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HARM TO SELF. By Joel Feinberg.[1] New York, N.Y.: Oxford University Press. 1986. Pp. xxiii, 420. $29.95.

John Stick[2]

For all the fanfares and fears that have heralded the rise of interdisciplinary studies in legal academia, constitutional lawyers and political philosophers still tend to do their everyday work in isolation from each other. The use of political philosophy in constitutional law is identified with the construction of grand theory: one looks to philosophy for the sweeping generalization that will put all the chaotic holdings together as pieces of a smooth arch, or for the indisputable foundation for a stinging criticism of the Supreme Court's latest failure to protect a fundamental right. Philosophy is at least as useful to lawyers, however, for the more mundane task of generating examples and subtle distinctions that are helpful in the manipulation of doctrine. Professor Joel Feinberg's *Harm to Self*, the third of four volumes in his series *The Moral Limits of the Criminal Law*, is not grand theory, but will nevertheless repay careful examination by any constitutional lawyer interested in paternalism and its corollary issues: consent, voluntariness, coercion, duress, unconscionability, and assumption of risk. Professor Feinberg, one of our most distinguished moral philosophers, has written a defense of the standard liberal position that paternalism is not a sufficient justification for making an activity a crime. He devotes much careful attention to the counter-examples commonly put forward by critics of the liberal position, and thoroughly delineates the boundaries of paternalistic, and thus unjustifiable, regulation. The book is clearly written, closely argued, and liberally strewn with legal examples.

Paternalism generates perennial philosophical and legal debate because, as Feinberg points out, there are strongly persuasive presumptive cases both for and against it. Many laws, some obviously good, seem to have paternalism as an essential part of their implicit rationales, yet allowing paternalistic interferences seems to lead down a slippery slope to a huge degree of state control. Moreover, any degree of paternalism is odious to personal autonomy. Feinberg attempts to save many of the attractive laws that seem to embody paternalistic premises, without sliding down the slippery slope, by distinguishing between hard and soft paternalism, and embracing only the latter. Soft paternalism allows state intervention to

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assure that the individual's self-harming choice is truly voluntary: that it is made rationally, not in ignorance of the facts, and without coercion. Soft paternalism is thus consistent with classical liberalism, and is not really paternalism at all.

A lawyer could best think of this book as a sophisticated treatise on the philosophical debates concerning paternalism, voluntariness, consent, and coercion. The overall argument follows the liberal tradition and the previous philosophical literature on paternalism: a minute dissection and judicious assessment of the various positions and arguments is prized above novel interpretations. (Which is not to say that Professor Feinberg has no new points to make; only that his originality consists for the most part in strengthening, refining, and extending the received tradition.) The research is the most complete of the existing sources; anyone who wants a guide into the philosophical literature on paternalism should start here.[3] The seeker will find a wealth of examples, counter-examples, and fine distinctions among various possible positions. Much more than grand theory, the reader will find all the building blocks for constructing doctrinal argument except the case holdings (and sometimes even those).

A brief description of the first of two chapters on coercion will give a representative idea of Professor Feinberg's method of proceeding. The background issue is to determine when person B's consent will validate a course of action by A that will likely be harmful to B and thus foreclose the state from restraining or punishing A. B's consent will not be valid if it is coerced. The degrees of force used to coerce are first described in a spectrum, with four gradations of compulsion and coercion described and illustrated with examples. Difficult cases to classify are also identified and discussed. The possible sources of coercive pressure—A, a third party (C), or natural causes—are catalogued. The implications of invalid consent—A's criminal liability and the privilege of a third party (D) to intervene forcibly to protect B—are elucidated in light of the various sources of coercive pressure. The chapter then tackles the difficult question of how much coercion is necessary to invalidate consent. Four possible measures of coercive pressure, taken from the philosophic literature, are deployed against a wide range of examples. Complicating issues (of great interest to lawyers), such as whether to use subjective or objective standards to measure the pressure felt by the consenter, whether the description of coercion

3. Other useful works include J. KLEINIG, PATERNALISM (1983), and PATERNALISM (R. Sartorius ed. 1983), which collects some of the most influential articles in the philosophical literature.

can refer only to psychological states or must include a component of moral evaluation, whether offers as well as threats can be coercive, and whether coercion can be understood apart from a baseline of morally expected conduct, are all discussed at length with much good sense and many illuminating examples. Because the analysis is so dependent on the common-sense weighing of examples, no one will find the entire analysis compelling. (The examples involving women, for example, although not offensively sexist, do seem untouched by feminism.) But precisely by being so exhaustive in categorization and explicit in examples, Feinberg gives the reader every opportunity to pinpoint the extent and effect of intuitive disagreements.

The limitations of the book, for the constitutional lawyer, flow from its place as a volume in a series on moral philosophy and the criminal law. Although Feinberg includes discussions of doctrines related to criminal topics—contract law is often examined to illuminate issues concerning the defense that the victim consented—the focus remains upon the standard criminal examples. Current constitutional issues are often barely discussed. For example, the conservative attack on a wide range of economic regulation, including consumer protection legislation, protection of occupational health and safety, and the regulation of private pension plans, rests in part on the idea that all such regulations are paternalistic, and that paternalism is not a sufficient reason for interfering with individual liberty. Feinberg discusses such statutes only briefly, to suggest that the rationale for them is not paternalistic (i.e., not to protect consumers from the results of their own voluntary choices), but instead to avoid various forms of market failure that render consumers unable to achieve their own voluntary desires.[4] This is an adequate response to the philosophical literature, but not to the legal literature where the analysis of Law and Economics scholars, if accepted, would undercut Feinberg's alternative justification for the statutes, leaving paternalism central. But the constitutional lawyer willing to apply Feinberg's analysis herself will still find much of value in his discussion of criminal and private law examples.

The lawyer seeking to use Feinberg as a guide to the secondary literature will find it limited in its tight preoccupation with the literature of moral philosophy. For example, during his discussion of the limits on personal autonomy Feinberg discusses the puzzles arising from the attempt to make a decision binding on one's later self, who at the later time may prefer not to be bound. (The classi-

4. John Kleinig makes a similar argument with regard to social security. *See* J. KLEINIG, *supra* note 3, at 165-67.

cal example, which Feinberg discusses, is Ulysses binding himself to the mast where he could hear but not follow the sirens.) Most legal scholars would want an assessment of the rational choice literature on the topic, including Jon Elster's book, *Ulysses and the Sirens*. Elster is not even cited, nor indeed is any of the economic or political science literature on social or rational choice. Such weaknesses of the book are only the limitations of its virtues: the comprehensive treatment of the philosophical literature should not mislead us to ask for more than Professor Feinberg ever promised to deliver.

By contrast to his comprehensive elaboration of a liberal classification of paternalistic regulation, Feinberg devotes much less space to defending the liberal point of view from its detractors. Not surprisingly, the broader political argument against paternalism is the least convincing quarter of the book; ultimately, paternalism is one of those ethical problems that stubbornly resists being dissolved by any theorist. Feinberg's line of attack is to emphasize the fundamental value of personal autonomy. To give definition to the protean concept of autonomy, he uses the analogy of state sovereignty. Hard paternalism is unjustifiable because it is degrading: it is inconsistent with personal autonomy understood as personal sovereignty. To make this argument work, Feinberg must convince us first that the analogy between persons and nations is sufficiently close that the concept of sovereignty can be transported usefully. Second, national sovereignty must be held forth as an attractive moral ideal. Neither part of the argument is fully convincing. International relations are famous for being beyond the reaches of the normal application of both moral and legal principles. Some philosophers of law dispute whether international law is law at all; the standards of moral accountability of nations often seem similarly debased. Theorists looking for a modern equivalent to the Hobbesian state of nature often point to the dealings of nations. The sovereignty demanded by national governments would seem to be the single largest factor in perpetuating the unsatisfactory nature of the law and morality of international affairs. And just those features that lessen the moral attractiveness of the concept of national sovereignty also make it less analogous to the situation of the individual in society. Nations are not as dependent on one another as are individuals in a modern society—materially or intellectually. To justify personal autonomy, one must paint a picture of independence within a context of dependence and moral responsibility—the analogy to nations and national sovereignty cannot do that. Our heroes of moral autonomy, such as the doctor in Ibsen's *An Enemy of the People*, or Henry David Thoreau, stand apart from society only to uphold the deepest values of that society. No comparable examples among na-

tions spring to mind. To find individuals who embody the strong notion of national sovereignty one looks to anti-heroes: perhaps J.R. Ewing.

Professor Feinberg is well aware of these arguments against his position. He uses similar arguments to cast doubt upon Kant's account of personal autonomy, which relies heavily on religious and military metaphors. The difficulty is to construct a strong virtue of personal independence that yields no hostages to those who would march down the slippery slope of paternalism. An account which treasures not pure individual choice, but some abstract virtue such as the rationality within the individual choice, leaves room for state intervention. If we value Kant's strong notion of rationality, we may interfere with the individual's choice if it fails to select the most rational alternative. National sovereignty values individual choice in its full arbitrariness, and so fits coherently with a rejection of paternalism, but I suspect that the analogy of national sovereignty, far from lending strength to the liberal case against paternalism, borrows credibility from the rejection of paternalism that it will never be able to repay.

NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION. By Forrest McDonald.[1] Lawrence, Kan.: Kansas University Press. 1985. Pp. xiii, 293. Cloth, $25.00; paper, $9.95.

Norman L. Rosenberg[2]

"When reflecting upon government," muses Professor Forrest McDonald, Americans have typically followed "the almost mystical habit of thinking of threes." Related to classical political theory and traditional social thought, this "habit may [also] have stemmed from the concept of the Holy Trinity . . . ." Is it something more than a historiographical fact, then, that *Novus Ordo Seclorum* is Professor McDonald's third book about the Constitution, our most sacred political document?

In line with the bicentennial spirit, McDonald waxes more reverential than in his earlier volumes. Both *We The People* (1958),

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