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AUTONOMY AND THE LEGAL CONTROL OF SELF-REGARDING CONDUCT*

William C. Powers, Jr.**

In his essay *On Liberty*, John Stuart Mill argues that¹

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is [that of] self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.

Thus, Mill articulates a limit on the legitimate scope of law: “purely self-regarding conduct^[2] cannot properly be meddled with in the way

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1. J.S. MILL, *ON LIBERTY* 9 (Crofts ed. 1947).

2. Self-regarding conduct may be loosely defined as conduct which affects only the actor or persons who freely consent to be affected. Mill uses drunkenness and idleness as examples of self-regarding conduct that should be beyond the legitimate scope of legal control. *Id.* at 82. A more extensive list of the types of laws to which Mill may be referring has been prepared by Gerald Dworkin within the framework of a discussion of paternalism. It is helpful in at least intuitively explicating the notion of self-regarding conduct:

1. Laws requiring motorcyclists to wear safety helmets when operating their machines.
2. Laws forbidding persons from swimming at a public beach when lifeguards are not on duty.
3. Laws making suicide a criminal offense.
4. Laws making it illegal for women and children to work at certain types of jobs.
5. Laws regulating certain kinds of sexual conduct, e.g., homosexuality among consenting adults in private.
6. Laws regulating the use of certain drugs which may have harmful consequences to the user but do not lead to anti-social conduct.
7. Laws requiring a license to engage in certain professions with those not receiving a license subject to fine or jail sentence if they do engage in the practice.
8. Laws compelling people to spend a specified fraction of their income on the purchase of retirement annuities (Social Security).

of prevention or punishment."³ Accordingly, except where an individual's conduct harms others, his *individually* chosen attitude and lifestyle must be tolerated by the community rather than frustrated by either limiting the scope of his choices or directly imposing communally determined attitudes and lifestyles on him.

My purpose in this essay is to criticize Mill's principle of liberty as a limit on the legitimate scope of legal coercion. I shall do so not by focusing on previously examined justifications for frustrating individually chosen lifestyles,⁴ but rather by examining the arguments in favor

9. Laws forbidding various forms of gambling (often justified on the grounds that the poor are more likely to throw away their money on such activities than the rich who can afford to).

10. Laws regulating the maximum rates of interest for loans.

11. Laws against duelling.

In addition to laws which attach criminal or civil penalties to certain kinds of action there are laws, rules, regulations, decrees which make it either difficult or impossible for people to carry out their plans and which are also justified on paternalistic grounds. Examples of this are:

1. Laws regulating the types of contracts which will be upheld as valid by the courts, e.g. . . . no man may make a valid contract for perpetual involuntary servitude.

2. Not allowing assumption of risk as a defense to an action based on the violation of a safety statute.

3. Not allowing as a defense to a charge of murder or assault the consent of the victim.

4. Requiring members of certain religious sects to have compulsory blood transfusions. This is made possible by not allowing the patient to have recourse to civil suits for assault and battery and by means of injunctions.

5. Civil commitment procedures when these are specifically justified on the basis of preventing the person being committed from harming himself . . .

G. Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 108-09 (R. Wasserstrom ed. 1971).

The term "victimless crime" is often used rather than "a crime involving self-regarding conduct." See E. SCHUR & H. BEDAU, *VICTIMLESS CRIMES: TWO SIDES OF A CONTROVERSY* (1974). A rigorous definition of "self-regarding conduct" or "victimless crime" will not be attempted since the thesis presented here is that the conduct to which Mill intends to refer is not, in fact, truly self-regarding.

3. MILL, *supra* note 1, at 99.

4. An extensive body of literature has been generated concerning the propriety of legal coercion to affect self-regarding conduct. For example, the Wolfenden report, published in England in 1957, recommending that homosexual practices between consenting adults be decriminalized, echoes Mill's principle of liberty by asserting that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." *REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION* (The Wolfenden Report), CMD. No. 247, at 24 (1957). The debate which has followed the publication of the Wolfenden report has focused on alleged justifications for communal interference with individually determined attitudes and lifestyles rather than on the value of individual autonomy and free choice. For example, Lord Devlin and H.L.A. Hart have debated, under the rubric of the "enforcement of morals," whether communally determined lifestyles may be imposed upon unwilling individuals in order to satisfy a common community morality. See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1962); H.L.A. Hart, *Immorality and Treason* in *MORALITY AND*

of the principle of liberty itself. I shall argue that at least two of its principal bases do not support its conclusion that communally determined elements of lifestyle cannot be legitimately imposed on unwilling individuals except to prevent harm to others.⁵ Indeed, these bases are fully consistent with the imposition of communally rather than individually determined lifestyles and attitudes.

I. TWO BASES OF MILL'S PRINCIPLE OF LIBERTY

A. "Goodness" Defined By Individual Choice

Two major lines of argument, both discernible in Mill's work, can be advanced to support the value of tolerance embodied in his principle of liberty.⁶ First, pure tolerance of individually chosen, self-re-

THE LAW (R. Wasserstrom ed. 1971); H.L.A. Hart, *Social Solidarity and the Enforcement of Morals*, 35 U. CHI. L. REV. 1 (1967). See also R.M. HARE, *FREEDOM AND REASON* 157-85 (1963); R. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962); Rostow, *The Enforcement of Morals*, 1960 C.A.M.B. L.J. 174; Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891 (1972); Comment, *Private Consensual Adult Behavior: The Requirement of Harm To Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581 (1967). On the other hand, the discussion under the rubric of "paternalism" asks whether the law may legitimately limit individual choice and autonomy for the benefit of the person whose choice is frustrated. See, e.g., G. Dworkin, *supra* note 2, at 107; *American Motorcycle Ass'n v. Daniels*, 11 MICH. APP. 351, 158 N.W.2d 72 (1968) (statutory amendment requiring motorcyclists and riders to wear crash helmets held unconstitutional because it had no relationship to the public health, safety, morals, or the general welfare). Some authors have objected to one justification without condemning the other. See, e.g., H.L.A. HART, *LAW, LIBERTY AND MORALITY* 30 (1962).

Moreover, supporters of decriminalization of "victimless crimes"—i.e., crimes involving self-regarding conduct—have drawn upon interests, such as the social and economic costs of enforcement, that do not arise directly from an argument for individual choice and autonomy. See, e.g., E. SCHUR & H. BEDAU, *supra* note 2, at 11-37. But the underlying assumption which runs through most of the debate, whether it focuses on "paternalism" or the "enforcement of morality," is that individuals have at least a prima facie right to choose their own way of life so long as they do not directly harm other people.

5. Thus, my argument will assume, *arguendo*, the underlying tenets of Mill's libertarian view. My criticism is "partial" since it challenges Mill's conclusion within the perimeter of his own thought. See R. UNGER, *KNOWLEDGE AND POLITICS* 1-28 (1975). The result may simply be an expansion of the meaning of "harm to others" beyond that which Mill envisioned, leaving the principle of liberty itself intact. So be it. My purpose is to challenge Mill's principle as it is commonly used, i.e., direct physical or economic impact. I simply choose to use "harm to others" with the meaning I believe Mill had in mind and attack his principle rather than accept the principle and attack his notion of "harm to others."

6. A third argument, which may be referred to as formalism, is also discernible in Mill. See MILL, *supra* note 1, at 15-54. Discussion of it is deferred until later in the essay. See text accompanying notes 61-63 *infra*.

garding life styles and attitudes may be supported by an underlying conception of value that is itself tied to individual choice. In his formulation of utilitarianism, Mill defines value as human happiness, with the relative happiness created by two competing courses of conduct being determined by "the preference felt by those who in their opportunities of experience, to which must be added their habits of self-consciousness and self-observation, are best furnished with the means of comparison."⁷ Thus, the "goodness" of a lifestyle or attitude is judged against this choice criterion of value. If value is dependent solely on human choice, there is no independent value against which human choices can be criticized. Attitudes and lifestyles which are actually chosen by individuals are the very ones that are defined as "good" and that create "happiness" under Mill's principle of utility.⁸

Such a solipsistic conception of value does not itself provide a prescription against intolerance, but it makes difficult an attempt affirmatively to justify intolerance in the name of a value that transcends⁹ the individual whose behavior or attitudes are not tolerated. A solipsistic conception of value does not argue positively in favor of tolerating individually chosen, self-regarding activities, but it does frustrate attempts to override individual choice for the sake of "correctly" chosen conduct.¹⁰

7. J.S. MILL, *Utilitarianism*, in *THE ESSENTIAL WORKS OF JOHN STUART MILL* 189, 199 (Bantam ed. 1961). See also R.M. HARE, *supra* note 4, at 157-85.

8. Some commentators have argued that Mill's formulation of utilitarianism is inconsistent with his principle of liberty. See I. BERLIN, *TWO CONCEPTS OF LIBERTY* 13 (1958). If utilitarianism defines "value" as human happiness, which in turn is defined as a biological state at least theoretically measurable in an objective way, there is no reason to believe that such a state will be achieved through adherence to Mill's principle of liberty. Mill's formulation of utilitarianism does not, however, define value with reference to a biological state. Rather, it defines value with reference to human choice. It is true that Mill's choice criterion of value is dependent upon the choices that would be made by persons who "are best furnished with the means of comparison" rather than actual choices made by real individuals. J.S. MILL, *Utilitarianism*, in *THE ESSENTIAL WORKS OF JOHN STUART MILL* 189, 199 (Bantam ed. 1961). A similar refinement is contained, however, in Mill's principle of liberty which "is meant to apply to human beings in the maturity of their faculties." MILL, *supra* note 1, at 10. It is far from clear that Mill equated persons who "are best furnished with the means of comparison" with "human beings in the maturity of their faculties." Thus, the principle of liberty and the principle of utility might not be precisely coincidental. They do not, however, seem widely divergent, and the definition of value based upon human choice is supportive of a principle of tolerance. If value is tied to human choices, it is difficult to criticize human choices and be intolerant of them in the name of value.

9. See note 19 *infra*.

10. Similar reliance could be placed upon Sartre's conception of value: "I do not have nor can I have value recourse to any value against the fact that it is I who sustain values in being." J. SARTRE, *BEING AND NOTHINGNESS* 77 (Wash. Square ed.,

I shall argue that a choice criterion of value¹¹ need not require absolute tolerance of individual choices, even when those choices appear at first glance to be self-regarding. It is true that many attempts to override individual choices rely on values that transcend human choice.¹² However, the value of human choice itself can be used to support the frustration of *individual* choices in order that the individual choices of others may be effectuated. Thus, absolute tolerance of *individual* choices is not entailed by a choice criterion of value.

B. *Autonomy and Human Dignity*

A second major argument, explicitly used by Mill, on which the principle of liberty might rest, is based upon a "humanistic"¹³ conception of human dignity. This argument ties human dignity to autonomy, *i.e.*, the ability to define and control one's own attitudes and way of life. By choosing our own plan of life, and thereby defining ourselves as persons,¹⁴ we engage in a uniquely human enterprise that expresses our dignity as moral beings. Conversely, a lifeplan that originates outside the individual and is imposed upon him by the community is an affront to the individual that robs him of his dignity. Thus, Mill argues that a person¹⁵

who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. . . . It is possible that he might be guided in some good path, and

H. Barnes transl. 1966). See also J. Sartre, *The Flies*, in *NO EXIT AND THREE OTHER PLAYS* 49, 122 (Vintage ed., S. Gilbert transl. 1955); F. NIETZSCHE, *THUS SPAKE ZARATHUSTRA*, in *THE PORTABLE NIETZSCHE* 103, 171 (Viking ed., W. Kaufmann transl. 1954).

11. See text accompanying note 7 *supra*.

12. *E.g.*, the enforcement of a theocratic morality. See note 4 and accompanying text *supra*.

13. See P. LONDON, *BEHAVIOR CONTROL* 190-98 (1969).

14. This notion has its source in several individualistic philosophies. Josiah Royce asserts that "a person, an individual self, may be defined as a human life lived according to a plan," and that an individual defines himself as a person by the plan he adopts. J. ROYCE, *THE PHILOSOPHY OF LOYALTY* 168 (1908). Royce's point is developed more fully in J. RAWLS, *A THEORY OF JUSTICE* 407-16 (1971), and C. FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* 97-101 (1970). A related notion, concentrating on actions rather than values, is Sartre's development of "being-for-itself" in *BEING AND NOTHINGNESS*. J. SARTRE, *supra* note 10.

15. MILL, *supra* note 1, at 58-59. See also P. LONDON, *supra* note 13, at 190.

kept out of harm's way. . . . But what will be his comparative worth as a human being? . . . Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of inward forces which make it a living thing.

The humanistic argument simply applauds individual autonomy. It does not equate attitudes and lifestyles that are indeed autonomously chosen by individuals with "good" attitudes and lifestyles. Rather, the humanistic argument asserts that the value of choosing is itself lexically prior¹⁶ to the value of the attitude or lifestyle that is chosen.¹⁷

16. I use the term "lexically prior" in the sense that Rawls uses it in *A THEORY OF JUSTICE*. One value is lexically prior to another when its fulfillment or satisfaction is a condition precedent to any consideration of the second value. See J. RAWLS, *supra* note 14, at 42-43. Autonomy might not be the only value posited by the humanistic argument, but it must be absolutely satisfied in the sense that there can be no trade-off between it and lesser values such as privacy and happiness.

17. It is clear that Mill intended this argument to support *individually* chosen attitudes and lifestyles—not simply communally chosen lifestyles that are autonomous in the sense that the community is free from external control, either by another community or a deity. This is evidenced by the fact that the argument appears in a chapter entitled: "Of Individuality, as One of the Elements of Well-Being." MILL, *supra* note 1, at 58-59. The humanistic conception of individual autonomy is also threatened by personality-altering behavior control techniques which have been the focus of what Eric Fromm has called the three great "negative utopias" of the middle of the twentieth century: Orwell's 1984, Huxley's *BRAVE NEW WORLD*, and Zamyatin's *WE*. Fromm, *Afterword*, to G. ORWELL, 1984, at 259 (Signet ed. 1950). Their common theme is the spectre of a society in which individuality and self-determined value are replaced by collectivity and externally imposed lifeplans, values, and thoughts: where autonomous individuals are "conditioned" and transformed into externally molded and controlled automatons. The fictional situations are purposely severe, but the underlying concern is reflected by several commentators who question the propriety, in a society that purports to value autonomy, of specific behavior control techniques presently used in penal and mental institutions. For example, Professor Packer is "impelled to ask whether a theory of punishment that would require acquiescence in compelled personality change can ever be squared with the long-cherished ideals of human autonomy." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 57-58 (1968). See also H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 136-86 (1968); P. LONDON, *supra* note 13; Comment, *supra* note 4. See N. KITTRIE, *THE RIGHT TO BE DIFFERENT* (1971), which accepts the therapeutic impact of behavior control, while expressing a concern with individual liberty. This work might aid the argument that the two views can, to a certain extent, be harmonized.

Behavior control technology is in use at Patuxent Institution for Defective Delinquents, a penal institution in Maryland. See Stanford, *A Model, Clockwork-Orange Prison*, N.Y. Times, Sept. 17 1972, § 6 (Magazine), at 9; *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971) (Maryland Defective Delinquents Act upheld against constitutional attack on due process grounds); *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964) (constitutional challenge of Maryland Defective Delinquents Act remanded for further hearings). *But see* *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972) (holding prisoner after expiration of criminal sentence to determine whether continued confinement at Patuxent appropriate violates due process). For a survey of the frequency of the use of behavior control programs in

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I shall argue that autonomy, at least as a political concept,¹⁸ is best viewed as inhering at least partially in communities of individuals rather than in individuals themselves. Thus, autonomy need not proscribe, and indeed supports, the imposition of communally determined attitudes and lifestyles upon unwilling individuals. Consequently, the community need not, for the sake of autonomy, absolutely tolerate individually chosen attitudes and lifestyles regardless of their content, even when those attitudes or lifestyles do not directly harm other individuals. Although distinctly separate concepts, a choice criterion of value and the humanistic value of individual autonomy work in harmony to support the concept of tolerance embodied in Mill's principle of liberty. I now turn my attention to a more detailed analysis of the question whether these arguments support the equation of human choice and autonomy with individuality, thereby supporting the requirement that individually chosen lifestyles and attitudes be tolerated as envisioned by Mill.

II. THE CHOICE CRITERION OF VALUE

Several situations exist in which *individually* chosen attitudes and lifestyles might be frustrated consistent with a criterion of value based

state prisons see Blatte, *State Prisons and the Use of Behavior Control*, in THE HASTINGS CENTER REPORT, INSTITUTE OF SOCIETY, ETHICS AND THE LIFE SCIENCES 4:4 (Sept. 1974).

To be sure, personality altering techniques of behavior control differ significantly from criminal laws that proscribe private consensual or self-regarding activities. The latter merely frustrate desire, whereas the former alter desire itself. One might, therefore, regard behavior control as more destructive of individual autonomy; control over one's attitudes might be more essential to a conception of autonomy than control over one's lifestyle. But behavior control and "victimless crimes" pose similar problems for autonomy and tolerance in that each involves an externally determined conception of a "good" lifestyle or attitude that is imposed on individuals rather than autonomously chosen by the individuals themselves. Thus, despite their differences, each faces criticism based upon an argument from autonomy, and it becomes important to determine whether autonomy, standing alone, actually supports such an argument.

18. I am not here concerned with autonomy as an ontological concept or the debate concerning free will. See, e.g., FREE WILL (S. Morgendesser & J. Walsh eds. 1962). Similarly, it is clear that Mill was not concerned with "liberty" as an ontological concept. See MILL, *supra* note, 1 at 1 ("The subject of this Essay is not the so-called Liberty of the Will, so unfortunately opposed to the misnamed doctrine of Philosophical Necessity; but Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual."). Even if one subscribes to ontological determinism, there is room for debate concerning the propriety of the state or community purposefully controlling individual conduct.

Neither am I concerned with developing a precise definition of autonomy, although

upon human choice. These situations, as the following discussion will indicate, suggest that choice-based utilitarianism, while supportive of autonomy, does not support a concept of autonomy that is necessarily tied to absolute individuality. Thus, it does not support a principle that requires pure tolerance of *individually* chosen attitudes and lifestyles regardless of their content. Of course, it is not difficult to justify intolerance of individually chosen lifestyles and attitudes if one is prepared to assert a transcendental¹⁹ value system that is not dependent upon human choice. The following arguments are significant, however, in that they do not rely upon a transcendental value system. Rather, they rely on human choice itself as a justification for the frustration of individual choices in specific circumstances.

A. *Prevention of Harm to Others*

A primary justification for infringing upon a freely chosen course of conduct is contained in Mill's principle of liberty itself. The principle of liberty is not only a proscription against interference with individual free choice, it is also an affirmative justification for such interference whenever it is necessary "for prevention of harm to others."²⁰ The argument that individual choices can be frustrated to prevent harm to other individuals can be supported by reference to the value of free choice itself. Activities that harm other individuals decrease the ability of those individuals to freely choose their own way of life. Thus, restriction of free choice to prevent harm to others can be viewed as an enhancement of overall free choice because it protects the ability of other individuals to choose their own lifeplans.

The concept of "harm" as a justification for limiting individual choice is a flexible one that can be used to justify greater or lesser de-

there is room for much study in this regard. For example, does autonomy specify a first order condition requiring the absence of determinants or a second order condition requiring approval of first order determinants? See G. Dworkin, *Autonomy and Behavior Control*, 1975 (unpublished paper on file at the offices of the *Washington Law Review*). But for my purposes, a rough notion of autonomy specifying some form of self-control, approval, or consent will suffice. I am concerned with the question whether autonomy, whatever its other attributes, is individualistic or communal.

19. By "transcendental" I mean a value that transcends individuals and their preferences and beliefs. Thus, one could argue for the "enforcement of morality" by simply asserting that the morality being enforced represents a higher value than human choice.

20. G. Dworkin, *supra* note 2, at 107.

degrees of social control, depending upon the nature of the alleged harm. For example, aesthetic and moral offenses can cause very real harm to human happiness. Therefore, at least one author has argued that "offense," if sufficiently legitimate, should count as "harm" and therefore be a sufficient justification for the frustration of an individually chosen course of conduct.²¹ If harm is defined broadly enough to include the offense one feels toward self-regarding "immoral" behavior, the efficacy of Mill's principle of liberty is greatly undermined. But the amorphous nature of "harm" does not rob it of its intuitive content as an element in Mill's principle of liberty: at some point an individual's freely chosen conduct does become destructive of the ability of other individuals to freely choose their own way of life.

Because individually chosen courses of conduct interfere with one another, free choice is a scarce resource. As such, free choice must be distributed in an equitable fashion that requires the restriction of one person's free choice for the sake of another's.²² A recognition of the need to infringe upon an individual's free choice to prevent harm to others does not necessarily weaken the connection between autonomy and individuality or between autonomy and the objective that individually chosen courses of conduct be tolerated. Certainly, Mill did not intend such a result by referring to "harm" in his principle of liberty. As long as "harm" is limited to direct economic or physical detriment, individually chosen lifestyles and attitudes remain protected.²³

B. Enforcement of Anti-Competitive Arrangements

A second justification for restricting individual choice arises from the interest individuals have in enforcing anti-competitive arrange-

21. Feinberg, "Harmless Immoralities" and *Offensive Nuisances*, in *ISSUES IN LAW AND MORALITY* 83-85 (N. Care & T. Trelogan eds. 1973).

22. Thus, Rawls states his principle of liberty as follows: "Each person is to have an equal right to the most extensive total system of equal basic liberty compatible with a similar system of liberty for all." J. RAWLS, *supra* note 14, at 250. Similarly, Kant formulates his principle of justice: "Every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law." I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (Library of Liberal Arts ed., J. Ladd transl. 1965). See Dyke, *Freedom, Consent and the Costs of Interaction*, in *IS LAW DEAD?* 134 (E. Rostow ed. 1971). For a similar point concerning intrapersonal liberty over time see G. Dworkin, *supra* note 2, at 107, 118.

23. See note 17 *supra*.

ments.²⁴ Although typical examples occur in the area of economic relationships, this justification for limiting free choice has impact elsewhere as well. A typical example is a group of workers who desire to restrict their employment to a 40-hour work week. They may be unable to do so unless other workers are proscribed from competing by offering to work longer hours. Workers who desire to limit their employment to a 40-hour work week cannot obtain their objective without infringing upon the free choice of other workers concerning this term of employment. Justification for the infringement of individual free choice in this instance does not depend upon a transcendental conception of value.²⁵ Rather, it depends upon the value of satisfying the desire of a group of workers to choose and control one element of their lifeplan: the terms of their employment.

Similar examples exist outside the economic field in the area of social relationships. For example, individual ice hockey players might want to wear helmets but might be unable to do so without sacrificing a competitive edge in terms of mobility. Although players might prefer the situation in which no one wears a helmet to the one in which every player wears a helmet, in such an instance their individual free choice must be frustrated if the choice of other individuals to wear helmets without suffering a competitive disadvantage is to be honored. Infringing upon the individual free choice of players who desire not to wear helmets need not be justified by paternalistic references to their own well-being or by moralistic reference to a transcendental value that supports wearing helmets. Rather, the frustration of individual choice can be justified as a necessary prerequisite to satisfying free choice and desire by other individuals: the choice to wear a hockey helmet without suffering a competitive disadvantage.

The significance of these examples is that they require a determination of a "good" state of affairs which must be chosen or rejected by the entire community and not simply by individual members of the community. In these situations, the ability to choose autonomously one's own lifestyle cannot be exercised by individuals: rather it must

24. See G. Dworkin, *supra* note 2, at 107,112.

25. *E.g.*, as a notion that work on the Sabbath is intrinsically evil. See note 19 *supra*. It is difficult to ascertain the actual motivation behind the desire of certain individuals to enforce their moral views on other individuals where unrelated to any obvious competitive forces. The immediate motivation may be an intellectual or emotional desire to satisfy a particular value system by imposing it upon the community.

be exercised by communities of individuals. This results in a necessary frustration of lifestyles chosen individually by other members of the community.²⁶

At least formally, similar arguments might be advanced to justify the frustration of free individual choice concerning a variety of social relationships. The enforcement of social institutions such as monogamy, premarital chastity, and customs concerning dress might formally be justified as necessary to enable individuals to choose freely these lifestyles without suffering a competitive social disadvantage.²⁷ Formally, imposing these lifestyles on unwilling individuals can be justified through an argument in favor of anti-competitive arrangements, an argument that does not call upon a transcendental value system but rather calls upon the desire of a majority of individuals in the community to choose their own lifestyle without suffering a competitive disadvantage.²⁸

C. *Avoidance of Costly Decisions*

A third possible justification for infringing upon individual choice that is based upon autonomy and free choice itself has been developed by Gerald Dworkin.²⁹ Situations exist in which an individual might freely elect to have free choice removed as an available opportunity.³⁰ The ability to choose requires making a choice, and the decision-making process entails costs.

A decisionmaker must assimilate a variety of information and make

26. Faced with a conflict between the choices of competing groups of individuals, the community might be forced to turn to a transcendental value to resolve the difference. For example, it might resolve the dispute between competing groups of hockey players in favor of those who desire a requirement to wear helmets because the community values safety. But the use of a transcendental value to resolve conflicting choices is far different from frustrating non-conflicting choices with reference to the transcendental value directly. In the former situation, the frustration of one person's individual choice is permitted only when necessary to effectuate the choice of other individuals. In the latter, individual choice is frustrated solely for the purpose of satisfying the transcendental value.

27. For example, women who strive for equal pay and non-exploitive social relationships are hindered significantly by women who "voluntarily" work for less pay or enter into exploitive social relationships.

28. For a more rigorous discussion of this problem see the discussion of the prisoner's dilemma in R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* 94-102 (1957).

29. See G. Dworkin, *More is Better than Less: The Case of Choice*, 1974 (unpublished paper on file at the offices of the *Washington Law Review*).

30. See note 33 and accompanying text *infra*.

calculations based upon that information prior to making a choice.³¹ Social conventions such as those prescribing certain forms of salutation, courtesies, and acceptable modes of conduct and dress help lubricate social intercourse by eliminating the need to spend time and energy making specific choices in individual circumstances. A simple example concerns the ease with which military personnel select their wardrobe.

A more interesting cost entailed in free choice is the responsibility which free choice implies for the decisionmaker.³² Returning to the example of the hockey player who is faced with the decision whether to wear a helmet, the choice to wear a helmet might conflict with a desire, however unreasonable, to appear courageous. Wearing a helmet does not detract from that image, but choosing to wear a helmet might do so. The player might, therefore, desire a rule which removes the stigma of choice. Similarly, an individual might reasonably prefer a rule that proscribes nude bathing on a public beach so that he can wear a bathing suit without the stigma of being a prude.³³

As with electing an anti-competitive situation, a free choice to avoid the costs of choosing by removing the ability to choose cannot be effectuated individually. A social rule cannot remove the opportunity of free choice in a specific situation from one individual without

31. *Id.*

32. *Id.*

33. Other examples include a dress code where an individual might desire to escape the stigma of "slumming" resulting from the choice to wear casual clothes or the stigma of being stodgy resulting from the choice to wear more formal clothes. A more serious example concerns euthanasia where a person might desire to live without the stigma of having made a choice that might bankrupt family or friends. Similarly, a patient might desire death without the religious stigma of having committed suicide. An interesting, although possibly disingenuous, example is found in a case involving a refusal on religious grounds to accept a blood transfusion. Indicating that the *choice* to permit a blood transfusion rather than the transfusion itself was at least a partial basis of the objection, the court ordered a transfusion. See *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1006-07, *cert. denied*, 377 U.S. 978 (1964). Judge Wright's commentary makes the point clearly:

I thereupon proceeded with counsel to the hospital . . .

. . . I asked her [the patient] whether she would oppose the blood transfusion if the court allowed it. She indicated . . . that it would not then be her responsibility.

....

. . . Mrs. Jones had no wish to be a martyr. And her religion merely prevented her consent to a transfusion. If the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without sacrifice of her religious beliefs.

331 F.2d at 1006-07, 1009.

removing it from an entire community of individuals.³⁴ Thus, hockey players who desire to play without a helmet and bathers who desire nudity must have their choice frustrated if we are to honor the choice of other individuals to have the availability, and thereby the responsibility, of choice removed. The dissenting hockey players and bathers would not, in these situations, have had their choices frustrated for the sake of their own good or a transcendental value concerning the “goodness” of helmets or clothed bathing. Rather, they would have had their choices frustrated solely for the sake of the autonomy of other individuals in defining their own lifestyle: a particular course of conduct without the stigma of having chosen that course of conduct.³⁵

D. *Maximizing Choice Satisfaction*

A final justification for infringing upon individual choice, which is consistent with a choice criterion of value and its abhorrence of coercion, is the maximization of choice satisfaction. At first glance maximizing choice satisfaction seems to forbid the frustration of individual choices based on individual wants. But want or choice satisfaction can be maximized in either of two ways: by concentrating on the satisfaction of existing wants and choices or by manipulating the wants and

34. Of course, the opportunity to choose might be removed from subsets of the community rather than from the entire community. Such subsets could not, however, be determined according to the wishes of individuals in the community. The responsibility inherent in choosing to enter the subset would be similar to the responsibility inherent in making the ultimate choice itself. See note 39 and accompanying text *infra*.

35. Again, the resolution of these conflicting choices might be made with reference to a transcendental value system. See notes 19 & 26 *supra*.

The importance of this justification for restricting free choice is that it seems particularly applicable to the area of social and sexual morality. The formation of social and sexual relationships can be especially anxiety-creating and embarrassing. Social conventions and rules of sexual morality might at least have the effect of facilitating the creation of social and sexual relationships by removing one of the barriers to their creation: the anxiety caused by the fear of choosing to do something “wrong.”

I wish to emphasize that I am not arguing for re-establishment of social institutions such as the town matchmaker in order to relieve individuals of the anxiety involved in choosing a mate. Nor am I arguing in favor of currently enforced social rules dealing with sexual morality. I oppose such rules, but the import of this analysis is that opposition to the enforcement of these rules cannot be based solely upon an argument that refers to autonomy and free choice. Consequently, one might develop arguments in opposition to the enforcement of rules of sexual morality without foreclosing the possibility of infringing upon *individual* free choice in other areas where it may be desirable to do so, for example, in the area of exploitive, consensual social relationships. See H. Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, *A CRITIQUE OF PURE TOLERANCE* 81 (1965).

choices themselves. Thus, we might maximize the satisfaction of human choices by structuring the social milieu so that the desires it creates can be easily satisfied. It would be irrational, as viewed against a standard of want or choice satisfaction, to continue to satisfy, under a principle of pure tolerance, certain wants and desires for material goods if the satisfaction of these wants (or advertising for the goods) simply increases the desires more than it satisfies choices based upon them. Thus, the frustration of individual wants and free choice in the short term might be consistent with the long-term maximization of choice satisfaction.

Similarly, a desire to reduce coercion in the long run might be inconsistent with the minimization of coercion in individual instances in the short run. For example, the freedom to exhibit and view violent television programs or to advertise certain material goods might create aggressive or competitive attitudes in individuals. The interference caused by this aggression or competition might require coercive techniques to minimize the harm caused by some individuals as competition plays itself out. On the other hand, less overall coercion might be required if in the first place the social milieu were altered so that aggressive and competitive desires were not instilled. Coercion might be required at the outset to alter the social milieu, but in the long run individual desires would be less aggressive and conflictive and therefore require less coercion to be regulated.³⁶

III. THE DIGNITY OF CHOOSING ONESELF AS A PERSON

Just as a choice criterion of value fails to support an individualistic notion of autonomy under which *individual* choices must be abso-

36. This argument is developed on a more sophisticated level by Marx and Lenin in the concept of the withering away of the state. See K. MARX, CRITIQUE OF THE GOTH PROGRAMME (Little Marx Library, C. Dutt ed. 1938); LENIN, STATE AND REVOLUTION, in THE ESSENTIAL WORKS OF LENIN 272, 333-49 (Bantam ed. 1966). Of course, this is a utopian ideal if one envisions an absolutely harmonious society in which no coercion is required. As a direction, however, it is consistent with the theory of autonomy and want satisfaction I have developed. Even though unable to be totally successful, one might nevertheless attempt to alter certain aspects of the social milieu in order to reduce competitive and aggressive values, thereby reducing the necessity for coercion in the long run. This, of course, requires infringing upon some *individually* chosen lifestyles.

The alteration of the social milieu to change individual desires is a means of want modification—itsself a type of behavior modification. Behavior modification and control through alteration of the social milieu are discussed more fully in Part III *infra*.

lutely tolerated, the "humanistic" argument that connects human dignity with autonomy and the ability to define oneself as a person also fails in that objective. The weakness in the connection between the "humanistic" argument on the one hand and individuality and pure tolerance on the other arises from a consideration of advances in the understanding of behavior control. The theory of milieu therapy is that we can affect an individual's attitudes and lifestyle by altering the environment in which he lives.³⁷ If an individual's values and actions are affected, if not determined, by the social milieu in which he lives, and if he has an interest in autonomously choosing his own values and action, then he has an interest in altering the social milieu in such a way that his values and actions are formed in accordance with his choice.

Autonomy cannot find its base in freedom from external forces in the formation of values because too much is known about the effects of environment and the social milieu upon one's values to consider this as a possibility.³⁸ Rather, autonomy should refer to the ability of an individual to control those forces that in fact do influence his values and attitudes, *i.e.*, to control, at least partially, the social milieu. Since the social milieu is made up at least partially of individual instances of consensual conduct, one individual's autonomy depends upon his ability to prescribe the conduct of other individuals and thereby frustrate their ability to autonomously choose their own lifestyles. Moreover, if one individual is able purposefully to structure the social milieu in order to influence and thereby choose his own values, he will indirectly engage in a form of behavior control over others. Having purposefully structured the social milieu in order to structure his own values, he will have affected the values of others through a form of milieu therapy. Thus, the interest that one individual has in autonomously choosing his own values by structuring

37. It is not my purpose to discuss the details of various behavior control techniques. I assume for the sake of discussion that the technology is at least partially successful in controlling human attitudes and behavior. For a discussion of specific techniques, including milieu therapy, and their efficacy see P. LONDON, *supra* note 13; Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972). See generally B. F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971). For a more general discussion of behavior control techniques and their ethical implications see Symposium, *Viewpoints on Behavior Issues in Closed Institutions*, 17 ARIZ. L. REV. (1975).

38. See, *e.g.*, B.F. SKINNER, *supra* note 37.

the social milieu in which he lives will necessarily interfere with a similar interest of others. Since we share a common social milieu, and since our ability to choose our values depends upon the structure of that social milieu, we must choose our values and attitudes at least partially as a community rather than as individuals. We cannot design the social milieu to meet the requirements and desires of each individual. The act of autonomously choosing values must, therefore, be at least a partially communal enterprise.

This argument for a communal concept of autonomy is exemplified by a reasonable motivation for entering a monastery. An individual might look at the world around him and determine that life in it has instilled him with certain values—possibly values he does not desire to hold. Such an individual might determine at time T_1 that he does not wish to be a particular type of person at time T_2 , but he might fear that he will become such a person at T_2 if he continues to live in a specific environment during the time interval between T_1 and T_2 . Thus, he might enter an environment, such as a monastery, that will facilitate his holding the values at T_2 which he desires to hold. He autonomously chooses at T_1 the values he will hold, and thereby the person he will be at T_2 , rather than permit the world around him to shape his values toward an undesired result. Although the decision to enter a monastery commits an individual to a regimen, the individual who makes that decision chooses his attitudes to a greater extent than does a person who permits his attitudes to be shaped by the social environment as he finds it.³⁹ Short of entering an artificial social envi-

39. Thus, communal autonomy is organic rather than atomic in two respects. Not only is autonomy sometimes exercised by a community of individuals rather than by isolated individuals, individual self-control might refer to the ability to choose oneself as a person over a period of time rather than at isolated moments. Autonomy might be satisfied by denying free choice in the short run in order to control the type of person one becomes in the long run. Autonomy does not require that an individual favor the long run over the short run, it merely permits the denial of short-term choices for the sake of choosing oneself as a person, that is, the individual's selection of a lifeplan, over a period of time.

The distinction between long term and short term choices of oneself as a person is not intended to coincide with the distinction between choices based upon reason and those based upon emotion. Compare I. KANT, *THE FOUNDATIONS OF THE METAPHYSICS OF MORALS* 17 n.2 (Library of Liberal Arts ed., L. Beck transl. 1959) and J. ROUSSEAU, *THE SOCIAL CONTRACT* 49-99 (Penguin ed., M. Cranston transl. 1968) with F. DOSTOYEVSKY, *NOTES FROM UNDERGROUND, IN THREE SHORT NOVELS* 25, 41-46 (Dell-Laurel ed., C. Garnett transl. 1960) and Blake, *The Four Zoas*, in *THE POEMS OF BLAKE* 292 (W. H. Stevenson ed. 1971). It is true that the motivation for choosing oneself in the long term in spite of short term desires might be based upon a preference for aesthetic values and a denigration of immediate bodily

ronment such as a monastery to choose a social milieu and thereby a set of values, an individual might desire to shape the larger social milieu by proscribing or prescribing certain courses of individual conduct that are aggregated to form its institutions.⁴⁰

This form of autonomy, which must be communal, is dependent not upon freedom from outside influences but rather upon an ability to control the outside influences which affect an individual's attitudes and lifestyle. As B. F. Skinner puts it:⁴¹

Were it not for the unwarranted generalization that all control is wrong, we should deal with the social environment as simply as we deal with the non-social. Although technology has freed men from certain aversive features of the environment, it has not freed them from the environment. We accept the fact that we depend upon the world around us, and we simply change the nature of the dependency. In the same way, to make the social environment as free as possible of aversive stimuli we do not need to destroy that environment or escape from it; we need to redesign it.

The greater control of the influences that define us, the greater our autonomy.

The effect on the social milieu of institutions formed by the aggregate of individual instances of freely chosen conduct has been recognized by several commentators on the social control of technology.⁴² For example, a technological development in the field of genetics enabling parents to control physical characteristics of their children

desires. But a long-term choice might be based upon an emotional response to competing long-term lifestyles rather than a purely rational one.

At no point have I relied upon a concept of autonomy that defines autonomous or free behavior as that behavior which would be chosen by reason. If such a definition of autonomy is adopted we might justify the frustration of actual choices by claiming that other choices are more rational and therefore the ones that manifest individual autonomy. See I. KANT, *supra* at 17 n.2; J. ROUSSEAU, *supra* at 46-99. For a discussion of the problems of equating autonomy or freedom with rationality see I. BERLIN, *supra* note 8.

40. If an individual is unable to shape his environment, he might at least remove the ability to act upon the desires formed by his environment during the period T₁ to T₂. For example, Odysseus "chose" himself as a person when he had himself bound to the mast in order to avoid seduction by the Sirens. See G. Dworkin, *supra* note 2, at 107.

41. B.F. SKINNER, *supra* note 37, at 39. See also R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

42. See, e.g., Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973); Delgado & Keyes, *Parental Preferences and Selective Abortion: A Commentary on Roe v. Wade, Doe v. Bolton and the Shape of Things to Come*, 1974 WASH. U.L.Q. 203.

would afford parents a greater degree of choice than they theretofore possessed. But the exercise of this choice in individual instances might, when aggregated, significantly affect the social milieu. Thus, an individual with an interest in structuring the social milieu in a particular way and thereby influencing his own values and attitudes might desire to proscribe the use of the particular genetic technology. This desire would not be based upon a paternalistic interest in the well-being of the parents or their children; nor would it be based upon a transcendental value concerning the use of genetic control. Rather, it would be based upon an individual's desire to shape and control his own attitudes and values by shaping and controlling the social milieu which affects them.⁴³ The force of this point is not limited to the control of new technologies. A similar, although not identical,⁴⁴ argument can at least formally be made concerning existing social institutions that are formed by the aggregate of individual instances of freely chosen conduct. Thus, the notion that individuals express their dignity by choosing themselves as persons does not necessarily support pure tolerance of individual choices, and is perhaps more supportive of communal autonomy.

IV. AN ALTERNATE PERSPECTIVE ON AUTONOMY AND TOLERANCE

The arguments presented above offer justifications for frustrating individual free choice and are dependent upon a criterion of value based upon human choice or upon the "humanistic" value of autonomously chosen attitudes and lifestyles. In none of the arguments was it necessary to refer to a transcendental "morality" or a paternalistic desire to frustrate another individual's free choice for his own good. In each example it became necessary for the community to collectively

43. The ability of parents to select the sex of their children is an example of genetic control that is more fully treated in Delgado & Keyes, *supra* note 42.

44. The analysis of choices presented by a new technology or social institution is not precisely identical to the analysis of choices presented by an existing technology or social institution. Unlike the alteration of the status quo, the proscription of new technologies or institutions does not frustrate immediate desires that have been firmly instilled over a long period of time. Nevertheless, the analysis of choices offered by new technology demonstrates the inadequacy of instrumental reasoning for the task of determining the constellation of choices we desire to be offered. See Tribe, *supra* note 42.

determine a “good” lifestyle or attitude and impose it upon unwilling individuals in order to satisfy the value of communal autonomy. The arguments cast doubt upon the liberal conception of autonomy and its connection with individuality and pure tolerance. The distinction between a purely individualistic idea of autonomy with its relationship to pure tolerance and a more communal conception of autonomy can be clarified by a comparison of metaphors.

We might imagine Mill’s concept of liberty as a situation in which individuals are analogized to billiard balls.⁴⁵ If the billiard balls are free to move through space, their freedom might be viewed as the absence of interference from other billiard balls. As long as one billiard ball does not collide with other billiard balls it is not affecting the freedom of those other billiard balls. Its own movement must therefore be tolerated under Mill’s principle of liberty.

The analogy between human activity and the ability of a billiard ball to move freely through space without interfering collisions is dubious. Very little important human activity is comprised of totally individual conduct. Individuals define themselves not so much by physical location and movement free from external constraint as they do by the roles they play in society.⁴⁶ For example, a person might define himself as a teacher, spouse, parent, and friend. None of these roles is possible, however, without the human institutions of teaching, marriage, parenthood, and friendship. An individual is not free to be a teacher unless the role of teacher exists in the society in which he lives.⁴⁷ The existence of the role of teacher requires a specific constellation of activities of other individuals in the society; it requires more than that an individual be left alone in the sense that a billiard ball does not suffer collisions by other billiard balls.

If human activity is predominantly characterized by social roles, freedom is best viewed as the range of possibilities in terms of roles and lifestyles that are available for an individual to assume. Rather

45. The metaphor was inspired by a similar one, using expanding balloons, used by Robert Wolff in *Beyond Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, *supra* note 35, at 23–33.

46. See R. UNGER, *supra* note 41; R. WOLFF, *IN DEFENSE OF ANARCHISM* 69–78 (1970).

47. Of course, the first teacher “invented” the role, and the role of teacher evolves as individuals alter its contours. Nevertheless, a person could not be a teacher in an institutional setting as we know it today unless the institutional role of teacher has been fairly well established.

than billiard balls moving through space affected only by direct collision between themselves and other billiard balls, human activity might better be analogized to billiard balls moving through force fields, paths, or channels that are formed by the constellation of other billiard balls in the environment. This metaphor undermines the force of Mill's principle of pure tolerance; individuals must do more than avoid my path in order to preserve my freedom, they must align themselves and their activities in certain general ways in order for me to be free to choose the particular lifestyle I desire. Within this metaphor, freedom is a concept concerned with an individual's *freedom to* act rather than *freedom from* interference.⁴⁸ The social milieu, and within it, the constellation of social roles and institutions, is a product of individual instances of conduct. Rather than each individual autonomously choosing himself as a person, the community of individuals, by defining the constellation of social institutions and roles that make up the social milieu, collectively defines itself as a community of persons.⁴⁹

48. See I. BERLIN, *supra* note 8; Fuller, *Freedom: A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955). W.B. Yeats suggested a more expressive metaphor when he asked:

O chestnut tree, greatrooted blossomer,
Are you the leaf, the blossom or the bole?
A body swayed to music, O brightening glance,
How can we know the dancer from the dance?

W. B. Yeats, *Among School Children*, in COLLECTED POEMS OF W.B. YEATS 249, 251 (MacMillan Co. ed. 1933). See also Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

The dancer is free to define himself only in relation to the dance. First, the meaning of being a dancer is dependent upon the contours of the dance. This in turn is dependent upon the constellation of activities of other dancers who participate. Each dancer both affects the dance for the other dancers and is affected by the conduct of the other dancers that define the dance. Moreover, the attitudes and desires of a dancer might themselves be affected by the nature of the dance in which he participates.

If we cannot separate the dancer from the dance which defines him, we cannot reasonably determine whether the dancer is free from the constraints of the dance and the other dancers. Each dancer affects the dance for others and is affected by the dance as defined by others. The concept of each individual dancer autonomously defining himself gives way to a conception of the community of dancers collectively defining the dance.

Yeats' image has deeper impact in addition to its use here: it questions the distinction between person and his work. A total criticism of liberal thought must question this and other dualisms (*e.g.*, rule/value and reason/desire) that serve as the underpinnings of liberal thought. By questioning one, Yeats opens the door for criticizing the others. See R. UNGER, *supra* note 41.

49. It is true that communal autonomy is inconsistent with a conception of value based solely upon *individual* choice. It is not, however, inconsistent with a conception of value that is based solely upon *human* choice. Thus, we need not disagree with

V. ALTERNATIVE OBJECTIONS TO FRUSTRATING INDIVIDUAL CHOICE

Thus far, I have argued that autonomy has communal aspects and is not antithetical to the imposition of communally determined lifestyles and attitudes upon unwilling individuals. We are not, however, left without bases for objecting to impositions of communally determined lifestyles and attitudes upon unwilling individuals in specific circumstances. Communal autonomy permits, but does not require, departures from individualism. It remains possible to criticize specific impositions of communal norms, such as criminal laws that enforce sexual norms and objectionable uses of behavior control, by referring to values other than autonomy or by referring to communal autonomy itself.

First, the enforcement of communally determined sexual norms entails undesirable invasions of individual privacy.⁵⁰ The ability of a community to structure its social milieu and individual privacy are competing values that must be balanced. A great deal of privacy should be afforded individuals for its own sake⁵¹ even while recognizing its cost of frustrating the community's ability to structure its social milieu.

Second, communal norms that attempt to control the details of an individual's life require careful structuring of the lifeplan by the indi-

Zarathustra when he says: "Verily, men gave themselves all their good and evil. Verily, they did not take it, did not find it, nor did it come to them as a voice from heaven. Only man placed values in things to preserve himself. . . ." F. NIETZSCHE, *supra* note 10, at 171.

A final salutary effect of a communal concept of autonomy should be noted. It is true that we are chilled by the suppression of individuality in 1984, but we might just as easily respond to the lonely image of a solitary wanderer on a cold, snow-swept plain in juxtaposition to a village with lighted windows. See R. Wolff, *Beyond Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, *supra* note 35, at 31-32. We ought not react to excessive communalization with a desire for pure individualism. Like Attic Tragedy, we should seek a society that synthesizes our Apollonian individualism with our Dionysian desire to dissolve individuality and participate in community. See F. NIETZSCHE, *The Birth of Tragedy from the Spirit of Music*, in *THE BIRTH OF TRAGEDY & THE GENEALOGY OF MORALS* 19 (Anchor Books ed., F. Golffing transl. 1956). A communal conception of value can also help alleviate the anxiety caused by the infinite regress inherent in pure instrumentalism. See A. C. MacIntyre, *Against Utilitarianism*, in *AIMS IN EDUCATION* 1 (T. Hollins ed. 1964).

50. See F. SCHUR & H. BEDEAU, *supra* note 2, at 11-18; Comment, *supra* note 4, at 602-03; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

51. See C. FRIED, *supra* note 14, at 137; Fried, *Privacy*, 77 *YALE L.J.* 475 (1968). In addition, individual privacy is an especially powerful argument against communally determined attitudes instilled by institutionalized methods of behavior control. See note 17 *supra*.

vidual to comply with the norm. This restricts an individual's ability to escape rational calculation for the sake of whimsical and spontaneous behavior and thereby ignores the warning of the Underground Man:⁵²

[M]an everywhere and at all times, whoever he may be, has preferred to act as he chose and not in the least as his reason and advantage dictated. And one may choose what is contrary to one's own interests, and sometimes one *positively ought* (that is my idea). One's own free unfettered choice, one's own caprice—however wild it may be, one's own fancy worked up at times to frenzy—is that very 'most advantageous advantage' which we have overlooked, which comes under no classification and against which all systems and theories are continually being shattered to atoms. And how do these wiseacres know that man wants a normal, a virtuous choice? What has made them conceive that man must want a rationally advantageous choice? What man wants is simply *independent* choice, whatever that independence may cost and wherever it may lead. And choice, of course, the devil only knows what choice. . . .

Indeed, life would be abhorrent if every aspect of it were planned by the community with nothing left to the whim of the individual.

Thus, the social milieu and its institutions should be designed to leave much room for non-calculated, spontaneous, individual activity.⁵³ This is, however, an argument concerning the substantive design of the social milieu rather than the community's need to control it. Communal attempts to control too many details of an individual's life, either through the enforcement of social norms or through intensive institutional behavior control programs,⁵⁴ should be resisted for the reasons mentioned by the Underground Man. Still, much can be done to influence the social milieu without reaching an undesirable level of detailed control. Indeed, a *laissez-faire* development of social institutions might itself create a social milieu that suppresses spontaneity.

A third basis from which specific communal norms or behavior control programs can be criticized is the extent to which they cause individual suffering, whether physical or psychological. Although a communal conception of autonomy implies that short-term individual choices need not be *absolutely* protected for the sake of autonomy itself, we need not and ought not be oblivious to the suffering caused

52. F. DOSTOYEVSKY, *supra* note 39, at 45–46.

53. *See* note 17 *supra*.

54. *Id.*

by the frustration of immediate individual desires. Thus, social norms that proscribe homosexuality can be criticized, not because they offend autonomy, but rather because they frustrate pervasive and intense desires held by some individuals.⁵⁵ Communal autonomy only removes individualistic autonomy's absolute proscription against controlling our social institutions in order to control our destiny when those social institutions are the result of individual instances of consensual behavior. It is true that every frustration of an immediate individual desire causes a certain amount of suffering, but the community's desire to shape its social milieu need not and should not be given absolute priority. It must compete with, and often defer to, the value of avoiding human suffering. Similarly, just as the norm itself should not cause an intolerable level of suffering, neither should the community impose unduly harsh sanctions for its breach.⁵⁶

The fourth basis for objecting to radical forms of behavior control—as opposed to a gradual alteration of values caused by reshaping the social milieu—draws upon the concept of a person as an entity that continues over time.⁵⁷ An individual should be able to identify with the type of person he was in the past and will be in the future. Of course, an individual changes as a person over time, but if the change is gradual he is likely to make adjustments and relate to himself at different periods of his life. On the other hand, a sharp break in personality such as that which would be created by psychosurgery or a rigorous program of milieu therapy might create a temporal discontinuity in an individual that would have undesirable consequences.⁵⁸ Broad forms of behavior control that rely upon reshaping major social institutions work more gradually and do not entail the adverse consequences of inserting a temporal discontinuity in an individual's life.

A fifth and very fruitful basis for criticizing specific impositions of communal lifestyles and attitudes upon unwilling individuals depends upon the content of those lifestyles and attitudes. For example, we

55. Similarly, closely supervised institutional behavior control programs and shock therapy might cause an intolerable level of suffering for those who are controlled. *Id.*

56. Thus, a conclusion that bigamy should be proscribed does not imply that bigamists should be killed or indeed, even punished. This point is not limited to the control of self-regarding conduct. For example, the community has the undoubted right to enforce traffic laws, but we do not feel required to imprison violators.

57. See note 14 *supra*. See also R. UNGER, *supra* note 41.

58. See G. Dworkin, *Autonomy and Behavior Control*, 1975 (unpublished manuscript on file at the offices of the *Washington Law Review*); see generally Symposium, *supra* note 37.

might criticize criminal laws that suppress human sexuality not for the sake of preserving autonomy but rather as a critique of anti-sexual values. Similarly, we might object to institutional uses of behavior control that attempt to instill middle-class values on dissident members of the population by criticizing middle-class values or by asserting the value of dissidence. On the other hand, we might rely on the negative value of violence to justify its elimination on television as a purposeful attempt to reduce aggressive and violent attitudes. Autonomy does not distinguish between tolerating sexuality and tolerating violence, but the relative value of sexuality and violence does make such a distinction.

The objection might be raised that it is hypocritical or inconsistent to tolerate the sexual practices of some individuals while being intolerant of the desire of other individuals to watch violence on television or participate in consensual exploitive social institutions. As Gerald Dworkin has pointed out, however, the critique based upon inconsistency or hypocrisy is invalid.⁵⁹ Tolerance of some forms of conduct but not of others does not apply a principle to one situation while refusing to apply it to another. Rather, a principle applied to the two situations takes notice of the relative value of the two forms of conduct. The principle is, therefore, substantive and fuzzy rather than formal and clear. But a refusal to apply formal rules is not an example of inconsistency or hypocrisy: one principle is applied consistently to both situations.

A related objection to the imposition of communal lifestyles and attitudes expresses a concern over the person or institution that will decide the relative value of competing lifestyles and attitudes. The spectre of a social planner with a perverse sense of value is not an attractive one.⁶⁰ A laissez-faire development of social institutions mitigates the fear that the power to structure the social milieu will fall into the hands of an "evil" person.

A preliminary response to this objection is that nothing in the concept of communal autonomy requires us to abandon democratic decision-making processes in favor of a singular social planner. But even if communal determinations of "good" attitudes and lifestyles are made by democratic institutions, there is a danger that those institu-

59. G. Dworkin, *Non-neutral Principles*, 71 J. PHIL. 491 (1974).

60. See R.M. HARE, *supra* note 4.

tions will be abused or that the majority itself will take a disastrous adventure in social planning. A formal rule such as pure tolerance might be argued to be a necessary hedge against these dangers. Such a justification would recognize that pure tolerance and the laissez-faire development of consensual social institutions does not result in the most desirable social milieu, but it has the advantage of guarding against disaster. Like all formalities, this justification recognizes that we must break some eggs to make an omelet, that we must sacrifice the ability to arrive at the best possible result in order to guard against abuse.⁶¹ The objections raised above do not, however, find their basis in autonomy.

I shall not argue at length that pure tolerance is not justified as a formal barrier to protect society from social error.⁶² But it is one thing to justify pure tolerance as an instrumental means for another end or as a formal protection against another evil. It is quite another thing to perceive pure tolerance as an end in itself and as an absolute right inhering in individuals. We might recognize the value of pure tolerance as a formality, but we cannot close our eyes to the costs of formalism. We should adopt pure tolerance as a formality only if its benefits in terms of preventing abuse outweigh its cost in terms of perpetuating exploitive or otherwise undesirable consensual social institutions. Moreover, even if pure tolerance as a formality can be justified as a general proposition, specific situations might arise where the value of structuring the social milieu outweighs the detriment of partially undermining the formality.⁶³

61. See Kennedy, *Legal Formalism*, 2 J. LEGAL STUDIES 351 (1973). Rawls' development of the original position, the veil of ignorance and the theory of the maximin reflects a hedge against disaster at the cost of foregoing the possibility of the most desirable result. See J. RAWLS, *supra* note 14, *passim* (1971). Kant's categorical imperative permits a discriminating concept of tolerance that distinguishes between "good" conduct and "bad" conduct through properly structuring the universal maxim. But since the "maxim giver" in Rawls' original position is unaware of his social role, he will not risk a maxim that is intolerant of the type of conduct inherent in a specific social role. See J. RAWLS, *supra* at 251-57. Unless we desire to adopt a theory of pure tolerance as a formal hedge against abuse, communal autonomy supports Kantian flexibility rather than the emasculation of substantive judgments implied by Rawls' veil of ignorance.

62. For a suggestion that pure tolerance is not justified as a formality compare Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, *supra* note 35, at 81; Marcuse, *Sartre's Existentialism*, in STUDIES IN CRITICAL PHILOSOPHY 157 (1972), and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) with H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

63. This point is developed more fully in discussions of act utilitarianism versus rule utilitarianism. See, e.g., Smart, *Extreme and Restricted Utilitarianism*, 6 PHIL.

A final basis from which to criticize specific institutional uses of behavior control arises from a consideration of communal autonomy itself. Communal autonomy partially substitutes communal self-control for individual self-control. But it does not abandon the concept of self-control by permitting one community of individuals to control the lifestyle and attitudes of another community of individuals. Thus, communal autonomy permits individuals to structure their social environment and thereby choose themselves as persons. But it does not permit a group of individuals to structure a social milieu in which they do not live but in which they force other people to live. Communal autonomy remains connected with self-control in that individuals must participate in the decision-making process which determines the contours of the social milieu in which they live.⁶⁴ Conversely, those individuals who infringe upon the free choice of other individuals for the sake of structuring the social milieu and thereby choosing themselves as persons can justify their action under the concept of communal autonomy only if they are affected by the rules which they have adopted, that is, only if they live within the social milieu which they have designed.⁶⁵

VI. CONCLUSION

I have argued that autonomy should not be tied to individualism and that it requires at least a partially communal determination of ourselves as persons and of the lives we want to live. Thus, as Marcuse suggests,⁶⁶ we need not tolerate, for the sake of autonomy, every form of behavior regardless of its repressive, violent, or exploitative nature. On the other hand, persuasive substantive arguments can be developed to criticize repressive uses of behavior control and the enforcement of specific social norms. In opposing those uses of behavior

Q. 344 (1956); McCloskey, *An Examination of Restricted Utilitarianism*, 66 PHIL. REV. 466 (1957); Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A. L. REV. 780 (1963). See generally Kennedy, *supra* note 61, at 371.

64. See I. BERLIN, *supra* note 8, at 39-52.

65. Thus, institutional behavior control programs violate even a communal conception of autonomy. The prisoners have not infringed upon individual free choice in order to structure their own social milieu, but rather have had a social milieu imposed upon them by people unwilling to live within it.

66. Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, *supra* note 35, at 81.

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control and the enforcement of specific social norms we need not, however, rely upon a theory of pure tolerance that emasculates our ability to control our social institutions and thereby our lives. Autonomy cannot be used to support a theory of pure tolerance that prevents us from examining our social institutions and redesigning them to be more compatible with a humane conception of life.