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INTRODUCTION

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The essays in this volume constitute a symposium on the work of Joel Feinberg. Ten leading scholars in ethics, legal philosophy, and social and political philosophy offer a glimpse of the scope and impact of Feinberg's work. They address issues such as a theory of rights, antipaternalism, an account of action and omission, and the legal enforcement of morals.

In "Liberalism and Paternalism," Russ Shafer-Landau considers the foundations of Feinberg's arguments against paternalism. While Feinberg rejects *hard paternalism* (a view that takes self-regarding harm as a reason for imposing criminal sanctions on certain conduct), he endorses *soft paternalism* (which allows for restricting involuntary or nonvoluntary conduct). Feinberg treats voluntariness as a scalar phenomenon. There may, then, be a threshold of voluntariness beneath which the law may restrict conduct. This threshold may vary depending upon the degree of self-harm or the permanence of results. What, then, are we to make of persons bent on suicide or the amputation of some of their otherwise healthy limbs?

Feinberg's writings suggest two arguments against criminalizing their conduct or assisting in it. (1) The *expressive function argument* holds that punishment is appropriate only if the targeted conduct is worthy of condemnation. Punishment would not be an appropriate response to morally permissible conduct. Given Feinberg's support of the *volenti* principle, self-mutilation then seems ineligible for criminal penalty. Shafer-Landau ultimately finds this argument unsound, though, since Feinberg endorses some criminal sanctions for actions that are not obviously rights violations. (2) An *analogical argument* maintains that self-mutilation is ineligible for criminal sanction for reasons similar to those regarding some suicides. But this argument is also suspect, especially when applied to *assisting* another's self-mutilation. Feinberg thought, for instance, that the state is justified in supposing that slavery contracts are not voluntary (because of the danger of even occasional mistakes otherwise); perhaps something similar applies to mutilation contracts. Threat of undue grievous harm from permitting such conduct may trump the importance of an unrestricted liberty to engage in it.

But Shafer-Landau worries this may undermine Feinberg's antipaternalism. Shafer-Landau discovers that Feinberg in effect appeals to considered moral judgments about the proper scope of state power. But there are difficulties in reconciling competing considered moral judgments, and it

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remains unclear how to distinguish self-regarding from other-regarding behavior. Shafer-Landau then considers how Feinberg seems to favor some "balancing strategy" for assessing the force of appeals to self-imposed harms, but this strategy might vitiate the force of Feinberg's arguments for the inviolability of personal sovereignty and it leaves undefeated many standard paternalist arguments that permit the gravity of self-imposed harm to count as some reason for state interference.

In her comments, Heidi Malm has misgivings about Shafer-Landau's views on the stringency and location of the burden of proof regarding the merits of paternalist reasons. While a robust liberal position may be difficult to establish, the failure to do so does not vindicate paternalist arguments by default; proponents of paternalism must still provide reasons for their view. Malm finds the liberal antipaternalist position most compelling as a default position. Even if Feinberg is not necessarily committed to the inviolability of personal sovereignty, arguments for the "balancing strategy" rest on a questionable rejection of the centrality of autonomy in a political morality. Malm wonders why the state has the authority coercively to restrict self-regarding harms in the first place. She agrees with Shafer-Landau that it is often difficult to draw many of the distinctions that figure in Feinberg's antipaternalist arguments (such as voluntary/involuntary, reasonable/unreasonable, etc.), but she maintains that the distinctions remain theoretically significant. Feinberg's arguments for certain criminal sanctions on conduct need not be understood as undermining his antipaternalism; Feinberg might be drawing on some other considered moral judgments about the scope of legitimate state power.

Christopher Heath Wellman argues, in "Feinberg's Two Concepts of Rights," that Feinberg's account of rights as valid claims is in tension with his account of who qualifies as a rights-bearer. On Feinberg's much discussed view, the landscape of a moral community should make room for *claimants* and *claiming* in order to allow for a certain crucial sort of self-respect. Feinberg also holds that only beings with interests can be rights-bearers; they uniquely have a "sake" that is morally considerable. Nonhuman animals and human infants have interests that can figure in rights claims. But Wellman is unsure that having interests is sufficient for having rights. He cites Carl Wellman's account of rights, wherein animals and infants do not qualify as *agents* and so cannot have rights. Feinberg's discussion of proxies wielding a being's rights is ultimately of little help; Feinberg seems committed to saying that rights-holders appoint their own proxies. Further, the value of including rights in a moral community seems of no interest to animals. Wellman thus argues that Feinberg alternately uses two incompatible views of rights ("will" versus "interest" accounts). Which of these two views is a better foundation for a theory of rights, Wellman argues, rests on controversial value questions on which reasonable people disagree.

In his response to Christopher Heath Wellman, George Rainbolt considers two competing models for assessing the merits of a theory of rights:

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theories are suspect when they privilege "theoretical" over "extensional" adequacy (and thereby exclude infants from the protection of rights). People commonly take ordinary reasons not to kill infants to be of the same sort and stringency as reasons not to kill adults. Against Wellman's argument that Feinberg's views on proxies preclude nonhuman animal rights, Rainbolt considers the possibility of rights that cannot in fact be currently claimed. Wellman argues that Feinberg's view on the value of rights restricts the class of candidates of rights-holders, but Rainbolt resists this. There is a compelling basis in Feinberg's work for constructing an argument against an interest theory of rights. After considering how we might dissolve the seeming tension that Wellman flags in Feinberg's corpus, Rainbolt acknowledges some key difficulties in reconstructing Feinberg's theory of rights. For one, Feinberg's account might not make proper room for the idea that rights sometimes pick out not just prohibitions but disabilities. Rainbolt discusses some remaining concerns about Feinberg's theory of rights, among which are its inability to account clearly for why duties are *duties to* and how rights link with permissions and certain normative constraints. Rainbolt closes by countering Wellman's claim that interest and will theories are equally plausible; instead, he suggests that both theories are mistaken and that we should consider alternatives.

In one chapter of *Harm to Others,* Feinberg argues that some failures to act may be subject to legal sanction. He defends this thesis against several compelling objections. In "Feinberg and the Failure to Act," Patricia Smith's analysis of omission further develops this discussion. There is a distinct normative component to Smith's account of omission; an agent's failure to act is not an omission unless it was reasonable to expect the agent to perform the action. Smith considers how "ability, opportunity, and knowledge" figure in making expectations of action reasonable. Such reasonable expectations also play a key role in her analysis of the notions of unintentional omissions and negligent omissions. Conflicting normative standards help to explain the notions of justified omission and excused omission. Smith proposes as a necessary condition for a failure to act that an agent should have been able to perform some action; this condition invites a "second-order level of evaluation that enables us to account for negligent omissions that involve culpable inabilities or at least inability (or lack of opportunity) for which the agent is responsible." Reasonable expectations also hinge importantly on what ordinary persons can and should be in a position to do and know. What, then, are we to make of the ontological status of omission? Smith argues that, given a standard robust social context and the expectations it creates, omission—even if not an action—is a form of conduct; it is "something done."

While noting several illuminating features of Smith's analysis of omission, Andrew Altman argues in his comments on Smith's essay that there is not a single practically and theoretically useful concept of omission but that there are many such notions that capture different elements of the

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conceptual landscape. There are important ambiguities in the notion of reasonable expectation, Altman writes. The notion admits of epistemic and moral readings, and while ordinary usage may conflate these, clarifying the distinction is important for any analysis of reasonable expectation. Altman resists Smith's account of norms; behavioral regularities alone do not make for norms, and it is important to distinguish norms rooted in social rules from those founded in morality: they each generate different notions of omission. The actual reasonableness of rules and judgments about them are irrelevant both for the existence of social norms and for judgments of omission in light of them. On the other hand, a practical-reason concept of omission rests crucially on the justification both of norms and of the expectations they generate.

Feinberg is particularly concerned to counter arguments that a person's own good is a reason for criminally prohibiting some conduct. Richard Arneson, however, wishes to take steps toward defending paternalism by criticizing arguments against hard paternalism. In "Joel Feinberg and the Justification of Hard Paternalism," Arneson carefully notes that the notion of personal sovereignty rooting Feinberg's antipaternalism gives reasons against restrictions other than those found in the criminal law: certain forms of private acts on others may also be ruled out. Even though personal sovereignty may root a right of autonomy, it does not rule out reasons for actions that the right would obstruct. So it is unclear why Feinberg denies that reasons potentially relevant in some domains can count in formulating the criminal law. Just as arguments for indefeasible rights are implausible, so too, Arneson regards infringement of the right of personal autonomy as potentially justifiable given weighty considerations about an agent's own good. This would vitiate arguments for absolutist antipaternalism. Arneson worries about the soft antipaternalist's seeming fetishizing of voluntary choice; appeals to voluntary choice—especially considering that voluntariness is a scalar concept—might not dispatch likely objections from hard paternalists or hard antipaternalists. Indeed, voluntariness may be importantly disconnected from what makes a life valuable.

Feinberg's soft antipaternalism is admittedly more plausible in light of his subjectivist account of the good, but, as Arneson discusses, Feinberg's defense of universal welfare interests complicates matters a bit by potentially conceding too much to the hard paternalist. The capacity of choice, Arneson further notes, is distributed unevenly among human beings. Some persons' lives may then go better because of paternalist restrictions on their liberties. Arneson discusses rational agency and its value in a good life, agreeing with Feinberg that Kantian arguments are implausible when treating rational agency as unsurpassably valuable. Arneson then explores some of the foundations and implications of a duty to live a valuable life—a duty owed both to oneself and to others. Such a duty may license in different ways at various levels of voluntariness the use of coercion for a person's own good.

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Feinberg's antipaternalism confines criminal prohibitions to preventing wrongs. William A. Edmundson discusses how Feinberg has several resources for underwriting a liberal antipaternalist argument that consistently acknowledges that harm to self is at most a reason for informal correction. For one, harm to self need be neither a *wrong to oneself* nor, for that matter, any other kind of wrong. Feinberg wishes to argue not just that voluntary setbacks to one's interests sometimes give no reason for criminal prohibition; he wants to show that they *never* give such reason.

Edmundson then agrees with Arneson that Feinberg's scalar conception of voluntariness cannot bear the argumentative burden of opposing both hard paternalism and hard antipaternalism. Against Arneson, though, Edmundson argues that Feinberg's antipaternalism can produce a notion of rights that rests on a "want-regarding" notion of interests. Insofar as paternalism allows for an agent's own good to count as a reason to restrict her conduct, it rests on a controversial idealized notion of interests. Arneson argues that sometimes a person's life goes better when she is prevented from doing what she voluntarily wishes to do. Edmundson agrees but thinks that what matters to Feinberg is that such considerations do not justify the violation. Arneson's "secular sanctity of life" doctrine might stand as a commendable personal ideal, but if we impute this value to all persons, we rely on a contestable idealized notion of interests and we ultimately undermine the idea that our lives are our own to live. While Edmundson remains sympathetic to Arneson's take on which considerations justify paternalism, he flags important challenges remaining for any such argument.

In "Politics Is about the Grievance: Feinberg on the Legal Enforcement of Morals," Gerald J. Postema writes that it is law's place to respond appropriately to human evils. But why does liberalism restrict the law from addressing certain sorts of evils? Postema considers the "grievance morality" of Feinberg's liberalism. Though it does not exhaust morality, it treats the claims to sovereignty by specific individuals as morally fundamental. On Feinberg's view, grievance morality is the only morality a political community may enforce through law. Thus, Postema points out, Feinberg's liberalism does not differ from that of opponents over the tenability of legal moralism; it parts from them only on its scope. Only "wrongs done to the victim" are candidates for criminal prohibition. Postema considers adding wrongless harms and harmless personal wrongs to the roster of acts eligible for criminal prohibition under Feinberg's liberalism.

In assessing Feinberg's views on the harm and offense principles, Postema traces an evolution in Feinberg's works toward recognizing some nongrievance evils as candidates for reasons for restricting liberty—even if such reasons do not ultimate justify any interference. Inspired by compelling counterexamples (such as Kristol's gladiatorial contest and Parfit's malicious conception example), Feinberg's theoretical adjustments give away too much to global legal moralism. Instead, Postema argues, Feinberg's liberalism can make other adjustments. Consent does not eliminate all

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grievances; some acts wrong persons despite those persons' consent, and the criminal law may prohibit others from facilitating their conduct. The required weakening of the *volenti* principle is consistent with a commitment to personal autonomy. Further refining the basis of personal wrongs may accommodate other difficult cases. Postema closes by recounting some of his experiences with Feinberg's legendary nemesis, Josiah S. Carberry.

In comments on his essay, Larry A. Alexander worries that Postema's account of Feinberg's grievance legal moralism permits only victims, their agents, or the state to punish wrongdoers. Alexander wonders further about the justification for *punishment* as a response to grievance claims and how and whether special considerations of distributive justice figure in grievance legal moralism. Alexander warns of potentially illiberal implications of allowing that grievance claims may arise from concerns with maintaining a valuable way of life. Including the offense principle in Feinberg's grievance morality may jeopardize efforts to block global legal moralism—especially if violations of nongrievance moral norms generate offense. But when the justification for punishment is offense and not immorality, the offense principle might remain conceptually distinct from global legal moralism. Alexander resists Postema's responses on behalf of Feinberg to the malicious conception and gladiatorial contest examples; such cases cannot be prohibited by appeal to grievance morality.

In April of 2005, the Jean Beer Blumenfeld Center for Ethics at Georgia State University hosted a conference at which earlier versions of these essays were presented. I am indebted to Larry Alexander, Andrew Altman, Jules Coleman, and Kit Wellman for conceiving of and helping with the planning of this conference. Many thanks as well to Andrew Jason Cohen, Jon Gardner, and Ani Satz for their participation in this conference. I am also grateful to Tim Crews-Anderson, John Ranta, and especially to Claire Murata for all their help with the conference.

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