing how on his definition the *act* of taking an unconscious injured person to the hospital, and the *act* of shoving out of harm's way a man who is unknowingly in the path of a runaway truck, are *not* paternalistic.[27] We presume in both cases what is overwhelmingly probable, namely that what we are doing is in accord with, not against, the man's will, though we don't have a chance in the circumstances to find out for sure. But now consider a pair of *rules* requiring persons to take unconscious injured persons to the hospital and to shove unaware persons out of the path of runaway vehicles. Because of their generality these rules apply both to the over ninety-nine percent of unconscious injured parties and unaware potential accident victims whose will is to live, and to the tiny minority of those who would have preferred the alternative fate. Rather than say that the rule is nonpaternalistic for the majority but paternalistic when applied "against their wills" to the minority, as Arneson's definition seems to imply, we can say that the rule is nonpaternalistic *tout court*, because its rationale is to

enable people to do what they want, not to impose safety on those who would voluntarily commit suicide.

This revised Arneson approach also helps us to explain why consumer protection laws are *not* paternalistic.[28] To be sure, the "Truth in Advertising" act, for example, which requires clear labeling of ingredients, quantities, and terms of sale, protects unwary customers who could protect themselves if they were attentive or demanding enough, and departs from the rugged individualism of *Caveat emptor*. It clearly *is* a case of paternalism of the benevolent, "presumptively nonblamable" kind distinguished in section 1 of this chapter, and economic individualists are fond of applying the term "paternalism" to it, borrowing that label's derogation so well earned in other contexts. The Pure Food and Drug Laws empower government agencies to require food producers, under pain of criminal penalty, to satisfy set standards of sanitation and purity, and to forego using ingredients declared to be dangerous to health, like Red Dye No. 2. These laws are general and they are coercive, but are they paternalistic in the present sense? I think not. The coercion is directed against one class of persons, the food processors, in order to protect a second class of persons, namely the vast majority of food buyers. It appears that the legitimizing principle supporting the legislation is the harm to others principle, not legal paternalism. But what about the tiny minority that would prefer to assume the announced risk of cancer to get a more life-like color in their frozen strawberries? What about the tiny group that would happily purchase substantially impure foods for substantially lower prices if given the option? Isn't the Pure Food Law paternalistic in respect to them? Not if the implicit rationale of the law—the account of its role, function, and motivation that most coheres with the known facts—is to enable the majority to secure its goals, not to enforce prudence on the unwilling minority. It may be, of course, that the law in question has both purposes, in which case it has a mixed rationale. On the other hand, it could be that interference with the voluntary risk-taking of the minority is an indifferent or unwelcome byproduct of protecting the good of the majority, preferred to more flexible arrangements that would respect the wishes of majority and minority groups alike only because of their heavy administrative and economic costs. Where alternative arrangements that would satisfy both groups at tolerable cost are obviously available, then the interpretation of the "implicit rationale" as paternalistic gains plausiblity.

5. *Legal paternalism, the harm principle, and "garrison thresholds"*

There are many cases, as we have seen, of criminal prohibitions that can be defended, at least initially, on two distinct grounds, both the need to protect

individuals from the harmful consequences of their own acts *and* the need to prevent social harm generally. Sometimes the public interest is so clearly at stake that the paternalistic rationale is quite redundant and an opponent of paternalism can defend the prohibition in question entirely on liberal grounds. Indeed, the public interest is always involved, at least to some small extent, when persons harm themselves. Society is deprived of the services of the injured party, and must also bear the more direct social costs of cleaning up, rescuing, retrieving, or repairing. If fifty thousand persons kill themselves every year by their own choice or through reckless disregard of their own safety, then millions of dollars of tax money are not paid to the treasury, millions of dollars are paid out in social security and death benefits, millions more are spent on police teams, ambulances, and hospitals. Even the sanitation workers who sweep the debris and wash the blood off the roads are paid from public funds. Self-caused deaths and injuries, in the aggregate, are a considerable public inconvenience, at the very least.

It must be a presupposition of the present discussion, however, that there is no necessity that public harm be caused in sufficient degree to implicate the harm principle whenever an individual deliberately injures himself or assumes a high risk of so doing.[29] In modern Western societies, at least, the presupposition seems safe enough. There are persons whose suicides, for example, would harm no one directly, and even benefit their survivors and obviate the great expense of their continued maintenance. And in other examples where the public interest *is* necessarily affected, the degree of harm to it seems altogether too trivial to justify, by itself, imposing burdensome constraints. We can assume, therefore, that in some societies, at least, and at some times, a line can be drawn (as Mill claimed it could in Victorian England) between other-regarding behavior and conduct that is primarily and directly self-regarding and only indirectly and remotely, therefore trivially, other-regarding.[30] If this assumption is false, then there is no interesting problem concerning legal paternalism, and certainly no practical legislative problem, since all "paternalistic" restrictions, in that case, could be defended as necessary to protect persons other than those restricted, and hence would not be (wholly) paternalistic.

One can imagine societies, however, in which our presupposition would not hold. To take a simple model, imagine a beleaguered garrison of settlers under attack from warlike Indians. Everyone is working furiously to repel the assault. The men are all firing at the mounted marauders while the women load the muskets, and children pour water on fires started by flaming arrows. At the peak of the excitement, John Wayne becomes so bored and depressed, that he withdraws with the announced intention of killing himself. "After all," he says, "my life is my own and what I do with it is my own business." Of course, he could not be more wrong. What he does is *everybody*

else's business since the issue is so close that the withdrawal of one party threatens to tip the balance. There is no distinction in these circumstances between self-regarding and other-regarding, or between not helping and positively harming. Anyone who does not help inflicts serious harm on all the others. Insofar as any larger, more complex, society resembles the garrison situation, the debate over legal paternalism is otiose.

One way in which a society can approach the garrison model is through a steady accumulation of individual withdrawals, though each may seem in its own terms primarily self-regarding. A nonproductive life devoted entirely to lotus-eating, opium smoking, or heroin shooting, in which all of one's waking moments are spent cultivating or enjoying dreamy euphoric states, may be "no one else's business" when one, or a hundred, or ten thousand self-supporting persons do it of their own free choice. But when ten percent of the whole population choose to live that way, they become parasitical, and the situation approaches the threshold of serious public harm. When fifty percent choose to live that way it may become impossible for the remainder to maintain a community at all. The closer any society is to what we might call "the garrison threshold," the more the harm principle comes into play, until at a given point, any further withdrawals pose a clear and present danger, and can be emphatically prohibited by the harm principle without any help from the principle of legal paternalism.

6. Presumptive cases for and against legal paternalism

I said in section 1 that legal paternalism is "presumptively blamable." Why should that be? Why should the coercion-legitimizing principle itself, even when stripped of its derogatory label and its misleading associations, tend spontaneously to evoke repugnance? Part of the answer, I think, is that when it is applied by another party to oneself it seems arrogant and demeaning. It says in effect that there are sharp limits to my right to govern myself even within the wholly self-regarding sphere, that others may intervene even against my protests to "correct" my choices and then (worst of all) justify their interference on the ground (how patronizing!) that they know my own good better than I know it myself. It is that "justification" that is most unpleasantly analogous to parental behavior. Parents can be expected to justify their interference in the lives of their children, telling them for example what they must eat and when they must sleep, on the ground that "Daddy knows best." Legal paternalism seems to imply that since the state often can know the interests of individual citizens better than the citizens know them themselves, it stands *in loco parentis* as a permanent guardian of those interests even against the free choices of the persons whose interests they are. Put in

this way, paternalism seems a preposterous doctrine. If adults are treated (*in this fashion*) "as children," they will in time come to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision. Even children, after a certain point, had better not be "treated as children," else they will never acquire the outlook and capability of responsible adults.

Yet if we reject hard paternalism entirely, and deny that a person's own good is ever a valid ground for coercing him, we seem to fly in the face of both common sense and our long-established customs and laws. In the criminal law, for example, a prospective victim's freely granted consent is no defense to the charge of mayhem or homicide. The state simply refuses to permit anyone to agree to his own disablement or killing. The law of contracts, similarly, refuses to recognize as valid, contracts to sell oneself into slavery, or to become a mistress, or a second spouse. Any ordinary citizen is legally justified in using reasonable force to prevent another from mutilating himself or committing suicide. No one is allowed to purchase certain drugs even for therapeutic purposes without a physician's prescription (Doctor knows best). The use of other drugs, such as heroin, for pleasure merely, is permitted under no circumstances whatever. It is hard to find any plausible rationale for all such restrictions apart from the argument that beatings, mutilations, and death, concubinage, slavery, and bigamy are always bad for a person whether he or she knows it or not, and that antibiotics are too dangerous for any nonexpert, and heroin for anyone at all, to take on his own initiative.

The trick is stopping short once we undertake this path, unless we wish to ban whiskey, cigarettes, and fried foods, which tend to be bad for people too, whether they know it or not. One writer backs up his charge that legal (hard) paternalism justifies too much, by contending that in principle it would "justify the imposition of a Spartan-like regimen requiring rigorous physical exercise and abstention from smoking, drinking, and hazardous pastimes.[31] Tom Beauchamp, who quotes this passage with approval, adds an additional complaint of his own that legal paternalism might impose either direct or indirect criminal sanctions against medical experimenters and/or volunteer subjects, or at the very least warrant forceful interferences for "the good" of the subject, overruling his voluntary choice:

> Suppose, for example, that a man risks his life for the advance of medicine by submitting to an unreasonably risky experiment, an act which most would think not in his own interest. Are we to commend him or coercively restrain him? Paternalism strongly suggests that it would be permissible to coercively restrain such a person. Yet if that is so, then the state is permitted to restrain coercively its morally heroic citizens, not to mention its martyrs, if they act—as such people frequently do—in a manner "harmful" to themselves. I do not see how paternalism can be patched up by adding further conditions about the actions of heroes and martyrs . . .[32]

The cases for and against legal paternalism then can be summed up as follows. In favor of the principle is the fact that there are many laws now on the books that *seem* to have hard paternalism as an essential part of their implicit rationales, and that some of these at least, seem to most of us to be sensible and legitimate restrictions.[33] It is also a consideration in favor of paternalism that preventable personal harm (set-back interest) is universally thought to be a great evil, and that such harm is no less harmful when self-caused than when caused by others. If society can substantially diminish the net amount of harm to interests caused from *all* sources, that would be a great social gain. If that prospect provides the moral basis underlying the harm to others principle, why should it not have application as well to self-caused harm and thus support equally the principle of legal paternalism?

On the other side, it is argued that a consistent application of legal paternalism would lead to the creation of new crimes that would be odious and offensive to common sense, leading to the general punishment of risk-takers, the enforcement of prudence, and interference with saints and heroes. Moreover, hard paternalistic justification of any restriction of personal liberty is especially offensive morally, because it invades the realm of personal autonomy where each competent, responsible, adult human being should reign supreme.

However it is approached, the problem of paternalism is a problem requiring reconciliation of apparently conflicting considerations. On the one hand, we are challenged to reconcile our general repugnance for paternalism with the seeming reasonableness of some apparently paternalistic regulations. On the other hand, we are challenged to reconcile, somehow, our legitimate concern with diminishing over-all harm with the threatened proliferation of criminal prohibitions enforcing a "Spartan-like regime" of imposed prudence.

Two broad strategies suggest themselves. We can first of all remind ourselves that legal paternalism, like all of the other coercion-legitimizing principles, is defined not in terms of necessary and sufficient conditions for justified interferences with political liberty, but rather in terms of "good and relevant reasons." (See Vol. 1, Chap. 1, §3.) To say that the need to protect people from their own foolishness is always *a* "good and relevant reason" for coercive legislation, is not to say that it is in any given case a decisive reason. Rather, it leaves open the possibility that in that case reasons of a quite different kind weigh on the other side, and that those other reasons (including respect for personal autonomy) may in the circumstances have still greater weight. Thus, it is possible to defend legal paternalism, as we have defined it, while arguing against paternalistic legislation in particular cases. We can call this approach "the balancing strategy." The anti-paternalist has a heavier argumentative load to carry. He must not only argue against particular legislation with apparently paternalistic rationales; he must argue that

paternalistic reasons never have *any* weight on the scales at all. In his eyes they are morally illegitimate or invalid reasons by their very natures, since they conflict head on with defensible conceptions of personal autonomy.[34]

The most promising strategy for the anti-paternalist is to construct a convincing conception of personal autonomy that can explain how that notion is a moral trump card, not to be merely balanced with considerations of harm diminution in cases of conflict, but always and necessarily taking moral precedence over those considerations. Then he must consider the most impressive examples of apparently reasonable paternalistic legislation, and argue, case by case, either that they are not reasonable, or that they are not (hard) paternalistic. The latter project will almost certainly lead him to defend "soft paternalism" as an alternative, essentially liberal, rationale for most of what seems reasonable in paternalistic restrictions. For that reason, we can call this approach "the soft-paternalist strategy."

Since part of the purpose of this book is to determine what is salvageable in the traditional liberal doctrine, the following chapters will be devoted to explicating personal autonomy, considering alternative autonomy-respecting rationales, and in particular, elaborating a soft-paternalistic theory of how forcible implementation of a person's will can accord with his personal autonomy.