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A THEORY OF JUSTIFIED REFLECTIVE NONCOMPLIANCE

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A THEORY OF JUSTIFIED REFLECTIVE NONCOMPLIANCE

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

Jonathan Carl Schonsheck, B.A., M.A., M.A.

*   *   *   *

The Ohio State University

1979

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James P. Scanlan
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Jonathan Carl Schonsheck
1979
This work is dedicated to my friends,  
who made it possible---  
and necessary.
ACKNOWLEDGMENTS

This dissertation has been written over the course of three years. During the first half of that period I was a Graduate Teaching Associate; during the second, a visiting Lecturer at one institution and an Assistant Professor at another. It would not have been completed but for the assistance and support of a number of people.

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My greatest debt is owed to Janet A. Coy, who has endured years of my constantly changing attitude toward this work: the pride and despair, the confidence and the misgivings. Without the stability her love provided, this could not have been written.
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INTRODUCTION

I. The Problem of Reflective Noncompliance

Under what circumstances (if any) is it morally permissible for a citizen to covertly disobey some law of a reasonably just government? The issue of public disobedience of laws for reasons of conscience—civil disobedience—received much attention in the philosophical literature throughout the period that civil disobedience was a widely practiced mode of dissent. But civil disobedience has, for the most part, faded from the public scene—and interest in it has faded from the philosophical scene as well.

However, it would be a mistake to infer from the decline of civil disobedience that public dissatisfaction with "the law" has ended. What we have witnessed, I believe, is a shift from vocal, public protest of laws held to be unjust to quiet, private disobedience of such laws. When there is a conflict between one's lifestyle and a law believed to be unjust, the response of many is to ignore the law. (Hard evidence about the incidence of illegal acts is notoriously difficult to obtain—and this is understandable. Some "soft" statistics are presented
in section V. below; I also rely heavily on the reader's personal (and perhaps intimate) knowledge concerning such actions.

Unhappily, philosophical inquiry has not made this shift, has not focused its attention on the phenomenon of widespread covert noncompliance with the law. A minor, partial exception is John Rawls' discussion, in A Theory of Justice, of what he terms "conscientious evasion." Rawls coins this term in distinguishing noncompliance which the authorities will surely come to discover--"conscientious refusal"--from noncompliance which may be hidden. He writes:

One's action is assumed to be known to the authorities, however much one might wish, in some cases, to conceal it. Where it can be covert, one might speak of conscientious evasion rather than conscientious refusal.

This remark is simply made in passing, however; Rawls does not provide a formal definition of conscientious evasion, or discuss the circumstances under which conscientious evasion would be morally permissible. And no philosophical treatise I am aware of goes beyond Rawls' acknowledgement of dissent of this sort.

For reasons which will emerge, I do not call the activity whose moral permissibility I investigate "conscientious evasion." One prominent reason, however, may
profitably be mentioned now: I want to include in my inquiry actions which cannot in any serious sense be called "evasive." While those involved certainly do not call their activities to the attention of authorities, and may well prefer that authorities never come to know about them, the participants often are not secretive. Often, no special measures are taken to hide their activities from the authorities. Included in what I shall call "reflective noncompliance" is both this sort of activity, and also some actions which are genuinely evasive.

Before providing a formal definition of "reflective noncompliance," I must attend to some preliminary matters. First, I want to discuss the governmental setting of the theory I offer. Second, an assumption on which my work is based is made explicit. Finally, a discussion of the concept "plan of life," or "life plan," is in order.

Governmental Setting

In A Theory of Justice, Rawls restricts his discussion of various modes of dissent to a specific governmental setting—what he calls a "reasonably just constitutional democracy" (hereafter "RJCD"). Rawls so identifies the context of his theory of civil disobedience and explains the concept of an RJCD:

...this theory is designed only for the special case of a nearly just society,
one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur. Since I assume that a state of near justice requires a democratic regime, the theory concerns the role and the appropriateness of civil disobedience to legitimately established democratic authority.3

Which forms of dissent are morally permissible in which forms of government is an issue whose adequate treatment would require several volumes. It is reasonable to believe that in a less just setting, some species of dissent may even be obligatory. I do not wish to address these matters here, and thus shall follow Rawls, and restrict my arguments (and subsequent theory) to the context of a reasonably just constitutional democracy.

A Crucial Assumption

The assumption on which my theory depends is that a citizen has a prima facie moral obligation to obey the laws of a reasonably just regime. This work is addressed to the conflict between a person's prima facie obligation to obey the law, and his desire to act contrary to laws he believes unjust. If there is no such prima facie obligation, if disobedience of the laws of a just regime is not a moral matter, there is no need for a theory of justified reflective noncompliance: there is no conflict to resolve. But despite disagreements concerning the
source of one's *prima facie* moral obligation to obey the law in such a regime, there is wide agreement among social philosophers that citizens have such an obligation. For Locke, one's obligation arises from one's own consent (express or tacit); for the Plato of *Crito*, an adult's continued willing residence gives rise to the obligation. For Mill and contemporary utilitarians, the production of utility binds one to obey, while for Rawls obedience is a natural duty—a rational person would agree to such in a suitably designed choice situation.

I make no attempt here to decide among these various accounts, but simply subscribe to that on which there is unanimous agreement: disobeying the laws of a reasonably just regime is a moral matter; the burden of proof rests on the citizen who disobeys. To discharge this burden he must show why his refusal to comply with the law is morally permissible.

**The Concept of "Plan of Life"**

Throughout this work I shall make use of a concept popular in social philosophy: "plan of life" (or sometimes, "life plan"). Nothing depends upon a rigorous definition of this concept an informal characterization will suffice. Roughly, a person's plan of life (or
"life plan" is his own system of values, of goals, of ends, and of the appropriate means for attaining his goals. It is his concept of which activities will bring him happiness and individual fulfillment.

An intuitive understanding of life plan can be furthered by looking at Rawls' comments on a derivative notion: the rational life plan.

...a person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances. A man is happy when he is more or less successful in the way of carrying out this plan....This plan is designed to permit the harmonious satisfaction of his interests. It schedules activities so that various desires can be fulfilled without interference. 4

There are, of course, people who do not have rational life plans, and some who have no plan of life at all. Such people drift aimlessly among different occupations and activities. I shall not assume in this work that everyone has a life plan. I think it uncontroversial, however, that many people do have a plan of life, and many of those plans are rational: they are reasonably consistent, reasonably coherent sets of goals, and strategies for attaining those goals.
A final note is in order to avoid any confusion later. A person's plan of life may include activities which are illegal. Unlawful acts may be incorporated in one's set of goals. Additionally, illegal acts may be included in one's strategies for attaining goals which are themselves legal. I shall elaborate on this in Section V. below, when I discuss reflective noncompliance as being both intrinsically valuable and instrumentally valuable in various plans of life.

II. Civil Disobedience and Reflective Noncompliance

Before offering a formal definition of reflective noncompliance, I consider the problem of an acceptable definition of civil disobedience; I do this for four reasons. First, the concept of reflective noncompliance will be more clear if it can be compared and contrasted with civil disobedience—and of course this requires a clear definition of civil disobedience. Second, in highlighting the differences between civil disobedience and reflective noncompliance, I show the need for a theory of justified noncompliance independent of a theory of justified civil disobedience. Before considering the matter in this way, one might be inclined to think that
civil disobedience and reflective noncompliance are sufficiently similar that a theory of justified civil disobedience could serve—perhaps with mild alterations—as a theory of justified reflective noncompliance. By focusing on the differences (and such focusing requires a formal definition of both) I show that this is not the case. Even if one is in possession of "the correct" theory of justified civil disobedience, the differences between civil disobedience and reflective noncompliance are such that a theory of justified reflective noncompliance is yet needed. Third, in Part II of this dissertation I shall discuss the conditions under which civil disobedience is an appropriate mode of dissent, and the condition under which reflective noncompliance is appropriate. That the conditions appropriate for the two modes differ—and this I shall argue—cannot be argued unless the two modes have been defined, and their differences noted. Finally, it is worthwhile in and of itself to have a clear and precise definition of civil disobedience.

The definition of civil disobedience I shall use in this work is a modification of one devised by Jeffrie Murphy. His definition is as follows:
An act A is properly called an act of civil disobedience only if (1) there is some law L according to which A is illegal, (2) L is believed by the agent to be immoral, unconstitutional, irreligious, or ideologically objectionable, and (3) this belief about L motivates or explains the performance of A.®

Two qualifications are made in a footnote; one is relevant here. It is a move toward a distinction often encountered in the literature, between direct and indirect civil disobedience.

The agent may have no objection to L per se but may violate L because he views it as symbolic for or instrumentally involved with some other law L' (or some general policy P) to which he does object. In my view, such a person (Thoreau for example) is also to be regarded as civilly disobedient.®

Some examples will clarify this distinction. Refusing to register with one's draft board in protest of the Selective Service Act is an instance of direct civil disobedience: the Act commands such registration. However, it may be impossible or impractical to violate the law one considers unjust. A male cannot protest, using direct civil disobedience, laws prohibiting the obtaining (for oneself) of an abortion. Rawls discusses a case in which direct civil disobedience would be possible, but
impractical: "Thus, if the government enacts a vague and harsh statute against treason, it would not be appropriate to commit treason as a way of objecting to it." Rawls suggests indirect civil disobedience as the appropriate mode of dissent in cases such as these: "Instead, one may disobey traffic ordinances or laws of trespass as a way of presenting one's case." In all likelihood, the "indirect" civil disobedient believes the traffic ordinances and laws against trespass to be just laws; but given the existence of some unjust law or policy, and the impossibility or impracticality of violating it in protest, he violates a different law in symbolic protest. He marches through the streets (obstructing traffic), or remains in a congressman's office (after being asked to leave), to bring public attention to his cause.

Murphy claims that few writers would deny that his conditions (1)-(3) are necessary conditions, but many would deny that they are sufficient. Various writers have added clauses to the effect that the agent must accept punishment for his action, or that civil disobedience by definition is nonviolent, and so forth. Rawls, for example, defines an act of civil disobedience as
"...a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government." Murphy finds such a move objectionable:

...it is unfortunately common for philosophers to build their own moral preferences into definitions, to try to solve substantive moral issues by stipulation. Thus civil disobedience may be defined in such a way that it is necessarily justified. Or it may be defined so as to logically require the use of nonviolent means. But such definitions may beg important questions of moral substance. Surely an act can properly be called an act of civil disobedience even if it is unjustified. And the question whether the civil disobedient must accept his punishment or the question whether he must avoid violence seem to be morally open questions.

In defining civil disobedience, the desideradum is the isolation of a certain mode of dissent, not the closing of substantive moral issues. It may turn out that no act of civil disobedience is morally justified unless it is nonviolent, or unless the agent accepts, or willingly accepts, punishment for his illegal act. But this is very different from the claim that it is not even civil disobedience unless nonviolent, etc.
After this contention, Murphy pronounces his conditions (1)-(3) jointly sufficient. I concur with Murphy that moral problems should not be defined away. However, I believe that his definition, as it stands, is too broad. Something must be said about the forum of the act, and about the goal of the disobedient, in order to "isolate" this mode of dissent.

About acts of civil disobedience, Rawls writes: "By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected." Civil disobedience is essentially a kind of communication; it is this that motivates Rawls' condition of his definition of civil disobedience that the act be "public." This condition distinguishes civil disobedience from other modes of dissent which are typically covert. Additionally, I side with Rawls in making the goal of acts of civil disobedience part of the definition (although, since Rawls says "usually" done to effect a change, having that goal cannot be a necessary condition for him). This distinguishes the civil disobedient from the revolutionary, who wishes to overthrow the government.
Unhappily Murphy's definition does not make this distinction; the actions of a revolutionary will satisfy conditions (1)-(3). This is unsatisfactory; on the spectrum of dissent, civil disobedience is surely less extreme a mode than revolution. I therefore propose the following definitions of direct and indirect civil disobedience, which I shall employ in this work. The added conditions do not, I contend, close by definition any substantive moral issues, but do more effectively distinguish civil disobedience from other modes of dissent.

An act \( A \) is properly called an act of direct civil disobedience just in case:

1. there is some law \( L \) according to which \( A \) is illegal,
2. \( L \) is believed by the agent to be immoral, unconstitutional, irreligious, or ideologically objectionable.
3. this belief about \( L \) motivates or explains the performance of \( A \),
4. \( A \) is publicly performed, and
5. the goal of the agent is the reform or the repeal of specific legislation or policies, not the overthrow of the government.
An act $A$ is properly called an act of indirect civil disobedience just in case:

(1) there is a law $L$ according to which $A$ is illegal,

(2) there is some other law $L'$, or some public policy $P$ believed by the agent to be immoral, unconstitutional, irreligious, or ideologically objectionable,

(3) the agent believes that violation $L$, under the conditions of the act, is a symbolic protest of $L'$ (or $P$),

(4) it is these beliefs about $L$, and $L'$ (or $P$), which motivate, or explain the performance of $A$.

(5) $A$ is publicly performed, and

(6) the goal of the agent is the reform or repeal of specific legislation or policies, not the overthrow of the government.

Let us turn now to that mode of dissent which is the focal point of this work—what I call "reflective noncompliance." Informally, it is "reflective" in that it is based on one's moral stance, one's determination of the boundary between the authority of the state and the rights of the individual. It is "noncompliance" in that
one disobeys the law. The formal definition of reflective noncompliance is as follows:

An act \( A \) is properly called an act of reflective noncompliance just in case:

1. there is some law \( L \) according to which \( A \) is illegal,
2. the agent believes that the state (morally) ought not have enacted a law of sort \( L \) (the agent believes that the state ought not have made acts of sort \( A \) illegal),
3. the agent believes that this wrong by the state makes non-compliance with law \( L \) morally permissible,
4. the goal of the agent is neither the reform of \( L \), nor the overthrow of the government, but is to live out his plan of life.

(I shall elaborate on clause (2) in Chapter One.)

Direct civil disobedience, indirect civil disobedience, and reflective noncompliance can now be compared and contrasted.

Direct civil disobedience is protest against the law held unjust itself; it is not clear how one could directly violate a "policy". However, one could break laws (e.g., trespass, parade without a permit, etc.) in
protesting governmental policy. Recent (1978-79) such illegal protests have occurred in the United States: groups have protested the governmental encouragement of nuclear power, its (perceived) pressures on Egypt and Israel to sign a peace treaty, its willingness to sign a Strategic Arms Limitation Treaty with the U.S.S.R., and its willingness to harbor the deposed Shah of Iran. It is not clear how one could engage in an act of reflective noncompliance with respect to a policy; in this respect direct civil disobedience and reflective noncompliance are similar, and to be distinguished from indirect civil disobedience. (It is possible that I simply haven't thought of the right case--perhaps reflective noncompliance with a governmental policy is possible. Were such a case raised, clause (1) of the definition would have to be modified. However, this would not affect the other distinguishing features, nor would it affect the theory of justified reflective noncompliance offered and defended below.)

Both direct and indirect civil disobedience are aimed at laws held "immoral, unconstitutional, irreligious, or ideologically objectionable." In contrast, reflective noncompliance is by definition directed against laws that are "ideologically objectionable" on specific grounds--the
agent believes that the state has legislated on matters on which it ought not legislate. The law may be either constitutional or unconstitutional—in the former case, the agent believes that the constitution of the state grants it powers it morally ought not have. (Conversely, the constitution may prohibit actions which the state is morally entitled to perform. Although this cannot by definition lead to acts of reflective noncompliance, it needs to be mentioned.) Finally, the law subject to reflective noncompliance may or may not bear on religious rights.

The forum of the act, and the agent's motivation and goal, are so intertwined that they cannot be considered separately. Both direct and indirect civil disobedience are performed publicly; the civil disobedient's goal is to have some law or policy changed, and his belief is that focusing public attention on that law or policy is a means to that end. The person engaged in reflective noncompliance, in sharp contrast, does not aim at the alteration of laws or policies. His goal is simply to live out his plan of life, to follow his inclinations. While he may not care whether authorities, or the general public, come to know of his illegal actions, he does not go out of his way to draw attention to his actions. Civil disobedients, both direct and indirect, often publicize their upcoming
illegal actions—the more police and reporters who observe, the greater the impact of their disobedience.

In sum: the civil disobedient is a person who believes some law or public policy is immoral, unconstitutional, etc., and sets out to change it by performing public, illegal acts. The person engaged in reflective noncompliance is a person who believes that the state has criminalized acts it ought not have criminalized, who believes that it is morally permissible to disobey laws which the state lacks the moral authority to enact, and who disobeys such laws when they conflict with his plan of life. The (sincere) civil disobedient is motivated by moral indignation to change the law, the person engaged in reflective noncompliance simply lives out his plan of life.

Earlier I claimed that the differences between civil disobedience and reflective noncompliance entailed different justifications. This can now be seen; features which have often been held crucial in justifying civil disobedience are absent from reflective noncompliance. But reflective noncompliance boasts ameliorating features absent from civil disobedience. For example, it has been argued that the civil disobedient, in seeking justice both for himself and others, rather than personal gain (indeed, he risks grave personal loss), commits less serious a wrong, and is less blameworthy a person, than one whose disobedience
is motivated by personal gain (e.g., the person engaged in reflective noncompliance following his inclination). Indeed, some authors have considered the civil disobedient a praiseworthy person. And since his (the civil disobedient's) actions are public, they can be "monitored" by the authorities; private or covert noncompliance is insidious. In virtue of these two features, reflective noncompliance seems a more extreme mode of dissent than civil disobedience. But if more extreme, then certainly different, and thus requiring a different justification.

But acts of civil disobedience are typically disruptive, whereas acts of reflective noncompliance typically are not. Consequently, there is an "evil" of civil disobedience not shared by conscientious evasion—in this respect, the burden of justifying reflective noncompliance is lighter than that of justifying civil disobedience. It is lighter in another respect as well. An important concern of those who study the justifiability of civil disobedience is its effect qua disobedience on others. It is possible that the "message" received by some citizens will not be the desired "the law under protest is unjust," but "disobedience in general is permissible." Typically, acts of reflective noncompliance are performed privately—and thus incorrect imitation is not an evil of reflective noncompliance. The justification of reflective noncompliance
need not concern itself with "outweighing" this evil. Again, a difference between justifying civil disobedience and justifying reflective noncompliance is indicated.

III. A Theory of Justified Reflective Noncompliance

In considering the "justification" of reflective noncompliance, one is confronted not with a single issue, but a cluster of issues. I now distinguish these, and indicate the position I shall take on each.

First, there is the most general issue: are any acts of reflective noncompliance morally permissible? I.e., is it ever morally permissible for a citizen to covertly disobey the laws of a reasonably just constitutional democracy upon a determination that that democracy has done wrong in making illegal the conduct in question? The issue is not whether any particular theory of justified reflective noncompliance is correct, but whether it is possible for some theory of justified reflective noncompliance to be correct. No theory of justified reflective noncompliance—mine, or a competitor—can be correct unless this question is answered in the affirmative. How is the answer to this question to be determined? By what procedure are we to determine whether this question is to be answered in the affirmative or negative? The position I maintain is that one must compare two societies,
identical save that in one reflective noncompliance is practiced, and in the other it is not. Reflective noncompliance is permissible just in case a society in which reflective noncompliance is practiced is preferable, from the moral point of view, to a society in which there is no reflective noncompliance. (The expression "preferable from the moral point of view" is intended to be neutral as between various moral theories.) Part II of this dissertation is devoted to this issue.

Second, there is the issue of which of a number of competing theories of justified reflective noncompliance is correct. To decide this issue one must compare societies which are identical except for the fact that in each, one of the competing theories of justified reflective noncompliance is practiced. A theory of justified reflective noncompliance is better than its competitors just in case the society in which it is practiced is preferable, from the moral point of view, to the other societies. Since the theory which I present is the only extant theory of justified reflective noncompliance of which I am aware, this task must await the appearance of the competition.

Finally there is the matter of the theory of justified reflective noncompliance that I shall defend in this work. This is the theory:
A is an act of justified reflective noncompliance just in case:

(1) A is an act of reflective noncompliance (cf. the formal definition), and

(2) the state indeed ought not have enacted a law of sort L, i.e., indeed ought not have made acts of sort A illegal.

Thus, an illegal act is an act of reflective noncompliance just in case the agent believes that the state has done wrong in making acts of that kind illegal, that this makes the act morally permissible, and the agent is neither attempting the reform of the law nor the overthrow of the government, but is merely living out his plan of life; it is justified just in case his belief about the state's having done wrong is correct.

Of course, in order to know precisely which acts of reflective noncompliance are morally permissible and which are not, we must determine which laws a state ought and ought not enact, with which actions the state may and may not interfere. The virtue of my theory, however, is that it replaces a question on which no work has been done—"Which acts of reflective noncompliance are justified"—with a question on which a great deal of work has been
done— "Which laws ought the state not enact?" Part I of this dissertation is devoted to answering that question.

There is good reason, I believe, for arguing the correctness of my theory of justified reflective noncompliance before addressing the general issue of whether a society with reflective noncompliance is morally preferable to a society without. I do not think it possible to argue the moral preferability of a society in which reflective noncompliance is practiced without citing specific benefits to specific citizens which result from their noncompliance with specific laws. But this is not possible, of course, prior to the specification of a set of laws regarding which reflective noncompliance is permissible. It can hardly be doubted that widespread reflective noncompliance is permissible. It can hardly be doubted that widespread reflective noncompliance with some laws would make a society morally worse than an identical society in which no reflective noncompliance were practiced. But this is not the test.

Another reason can be given for considering these issues in the order that I do, although at this point it is no more than a promissory note. In arguing for the drawing of the boundary between the "sphere of individual choice" (the set of actions over which the individual ought to be sovereign), and the "criminalizing authority
of the state" (the set of actions which the state may morally criminalize), I will call upon a number of considerations concerning the development and, ultimately, the happiness of the individual. It will turn out that some of the considerations which militate for various actions' being placed in the sphere of individual choice also militate for the moral permissibility of disobeying laws which make those actions illegal.

Thus, my strategy is not to argue first that some (unspecified) acts of reflective noncompliance are justified, and then move to a specification of those which are. Rather, I shall argue that certain, specified acts of reflective noncompliance are justified. If I am successful, then eo ipso I have shown that some acts of reflective noncompliance are justified.

IV. The "Reflective Noncompliance Set"

A final definition is needed for ease of exposition in what follows. I define the "Reflective Noncompliance Set" (sometimes abbreviated to "R.N. Set") as "the set of all laws concerning which reflective noncompliance is morally permissible." Of course, just which laws are elements of this set will be controversial. And one who believed that no act of reflective noncompliance were permissible would thereby be claiming that the R.N. Set is
empty. Similarly, by my theory of justified reflective noncompliance, if a society is perfectly just (i.e., the state has not made illegal any act which it ought not), the R.N. Set would be empty. No act of reflective non-compliance would be justified in such a society.

In the following chapters I shall argue that a number of laws are elements of the Reflective Noncompliance Set. For the purpose of definition, however, whether I am successful as regards any particular law is not relevant. The R.N. Set is the set of all laws it is morally permissible to evade in performing reflective noncompliance, whichever ones (if any) those turn out to be.

V. Some Soft Statistics

In the opening paragraphs I promised that I would provide some statistics on the extent of covert noncompliance with the law of one reasonably just constitutional democracy, the United States. As I claimed then, statistics on illegal conduct are notoriously unreliable; the sources I cite are not impeachable. However, I think that they (along with common knowledge) are sufficient to underscore the fact that covert noncompliance with some laws is pervasive—and this in turn highlights the need for a theory of reflective noncompliance.
I think it would be tedious, and a case of overkill, to attempt a thorough documentation of this claim by reviewing the criminal statutes of the several states and juxtaposing evidence of illegal conduct. Suffice it to say that, in many or all jurisdictions, the following are crimes: the use of marijuana and other hallucinogenic drugs, so-called "unnatural" sexual acts—fellatio, cunnilingus, anal intercourse between consenting adults (even in private, regardless of sex or marital status)—fornication, cohabitation, adultery. Further, consent of the victim is not an acceptable defense against charges of serious bodily injury (aggravated assault, mayhem, or death).

A survey of the sexual practices of Americans was completed in 1973 by The Research Guild, Inc., and is regarded as the most comprehensive survey of its kind since that of Dr. Alfred Kinsey. Reports of the findings have focused on the change in sexual attitudes and practices in the quarter century since the Kinsey study, but it is the mere incidence of some of that conduct that is relevant here. "Premarital sex has become both acceptable and widespread," according to the report, in spite of laws against fornication. Despite laws against "unnatural" sex acts, "more than four-fifths of single males and females between 25 and 34 and about
nine-tenths of married persons under 25 had practiced cunnilingus or fellatio, or both, in the past year."\textsuperscript{14} In addition, "Heterosexual anal intercourse is much more widely used today than formerly."\textsuperscript{15}

Laws intended to mandate the monogamy/sexual exclusivity model of adult relationships are widely disregarded. The survey found that 24 percent of married women under 25 had engaged in extra-marital intercourse,\textsuperscript{16} as had a higher percentage of men—laws against adultery notwithstanding. Further, "open marriage and flexible monogamy have been advocated by a number of best-selling authors. Group marriages have become a reality; close to 2000 communes were located by one newspaper survey in 1970, a large number of which involved some form of group marriage."\textsuperscript{17}

Dr. Robert DuPont, a director of the National Institute on Drug Abuse, testified in 1973 that 26 million Americans aged 12 and older have used or at least experimented with marijuana, and that "available evidence indicated that marijuana use still is growing."\textsuperscript{18}

Since consent of the victim is not a valid defense against a charge of serious bodily injury (e.g., whipping), practitioners of sado-masochistic sexual techniques could be prosecuted under aggravated assault and battery laws, even though the "victim" (more than) consented. While the
mentioned survey did not find evidence of widespread practice of "S-M", it is part of the life plan of some.

Since consent of the victim is not a valid defense against a charge of homicide, euthanasia is a species of murder. Although accurate statistics are understandably unavailable, there is no doubt that doctors, friends, and relatives are instrumental in shortening the lives of some citizens. Often this is done not only with the consent of the victim, but at his insistence. I think it will be readily admitted that our views on death, and the appropriateness of prolonging life as long as technology allows, are changing. Renewed interest in "living wills," directing that no extraordinary means be used to prolong one's life (should there be no serious medical hope of recovery) is evidence of this. It is clear that a person's life plan may include provisions as to when that life ought to end, either by one's own hand, or (if that is not possible) that of another.

VI. The Importance of a Theory of Justified Reflective Noncompliance

I want to address now an objection which, if successful, would not prove my theory false, but would trivialize this enterprise. It could be objected that it is professionally misguided to devote this sort of time and energy
to a consideration of the moral permissibility of homo-
sexual acts, drug use, gambling, prostitution, pornography,
etc. Is a person whose plan of life centers about such
activities worthy of such philosophical attention?

As the statistics of the previous section show, viola-
tions of the laws prohibiting such conduct are wide-
spread. And while we can be certain that some citizens
are "counted twice" (they are violators of two or more of
these laws), it is certain that a sizeable portion of the
population violates one or another of these laws. Thus,
one cannot claim that this work focuses on the actions of
a small, unworthy minority.

More importantly: actions in violation of certain
laws may play a crucial role in a person's life, and yet
it not be true that his plan of life "centers about" that
activity. In the Republic Plato distinguishes between
intrinsic and instrumental goods;¹⁹ that distinction is
apt here. Cases abound in which the activities at the
center of a person's life plan are socially beneficial by
any reasonable criteria, yet could not be performed as
well, or at all, without the inclusion in that plan of
life of some acts which are currently illegal. If Gay
Liberation has shown us nothing else, it has shown us that
homosexuals are to be found in every occupation of society.
It is not unreasonable to believe that were these people
unable to relate sexually, their ability to discharge their occupational duties would be impaired. A second example is the widespread use of various illegal drugs by persons in academic life—which cannot be denied. Some use is purely "recreational"--they are "fun." Others claim that "cobwebs" can be driven from one's mind by (e.g.) marijuana: if diligent work seems not to be bringing one closer to solving a difficult problem, and one cannot "break out" of old ways of thinking, it is sometimes helpful to be in an altered state of consciousness for a while. (There are also those who claim to solve problems while in an altered state of consciousness; I am unsure how seriously to take such claims, and in any event do not want my argument to rest on its being true.) And while some may find no pleasure in life apart from pornography, many find it a harmless diversion--but a diversion instrumental in maintaining psychological homeostasis.

The reader can, I believe, extrapolate from these examples. In considering whether the defending of a theory of justified reflective noncompliance is philosophically worthwhile, it must be borne in mind that such a theory is not only for those whose lives center about such acts, but is also offered on behalf of those for whom such acts play a subsidiary, but nonetheless
important, role. There are many who could not do the socially beneficial things they do, or do them as well, without engaging in acts of reflective noncompliance. It is because of these, as well as those whose lives center about such activities, that defending a theory of justified reflective noncompliance is important.

Considering this objection leads naturally to a note concerning the addressees of my theory. To those who believe that disobeying the law is not a moral matter, this work will seem pointless. It will seem pointless, too, to those who believe that the state never encroaches on the rights of the individual through the criminal law. This work is addressed to those who feel a tension between an obligation to obey the laws of a reasonably just constitutional democracy, and an obligation to oneself to construct and live out a plan of life (within the bounds of the moral), regardless of the law.

VII. Defending the Theory of Justified Reflective Noncompliance: The Strategy

I conclude this Introduction with a brief overview of the strategy of the enterprise.

The dissertation is divided into two parts. The three chapters of Part I are devoted to a variety of problems in the philosophy of law. In Chapter One,
"A New Schema for Determining Whether to Criminalize Conduct," I criticize the decision-procedure widely accepted for determining whether actions ought to be made criminal, and offer a new procedure of my own. Chapter Two contains two divisions. In the first, I provide a reconstruction of the central argument of John Stuart Mill's On Liberty, presenting Mill's position concerning the limits of the state's authority to criminalize conduct, and the set of actions with which the state ought not interfere, in its strongest form. In the second division of Chapter Two, I consider a variety of objections to Mill's position which must be answered in defending a theory of reflective non-compliance. In Chapter Three I defend Mill's position by attacking its most promising competitor, "paternalistic intervention." Chapter Four is a consideration of pragmatic constraints on criminalization—arguments against making certain actions criminal because there being such a statute results in evils which counter-balance any benefits of such legislation. The "new schema" of Chapter One shows the role of those arguments in the procedure for deciding whether to criminalize conduct.

Part II of this dissertation is devoted to a variety of problems in social and political philosophy. In Chapter Five I detail the benefits of acts of reflective non-compliance which accrue to both the individual and the
society. I argue that these benefits make some acts of reflective noncompliance—those specified by my theory—morally permissible. In the final chapter, Chapter Six, I attack Rawls' position that citizens have a duty to obey unjust laws. Rawls' position and mine are contraries; I must show his incorrect if my theory of justified reflective noncompliance is to stand.

Let us turn now to the issue of the correct procedure for determining which actions ought and which actions ought not be subject to criminal prosecution.
FOOTNOTES


2. Ibid., pp. 368-9.

3. Ibid., p. 363.

4. Ibid., pp. 92-3.


6. Ibid.


8. Ibid.

9. Ibid., p. 364.

10. Murphy, op. cit., p. 2.


13. Ibid., p. 85.


15. Ibid.

16. Ibid.

17. Ibid.


PART ONE

CHAPTER ONE

A NEW SCHEMA FOR DETERMINING WHETHER TO CRIMINALIZE CONDUCT

I. An Old Procedure and a New Procedure

What is the correct procedure for determining whether conduct ought to be criminalized? In "Criminal Paternalism," Michael Bayles outlines a procedure which is widely accepted—the balancing of reasons for and against criminalization:

Reasons supporting criminal legislation may be stated as principles. A principle for criminal legislation presents a characteristic of actions which constitutes a reason, but neither a necessary nor sufficient one, for legally prohibiting or requiring them. The characteristic presented in a principle does not constitute a necessary reason because that of another principle might by itself justify legislation. It does not constitute a sufficient reason because it might not outweigh the presumption against criminalization...

There are also principles which present reasons against criminal legislation, e.g., that a law cannot be effectively enforced. When conflicting principles apply to a proposed law, they must be balanced against one another. Collectively, all acceptable principles both for and against provide a standard of good criminal legislation.¹

In Social Philosophy, Joel Feinberg has compiled such a list of principles (whether "acceptable" nor not has yet to be determined) which present characteristics of actions
constituting reasons for criminal legislation. The balancing of reasons for and against criminalization of conduct is an integral element of Feinberg’s account too:

The liberty-limiting principles on this list are best understood as stating neither necessary nor sufficient conditions for justifying coercion, but rather specifications of the kinds of reasons that are always relevant or acceptable in support of proposed coercion, even though in a given case they may not be conclusive. Each principle states that interference might be permissible if (but not only if) a certain condition is satisfied. Hence, the principles are not mutually exclusive; it is possible to hold two or more of them at once, even all of them together, and it is possible to deny all of them. Moreover, the principles cannot be construed as stating sufficient conditions for legitimate interference with liberty, for even though the principle is satisfied in a given case, the general presumption against coercion might not be outweighed.

I do not think this scheme is wrong-headed, but I do think it defective in that it is oversimplified. It is surely true that difficulties in enforcing a proposed law "weigh" against its enactment. But is the converse true, i.e., does a law's being easy to enforce weigh in favor of its enactment? A law against painting one's automobile shocking pink (to take a silly example) would be easy to enforce (detection would be very easy)—but does this fact "weigh" in favor of such a law? Similarly, a law prohibiting change of occupation (to take a serious
example) would be easy to enforce—workers would be paid by state officials rather than a private company, officials who ensure that workers work where the state commands. Once again, though, ease of enforcement does not weigh in favor of a law in the way that difficulty of enforcement weighs against enactment. Such examples could be multiplied with the same result. The question arises: what is the correct account of this asymmetry?

The answer I defend in this chapter is that two distinct sets of issues have been collapsed in the "Balancing Schema" urged by Bayles and Feinberg. I propose replacing the "Balancing Schema" with what I shall call the "Two-Issue Schema." In the decision procedure I advocate, two very different matters must be addressed—in a certain order—when deciding whether to criminalize conduct.

The first set of issues concerns the moral authority of the state. Regardless of one's theory of the source of this authority (utility, tacit consent, hypothetical consent, etc.), it is almost universally agreed that that authority has limits. There are actions of citizens with which the state cannot (morally) interfere. The first issue to be resolved, then, is this: is the action in question (the subject of the proposed criminal law) within the moral authority of the state? Many
different considerations may be relevant to the resolution of this issue: is the action likely to cause harm to others? Is it likely to cause harm to the agent? Is it likely to cause harm to important social institutions? Is it likely to offend others? Of course, which of these considerations (and others) are relevant will be a function of one's theory of criminal jurisprudence. But regardless of the theory to which one subscribes, criminalization is not morally permissible unless the action in question is within the jurisdiction of the state. That is, an action's being within the moral authority of the state is a necessary, although not a sufficient, condition for criminalization.

If an action has been judged within the jurisdiction of the state, a second set of issues must be addressed. First, metaphorically: Does the state have in its arsenal of morally permissible responses, a weapon capable of combatting the conduct in question effectively? Even if it is agreed that conduct may be interfered with legitimately by the state, in the sense that the state has jurisdiction over conduct of that sort, it still may be the case that no action of the state, all things considered, is warranted. It might be the case that a law prohibiting the action in question would be wholly unenforceable, or enforceable only in an arbitrary manner,
or such a law might be enforceable, but only at great
cost, or only by compelling the police to engage in
undesirable practices. For example, both "double parking,"
and parking overtime at meters, could be eliminated were
they made capital offenses--especially if the police were
permitted to make summary executions. However, in
claiming that regulation of traffic is within the limits
of the state's moral authority we do not thereby counten­
ance just any tactics whatever in enforcing the state's
decision. Smoothly flowing traffic is desirable, but
not at just any cost. (The intuitions of residents of
Washington, D.C. and New York City may diverge with mine
here.) And there are other practical constraints on
criminalization--it may be that a law would be relatively
easy to enforce, and could be enforced using morally
acceptable tactics, but the enactment of such a law would
have inevitable consequences which are unacceptable. (All
this anticipates my work in Chapter Four, wherein I detail
various practical constraints on criminalization. I men­
tion them here only to bolster my claim that the correct
decision procedure for criminalization must take account
of two very different issues.)

The correct procedure for determining whether conduct
ought to be criminalized can thus be seen as consisting of
two different sub-procedures. The first is a determination
of whether the state has moral jurisdiction over the conduct in question. Only if the result of this is in the affirmative do the considerations relevant to the second sub-procedure—the balancing of practical costs and benefits—come into play.

Before I discuss in further detail this decision-procedure, which I claim is superior to the "Balancing Procedure," I must define a number of terms which I shall use throughout this work, and discuss some of the inter-relationships of the referents of these terms. Both the set of definitions and the procedures are designed to be perfectly general—no substantive issues are answered by the definitions themselves or the procedure itself.

Consider first all the actions of all citizens. Every action falls into one of two sets: either the "sphere of individual liberty," or the "sphere" (or "region") of state moral authority." A particular action falls into one set or the other depending upon one's theory of which actions ought to be left to an individual's discretion, and with which actions the state may "interfere." ("Interference" here includes the gamut of responses, from a publicity campaign against the action to criminalization of the action. The species of interference that is appropriate in given sets of circumstances is a topic addressed at various points throughout the work.)
If an action is within the sphere of individual liberty, it is wrong for the state to interfere with a citizen's performance of that action. However, it does not follow from the fact that an action is not within the sphere of individual liberty that the state may make that action criminal; such an inference ignores the pragmatic constraints on criminalization. Thus, a proper subset of the actions within the moral authority of the state is the set of actions the state may make criminal. This set I shall call the state's "criminalizing authority;" similarly, when I write that "the state exceeds its criminalizing authority," I mean that the state has made criminal some action which is not in the subset of the state's moral authority called the state's criminalizing authority. (I shall ignore the technical distinction between a "crime" and a "violation" here; it is morally permissible for the state to prohibit behavior, and enforce that prohibition with sanctions, just in case the action is within the criminalizing authority of the state.)

Let us consider now the optimum procedure for determining the contents of the set known as the state's criminalizing authority. When this has been done, we shall be in a position to add a few definitions, and discuss interrelationships.
I have called the decision-procedure I advocate the "Two-Issue Schema." Two distinct issues must be addressed and resolved before it can be said that an action falls within the state's criminalizing authority. The first is a determination of whether the state has moral jurisdiction over the conduct in question. One invokes one's theory of the state, placing actions in either the sphere of individual liberty or the sphere of state moral authority. A necessary condition for an action's (morally) being made criminal is that the action fall within the moral authority of the state. If some particular action does, I shall say that the state has the prima facie right to criminalize that action.

The state has the right all things considered to make an action criminal only if (i) it has the prima facie right, and (ii) given the world the way it is, there exist some "effective" actions the state can take, i.e., there is an alternative available such that electing that alternative will deter (to an acceptable degree) the conduct in question and does not have prohibitive practical or moral costs. Thus, an action is within the criminalizing authority of the state only if it is within the state's moral authority, and the state's making the action criminal will not produce a net evil, i.e., a balance of cost over benefit.
Now the Two-Issue Schema accounts for the asymmetry discussed above. No matter how easy to enforce some law might be, a necessary condition for moral enactment is that the conduct be within the moral jurisdiction of the state—and of course the painting of one's automobile, and one's choice of occupation, generally are not. Generalizing: the issue of the cost of enforcement is irrelevant to the determination of whether the state has the authority to interfere with the liberty of its citizens. The fact that a law would be easy to enforce does not place the questioned conduct within the authority of the state, nor does the fact that the "costs" of enforcing a law are excessive remove an action at issue from the moral jurisdiction of the state—although it might be a conclusive reason for refusing to criminalize the act. Finally, determining that an act is within the moral jurisdiction of the state does not ipso facto mean that the state may criminalize it—the costs of enforcement must be taken into account.

Let us return now to defining, and to discussing interrelationships.

If a law is such that its enactment would produce a balance of evil over good, a balance of cost over benefit, I shall say that it falls in the "sphere of pragmatic noncriminalization." Similarly, if an action is such that,
were a law enacted that criminalized that action the law would produce a balance of evil over good, I shall say that that action falls in the "sphere of pragmatic non-criminalization." (That both laws and actions fall within that sphere will cause no confusion; the context will make perfectly clear which is under discussion at any point.) It should be noted that a law which results in a balance of cost over benefit may criminalize actions which are either in the sphere of individual liberty or in the sphere of state moral authority. (The relationship between a law's prohibiting an action which is in the sphere of individual liberty, and that law's producing net evil, is discussed in Chapter Four.)

Clause (2) of my definition of reflective noncompliance (cf. the Introduction) is as follows:

(2) the agent believes that the state (morally) ought not have enacted a law of sort L (the agent believes that the state ought not have made acts of sort A illegal)

The agent's belief can now be understood as the belief that the state has exceeded its criminalizing authority. The state can have done this by either making criminal some act which is in the sphere of individual liberty, or by enacting a law which produces a balance of evil over good. As it is more convenient, I shall use the phrase "exceeds its criminalizing authority" henceforth.
Clause (2) of my theory of justified reflective noncompliance is as follows:

(2) the state indeed ought not have enacted a law of sort L, i.e.,
the state ought not have made acts of sort A illegal.

My theory can now be understood as the claim that reflective noncompliance is morally permissible with respect to any law such that the state has exceeded its criminalizing authority in enacting that law. (To anticipate my argument in the interests of clarity: I shall argue that reflective noncompliance is permissible with respect to such laws whether they exceed the state's criminalizing authority on Issue One or Issue Two considerations--but the arguments will differ, depending upon the Issue. The arguments which justify reflective noncompliance with laws that criminalize actions that are in the sphere of individual liberty differ from the arguments which justify reflective noncompliance with laws which produce a balance of evil over good.)

According to my theory, reflective noncompliance is justified with respect to laws which criminalize actions which are in the sphere of individual liberty, and actions which are in the sphere of pragmatic noncriminalization. The union of these two sets I shall call the "sphere of individual choice." Thus, according to my
theory of justified reflective noncompliance, if a law makes criminal an action which is in the sphere of individual choice, then reflective noncompliance with respect to that law is morally permissible.

In review: all actions fall into either the sphere of individual liberty or the sphere of state moral authority. An action cannot morally be criminalized unless it falls within the moral authority of the state; if it does, then the state has the *prima facie* right to make it criminal. The state has the right all things considered to make an action criminal just in case it has the *prima facie* right, and the criminalization of that action will not produce a balance of evil over good.

The proper procedure for determining whether an action may morally be criminalized is to determine whether the action is within the state's moral authority (Issue One), and then determine whether criminalizing the action will produce a balance of good over evil (Issue Two). Only if both are answered in the affirmative is it morally permissible to criminalize the action.

(The definition of reflective noncompliance, and my theory of justified reflective noncompliance, will be reviewed at subsequent, appropriate times.)

Neither the definitions of the various spheres, nor the Two-Issue Schema, resolves any substantive issues. I
have not said what actions are within the state's criminalizing authority (if any), what actions (if any), are in the sphere of individual liberty. Similarly, I have not said what actions or laws (if any) are in the sphere of pragmatic noncriminalization. The addressing of substantive issues begins with Chapter Two. But before turning to those substantive issues, more must be said about the correct procedure for determining whether to criminalize conduct—the Two-Issue Schema.

II. State Moral Authority versus Individual Liberty: Borderline Cases

The first operation to be performed in using the Two-Issue Schema is a determination of whether the conduct in question lies within the moral authority of the state. As I have described this operation, it is not a balancing. As regards most kinds of conduct, I believe this holds. However, I do concede that, with respect to borderline cases, determining whether the conduct in question is within the sphere of individual liberty or the region of the state's authority, seems to be a kind of "balancing." One "weighs" the considerations which militate for the action's being within the moral authority of the state against the considerations for placing the action in the
sphere of individual liberty. Indeed, preoccupation with borderline cases may account for the popularity of the "Balancing Schema" I have argued is defective.

I want to present now an example of this kind of weighing of considerations in attempting to resolve the first issue of the Two-Issue Schema. In the example we find John Stuart Mill trying to determine whether "pimping," and the keeping of a "gambling house," are properly placed in the sphere of individual liberty or the region of state moral authority.

Fornication, for example, must be tolerated, and so must gambling; but should a person be free to be a pimp, or to keep a gambling-house? The case is one of those which lie on the exact boundary line between two principles, and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides.3

What is of interest in the ensuing discussion is not Mill's resolution of the matter, for he does not resolve it. He sees a tension between punishing the "accessory" to the act—the gambling-house keeper, the pimp—while not punishing the "principals"—the gambler, the fornicator. What is of interest is how Mill thinks the issue ought to be resolved: by considering, by balancing, arguments with contrary conclusions. Note carefully, though, that Mill does not mix considerations of the moral authority of the state with considerations of practical constraints on
criminalization. The considerations Mill raises all bear upon the matter of determining whether the action falls under the moral authority of the state, or ought to be left to individual liberty.

Mill makes the case for the action's being within the sphere of individual liberty as follows:

On the side of toleration it may be said that the fact of following anything as an occupation, and living or profiting by the practice of it, cannot make that criminal which would otherwise be admissible; that the act should either be consistently permitted or consistently prohibited; that if the principles which we have hitherto defended are true, society has no business, as society, to decide anything to be wrong which concerns only the individual; that it cannot go beyond dissuasion, and that one person should be as free to persuade as another to dissuade.4

These are the considerations which militate for pimping and the keeping of a gambling-house to be left to individual liberty.

In opposition Mill claims that while the society cannot decide that a self-regarding action is "bad" for the purpose of prohibiting it, it can decide that whether the action be good or bad is at least "disputable," and that as such, citizens ought not be unfairly influenced in deciding the matter for themselves. That is, while society may not prohibit people from "x-ing" (where x-ing is self-regarding, but thought of as "bad"), it need
not insure that those wishing to promote x-ing for their personal profit are not hampered. Mill claims of society that

...they cannot be acting wrongly in endeavoring to exclude the influence of solicitations which are not disinterested, of instigators who cannot possibly be impartial—who have a direct personal interest on one side, and that side the one which the State believes to be wrong, and who confessedly promote it for personal objects only. There can surely, it may be urged, be nothing lost, no sacrifice of good, by so ordering matters that persons shall make their election, either wisely or foolishly, on their own prompting, as free as possible, from the arts of persons who stimulate their inclinations for interested purposes of their own.\(^5\)

Thus, in borderline cases, there may well be a balancing involved in determining whether the state has moral jurisdiction over the conduct. However, even in these cases, keeping the two sets of issues distinct is important. Details about the ease or difficulty of enforcing the proposed law are not relevant to this balancing, nor are the considerations relevant to this balancing relevant to the cost-benefit balancing of the second procedure. In the optimal decision procedure, these two sets of issues are kept distinct.

Although I claim that the Two-Issue Schema makes the process of deciding whether to criminalize conduct easier,
I do not claim it makes it easy. In the example just given, Mill clearly agonizes over the matter. In the following chapters, there will be some agonizing concerning certain laws, i.e., in determining whether said laws are elements of the Reflective Noncompliance Set. As I mentioned earlier, on the occasion of defining the R.N. Set, whether certain laws are elements will be controversial. But whether I am persuasive in my determinations or not, it will be seen that the Two-Issue Schema is superior to the Balancing Schema as a procedure for determining whether to criminalize conduct.

III. Another Benefit of the Two-Issue Schema

I have argued that the Two-Issue Schema is a superior procedure for determining whether a certain kind of conduct ought to be criminalized. An essential feature of that procedure is the distinguishing of two different sorts of issues: the issue of whether the state has moral authority over the act in question, and the issue of the costs and benefits of there being such a law. This division of issues is not only an essential feature of the correct decision-procedure: it is also a good rhetorical strategy when arguing against a proposed new law, or arguing that some current law be repealed. Let us see how this works.
In arguing that some extant law be repealed, or some proposed law not be enacted, it is very common to encounter the following objection: "But not having a law against x is condoning x!" The objection can be committed to the following position: "If it's legal, it is condoned; if it is disapproved of, it ought to be illegal." Now as Herbert Packer has noted in *The Limits of the Criminal Sanction*, "It does not pay a statute much of a compliment, a justice of the Supreme Court once remarked, to say that it is not unconstitutional. It may also be said that it does not express much approval of a behavior pattern to say that it is not criminal." While this point is well taken, it is likely to be unpersuasive. The objector claims that decriminalization (or refusal to criminalize) constitutes approval of the action in question; Packer's claim is the reply, "No it doesn't." The taking of a different tack would be helpful: the Two-Issue Schema offers two.

First, one can focus on the first issue, and argue about the proper extent of the state's interference with individual liberty. In the following chapter I discuss the limits of the state's rights to so interfere, and argue for the suggested location of these limits. Such can be used by one taking the tack that the state exceeds
its authority, to the detriment of both individual citizens and the society as a whole, in criminalizing the conduct in question.

Unfortunately, many will not be moved by these arguments, convinced that criminalizing conduct which differs from their own will be to the advantage of both the society and the individual involved. Conduct they do not approve of they claim is within the moral jurisdiction of the state.

At this point, the arguments of the second issue, the balancing, are relevant. Attention is directed not to the ethereal (to the layman) moral issue of state jurisdiction, but to practical matters: What are the ramifications of there being such a criminal statute? I.e., what are the consequences of there currently being such a law, or what would be the consequences of enacting such a law? A showing that the costs of criminalizing the conduct exceed the benefits can be expected to have the desired result: conduct will not be criminalized. The strategy is this: "All right, let's set aside the issue of whether the state has the authority over this kind of action, and look at the impact on society that the action's being criminal will have. The 'social costs' of such a law will be such-and-such; the 'social benefits' will be such-and-such. Do the benefits outweigh the costs?
Would the best interests of society, all things considered, be served by having such a criminal law?" Taking such a tack drives a wedge between the claims, "I do not condone \( x \)," and "\( x \) ought to be criminal." In the context of the Two-Issue Schema it is easily seen that one's criteria for approving of and disapproving of actions must be kept distinct from one's criteria for criminalization. In deciding whether to criminalize actions one must be cognizant of the complex workings of a criminal justice system; in deciding whether to approve of or disapprove of an action, such considerations are wholly irrelevant. Adopting the Two-Issue Schema makes it easier to accept this position: "I do not approve of peoples' doing \( x \), but I do not think \( x \)-ing should be illegal. I believe that \( x \)-ing is wrong, but the consequences of having a law against \( x \)-ing are unacceptable."

In the ideal moral world agreement would be reached on both issues: the extent of the state's moral authority, and the proper use of the criminal law. In this world, one must sometimes establish a thesis (e.g., that a certain class of actions ought not be criminalized) not by arguing the case one believes most important (the state would exceed its moral authority in making the actions criminal), but by arguing the case one believes most likely to persuade those in power (the evils of such
criminal legislation outweigh the benefits). In Chapter Four of this dissertation I will examine the relationship between a law's exceeding the state's moral authority, and a law's having attendant evils which outweigh the benefits its enactment would produce.

IV. Review and Preview

My concern in this chapter has not been to resolve, or even address, any of the substantive issues of criminalization. My concern has been to show that a widely accepted decision-procedure is defective, and to argue that the procedure I offer is superior. The Two-Issue Schema assigns the proper role to two distinct sets of considerations we can agree are relevant to the decision whether to criminalize conduct: the extent of the state's moral authority, and the capabilities (and incapacities) of a criminal justice system.

In the remaining chapters of Part One, substantive issues are addressed. In Chapter Two I defend an essentially Millean position on the proper boundary between individual liberty and state moral authority. That position is further defended in Chapter Three, as I attack the most plausible competitor of Mill's position—a species of paternalism. In the final chapters of Part One, I examine some of the practical constraints on criminalization.
The primary result of Part I will be a specification of (what I judge to be) the elements of the Reflective Noncompliance Set, i.e., the set of laws concerning which reflective noncompliance is morally permissible. In addition, the foundation for Part II of this dissertation will have been constructed. As I wrote in Section VII. of the Introduction I shall argue the moral permissibility of acts of conscientious evasion by attacking Rawls' position that citizens have a duty to obey unjust laws, and by showing the benefits which accrue to both the individual and society from acts of reflective noncompliance. The latter task—adding up the benefits—cannot be performed until the R.N. Set has been specified, until it has been determined which acts of reflective noncompliance are permissible, and which are not.

Let us turn, then, to this task. Where is the boundary between the sphere of individual liberty and the region of state moral authority to be drawn?
FOOTNOTES


4. Ibid., pp. 120-121.

5. Ibid., p. 121.

CHAPTER TWO
THE SPHERE OF INDIVIDUAL LIBERTY;
THE REGION OF STATE MORAL AUTHORITY

I. Introduction

The task of Chapter One was essentially formal, not substantive. I defined a number of sets ("spheres") and discussed their interrelationships; I offered and defended a new decision procedure— the Two-Issue Schema— for determining which actions ought and ought not be made criminal. But I said nothing about the contents of the respective spheres, nor even whether they were populated. Similarly, I did not use the Two-Issue Schema, arguing that particular actions ought or ought not be made criminal.

With this chapter the substantive argumentation begins; I use the Two-Issue Schema, and start the task of specifying the contents of the various spheres.

The position I shall take and defend is essentially that of John Stuart Mill in On Liberty. But of course On Liberty was not written in the vocabulary of Chapter One, or in terms of the Two-Issue Schema. Hence, I must "translate" Mill's position into my own conceptual apparatus. It will emerge, however, that Mill was
sensitive to the various sets of laws and actions which I have isolated, even though he did not explicitly identify and name them.

Near the beginning of *On Liberty*, Mill laments the fact that the determination of which actions ought to be subject to state interference, and which left to individual discretion, is usually a consequence of personal preference, not philosophical position:

There is, in fact, no recognized principle by which the propriety or impropriety of government interference is customarily tested. People decide according to their personal preferences. Some, whenever they see any good to be done, or evil to be remedied, would willingly instigate the government to undertake the business, while others prefer to bear almost any amount of social evil rather than add one to the departments of human interests amenable to governmental control. And men range themselves on one or the other side in any particular case, according to this general direction of their sentiments, or according to the degree of interest which they feel in the particular thing which it is proposed that the government should do, or according to the belief they entertain that the government would, or would not, do it in the manner they prefer; but very rarely on account of any opinion to which they consistently adhere, as to what things are fit to be done by a government.¹

In *Social Philosophy*, Joel Feinberg offers the following list of principles, each of which has been argued as the correct "opinion...as to what things are fit
to be done by a government." Since they can be taken either individually or in combination, they constitute a wide variety of resolutions to the issue of drawing the boundary between individual liberty and the state's moral jurisdiction.

One might hold that restrictions of one's liberty can be justified:

1. To prevent harm to others, either
   a. injury to individual persons (The Private Harm Principle), or
   b. impairment of institutional practices that are in the public interest (The Public Harm Principle)

2. To prevent offense to others (The Public Harm Principle);

3. To prevent harm to self (Legal Paternalism);

4. To prevent or punish sin, i.e., "to enforce morality as such" (Legal Moralism);

5. To benefit the self (Extreme Paternalism);

6. To benefit others (The Welfare Principle).

The task Mill sets for himself in On Liberty is a defense of the "Harm Principle":

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the
form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the 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.³

Later in On Liberty Mill makes the following statement, which must be construed as a qualification of the Harm Principle:

Whenever, in short, there is a definite damage, or a definite risk of damage... the case is taken out of the province of liberty and placed in that of morality or law.⁴

Mill's position is that showing that a person's action will harm, or is likely to harm another, is a necessary, but not a sufficient condition, for just interference with his liberty. As we shall examine in detail, Mill argues that it expresses a necessary condition by arguing that none of the other principles are as important as liberty; Mill argues that it is not sufficient by pointing out cases in which government interference produces less net good than noninterference.

Mill adds another important qualification to the Harm Principle which needs to be noted here: his arguments are designed to protect the liberty of competent adults.
...this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury. 5

Mill here is not claiming that children do not have rights, but acknowledging that the rights of adults and children differ (and this can hardly be questioned), and that his arguments are directed at the rights of adults.

Let us now translate Mill's position into the apparatus of Chapter One. The Harm Principle, suitably qualified, expresses a necessary condition, but not a sufficient condition, for criminalizing a particular action. Thus the Harm Principle circumscribes the moral authority of the state: an action that harms, or is likely to harm another can be interfered with in some way, and the state has the prima facie right to criminalize it. Mill does not hold that such a showing of harm is sufficient for criminalizing the act; other sanctions are available (cf. Section X. below), and the evil consequences of some criminal laws outweigh the benefits those laws produce, and thus they ought not be enacted. (I.e., Mill acknowledges what I have termed the sphere of pragmatic non-criminalization; cf. Chapter Four for a fuller account.)
Thus, the Harm Principle cannot define the limits of the criminalizing authority of the state, for an action's being within that sphere is a sufficient condition for criminalization. Mill does not explicitly say what, in addition to a showing of harm, is sufficient for (moral) criminalization, but his sensitivity to pragmatic constraints on criminalization make it reasonable to believe he would be sympathetic to the Two-Issue Schema.

While Mill acknowledges that criminalizing some actions would produce a net balance of evil over good, he does not address the issue of the appropriate response of citizens to such laws. Rather, Mill concentrates on a specification of the sphere of individual liberty—the set of actions which ought to be left to the individual's discretion. His arguments for the contents of that sphere do not refer to the consequences of there being laws against those actions, but to the benefits which accrue to both the individual and the society if said actions are left to the individual's discretion.

As I have constructed the problem of defending my theory of justified reflective noncompliance, the crucial boundary is between the state's criminalizing authority, and the sphere of individual choice. Mill's arguments do not apply explicitly to either of these. Nonetheless, they are crucially relevant to the enterprise of defending
my theory of justified reflective noncompliance. Since the Harm Principle circumscribes the moral authority of the state, and an action's being within that sphere is a necessary condition for moral criminalization, a determination of what is--and more importantly, what is not--in that sphere is of vital importance. The Harm Principle will exclude many actions from the moral authority of the state (and thus from the criminalizing authority of the state); by the conclusion of Chapter Four, the contents of the sphere of the state's criminalizing authority will be specified.

The case is similar with respect to Mill's defense of the sphere of individual liberty. The position I defend is that reflective noncompliance is morally permissible with respect to any law which makes criminal an action which is in the sphere of individual choice. The sphere of individual choice contains two sets of actions--those in the sphere of individual liberty, and those in the sphere of pragmatic noncriminalization. While Mill's specification of the sphere of individual liberty does not complete the task of identifying the actions one may morally (by my theory of justified reflective noncompliance) perform whether illegal or not, it does accomplish the major portion of it. Specification of the remainder--those
in the sphere of pragmatic noncompliance—will be accomplished by the end of Chapter Four.

Not only do I substantially endorse Mill's position on the limits of the moral authority of the state—the Harm Principle—I substantially endorse his reasons for accepting it. Again, there will be some minor divergences, but the position I take is essentially Milllean. Thus to make explicit and to defend my position is largely a matter of explaining and defending Mill's position. To do this adequately I must divide this chapter into two parts. In Part I, I offer a reconstruction of Mill's argument for the Harm Principle. While On Liberty is brilliant prose, I do not believe it is organized in its most persuasive form. In Part I, I begin with a portion of Mill's "theory of human nature"—an account of what Mill judges essentially human. That is followed by an account of what I call Mill's "vision"—his conception of what human beings can become. But this "vision" can be fulfilled—people are able to fulfill their potential—only if external conditions (especially governmental actions) are appropriate. This constitutes the core of the defense of the Harm Principle. Given what human beings are, and what they can become in the appropriate circumstances, government interference ought to be limited by the Harm Principle.
It should be noted, however, that I do not claim that this is the only possible (or even plausible) defense of the Harm Principle. I do not claim that one must accept Mill's theory of human nature, or his conception of the ideal character type, in order to claim that the Harm Principle is the appropriate boundary between individual liberty and the state's moral jurisdiction— one could reach that conclusion by a different route. The position I do take is that Mill's comments on human nature are entirely plausible, that his conception of the ideal character type is attractive, and that the restrictions on government action necessitated by these ought to be observed. Part I of this chapter is devoted to this enterprise.

In Part II, I address a series of objections which have been raised against Mill. By no means do I answer, or even consider, the myriad objections which have been leveled at On Liberty; I have selected for consideration those which are most relevant to my overall enterprise of defending a theory of justified reflective noncompliance.

Finally, a note on format. The section numbers of this chapter run consecutively throughout the entire chapter, irrespective of the two major "divisions."
II. (A Fragment of) Mill's Theory of Human Nature

I do not believe that Mill, in On Liberty, offers a "complete" theory of human nature—a complete account of what is essentially human. Rather, he focuses attention of a few salient features of such a theory, features which are relevant to his position concerning the boundary between the sphere of individual liberty and the region of state moral authority.

The fragment of a theory of human nature we find in On Liberty has two parts. First, human beings, just in virtue of being human, have faculties. Mill refers to the faculties of "perception," "judgement," "discriminative feeling," "mental activity," and "moral preference" "as the distinctive endowment of a human being."⁶ Later he adds "observation," "reasoning," and "firmness and self-control."⁷ Now these faculties can be improved, sharpened, developed, etc., or left to atrophy. Mill writes, "the mental and moral, like the muscular, powers are improved only by being used."⁸

Second, human beings are such that they differ widely concerning sources of pleasure and pain.
...different persons...require different conditions for their spiritual development; and can no more exist healthily in the same moral than all the variety of plants can in the same physical, atmosphere and climate. The same things which are helps to one person toward the cultivation of his higher nature are hindrances to another. The same mode of life is a healthy excitement to one, keeping all his faculties of action and enjoyment in their best order, while to another it is a distracting burden which suspends or crushes all internal life.9

III. Mill's "Vision"

I turn now to a discussion of Mill's "vision," his conception of the ideal character-type. This is what Mill believes that human beings can become (if conditions are appropriate), and indeed ought to become. Not surprisingly; this "vision" is based on the (partial) theory of human nature discussed in the previous section.

Mill envisions the ideal (yet possible) character as a person who fulfills two requirements. First, he is a person who has developed, who has sharpened his faculties. He is a person who uses, rather than allows to atrophy, the human faculties of "perception," "judgement," "discriminative feeling," "mental activity," "moral judgement," etc.10 This nexus of faculties is essentially human, according to Mill, and in the ideal character, these are developed and sharpened.
Second, the ideal character is a person who develops, who makes use of his talents. Loosely, a person's talents are those abilities or competencies which distinguish him from others; a person who is talented is able to perform some task, make some judgment, etc., markedly better than others. A person's talents separate him from his peers; indeed, they are abilities which individuate him. The ideal character is one who capitalizes on these individuating skills, abilities, etc. Mill writes,

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation....

Mill believed that each person should develop his faculties and talents, so long as such development did not harm, or constitute a clear and present danger of harming, other persons.

This leads naturally to a definition that is rough, but adequate for my purposes. I shall say that a person is a "genuine individual" just in case that person has developed his talents and sharpened his faculties. Of course we have no crisp principles of individuation for talents or for faculties. Just how many "talents" a person has, or just how many "faculties," is a question which cannot be answered with any precision. In addition,
I do not think it possible, or important, to say how sharpened, or how developed, talents and faculties must be for a person to count as a "genuine individual." The genetic endowment of some individuals is so rich that it is not possible for them to develop all the potential they possess. The endowment of others is so meager that the development of a "single" (by our crude, intuitive principle of individuation) talent is an achievement. But no part of my argument depends upon a determination of whether any particular individual is indeed a "genuine individual." Indeed, both number of talents and degree of development of talents (and faculties) are matters of cardinality rather than ordinality. In at least some cases, we can say of two individuals that one has more talents, or has more developed a talent or talents, even though we cannot precisely enumerate talents, or specify a degree of development. Perhaps genuine individuality ought to be thought of as a continuum, and not a "threshold" which must be crossed. But this too is a needless complication. What Mill advocates, and I hereby endorse, is that people develop talents and sharpen faculties—within the constraints of the Harm Principle—and the greater the development, both in depth and breadth, the better. At what point of a continuum of diverse and
intense development one becomes a "genuine individual" cannot be precisely specified. I shall call a person a genuine individual just in case that person has worked to increase and sharpen his faculties, and has developed talents—all the while acknowledging the great differences in genetic endowment and degree of development.

Why is Mill so strong an advocate of faculty and talent development, of persons' becoming genuine individuals? Taking Mill at his word, we can expect the arguments to be utilitarian: "I regard utility as the ultimate appeal on all ethical questions..." However, in looking for the utility of faculty and talent development, we must look not solely to short-term utility, e.g., the utility of the activities of development themselves, but to the impact of having developed talents and faculties on one's entire life. The passage from Mill continues "...it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being." (What Mill means by "progressive being" will be examined later in this chapter, and in the following chapter.)

Of course, what counts as "utility" is a question with many answers; the number of specifications of utility approaches the number of utilitarian theorists. I present now four arguments, each of which can fairly be considered a specification of "utility," each of which is designed to
justify Mill's (and my) advocacy of genuine individuality. In the first, I consider the role of developed faculties and talents in having a pleasurable life. In the second, I present John Rawls' account of self-esteem (from A Theory of Justice\textsuperscript{14}), and show how the relationship between developed talents and self-respect. I derive further support for this argument from Robert Nozick's Anarchy, State, and Utopia.\textsuperscript{15} The third argument focuses on the relationship between individuals' having developed their respective talents, and the value of the society they constitute. Finally, I make a few comments about the relationship between a society composed of genuine individuals, and the stability of that society.

1. The Argument from a Pleasurable Life

What is the value of having "acute faculties," of developing one's talents—in short, of becoming a "genuine individual"? The answer to this is straightforwardly utilitarian: one increases one's opportunities for happiness. The more, and more varied one's talents, the more sources of happiness available to him. The person skilled at rock climbing, volleyball, bridge, and sculpture has available to him more sources of happiness than someone unskilled at anything, or skilled at only one. In a similar vein, the more acute a faculty, the more
happiness that is available from that pursuit. Now this is not to say that every person's happiness is strictly speaking a function of his or her developed capacities and talents, that the more and better developed one's talents, the happier one inevitably is. Nor is it to say that a person with developed faculties is inevitably happier than someone with less developed faculties. What is claimed is that, as a rule, developing one's faculties leads to greater happiness. To become a genuine individual is to adopt the optimal strategy for living a pleasurable life.

Now Mill claims (and I concur) that one achieves acute faculties by exercising them: "observation," "reasoning," "judgement," "discrimination," "firmness and self-control" are developed and sharpened only if one observes, reasons, judges, etc. Consequently, one is most likely to live happily only if one's faculties and talents are developed, and they will be developed only if they are exercised. But this is not to say, however, that the exercising of a faculty cannot be a source of happiness itself. Jogging leads to strengthened muscles (especially the heart), better wind, and (generally) better health. But while some find that jogging has instrumental value only (they hate jogging itself), others enjoy jogging itself. An analogous claim can be made concerning other faculties, both physical and mental. They have
instrumental value in the pursuit of happiness, and for many, intrinsic value as well.

The conclusion of the Argument from a Pleasurable Life is that developing one's talents and faculties—or at least, having developed talents and faculties—leads immediately (if not inevitably) to a more pleasurable life.

2. The Argument from Self-Respect

There is very little on which John Rawls (in A Theory of Justice) and Robert Nozick (in Anarchy, State, and Utopia) agree. However, they are in substantial agreement about the value of self-respect (often called by both "self-esteem"). And it would be perfectly coherent, I believe, for Mill qua utilitarian to cite self-respect as one of the benefits of living a plan of life in which the development and sharpening of faculties, the development of talents, played a central role.

Rawls offers the following definition of self-respect, with which I have no quarrel:

We may define self-respect (or self-esteem) as having two aspects. First of all, ...it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions.16

Continuing, Rawls poignantly describes the life of one lacking self-respect:
When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue in our endeavors...Without it nothing can seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and activity becomes empty and vain, and we sink into apathy and cynicism.  

Two interrelated yet distinct questions immediately arise: How can one gain self-respect (avoiding this cynicism and apathy), and is it possible for everyone (or nearly everyone) to gain self-esteem? Let us take these in order, looking first to the acquisition of self-respect.  

The essence of self-respect acquisition, for both Rawls and Nozick, is the development of a skill, the expertise at some activity, which "sets apart" the individual from his peers. Rawls claims of our endeavors that "...others tend to value them only if what we do elicits their admiration or gives them pleasure. Thus activities that display intricate and subtle talents, and manifest discrimination and refinement, are valued by both the person himself and those around him." Here Rawls neatly connects the development of talents and faculties with the gaining of self-respect.  

Becoming a "genuine individual" entails developing those aspects of oneself which distinguish one from one's peers. Nozick asks rhetorically why the talents and
abilities of other people should affect one's own self-esteem; the reason "is that we evaluate how well we do something by comparing our performance to others, to what others can do."¹⁹ Nozick later elaborates on this point, illustrating with examples.

People generally judge themselves by how they fall along the most important dimensions in which they differ from others. People do not gain self-esteem from their common human capacities by comparing themselves to animals who lack them. ("I'm pretty good; I have an opposable thumb and can speak some language.") Nor do people gain or maintain self-esteem by considering that they possess the right to vote for political leaders, though when the franchise was not widely distributed things may have been different. Nor do people in the United States today have a sense of worth because they are able to read and write, though in many other societies in history this has served. When everyone, or almost everyone, has some thing or attribute, it does not function as a basis for self-esteem. Self-esteem is based on differentiating characteristics; that's why it's self-esteem.²⁰

It would be easy to infer from all this that the only people who can gain self-respect are those who have been generously endowed by nature, those who have been born with physiological prerequisites of the various talents and abilities. This would be true if all persons competed for self-esteem as regards the same activity, or a small set of activities. If one could have self-esteem only if one could sing well, or play a musical instrument well, or
hunt well, or teach well, then only a small number of persons could have self-respect. However, as even this miniscule list suggests, there are very many different activities in which one might engage, and earn the admiration and respect of others that is essential to self-respect. (And, it might be added, new activities for founding self-respect are being "discovered" continuously.) According to Rawls, "what is necessary is that there should be for each person at least one community of shared interests to which he belongs and where he finds his endeavors confirmed by his associates."

Generalizing, Rawls writes,

It normally suffices that for each person there is some association (one or more) to which he belongs and within which the activities that are rational for him are publicly affirmed by others. In this way we acquire a sense that what we do in everyday life is worthwhile. Moreover, associative ties strengthen the second aspect of self-esteem, since they tend to reduce the likelihood of failure and to provide support against the sense of self-doubt when mishaps occur. To be sure, men have varying capacities and abilities, and what seems interesting and challenging to some will not seem so to others. Yet in a well-ordered society anyway, there are a variety of communities and associations, and the members of each have their own ideals appropriately matched to their aspirations and talents.

To sum up: the importance of self-respect can hardly be over-emphasized. Without self-respect, life is a
barely tolerable (and in some cases intolerable) burden; with self-respect life is fulfilling and satisfying. (It is difficult to avoid sounding trite and banal here; I believe the reason for this is that self-esteem really is that central to human happiness—though this sounds trite and banal too.) And one achieves or fails to achieve self-respect depending upon the development of one's faculties and talents (and, of course, finding a group in which those are appreciated).

The pressing question now is this: how can the probability of a given person's finding an "appreciative group" be increased? Nozick's answer, with which I agree, is that social tolerance of, and indeed encouragement of, a wide variety of activities ("dimensions" for Nozick) in which people can participate (dimensions on which people can "score"). The greater the number and diversity of activities on which self-esteem can be based, the higher the probability a person will achieve self-respect.

The most promising ways for a society to avoid widespread differences in self-esteem would be to have no common weighting of dimensions; instead it would have a diversity of different lists of dimensions and of weightings. This would enhance each person's chance of finding dimensions that some others also think important, along which he does reasonably well, and so to make a nonidiosyncratic favorable estimate of himself. Such a fragmentation of a
common social weighting is not to be achieved by some centralized effort to remove certain dimensions as important. The more central and widely supported the effort, the more contributions to it will come to the fore as the commonly agreed upon dimension on which will be based people's self-esteem.23

Thus, the two essential ingredients of self-respect—a fundamental human good—are (1) the development of faculties and talents, and (2) wide variety in the activities accepted as bases of self-respect. On the assumption that self-respect produces utility (and this can hardly be doubted), considerations of self-respect militate for developed faculties and talents.

(It is obvious that actions of the government, especially its use of the criminal law, will determine to a large extent whether this diversity in accepted dimensions will be realized. Here the importance of self-respect plays a role in determining limits on the moral authority of the state; in Chapter Five, self-respect will be the basis of one argument for the central thesis of this work, the moral permissibility of reflective noncompliance.

3. The Argument from the Enriched Society

Suppose Nozick's prescription is followed; suppose that in some society "a diversity of different lists of dimensions and of weightings"24 is fostered. One
consequence of this (as noted above) is an increased probability that every citizen will find some dimension or other on which to found his self-esteem; this is the immediate benefit to the individual. And of course not only is this beneficial to existing members of society, but it will benefit those born into such a society: the probability that any given person born into the society will find a dimension on which to base self-respect is enhanced. But even very talented, very gifted persons will require only a few dimensions for the founding of self-respect; what is the value to a person of his society's having dimensions on which he does not base self-esteem? Mill's answer: a society in which a wide variety of competences can support self-respect is a more interesting, more stimulating society in which to live. In the following passage Mill couples (what I have called) his "vision" with this benefit:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant ailment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making
the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, that is, therefore, capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more life in the mass which is composed of them.25

The dimensions which are not immediately relevant to one's self-respect are valuable for two reasons. First, they make the society a better place in which to live, a more interesting and invigorating environment. Second, those dimensions not crucial to one's self-respect at a given time may become crucial later. Latent talents emerge as people discover new sports, arts, etc., i.e., new ways of developing individuating features of themselves. The fostering of many dimensions is self-perpetuating and indeed self-enhancing: the more activities on which self-respect can be founded, the more new activities will be discovered and encouraged. Thus, in addition to the immediate advantages of the encouragement of variety in dimensions, there are these mediate benefits: society is made a better place in which to live, and the growth of individuals, the entering into new activities is encouraged.

4. The Argument from Non-Envvy and Social Stability

The fourth specification of the utility of individuals' developing faculties and talents is less straightforward
than the previous three, but nonetheless important. It assumes the correctness of the Argument from Self-Respect, and like that argument, is based on a Rawlsian position.

In arguing that the rational legislators in the "original position" would select "Justice as Fairness," Rawls assumes that the legislators are not motivated by envy. Furthermore, Rawls argues at length that Justice as Fairness will not arouse envy in the citizenry. One is compelled to ask: why is Rawls so concerned about envy? why does he claim that envy is "something to be avoided and feared, at least when it becomes intense"?

According to Rawls, when we are envious

...we are willing to deprive [others] of their greater benefits even if it is necessary to give up something ourselves. When others are aware of our envy, they may become jealous of their better circumstances and anxious to take precautions against the hostile acts to which our envy makes us prone. So understood envy is collectively disadvantageous: the individual who envies another is prepared to do things that make them both worse off, if only the discrepancy between them is sufficiently reduced.

Envy is destabilizing; people who are envious are less likely to support just institutions. Utility favors the reduction of envy in society in that utility favors stability over instability, at least when arrangements are reasonably just. And one way to combat envy is to promote self-esteem; Rawls writes
...the plurality of associations in a well-ordered society, with their own secure internal life, tends to reduce the visibility, or at least the painful visibility, of variations in men's prospects. For we tend to compare our circumstances with others in the same or in a similar group as ourselves, or in positions that we regard as relevant to our aspirations. The various associations in society tend to divide it into so many noncomparing groups, the discrepancies between these divisions not attracting the kind of attention which unsettles the lives of those less well placed.29

As was noted above, in the Argument from Self-Respect, the price of membership in such envy-combatting groups is the development of a skill or skills which others can respect and admire.

Thus, as an utilitarian, Mill can argue for the development of skills and talents in that such is required for membership in groups in which one's value is affirmed, and this reduces envy. Since envy is destabilizing, and utility favors (at least just) stability, utility favors the development of one's talents, one's becoming a genuine individual.

To summarize the arguments of this section: the ideal character, according to Mill, is one who has developed his faculties (the potentials which human beings have in common), and his talents (those special skills which individuate persons). Mill can hold this, and remain a
utilitarian (as he claimed he is) because utility favors the development of faculties and talents. First, developing one's talents and faculties is the best strategy for attaining a pleasurable life. Second, such development is the foundation of self-esteem. Third, society is invigorated when the individuals who compose it have developed their talents and faculties. Finally, such a society is more stable.

One final issue needs to be discussed in this section: how does one develop one's faculties and talents? According to Mill, it is by constructing and living out a plan of life.

He 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. He must use observation to see, reasoning and judgement to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgement and feelings is a large one. 30

One becomes a genuine individual, a person whose faculties and talents are developed, by exercising those faculties. But exercising faculties requires a sphere of liberty, a
set of actions over which the individual is sovereign. Without such, he does not have alternatives to weigh, choices to make, and to hold fast to, etc. Let us look now at the contents of the sphere of individual liberty.

IV. The Sphere of Individual Liberty

At a number of points I have used the expression "sphere of individual liberty," meaning the set of actions which ought not be interfered with legally, the set of actions concerning which it ought to be each individual's decision whether to do or forebear. I provide, in this section, Mill's specification of the sphere of individual liberty, and in the following two sections his arguments that these actions ought not be subject to the state's control.

In specifying what actions ought and ought not be subject to the state's interference (i.e., what actions are within the moral jurisdiction of the state), Mill's concern is to avoid two grave evils. If the state's moral jurisdiction is too limited, if the sphere of individual liberty is too large, the result will be a society in which the strong prey on the weak. Mill acknowledges that "all that makes existence valuable to anyone depends on the enforcement of restraints upon the
actions of other people." Without some restraints, happiness cannot be maximized. Yet, if the sphere of liberty is too small and the region of state moral authority too large, the growth of citizens will be stunted. Citizens will not become genuine individuals, and the utility discussed in the previous section will not be realized. To maximize utility is to specify the sphere of individual liberty as dictated by the Harm Principle, viz:

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological....Secondly, the principle requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the same liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others: the persons combining being supposed to be of full age and not forced or deceived.

Mill's argument for the first element--freedom of thought and speech--begins as a simple constructive dilemma--a disjunction, and a showing that both disjuncts lead to the same conclusion. Having completed this,
though, Mill considers a third alternative, another disjunct, and shows that this leads to the same conclusion also. Mill says that this argument for the second element—freedom of life-style—will follow that format, but in fact it does not. Thus, I shall offer a reconstruction of Mill's Chapter Three, "Of Individuality, As One of the Elements of Well-Being," constructing first the dilemma, and then adding a disjunct which leads to the same conclusion as the original two. Finally in that section I indicate a crucial difference between the arguments, a difference which strengthens Mill's case for freedom of life-style.

V. Freedom of Thought and Discussion

In Chapter Two—"Of the Liberty of Thought and Discussion"—Mill argues against the encroachment, by either criminal sanctions or the weight of popular sentiment, on the freedom of people to have and discuss opinions. He assumes without discussion (as shall I) that the pursuit of truth is a good; the arguments of Chapter Two of On Liberty are concerned with the best conduct, vis-a-vis "thought and discussion," for attaining truth. Mill's ultimate conclusion, of course, is that there ought to be liberty of thought and discussion. Mill offers the
following "preview" of his argumentation, indicating that it will proceed as a constructive dilemma.

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.33

On the supposition that the "received opinion" is false, liberty of thought and discussion is crucial in the search for the truth. While it may be the case that no extant competitor is correct, free discussion is a good strategy to adopt. On the supposition that the received opinion is true, there is still an important role to be played by discussion: "if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth."34 The individual whose mental faculties are well developed has grounds for his beliefs, and can defend his beliefs. Acquiring this skill requires defending one's position against sincere advocates of contrary positions, not mock adversaries:

He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole
force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.35

Thus, whether the received opinion is true or false, freedom of discussion is essential.

Having completed the dilemma, Mill argues that the disjunctive premise of the dilemma—"received opinion is either true or false"—misses an important possibility: "...there is a commoner case than either of these, when the conflicting doctrines, instead of being true and the other false, share the truth between them..."36 What is the value of freedom of discussion in these circumstances? Mill continues: "...and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part."37 I think it apparent now that the disjunction was inadequate in just the way Mill claims. And the truth of the matter is more likely to emerge from free discussion of the issues and positions than from censored debate, or the absence of debate.

Whether the received opinion is true, or a mixture, liberty of thought and discussion is a good.
VI. Freedom of Life-Style

At the beginning of On Liberty's third chapter, Mill says that he will

...examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow-men, so long as it is at their own risk and peril.38

Of course, since what he is arguing for in this chapter (freedom of life-style) is different from what he argued for in the previous chapter (liberty of thought and discussion), the reasons cannot be, strictly speaking, "the same". Nor does the structure of Mill's Chapter Three parallel the distinctive structure of Chapter Two: a dilemma, followed by a modification of the disjunctive premise of the dilemma. Like Chapter Two, however, concern with creating the environment most conducive to individuality pervades his work. What I propose to do is to reconstruct Mill's third chapter, following the pattern set in his previous chapter. I think this will aid in a clear explication of his view.

In this interpretation, the parallel (but not, strictly speaking, "analogue") of "received opinion" is "customary life-style"; the parallel of "contrary opinion"
is "contrary life-style"; the parallel of "truth" is "life-style most conducive to individuality".

Let us suppose that the customary life-style is not the most conducive to individuality. If this is the case, contrary life-styles are important; developing contraries is a good strategy in the search for the optimum (even if no extant life-style is optimal). On the contrary, suppose that the customary life-style is the most conducive to individual fulfillment. Just as the truth of an opinion is best determined in the context of free and open discussion, the life-style most likely to lead to individual fulfillment is best determined in open competition, wherein "the worth of different modes of life [is] proved practically." Thus, whether the customary life-style is the most conducive to individuality, or is not, a variety of life-styles in society is preferable.

Having completed the dilemma in Chapter Two, Mill amended the disjunctive premise: it was likely, he maintained, that neither the received opinion or its competitors were wholly true or wholly false, but both contained a mixture of truth and falsity. A parallel move can be discerned in Chapter Three.

Mill observes that "originality is the one thing which unoriginal minds cannot feel the use of." However, there is a use for originality in life-style. As it is likely
that neither the received nor the contrary opinion is wholly true, even less likely is any single life-style--the customary mode of living, or any of its competitors--the most conducive to individual fulfillment. Portions of each are valuable, other portions not; Mill laments our forgetting that:

...the unlikeness of one person is generally the first thing which draws the attention of either to the imperfection of his own type, and the superiority of another, or the possibility, by combining the advantages of both, of producing something better than either.41

Again, it is from an extant array of life-styles that that most conducive to fulfillment can best be selected.

Now this is not to say that everyone's experiment will benefit mankind. Mill acknowledges this, but argues for a wide range of experiments anyway:

...there are but few persons, in comparison with the whole of mankind, whose experiments, if adopted by others, would be likely to be any improvement on established practice. But these few are the salt of the earth; without them, human life would become a stagnant pool. Not only is it they who introduce good things which did not before exist, it is they who keep the life in those which already exist.42

Thus, whether the customary mode is most conducive to individual fulfillment, or a competing life-style is, or neither is but both include features of the life-style, that is, experiments of living ought to be fostered.
I find the above arguments persuasive; the case in favor of experiments of living is compelling. But there is a crucial dissimilarity between "truth" and "individual fulfillment"—the "goods" argued for—and the acknowledge­ment of this strengthens dramatically the case for experi­ments of living. Whatever one's theory of truth, it is generally defined that no two contrary statements can both be true. Is this the case with life-styles, i.e., is it the case that no two contrary life-styles can be "the best," vis-a-vis individual fulfillment? Mill holds, and I believe correctly, that fulfillment is individual­relative in a way that truth is not. He writes:

Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies, that unless there is a corresponding diver­sity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable.43

Now this argument for diversity of life-styles in society rests on an empirical claim—that different modes of life will be found fulfilling by different persons, that the life-style which is fulfilling for one will be stultifying for another, and conversely. But it is difficult to see how this claim could be controversial. This provides yet
another reason for variety in a society's experiments of living.

VII. Conclusions: Division One

My attempt in Division One has been to offer Mill's case for the Harm Principle in its most persuasive form. To that end, I began with his comments on human nature—human beings have a nexus of faculties and talents just in virtue of being human, which can be improved through use, or left to atrophy through disuse. I then offered four arguments in support of the claim that people ought to develop their respective faculties. These arguments can be considered either as straightforward argumentation, or specifications of utility created by the sharpening of faculties. But the activities of faculty and talent development require a sphere of individual liberty, a set of actions over which the individual is sovereign. I have provided Mill's specification of the contents of that sphere, and his arguments for it. The first appears in On Liberty as a modified constructive dilemma; the second has to be reconstructed.

Let us turn now to some of the objections which have been raised against Mill.
Division Two

VIII. Introduction

In this, Division Two of Chapter Two, my attention is still directed to Mill's *On Liberty*. The task of Division One of this Chapter was to reconstruct Mill's argument, presenting it in what I judge to be its most persuasive form. The section of this division are examinations of specific issues which arise; in each, I either note a qualification Mill makes, or offer a clarification of his position. The goal throughout remains the demarcation of the boundary between the sphere of individual liberty and the region of the state's moral jurisdiction, so that the Reflective Noncompliance Set—the set of all laws concerning which reflective noncompliance is morally permissible—can be specified.

IX. Private and Public Harm

In *Social Philosophy*, Joel Feinberg subdivides the Harm Principle as follows:

a. injury to individual persons
   (*The Private Harm Principle*),...

b. impairment of institutional practices that are in the public interest
   (*The Public Harm Principle*).44
Throughout this dissertation, when I claim to be defending "the harm principle," I shall mean both subdivisions, i.e., both private and public harm. When one contextlessly thinks of "harming" another, what usually springs to mind are instances of direct, bodily injury: assault, mayhem, rape, murder. There are, however, other ways of harming others, ways which, though more subtle, are sufficiently serious to warrant the intervention of the state. Surely an inadequate defense force poses a serious threat of harm to all citizens. (According to the Harm Principle, the threat of harm is sometimes sufficient to warrant intervention.) Similarly, inadequate police or firm services make harm in the most obvious sense (personal bodily) a likelihood. These, and many other public institutions, depend upon tax dollars—without taxes, such institutions could not exist, and their non-existence constitutes harm. Thus, payment of tax dollars, in support of at least some institutions, is required by the Harm Principle.

That is not to say, of course, that just any tax law is justified by the Harm Principle, or that the elimination of any particular public institution constitutes a harm. There are unjust (and unjustifiable) tax laws, and social institutions which do not prevent harm from befalling the citizenry. Each law, each
institution, must be judged on its own merits. My point here is simply that adoption of the Harm Principle exclusively does not preclude advocating public institutions, or claiming that, in at least some circumstances, the Harm Principle generates a moral obligation to obey tax laws.

I include this section to clarify my position regarding the Harm Principle; I include it under a discussion of Mill in that an interesting exegetical question is raised. Is On Liberty a defense only of the private Harm Principle, or of both public and private? Put another way: is Feinberg's subdivision an addition to Mill, or an elaboration on Mill? I believe the latter is correct.

Early in Chapter Four, Mill is concerned with distinguishing the sphere of individual liberty from the sphere of social concern. The discussion of society's jurisdiction begins with this passage:

> It is far otherwise if he has infringed the rules necessary for the protection of his fellow-creatures, individually or collectively.  

Here, I suggest, Mill shows sensitivity to the private/public distinction, and takes himself to be placing both private harm and public harm within the jurisdiction of the state. (Of course, having jurisdiction does not entail having the right to criminalize conduct. Cf. Chapter Two, Section X. below—the discussion of sanctions.)
X. Species of Sanctions in Mill

Concerning self-regarding conduct, Mill writes, "In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences." In mentioning two "kinds" of freedom, Mill indicates a belief in two "kinds" of constraints: social and legal. A careful reading of *On Liberty* reveals that there are two species of social constraint: what I shall call the "Social Snub" and the "Social Sanction." These, along with the "Criminal Sanction," constitute three "degrees" of social response to behavior found disagreeable.

At no time does Mill link tolerance of life-styles contrary to one's own with an obligation to associate with those living in different ways. He claims:

We have a right, also, in various ways, to act upon our unfavorable opinion of anyone, not to the oppression of his individuality, but in the exercise of ours. We are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to choose the society most acceptable to us. We have a right, and it may be our duty, to caution others against him, if we think his example or conversation likely to have a pernicious effect on those with whom he associates. We may give others a preference over him in optional good offices, except those which tend to his improvement.47

This conduct toward others I shall term the Social Snub. As I read Mill, he does not abandon utilitarianism
here, but the "subject" of the utilitarian calculus is not individual acts, but a set of acts. What is put to the test of utility is not whether individual Social Snubbings produce a greater overall happiness, but whether allowing individuals to choose whether to seek another's company, or avoid him, produces greater happiness than proceeding case-by-case. Mill's position, and I concur, is that greater happiness is produced by allowing people to choose the company they keep, than would be produced if one were obligated to keep company with a person whenever that person's happiness exceeded one's own displeasure. To illustrate the point: overall happiness is increased by letting popular entertainers choose the company they keep, rather than having their social schedule dictated by "groupies."

I discern a similar strategy in Mill vis-a-vis acts of paternalistic intervention. This will be discussed at length in the following chapter.

A key in distinguishing the Social Sanction from the Social Snub is found in a qualification Mill makes in the passage above--we are not entitled to "parade" our avoiding another's society. In parading such avoidance, we make our opinion public, and thereby encourage others to have a similar low opinion of the individual (and others of his ilk). In its more serious forms, the Social
Sanction is an orchestrated effort of letters to the editors of papers, editorials, and other media events (movies, plays, novels, etc.) designed to initiate and sustain attitudes condemning a kind of conduct or lifestyle—e.g., to mobilize public opinion against hippies, homosexuals, war protestors.

That the Social Sanction is distinguishable from the Social Snub is more evident in this passage from Mill:

> It makes a vast difference both in our feelings and in our conduct toward him whether he displeases us in the things we think we have a right to control him, or in things in which we know that we have not. If he displeases us, we may express our distaste, and we may stand aloof from a person as well as from a thing that displeases us; but we shall not therefore feel called upon to make his life uncomfortable. We shall reflect that he already bears, or will bear, the whole penalty of his error....

And early in *On Liberty* Mill takes note that society has at its disposal the means of tyrannizing the individual independently of the Criminal Sanction.

> But reflecting persons perceived that when society is itself the tyrant—society collectively over the separate individuals who compose it—its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries.

Included under "political functionaries" would be the police force, the courts, the prisons—i.e., the criminal justice system which enforces the Criminal Sanction.
As mentioned above, the Social Snub requires no jurisdiction. In contrast, the Social Sanction requires arguments in its behalf. I think it uncontroversial that waging a public opinion war against a person or group is a serious moral matter; there is the possibility of gravely wronging others. This is not to say, of course, that no use of the Social Sanction is justified; following Mill, I believe there is a legitimate role for it. Mill describes that role:

The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law.50

The Social Sanction is an intermediary between the Social Snub and the Criminal Sanction. It represents wider disapproval than the Social Snub, which is the action of a single individual. Yet it represents milder disapproval than the Criminal Sanction—while the behavior in question is not approved of, it does not merit loss of liberty or property (an account of the Social Sanction's being invoked appears in Chapter Five).

Unquestionably, the Criminal Sanction is the most serious societal response to the conduct of which the society disapproves, and the imposing of this sanction requires thorough justification. Much of the material
which follows is devoted to the issue of what is required in justifying the Criminal Sanction. What is important to note at this point is that there are several options available to us regarding conduct we disapprove of. Disapproval does not entail that it ought to be made criminal. Even if we agree that a certain action ought to be discouraged, we must ask about the appropriate kind of discouragement—whether it ought to be discouraged by the happenstance of people shunning the company of those who engage in it, or by organized social opinion, or by jailing those who so engage.

XI. Offense and Harm

Another concern of Joel Feinberg's, in *Social Philosophy*, is that "the unsupplemented harm principle, and its corollary, the clear and present danger test" may not "do justice to all of our particular intuitions in the most harmonious way" regarding what behavior ought to be criminalized. His final recommendation is that the Harm Principle be supplemented with the Offense Principle (cf. Section I. above), qualified as follows:

If we are to accept the offense principle as a supplement to the harm principle, we must accept two corollaries which stand in relation to it similarly to the way in which the clear and present danger test stands to the harm principle. The first,
the standard of universality...For the offensiveness (disgust, embarrassment, outraged sensibilities, or shame) to be sufficient to warrant coercion, it should be the reaction that could be expected from almost any person chosen at random from the nation as a whole, regardless of sect, faction, race, age, or sex. The second is the standard of reasonable avoidability. No one has a right to protection from the state against offensive experiences if he can effectively avoid these experiences with no unreasonable effort or inconvenience.

Feinberg's position is that no one ought to be exposed to scenes, pictures, etc., which nearly everyone would find offensive, at least under the circumstances, and which cannot be easily avoided. His reasoning for this is revealing. Citing an example of conduct legitimately subject to state coercion, he writes:

> The sight of nude bodies in public places is for almost everyone acutely embarrassing. Part of the explanation no doubt rests on the fact that nudity has an irresistible power to draw the eye and focus the thoughts on matters that are normally repressed. The conflict between these attracting and repressing forces is exciting, upsetting, and anxiety-producing.

After a brief discussion of the phenomenology of shame, the result of such experiences, Feinberg continues,

> The result is not mere "offense," but a kind of psychic jolt that in many normal people can be a painful wound. Even those of us who are better able to control our feelings might well resent the nuisance of having to do so.
Feinberg is attempting to show that the unsupplemented harm principle is inadequate; it cannot justify laws regarding public nudity, or prohibiting a billboard which graphically extolled the virtues of certain sexual acts. The attempt takes the form of arguments which might be offered by an advocate of the unsupplemented Harm Principle that prohibiting public nudity, or certain billboards, is outside the legitimate jurisdiction of the state. These arguments, put into the pen of an imaginary opponent, are unconvincing. They rest on an impoverished conception of harm—bodily injury—and suggest that unless nudity, billboards, or whatever, are likely to lead to riots of the populace (and thus to bodily injury), they cannot be prohibited under the Harm Principle. But this is false. If an "experience" is likely to disrupt the psychic equilibrium of nearly everyone, and cannot be avoided easily, then it presents a clear and present danger of harm, and is permissibly controlled by the state. Offenses of this sort are a species of harm. Thus, the two corollaries of the offense principle delineate a set of disruptions which are other-inflicted, not self-inflicted wounds. And the offense principle is not needed to supplement the Harm Principle, as Feinberg maintained: any conduct, display, etc., which ought to be outlawed, and can be under the Offense Principle, can be outlawed under the Harm Principle.
I believe that considering seriously offensive behavior a species of harm is Mill's position in *On Liberty*. He claims at numerous points to be an advocate of only the Harm Principle, and in the following passage he clearly indicates his belief that such behavior is within the sphere of state jurisdiction.

> Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited. Of this kind are offences against decency...  

The operative phrase, of course, is "coming thus within the category of offences against others," interesting to note is that Mill did not write "offensive to others," but the stronger "offences against others." His reference to actions done "publicly" anticipates the second of Feinberg's corollaries, though it is less precise.

It is advantageous to eliminate the offense principle as an additional ground for state coercion for a reason other than mere theoretical simplicity. There is a danger, which Feinberg recognizes, inherent in promoting the Offense Principle as a ground: "nonconformist and eccentric expression generally" might be suppressed by laws so justified. He writes:
There is good reason to be "reluctant" to embrace the offense principle...
People take perfectly genuine offense at many socially useful or harmless activities....Moreover, widespread irrational prejudices can lead people to be disgusted, shocked, even morally repelled by perfectly innocent activities, and we should be loath to permit their groundless repugnance to override the innocence.58

Feinberg's proposal to keep the Offense Principle from running amok are the two corollaries provided above. Subsuming the Offense Principle under the Harm Principle is, I claim, a better solution. Not only would nearly everyone have to be offended, and avoidance unreasonable or inconvenient, but the offense serious enough to be considered a harm, and the resultant wound not self-inflicted.

Discussion of obscenity and pornography recurs in this work. In discussing the grounds for state interference, I shall assume the Harm Principle unsupplemented by another principle, but this strategy for subsuming certain instances of seriously offensive behavior under the Harm Principle must be borne in mind.

XII. Insignificant Harm

According to the schema I presented in Chapter One, the argument between Mill and his "external" critics centers about "legal principles"--the characteristics of
actions relevant in a determination of whether the state has a *prima facie* right to "control" such actions. For Mill, the only relevant characteristic is harm to others; for the paternalist, e.g., harm to the agent would also weigh toward an action's being within the jurisdiction of the state. Now justifications for laws may arise from more than one legal principle; a law which *appears* to be paternalistic may have a sufficient Harm Principle justification. Thus one strategy in defending certain laws will be to concede that Mill's argument for the Harm Principle stands (only *that* principle yields reasons for e.g., criminalization), but that one's "pet" law can be justified by citing harm to others. For example, one might argue for a law prohibiting attempts to cross the Atlantic Ocean in a balloon, since it is likely that the attempt will fail, and the Coast Guard will have to search for, and (if they are found) rescue the survivors. But the Coast Guard is supported by taxes, and would not need so large a budget (and thus taxes could be reduced) were there no balloonists to rescue. In a similar vein, one could argue for a law making the wearing of seatbelts mandatory by claiming that, in some accidents, passengers are likely to be thrown from the automobile in which they ride, and, *qua* missile, injure innocent passers-by.
My point in raising these two cases is to give limited endorsement to a comment made by both Feinberg and Bayles in Chapter One of this work, and then fit it into my Two-Issue Schema. Both Feinberg and Bayles claimed that a principle's citing a relevant characteristic of an action was not a sufficient reason for criminalization. It might be outweighed by other considerations, e.g., the cost of enforcement. Of course I agree with this; to show that the state has moral jurisdiction over some matter (the prima facie right to criminalize) is not to show that the state may morally criminalize (that it has the right all things considered). The above examples support a related thesis--not every showing of the characteristics cited by a legal principle is sufficient to show that the state has jurisdiction over the action. I.e., the cost in taxes of the Coast Guard's rescue work militates for ballooning's being within the moral jurisdiction of the state, but I think most would agree that it does not succeed: prohibiting ballooning is not within the moral authority of the state. Similarly, the possibility of a person's injuring another, having been launched from a wrecked automobile, must be taken into consideration when determining whether the state has the moral authority to make seatbelt-wearing mandatory. Again, I think this
argument fails to show that the state's authority extends that far.

The reason for this insufficiency is clear in Mill. As I have traced the argument in this chapter, Mill begins with a theory of human nature, and a commitment to utility. Briefly put, the reason the Harm Principle is a necessary condition for criminalization is that it affords people the optimal conditions for developing their capacities and individuality—greater state control would preclude acceptable development, less control would make persons subject to the encroachment of others. But while serious and direct harms to others must be outlawed, to preserve the optimal climate for individual development, were every conceivable harm to another legally prohibited, opportunity for such development would be greatly diminished. Both individuals and society as a whole may sometimes have to endure minor harms in creating the desired environment. Inconvenience (tax) or chance of injury (being struck by a flying passenger) are a small price to pay for the overall increase in freedom.

As Mill writes:

Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality of the law.
But 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. 59

As I see it, the additional tax dollars (or cents, or mills) required of each citizen to support balloonist rescue is not "perceptible," and the likelihood of being struck by a flying passenger does not constitute a "definite risk of damage."

Of course, determining whether a harm is "perceptible" or not, whether an action constitutes a "definite risk of damage," is a serious, substantive issue. Most cases will not be as uncontroversial as these "paradigm" cases. I acknowledge the burden of arguing, concerning subsequent cases, that the harm is imperceptible, perceptible but nonetheless not weighty, etc. What I hope to have shown is this: there is no immediate inference from an action's posing conceivable harm to another, to the action's being within the moral authority of the state. In cases of this sort, not only does the state not have the right all things considered to criminalize the conduct, it lacks the prima facie right as well.
XIII. A Case of Insignificant Harm

I would like to consider now a line of argumentation popular in conversation and newspaper editorials, if not in the philosophical literature. The "Burden on Public Funds" argument seeks to expand the state's moral authority by noticing that when individuals engage in activities that are extraordinarily dangerous, there is an increased probability that public funds will have to be spent to assist them. Since a drain on the public treasury is surely a species of harm, the action in question falls under the Harm Principle. The desired conclusion: the state has the right to prohibit the conduct in question.

Donald Regan, in "Justifications for Paternalism," argues such a case, using the example of riding a motorcycle without a helmet. Of course, if he is successful, his arguments will apply mutatis mutandis to a large number of other cases, expanding greatly the moral authority of the state. What I shall urge, in response to Regan, is that either (i) the harm he writes of is insignificant, and thus can be borne for the greater good of liberty, or (ii) if it is significant, then what the harm justifies is a means of protecting the public treasury, not the criminalization of the conduct in question.

Regan's style is to develop a dialogue between the defender of statues requiring the wearing of motorcycle
helmets, and an opponent of those statutes. The opening gambit by the defender:

Anyone who rides a motorcycle without a helmet is risking serious injury. If he is seriously injured, then he is very likely at some stage to become a public charge. He will be cared for in a public hospital, or even if he can afford private care, he will end up unemployed and drawing public compensation. Even this may not happen in every case, but certainly in statistical terms the helmetless cyclist is imposing a burden on public assistance funds. Since public assistance funds must be raised by taxation, the helmetless cyclist is in fact hurting someone besides himself. 

Regan himself regards this argument as unsatisfying; it is not clear that the burden on public funds will be significant, not at all clear that it will outweigh the utility to the rider of feeling the wind in his face, the "rush" of adventure, etc.—the joys of helmetless riding. Additionally, the rider could simply be debarred from tapping public funds. "If he suffers a serious injury, leave him to manage as best he can. Leave him to private charity, or let him die in the street. So long as you are prepared to do that, his riding without a helmet doesn't hurt anyone but him self."

In another example, the statute defender claims that the above treatment (or lack thereof) is inhuman, and would cause citizens excessive emotional distress; the statute
opponent points out that this is hardly a sufficient reason for criminalization.

Reagan's own argument at this point takes a novel twist; before considering it, I provide a portion of the advocate's next argument, since (with suitable amendments) it is the position most frequently encountered in discussing this tack.

"It's not simply a matter of squeamishness that makes me want to help the injured cyclist. I have a moral obligation to. Being denied assistance when one is injured is a punishment too great to visit on anyone's head just for making a foolish choice, even if the choice was precisely to risk that punishment...." From here the defender of the statute would go on to say that being put in a position where one must undertake some burden or expense if one is to satisfy one's moral obligations (as opposed to reacting on the basis of one's feelings of pity or horror) is harm, so the cyclist has harmed someone after all.62

Since public funds must be expended to satisfy the public's moral obligation, and such expense is a harm, the state has a right to criminally prohibit the riding of a motorcycle without a helmet. (And thus there ought to be a law against helmetless riding; consequently evading such a statute is not morally permissible.)

A number of distinct lines of attack on this position are available. The opponent of the statute could argue that monetary expenses are not "harm" in the requisite
sense, and thus there is no violation of the Harm Principle. I think this claim implausible; we judge burglary, embezzlement, counterfeiting, and other such activities as "harms" even though the harm is not "physical," but financial.

A second tack is more promising. The law in question would make illegal the helmetless riding of motorcycles, not the riding of motorcycles simpliciter. Thus, the injuries relevant to the justifying of helmet laws are not those arising simply from motorcycle accidents, but those injuries in motorcycle accidents which the wearing of a helmet would have prevented. (Additionally, the "worsening", by the failure to wear a helmet, of an injury which would have been sustained even if a helmet had been worn.) When one considers the probability of this sort of injury occurring, and given that injury, the probability of the rider's becoming a public ward on account of that injury, one may well conclude that the harm threatened is not sufficient to warrant criminalization. There are many "risky" activities in which citizens engage and as a result of which they might become wards of the state (e.g., continuing to play golf during a thunderstorm, risking being struck by lightning) which do not pose a serious enough threat to public funds to warrant criminalization. Although statistics are not (to my knowledge)
available, I think it unlikely that "helmetless caused" injuries are a noteworthy drain of the public treasury. When we balance the utility to the rider of helmetless riding, against the "disutility" to the state (and thus the taxpayers) of sometimes having to care for "helmetless caused" injuries, and then consider the cost (again to the taxpayer) of enforcing that criminal law, and maintaining the (jailed) cyclist, it is difficult to believe that utility requires criminalization.

But suppose "hazardous activities" (activities which involve risks of bodily injury greater than the average citizen, or most citizens, would willingly assume) do result in a significant loss of public funds, and thus constitute harm. Does this justify criminalization? I think not. What a violation of the Harm Principle justifies is a constraint on freedom—but a constraint on freedom need not take the form of a criminal sanction. To argue from "the state is entitled to protection from this financial loss" to "the state is entitled to fine or imprison (or both) persons whose actions might result in such a loss" is to commit a non sequitur.

Let us grant that the state has a right to constrain freedom in order to prevent this sort of financial loss. What form ought this constraint take in order to be effective, the mildest constraint that will be effective
(acknowledging the strong presumption in favor of liberty), and carry with it the fewest inherent evils? While a criminal sanction might be effective, it is the most severe sort of constraint. The appropriate sort, I submit, would be a tax, a "Hazardous Activities Tax" used to establish an insurance fund to protect the public treasury from the sort of claims under discussion. (In practice, the insurance could directly pay for the care of those injured while engaged in hazardous activities, or their dependents.) Having to pay such a tax is a constraint on freedom, since one (usually) must labor to earn the money used to pay the tax, and in any event cannot use that money for any other purpose, i.e., for living out one's plan of life. (For a right-headed but overstated argument for this, see Robert Nozick, Anarchy, State, and Utopia). Given the state of actuarial science, it should be possible to determine the appropriate amount of Hazardous Activity Tax each citizen ought to pay, given the activities in which he engages. Helmet cyclists might be charged $.53 per annum, marijuana smokers $.47, and so forth. And under this conception of harm, activities currently legal but nonetheless hazardous could be taxed, since they too pose a threat to the treasury: say, $.17 for snow skiing, $.51 for sky diving.
There is no requirement, of course, that the state exercise every right it has. Let us suppose that my arguments against the criminalization of helmetless riding prevail (I think they do). The state may yet be entitled to levy a Hazardous Activity Tax, but may well decide that the cost of determining each individual's tax, and enforcing that tax law, are prohibitive. If no criminal sanction is warranted, and some noncriminal means (the "HAT") have been judged inefficient, the state can resort only to other non-criminal means (e.g., an advertising campaign explaining the dangers and social cost of helmetless riding), or inaction--acknowledging that although the state has a moral right to some means of protection against financial harm, since none of those measures is worthwhile, it will remain unprotected, and ignore the financial loss of paying hazardous activity claims out of general tax revenues.

In paying hazardous activity claims out of general tax revenues, the state allocates a portion of each citizen's tax obligation to pay such claims. How can this be justified? Two sorts of justifications will be needed, one for those who currently engage in hazardous activities, and one for those who do not.

If a person currently engages in hazardous activities, his so engaging justifies the allocations. The portion of
his taxes so allocated can be viewed as a \textit{de facto} Hazard­
dous Activity Tax—the state is protecting itself from
financial loss.

If a person does not currently engage in hazardous
activities, allocating a portion of his taxes is justified
by one or more of the following. (i) An argument parasitic
on Rawls' "original position" strategy is telling here.
The particular plan of life a person has is to some degree
a matter of chance; whether his plan includes actions which
are extraordinarily risky is similarly a matter of chance.
A person in the "original position" would favor an
institution which would care for those injured in hazardous
activities, since he might well have, when "actualized," a
life plan which directs such activities. He might be
injured while engaging in such, and not have the means to
pay for his own care. The allocation underwrites the
privilege of living in a society where a wide variety in
experiments of living is permissible. (ii) The citizen
might, at some time in the future, decide to engage in one
or more hazardous activities. The ongoing practice of
caring for those so injured (who cannot care for themselves)
will be to his advantage. (iii) (I have some hesitation
about this): Even if one does not engage in hazardous
activities, and believes he never will, it ought to be
worth some financial loss to know that one could, and that one's choice of not engaging in such activities is not motivated by fear of criminal sanctions.

The dilemma faced by the critic of my position is this. Either the financial loss to the state of paying hazardous activity claims is sufficiently high to warrant the administration of a Hazardous Activity Tax, or it is not. If it is, then instituting such a system is permissible--but also the most serious encroachment on liberty permissible. If it is not, then either one or more of the justifications (i)-(iii) is sufficient, or this is: it is extremely likely that the financial loss is so minimal, and the portion of each citizen's tax obligation devoted to paying such claims so miniscule, that the moral analogue of the legal maxim "the law does not concern itself with trivial matters" can be invoked. Morality does not concern itself with trivial matters, i.e., so slight an inequity in tax obligations.

XIV. Summary

The attempt in Division Two of this chapter has been to answer some of the objections which have been raised against Mill, objections which are relevant to the overall goal of this work--the defense of a theory of justified
reflective noncompliance. I have shown that Mill will accept either public or private harm as sometimes sufficient for criminalization, and that he was aware of a variety of responses to untoward behavior. I have shown that the Harm Principle need not be supplemented by the Offense Principle—offenses which are severe and unavoidable constitute a species of harm, and thus are included in the scope of the Harm Principle. Finally, I have argued that there are actions which, while posing some threat of harm, pose so minor a threat that they fall in the sphere of individual liberty, not the region of state moral authority.

Thus, I have taken a Millean stance on the first issue of the "Two-Issue Schema," the determination of the state's prima facie right to criminalize conduct. The defense of this stance consists not only of the explication and arguments for Mill's position, but an attack on its most plausible competition: the addition of (some form of) the Principle of Paternalism to the Harm Principle. Let us now consider this proposed expansion of the state's moral authority.
FOOTNOTES


4. Ibid., p. 100 (italics added).

5. Ibid., p. 13.

6. Ibid., p. 71.

7. Ibid.

8. Ibid.

9. Ibid., p. 82.

10. Ibid., p. 71.

11. Ibid., p. 76.


13. Ibid.


17. Ibid.

18. Ibid., p. 441.
20. Ibid., p. 243.
22. Ibid., p. 441.
24. Ibid., p. 245.
27. Ibid., p. 530.
28. Ibid., p. 532.
31. Ibid., p. 8.
32. Ibid., p. 16.
33. Ibid., p. 21.
34. Ibid., p. 43.
35. Ibid., p. 45.
36. Ibid., p. 56.
37. Ibid.
38. Ibid., p. 67.
39. Ibid., p. 68.
40. Ibid., p. 79.
41. Ibid., p. 87.
42. Ibid., p. 78.
43. Ibid., p. 83.
44. Feinberg, op. cit., p. 33.
46. Ibid., p. 92.
47. Ibid., p. 94.
48. Ibid., p. 96.
49. Ibid., p. 7.
50. Ibid., pp. 91-2 (italics added).
51. Feinberg, op. cit., p. 43.
52. Ibid., p. 44.
53. Ibid.
54. Ibid.
57. Feinberg, op. cit., p. 43.
58. Ibid.
61. Ibid.
62. Ibid., p. 203.
I. Introduction; Distinctions; the Strategy

I have taken the position that the Harm Principle expresses a necessary but not a sufficient condition for the moral criminalization of actions in a reasonably just constitutional democracy. My defense of that position in the previous chapter consisted of two lines of argumentation. In the first, I showed how the Harm Principle is based on a fragment of a theory of human nature, and a conception of the ideal character-type; the overall cohesiveness of Mill's view makes it attractive. In the second line of argumentation I answered a series of objections that has been raised against Mill, objections relevant to the task of defending a theory of justified reflective noncompliance. In this chapter my defense of the Harm Principle as expressing a necessary condition for moral criminalization consists of a critique of the most plausible alternative to that position: the conjunction of the Harm Principle with a series of the Principle of Paternalism. But a careful account of the position I
shall attack cannot be given until a number of preliminary matters have been addressed.

Strictly speaking, it is a "category mistake"\(^1\) to write of paternalistic acts, or paternalistic laws. Neither acts nor laws are the sorts of things which might be paternalistic; justifications are. A justification is paternalistic just in case it consists of appeals to the welfare of the person in question. Loosely speaking, then, we can call an action or a law a paternalistic law or action just in case paternalistic considerations are necessary to its justification. I.e., a paternalistic law is a law which is not justified after paternalistic considerations have been deleted from its justification; an action is a paternalistic action which is not justified after paternalistic considerations have been deleted from its justification.

Even in this loose sense (which I shall employ in the remainder of this work) an act cannot be correctly called paternalistic without an investigation of the (purported) justifications of that act. A law prohibiting suicide, for example, appears to be paternalistic. It would not be a paternalistic law, however, if the justification for the law were that suicides generally required such an amount of costly police, ambulance, and hospital time that they were a threat to the municipality's treasury. (I am not
claiming that this justification succeeds, only that it is
a nonpaternalistic justification for a law which appears
to be paternalistic.)

Paternalistic justifications have been employed in
support of a variety of things, including laws, and what
have been called "paternalistic interventions." Paternalistic
laws prohibit all persons' doing specific things,
or require all persons' doing specific things. "No person
shall...," and "any person who..." are common "openings".
Distinct from these are "paternalistic interventions,"
which are "interferences" (as broad a term as I can think
of) with a person's action not because it has character-
istics which make it dangerous or wrong for (virtually)
anyone (virtually) ever, (like murder, assault, etc.), but
because of characteristics of the person, or circumstances,
or both. A couple of examples will help clarify the dis-
tinction; furthermore I believe the distinction will become
clear enough as we proceed. A person seeing another about
to take a hallucinogenic drug might stop him, not because
he believes that no one should ever take the drug (perhaps
he himself uses it), but because of characteristics of
that person (he hasn't really thought out the consequences,
perhaps) or the circumstances (e.g., he is about to
operate "dangerous machinery"). Were the person about to
take the drug of legal age, and at least normal competence,
we might call preventing his taking of the drug a "paternalistic intervention." Similarly, suppose a person were to happen upon a friend about to commit suicide. He might well think that suicide is in some cases justified (although presumably he himself hasn't tried that), but it isn't justified in this case, or at least not now—his/her spouse has returned, the stock is on the upswing, or whatever.

While only a state can enact paternalistic laws, paternalistic acts (including paternalistic interventions) can be perpetrated by anyone, either a private citizen or a public official. I shall call a paternalistic intervention performed by an official of the state, under color of law, an instance of state paternalistic intervention. Should a paternalistic intervention be performed by a private individual, I shall call it a case of private paternalistic intervention. (In a section below, I explore the similarities of and differences between state and private paternalism, and the implications these have with respect to justifying the two kinds of actions.)

A distinction can be drawn which cuts across the distinction between private and state paternalism. Instances of paternalistic interference with a person's liberty can be divided according to the duration of the interference. "Spontaneous paternalism" occurs when one
(or many) interfere with the liberty of another (purportedly) for his benefit, when that interference is of short duration and must be done promptly by whomever is at hand if it is to be beneficial. Contrasted with these are instances of what I shall call "continuous paternalism"—long-term "control" over (at least a portion of) one's behavior (purportedly) to benefit that person. A wide range of "controls" may be used, e.g., prohibition by law of the purchase or consumption of alcoholic beverages by minors, or the literal "institutionalizing" of persons deemed incompetent to conduct their own affairs.

No precise demarcation between spontaneous and continuous paternalism can be drawn, I suspect, but this is of no serious concern. My point in drawing the distinction is to draw attention to the fact that "paternalism" may consist of actions ranging from brief interference to lifetime detainment. And we should not be surprised if the arguments which justify one sort do not justify the other, i.e., that the arguments which justify very short-term interferences with a person's liberty do not similarly justify long-term interference.

Traditionally the battle between the paternalists (those who support the Harm Principle plus the Principle of Paternalism) and the anti-paternalists (usually, those who support the naked Harm Principle) has been waged over
paternalistic laws. Paternalists claim that people will be better off if certain actions are made illegal: people will be less inclined to harm themselves in various ways. Anti-paternalists often argue the Millean case offered in the preceding chapter: the mental, moral, and spiritual growth of people will be stunted if they are not permitted to act, and to stand the consequences, when the only people (if any) who will be harmed by an action are those people themselves.

I do not enter the fray at this point. As might be expected, I believe the Millean position prevails. My concern in this chapter is with a kind of paternalism which is the "fallback" position of paternalists who have seen the case for paternalistic laws fail, and who desire a paternalistic position which is unaffected by the traditional Millean arguments. The position I attack in this chapter is that continuous, state paternalistic intervention is sometimes morally permissible, i.e., that the moral authority of the state extends to acts of continuous state paternalistic intervention. (Understandably this is of importance to my enterprise, given the relevance of the boundary between the moral authority of the state and the sphere of freedom to the justifiability of reflective noncompliance.) As the following discussion will make clear, the reason that paternalistic intervention is immune
to the standard Millean objection—at least as advanced by Joel Feinberg in "Legal Paternalism" and Gerald Dworkin in "Paternalism"—is that they advocate interference with nonvoluntary acts, acts such that it is not plausible to argue that the benefits of intervention (to prevent harm to the agent) are outweighed by long-term damage to the individual's character. With respect to the kinds of cases cited by Feinberg, it is implausible to claim that allowing the agent to act and stand the consequences is preferable (on utilitarian grounds) to intervention.

In his excellent paper "The Principle of Paternalism" John D. Hodson argues against a number of papers which advocate some sort of paternalistic intervention, including the papers of Feinberg and Dworkin mentioned above. Hodson's strategy is to consider each writer's position a proposed set of necessary and sufficient conditions, and then to devise (I believe successfully) counterexamples to each set.

While acknowledging that this is an excellent strategy, the one I employ is different. After examining Mill's famous "unsafe bridge" case—the starting point of Feinberg's proposal—I review that proposal, and offer a series of arguments against incorporating that proposal into the criminal justice system. I will expose both moral and practical problems of such implementation,
problems not peculiar to Feinberg's proposal, but infecting all proposals of state paternalistic intervention. Upon completing the critique of Feinberg's proposal, I address an issue in moral theory. Dworkin claims, and Feinberg agrees, that Mill cannot both be a utilitarian and promote a universal ban on paternalistic intervention. I show how a utilitarian could argue for such a ban. The chapter concludes with a consideration of private paternalism, slavery contracts (because of the role they have played in arguments for paternalism), and the use of taxation to discourage various actions.

One final note. Although my concern in this chapter is with paternalistic intervention, and not paternalistic laws per se, some of the arguments I offer are telling against paternalistic laws too. Some of the issues raised are not new—e.g., the propriety of imprisoning a person "for his own good," when it is clear that the evils of imprisonment far outweigh the evils of his contemplated action—but when they are raised in the context of paternalistic intervention, they arise with a new poignancy.

Let us turn, then, to the source of the problem of paternalistic intervention—Mill's case of the unsafe bridge.
II. Mill's "Unsafe Bridge" Case

The text of Mill's case is as follows:

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. 5

Of course none of us can know all of the consequences of all our actions. But, some of the results of at least some of our actions are sufficiently probable as to merit the label "foreseeable consequence." Now if a person engages in some action, and yet is ignorant of the foreseeable consequences, it is fair to say that his so acting is not wholly voluntary6--for it is not clear that he would so engage, were he to learn that which he does not know. In the case at hand, a foreseeable consequence of crossing an unsafe bridge is injury or death--or at least a thorough dunking. Given the attitude of most people toward these outcomes, at least most of the time, preventing the crossing until the person's ignorance is erased, is warranted. Mill continues by offering the view that "liberty consists in doing what one desires",7 a view that is not without detractors. However, I do think it uncontroversial that information enhances, rather than detracts
from, liberty. The more we know of the probable consequences of various courses of action open to us, the better able we become to construct and live out a life plan. Thus Mill claims that offering a warning—informing a person of the foreseeable consequences of his action—is not an infringement on liberty.

Suppose the person about to cross the unsafe bridge, having been given the warning, replies (with a devil-may-care-smile) "I know that the bridge is unsafe. Isn't it thrilling to risk life and limb in this way?" Upon discovering that his "plan of life" included the taking of risks of this sort, permitting the person to continue is the morally correct course of action. As Mill writes, "no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk," and, provided he is not "delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty," the person ought "to be only warned of the danger; not forcibly prevented from exposing himself to it." 8

The fundamental issue of this chapter arises concerning an alternative that Mill did not consider. Suppose we come upon a person about to cross an unsafe bridge and, after issuing a warning, believe that the person's "choice" to continue with the crossing (at least, the attempt) is
not voluntary. Suppose, that is, that we believe him in
a "state of excitement or absorption incompatible with the
full use of (his) reflecting faculty?" Ought he be forc­
ibly detained, or permitted to continue? While Mill does
not address this issue, Feinberg does.

III. Feinberg's Proposal: The "Voluntariness Tribunal"

The position Feinberg takes is that (1) a presumption
of nonvoluntariness warrants interference with liberty, and
(2) a finding of nonvoluntariness warrants preventing the
elected course of conduct. This position is adopted in the
course of discussing another example, and proposing a new
legal institution for dealing with such cases. Since I
discuss the example at length below, and since the proposal
is quite radical (and I am anxious to avoid charges of
misrepresentation, or that I commit the fallacy of exten­sion when I criticize it), I supply this lengthy passage:

Now it may be the case, for all we
know, that the behaviour of a drunk or
an emotionally upset person would be
exactly the same even if he were sober
and calm; but when the behaviour seems
patently self-damaging and is of a sort
that most calm and normal persons would
not engage in, then there are strong
grounds, if only a statistical sort, for
inferring the opposite; and these grounds,
on Mill's principle, would justify inter­
ference. It may be that there is no kind
of action of which it can be said "No
mentally competent adult in a calm,
attentive mood, fully informed, etc., would ever choose (or consent to) that." Nevertheless, there are actions of a kind that create a powerful presumption that any given actor, if he were in his right mind, would not choose them. The point of calling this hypothesis a "presumption" is to require that it be completely overridden before legal permission be given to a person, who has already been interfered, to go on as before. So, for example, if a policeman (or anyone else) sees John Doe about to chop off his hand with an ax, he is perfectly justified in using force to prevent him, because of the presumption that no one could voluntarily choose to do such a thing. The presumption, however, should always be taken as rebuttable in principle; and now it will be up to Doe to prove before an official tribunal that he is calm, competent, and free, and that he still wishes to chop off his hand. Perhaps this is too great a burden to expect Doe himself to "prove," but the tribunal should require that the presumption against voluntariness be overturned by evidence from some source or other. The existence of the presumption should require that an objective determination be made, whether by the usual adversary procedures of law courts or simply by a collective investigation by the tribunal into the available facts. The greater the presumption to be overridden, the more elaborate and fastidious should be the legal paraphernalia required, and the stricter the standards of evidence. (The law of wills might prove a model for this.) The point of the procedure would not be to evaluate the wisdom or worthiness of a person's choice, but rather to determine whether the choice really is his.9

Finally, Feinberg offers this assessment of his proposal:

This seems to lead us to a form of paternalism that is so weak and
innocuous that it could be accepted even by Mill, namely, that the state has the right to prevent self-regarding harmful conduct only when it is substantially nonvoluntary or when temporary intervention is necessary to establish whether it is voluntary or not. When there is a strong presumption that no normal person would voluntarily choose or consent to the kind of conduct in question, that should be a proper ground for detaining the person until the voluntary character of his choice can be established. 10

What this proposal amounts to is this: If a police officer happens upon a person engaged in conduct he believes no normal person would engage in or consent to, he is entitled to interfere with that conduct, and warn the person(s) of the dangers of that conduct. If he is convinced that the participants have chosen to participate voluntarily, they are left alone. If, however, he believes that they have not chosen voluntarily (they are ignorant, in an agitated state, etc.—they are "not capable of full use of the reflecting faculty") he may seize them, and cause them to appear before a tribunal—a "Voluntariness Tribunal." The person then becomes, in effect, the plaintiff—he has burden of proof, he must "go forward" and prove that his choice was voluntary. The standard of proof is established by the Tribunal, i.e., it is the Tribunal which establishes the criteria of success for the plaintiff (e.g., preponderance of evidence, beyond reasonable doubt, to a moral certainty).
Furthermore, the standard is "sliding;" the greater the presumption that the choice is nonvoluntary (i.e., the less inclined the Tribunal is to believe that a "normal" person would choose the course of action in question), the higher the standards of proof. Finally, there are two features of the proposal not explicitly mentioned by Feinberg, but necessary if the proposal is to be coherent. First, if the Voluntariness Tribunal is to determine whether the plaintiff is to be permitted to do \( x \), the plaintiff must be prevented from \( x \)-ing prior to his "hearing." And second, if the Tribunal's decision is that the plaintiff's choice is not voluntary, then the tribunal must prevent the person from \( x \)-ing henceforth, or at least until such time as he satisfies the Tribunal that his choice is voluntary.

IV. Critique of the Voluntariness Tribunal

A. Overall Strategy

My overall strategy in this critique is simply to argue that the benefits realized from a proposal like Feinberg's Voluntariness Tribunal are far outweighed by the evils which would result from having such an institution. Underlying the various individual objections is this claim: while it can be argued that there will be cases in which paternalistic intervention would be, at least in the
short run, utility-wise preferable, which cases they are cannot be determined before the intervention takes place. Intervention will be hit-or-miss—and the good realized from the "hits" will be overwhelmed by the evils of the "misses."

B. Objections to the Voluntariness Tribunal

1. The Problem of Detection

The good to be realized from having a Voluntariness Tribunal is preventing people from harming themselves as a consequence of their nonvoluntary choices. Admittedly, this is a noble goal. However, this good is not realized unless all of the following conditions are met: (i) the person is detected about to harm himself, (ii) the person is prevented from harming himself, (iii) the person subsequently regains the use of his "reflective faculties," and does not choose to engage in the activity he had chosen before the intervention took place. If any of these conditions is not met—the person is not detected, or not prevented from harming himself, or not dissuaded (he will attempt the action again, once he is not constrained)—no good is produced. Yet, there are evils in having an institution like the Voluntariness Tribunal. And even in those cases where good is produced, there are counter-balancing evils which cannot be neglected. Let us examine these problems in detail.
In police-oriented television shows, the starring officers regularly happen upon about-to-be committed crimes: the stage is set for a crime, but it can be prevented (or it is in progress, but the perpetrators can be apprehended) if only the officers act in time. ("Adam-12" is a particularly apt example.) A frequent criticism of such shows by actual police officers is that they misrepresent the work of the police: rarely are they able to intervene to prevent a crime, or do they happen upon a crime in progress. Most of their work (besides, of course, traffic accident investigation and public intoxication arrests) is investigation of crimes that have already been committed, and have been reported to them. This compels one to ask: how often will the police happen upon a person about to injure himself as a consequence of a nonvoluntary choice? At least in the case of a crime, the wronged person is sometimes able to forestall the crime, and call for the aid of the police. This is absent in the case of the person's harming himself. Thus, it is unrealistic to believe that many nonvoluntary harms will be prevented even if there were a Voluntariness Tribunal system.

2. The Problem of Arrest

Suppose a state official, under color of law, were to happen upon a person about to engage in an activity that he (the officer) considered so dangerous, foolhardy,
self-destructive, etc., that he believed that a presumption of nonvoluntariness of choice existed. We are agreed that the officer (or anyone) may shout out a warning--indeed, it is plausible that both have an obligation to give a warning, especially when the suspected cause of the nonvoluntariness is ignorance of the foreseeable consequences of the act. And even restraining a person while a warning is given might be permissible, or even obligatory, in some circumstances: the risk of danger is high, the degree of danger is severe, and there is no other way to warn him, for example. But now we are supposing that the person has been warned, and has given every indication that he will not heed the warning. According to the Feinberg proposal, he is to be seized, and brought before the Voluntariness Tribunal.

I do not believe that constitutionality is the final word on matters such as this, but it can serve as a guide: If a practice is unconstitutional, there are likely good reasons for not countenancing it. Now as constitutional matters stand, a police officer may make an arrest only if a warrant has been issued or an indictment handed down, or if he has probable cause to believe the suspect has committed a crime. Using Feinberg's example of John Doe about to chop off his hand with an ax, we may ask: Under what authority could Office Richard Roe arrest John Doe?
I.e., under what authority could Roe seize Doe, and prevent the hand-chopping? Obviously, since Doe has not yet performed the hand-chopping, there can be no outstanding arrest warrant, or a grand jury indictment.

There are two obvious alternatives for solving this difficulty. First, we could make it a crime to do anything which might be viewed by a police officer as creating a presumption of nonvoluntary choice. Second, we could amend the constitution and create an analog of arrest called "paternalistic seizure." Let us consider these in turn.

Actually, enacting a law making it criminal to do, or to engage in, activities which could be viewed as self-destructive, foolhardy, etc., would not accomplish the paternalist's goal: preventing a person from harming himself nonvoluntarily. What would have to be made criminal is not the activity itself--by then the damage may well be done--but the attempt! We could give the police the authority to arrest by making it criminal to attempt to engage in conduct which, were it to be observed by the police, would lead them to believe that one's choice to engage (rather: one's choice to attempt to engage) was nonvoluntary.

Only casual familiarity with law-writing, and constitutional constraints on laws, is required to see the impossibility of this task. I think it non-controversial
that there are at least indefinitely many (and possibly infinitely many) activities in which a person might engage, or attempt to engage, which would lead a police officer to believe that the choice was not voluntary. Thus, indefinitely many laws would have to be enacted in order to give the police the authority to arrest—and as people discover new and different ways or risking life and limb (as they are wont to do), even more laws will be required. It is clear that this is not feasible.

Perhaps, it could be replied, a single law would do: a law making it criminal to attempt to engage in any activity whatsoever, were that activity to be of a sort that were one to engage in it, an observer would (could? might?) presume that the choice to engage in it was not voluntary. The constitutional difficulty with such a law, of course, is that it is vague—and it is not uncommon to discover that some law has been found unconstitutional on account of vagueness. And this is not a constitutional requirement for reasons of legislative "neatness." An important principle of the criminal law is that it must be clear what actions are forbidden. It is simply wrong to arrest and punish a person for doing something there was no reason to believe was legally prohibited.

Thus, it does not seem possible to give the officer the authority to arrest paternalistically by making certain actions criminal.
Could we create a new procedure called "paternalistic seizure?" The moral arguments which underlie various constitutional provisions now come to the forefront. To the person who is being forcibly restrained, the difference between "arrest" and "paternalistic seizure" is at best a legal nicety, at worst Kafkaesque irony. The arguments which show that no precise criminal law(s) could be written show, mutatis mutandis, that no precise restrictions on paternalistic seizure could be written. Thus, paternalistic seizures would be as capricious and arbitrary as would be arrests. And, of course, the legal principle remains: a person ought not to be seized for doing something he had no reason to believe was legally forbidden.

We are faced, I believe, with these alternatives: either we cannot confer upon the police the authority to arrest, or we vest in them the power to enact, instantly, "bills of attainder." That is, we give the police the right to make criminal a person's conduct, as it were, "on the spot": at this time, regarding this person, the conduct is criminal. But both seizure without authority and authority on account of bills of attainder, are morally repugnant.

3. The Problem of Justifying the Tribunal

If part of the cause and justification of social organization is enhanced life prospects of individuals (and
this can hardly be doubted), then the tasks of the various parties to a criminal proceeding strike one as essentially fair. A person cannot be compelled to show that he is not guilty of some offense unless the police have discovered reason to believe he is indeed guilty, and the prosecution has made, consistent with rules of evidence, etc., a prima facie case that the person is guilty. If these conditions are met, however, the accused must go forward with his defense, again consistent with the rules of evidence. The party which prevails is determined by the court according to a standard believed to be optimal in avoiding two grave evils: punishing the innocent, and freeing the guilty.

Now this brief excursion into criminal procedure is not intended, in and of itself, to enlighten the reader. Rather, it is to call attention to the moral foundation of the criminal justice system: what justifies the state's arresting an individual, compelling him to appear before a tribunal, to go forward with a defense (a defense consistent with the rules of evidence), and to meet a society-established burden of proof, is the belief that the society's right to be free of offenses against its members entitles it to make these demands. Now whether these rules of evidence, or this standard of proof is the most just, is not relevant here; I am not arguing for any specific rules or standards. I simply point out that when
the state is asked to justify its criminal justice system, the appeal is to the protection of the individual members of the society from their fellow citizens. (And it might include the claim that the society's very existence, which is beneficial to all who wish to live in civil peace, is imperiled by those who violate that peace.)

Now Feinberg's proposed Voluntariness Tribunal incorporates features of the criminal justice system cited above. The person "arrested" must go forward with a positive defense, and must conform to tribunal-established rules of evidence. And the criterion he must meet to have successfully discharged his burden of proof is set by the tribunal too. However, the justifications of the demands which are so prominent in the criminal justice system are wholly absent in the Voluntariness Tribunal system. No writer, so far as I can determine, has ever argued that either the prime cause of, or the prime justification for, civil society, is protection of the individual from the effects of his own involuntary actions. And it is surely doubtful that protecting individuals from the consequences of their respective involuntary actions is essential to the continued existence of social organization. In short: the reasons which justify the demands placed on a defendant in the criminal justice system do not justify the demands
Feinberg wishes to place on the person seized in the Voluntariness Tribunal system. At least at this point, these demands are unjustified.

4. The Problem of the Verdict: "Not Voluntary"

Let us suppose arguendo that the problems of detection and arrest, and the problems of the Tribunal can be resolved.

Suppose that John Doe, who has been discovered about to chop off his hand with an ax, is arrested and brought before a Voluntariness Tribunal. Further suppose that the verdict-analog of the tribunal is that Doe's action is nonvoluntary, and thus impermissible. What are we to do with Mr. Doe?

The tribunal could simply free Mr. Doe, having informed him of its findings (i.e., that his contemplated action would not be voluntary), and that as a consequence his chopping off his hand is not permissible. This alternative is, of course, outrageous. If the tribunal is correct—Doe's action would not be voluntary—it seems likely that (in that state of mind) he would leave the tribunal room and look for an ax. Not only would the entire voluntariness proceeding have been a waste of public funds, but the essential moral purpose—protecting citizens from the consequences of their own nonvoluntary actions—would be defeated. This scenario provides a plot
for a play in the Theatre of the Absurd, but not an improvement, from the moral point of view, of state functions. The person seized cannot merely be released.

If the Voluntariness Tribunal procedure is to provide any moral benefits whatsoever, citizens must in fact be protected from their own nonvoluntary acts. In the instant case, Mr. Doe must be protected from chopping his hand off with an ax. How is this to be accomplished? Given that axes are readily available, and that it would take only an instant for Doe to accomplish the deed, he must be under perpetual guard. Perhaps round-the-clock security guards, strong enough to overpower Doe were it to become necessary, and not susceptible to bribes, etc., could be assigned to guard him. Alternatively, he could be incarcerated, although solitary confinement would be required, given what we know of the trafficking of weapons in prisons.

Something has, of course, gone badly wrong here. The former solution would be prohibitively expensive. The latter is simply immoral; to protect Doe from the evil consequences of an involuntary action (as determined by our own procedure, standards, etc.) of his own, viz., chopping his hand off, we deny wholesale his freedoms. To protect him from living an otherwise normal life as an
amputee, we incarcerate him in isolation. Surely the cure is worse than the disease.

The difficulty here is devising a way of preventing a person from doing some act, while simultaneously (i) not encroaching on the other rights of that person, and (ii) not making the system prohibitively expensive.

There is yet another complication. If the Voluntariness Tribunal system is to achieve its goals, it seems that not only the intended acts of the person seized but "similar" acts, must be prevented. (The vagueness of "similar" here constitutes a problem which is either analogous to, or a species of, the problem of constitutional arrest.) E.g., if it has been determined by the Voluntariness Tribunal that Doe's chopping off his hand with an ax would be involuntary, and thus is to be prevented, then (ceteris paribus) his chopping off his foot with an ax, or his foot with a machete,..., his arm with a chainsaw, is to be prevented. But is he to be prevented from jumping a canyon (well, attempting) on a rocket motorcycle, or mainlining heroin, or eating fried foods? In short: it is not clear just what "carrying out the sentence of the tribunal" amounts to, or whether it could be carried out at a reasonable cost, or whether it could be carried out morally, or whether it could be carried out at all.
There is a problem which arises earlier in the Voluntariness Tribunal procedure which is better discussed now that the problems of an unhappy verdict have been presented. On the (safe) assumption that there will be some delay between the time that a person has been paternalistically arrested and the time he is actually brought before the Voluntariness Tribunal, the question arises: what is to happen to the person in this interval? Again, if the system is to achieve its goal, it must prevent the contemplated act until the tribunal has heard the case and issued its ruling. If the person is merely freed, it is likely that the issue will become moot—whether the action was voluntary or not, the hand will be off. Thus, the measures taken upon an unhappy verdict must be employed prior to the trial—the "defendant" must be placed in solitary confinement, or otherwise (armed guard, etc.) prevented from completing the act. He cannot be freed on bail, of course, since if the choice is in fact not voluntary, he cannot be trusted to abstain prior to judgment. Thus, the most severe measures of the criminal justice system (short of capital punishment) are visited on the person "arrested," prior to any judgment against him, and based solely on the arresting officer's belief that that person's choice to engage in some activity was not voluntary. Surely this is morally odious.
What I take myself to have shown is that the likely benefits of a system of paternalistic intervention are meager: it is unlikely that many harms will be prevented. But the costs are extremely high: the police must be given wide-ranging power of arrest, a costly and as yet unjustified Tribunal must be established, and, in the case of a verdict "not voluntary," the person seized must be guarded or incarcerated; both are expensive, and it is not clear that either will result in a balance of benefit over evil to the individual in question. Again, the key is that while we can be sure that some interventions will be utility-wise preferable, there is no way of determining which cases will be such—and to have interventions at all is to have an institution subject to widespread and serious encroachment on individual liberty. I.e., even if we do not adopt Feinberg's Voluntariness Tribunal, any system of permissible paternalistic interventions requires very broad police discretion, and faces the problems of the "not voluntary" verdict.

Thus, it is not possible to argue interventions one case at a time: the utilities are not knowable beforehand, there will not be time to make an approximate calculation of each individual case, and in order to make interventions at all the society must endure the evils catalogued above. Hence, in deciding the issue of paternalistic intervention,
the appropriate question is: shall we have an institution of paternalistic intervention, or not? Which would produce greater utility; a society with a system of paternalistic intervention, or a society without such a system, a society in which the Harm Principle expresses a necessary condition for criminalization? The above arguments demonstrate that the latter is the preferable society.

If these arguments hold, they constitute a defense of Mill against Dworkin and Feinberg on a meta-ethical issue. Dworkin claims that Mill cannot both be a utilitarian, and advocate an absolute prohibition against paternalistic intervention: whether any given intervention will produce greater utility is always a contingent matter. Feinberg echoes these sentiments, claiming that "Absolute prohibitions are hard to defend on purely utilitarian grounds." However, there cannot be state paternalistic intervention without a certain legal framework, and that framework brings with it serious evils. When the evils of incorrect guesses on the part of the police (they intervene when non-intervention has greater utility) are added to these, the result is as described above. We must choose between having an institution of paternalistic intervention, or not having such an institution, i.e., having an absolute prohibition against paternalistic intervention. On "purely utilitarian grounds" we can elect not to have such an institution, to prohibit state paternalistic intervention.
V. Private Paternalism

The distinction I have drawn between state and private paternalism plays a key role in my reply to a certain problem case. While this section raises more issues than it resolves, I believe the proper strategy concerning cases of this sort is evidenced.

The case is this. Suppose some person P discovers someone about whom he cares very much (call that person 'Q') about to do something the consequences of which are severe and irreversible. E.g., suppose one happens upon his sibling about to take some drug which induces frequent states of euphoria, but at a cost of a permanent, severe reduction of one's intellectual capacities. Person Q is currently of sound mind, and argues competently (if not persuasively) for his action. (While Q has met with misfortune, he is not currently in a state that precludes rational decision-making.) Further suppose that in P's considered judgment, Q's taking the drug would be a tragic mistake—in P's considered judgment, Q is not making an accurate assessment of his own capabilities, or of the likelihood of opportunities for exercising his talents—and P is unable to persuade Q not to take the drug. Now, supposing P had the power to interfere—to take away the drug, to destroy it, perhaps to lock his sibling in a room,
or watch over him—in short, to seriously interfere with Q's liberty to prevent him from taking the drug—would this not be justified? Could P not claim that, in spite of the fact that Q had reached majority, he was a "child" regarding this decision, and thus—as a child comes to see his disciplining as in his own interest, as something he would have willed had he been fully rational—he ought to be prevented from taking the drug? And even if Q never came to that point of view, might not P believe, and rightly, that under the circumstances, he had a duty to interfere, to prevent the drug-taking?

It is likely that the case is still "richly under-described," that more would have to be specified before the moral permissibility (or, perhaps, duty) of such interference could be determined. I think it safe to say, however, that it is not obvious that such interference is not justified. I am inclined to think that, were I to find myself in circumstances of this sort, I would intervene paternally.

The essence of my position is that, in at least some cases, private paternalism may be morally permissible, or even obligatory, and yet state paternalism morally impermissible. Now I cannot offer here a full theory of justified private paternalism—that is a dissertation topic in itself. I shall content myself with showing some
differences between private and state paternalism which bear on the issue of whether they are justified. Further, I show that some of the arguments which were telling against state paternalism are much weaker, or even inapplicable, when offered against private paternalism.

First, the source of the obligation toward the person wishing to take the drug is different in the two types of paternalism. The obligation of state toward citizen arises, as I have described in Chapter Three, out of the functional role played by the state. While that state is to safeguard the greatest possible freedom for each citizen, as we have seen, an essential element of that task is leaving a sphere of individual action to the citizen. While in some isolated case it might seem that encroaching on that sphere is what is required to preserve freedom, giving the state such a mandate is sure to lessen freedom (as I argued in the previous section.)

W. D. Ross, in The Right and the Good,¹³ argues against utilitarianism that our obligation toward, e.g., family and friends ought to take precedence over obligations to strangers. Suppose I have some benefit to bestow and can bestow it on either a sibling or a stranger. If, according to utilitarianism, bestowing it on the complete stranger results in a greater net happiness, then morality requires that I bestow the benefit on him. Ross
finds this unacceptable. While I do not here embrace Ross wholesale, I think it unacceptable too. From the perspective of morality, one's duties toward, and expectations from, one's "inner circle" are more compelling. My duties toward my sibling are greater than the state's toward him. (And less, it might be added, than toward someone else's sibling about to take the same drug.)

Second, P is more likely to have at his disposal far more information about Q, including information about his "future will," than either an arresting officer or even a Voluntariness Tribunal. Mill worries that interference will be "in the wrong place," and "in the wrong way;" there is less worry with regard to private than state, paternalistic intervention.

Third, and perhaps most important, when P acts as a private citizen, he is not encumbered by the machinery of the criminal justice system. Whereas the state must treat all citizens "the same," and observe various procedural restrictions to guarantee preservation of their rights, the private individual is not so restricted. He may use evidence that would be inadmissible in a court in deciding his course of action. He may treat different people, e.g., different siblings, differently. He need not worry about abiding by precedents, or that his actions will create a new precedent. If he decides that interference is
is permissible, or obligatory, he has a wider scope of ways to interfere. Additionally, his interference may have a higher likelihood of success: he can give Q love, psychological support, interested attention, etc.,---in marked contrast to the impersonal, or even destructive, means employable by the state.

Now this discussion is not to be taken as a defense of widespread private paternalism, or claiming that private paternalism is "usually" justified, or "usually" effective. Private paternalism is surely susceptible to a variety of abuses, including many analogous to those the machinery of the criminal justice system is designed to ameliorate or prevent. The virtue of not having to treat siblings as "equals" may be the vice of treating them in arbitrary, capricious, and unwarranted ways. The point of this discussion is only to point out that private paternalism is to be distinguished from state paternalism in several respects, all of which bear on the issue of the justifiability of the intervention. There may be cases in which state paternalism would not be justified, but private paternalism would be at least permissible.

On this issue, Mill and I disagree. The Harm Principle begins "...the sole end for which mankind are warranted, individually or collectively...."14 This rules out the possibility that private paternalism toward
competent adults is ever justified. The above shows, I believe, that in some cases private paternalism might be justified.

VI. Slavery Contracts

I turn now to a discussion of the moral permissibility of "Slavery Contracts"—contracts whereby one agrees to become the slave of another. My interest in this topic is not intrinsic—my goal is not to advocate people's becoming, or owning, slaves. My interest stems from the role Slavery Contracts have played in defending paternalism. "If such contracts can be prohibited on paternalistic grounds, then taking drugs, engaging in "unnatural sex acts," etc.) can be prohibited too, for they are just a kind of slavery." By expanding the concept of slavery, defenders of paternalism seek to outlaw a wide variety of activities. I argue the moral permissibility of Slavery Contracts only to prevent the first step onto this "slippery slope."

In Chapter Five of On Liberty, Mill reiterates his position that the Harm Principle is meant to protect not only the self-regarding actions of individuals, but the members of a group (two or more) who consent to some activity or enterprise. He writes:
It was pointed out in an early part of this Essay, that the liberty of the individual, in things wherein the individual is alone concerned, implies a corresponding liberty in any number of individuals to regulate by mutual agreement such things as regard them jointly, and regard no persons but themselves.  

There is a limiting case of this, however, at which Mill balks: the selling of oneself into slavery. He takes his stand, and offers his reasons, in this passage:

In this and most other civilised countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion. The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he would be free not to be free.
Both Feinberg and Dworkin make much of this passage, agreeing with Mill on the substantive matter, and looking for justification for other paternalistic laws based on this reasoning. I turn now to an examination of their respective arguments, and then take a stand myself, viz., that Mill is mistaken—voluntary contracts into slavery are within the sphere of liberty of the contracting parties, and ought to be enforceable. In defending my stand I will, of course, be attempting to refute Feinberg and Dworkin.

Commenting on the above passage, Feinberg writes:

It seems plain to me that Mill, in this one extreme case, has been driven to embrace the principle of paternalism. The 'harm-to-others principle,' as mediated by the volenti maxim would permit a competent, fully informed adult, who is capable of rational reflection and free of undue pressure, to be himself the judge of his own interests, no matter how queer or perverse his judgment may seem to others.17

I think Feinberg is essentially correct here; Mill was not able to accept one of the consequences of his position, and so, in effect, adopted another. Feinberg concludes,

Mill's earlier argument, if I understand it correctly, implies that a man should be permitted to mutilate his body, take harmful drugs, or commit suicide, provided only that his decision to do these things is voluntary and no other person will be directly or seriously harmed. But voluntary acceding to slavery is too much for Mill to stomach. Here is an evil of
another order, he seems to say; so the "harm-to-others" principles and the volenti maxim come to their limiting point here, and paternalism in the strong sense (unmediated by the voluntariness test) must be invoked, if only for this one kind of case. Thus for Mill there is one thing (though only one) which a rational, mature adult may not voluntarily do—sell himself into slavery.

Feinberg continues with a review of other arguments against making slavery contracts legally enforceable. If one accepts the principle of "legal moralism" (cf. Chapter One), one can argue that such contracts ought not be recognized by the courts for the reason that they tend to morally corrupt the slave owner. Feinberg writes, "To own another human being, as one might own a table or hose is to be in a relation to him that is inherently immoral..." Yet another argument focuses on the effect of granting legal recognition to slavery contracts on the populace as a whole: "One might argue...that weakening respect for human dignity (which is weak enough to begin with) can lead in the long run to harm of the most serious kind to nonconsenting parties." I.e., were some people to "own" other people, there would be an eroding of the mutual concern and respect we ought to have for other people.

Finally, Feinberg offers the objection to slavery contracts he believes is the strongest:
...a non-paternalistic opponent of voluntary slavery might argue (and this is the argument to which I wish to give the most emphasis) that while exclusively self-regarding and fully voluntary "slavery contracts" are unobjectionable in principle, the legal machinery for testing voluntariness would be so cumbersome and expensive as to be impractical.21

Feinberg continues by noting that such procedures would have to be paid for from tax revenues, that psychiatric testimony would be needed and psychiatric fees are high, and that the chance of a person's nonvoluntarily becoming a slave could well be unacceptably high. He concludes:

> Given the uncertain quality of evidence on these matters, and the enormous general presumption of nonvoluntariness, the state might be justified in presuming nonvoluntariness conclusively in every case as the least risky course. Some rational bargain-makers might be unfairly restricted under this policy, but on the alternative policy, even more people, perhaps, would become justly (mistakenly) enslaved, so that the evil prevented by the absolute prohibition would be greater than the occasional evil permitted.22

Let us return now to Mill's argument against slavery contracts, and then consider each argument in Feinberg's series in order.

In the above-quoted passage, Mill claimed that "the principle of freedom cannot require that [a person] should be free not to be free."23 That Mill so champions freedom is surely understandable; it is the theme of Chapter Three
of *On Liberty*: individuals need a sphere of liberty, a set of actions over which each person is sovereign, if that person is to sharpen his faculties and develop his talents. But the point of developing talents and faculties is that that is the optimal strategy in gaining happiness, i.e., in the production of utility. And Mill has said that he will "...regard utility as the ultimate appeal on all ethical questions..."24 In his prohibition of slavery contracts, Mill seems to be placing more importance on freedom than on utility; Mill can fairly be committed here to the position that utility never favors slavery contract. I think Mill mistaken; there are circumstances under which a person's entering a slavery contract would produce the greatest utility possible—and such a choice ought to be in the sphere of individual liberty. Donald Regan, in "Justifications for Paternalism," has identified the source of our reluctance to permit slavery contracts. He discusses a case in which a father considers selling himself into slavery in order to pay for an operation which will save the life of his child. Regan supports my view of the role such a decision might play in the father's life plan.

...saving his child may be more important to the man we are talking about than anything else he will ever do. Depending on whether it is his only child, and on his views about posterity, it may be important
not merely in the sense that he badly wants to do it, but in the sense that it touches his deepest feelings about his own worth and identity.  

Were someone to view his own life, and the life of another, in this way, why should he be prevented from so exercising his freedom? Why are we reluctant:

...we refuse to accept the conditions of the problem, in particular that becoming a slave is really the only way to save the child. We feel that if a father ever found himself in such a position—and more generally if anyone ever found himself in a position where he was denied something so important that he might reasonably decide to sell himself as a slave in order to get what he was denied—there would be something drastically wrong with the broader social context, and we ought to focus on changing the social context instead of coolly allowing the contract for slavery to be enforced.

But suppose we really were convinced of the conditions of the case—that there was no alternative to the father's slavery for saving the life of his child, and that the slavery would indeed save the child's life. Our intuitions would, I think "switch"—we would deem the enslaving as morally permissible. After all, we admire the parent who sacrifices his life to save the life of his child, e.g.,—from a burning house. Or take an intermediate case: a father subjects himself to medical experimentation, from which he may or may not be disabled or killed, again to
secure the life of a child. He may well deem even the worst possible outcome for him—whether it be a life of pain, or immediate death, or whatever—as preferable, in his value scheme, to the death of his child.

If this is not persuasive, then perhaps it is our intuitions about death and slavery which have gone awry. Regan observes, and I think correctly, that "(w)e would prefer the child to die than the father to become a slave because there is nothing positively offensive to our valuation of freedom in someone's being dead, whereas there is something very offensive in someone's being alive but totally unfree."\(^{27}\)

Again, we need to convince ourselves that the slavery contract is the only viable alternative, and that it conforms to the would-be slave's plan of life. But if we are permitted to exercise our freedom by accepting certain death (the medical experimentation), then I can see no moral bar to accepting a life of slavery. If we genuinely affirm Mill's conception of human beings, their capacities and their development into reflective moral agents, then this choice cannot be forbidden to them.

Consider now Feinberg's argument that being a slave-owner is morally corrupting. I think this argument telling when the slave is a slave not voluntarily, but forcibly. Recalling the history of slavery in this country,
Feinberg's point is well-taken. To play an essential role in an institution wherein human beings are deprived of their freedom against their will can easily be construed as corrupting, since one treats other human beings as if they were not moral agents, as if they were without dignity. Similarly for the non-slaveholding population (turning to Feinberg's related argument) -- the knowledge that the freedom of some members of their society is forcibly denied by others cannot encourage their having morally healthy attitudes, e.g., that their fellow human beings ought to be treated as ends in themselves, not means.

But all these evil consequences depend crucially on the slavery's being involuntary, not voluntary. What attitudes would be taken by slave owners, and the citizenry generally, toward voluntary slaves? The person who dies in saving the life of his child is regarded as a hero, as is one who risks his life, but survives. The person who sacrifices for his progeny in other ways (works several jobs, denies himself hobbies, etc.) may receive the sympathy of some, but surely the admiration of nearly everyone. What, then, can be said regarding the person who voluntarily becomes a slave? Both the owner and the populace might well regard the person as one who, despite incredible hardships (the circumstances which necessitated
his slavery), survived, and indeed conquered. He has not suffered the indignity of being captured and sold, but rather has the dignity of one who successfully serves a cause of deepest importance to him.

We cannot be sure of the consequences of voluntary slavery without the institution. But I think it clear that one cannot simply assume, as Feinberg has done, that the deleterious effects of involuntary slavery visited on both the slave owner and the citizenry generally would be manifest in an institution of voluntary slavery.

Finally, let us look at the argument against slavery contracts which Feinberg believes is the strongest. As Feinberg envisions the institution of slavery contracts, the prospective slave-owner and the prospective slave would appear before the Voluntariness Tribunal seeking permission to enter a slavery contract. This is a radical departure from current contract law. As matters stand, prospective contracting parties do not meet in court to secure judicial permission to enter a contract. The parties appear in court only when the performance of one of the parties is unsatisfactory to the other (and he thinks it worth his while to sue, etc.). What is at issue in the context of current contract law is not whether parties ought to be permitted to enter a slavery contract, but whether such contracts ought to be enforced by the courts.
Under the present system, the concerns are greater: in determining the validity of the contract, the court must determine whether the actions of the parties were (at the time the contract was made) not are, voluntary. And since the non-voluntariness of one of the parties to a contract supports the voiding of that contract (via duress, incompetence, etc.), this may well be the decisive objection against permitting slavery contracts.

But whether in the context of current contract law, or a new system of judicial permission to enter a contract, these objections are practical, not moral. These objections are of no help to Feinberg in advancing the case for paternalism. The reason a slavery contract would not be recognized by the courts is that it is too difficult to determine whether the contract is valid. No reference whatever is made to the welfare of the slave. The outlawing of such contracts is to prevent harm to the state (the costs of determining validity), not advancing the interests of the would-be slave. And if it is harm to the state which justifies the prohibiting of such contracts, then one cannot advance the argument in favor of paternalism by citing the prohibition of slavery contracts. I.e., the "slippery slope" argument proceeds: "Paternalistic justifications secure a prohibition against slavery contracts, and since this is so, actions relevantly like
slavery can be similarly prohibited on paternalistic grounds, actions like..." One does not take that first, fatal step onto the slippery slope in claiming that slavery contracts ought not be recognized by the courts when the reason is the difficulty of determining whether the necessary conditions for a valid contract have been met.

Additionally, it is interesting to note that the format of Feinberg's practical argument against slavery contracts is similar to that of my argument against paternalistic intervention, and against the claim (advanced by Dworkin and endorsed by Feinberg) that a utilitarian cannot argue in favor of a universal ban on paternalistic intervention. Feinberg argues against allowing any slavery contracts, despite the fact that some would produce greater utility than not having such a contract, by claiming that "the evil prevented by the absolute prohibition would be greater than the occasional evil permitted." 28 I have argued that the evil prevented by the absolute prohibition of paternalistic intervention would be greater than the occasional evil permitted; very little self-inflicted harm would be prevented in exchange for greatly enlarged police powers, an unjustified tribunal, immoral incarceration, etc.
The upshot of my discussion of slavery contracts, I believe, is this: neither Mill nor Feinberg succeeds in showing a paternalistic justification for prohibiting such contracts. And even if Feinberg's practical objection is thought successful, it does not advance the paternalistic position.

VII. The Use of Taxation as a Deterrent

In this, the final substantive section of the chapter, I address yet another issue raised by Feinberg: the use of taxation to deter conduct. Once again the broad issue is whether such action is within the region of the state's moral authority.

Discussing cigarette smoking, Feinberg argues as follows:

The way for the state to assure itself that such practices are truly voluntary is continually to confront smokers with the ugly medical facts so that there is no escaping the knowledge of what the medical risks to health exactly are. Constant reminders of the hazards should be at every hand and with no softening of the gory details. The state might even be justified in using its taxing, regulatory, and persuasive powers to make smoking (and similar drug usage) more difficult or less attractive....

Feinberg continues that an outright prohibition would not be warranted, claiming that such a public policy would have "an acrid moral flavour." Of course I agree with
Feinberg that there ought not be such a public policy. And above I have argued that the state does not have the right to "assure itself that such practices are truly voluntary," and that "to confront smokers with the ugly medical facts" is an instance of informing, and not paternalistic at all. What I want to question here is Feinberg's claim that the "state might even be justified in using its taxing...power to make smoking (and similar drug usage) more difficult." In On Liberty Mill argues against this tactic by the state; Feinberg does not consider Mill's case. I review Mill's position now, contending that it still stands.

For Mill, there is only a quantitative, not a qualitative difference between taxing for the purpose of discouragement, and outright legal prohibition. From On Liberty concerning alcoholic beverages:

A further question is, whether the State, while it permits, should nevertheless indirectly discourage conduct which it deems contrary to the best interests of the agent; whether, for example, it should take measures to render the means of drunkenness more costly, or add to the difficulty of procuring them by limiting the number of the places of sale....To tax stimulants for the sole purpose of making them more difficult to be obtained, is a measure differing only in degree from their entire prohibition; and would be justifiable only if that were justifiable. Every increase of cost is a prohibition, to those whose means do not come up to the augmented price; and to those who do, it is a
penalty laid on them for gratifying a particular taste. Their choice of pleasures, and their mode of expending their income, after satisfying their legal and moral obligations to the State and to individuals, are their own concern, and must rest with their own judgement.31

(Mill continues that to tax, e.g., "stimulants" for the purposes of "revenue" might well be justified.)

Two arguments are distinguishable here. The first is a challenge to Feinberg's position that discouragement through taxation might be acceptable, whereas prohibition is morally repugnant. According to Mill, an action is either self-regarding or it is not. If it is, then the state has no right to interfere with the individual's freedom of choice—by either prohibition or taxation. It is incumbent on Feinberg to show that one might be justified while the other is not. And this is not simply a matter of showing that some degree of interference is justified, although a larger degree is not. What must be shown is that interference simpliciter is warranted. Only then does the question of method arise. (This harks back to the Two-Issue Schema of Chapter One. Feinberg must show that the state has the prima facie right to interfere, before addressing the issue of whether taxation, or prohibition, is enough, or too much.)

The second argument here shows the difficulty of defeating the first. As a purely practical matter, the
higher the cost of some commodity, the fewer are those who will be able to purchase it. That some people are "priced out of the market" by "natural" causes—the scarcity of the commodity (diamonds), the man-hours needed to produce it (Rolls Royces), etc.—is an unfortunate fact of life. But when people are priced out artificially—e.g., by government action—it is not only unfortunate, but more importantly, unfair. Through government action, what is de facto prohibited to the poor is permitted to the better off. This savages the principle of egalitarianism, and the concept that, at a minimum, governments ought not exacerbate natural inequities.

The connection between the arguments is this: Feinberg must show how one species of interference with individual choice (taxation) is justifiable, while another (prohibition) is not. He must begin by showing the state has a right to interfere simpliciter. And even if he does show that right, he must justify what that entails: that what is permitted to some, is denied to others—and that which distinguishes the classes is relative wealth.

VIII. A Brief Summary

In this chapter I have attacked a position—the moral permissibility of state paternalistic intervention—which
is more cautious, and more plausible, than the case for paternalistic laws. Yet that position has fallen; state paternalistic intervention is not morally permissible. (Additionally I have shown that some of the arguments against paternalistic intervention militate against paternalistic laws as well.) This completes my consideration of individual liberty and the region of state moral authority. I conclude that Mill's Harm Principle, as qualified at various points, expresses a necessary condition for moral criminalization of actions. The next task is to consider Issue Two of the Two-Issue Schema: pragmatic constraints on criminalization, and moral constraints arising from practical matters.


6. A draft of a portion of this chapter, entitled "On Feinberg's 'Voluntariness Tribunal'", was read at the Spring Meeting of the Creighton Club (New York Philosophical Association), and published in its Proceedings. During the discussion, Max Black contested this use of "voluntary," claiming that the bridge-crosser's action was indeed voluntary despite his ignorance--voluntariness is not what is at issue. I have come to no resolution of this difficulty, and thus will follow Feinberg in focusing on voluntariness.


8. Ibid.


10. Ibid., pp. 113-4, (emphasis added).

11. Ibid., p. 108.

12. This case was suggested by Daniel Farrell.


15. Ibid., p. 124.

16. Ibid., p. 125.


19. Ibid., p. 118.


21. Ibid., p. 119.

22. Ibid.


26. Ibid., p. 197.

27. Ibid., p. 198.


29. Ibid., p. 116.

30. Ibid.

CHAPTER FOUR

PRAGMATIC CONSTRAINTS ON CRIMINALIZATION

I. Preliminaries

According to the Two-Issue Schema of Chapter One, a necessary condition for an action's moral criminalization (for an action to fall within the state's criminalizing authority) is that it be within the moral authority of the state. This condition is not sufficient, however, because one must also take account of Issue Two considerations—the balancing of good and evil effects produced by the enactment of a law against the action in question. An action might be within the moral authority of the state, but not within the state's criminalizing authority, for the reason that criminalizing it would produce a net balance of evil over good, of cost over benefit.

The task of Chapters Two and Three was to locate the boundary between the sphere of individual liberty and the sphere of state moral authority: concerning what actions does the state have and not have the prima facie right to criminalize? In this chapter the task is to specify the elements of the sphere of pragmatic noncriminalization. In showing how the enactment of some laws results in a net
balance of evil over good, I (i) show the role of Issue Two considerations in the use of the Two-Issue Schema, and (ii) garner additional evidence for the correctness of that procedure. The second important benefit concerns my theory of justified reflective noncompliance. My theory is that reflective noncompliance is permissible with respect to any law whose enactment is an exceeding by the state of its criminalizing authority. Two different (but not discrete) sets of actions are outside the criminalizing authority of the state. One set is the set of actions which constitutes the sphere of pragmatic noncriminalization. Thus, in specifying that set, I complete my account of laws with respect to which reflective noncompliance is morally permissible: those laws which criminalize actions in either the sphere of individual liberty or the sphere of pragmatic noncompliance. (As I wrote in Chapter One, I shall call the union of these two sets the sphere of individual choice.)

Strictly speaking, the term "pragmatic" both in the chapter title and in the expression "sphere of pragmatic noncriminalization," is somewhat misleading; let me explain just why. Let us call arguments which bear on Issue One of the Two-Issue Schema--the question of the boundary between the sphere of individual liberty and the region of state moral authority--primary moral arguments. In that
these are concerned with individual development of faculties and talents, a conception of the ideal character-type, a conception of the ideal state, etc., they clearly are moral arguments. The arguments of Issue Two focus primarily on economic and quasi-economic concerns—largely, on the most cost-efficient use of a criminal justice system. Viewed in this way, the arguments of Issue Two are pragmatic arguments.

However, one could be a certain kind of utilitarian, and hold that if a system is not the most efficient from the economic point of view, then ceteris paribus it is not the best morally either. Inefficient use of the criminal justice system is not merely a practical problem, but eo ipso a moral problem.

There is yet another complication. Arising from some of the pragmatic problems discussed below are some additional problems which are clearly moral problems. To anticipate somewhat: it is possible for the enactment of some criminal laws to both (i) reduce the efficiency of the criminal justice system, and (ii) insure that some racial, ethnic, or political minority will be unfairly treated by the officials of that system. I.e., members of some minority, just in virtue of being members of that minority, will be subjected to disproportionately many arrests and prosecutions.
Realizing that no resolution of this terminological morass will be entirely satisfactory, I have settled on the following. As mentioned above, arguments concerning Issue One will be called primary moral arguments. Those Issue Two arguments which are concerned with the cost-efficiency of the criminal justice system I shall call pragmatic arguments, realizing all the while that for some these will be moral arguments too. Finally, I shall call arguments which focus on clearly moral matters, which arise from practical matters of the criminal justice system, secondary moral arguments. The conclusion of both pragmatic arguments and secondary moral arguments is that specific laws ought not be enacted (ought to be repealed): the actions which they criminalize are in the sphere of pragmatic criminalization; criminalizing them produces a balance of evil over good.

Now in this chapter it is not possible to discuss every action or every law, in the sphere of pragmatic noncriminalization. Nor is it possible to catalogue every pragmatic argument, and every secondary moral argument, against the enactment of various criminal statutes. My enterprise is more modest. I shall provide an account of a significant number of pragmatic and secondary moral arguments, and discuss a significant number of laws, either in force in many jurisdictions, or being considered
for enactment. My goal is to show (i) how such arguments militate against certain laws (i.e., the value of the Two-Issue Schema), and (ii) that the state has often exceeded its criminalizing authority in enacting certain pieces of legislation.

My thinking about pragmatic constraints on criminalization has been greatly influenced by Herbert Packer's *The Limits of the Criminal Sanction*, which is a wealth of information on the workings of a modern criminal justice system. While I cite Packer frequently as an authority on these matters, much of the material is original—as is the use to which Packer's material is put.

The format of the chapter is as follows: In Section II I offer two reminders about criminalizing actions; while not new or startling, they are apt to be forgotten in the course of arguing whether various actions ought to be subject to criminal prosecution. I note in Section III that Mill was sensitive to considerations of this sort. Section IV contains the bulk of the argumentation of this chapter; in it, I describe what Packer calls the "crime tariff," and detail the many evils which arise from the creation of such a tariff. Devoting so much space to the crime tariff is justified in that (i) the criminalizing of so many different actions results in the creation of a crime tariff, and (ii) the evils of the tariff are serious
and far-reaching. In Section V I discuss a number of other Issue Two considerations, consequences of criminalization which weigh against the enactment of certain laws. In the final substantive section, VI, I look at the relationship between an action's being in the sphere of individual liberty, and an action's being in the sphere of pragmatic noncriminalization. The thesis I shall advance is that the cause of the pragmatic difficulties of the enforcement of many laws is the belief of citizens that the action in question is in the sphere of individual liberty—that the state has no moral right to interfere with such conduct.

II. Two Reminders

I offer at this point two noncontroversial claims about the criminal justice system which are too often neglected. The first is that the passage of, or the existence of, some criminal law, does not guarantee compliance. Packer dryly comments about the public: "As we know, they do not always respond to a new criminal prohibition by acquiescence."\(^2\) To criminalize some action \(A\) is to make \(A\) illegal; it is not (necessarily) to prevent people from doing \(A\).

The second reminder is that the enactment or existence of criminal legislation has far-reaching consequences.
Criminal laws do not function in a vacuum, but in the midst of a highly complex social milieu. Not only will there be citizens who do not respond to new legislation by conforming to it, there will be people who see the enactment of a law (or the existence of a law already enacted) as a unique opportunity for financial gain, or to foment social unrest, or to get peer-group approval. In short, criminal laws have "side effects," consequences we cannot afford to ignore—especially when deciding whether to make some conduct criminal. The "side effects" analogy with medicine can be taken seriously. No competent physician would administer a treatment to a patient without considering the side effects of that treatment. While a tourniquet around the neck may well stop the bleeding from a scalp wound, the obvious side effects of such a treatment indicate that it not be elected. In taking up Issue Two considerations, we investigate the legal analogue of this: looking for unintended, but perhaps far-reaching or disastrous (or both) consequences of enacting certain criminal laws.

III. Mill and Pragmatic Constraints on Criminalization

It is interesting to note that Mill is sensitive to the problem of the side effects of criminalization. He writes in Chapter One of On Liberty: "If anyone does an act hurtful to others, there is a prima facie case for punishing him by law or, where legal penalties are not
safely applicable, by general disapprobation."\(^3\) ("General disapprobation" would be a species of what I term the Social Sanction; cf. Chapter Two.) In discussing whether a citizen ought to be held legally responsible for failing to prevent an evil, Mill writes: "There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expediencies of the case: ...or because the attempt to exercise control would produce other evils, greater than those which it would prevent."\(^4\) Of course Mill may not have in mind specifically the laws of the Reflective Noncompliance Set. And since he does not say specifically what counter-balancing evils might arise, it is not possible to determine whether, or to what extent, they coincide with the evils to be discussed here. However, it is clear that Mill held that the prospective side effects of some laws were so seriously detrimental that they ought not be enacted.

IV. The Consequences of Creating a "Crime Tariff"

It is likely that the most serious evils of inappropriate criminalization are those produced by what Packer calls the "crime tariff." This is so because the making criminal of any commodity---good or service---harbors the potential for the creating of such a tariff. Additionally,
the evils are far-reaching, and frequently unacknowledged; they are at the end of a complex, but nonetheless discernible, causal chain.

The essence of some criminal laws is to forbid certain economic transactions. The intent, of course, is to prevent there being such transactions. If the demand for the commodity in question is what economists call elastic—it varies inversely with the price of the commodity—there is some chance of success. If the demand for the commodity is inelastic, however—increases in price do not significantly lower the demand—criminalization is most unlikely to prevent transactions. Instead, the law will create a crime tariff. Packer writes:

Commerce involves transactions between willing buyers and willing sellers, each of whom gets what he wants from the deal. By making conduct that answers to this description criminal, what we are in effect doing is limiting the supply of the commodity in question by increasing the risk to the seller, thereby driving up the price of what he sells. It may be suggested that driving up the price is just what we want to do: make it so expensive to buy narcotics, for example, that people will stop buying them. As we know from current experience, it doesn't work that way.

Of course elasticity is a matter of degree—but it is safe to say that the less elastic the demand for some commodity, the more likely criminal legislation will result in a
crime tariff. After explaining the concept of inelastic demand, Packer continues

Regardless of what we think we are trying to do, when we make it illegal to traffic in commodities for which there is an inelastic demand, the effect is to secure a kind of monopoly profit to the entrepreneur who is willing to break the law. In effect, we say to him: "We will set up a barrier to entry into this line of commerce by making it illegal and, therefore, risky; if you are willing to take the risk, you will be sheltered from the competition of those who are unwilling to do so. Of course, if we catch you, you may possibly (though not necessarily) be put out of business; but meanwhile you are free to gather the fruits that grow in the hothouse atmosphere we are providing for you." 6

A paradigmatic example of the crime tariff in operation was Prohibition. For those willing to risk arrest, the profits were enormous—and those profits, as we know, financed what we now call "organized crime." Although that particular crime tariff has been "repealed," others have been enacted, and the threat of even more is continuous. And there is strong evidence that the crime tariff on narcotic and hallucinogenic drugs, for example, is more profitable for the sellers than was the tariff on alcohol.

A further feature of the crime tariff is identified in the following example. Although Packer uses abortions here as his example, any other commodity (goods or service) with a crime tariff can be substituted.
Because we are dealing with voluntary commerce in a commodity whose buyers are willing to submit to price increases, every increase in risk increases the potential gain to the seller. The harder we work to make the sale of abortions risky, the higher we drive the price that makes the risk worthwhile. The calculus of pleasure and pain, to put it in Jeremy Bentham's terms, produces an equilibrium at a higher level of price. The theory of deterrence, however useful it may be in the ordinary run of crimes, breaks down. In its place we get a crime tariff, which operates like any other protective tariff.  

In a subsequent chapter of *The Limits of the Criminal Sanction*, Packer lists a number of specific evils which result from the crime tariff on narcotic and hallucinogenic drugs. I will relate the most serious of these, pausing to elaborate on them, to add to them, and to discuss the secondary moral arguments which arise from them. In addition, I will comment on analogous evils of other crime tariffs, those against pornography, prostitution, and gambling.

Finally, I will list some additional evils not discussed by Packer. Throughout all of this we must ask whether the arguments considered in favor of criminalization purport to show that the drug law (which creates the tariff) is beneficial to the non-using public--and thus the justification falls under the Harm Principle--or beneficial to the drug user. The former will count in favor of such a law--although, of course, those benefits might well be
outweighed. But the latter cannot weigh in favor of the law according to the Two-Issue Schema of Chapter One—unless it can be shown that coercing an individual for his own benefit is within the moral authority of the state. It will, however, be appropriate in the course of the following discussion to ask the empirical question of whether the benefits said to accrue to the person coerced are indeed received by him.

Perhaps the most serious evil of drug laws is that hundreds of thousands of people, primarily users rather than those who traffic in drugs, have been jailed or fined. Set aside for the moment the problem of drug traffickers, and consider the issue of punishing drug users. First, as was argued extensively in previous chapters, it is not at all clear that the state has a right to punish citizens in an attempt to protect them from the evil consequences of their own actions. Second, it is not at all clear that the consequences of drug use are "evil" to the user; indeed, many of the evils prominently cited by the media are a consequence not of drug use per se, but of the criminalization of drug use. Malnutrition is prevalent among drug takers, at least in part, because the artificially exorbitant price of drugs makes the purchase of food, and time spent preparing food, "low priority" items. Infection is common since there is no ready access to
sterile equipment. And it is truly ironic that a reduction in heroin deaths is often cited as a benefit of a drug crackdown. Why is it that addicts die of overdoses? While some miniscule number might be deliberate, it is safe to say that nearly all are accidental—usually the result of injecting a dosage of unusually potent heroin. But it is because the drug is illegal that it varies so widely in purity and potency: there is no "quality control" by those protected by the crime tariff.

Finally, even if drug use is within the authority of the state, and even if drug use is an evil to the user, and even if there were no other side effects to the law against drug use: the law would not be justified, in that it is not efficacious. The data on this are painfully well known: laws against drug use are not a significant deterrent to drug use.

In a similar vein, laws against prostitution, gambling, and pornography do not have a significant deterrent effect on those activities. And the participants in them do not view their actions as having evil consequences—although there are evil consequences of criminalization. "Crooked" gambling establishments exist because legitimate ones are outlawed (and the people willing to risk the criminal sanction are unlikely to operate a "fair" business). Runaway teenagers become the prey of pornographers, if it
is illegal for willing models to pose. The ancillary evils of prostitution often cited in defense of laws against prostitution—e.g., that "customers" are sometimes robbed—are aggravated, if not created, by the crime tariff. One cannot complain to the police, when the robbery took place while one was engaged in a crime.

Let us consider now the drug trafficker, the gambling-establishment owner, the pimp. It will be recalled that Mill was torn on this issue. On one hand, he wished for "voluntary group activities" to be protected under the Harm Principle; so long as harm (if any) accrued only to those competent adults whose participation in the activity was voluntary, the state ought not interfere. On the other hand, Mill was sensitive to the fact that participation might not be wholly voluntary, that the pimp et al. had a vested interest in enticing others to "join" in the activity. The upshot of this is uncertainty as to whether the state has the prima facie moral right to legislate on these matters. But since this chapter is devoted to pragmatic considerations, let us assume that the state does have the prima facie right, and ask whether it has the right all things considered to legislate.

As I intimiated above, some people view legislation—newly enacted or existing—not as something with which they must comply, but as a unique opportunity for profit. The
entrepreneurs who operate behind the protection of the crime tariff surely view the law this way. It is important to them that the commodity remain illegal, for that is what assures high prices. It is important to them that some of their peers are arrested and jailed, for that reduces competition. But since even the most wildly optimistic Drug Enforcement Agency reports claim that less than 10% of the drugs smuggled into this country are seized (and thus more than 90% is marketed by traffickers), it is clear that the goal of the drug laws is not being met. Even if we agree that the world would be better without drug addiction, without drug trafficking--it does not follow from this that there ought to be drug laws.

The most immediate consequence of the tariff created by drug laws is that it has created a highly profitable business: drug trafficking. That these profits could be made has not gone unnoticed by organized crime. With so few drugs seized, and such enormous profits for organized crime, it seems almost silly to call the funding of organized crime a "side effect," rather than the principal effect, of drug laws. Whatever the name, however, this evil alone is sufficient to outweigh the meager benefits of the law. The crime tariff ensures that the really serious enterprises of organized crime--e.g., the
infiltration of legitimate businesses and labor unions—is well financed. What benefits can be cited which outweigh this evil?

The list of evils does not end with the funding of organized crime activities. There is another evil perhaps as great, and for many people—especially residents of large cities—more personal. A large portion of all acquisitive crimes, e.g., robbery, burglary, etc., are committed by people who use drugs, in order to pay for drugs. And of course, due to the crime tariff, that price is artificially inflated.

It is truly a tragic irony that the reason most often cited in favor of drug laws is that drug addicts steal in order to get a "fix." The major cause of the resort to criminality, if not the sole cause, is the law against the drugs itself. It is plausible to claim that were drugs not illegal, such that they could be produced and sold as a free enterprise commodity, there would be no need for the addict to steal; average job wages would be sufficient to purchase the required drugs. But let us assume arguendo that this is far too rosy a picture: let us assume that virtually all addicts would continue to steal to buy drugs. On the same assumptions that addicts do not steal more than they need to support their habit (stealing is, after all, dangerous), and that the free
market price of drugs would be a fraction of their crime tariff price, acquisitive crimes would be drastically reduced. Again, would that there were no drug addiction; but criminal laws against it do not prevent it, and they do inflict this serious evil on the populace.

Of course these arguments would be damaged if, upon the repeal of drug laws, drug use escalated. More drug users multiplied by fewer crimes each might equal, or even surpass, fewer drug users multiplied by more crimes. What is at issue here is the deterrent effect of drug laws, and this reduces to the question: "Why is it that people who do not use drugs abstain?" It is not at all clear that the correct answer is "because the use of drugs is illegal." A more plausible answer, I suggest, has nothing to do with the legality or illegality of the item, but how its use fits into one's plan of life, one's overall system of goals and values. Using drugs would entail eliminating portions of their respective plans of life which have high priority. Of course one is now led to ask how people acquire the plans of life they have--a question which would take us far afield. My point here is simply that the conclusion that acquisitive crime would increase were drug laws repealed depends upon the dubious assumption that many people who do not now use drugs would, if only they weren't illegal.
Although the benefits of drug laws are meager, the costs are not. According to Packer, "Billions of dollars and a significant proportion of total law enforcement resources have been expended in all stages of the criminal process." Reliable statistics are (of course) unavailable, but ABC News estimated that there are between 600,000 and 700,000 heroin addicts in the United States. Bluntly: aside from all the other side effects, does 1/2 of 1% of the population deserve this kind of "attention"? Since the side effects of drug laws are so deleterious to the citizenry, it is tempting to think of the laws as directed to the benefit of the user. But of course they do not benefit him; they compel him to a life of crime, a life as a social outcast.

Since the detection of narcotics offenses is so difficult, the police have resorted to a variety of practices which constitute a threat to individual liberty. Three such practices mentioned by Packer are unconstitutional searches and seizures, entrapment, and electronic surveillance. These practices are directed not only at detection of narcotics violations, but gambling violations as well. Intrusive police tactics of this sort are unfortunate even in the case of investigating a crime the police know has been committed. But they are even more serious a threat to privacy, and ultimately to freedom of
thought and discussion, when used in the detection of crime.

Why, we might ask, must the police resort to such tactics? With respect to a wide variety of crimes, such tactics are not necessary for detection: individuals come forth with a complaint, or at least a "tip." As a rule, when a murder, assault, robbery, etc., has been committed, someone (often the aggrieved party) informs the police. Yet gambling, drugs, prostitution, and pornography offenses are rarely reported. And when law enforcement officials do receive information, more than likely the motive is selfish: a reward from U.S. customs, a lighter charge in a negotiated plea or immunity from prosecution, retaliation against one's former cohorts--a "falling out among dealers," so to speak. (While it is appropriate to raise these questions here, it will not be appropriate to answer them until Section VI below.)

There is the continuing threat that the existing problems resulting from crime tariffs will be augmented by the enactment of new legislation, laws which create new crime tariffs. With every newly banned substance the Congress (or state legislature) founds a new industry, guaranteeing it high profits by protecting it with a crime tariff. Of course some entrepreneurs will be driven out of business (i.e., jailed), but this is part of the overall scheme
which guarantees those high profits to the industry as a whole.

A truly frightening possibility being considered by some is making ordinary cigarettes illegal. Given the number of people addicted to cigarettes, and the fact that many smoke in spite of the well-known medical consequences, it is clear that there is an enormous, inelastic demand for cigarettes. Were they to be outlawed, we would instantly underwrite a business of illegal cigarette manufacturing and distribution the potential profits of which are incalculable. In spite of the fact that non-smokers are becoming more militant about smoking in public places, there is no significant opposition to smoking in private. Indeed, the two propositions are linked in the minds of many: "I don't care what you do to your own lungs, but please don't do it to mine." Prohibition failed in spite of the fact that a significant portion of the population was opposed to anyone's drinking anywhere; lacking even that support, it is hard to see how a ban on cigarette smoking could succeed. (Again, all this without considering the issue of whether the state has the prima facie right to criminalize cigarette smoking.)

What might well be the most insidious consequence of the crime tariff on drugs is that the severe penalties for adults have led to the recruitment of the young for a
variety of tasks in the narcotics business. A cherished principle of our legal system is that children ought not be held "fully responsible" for their actions. This is reflected in our legal institutions: court procedures, sentencing, criminal records, etc., are different for "children" (in the legal sense) than for adults. These facts have not been missed by the illicit drug business: while an adult smuggler, courier, dealer, etc., may face severe punishment if caught, a child does not. Indeed, not only does "arrest" not lead to significant evils to the child, it may (in the skewed values of some) lead to enhanced peer prestige. The result of this has been recruitment of children for the more dangerous tasks of drug enterprise. It is clear that drug laws cannot abolish the business, and that those laws are responsible for the involvement of children. Were there no penalties for adults, there would be no reason to recruit children.

Yet another effect of the crime tariff on narcotic drugs is felt at the international level. This is too broad a topic to be fully considered here, and the data are even more sparse than in the case of domestic consequences, but a few comments can be made. First, there is some evidence that high officials of governments themselves profit from the growing, transporting, and processing of drugs. Second, there is a rebel band in the so-called
"Golden Triangle" (Burma, Thailand, and Cambodia) which extorts money from opium smugglers who travel through territory the rebels control. These funds are used to buy weapons. Thus, the artificially high price of heroin is responsible for both political corruption and political instability.

I mentioned above that some of the evil consequences of the crime tariff are unacknowledged in that they lie at the end of a complex (yet discernible) causal chain. I relate one such consequence now; like the chapter as a whole, it is not meant to be exhaustive, but an example. As a consequence of the law against the importation of marijuana, the odds of one's drowning after a boating accident off the coast of Florida have increased sharply. The reason is this. Due to the crime tariff the value of marijuana is extremely high; a sea-going pleasure craft can hold several million dollars' worth of marijuana. Yet such a boat can be used for only a few smuggling trips, lest it be recognized by the U.S. Coast Guard. Thus, there is a need for a constant supply of boats by smugglers--but they cannot purchase them; this too would make known to the authorities the smugglers' activities. Thus one current ploy is to broadcast a bogus distress signal from a boat; when a well-intentioned pleasure craft responds, the occupants are killed, and the boat seized. (It is
estimated that over two hundred boats have been so seized, and more than six hundred persons killed.\(^{12}\) This ploy has become known to boaters, who (understandably) are now reluctant to answer any distress calls whatsoever. Thus, if one has a genuine boating accident, it is unlikely that one's distress call will be answered (unless by the Coast Guard)--which dramatically increases the odds of one's drowning.

This is due, of course, solely to the crime tariff. Were marijuana not illegal, its price would plummet. The profit to be realized from a pleasure craft load of marijuana would be so meager as to make the risks of piracy not worthwhile.

I would like to end consideration of the crime tariff with an irreverent suggestion. Imagine that some city unexpectedly came into a sum of money and the city council was debating possible use of the funds. Let us suppose that the decision was to turn the money over to the police department, to fund the increased enforcement of some law which constituted a crime tariff, e.g., for a "crackdown" on drug trafficking. Now given the consequences enumerated above--especially the increase in crime as addicts need more money to pay for the resultant price increase--from the moral point of view, it might be preferable for one of the councilmen to abscond with the funds, and go to
Mexico with his mistress. The evils of the crackdown might outweigh not only the benefits of the crackdown, but the evils of the embezzlement as well.

The conclusion I wish to establish is not that commodities ought never be made criminal. If the demand for a product is to some degree elastic, the long-term benefits of a reduction in its commerce might outweigh the short-term evils of the crime tariff. The trade in exotic animals, and animal parts (skins, tusks, horns, etc.) might be such a case. Additionally, some commodities have to be made illegal because of the intolerable consequences of their not being illegal: contract murder is an example of this. The conclusion I wish to establish is that a law which creates a crime tariff produces a large and diversified array of evils, and, unless the demand for the commodity is elastic, only the protection of the most fundamental interests of society can outweigh them.

V. Additional Evils of Improper Criminalization

As essential ingredient of a properly functioning criminal justice system is cooperation between the police and the public. This productive partnership is not possible when the citizens view the police as "the enemy." According to Packer, the police come to be so viewed when the police "are seen to be more intrusive than
And the police are seen as intrusive primarily as they seek to enforce so-called "victimless crimes"—which include gambling, drugs, prostitution, and pornography, among others. Were these laws eliminated, it would be reasonable to believe there would be far less tension between police and public. This is especially true concerning relationships which historically have resulted in friction due to intrusive police conduct: relationships between police and students, police and racial minorities. Given the importance of cooperation between the police and the public in preventing, detecting, and investigating crime, we ought to be wary of enacting laws such that the police, in enforcing them, will be seen as intrusive. How the relationship between police and public is affected by the enactment of a law is another Issue Two consideration.

Under the title of "Sporadic Enforcement" Packer identifies four evils that result when a law is enforced only intermittently. All are Issue Two considerations; one of Packer's merits much closer scrutiny, as does one not mentioned.

First, respect for law generally is likely to suffer if it is widely known that certain kinds of conduct, although nominally criminal, can be practiced with relative impunity. Second, enforcement officers aware that the enforcement rate for a particular offense is undesirably low may be tempted to use unsavory methods to raise the rate. Third, lack of full
enforcement necessarily involves discretion in the choice of targets; this discretion is unlikely to be exercised in any but an arbitrary kind of way. Finally, this arbitrariness is bound to contribute to the unfortunate sense of alienation on the part of those who see themselves as its victims.14

Of course no law can be "fully enforced," i.e., the action in question always prevented, or even always detected, or even always investigated. But there are great differences in the attention and effort given to the prevention, detection, and investigation of various crimes. The public demands that attention be devoted to murder, robbery, burglary, etc.—if measures are not taken to prevent such crimes, and to vigorously investigate such crimes when they do occur, citizens file complaints, mayors (under political pressure from the citizenry) fire police chiefs, police commissioners are recalled, etc. But the populace knows that not all instances of prostitution, pornography, gambling, drug dealing, etc., can be detected, only a few investigated, only a few of those actually prosecuted. In general, there is no hue and cry from the citizens if enforcement of laws against such actions is not diligent and enthusiastic. This leads to two evils, both secondary moral arguments against criminalizing these activities. First, the police are open to corruption. The consequences for the police of a murder's not being vigorously investigated are such that, in general, it is unlikely that the
accused can successfully bribe the police to not charge him with the crime. In sharp contrast, since there are likely to be no serious consequences to the police if a particular drug, pornography, prostitution, etc., case goes "unsolved," the likelihood of a successful bribe increases. Since public outcry is unlikely, it has no deterrent value.

The second evil is that of selective enforcement. Individual officers, or the police force as a whole, may have a "favorite" minority against whom laws prohibiting homosexuality, unnatural sex acts, gambling, prostitution, etc., are systematically enforced. It may be Blacks, Chicanos, or "hippies," but some minority group is likely to bear the brunt of sporadic enforcement, as the criminal law is used as a tool of harassment. Of course there is the risk of such abuse inherent in any criminal law—but it is much higher with respect to these laws. No one expects full enforcement, so sporadic enforcement is not viewed with alarm. When laws are enacted with full knowledge that they cannot or will not be vigorously enforced—as is true of many of the laws in the sphere of pragmatic noncompliance—the door to abuse of discretion is opened wide.

This completes only a partial list of Issue Two considerations, matters which must be investigated in deciding
whether the costs of enacting various pieces of criminal legislation outweigh the benefits—and ultimately, whether such laws ought to be enacted. Since the list is indeed partial, I have not fully specified the set of laws which, if enacted, would produce a balance of evil over good. I do take myself to have accomplished a number of important things. First, I have shown that the costs of some criminal laws outweigh the benefits—that the sphere of pragmatic noncriminalization is not empty. Second, I have shown how the Two-Issue Schema functions, and its value in indicating which laws ought not be enacted, in that they do not produce a net of good. Finally, I have shown many of the important considerations for determining whether an action is in the sphere of pragmatic noncriminalization; this is instrumental in determining which actions are subject to morally permissible reflective noncompliance according to the theory to be defended in Part Two of this work.

VI. On the Relationship Between Issue One and Issue Two Considerations

I want to discuss now, albeit briefly, the relationship between Issue One and Issue Two considerations. What I urge (and hope to make plausible, if not conclusively show) is that many laws which "fail" on Issue Two considerations
fail on Issue One considerations as well, and that there is a *causal* relationship between failing on Issue One and failing on Issue Two. Now I am not claiming identity of the sets: either that any law which criminalizes actions in the sphere of individual liberty will raise overwhelming pragmatic and secondary moral arguments, or that a law which would produce more evil than good must make criminal an action in the sphere of individual liberty. What I claim is that, with respect to some laws, the *reason* that pragmatic difficulties arise in their enforcement is that citizens believe that the actions made criminal are in the sphere of individual liberty. Let us look at some specific cases.

As I have written, some commodities must be made illegal despite the creation of a crime tariff (e.g., contract murder), while in other cases the crime tariff's evils outweigh any plausible benefits of the law which creates it. Consider now those laws in the sphere of pragmatic noncriminalization. Why is it that the police do not receive the cooperation of the public in enforcing laws against "unnatural" sex acts, or prostitution, or gambling, pornography, drug use? Why is it that the investigators of such crimes meet stony silence, and that the district attorney's office finds so few witnesses willing to testify? Difficulty in detection and enforcement
is not *sui generis*; that certain crimes go unreported and that cooperation with the police is minimal is not accidental. And undesirable police tactics (the use of decoys, electronic surveillance, etc.) are used because alternatives are not available. Enough people believe that the use of drugs, gambling, *et al.* is a matter of individual choice, not a matter within the moral jurisdiction of the state, that prevention, detection, and investigation is difficult, if not impossible.

Now I am not claiming that the sentiments of the citizenry are an infallible guide to the contents of the sphere of individual liberty. And some of the practical difficulties faced by the criminal justice system, especially in racial or ethnic ghettos, have nothing to do with citizens' determination of the boundary between the sphere of individual liberty and the region of state moral authority. But if a law is difficult to enforce, or its enactment produces some of the enumerated side effects, there is good reason to look more closely at the morality of the law. That many laws which are difficult to enforce are laws which prohibit actions in the sphere of individual liberty is far from coincidental.
VII. Conclusions: Chapter Four; Part One

My task in this chapter has been to show how Issue Two of the Two-Issue Schema functions. What I have argued is that certain criminal laws ought not be enacted (existing laws ought to be repealed) in that (independently of Issue One considerations) the pragmatic difficulties of such laws, and the secondary moral arguments their enactment gives rise to, the evils produced by such laws outweigh the benefits. While not fully specifying the set of actions whose criminalization would have this result (i.e., specifying the sphere of pragmatic noncriminalization), I have given the technique whereby this determination can be made. Finally, I argued that in many cases the cause of pragmatic difficulties in the enforcement of many criminal statutes is the belief of the citizens that the state has exceeded its moral authority in making the conduct an issue.

This completes Part One of the dissertation, the determination of the boundary between the criminalizing authority of the state and the sphere of individual choice. (It will be recalled from Chapter One that the criminalizing authority of the state consists of those actions within the moral authority of the state minus those in the sphere of pragmatic noncriminalization; the sphere of individual choice consists of the sphere of individual
liberty plus the sphere of pragmatic noncriminalization.) In Chapters Two and Three I have argued for the location of the boundary between the sphere of individual liberty and the region of state moral authority; in Chapter Four for the location of the boundary between the criminalizing authority of the state and the sphere of pragmatic non-criminalization. Having a technique for determining when the state has and has not exceeded its criminalizing authority, we are now in a position to ask the question whose answer constitutes Part Two of this work: What is the relationship between the state's exceeding its criminalizing authority, and the moral permissibility of reflective noncompliance?
FOOTNOTES


2. Ibid., p. 263.


4. Ibid., p. 15 (emphasis added).


6. Ibid., p. 279.

7. Ibid., pp. 281-2.

8. Packer refers to medical evidence that, were the addict not forced into a subculture of uncertain supply and certain crime, he could lead an economically productive, virtually normal life. Cf. Packer, *op. cit.*, Part III.


12. The figures are those of the U.S. Coast Guard, publicized by CBS on "60 Minutes." This segment has aired on several occasions.


PART TWO

CHAPTER FIVE

THE MORAL PERMISSIBILITY OF REFLECTIVE NONCOMPLIANCE

I. Introduction

Suppose the state has exceeded its criminalizing authority in making some action criminal. (This determination is made, of course, using the Two-Issue Schema.) What bearing does this have on the moral permissibility of reflective noncompliance with that law? According to my theory of justified reflective noncompliance (cf. the Introduction), the state's having exceeded its criminalizing authority is a sufficient condition for the moral permissibility of reflective noncompliance with that law.

My defense of the theory requires two chapters. In the first (Chapter Five) I catalogue the benefits of the moral permissibility of reflective noncompliance, the good that will be produced by citizens' practice of reflective noncompliance. In Chapter Six, the final substantive chapter of this work, I attack a series of philosophical positions which are (or at least appear to be) incompatible with the moral permissibility of reflective noncompliance.
Since two different sorts of arguments are used in this chapter, it is divided into two distinct divisions. In Division One (comprising sections II-V), the anticipated benefits are detailed. I discuss first the benefits with respect to laws which are rejected on Issue One considerations (the action made criminal is in the sphere of individual liberty), then the benefits of reflective noncompliance with laws which ought not be enacted on Issue Two considerations (the action made criminal is in the sphere of pragmatic noncriminalization), and finally the benefits when the law in question ought not be enacted on both Issue One and Issue Two considerations.

In *A Theory of Justice,* John Rawls uses a justificatory schema for his theory of justice known as the "original position." Many philosophers have found this a powerful justificatory device. In Division Two (comprising Sections VI-X) I provide a brief account of the original position, and then show that it is reasonable to believe that my theory of justified reflective noncompliance would be accepted as an amendment to Rawls' theory of justice.
II. Reflective Noncompliance and Laws Which Fail Issue One Considerations

It is not uncommon in philosophy to find that the set of premises which supports some conclusion also, with minor modifications or no modifications at all, supports another conclusion as well. In Chapter Two I offered four arguments concerning the boundary between the sphere of liberty and the region of state moral authority; all were designed to show that Mill's Harm Principle locates that boundary properly. In this section I employ those arguments in a different task. Here they support the claim that if the state exceeds its criminalizing authority (on account of Issue One considerations) then reflective noncompliance with such laws is morally permissible. The order of the arguments will be altered, however, so that the stronger are presented first.

Consider the Argument from Self-Respect. What I hope to have established in Chapter Two is that Rawls is correct: self-respect (or self-esteem) is one of the most important, if not the most important, social good. With self-respect life can be full and invigorating; without it, "our plans are of little value," "we lack the will to
strive" for the completion of them, and "sink into apathy and cynicism." Thus, the preservation of the self-respect of individual citizens is of utmost importance. But how is it that citizens achieve self-respect? By developing their faculties and talents, by developing those skills and abilities which individuate each person—and by belonging to some group in which one's talents are respected and admired. As Nozick writes, "Self-esteem is based on differentiating characteristics; that's why it's self-esteem." And as Rawls writes, "...in a well-ordered society...there are a variety of communities and associations, and the members of each have their own ideals appropriately matched to their aspirations and talents."

Suppose, however, that the state has exceeded its criminalizing authority on Issue One considerations. By definition, the state has made criminal actions which are in the sphere of individual liberty. We may infer immediately from this that some faculties will not be developed, but will atrophy—if the law is obeyed. Some talents of citizens will not be developed, some potential not manifested—again, if the law is obeyed. And finally, the formation of some groups, groups essential to the achievement of self-respect of their members, will be precluded—if the law is obeyed.
This is a serious moral matter. Recall the distinction drawn in the Introduction between the instrumental and intrinsic value of various acts of reflective noncompliance. For some people, the criminalized actions are of instrumental value: if unable to engage in them, they are not able to perform (what are agreed to be) socially useful tasks—or at least, not perform them as well. (Recall, among others, the examples of (i) homosexuals, who are to be found in every occupation, (ii) the use of hallucinogenic drugs incidental to many vocations, especially academic, and (iii) gambling or pornography as an "escape valve" for many.) For others, the actions criminalized are the focal point of one's life.

Suppose that the state has wrongly made criminal an action important in a person's plan of life: it is of intrinsic or instrumental value to him. Suppose further that he is morally conscientious; he wishes to fulfill his moral obligations. If reflective noncompliance with laws outside the state's criminalizing authority is not morally permissible, then there will be a deep tension in such a person's life. He must either abandon those portions of his life plan that are illegal (in order to fulfill his moral obligation to the law), or live out his plan of life, bearing the guilt such a person would inevitably feel for having not fulfilled a moral obligation.
Neither of these alternatives is palatable. If he chooses to live out his plan of life, the guilt he lives with surely will make his life less happy than it otherwise would be. Alternatively, changing his life plan would likely constitute a serious attack on his self-esteem. If the action in question plays an intrinsic role, deleting it from his plan of life would mean making a fundamental change in his life. Arguably, to abandon one set of values and adopt another is to become, in important ways, a "different person." Being forced to make this change because of fellow citizens' wrongful use of the criminal law is highly likely to damage one's self-respect. If the action in question plays an instrumental role, the eo ipso abandoning it means that other things one does will be done less well—if they can be done at all. Given the role of competent performance in the achievement of self-respect detailed in Chapter Two, rejecting an action which plays an instrumental role is an attack on self-esteem too.

Of course it is possible that such a person will find some other activity which can replace the one abandoned. But that there is this bare possibility is cold comfort. There is no guarantee that this action will not be made illegal too. More importantly—that there might be a "replacement action" does not weigh very heavily against the high probability of severe damage to self-esteem.
If, however, reflective noncompliance with laws which are outside the state's criminalizing authority is morally permissible, the morally conscientious person whose plan of life includes actions wrongfully made criminal will not be forced to make this unhappy choice. He will not be forced to choose between abandoning portions of his plan of life and bearing guilt for failing to fulfill his moral obligation to the law. Since he can both fulfill this moral obligation and not change his plan of life, self-respect will be preserved.

This leads naturally to the Argument from a Pleasurable Life. In Chapter Two I argued that a person who had developed a variety of faculties and talents was a person who had adopted the optimal strategy for a happy life; while not guaranteed a happy life, in being receptive to a greater variety of pleasures, he increased the probabilities of his having a happy life. Again consider a person who takes seriously his moral obligations. If various acts of reflective noncompliance are not morally permissible, and yet are (or would be) elements of his plan of life, he is denied happiness he ought to be able to realize. When the state makes criminal actions which are in the sphere of individual liberty, it eliminates sources of pleasure to some citizens—if they are morally obligated
to obey such laws. This constitutes a reason that they ought not be so obligated.

When the state criminalizes conduct in the sphere of individual liberty, it attacks the self-esteem of at least some of its citizens, and reduces their pleasure. The likely consequences of this is a lessening of these citizens' allegiance to the existing arrangement. This is the subject matter of the Argument from Social Stability. Of course, so long as actions they wish to perform are illegal, one must expect a lessening of allegiance. But this can be ameliorated, I suggest, if reflective noncompliance is morally permissible. While subject to arrest and prosecution if caught, they are not subject to (justified) moral condemnation. (I do not believe this argument to be nearly as compelling as the previous two, or the following one. However, the effect of reflective noncompliance on the stability of the society in which it is practiced will be discussed both in Division Two of this chapter, and in Chapter Six.)

Consider finally the Argument from an Invigorated Society. If acts of reflective noncompliance are morally permissible with respect to laws which criminalize actions in the sphere of individual liberty, then talents and abilities will be developed (among those who take their moral obligations seriously) which would not be developed
otherwise. While the development of some of these would not be a particular help toward invigorating society (e.g., prostitution, pornography, gambling), some surely would. Again, one must bring to mind the enrichment provided by those in society for whom acts of reflective noncompliance serve an instrumental role. Reflective noncompliance's being morally permissible makes possible creation in the fine arts, advances in the liberal arts and the sciences, and so forth. The improvement of society is one benefit of the moral permissibility of reflective noncompliance.

Although I believe these suffice, I also believe that additional arguments could be generated from the Millean line of argumentation. If an argument shows that some action ought to be in the sphere of individual liberty, then that argument (perhaps slightly modified) also militates for the moral permissibility of reflective noncompliance with a law that makes that action criminal.

III. Reflective Noncompliance and Laws Which Fail Issue Two Considerations

Suppose some law ought not be enacted on Issue Two considerations, i.e., that the good the law produces is outweighed by the evils of pragmatic difficulties to which it gives rise, together with secondary moral arguments.
Such a law might create a crime tariff (with all its attendant evils; cf. Chapter Four). Or it might require the police to use unsavory tactics in investigating its violations, or it makes the police (more) susceptible to bribery. The counterbalancing evil might be the inevitability of some minority's being subjected to disproportionately many arrests and prosecutions. Or those evils could consist of some combination of these, or these and others discussed in Chapter Four, or others not yet known to philosophers or criminologists. The question to be answered: How do I defend my theory of justified reflective noncompliance, according to which reflective noncompliance with such laws is morally permissible?

By definition, the set of laws under discussion visits a net evil on the society. Were there no law making the commodity illegal, there would be no crime tariff. Were there no such law, the police would not be (so) subject to corruption, minorities (so) subject to arbitrary arrest and prosecution, etc. Thus, the repeal of the laws in question would result in a net benefit to the society. How can this be accomplished?

One alternative is the use of civil disobedience, either direct or indirect. (For formal definitions of these, see Section II of the Introduction.) However, even if civil disobedience of these laws is justified, a person
may have good reason to believe that his engaging in it would be foolish: it is unlikely that civil disobedience will be effective a tactic in getting the law amended or repealed. He may well believe, and I think correctly, that neither direct nor indirect civil disobedience will persuade his fellow citizens to change certain laws, and might even make change more difficult. Consider the citizen who wishes for it to be legal to perform various proscribed sexual acts, in private, with the consent of his adult partner(s). I think the public performance of fellatio or cunnilingus unlikely to advance the cause, and likely to impede it. In addition to making opponents of the law's reform more resolute, and offending (nearly) everyone, such action might well have a negative effect on those citizens otherwise disposed to favor the law's reform or repeal. Also, it would violate another law—that against indecent exposure—which the protested might well judge a good law, one that ought not be violated. Nor does an illegal sit-in for anal intercourse in some congressman's office—an instance of indirect civil disobedience—seem any more likely to produce the desired result. And this argument, I submit, applies mutatis mutandis to the cases of pornography and hallucinogenic drugs. Neither the buying and selling of pornography on the steps of the state capital, nor smoking marijuana on
the courthouse lawn, is likely to be efficacious. The
difficulty is that, according to Rawls (and I concur),
civil disobedience is essentially a mode of communication—
and one cannot effectively communicate with the citizenry
by engaging in actions of these sorts.

Of course Mill was not the first to notice the Social
Sanction (cf. Chapter Two), but his description of it is
poignant; he writes that society seeks

...to impose, by other means than civil
penalties, its own ideas and practices
as rules of conduct on those who dissent
from them; to fetter the development, and
if possible, prevent the formation, of
any individuality not in harmony with its
ways....

Social ostracism takes many subtle and not-so-subtle forms;
the loss of one's job for either frank or fictitious
reasons; threatening, obscene or harassing telephone calls
and letters; one's children being taunted at school, and
parents forbidding their children to play with the civil
disobedient's children; loss of membership, again for
either frank or fictitious reasons, in various clubs and
fraternal or business organizations. And surely this is
only a partial list.

Understanding the sanctions some members of a commun-
ity might well mobilize against him, even a person of the
character requisite for engaging in civil disobedience might
understandably decide the cost of engaging in it excessive--indeed, prohibitive.

But these costs accrue not only to those who engage in illegal protest of these laws, but to those who engage in legal protest as well. These same social sanctions can, and I suggest will, be mobilized against those who write letters to newspaper editors and congressmen, who circulate petitions, who appear on radio and television panel shows, etc. The costs of legal as well as illegal protest are prohibitive.

While one not uncommonly encounters the claim that citizens who object to laws have a positive duty to work for the repeal of that law, arguments for this claim are scarce. Given the severity of the social penalties likely to be exacted on citizens who work for the repeal of laws like those against pornography, prostitution, gambling, drugs, etc., this is not surprising. Even though many, and perhaps a majority, believe that the laws ought to be repealed, a vocal and active minority can make a reformer's life painful.

The problem remains: How can the good which the repeal of these laws would entail be produced? The evils of the crime tariff established by Prohibition ended with the repeal of that amendment; the repeal was brought about by widespread, often covert, noncompliance. It is
reasonable to believe that acts of reflective noncompliance have been instrumental in the decriminalization of the use of marijuana, where that has occurred. In short: widespread reflective noncompliance can spell the doom of a law. If sufficiently many people determine that the state has exceeded its criminalizing authority in making some action illegal, and decide that that wrong by the state justifies one's disregard of that law, the probability of that law's being repealed is greatly increased. Thus, reflective noncompliance can play a vital role in the repeal of laws which produce a balance of evil over good—and this justifies acts of reflective noncompliance with respect to laws in the sphere of pragmatic noncriminalization, laws which fail on Issue Two considerations.

IV. Reflective Noncompliance and Laws Which Fail on Both Issue One and Issue Two Considerations

As the reader has likely anticipated, if a law ought not be enacted on both Issue One and Issue Two considerations—the action it makes criminal is in the intersection of the sphere of individual liberty and the sphere of pragmatic noncriminalization—reflective noncompliance is justified by the sum of the arguments of the previous two sections. Acts of reflective noncompliance are justified in that they enhance the self-respect of individual
citizens, and allow them more pleasurable lives. Furthermore, the society will be more invigorated for their actions, and more stable. Finally, the acts of reflective noncompliance play an instrumental role in having the laws in question repealed.

V. Summary of Division One

The arguments of this division are not long, but this does not preclude their being strong. Their relative brevity is due to a number of factors. Concerning reflective noncompliance with laws which fail Issue One considerations, the bulk of the argumentation appears in Chapter Two, where the arguments appear in much greater detail—there, of course, locating the boundary between the sphere of individual liberty and the region of state moral authority. I believed that it would be tedious to repeat the arguments, so they have merely been recalled, with modifications supplied, to show how they militate for the moral permissibility of reflective noncompliance with certain laws.

I have shown that the moral permissibility of reflective noncompliance will enhance the self-respect of many. Further, it will make the lives of many more pleasurable. The society in which reflective noncompliance is practiced
will, ceteris paribus, be more invigorated than a society in which it is not. And there is reason to believe it will be more stable.

If the tally of the pragmatic consequences and secondary moral considerations of some law demonstrates that it produces a balance of evil over good, its simply being a law inflicts an unwarranted evil on the society. Said evil ends with the law's repeal; I have argued at length (in Chapter Four, though, not in this chapter) that there are many such laws. Their repeal constitutes the elimination of serious evils; reflective noncompliance can be instrumental in their repeal.

Although this completes (what I judge to be) the strongest portion of my argument for the moral permissibility, it is but one third of the overall strategy. In Division Two of this chapter, I consider the argument from self-respect, and considerations of stability, in the context of Rawls' justificatory scheme, the "original position." Finally, in Chapter Six, I examine the case against the moral permissibility of reflective noncompliance. In attacking a series of arguments against the moral permissibility of reflective noncompliance, I further support its permissibility.

Let us turn now to Rawls, and see how the original position can be used in support of the moral permissibility of acts of reflective noncompliance.
Division Two

VI. The Strategy of Division Two

Rawls' "original position" is highly regarded by many as a justificatory scheme. After a brief review, I shall exploit it. Rawls claims that in the original position his theory of justice, "justice as fairness" would be chosen. I shall not contest this. What I shall ask is this: on the supposition that justice as fairness would be chosen, what reasons can be given for the rational legislators' choosing that plus my theory of justified reflective noncompliance? I.e., would the conjunction of justice as fairness and my theory of justified reflective noncompliance be preferred to justice as fairness alone? Let us look briefly at the original position, and then at the reasons I believe the conjunction would be chosen over justice as fairness alone.

VII. The Original Position as a Justificatory Scheme

How can one determine which principle(s) of justice is (are) correct? What is the proper procedure for deciding among competing principles of justice? John Rawls answers this, the most important methodological question of social philosophy, with the "original position." In the
few years since its publication, *A Theory of Justice* has enjoyed a wide readership and voluminous commentary, both expository and critical. As a consequence, the details of the original position have become common currency; a brief review will suffice.

Rawls claims that a theory of justice is to be preferred over a competing theory of justice just in case it would be chosen over its competitor in the original position. (Justice as fairness is to be preferred over utilitarianism *et al.* because it would be chosen of those competitors.) The "choosers" in the original position, the "rational legislators," are (in effect) modified human beings making choices on the basis of carefully limited information. They are modified in that they are rational, not motivated by envy, and mutually disinterested ("...they are conceived as not taking an interest in one another's interests."8). The information to which they have access is limited, in that no one is able to determine any of his individuating characteristics, and thus does not have the information necessary to design and urge passage of principles which will favor him. Given such legislators, deciding under such circumstances, whatever principles are unanimously chosen are the correct principles of justice (or at least to be preferred over competitors). My exploitation of the original position is to ask the rational
legislators to choose between justice as fairness conjoined with my theory of justified reflective noncompliance, and justice as fairness alone. By two different lines of reasoning, they would prefer the conjunction.

VIII. The "Original Position" Argument from Self-Respect

What attitude would the rational legislators in the original position take toward self-respect? It will be recalled that much of my discussion both in Chapter Two and in Division One of this chapter was based on Rawls' position. It is Rawls who termed self-respect "the most important primary good." As a consequence, argues Rawls, "the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect." Rawls considers this a strong reason for the rational legislators in the original position to adopt his Principles of Justice: they give "more support to self-esteem than other principles." This is especially true of the First Principle, according to which each person is to have as much basic liberty as possible, consistent with similar liberty for all others. At issue is whether the addition of my theory of justified reflective noncompliance to Rawls' theory of justice as fairness would enhance the self-respect of the citizens. I believe it would; this is
the reasoning the legislators in the original position could adopt to arrive at that conclusion.

The information available to the legislators in the original position is described by Rawls:

It is taken for granted, however, that they know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology.\textsuperscript{11}

and:

There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate, and there is no reason to rule out these facts.\textsuperscript{12}

Thus the following information will be available to the legislators in the original position, either directly under the heading of "laws of psychology" or "laws of sociology" (general laws and theories), or inferable from items under those headings. First, some citizens will not be able to distinguish actions in the sphere of individual liberty from actions in the region of state moral authority (they will not be able to determine which actions the state has the \textit{prima facie} right to criminalize, and which not). Second, there will be citizens who believe that some actions which are really in the sphere of individual
liberty are in the region of state moral authority—and thus may be criminalized. Third, they will know that people of both sorts will act on their incompetence or misconception, employing not only the Social Snub (which is always permissible) or the Social Sanction (which is sometimes permissible; cf. Chapter Two), but the Criminal Sanction. What the legislators in the original position know is that they will be subject to interferences with individual liberty which they have not countenanced. They will know that not all people will abide by a correct understanding of the principles of justice, in that they will wrongly interfere with the liberty of others.

Given the psychological and sociological facts known to the legislators in the original position—in short, that some degree of tyranny of the majority, via legislation, is virtually inevitable—the conflict which looms is obvious. Some citizens, once in society, will find themselves with life plans portions of which are illegal. In some cases, of course, the illegality is perfectly appropriate—the life plan incorporates elements which, if carried out, would violate the rights of others. But in many cases (cf. the statistics proffered in the Introduction), the illegal elements, if carried out, would not violate the rights of anyone. The actions in question are within the sphere of individual liberty.
The person who finds that portions of his life plan have wrongly been made illegal faces the alternatives mentioned above: abandoning his life plan; living his life plan, but suffering feelings of guilt for failing his moral civic duties; or—provided that reflective noncompliance is morally permissible—living out his life plan free of guilt. If maximizing self-respect is as important to the legislators in the original position as Rawls claims, then they would decide in favor of the moral permissibility of reflective noncompliance. Since it enhances self-respect, they would prefer the conjunction of justice as fairness and my theory of justified reflective noncompliance to justice as fairness alone.

IX. The "Original Position" Argument from Relative Social Stability

In section 76 of A Theory of Justice, Rawls argues that his theory (justice as fairness) is more conducive to stability than competing theories. He refers his readers to a prior section (i.e., 43) where two species of instability are described; the topic is also addressed in section 51. In the latter, we find these succinct formulations.

From a self-interested point of view each person is tempted to shirk doing
his share. He benefits from the public good in any case; and even though the marginal social value of his tax dollar is much greater than that of the marginal dollar spent on himself, only a small fraction thereof rebounds to his advantage. These tendencies arising from self-interest lead to instability of the first kind.\textsuperscript{13}

Rawls continues:

But since even with a sense of justice men's compliance with a cooperative venture is predicated on the belief that others will do their part, citizens may be tempted to avoid making a contribution when they believe, or with reason suspect, that others are not making theirs. These tendencies arising from apprehensions about the faithfulness of others lead to instability of the second kind.\textsuperscript{14}

It is Rawls' belief that these sources of instability can be negated (and are in fact by his theory): "The assurance problem...is to maintain stability by removing temptations of the first kind, and since this is done by public institutions, those of the second kind also disappear, at least in a well-ordered society."\textsuperscript{15} The comparison of theories of justice \textit{vis-a-vis} stability, then, is a comparison of how well the respective theories inhibit the tendency toward instability arising from these sources. (Of course, on condition that an arrangement is just, its being stable is vital. Indeed, Rawls argues that preserving just arrangements is a natural duty. (Cf. section 19.)
Rawls implicitly assumes that there is no "objective scale" by which "the" stability of a conception can be measured. We can, however, compare conceptions as regards stability, offering arguments that some conception is more stable (i.e., is more likely to remain stable) than another. (I suggest that an analogy might be drawn to determining the "strength" of analogical arguments. While there is no way to assign some determinate "strength" to any given argument, there are widely accepted criteria by which we can often determine which of two is stronger.)

Rawls' comparison, in section 76, is between justice as fairness, and utilitarianism. Rawls argues, and I believe successfully, that justice as fairness is a more stable conception: people being what they are, they are more likely to view fulfilling their moral duties under that conception as "the thing to do," than their duties under utilitarianism. Rawls claims that, given the "natural attitudes" of "friendship and mutual trust,"

...and the desire to do what is just, no one wishes to advance his interests unfairly to the disadvantage of others; this removes instability of the first kind. And since each recognizes that these inclinations and sentiments are prevalent and effective, there is no reason for anyone to think that he must violate the rules to protect his legitimate interests; so instability of the second kind is likewise absent.16

Rawls concludes this paragraph with a point important to my argument. "Of course, some infractions will presumably
occur, but when they do feelings of guilt arising from friendship and mutual trust and the sense of justice tend to restore the arrangement." 17

What I am comparing regarding relative stability are Rawls' conception of justice as fairness simpliciter, and that conception plus my theory of justified reflective non-compliance. My claim is that the conjunction is a more stable conception than justice as fairness alone.

The rational legislators in the original position will determine whether reflective noncompliance of laws outside the state's criminalizing authority is morally permissible or not. They will decide this by weighing the considerations for permissibility against those for impermissibility. My claim is that the considerations concerning relative stability will urge them towards "permissibility" (and this, in conjunction with other considerations, e.g., the argument from self-esteem, will compel them to decide in favor of permissibility). What are the relevant considerations?

Suppose it were to be decided that reflective noncompliance is not morally permissible? Citizens have a moral duty to obey the laws of a reasonably just constitutional democracy, even when those laws are outside the state's criminalizing authority. What would be the impact of this on society? Most obviously, it would force the unhappy
choice mentioned in Section II of this chapter on those whose life-styles were contrary to such laws: they must either abandon their life-style, denying themselves as persons, or live the life they had chosen, bearing the guilt that accompanies failing to fulfill one's moral duty. They would know that what they wished to do was morally permissible in itself, but that since it was illegal, it was morally wrong. And of course it is illegal because of the incorrect conception of the criminal law's role held by fellow citizens. It is safe to say that this would not lead to the feelings of "mutual trust and friendship" Rawls correctly sees as so important to stability. It is difficult to see how one would be motivated to do his fair share toward societal undertakings (instability of the "first sort") when one's peers are forcing him to choose between abandoning his life-style or failing his moral responsibilities. In the argument of Sections II and VIII, self-respect was championed as an intrinsic good. Here it is advanced as an instrumental good—in denying a person self-respect, one contributes to instability. For, as was argued above, a person whose liberty is threatened—indeed, denied—has little else to lose, and thus will lack strong attachment to the existing order.
Suppose now that it were decided that reflective noncompliance with laws the state has exceeded its criminalizing authority in enacting is morally permissible. What is the likely impact of this decision? I think it likely that the attachment of those with illegal lifestyles to the existing order would be far stronger. Although they would still have to (in the relevant ways) live covertly to avoid legal penalty, they would not be forced to choose between fulfilling moral responsibility and abandoning their life-plan. Of course they could not be pleased about the existing laws, but they would not bear the burden of correct moral condemnation. I.e., it is likely that some would still condemn them, but those people would be mistaken, given these arguments. The evaders would not be fully moved to "friendship and mutual trust" with those who criminalized elements of their life-plans. Nor would the others be so moved, knowing that their laws were being evaded. But the animosity between the groups would be lessened; as a consequence, the society would be more stable. Thus, the legislators in the original position would decide that reflective non-compliance is morally permissible, since its being attached to justice as fairness results in a more stable conception than justice as fairness alone.
X. Conclusions of the Chapter

This completes my "positive" arguments—arguments which support the moral permissibility of reflective non-compliance with laws outside the state's criminalizing authority. The benefits to be realized are great; there is good reason to believe that a society which included acts of reflective noncompliance consistent with my theory of justified reflective noncompliance would be preferable, from the moral point of view, to one which did not. Before a conclusive determination can be made, however, we must investigate the matter of counterbalancing evils. Given that acts of reflective noncompliance would produce the enumerated benefits—might they also produce evils, evils which would outweigh the benefits? I turn to that investigation in Chapter Six. The arguments of that chapter may be thought of as "negative" arguments for the moral permissibility of reflective noncompliance, attacking impediments to the correctness of my theory.
FOOTNOTES


2. Ibid., p. 440.


5. I owe this point to Bernard Williams, in conversation.


7. My strategy here—in particular arguing from within the original position, and employing the Rawlsian notions of self-respect and stability—parallels D. M. Farrell's strategy in his manuscript "Political Duty in a Reasonably Just Society'"


10. Ibid.

11. Ibid., p. 137.


13. Ibid., p. 336.

14. Ibid.

15. Ibid.


17. Ibid., p. 498.
CHAPTER SIX
ON THE SUPPOSED DUTY TO OBEY UNJUST LAWS

I. Introduction and Strategy

Since there is no existing theory of justified reflective noncompliance save my own, which is (of course) not well-known, there is no body of literature, no set of arguments, which constitutes a critique of justified reflective noncompliance *per se*. But this is not to say that the domain of such a theory is virgin territory, not yet subjected to philosophical scrutiny. There is a philosophical position which, though not advanced as an attack on theories of justified reflective noncompliance, is clearly inconsistent with such theories. Or, more cautiously, it is overwhelmingly likely that opposed judgments on the moral permissibility of a wide variety of acts would issue from my theory of justified reflective noncompliance and the philosophical position to which I refer. That position is that a citizen is morally obligated to obey unjust laws.

Understandably, the extreme positions have gained few subscribers: few maintain that citizens have a duty to obey all unjust laws; few maintain that citizens have
no duty to obey any unjust laws. A consequence of this is an initial awkwardness in the argumentation of this chapter. The position I defend is that there is no duty to obey unjust laws—at least, not very many unjust laws. The position I attack is that there is a duty to obey unjust laws—at least, many of them. As this chapter progresses, much of the imprecision will be resolved; I distinguish several species of unjust laws, and on the basis of those distinctions be in a better position to specify my position and that of my opponents. In spite of the indeterminacy concerning the limits of tolerable unjust laws (those which must be obeyed), it will be clear that I disagree with John Rawls and Charles Fried. Though the boundaries are unclear, the cardinalities are not: Rawls and Fried argue for a larger set of tolerable unjust laws than I. As regards many unjust laws, Rawls and Fried will urge compliance, and I shall urge reflective noncompliance.

This imprecision must be borne in mind in reading the following arguments. When I commit Rawls or Fried to the claim that we must obey unjust laws, I do not mean all unjust laws, but a larger set of unjust laws than I believe we have a duty to obey. And when I claim that we do not have a duty to obey unjust laws, I should not be taken to mean that there are no unjust laws which deserve
compliance, but a smaller set (to be specified below) than Rawls or Fried believes we have a duty to obey.

As will become clear, the problems addressed in this chapter have a philosophical component and an empirical component; disagreement is possible on one, the other, or both. Stated most broadly, the issue is this: "What will be the consequences of the widespread practice of reflective noncompliance (the empirical component), and what is the value (or disvalue) of these consequences?" Disagreement is possible concerning the impact of a theory of justified reflective noncompliance on a society, and disagreement is possible concerning the worth of its consequences. I acknowledge that my claims about the benefits of acts of reflective noncompliance (as enumerated both in this chapter and in the previous chapter) rest on empirical claims, claims which may turn out to be false. If I am wrong about the facts, the benefits of acts of reflective noncompliance may not be so great as I have argued, and the potential evils greater. This is not an expression of doubt about my case; I believe that my empirical assessments and predications are essentially correct. I merely want to go on record acknowledging that, should I be mistaken about the impact of my theory on society, the theory might have to be modified (or worse).
Four distinguishable arguments for a duty to obey unjust laws will be examined in this chapter. The first, addressed in Section II, is Rawls' argument based on a citizen's natural duty to support just arrangements, including a just constitution, and one of its essential features, a "principle of institutional settlement." I shall understand Rawls' position as a threat to the correctness of my theory of justified reflective noncompliance according to the criterion of correctness discussed in the Introduction to this work (and to be discussed in conjunction with that argument below). In Section III, I distinguish attacks on the correctness of a theory of justified reflective noncompliance from attacks which focus on the potential dangerousness of such a theory's promulgation. I then reconsider Rawls' argument from a duty to support just institutions, treating it as an attack of the latter sort. Since it is not clear (to me, at least) that this is what Rawls intended, and since this objection has been most forcefully argued against my position by D. M. Farrell, I shall refer to this as the "Farrell objection." Section IV is an examination of an argument by Charles Fried, which concludes that civil disobedients ought to accept punishment for their illegal actions. Since the argument could, with minor modifications, be directed against the moral permissibility of acts of
reflective noncompliance, I challenge it. Another of Rawls' arguments is considered in Section V; the concern here is that a citizen, in engaging in reflective noncompliance, does not discharge his duty of civility. I argue that this is not the case; there is no breach of this duty.

II. The Argument from a Natural Duty to Support Just Institutions.

A. Rawls' Argument

A principal task of Rawls' work is a defense of the claim that there is a natural duty to uphold a just constitution. To review that complex of arguments would be to provide a synopsis of the work. I trust that this is unnecessary, given the wide readership A Theory of Justice enjoys; the outline of the general argument is common currency. What is at issue here is whether that duty (which I accept) includes the duty to obey an unjust law. I.e., is it possible to "support a just constitution"--adequately fulfill that moral duty--without obeying unjust laws? Rawls argues that it is not; I argue for the contrary.

Concerning the constitution, Rawls writes:

The constitution is regarded as a just but imperfect procedure framed as far as the circumstances permit to insure a just outcome. It is imperfect because
there is no feasible political process which guarantees that the laws enacted in accordance with it will be just. In political affairs perfect procedural justice cannot be achieved.¹

After indicating the role of majority in procedural justice—that is how issues are to be resolved—Rawls continues,

Yet majorities (or coalitions of minorities) are bound to make mistakes, if not from a lack of knowledge and judgment, then as a result of partial and self-interested views. Nevertheless, our natural duty to uphold just institutions binds us to comply with unjust laws and policies, or at least not to oppose them by illegal means so long as they do not exceed certain limits of injustice. Being required to support a just constitution, we must go along with one of its essential principles, that of majority rule. In a state of near justice, then, we normally have a duty to comply with unjust laws in virtue of our duty to support a just constitution.²

This argument proceeds too quickly. Granted, some actions which are failures to comply with just laws are also failures of our duty to uphold a just constitution—armed insurrection against a just government is an obvious example. But it is far from obvious that all cases of noncompliance with an unjust law are cases of failing our duty to support a just constitution. Surely in principle this is not the case. Assume a constitution all of whose laws are just save one, which mandates that no one will step on any crack in any sidewalk. I am persuaded by Rawls' arguments that, were I a citizen of such a
constitution, I would have a natural duty to support that constitution. But I am not persuaded that, were I to step on a crack, that stepping would be a failure of said obligation.

Of course one silly counterexample like this proves little. What it does do, however, is to direct our attention to the germ of the issue. The claim that a duty to obey unjust laws arises from the duty to support a just constitution rests crucially on a causal assumption—that obedience to unjust laws is causally necessary in support of a just constitution. More perspicuously, failure to obey unjust laws will contribute causally to the demise of a just constitution—and that contribution will sometimes be sufficient to bring down that government. It is implausible that stepping on sidewalk cracks violates our duty to support a just constitution, just because there is no causal connection between such stepping and the dissolution of just regimes.

To make even plausible the claim that a duty to obey unjust laws arises from the duty to support a just constitution, Rawls must argue for a causal connection between noncompliance with unjust laws, and the bringing down of just constitutions. This would require considerations of unjust laws individually. Noncompliance with some unjust laws would not be causally connected with downfalls;
noncompliance with others might well be. To anticipate: what I shall argue is that even widespread and systematic noncompliance with laws outside the criminalizing authority of the state does not pose a significant threat to the continued existence of a just constitution. The requisite causal relationship between noncompliance with those laws and the demise of a just regime does not obtain.

As Rawls claimed in a passage above, majority rule is an essential feature of a just constitution. The contracting parties in the original position would see the need for a procedure for deciding social issues; they would also see that (i) no procedure that decided in any particular person's favor all the time would be accepted by the group, and (ii) agreeing on some procedure is preferable to having no procedure at all. However, any such procedure will be subject to abuse: due to ignorance or ill will on the part of some members of society, unjust laws will be passed. And although in general there is a natural duty to obey these unjust laws, this duty does not hold unconditionally:

...when they adopt the majority principle the parties agree to put up with unjust laws only on certain conditions. Roughly speaking, in the long-run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardship of unjust policies should not weigh too heavily in any particular case.3
Most importantly, 

...certainly we are not required to acquiesce in the denial of our own and others' basic liberties, since this requirement could not have been within the meaning of the duty of justice in the original position, nor consistent with the understanding of the rights of the majority in the constitutional convention.

The position I shall argue is this: (i) the requisite causal relationship between disobedience of laws outside the criminalizing authority of the state and the downfall of a just constitution does not exist, (ii) the burden of injustice is not "more or less evenly distributed over different groups in society," and (iii) obeying (at least many of) the laws outside the criminalizing authority of the state constitutes an acquiescence in "the denial of our own and others' basic liberties." In order to show (i), I must pause for a moment, and examine the relationship between the vague appellation "unjust law," and my concept of the criminalizing authority of the state.

B. Four Species of Unjust Laws

In defending his claim that (at least in some cases) there is a natural duty to comply with unjust laws, Rawls treats all unjust laws as if they were "of a piece," as if no differentiation of "unjust laws" (save degree of
injustice) were relevant to the issue of whether there is a duty to obey them. I believe this tacit assumption is mistaken; in the section which follows this I attempt to prove that claim. In the present section I simply describe four "ways" in which a law may be unjust (features of laws which would justify their being judged unjust).

I make no claims about the classification itself (that it is the correct way to categorize unjust laws; that there are precisely four categories of unjust laws, etc.) save that it serves my purpose: showing that Rawls' arguments are not equally telling concerning all unjust laws. (To anticipate: they are not telling at all vis-a-vis some unjust laws--they are inapplicable.) To differentiate unjust laws (when appropriate) in the remainder of this work, each will be labeled "unjust(1)," "unjust(2)," etc., to indicate the particular failing of that law. Of course it is possible that a law will be unjust in virtue of several of its features; this will be indicated (again, when appropriate) by the presence of additional numbers (e.g., "unjust(1),-(3)").

Unjust(1). A law may be unjust in that it prohibits actions which ought to be left to the liberty of the individual, i.e., the individual ought to be legally free to do or forbear. A law that is unjust(1) makes criminal an action that is in the sphere of individual liberty.
In criminalizing these actions the state exceeds its criminalizing authority, and *ipso facto* its moral authority. Hence, such laws are unjust. In Chapters Two and Three, I argued for various actions' being in the sphere of individual liberty; on condition, of course, that these arguments are successful, I have shown that many laws currently valid in many jurisdictions are unjust(1).

Unjust(2). As I argued in Chapter Four, there are many laws which produce a balance of evil over good in the society in which they are enacted. By creating a crime tariff, of encouraging corruption of the police, or encouraging the use of unsavory tactics, etc., they work a positive evil on the society. Laws in the sphere of pragmatic noncriminalization are unjust(2).

Unjust(3). A law may be unjust in that it distributes a legitimate burden of social organization, but does so inequitably. Several different kinds of cost arise from social organization: some citizens must lose their freedom, and perhaps their lives, in its armed services; some will have their property appropriated for the commonweal; nearly all, through taxes, will be compelled to underwrite a portion of the operating expenses of the government. Many schemes for distributing these burdens exist; some are equitable, others less so, others moral travesties (e.g., slavery). A law may be unjust in that, while it
performs a function which must be performed—it insures that the cost of social organization is paid—in distribut ing the burden unfairly, it violates the rights of some citizens. A law compelling only citizens of a certain race, religion, locale, etc., to serve in the military would be unjust. A law demanding the payment of taxes by only members of certain races, religions, or regions, would be unjust. Both laws would be unjust(3).

Unjust(4). A law may be unjust in that it prohibits actions which ought to be prohibited, but does so incompetently. A law which prohibited what ought to be prohibited, yet which was expressed in language so technical and complicated as to be unintelligible to a majority of the citizens, might well be held unjust. A law could be unjust for attaching too severe a penalty to an act which agreeably ought to be prohibited—cutting off one's arm for shoplifting, for example. I shall call laws of this sort unjust(4).

C. The Critique of Rawls' Argument

According to my theory of justified reflective non-compliance (cf. the Introduction and Chapter One), reflective noncompliance is morally permissible with respect to any law outside the criminalizing authority of the state.
This is not equivalent to the claim that reflective non-compliance is permissible with respect to any unjust law. According to my theory, reflective non-compliance is permissible with respect to laws unjust(1) or unjust(2) (or, obviously, laws unjust(1), (2)). I do not claim, nor do my arguments show, that laws unjust(3) or unjust(4) may morally be subject to reflective noncompliance. (This is not to say that they can never morally be violated--surely there are circumstances in which they may--but this is outside the domain of my enterprise.) The burden of proof Rawls bears is showing that reflective noncompliance with laws unjust(1) or unjust(2) poses a serious threat to the continued existence of a just constitution, i.e., that there is a causal relationship between such noncompliance and the demise of such a constitution.

Rawls' argument is not directed against my theory of justified reflective noncompliance; it is not surprising that this causal relationship is not detailed. We are free to speculate, however, on the sorts of illegal actions which would be likely to bring down a government--more specifically, the disobedience of which kinds of admittedly unjust laws. Persuasive arguments could be constructed, I suspect, concerning disobedience of laws which are unjust(3) or unjust(4). Were people to refuse to pay taxes because the tax burden was not equitably distributed,
(the tax law was unjust(3)), the government might well fall. And if people were to disregard laws prohibiting armed robbery, or assault, on account of legislators' having attached too severe a penalty (laws unjust(4)), the subsequent chaos would likely spell the doom of the government. Consequently, Rawls' argument may hold concerning laws unjust in these ways: we have a moral duty (within limits) to obey them, in virtue of our natural duty to uphold a just constitution.

However, as I have indicated, the person engaged in reflective noncompliance will be evading laws unjust(1) or unjust(2), not unjust(3) or (4). Does Rawls' argument hold against the evader? What needs to be shown is how violations, even systematic and widespread violations, of these laws could (causally) lead to the destruction of a just constitution. As the arguments of Part One have shown, there is no significant, direct harm to anyone (other than, possibly, the agent) in the performance of these actions. This being the case, it is difficult to see how the continued existence of the government could be threatened.

Following Hobbes and Locke, I agree that people may revolt, may risk chaos, when their life, liberty, and property is not secure; there is little to lose. But this condition does not obtain. Life, liberty and property are not threatened—indeed, the primary "threat" is from a
self-inflicted wound: some citizens may suffer pain in knowing that, e.g., some of their peers are smoking marijuana, or reading pornography. No argument is forthcoming that under these circumstances, a just constitution is in jeopardy.

The intuitive appeal of this argument by Rawls can be attributed to a "diet of one-sided examples" -- the conflict between a just constitution's existence, and widespread noncompliance with laws unjust(3) and (4). Due to the failure to show (and, I submit, the impossibility of showing) a causal connection between noncompliance with laws unjust(1) and (2), and the downfall of a just constitution, Rawls' argument is wholly inapplicable to the case of reflective noncompliance. This argument supplies no reason for obeying rather than evading.

Rawls' argument is further weakened by a consideration of the seriousness of the encroachment of such laws, and the distribution of the injustice. If the sphere of individual liberty contains the actions I (following Mill) have claimed it does, and if the performance of these actions plays the crucial role I (following Mill) have claimed they do in the development of faculties and talents, and ultimately the achievement of happiness and self-respect, then laws that are unjust(1) or unjust(2) constitute a serious attack on one's basic liberties. Knowing
the intrinsic or instrumental value such actions might play in one's life, one could not "acquiesce to the denial" of such basic liberties.

Suppose there were a moral duty, in virtue of the duty to support a just constitution, to obey laws unjust(1) or unjust(2). Would the burden of obeying unjust laws be "more or less evenly distributed over different groups in society," and would "the hardship of unjust policies...not weigh too heavily in any particular case?" We can make sense of the "even distribution of the burden" in the case of laws that are unjust(3); tax laws ought not unevenly distribute the burden of financing state functions, no particular group ought to be required to surrender freedom to defend the state more than other groups, etc. But can we make sense of the claim that the burden of laws unjust(1) or unjust(2) should be evenly distributed? The burden of injustice will be borne by those whose plans of life include actions which, though in the sphere of individual liberty, the state has chosen to make criminal. A person bears more or less a burden depending upon the portion of his life plan the state has wrongly made criminal. There are no well-defined "groups" (e.g., race, geography, income level) for distributing injustices of laws unjust(1) or unjust(2) as there are regarding laws unjust(3). The problem is this: some individuals will bear no burden,
while others bear a crushing burden. What distinguishes them is their respective plans of life. Yet the actions of both plans are in the sphere of individual liberty. This fundamental unfairness further weakens the argument that the duty to support a just constitution includes a duty to obey laws unjust(1) or unjust(2).

Finally, it is worth considering the more general issue of what is required by our duty to support a just constitution. For Rawls, it is (in part) the compliance with (at least some) unjust laws. Of far greater importance (and I doubt that Rawls would disagree) is our compliance with just laws, and our active, informed participants in self-government. If knowledgeable citizens are actively involved in governmental operations, even widespread reflective noncompliance will pose no threat.

III. Correctness and Dangerousness: The Farrell Objection

A. My Interpretation of Rawls' Argument

In the previous section, I interpreted Rawls' position as an attack on the correctness of my theory of justified reflective noncompliance. As such, what I took to be at issue was this: "Suppose citizens followed my theory of justified reflective noncompliance, i.e., suppose citizens systematically disobeyed laws outside the criminalizing
authority of the state. Would this be a threat to a just constitution?" I considered Rawls' arguments for obeying unjust laws, looked at the consequences of disobeying some unjust laws (those unjust(1) and unjust(2)), and argued that noncompliance with these did not constitute a threat to the continued existence of a just constitution.

But moral theories (including theories of justified reflective noncompliance) are subject to criticism on a number of different grounds. I consider now an objection to my theory which I understand as not being an attack on its correctness per se, but which focuses on some possible consequences of its promulgation.

B. The Farrell Objection

D. M. Farrell has urged a criticism of my theory of justified reflective noncompliance which, according to him, is the fundamental concern of Rawls in his argument that unjust laws must be obeyed in discharging the duty to uphold just institutions. I am undecided on this matter; I am unsure whether this is Rawls' concern. Consequently, I term this criticism the "Farrell objection:" "Were citizens permitted to decide for themselves which laws are within the criminalizing authority of the state and which are outside that authority (and thus which laws we are morally obligated to obey and which not), the consequence
would be anarchy, or at least more evil than would result from citizens' being obligated to obey unjust laws."

William G. Lycan suggested the following reply: "Well, those who disobey laws which make criminal actions within the criminalizing authority of the state simply have done wrong." This reply is both correct and unsatisfying; it is important to see why this is so.

To criticize some moral theory as being incorrect is to say that even if its prescriptions were followed perfectly, one would not be guaranteed of doing what was right. My theory of justified reflective noncompliance would be incorrect just in case the performance of actions it says are permissible creates a balance of evil over good, e.g., results in the demise of a just constitution. But there are other grounds on which moral theories can be criticized. A theory could be correct (in following its directive concerning permissible, obligatory, and prohibited actions, one never did wrong), and yet be "unacceptable" in that, e.g., a thorough understanding of advanced mathematics was required to use the theory, to determine its directives. Or a theory which was correct could be criticized in that its decision-procedure was so complex, and required so much time to use, that in many moral situations, a decision would have to be made before a directive could be determined.
There are other failings of this sort, one of which is the essence of the Farrell objection. The concern of that objection is not that, were people to use my theory properly, disobeying only those laws which are outside the criminalizing authority of the state, a balance of evil would result. In expressing fears about individuals' being the final arbiters of whether particular laws are in the sphere of the state's criminalizing authority, some (many?) citizens will make this determination incorrectly—and thus wrongly determine that noncompliance with particular laws is permissible. Were this to happen, the objection continues, were citizens to disobey laws unjust(3) or unjust(4), or just laws, then a balance of evil over good would be produced. The concern is not that truly justified (by my theory) reflective noncompliance will produce a net evil, but that were the citizenry to use such a theory, it would be improperly used sufficiently often so as to produce a net evil.

In this objection, empirical and philosophical issues are tightly intertwined. To determine how much evil would be produced, one must determine how often the theory would be misused (how often people would arrive at the conclusion that an action within the criminalizing authority of the state was not), and (the philosophical issue) how much evil such mistakes produce. To determine whether
a society with my theory of justified reflective noncompliance is preferable (from the moral point of view) to a society without it, one must balance the frequency of improper use multiplied by the evil of those cases against the frequency of proper used multiplied by the good produced by those cases.

In order to make a conclusive determination of whether a society is preferable with or without my theory, the empirical issue must be answered. We cannot balance the good produced against the evil produced until we know the frequency of justified reflective noncompliance and the frequency of unjustified reflective noncompliance.

Viewed this way, both the correctness and the unsatisfactoriness of Lycan's reply are clear. The fact that some people may (or will) make an incorrect determination of what laws are outside the state's criminalizing authority (and thus are subject to justified reflective noncompliance) does not mean that the theory is incorrect—that people in fact use a theory correctly is not a criterion for the correctness of the theory. (Even if people were unable to add and subtract correctly this would not show utilitarianism false.) The reply is unsatisfactory in that, in deciding matters of public policy, the competencies (and incompetencies) of the citizenry must be considered. (Even if utilitarianism is the correct moral
theory, one ought to hesitate before urging its adoption by individual citizens if few will ever master addition and subtraction.)

This leads one naturally to ask: "What is the ultimate conclusion of the Farrell objection?" It is clear that the objection does not lead to the conclusion that my theory of justified reflective noncompliance is incorrect. It is also clear that the evils cited from the theory's misuse are produced only if it is indeed misused—and of course it cannot be misused by the citizens unless they come to know it and use it. Thus, what the objection claims is that misuse of the theory is dangerous, and that misuse can be prevented only if citizens either are kept ignorant of the theory, or are convinced to not use it.

To say that whether my theory's promulgation and use would result in a morally preferable society ultimately depends upon the facts of correct versus incorrect use of the theory is not to say that there aren't good reasons for believing that the empirical matters will turn out a certain way. The position I (not surprisingly) take is that the good which results from correct (i.e., justified by my theory) reflective noncompliance will outweigh any evil produced by people who (i) learn of my theory, (ii) incorrectly determine that some action is outside the criminalizing authority of the state, and (iii) act on
that determination, i.e., disobey the law prohibiting it. The rest of this section is devoted to arguing that case.

C. An Assessment of the Evils Attributable to Misuse of the Theory of Justified Reflective Noncompliance

What reasons are there for believing that the evils attributable to misuse of my theory of justified reflective noncompliance will not be great, i.e., will not outweigh the benefits its proper use produces? Let us divide the citizenry into two groups--those who take seriously their moral obligations, especially the *prima facie* obligation to obey the laws of a reasonably just constitutional democracy, and who will sincerely try to determine their respective moral obligations; and those who do not take said obligations seriously, nor make a good faith effort to determine what those obligations are. And now let us look at the mistakes likely to be made by the members of each group.

The members of the first group are unlikely to make many mistakes, and those they do make are not likely to be mistakes which cause serious evil. In taking moral obligations seriously, they will not carelessly decide that there is no obligation to obey a given law. In making a good faith attempt to determine whether some action is in the
sphere of individual choice or the sphere of state criminalizing authority, they will review (at least some of) the arguments of Chapters Two through Four. They will not engage in reflective noncompliance of a law unless reasonably certain that the contemplated action is in the sphere of individual liberty (and their performing it will contribute to the development of their faculties and talents, or enhance self-respect, etc.), or that the law produces more evil than good (and thus noncompliance can help in getting the law repealed). In short: the arguments I have provided in support of the theory include reasonably specific steps for determining whether an action is within the criminalizing authority of the state. It is reasonable to believe that a person sincere in his attempt to determine whether a law is justifiably subject to reflective noncompliance can make an accurate determination. And while there will be borderline cases, it is highly unlikely that people of good will will be mistaken so often about laws so important to the state's continued existence as to pose a threat to it.

Consider now those people who do not take seriously their moral obligations as regards the law, or who do not make a good faith effort to determine their obligations. Wouldn't their knowledge of and misuse of my theory result in great evil? I think not. We must be careful here to
not lay too much blame for noncompliance on the theory. If a person does not take his obligations seriously, or doesn't determine what they are, it is unlikely that encountering my theory will spur any additional disobedience. Such a person decides which laws he will obey on grounds other than moral: perhaps convenience, or inclination, or cost, or pure caprice. The fact that he has learned of a moral theory according to which some instances of disobedience are morally permissible is unlikely to have any impact on his life at all. It is very difficult to believe that such an acquaintance will incite additional noncompliance.

Of course, my use of "likely" and "unlikely" here indicates that this is an empirical issue, an issue whose final resolution depends upon a determination of the effects of a theory such as mine on society. But the burden of proof is heavy; for the Farrell objection to succeed, the combined evils of (i) good-faith mistakes and (ii) additional noncompliance induced by knowledge of the theory must outweigh the benefits enumerated in Chapter Five.

While I do not believe that this will happen, I do acknowledge that it might. Were it the case, then the theory would have to be modified, or its dissemination limited, or the theory rejected on account of its being dangerous, despite its being correct.
IV. Fried's Argument from Adverse Remedial Legislation

As mentioned in Section I of this chapter, Charles Fried offers an argument in support of the claim that civil disobedients ought to accept punishment for their illegal act. His argument could easily be modified to constitute a denial of the moral permissibility of reflective noncompliance; hence, it is appropriate to consider it here.

The main thesis of Fried's paper is that "...an important, indeed a crucial technique for moving another to act is to make the desired performance the right thing for him to do..."7 In defending his claim that a civil disobedient ought to be willing to suffer the legal consequences of his illegal act, Fried discusses fidelity to a "principle of institutional settlement,"8 e.g., majority rule.

The civil disobedient protests, illegally, a law he wishes changed. Yet he wants continued compliance with the principle of institutional settlement, lest his reform be nullified.

The demonstrators in violating this principle run the risk that if they are successful in procuring a change in the law, those persons who believe that the old situation was justified and that the new unjustifiably prejudices their interests will feel entitled to resist the "remedial" legislation.9

Fried continues,

And this feeling would not be wholly unwarranted as the demonstrators'
unwillingness to abide by the principle of institutional settlement does weaken their moral claim on the fidelity of others to that principle. 10

As the reader likely has anticipated, Fried's proposed solution to the problem is for the disobedient to accept punishment for his deed; so suffering the legal penalty will discourage frivolous noncompliance with the principle of institutional settlement.

Thus, Fried's argument is that citizens ought to comply with the results of the principle of institutional settlement, even in cases where the result is unjust (within limits, of course), since the noncompliance of some encourages the noncompliance of others, especially as regards the "remedial" legislation.

Thus, if acts of reflective noncompliance are instrumental in changing the law, two problems arise. First, a pragmatic problem for the reformers: it is possible that their reforms will be nullified by reflective noncompliance with the remedial legislation. Second, if the reflective noncompliance of some induces the reflective noncompliance of others, which in turn induces more, etc., then anarchy will reign.

Now I have already addressed the second issue in the previous section; I add a few remarks here, but rest most heavily on those. (And I again acknowledge that if my
expectations concerning instability are incorrect, my theory will have to be modified.)

For Fried's Argument from Remedial Legislation to be telling, what must be shown is (i) that the noncompliance of some does in fact encourage the noncompliance of others; (ii) that remedial legislation has been enacted; (iii) that that remedial legislation creates a class of "newly disadvantaged" citizens (at least, by their perceptions), and finally, (iv) that the noncompliance of the "newly disadvantaged" is likely. I take two distinct tacks in arguing that these conditions will not be met. In my first tack, I shall consider (ii)-(iv), returning then to (i). In the second tack, I mark off a distinction Fried seems not to have noticed, and show that making that distinction further weakens their case.

Why, for Fried, is failing to abide by the principle of Institutional Settlement so "dangerous" a tactic? It is because one's remedial legislation may then become subject to the same tactic--noncompliance. The danger is essentially practical. Now this argument is plausible regarding laws which are unjust(3)--indeed, Fried chooses as his example an unjust tax law. Should those obligated to bear an unfair tax burden under the current law refuse to bear that burden, and subsequently succeed in enacting remedial legislation, those forced to undertake a higher
obligation may, in a similar manner, refuse. (Fried's conclusion is that one pay the legal penalty for the illegal noncompliance; this will deter insincere protests).

Consider now laws outside the criminalizing authority of the state—the laws subject to reflective noncompliance. What has been shown is not that remedial legislation is in order, but that, since the state is not justified in interfering with individual choice (in this case) at all, the encroaching law should be repealed, not supplanted with remedial legislation. If there is no remedial legislation, then necessarily there is no remedial legislation with which citizens can refuse to comply.

In the case of a new tax schedule, it is clear that a class of "newly disadvantaged" citizens is created—those who must pay more taxes than they did under the previous law. But when a law unjust(1) or unjust(2) is repealed, is a class of "newly disadvantageds" created? Who suffers when liberties are enlarged? Of course there is the omnipresent problem of those who are grieved when others are legally permitted to do what the grievers wish they wouldn't, but again this is no argument against extending the liberty of all citizens.

Nor is it clear just how a "backlash" could be mounted, e.g., by those citizens who mistakenly conceive themselves "newly disadvantaged." Suppose citizen C
considers himself worse off for pornography laws' having been repealed. In what way might he refuse to comply with the outcome of the Principle of Institutional Settlement? There is no way he can directly, through this kind of refusal, damage the interests of the "newly advantageds." Presumably he was not buying porn, and so cannot threaten to stop. And beginning to buy certainly won't have his desired result. He might opt for a more general protest—e.g., refusing to pay his taxes—but of course this requires moral justification, which I suspect is not forthcoming. This argument applies mutatis mutandis to many, if not all laws outside the criminalizing authority of the state: there is no specific "backlash," or "retaliatory" reflective noncompliance possible.

Since there is no reflective noncompliance available regarding a repealed law, the problem of condition (i) above—the "monkey see, monkey do" argument—is for the most part dissolved. But there are other difficulties with that argument which merit discussion.

According to the argument, the noncompliance of some citizens incites, breeds, or in some other way, makes more likely the noncompliance of citizens—perhaps noncompliance with laws essential to the continued existence of the constitution. Appealing as this armchair sociology may be, the lessons of the late 1960's—early 1970's do much to
dispel these fears. First, despite widespread illegal demonstrations against the Vietnamese war and other social malaise, the continued existence of the United States was not endangered. The fears within the Nixon White House constituted paranoia. Second, while some non-demonstrating citizens became demonstrators, there is little evidence to support the claim that other species of unlawfulness were prompted. Finally, there is a deep tension in the strategy of (a) claiming one ought to obey at least some unjust laws since that evil is outweighed by the benefits of social organization, and (b) worrying about retaliatory noncompliance. Let us suppose that the benefits of living in society are great, and thus it is generally in a citizen's interest not to perform actions which threaten the society's continued existence. Suppose further that a law unjust(1) or (2) is repealed, against the wishes of some group we can call the "Citizens Lobby." The question is: are the members of the Citizens Lobby likely to engage in some species of retaliatory noncompliance? (As I have argued above, there is no specific retaliation possible.) If those citizens are rational, the answer is "no." Ex hypothesi, no one's legitimate interests are harmed by the actions which were prohibited by the newly-repealed law; thus the members of the Citizens Lobby either don't understand the facts, or hold to an incorrect theory of the moral
authority of the state (i.e., that it is permissible to interfere with a citizen's liberty even if his actions do not harm another). Should the Citizens Lobby decide to refuse to pay taxes, they engage in an action which does harm the legitimate interests of others--those dependent upon tax-supported programs--and thus does threaten the continued existence of the society. It is difficult to believe that a significant number of people would perform actions which directly threaten their own interests, in response to a social action (repeal of the law) which does not harm their interests. Quite apart from the probable action of people: it is inconsistent to champion the benefits of society as outweighing the evil of obeying unjust laws, and worry that those benefits are not so great as to deter people from disobeying just laws when their attempts at meddling in the private affairs of others are thwarted!

Suppose some citizen fails to comply with a duly enacted law of his government. According to Fried, he has failed to abide by the results of the Principle of Institutional Settlement (hereafter "P.I.S."). While this is technically correct, it masks a crucial distinction. A person may think that the issue decided by the P.I.S. is one appropriately decided by a social procedure, but believe the result is "wrong." However, a person might
believe that an issue is one which ought not be subject to a social decision procedure at all, and thus any vote outcome would be wrong. It is one thing to believe that a tax structure ought to be the output of a P.I.S., and believe that the current schedule is inequitable; it is quite another thing to believe that a matter ought not be subject to the P.I.S. at all—whether I sleep with one pillow or two, whether I arise at dawn or dusk, etc. To argue for a contrary result in the first sort of case is to acknowledge the authority of the P.I.S. on the issue, but to claim (in the case of majority rule) that some people ought to have voted differently. In cases of the second sort, however, one does not acknowledge the authority of the P.I.S. on the issue: that it has authority is specifically denied. The matter ought not be put to a vote.

It is the position of the person electing reflective noncompliance that laws outside the criminalizing authority of the state prohibit activities which ought to be left to the liberty of the individual. When he "fails to comply with the output of the P.I.S." (which he certainly does), it is not because he believes the result of the P.I.S. is wrong—that some other result is "right"—but that the issue ought not be subject to social decision. The position of the person practicing reflective
noncompliance is that one ought to abide by the results of the P.I.S., even when one judges them unjust—provided the matter is one appropriate for social decision. (This amounts to the claim that one ought to obey laws which are unjust(3) or (4).) However, if the society, through its P.I.S., rules on matters which ought to be left to the individual, one need not comply with the results of the P.I.S. (It is permissible to disobey laws unjust(1) or (2).)

The importance of the distinction is this. The evader holds that noncompliance with some laws is permissible; noncompliance with other laws is impermissible. When all noncompliance is viewed as failure to abide by the results of a society's P.I.S., any distinction has the aura of arbitrariness. The evader might be viewed as maintaining that it is permissible to disobey laws which are important to his life plan, but not others. Armed with this distinction, the evader has a powerful reply. Violations of the P.I.S., in cases where issues have improperly been made subject to the P.I.S., are permissible. But if an issue is properly subject to the P.I.S., violations (save for exceptional circumstances) are not permissible.

Not only does this distinction give the evader a straightforward way of distinguishing permissible from impermissible noncompliance with the P.I.S., it shifts the
focus of argumentation. When all parties agree that an issue should be decided by the P.S.I., it is the specific outcome that is debated, and contrary interests collide. The various parties cite peculiar features of themselves, or their circumstances, in arguing for a certain outcome; adjudicating such matters fairly is difficult at best. The person engaging in reflective noncompliance, in sharp contrast, does not cite such peculiar features in arguing that a matter ought not be subject to social decision. He argues about the extent of the moral authority of the state, and has in his arsenal all the arguments for Mill's Harm Principle, the arguments from Rawls' original position, independent utilitarian arguments, etc. This is very different from, e.g., weighing the interest of childless couples versus multi-child children families versus multi-child children families whose children attend private schools, when trying to establish equitable property taxes which will be used to support the public school system.

Thus, the person engaged in reflective noncompliance defends his nonadherence to the P.I.S. by appealing to arguments which show the state has no authority to prohibit the illegal action. He deems justifiable the noncompliance of others just in case their actions ought to be left to the liberty of the individual too. Should a disgruntled citizen claim "Well, if that's outside the scope of the P.I.S., then this is too," there is a criterion for determining
whether that claim is correct or not—the Harm Principle, etc. Distinguishing the two species of failing to comply with the results of the P.I.S. (authority but wrong result, versus no authority) enables the evader to distinguish between permissible and impermissible reflective noncompliance and indicates the kind of arguments that are relevant to that determination.

V. Rawls' Argument from the Natural Duty of Civility

Such are the failings of fallible human legislators that, inevitably, imperfect laws will be written. Actions which law-writers intended to proscribe will not be proscribed by the "letter" of the law. And freedoms they did not intend to abridge will be abridged by laws. It will be possible, argues Rawls, for citizens to advance their interests at the expense of their fellow citizens, by taking advantage of these unavoidable, technical shortcomings of legislation. But, argues Rawls, "this would be wrong", it would violate the natural duty of civility...

...we have a natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests. The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them.11

Rawls continues, giving the reason for such a duty: "Without some recognition of this duty mutual trust and confidence is liable to break down."12 (There being "mutual
trust and confidence" concerning others' fulfilling of their moral obligations is a cornerstone of Rawls' conception of a just and stable society.) Rawls concludes: "Thus in a state of near justice at least, there is normally a duty...to comply with unjust laws provided that they do not exceed certain bounds of injustice." 13

Two sorts of actions are prohibited by this duty: (1) actions which are technically legal, but nonetheless unfair, and (2) actions which violate unjust laws, but where the injustice is too mild to warrant noncompliance. While I am in agreement with Rawls concerning a natural duty of civility, only actions of the second sort—noncompliance with the law—are relevant in a dissertation about reflective noncompliance. Nonetheless, a common theme is apparent in the two classes of actions: it is wrong to advance our interests by taking advantage of others. In considering the morality of reflective noncompliance in light of this duty, what we must determine is whether the person engaged in reflective noncompliance advances the interests at the expense of his fellow citizens. If he does, he fails his duty of civility.

Reflective noncompliance with laws outside the criminalizing authority of the state is surely the advancing of the evader's interests—that is the evader's motivation—but is it at the unfair expense of his fellow citizens? Again, ex hypothesi, performing actions
prohibited by these laws does not directly harm the legitimate interests of anyone other than the agent. Consequently, it is difficult to see how the advancing is "at the expense" of a fellow citizen. Suppose, contrary to law, I, e.g., buy or sell pornography (from or to adults), or smoke marijuana, or ride a motorcycle without a helmet, etc. The legitimate interests of no others are harmed; there is no breach of the Duty of Civility here.

Once again, a plausible case can be made that we have a duty to obey a law which is unjust(3) or unjust(4). Suppose a tax law is unfair to me. It would surely be unfair of me, in response to refuse to pay any taxes at all. This would be a case of advancing my interests by taking advantage of my peers: I accept the benefits made possible with tax dollars, but refuse to provide any of those dollars. In a similar vein, suppose some law is incompetently written, such that its borders are "fuzzy": as regards some actions, it is not clear whether their performance is proscribed by the measure. (It prohibits some action which ought to be prohibited, but does so incompetently: it is unjust(4).) Suppose further that, given the widely known legislative history of the law, and the legislature's intent in enacting the measure, it is clear that some action a is proscribed. Were a citizen to advance his interests by doing a, citing as a
justification "the law is unjust," he would be guilty of a breach of his Duty of Civility.

Once again, Rawls' argument does appear telling, vis-a-vis some species of unjust laws. But again, the laws subject to justified (by my theory) reflective noncompliance are not of that species. I conclude that Rawls has not provided an adequate reason for not evading laws outside the criminalizing authority of the state.

VI. Conclusions of the Chapter

The enterprise of this chapter has been to show that my theory of justified reflective noncompliance is neither incorrect, nor dangerous. In Section II, I argued against Rawls that the duty to support just institutions does not include the duty to obey all unjust laws--specifically, those unjust(1) or unjust(2). The claim I argued for in Section III was that my theory's becoming known and applied would not be dangerous. Misapplications by persons of good will are unlikely (or at least unlikely to be serious), and for others it would play no decisive role in the decision-making process. I.e., their coming to know the theory would not be responsible for increased disobedience. In Section VI I considered the possibility that the legal reforms won by acts of reflective noncompliance would be nullified by adverse remedial legislation; I showed that
this is not a serious concern. When laws are simply repealed, and not replaced by laws which redistribute the burden of social organization, there is no new law with effects that could be thwarted by the reflective noncompliance. Finally, in Section V, I showed that to engage in reflective noncompliance is not to fail one's duty to civility.

In the final segment of this dissertation I offer an overview of the enterprise, and an assessment of what I take myself to have shown.
FOOTNOTES


2. Ibid., p. 354.

3. Ibid., p. 355.

4. Ibid.


8. Ibid., p. 1268.

9. Ibid., p. 1269.

10. Ibid.


12. Ibid.

13. Ibid.
CHAPTER SEVEN

SUMMARY

Under what circumstances (if any) is it morally permissible for a citizen to covertly disobey some law of a reasonably just government? The answer I have worked to establish is this: whenever the state has exceeded its criminalizing authority in making some action criminal. Let us review the main features of the enterprise.

In the Introduction, I isolated a mode of illegal dissent, and named it "reflective noncompliance." I constructed a formal definition, and compared and contrasted reflective noncompliance with another mode of illegal dissent, one which has been subjected to philosophical scrutiny: civil disobedience. I argued that the difference between civil disobedience and reflective noncompliance meant that a theory of justified civil disobedience could not serve as a theory of reflective noncompliance—a new theory was needed. Further bolstering the claim that a theory of justified reflective noncompliance was needed was evidence that this sort of dissent is widespread. I argued that acts of reflective noncompliance could play a central role in one's life—could alter the focus of one's plan of life—or an instrumental role, in that various
illegal acts, while not the focus of one's life, could play an important role, facilitating those activities which are the central elements of one's life plan. Finally, I provided my theory of justified reflective noncompliance: roughly, if the state ought not to have enacted a law making some action illegal, then a citizen does not have a moral obligation to obey that law.

To determine which laws one is obligated to obey, and which are properly subject to acts of reflective noncompliance, one must know what kinds of actions the state may and may not criminalize. This was the task of Part One.

In Chapter One, I criticized the procedure widely used to determine whether conduct ought to be made criminal--the "Balancing Procedure." I argued that this ought to be replaced with the "Two-Issue Schema." In order to determine whether an action may morally be criminalized, two distinct issues must be considered, and they must be considered in a certain order. First, one must ask whether the action is the sort of action over which the state has moral jurisdiction, i.e., whether it is within the sphere of state moral authority. If that is answered in the affirmative, then one asks whether the state's making the action criminal will produce a balance of good effects over evil effects. Only if this too is answered in the affirmative does the state have the right to criminalize the
action, i.e., does the action fall within the criminalizing authority of the state.

Chapters Two and Three were directed to Issue One considerations, while Chapter Four was directed to Issue Two considerations.

My argument in Chapter Two was that Mill's Harm Principle expresses a necessary, but not sufficient condition for moral criminalization. According to Mill, the members of a society can attain the greatest amount of happiness possible only if there is neither too much nor too little governmental coercion. If there is too little, the strong will prey on the weak. If there is too much, then individuals will not develop their respective talents and faculties—and having developed faculties and talents is the best strategy for living a happy and fulfilling life. Consequently, individuals require a "sphere of individual liberty," a set of actions over which each is sovereign—for only the making of choices within this sphere will lead to developed faculties (and thus to the happy life). In the second division of Chapter Two, I answered some of the criticisms which have been raised against Mill, arguing (i) that Mill subscribed to both the Public Harm and the Private Harm Principles, (ii) that Mill was conscious of several species of sanctions which could be imposed for untoward conduct, (iii) that certain kinds of offensive
conduct could be considered harmful conduct, and (iv) that not every action which poses the possibility of harm ought to be subject to state interference.

The most plausible addition to the Harm Principle is the Principle of Paternalism; in Chapter Three, I argued that nonetheless it ought not be conjoined to the Harm Principle in specifying the moral authority of the state. Joel Feinberg proposes an institution of paternalistic intervention, claiming that such interventions are within the sphere of the state's moral authority. I argue against that position, showing that such an institution would produce far more evil than good. Though it would prevent some people from harming themselves, the inevitable evils of the institution would inflict harm on both those it was designed to help, and others. The chapter also includes a defense of "slavery contracts," not because I believe that people ought to contract to become slaves, but because Mill's argument against them has been modified by various people in an attempt to gut the Harm Principle.

In Chapter Four I discussed Issue Two considerations against making certain actions criminal; I showed how the criminalization of actions has "side effects": unintended but inescapable consequences. Some of these side effects are so serious that they outweigh any benefits a given law could produce. I have said that such laws (or actions) are
in the "sphere of pragmatic noncriminalization." Even if an action is within the state's moral authority, if it is also in the sphere of pragmatic noncriminalization, it ought not be made criminal. The side effects which militate against the making of an action criminal include (i) the creation of a crime tariff, (ii) making police (more) susceptible to corruption, (iii) inducing the police to use unsavory tactics in directing and investigating "crimes," and (iv) causing a deterioration in police-community relations.

If a proposed law would make some action criminal, and the action either is not within the moral authority of the state, or is in the sphere of pragmatic noncriminalization, then the state ought not enact the proposed law.

Suppose the state does enact a law which fails either Issue One or Issue Two considerations. Why does this mean that reflective noncompliance with that law is morally permissible? Answering this question was the goal of Part Two. In Chapter Five I offered arguments which cite the benefits of making reflective noncompliance with such laws morally permissible; in Chapter Six, I attacked positions which are contraries of mine.

I looked first to the benefits of the moral permissibility of reflective noncompliance. Suppose some law fails on Issue One considerations. By definition the law makes
criminal some action within the sphere of individual liberty, an action which plays a vital role in the development of faculties or talents—and thus ultimately in one's happiness. If reflective noncompliance is not morally permissible, and one wishes to be moral, then one must choose between changing oneself (denying elements of one's plan of life) or living a life of guilt. Both of these are unpalatable. If reflective noncompliance is morally permissible, one will have enhanced self-respect, and a more pleasurable life; the society will be more diverse and invigorated, and more stable.

Suppose some law fails on Issue Two considerations. That there is such a law results in the production of evil—evil that would be eliminated with the law's repeal. There is precedent supporting the claim that widespread noncompliance could play a crucial role in getting such a law repealed. Also in Chapter Five, I reviewed Rawls' "original position," and showed how it could be used in support of the moral permissibility of reflective noncompliance.

Of course there are no extant attacks per se on my theory of justified reflective noncompliance. There are, however, philosophical positions which, if true, entail the falsity of my position. In Chapter Six I attacked a number of these positions.
Rawls claims that, in virtue of citizens' natural duty to support just arrangements, they have a duty to obey unjust laws. I distinguished four species of unjust laws, and argued that with respect to two of these (those which are unjust in that they violate Issue One or Issue Two considerations) there is no such duty. I thus looked at the probable impact of the promulgation of my theory of justified reflective noncompliance on society, to determine whether said promulgation would lead to increased justified noncompliance. I argued that it would not. The theory is sufficiently clear and detailed that persons of good will are unlikely to be led to acts of unjustified noncompliance. If a person is not of good will, then it is unlikely that knowledge of a theory such as mine will lead to increased noncompliance. Such a person isn't concerned with moral theories anyway. Following this, I considered the possibility that acts of reflective noncompliance would lead others to engage in this mode of dissent with respect to reformed laws. But since reflective noncompliance leads to the repeal of laws, and not a shift in the distribution of social burdens, this is not a concern. Finally, I considered the argument that a person engaged in reflective noncompliance shirks his duty of civility—and found it wanting.
In the Introduction I defined the Reflective Noncompliance Set as the set of all laws concerning which reflective noncompliance is morally permissible. I can now claim that the state's criminalizing authority and the R.N. Set are complementary. If a law is within the state's criminalizing authority, then, ceteris paribus, citizens have a moral obligation to obey it. If, however, a law is outside the state's criminalizing authority, it is in the Reflective Noncompliance Set: reflective noncompliance with it is morally permissible.
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