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Drug Policy, Paternalism and the Limits of Government Intervention

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ABSTRACT

Gerald Dworkin provides an insightful starting point for determining acceptable paternalism through his commitment to protecting our future autonomy and health from lasting damage. Dworkin grounds his argument in an appeal to inherent goods, which this paper argues is best considered as a commitment to human flourishing. However, social-connectedness is also fundamental to human flourishing and an important consideration when determining the just limits of paternalistic drug controls, a point missing from Dworkin's essay.

For British philosopher Thomas Hill Green, regulation of alcohol sales emerged from the social ideal. Green argued that policy interventions, including restricted opening hours and locations, improved the conditions for humans to flourish. Green offers a compelling political vision but fails to account for the fact pleasure is also an inherent good. He focused excessively on our social nature, excluding our more pleasure-seeking and egoistic characteristics. In contrast, a more realistic and complete vision of human flourishing can be found in an amended version of Gerald's Dworkin's arguments.

In conclusion, this paper argues drug policy makers should remain committed to the harm principle as applied to criminal law whereby a person should never be criminalized for self-harm. Such a limit on paternalistic interventions is deemed necessary when *eudaimonia* is the end of government action. In practical terms, this means that the criminalization of drug use, as opposed to drug production, is always unjust.

Keywords: liberalism, paternalism, *eudaimonia*, drugs

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1 Introduction

This essay establishes the theoretical framework against which policy makers can assess the benefits and harms of government interventions. To know if a policy causes harm, a harm reduction advocate must first define what harm is. It is my argument that harm in drug policy is best be defined as damage to essential human goods. Moreover, a commitment to the maximization of essential goods is best conceptualized as a political theory where human flourishing is the proper end of all political action.

Gerald Dworkin provides a compelling case for perceiving harm as a reduction in the amount of essential goods constituting human flourishing. Dworkin argues these goods are autonomy, life, health, and pleasure, and allows a narrow range of strong paternalism if it can be clearly shown doing so is necessary for the maximization of essential human goods across society. However, the one essential human good Dworkin fails to account for in his theory of acceptable paternalism is the social aspect of our nature. If we are to measure policies against a broad vision of human flourishing, then we must include all essential goods. Humans are embodied, social beings, and it is not illiberal for law makers to advance our essential goods, so long as they do so within the boundaries of what could be accepted across the reasonable comprehensive doctrines that form the cultural fabric of our society.

In addition to Dworkin, I examine the writing of Thomas Hill Green, as I argue Dworkin's theory of the limits of government is best understood as building on Green's theory of political flourishing (*eudaimonia*). Green was influential in bringing the notion of *eudaimonia* back into political thought, and although he fails to provide a convincing view of what flourishing is, the form of his argument is convincing, that being the role of government is to advance human goodness, and rights exist to support this goal.

Like Green, I argue it does not follow that a government which places the good before the right must be oppressive, and my theory remains committed to the harm principle as applied to criminal law and the importance of negative freedom. To maximize human flourishing no one should be criminalized unless they violate the rights of another by harming their body or property. This version of the harm principle is necessary for the protection of our inherent human right to moral independence from unjust state interference with our body and action. The conclusion this produces for the drug policy maker is that drug users should never be criminalized.

2 The importance of Negative Freedom

Democracy demands an equality of legal rights as all citizens share the political space and the legislation that protects it. Unlike tyrannical regimes, we are all equal and all have the same right to freedom of movement, association and opinion. Legal rights are built upon and reflect the core notion that because the democratic state is shared equally by all, the wellbeing and vision of the good life of all citizens should be supported equally. It may turn out the case that Catholicism, utilitarianism or Schopenhauerian idealism are true, but democracy should allow all these views

and corresponding lifestyles to exist under its umbrella without casting judgment as to which one is correct.

Ronald Dworkin suggests rights are best thought of as restrictions on what a democratic society can demand of its citizens in the name of the collective. They are protections given to each so that his or her way of life is not demeaned or prohibited by the collective or the aggression of others.¹ Because democracy is a collective of equals, it should not be used to undermine the freedom of a minority: for example, by voting in a regime that promises to execute all Muslims (assuming that Muslims are the minority). The liberal tradition holds there are certain things that cannot be done to promote the collective goals of the majority without undermining the spirit of democracy and the rights of its citizens.

Dworkin argues that one such right is the right of ‘moral independence’:

Rights (I have argued elsewhere) are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole. If someone has a right to moral independence, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did. Of course, there are many different theories in the field about what makes a community better off on the whole; many different theories, that is, about what the goal of political action should be.²

If accepted, the right to moral independence grants us the ability to frame our lives in any way we choose regardless of whether other people think what we are doing is immoral. It is the right to base a life on one’s own values, not the centrally prescribed morality of a Church or ethical theory.³ Dworkin follows John Stuart Mill in demanding the largest area of negative liberty possible: that is, the largest area of space in one’s life to act freely without government coercion and construct a life in line with one’s vision of the good life.⁴

Negative liberty derives from the absence of government control rather than the presence of human activity. People are free when they are left alone by external agents, not because they partake in any kind of activity such as voting or enjoying leisure time to read. Political theories that argue only negative liberty is important to the discussion do not believe governments should try to promote any kind of way of life, nor should they interfere in the activities and lifestyle choices of their citizens. Freedom comes from government not getting in the way: it is a conception of freedom unconcerned with whether people obtain the goals they set after, nor with what people’s goals are.

Mill famously argued for the greatest degree of negative liberty for each person because to his mind this political structure best maximized utility across society.⁵ According to Mill in his famous harm principle, people should be able to do what they want so long as they do not directly harm other people.⁶ By allowing people to live in accordance with their own nature and values, society may find new avenues of happiness, and solutions to old problems. The protection of a large amount of negative liberty improves society as diversity begets innovative ideas which brings progress. Moreover, people reject and ultimately rebel against a lifestyle thrust on them against their will. Mill’s view is optimistic: if people are left to live freely away

from the government enforcement of personal morality, society will progress, and citizens will be happier than if shaped into a centrally determined way of life by an external authority.⁷ Diversity under this view is an asset to both individuals and society.

For Mill, each person has a private domain which government should not enter. This includes their opinions, their ability to express their opinions, and the freedom to choose a style of life that best suits their temperament and values. Mill tells us that, ‘No society, in which these liberties are not, on the whole, respected is free, whatever may be its form of government: and none is completely free in which they do not exist absolute and unqualified.’⁸ Mill establishes a strong right to the greatest area free from the hand of government as possible. Society may look down on what someone does in private, but governments do not have the right to enter someone’s private domain and enforce a lifestyle it thinks better than the one the individual chooses so long as the behavior causes no direct harm to others or their property, such as assault, murder or burglary.

The stipulation that one must not cause direct harm to others is important for Mill’s overall political philosophy. He differentiates indirect or contingent harm that comes from harm to one’s self – or to use Mill’s terminology ‘self-regarding’ actions – from direct harm resulting from ‘other-regarding’ actions. Mill states:

with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.⁹

Mills writes of a drunken person failing to meet his family obligations and argues he should not be restrained from drinking by the government even though people are harmed indirectly through his behavior. It is his choice to live that kind of life, and any potential social benefits from government intervention into that man’s drinking are not worth the loss of liberty: a society offering a fuller version of liberty increases overall happiness in the long run.¹⁰ Mill is not claiming that one can harm oneself severely without causing any harm to others – in any self-destruction, there will be emotions and even lives hurt at times.¹¹ Rather, Mill distinguishes self-harm as outside the realm of government interference as it is consented to by the person harmed and does not involve a victim with a claim that his or her rights have been breached.¹²

Turning to John Rawls we find a version of liberalism that attempts to ground rights in a social contract model instead of the utilitarianism of Mill. The right precedes the good for Rawls, as there is no end such as utility which rights promote. Rights for Rawls are what we can expect from others taking account of the fact we all have an equal standing in the collective. They establish the fundamental rules of society in which all can pursue their version of the good: ‘In justice as fairness the priority of right means that the principle of political justice imposes limits on permissible ways of life...’¹³

Rawls argues that in the original position where everyone has no knowledge of what kind of person they would be (and their potential religious, ethical views and incentives were unknown)

yet had to set the governing principles of justice, they would choose a social arrangement where individuals had the equality of liberty and rights.¹⁴ We would not choose to live in a society where everyone had to pray daily, because we could end up being persecuted once the veil is lifted.

Rawls tells us that ‘respect for persons requires government not to take a stand on the truth of people's comprehensive doctrines one way or the other.’¹⁵ If people want to smoke cannabis, or engage in homosexual activity, they should be able to. A conservative Catholic may not approve of homosexual behavior, but society and law exist equally for the atheist as for the Catholic, and each should be able to pursue their vision of the good life without governments claiming the truth or falsity of either.

Rawls compares his approach to comprehensive doctrines that contain broader religious or ethical beliefs that could not be accepted by reasonable people across diverse backgrounds. He argues that justice as fairness is a political not an ethical theory, so it exists within pre-existing limits, such as the fact democracy is the coming together of a multitude of people with differences of perspective that show no sign of resolution.¹⁶ Rawls believes there are a group of ‘primary’ goods that are pursued by reasonable people across religious and ethical views, and rights protect people’s pursuit of such goods. People may never agree on whether God exists, but all could agree on the necessity of religious worship or cultural practices not being persecuted arbitrarily. All would also agree to sanctions on violence towards others, because they would not want to be the target of such violence themselves.

Rawls argues that the absence of agreement as to ‘the good life’ means the state should coerce as little as possible, and negative liberty should be maximized by a range of options and markets. His political liberalism sees democracy as an equal grouping of people where the views of all should be respected by the state. He does not see the fundamental questions between ethical worldviews as resolving due to vastly divergent backgrounds, experiences and outlooks. Governments can however establish a set of social institutions where people can express their nature freely and hold opinions of dissent against organizational authority. This is not to say governments should be morally void: the political liberalism of Rawls is built upon the foundations of justice as determined in the ‘original position’ which is a thought experiment that attempts to capture whether a principle governing the structure of society could be accepted by all and thus fair. By entering a universal perspective, Rawls believes we come to equality of liberty and the difference principle (which allows unequal government interventions if they operate for the advantage of the least well off). These are the principles of justice, and they set the boundaries of behavior within which legally equal citizens can pursue freely chosen ends. The principles of justice lead automatically to a group of rights that cannot be violated to promote the greater good and demand the state must be neutral as to which view of the good life is true.¹⁷

Rawls joins Mill in strongly advancing the claim that people should be left free to choose how they live away from government or religious coercion. Within the liberal democratic framework, there is rich and profound support of Dworkin’s argument that we have a right to moral independence. Moreover, the right to moral independence, combined with an appeal to self-

ownership (including the right to full control over one's body), offer a solid foundation for arguing that people should have the legal right to take any drug they choose if that is the style of life they want. The current criminal sanction on recreational drug use demands an explanation: a strong reason must be given to why liberty has been taken and our rights seemingly trampled.

3 Limitations on Negative Freedom

Running beside the liberal-democratic appeal to freedom is the acceptance that people cannot directly harm others. The harm principle has had a powerful influence in setting the boundaries of government coercion and the criminal jurisdiction. While thinkers give different accounts of why freedom is valuable, they all adhere to some variation of the harm principle, allowing the criminal prohibition of acts of direct harm towards other people.

The most common criticism of the harm principle is that no one can directly harm themselves without harming other people. The drug addict or the person who attempts suicide causes great emotional harm to their family, as well as health care costs and potential loss of employment. However, as noted earlier, in setting the limits of the criminal jurisdiction, Mill sought to differentiate such indirect harms to others from direct harms and argued that only direct harms were suitable for criminal enforcement.¹⁸ Indirect harms may not eventuate, and often involve an appeal to risk rather than harm to any specific person, so sit in a different moral category.

If one agrees with Mill, then drug use and possession of any type should not be something which is the concern of the criminal jurisdiction: coercion and punishment is not the appropriate response here. Drug use taken as an act that does not cause direct harm to others should never involve the user or possessor entering the criminal jurisdiction. That is not to say that drug use cannot be regulated based on an appeal to community wellbeing or social harm, but one should never be criminalized for indirect-harm caused by direct self-harm. Drug use sits with other forms of potentially risky but subjectively pleasurable behavior such as gambling, judo, rugby, and prostitution.

The production of drugs is a different category of activity to use and possession. Like the production of pornography, one may argue that the production of some drugs should be banned because they cause direct harm to some users, such as a heroin overdose or a cannabis-induced psychosis. One might argue this constitutes direct harm to the user by the distributor who provides the drugs to the user; however, in reply one might assert that unlike an unprovoked assault it is not a wrong as it involves consent and it is mediated through the decision by the user to take the substance. Joel Feinberg argues this position is supported by a long intellectual lineage in arguing that where there is consent there is no wrong and where there is no wrong there is no justification for government involvement.¹⁹

Does the existence of consent end the argument? One may reply that consent is important, but there are cases where people want to engage in a behavior unquestionably to their detriment. Feinberg concedes this and notes there are examples of paternalistic interventions in place we would want to keep, such as prohibition on killing a healthy person even if they consent or allowing people to sell themselves into slavery.²⁰ Feinberg attempts to get around this by arguing

that in cases where the behavior seems unreasonable, a person must prove themselves to be acting in a fully informed and thus voluntary manner before they can proceed. He calls this 'weak paternalism', which he contrasts with 'strong paternalism'. The strong paternalist prohibits the seemingly irrational behavior (such as consenting to being shot), while the weak paternalist checks there is consent based on an informed decision-making process and will only prohibit the activity if a person fails to demonstrate this.²¹

In *Paternalism*, Gerald Dworkin argues in favor of a limited version of strong-paternalism.²² The state, for Dworkin, does and should prevent people from committing suicide, disabling themselves, swimming in areas that might result in death, dueling, and driving without a seatbelt. He notes that Mill relaxed his harm principle when it came to selling-oneself into slavery, because if a person used their liberty to destroy itself, then that person is clearly acting against their interests.²³

Like Rawls, Gerald Dworkin argues there is little agreement about what is good for our wellbeing, so paternalistic interventions need to be restricted to a small set of goods which he mentions at different points in his paper: health, staying alive, a basic education, pleasure, and maintaining our future liberty. However, his proviso is that paternalism should be available for actions that are 'far reaching, potentially dangerous and irreversible'; often involving a person irrationally discounting the potential damage of the activity and instead placing excessive weight on a negative such as inconvenience.²⁴ Paternalism is also justified in cases where someone is in a deep state of distress and not thinking straight but likely to see things differently once the dust settles, such as in cases of psychosis or deep depression. Dworkin argues that the future version of the coerced person would consent to the intervention even though at the time they did not.

Dworkin finished his essay by urging legislators to consider two rules when determining whether paternalism is warranted: firstly, there is a clear obligation on the state to prove the harm of the activity is real and not speculation or dogmatism, so there is a strong possibility that harm would be reduced by the intervention; and, secondly, that if the paternalistic path is chosen, the least restrictive intervention is taken.²⁵

One might admit that such interventions occur and seem reasonable, but are they morally justified? Dworkin argues we restrict the liberty of children because in some sense we deem them not fully rational or capable of making decision in their best interests. He argues this is morally justified as we deem that in the future they would give us consent as they come to realize the proper ramifications of their actions. He calls this 'future-orientated consent'. As humans, we are full of weaknesses, and it is rational to consent to a society in which we take out 'social insurance' against our own weakness.²⁶

Think for example of suicide: when someone is deep in depression, they might see the world in a significantly revised way once they rest and get treatment. Dworkin would argue that it is right to prevent the sale of a drug that leads to instant death, as in the future the suicidal person would recognize that this government interference of their behavior is justified, if we accept that staying alive is an objective moral good. This does not include cases of euthanasia as in this situation there is unlikely to be a future self that would consent to the prohibition if the illness is terminal and involves a large amount of pain.

In determining whether paternalism is warranted, Dworkin notes weight must also be given to whether the activity is pleasurable to a proportion of those who partake: this acts as a protection against the majority tyrannically preventing someone from doing something they enjoy due to custom or a negative emotional reaction. Rock climbing and cannabis smoking are claimed by some to provide pleasure or the absence of pain but consenting to be shot in the stomach or to amputate a limb seems to be beyond the realms of what someone could reasonably claim to be beneficial or pleasurable.²⁷

Dworkin makes a convincing case that at certain times strong-paternalism is justified as there are potential actions that are so clearly against someone's interest. For example, if a drug had the effect that every time it was taken (or a sizeable proportion of times) it caused death, then it seems reasonable to prevent people from getting the drug. Also, in cases where swimming in an area of water is dangerous to the point death is a strong possibility, it seems reasonable for a government to prevent people from swimming in that water even if the hypothetical swimmers know the risks involved. The grounds being that people taking the 'death drug' or swimming in areas with vicious rips are making an objective miscalculation regarding what is to their benefit.

There are diverse kinds of interventions, and the state may prevent a person from doing something without recourse to the criminal jurisdiction.²⁸ The criminal court is unacceptable in cases of paternalism. Cases of serious direct harm to self (actual or potential) could involve civil warning letters and fines or enforced waiting periods that if broken lead to civil penalties. The civil jurisdiction does not involve the same level of stigma and the potential life-ruining impact of the criminal jurisdiction and associated criminal convictions. Even before making something a civil infringement, the state would want to know for sure the thing being prevented is an evil either due to its negative effects on life, health or liberty, and that what is being prohibited is without any clear benefits that might outweigh potential harms, such as pleasure.

Practically, the paternalism of Feinberg and Dworkin is not that different. Feinberg does not believe the state should ever coerce someone who voluntarily decides to engage in a risky or even life-ending activity. For him, consent is what is most important, but the state can intervene at times through the civil jurisdiction to determine whether someone is fully-informed. If a drug seemed dangerous enough Feinberg would insist a person is given full information and made aware of potential consequences before being allowed to consume it. Dworkin would prohibit the production of a 'death drug' potentially via the criminal jurisdiction but would not punish someone trying to acquire it via the criminal jurisdiction. One may attempt to broaden the types of drugs subjected to production and distribution prohibition or restrictions to those highly likely to cause damage to health or decision-making faculties: the cut off point is not entirely clear but must be determined by the careful weighing of essential human goods.

4 Atomism and Positive Freedom

In his compelling essay *Atomism*, Charles Taylor tells us that much recent political philosophy in the liberal-democratic tradition holds individual rights to be theoretically secured by an appeal to

our capacity to act autonomously: a being capable of setting ends for itself should not be prevented to do so unless there is a compelling reason.²⁹ For Taylor, within the “atomistic” liberal tradition from Mill to Ronald Dworkin, human beings have been conceptualized as ontologically separate and self-interested entities pursuing goals set for themselves after a rational consideration of options. Think of the original position where people under the veil of ignorance must decide on what type of social arrangement they think would be best for them once the veil is lifted. The good of everyone in this thought experiment is separate from all others. The good of each atom is not that of the community but of the end-seeking subjectivity.³⁰

Yet if policy makers accept a view of the world where humans are conceived as end-setting atoms, then the purpose of government must be in part to promote that type of excellence. Such a theory has no time for neutrality about the good; however, Taylor does not believe this is possible in any case. He points to the loss of religious freedom versus not being able to drive down a certain road, and argues we believe any loss of the first type to be a more significant blow to negative freedom because it is an affront to a more essential part of human life.³¹

Charles Taylor writes: ‘The view that makes freedom of choice this absolute is one that exalts choice as a human capacity. It carries with it the demand that we become beings capable of choice’.³² To concede this point is to accept a legitimate role of government not only as the protector of people from violence from others but also as one that legitimately advances a limited version of human flourishing centered around autonomy. In making this concession, we commit to advancing goodness equally across all society, with autonomy a key component of this vision of human flourishing, but not the only one.

Moving to practical affairs lets us see this more clearly what this all means. Taylor believes his views take us towards a society that impresses the importance of inquisitiveness and clear planning, whereby mindsets are wide enough for people to conceive the most suited course of life to pursue given the realities of their character.³³ The state at this point is clearly not neutral but is one that is legitimately structured to promote flourishing, or to use the ancient Greek term *eudaimonia*. We find a state that respects debate on political and religious truths, where people make important life decisions in line with ends they have set for themselves based on evidence and experience rather than direction by an authority figure; it is a vision of human nature and its advancement close to that described so eloquently by Mill.³⁴

What does this all have to do with drugs? If negative freedom can be curtailed to promote future autonomy, then one may think this opens a case for legitimate government coercion of people away from using drugs with a high likelihood of impairing their future autonomy and thereby potentially preventing them from flourishing. If Jane becomes addicted to heroin, and her addiction heavily impairs her ability to make clear choices, or to achieve goals core to her sense of self, then following Taylor one could argue that society should assist her in quitting and getting her life back on track. Legislators with Taylor in mind would want to be certain that the intervention improved Jane’s future autonomy and was not oppression disguised as acceptable paternalism. In this sense, the spirit of the argument is still with Mill, whereby the intelligence of law makers should be used to create the political conditions whereby humans can express their creative natures. Society should provide conditions for growth, not just the space to set ends.

Taylor brings the focus on the limitations of atomism foundational to liberal ideas such as the original position, where one considers the right from the perspective of an isolated individual striving towards goals in an abstract reality. However, the realization that the good has a foundational yet discrete place in the thought of Rawls does not take us any further than Gerald Dworkin in advancing legitimate types of strong paternalism. Taylor's focus on autonomy gives weight to Dworkin's belief that there are legitimate types of strong paternalism, such as those that are clearly autonomy enhancing, but offers nothing for us to amend Dworkin's restrictions on its practice. We should remember that Dworkin already provided for the importance of both future autonomy and health in his model of strong paternalism. As Taylor tells us, many theories that claim to be neutral have conceptions of the good concealed in their configuration of the right, and it seems a matter of degree as to how much the good should enter considerations of political justice rather than if it should.³⁵

5 Thomas Hill Green and the social ideal

Gerald Dworkin broadened the liberal, democratic vision of human flourishing so negative freedom could be restricted in cases of serious risk of irrevocable damage to future autonomy, life and health, and where it was likely the coerced person would come to agree that his freedom was rightly curtailed for the higher goal of their flourishing. The question is how many goods can we add to the catalogue of what is essential for human wellbeing without drifting into a place unacceptable from the perspective of a comprehensive background.

One essential good missing from Gerald Dworkin's catalogue is social connectedness. I touched on this issue during my discussion of Taylor, but the fullest modern elaboration of the idea came via British transcendentalist Thomas Hill Green, who sought to ground the purpose of legislation and political action in a view of human flourishing. While Green presents a stronger version of human flourishing than is possible to use as a foundation of a political theory, his approach to politics and his equivocation of the word freedom with human *eudaimonia* adds insight as to how Dworkin's limited strong paternalism should be construed.

Green envisioned a government fully committed to the advancement of human flourishing, where the liberal exaltation of negative freedom remains, but legislators also work to improve human excellence equally across society. The person reaching for the rope to end sorrow, the alcoholic muttering on the sofa, and the individual signing her life away to an inhumane working contract are all acting without external coercion, but, for Green, are acting against their interests as dictated by nature: 'he is not free, because the objects to which his actions are directed are objects in which, according to the law of his own being, satisfaction of himself is not to be found. His will to arrive at self-satisfaction not being adjusted to the law which determines where this self-satisfaction is to be found....'³⁶

Green first connected the word "freedom" in liberal theory with the Aristotelian notion of *eudaimonia*, arguing one is only free to the extent that one is flourishing, or acting in accordance with one's nature.³⁷ To flourish is to perform one's core function well, so to function well as a human is to perform excellently the activities that constitute necessary elements of human life.³⁸

Like Aristotle before him, Green argued human flourishing necessarily involves one acting in a pro social manner and being connected in an intricate range of positive ways with others.³⁹ Green argues true freedom is not something that ‘can be enjoyed by one man or one set of men at the cost of a loss of freedom to others,’ and ‘we are free to use our powers but never against the common good’.⁴⁰

Avital Simhony argues Green places a moral burden on individuals and the state with substantial ramifications for what kind of behavior and goods legislators should value.⁴¹ She suggests for Green pleasure is not a suitable end of human and government actions, nor any private achievement that does not account for the wellbeing of other citizens. *Eudaimonia* is the extent to which one acts with the common good as the end of one’s action, where individual excellence is equated with a rich consideration of the impact one’s behavior on others. The pleasure seeker under this view is one of the types of self-absorbed characters society should seek to prune out, alongside the power-hungry and the vain.

This view not only clashes directly against utilitarianism, but with Gerald Dworkin’s argument that the existence of pleasure is an important determining factor when considering when paternalism is acceptable. Dworkin argued that if pleasure is a common characteristic of an activity then governments should not seek to prevent people from engaging in that activity. In contrast, Green argues that pleasure is never an appropriate end of individual activity, as it is an end focused solely on the advancement of one person’s interest instead of the positive advancement of the collective. Living one’s life in accordance with goals that degrade the autonomy, health or education of other citizens, or that disrupts relationships in a negative way, entails living in a way that clashes against that social reality on one’s being.⁴²

For Green, it is the normative end of government to provide the optimal conditions for as many people to flourish within the citizenry as possible. This we can accept, but Green overemphasizes the virtue of justice to an unrealistic degree at the expense of the more selfish, pleasure and power-seeking aspects of our being. One may reply that government should promote the best rather than the worst. That may be true, but decisions must ultimately be built on a realistic vision of human flourishing that attends as much to the subjective experience of human beings as it does the collective function in the interpersonal creation of human character.⁴³

The strongest argument Green provides for his strident vision of human flourishing is the Hegelian notion that the development of our personalities is inextricably bound to the communities we emerge from, and that we can only build careers and shape identities due to the interactions and support we have had with care givers, schools, friends and public institutions.⁴⁴ Green was influenced by Hegel’s famous master and slave dialectic, whereby one’s sense of subjectivity emerges from the complex range of social interactions and the customs, language and education systems that are readily available.⁴⁵ The calls for negative freedom continue to be essential for Green, but the human demanding his or her freedom from government coercion is only able to engage in political expression due to the political protections and institutions, and the language and system of ideas from which that person emerged. Hannah Arendt captured this point exquisitely stating, ‘it seems safe to say that man would know nothing of inner freedom if

he had not first experienced a condition of being free as a worldly tangible reality. We first become aware of freedom or its opposite in our intercourse with others...'⁴⁶

Green was also impressed by the Kantian moral ideal that we should never treat other people as means to our own ends, and good action is done for its own sake rather than for some external achievement, private glory or future reward.⁴⁷ While being prominent in Kant, this idea is central to the Aristotelian vision of flourishing where the good person is one who does excellent actions for their own sake. In contrast, we can imagine a person who performs duties to promote their career and image. The importance of these ideas becomes clear when we consider the moral futility for Green of using the criminal court to push an individual into activity deemed for their wellbeing but against their will. If the state criminalizes a behavior deemed against the interests of its citizens, it is putting pressure on people from the outside but not necessarily enhancing anyone's ability to make informed choices and build lives in line with human goodness. Their attitude and life become one of carrying out the work of another.

In his application to contractual law, Green used his theory of political *eudaimonia* to argue that the law should not allow people to willingly enter contracts that will get in the way of their flourishing. Freedom should not be used to place oneself into bondage.⁴⁸ We find here justification for legal restrictions on excessively long working hours or pay one is unable to live on, even if these contracts are entered with consent. Green explicitly overrides Feinberg's insistence that government should not involve itself in the affair if both parties consent freely to enter into such a contract: in doing so, he also dismissed the insistence of his friend Henry Sidgwick who shared the belief with Feinberg that contracts between consenting adults should be respected by governments no matter the content of the agreement.⁴⁹ Green was willing to accept restrictions on the sale of drugs if a more relaxed approach to their sale and distribution got in the way of human flourishing throughout society. He argues that freedom to consume alcohol should be curtailed if solutions are found to reduce the damaging impact alcohol has on human flourishing.⁵⁰ Green did not present outright prohibition as a response, but proposed restrictions on opening hours and bottle shop locations.⁵¹

Consider the following situation. Michael only stays clear of heroin because of criminal repercussions. He is a pleasure seeker whose mind is mostly occupied by physical arousal, and even though heroin is illegal and at times hard to get, Michael still attempts to maximize his personal pleasure through eating fast food, alcohol and prostitution, and even heroin when possible in a prohibited market. If society is to provide the conditions in which people find their best available self, then it is futile to simply ban things if people continue to act for the wrong reasons or in the most destructive cases still go after ends even though they continuously meet the stiff fist of the law. For Green, legislators should aim to encourage the type of character that restrains from excessive drinking out of concern for hurting the feeling of others once drunk or because it is better to read and enjoy the sun rise than drink half a bottle of gin, vomit and sleep. To be a good person is to act for reasons within the gambit of the virtues, and for Green justice takes precedence as a ubiquitous and demanding virtue where our end is not the pursuit of private pleasure or any other gain that depletes the overall wellbeing of the collective.⁵²

Green presents a compelling view of human flourishing; one that is inspirational and containing more than a grain of truth. It is the view of human *eudaimonia* that a conscientious person would like to be the truth. Unfortunately, if we are to ground politics in a notion of human flourishing, then it must be broad and realistic enough to be acceptable across all reasonable comprehensive doctrines. In this case, the challenge is not met. The pursuit of pleasure and the desire to escape pain is inseparable from our nature and an end equally as important as autonomy, good health and conscientiousness. While we would not exist if not for other people and the universe itself, we experience the world as subjects that can never directly experience the pleasure and pain of others.

Green may argue our social nature is more fundamental in that we could not even come to be subjects in search of fame and jewels unless we first lived among a group of men and women who taught us how to behave in complicated social communities. However, this argument fails to account satisfactorily for the fact that politics is the art of individuals living together where everyone experiences life as a separate and distinct subjectivity, embodied in an imperfect vessel that often conflicts with social perfection. If we are to build a workable political ideology, we cannot exclude the body and subjectivity from having important argumentative force when deeming what type of activities or physical objects to value and maximize.

Notwithstanding my unwillingness to adopt Green wholly, his arguments forces attention towards a view of political society where legislator activity aims to advance the best elements of human nature, but where justice is a virtue that resides beside many others as required by our complex embodied subjectivity. This is a view implicit yet not fully realized in the work of Gerald Dworkin, who argues there are goods so essential to human life that at times government can override autonomy to protect their future occurrence and growth. To Dworkin's catalogue we can also add the social connectedness of each person, an element that is largely missing from his discussion. The social aspect of humanity is surely as important as health and autonomy, with all needed for *eudaimonia*. Green also reminds us that if we are concerned about human development, then there is more to it than acting out a socially approved role, as we want a society of good people not an assortment of actors torturously performing the scripts of another. Good people perform actions because they are good, not from fear of punishment or to secure some hidden benefit.

Take alcohol as an example. It can cause a certain level of social destruction and is known to cause aggression and unreflective sexual advances. Even with these potential harms known, we would not want to criminalize its use due to our commitment to the harm principle. We would also not want to criminalize production, due to a belief that we should use the least paternalistic aim to achieve our outcome: the reduction of harm to human flourishing across society. We might eventually land on a range of policies that reduce potential harm to social life and health, without creating excessive damage to autonomy such as policies leading to criminalization and exposure to black market products such as bathtub moonshine. Sensible legislation must weigh up the impact of social connectedness against the results of the intervention itself. Finally, all interventions must be conducted in the spirit of working towards the clear aim of human flourishing, and the trade-off between the essential human goods will continue to be as much of an art as it is a science.

6 Conclusion

The criminal court is not acceptable in cases of paternalism, because if the purpose of the intervention to improve the wellbeing of the self-harmer it makes little sense to punish him or her in a system reserved for violations of the rights of others. There are also grave risks involved in paternalism, including the use of the political law to repress a way of life authorities do not agree with, and the potential closing of new avenues of social advancement. Paternalism acts against the fundamental equality of individuals under democratic law, unless it is working in a way that favours no group or ideology above another and when it inarguably protects individuals from a clear and lasting evil.

The function of the criminal court is to deter but also to punish for the violation of rights so should not be used when the aim of the intervention is solely to promote a person's flourishing. It is difficult to make the argument that a criminal conviction can improve an individual's future autonomy, health or social embeddedness and that it is the least paternalistic intervention available to achieve our aims. Governments should implement policies that improve the lives of people in the fullest sense, by making individuals aware of their choices, and helping them learn from their mistakes. The policy repercussion of this argument is that we should treat drug production separate from drug use because in cases of drug use no other people are directly involved in the action. I follow Mill in placing self-regarding actions outside of the limits of the criminal law. There are good theoretical reasons for continuing to use the decriminalisation versus legalisation distinction and for placing the sale of drugs in a different moral category than use and possession.

Flourishing must be defined as something that all comprehensive doctrines within a liberal democratic society could accept. Green's utopian vision of humanity seems too distant from the people we encounter in society. While government should not be in the business of promoting harmful activities, law makers should not pretend that our world is inhabited by fully rational beings capable of acting in accordance with the metaphysical and sociological truth that humans are intricately connected. They should approach political theory from a perspective that takes account of how people experience the world, and that is as fundamentally and often insufferably separate from the universe. Finally, if an intervention is working against human flourishing by depleting an individual's autonomy, health or social connectedness without appropriately advancing other essential human goods to offset the harm, such an intervention should be replaced by something more conducive to human *eudaimonia*.

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Notes

- ¹ Ronald Dworkin, "Is There a Right to Pornography?" *Oxford Journal of Legal Studies*, 1 (1989): p.200.
- ² Ronald Dworkin, "Is There a Right to Pornography?" p.200.
- ³ Ronald Dworkin, "Is There a Right to Pornography?" p.205.
- ⁴ Isaiah Berlin, "Two Concepts of Liberty," in *Liberty*, ed. Henry Hardy (Oxford: Oxford University Press, 2002), p.203.
- ⁵ John Stuart Mill, *On Liberty*, (New Haven and London: Yale University Press, 2003), p.122.
- ⁶ John Stuart Mill, *On Liberty*, p.139.
- ⁷ John Stuart Mill, *On Liberty*, pp.138-141.
- ⁸ John Stuart Mill, *On Liberty*, pp.82-83.
- ⁹ John Stuart Mill, *On Liberty*, p.145.
- ¹⁰ John Stuart Mill, *On Liberty*, p.145.
- ¹¹ Hobhouse, L.T., *Liberalism*, (London: Oxford University Press, 1964), pp.55-65. Hobhouse makes the argument that Mill's harm principle fails as one cannot harm oneself without harming others. However, he fails to address Mill's moral distinction between direct and indirect harms.
- ¹² I share this interpretation with C.L. Ten, "Mill on Self-Regarding Action," *Philosophy*, 43 (1968): p.30.
- ¹³ John Rawls, *On Liberalism*, (United States: Columbia University Press, 2005), p.174.
- ¹⁴ John Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972), pp.14-15.
- ¹⁵ John Rawls, "The Priority of the Right," *Philosophy and Public Affairs*, 17 (1988): p.252.
- ¹⁶ John Rawls, *On Liberalism*, p.3.
- ¹⁷ Jeremy Waldron, "The Ideal of the Neutral State," in *Liberal Neutrality*, ed. Robert E. Goodin and Andrew Reeve, (London: Routledge, 1989), pp.74-75.
- ¹⁸ Dudley Knowles, "A Reformulation of the Harm Principle," *Political Theory*, 6 (1978): p.235.
- ¹⁹ Joel Feinberg, "Paternalism," *Canadian Journal of Philosophy*, 1 (1971): pp.107-109.
- ²⁰ Joel Feinberg, "Paternalism," p.105.
- ²¹ Joel Feinberg, "Paternalism," pp.111-120.
- ²² Gerald Dworkin, "Paternalism," *The Monist*, 1 (1972): pp.78-83.
- ²³ Gerald Dworkin, "Paternalism," pp.76-78.
- ²⁴ Gerald Dworkin, "Paternalism," pp.78-80.
- ²⁵ Gerald Dworkin, "Paternalism," pp.83-84.
- ²⁶ Gerald Dworkin, "Paternalism," pp.76-78.
- ²⁷ Gerald Dworkin, "Paternalism," p.83.
- ²⁸ For an insightful analysis of the limits of the criminal jurisdiction and some of the difficulties in getting people to see the moral value of reducing its use, see Douglas Husak, 'The Criminal Law as Last Resort,' *Oxford Journal of Legal Studies*, 24 (2004): pp.207-235.

- ²⁹ Charles Taylor, "Atomism," In *Social and Political Philosophy*, edited by Andrea Veltman (Oxford: Oxford University Press, 2008), pp.339-340.
- ³⁰ Charles Taylor, "Atomism," pp.339-340.
- ³¹ Charles Taylor, "What's Wrong with Negative Freedom," In *Liberty*, edited by David Miller, (London: Routledge, 2006), pp.150-160.
- ³² Charles Taylor, "Atomism," pp.339-340.
- ³³ Charles Taylor, "Atomism," pp.339-340.
- ³⁴ Charles Taylor, "Atomism," pp.339-340.
- ³⁵ Charles Taylor, *Philosophical Arguments*, (Cambridge: Harvard University Press, 1997), pp. 181-203.
- ³⁶ T.H. Green, "On the Different Sense of 'Freedom' as Applied to Will and to the Moral Progress of Man," in *Lectures on the Principles of Moral Obligation*, (London: Longmans, Green and Co, 1941), p.2.
- ³⁷ Ben Wempe, *T.H. Green's Theory of Positive Freedom*, (Oxford: Imprint Academic, 2004), pp. 49-55.
- ³⁸ Timothy Hinton, "The Perfectionist Liberalism of T.H. Green." *Social Theory and Practice*, 27, (2001): pp.473-499. Hinton argues, rightly I believe, that Green presents an Aristotelian theory of *eudaimonia* where justice takes the role of leading virtue.
- ³⁹ Aristotle, *Nicomachean Ethics*, edited by Roger Crisp, (Cambridge: Cambridge University Press, 2000), p.11. '...since a human being is by nature a social being.'
- ⁴⁰ T.H. Green, "Liberal Legislation," in *Lectures on the Principles of Moral Obligation*, (Cambridge: Cambridge University Press, 1986), p.200.
- ⁴¹ Avital Simhony, "Beyond Negative and Positive Freedom: T. H. Green's View of Freedom," *Political Theory*, 21 (1993): p.32.
- ⁴² Maria Dimova-Cookson, *T.H. Green's Moral and Political Philosophy: A Phenomenological Perspective*, (Hampshire: Palgrave, 2001), pp.81-102.
- ⁴³ T.H. Green, "On the Different Sense of 'Freedom,'" p.7.
- ⁴⁴ Timothy Hinton, "The Perfectionist Liberalism of T.H. Green," p.487. Hinton argues Green rejected the idea personal and political morality could be built on private ends, because he believed human beings cannot find their good outside of human communities due to sociological and even metaphysical necessities.
- ⁴⁵ Ben Wempe, *T.H. Green's Theory of Positive Freedom*, pp.32-33.
- ⁴⁶ Hannah Arendt, "What is Freedom?" in *Between Past and Future: Six Exercises in Political Thoughts*, (London: Faber and Faber, 1961), p.148; Henry Sidgwick, "The Philosophy of T. H. Green," *Mind*, 10 (1901): pp.18-29. Sidgwick argues Green's focus on the social aspect of humanity was wedged to his Hegelian conception of reality where the subject and object can never be separated, and all conscious awareness is but an instance of a single, creative reality.
- ⁴⁷ H.D. Lewis, "Individualism and Collectivism: A Study of T. H. Green," *Ethics*, 63 (1952): p. 46.
- ⁴⁸ T.H. Green, "*Liberal Legislation*," p.209.

⁴⁹ Kenneth Hoover, "Liberalism and the Idealist Philosophy of Thomas Hill Green," *The Western Political Quarterly*, 26 (1973): p.560; Avital Simhony, "Beyond Negative and Positive Freedom," p.39.

⁵⁰ T.H. Green, "Liberal Legislation," pp.206-212.

⁵¹ T.H. Green, "Liberal Legislation," pp.206-212.

⁵² Timothy Hinton, "The Perfectionist Liberalism of T.H. Green," p.486.