

Everyone's Got Something They Just Can't Give Up:
A Challenge to Feinberg's Adherence to the *Volenti* Maxim

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ABSTRACT

Jennifer Kling: Everyone's Got Something They Just Can't Give Up: A Challenge to Feinberg's Adherence to the *Volenti* Maxim
(Under the direction of Gerald Postema)

In this paper, I challenge Joel Feinberg's in-principle unconditional adherence to the *Volenti* maxim, which states, roughly, that to he who consents, no wrong is done. Given the resources available in his theory of when a community can legitimately use the criminal law to prohibit actions, it seems that Feinberg need not hold that a person's consent always nullifies the wrong done to her. Through the lens of a particularly troubling case, I attempt to demonstrate that Feinberg can and should accept, given his prioritization of the doctrine of sovereign self-rule, that there are limits to consent's ability to nullify wrongdoing. I conclude by showing that accepting limitations on the *Volenti* maxim is not only consistent with Feinberg's theory, but actually enables his theory to consider a range of problematic cases in a fresh light.

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I. Feinberg's Theory

In his four-volume work *The Moral Limits of the Criminal Law*, Joel Feinberg argues that the jurisdiction of the criminal law ought to be limited to the harm and offense principles.¹ He writes that these two principles, “duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions.”² These principles provide the scope of our public morality; they pick out those actions that the community can legitimately prohibit via the use of the criminal law. Whether the community is justified in prohibiting, via the criminal law, all of the actions that fall under its jurisdiction is another matter; the crucial claim here is that the community's jurisdiction is limited. In Feinberg's hands, the harm and offense principles limit those actions that can legitimately be prohibited by the criminal law to those actions that have *victims*. A victim is one who has been wronged by another person, in the sense that her rights have been violated.³ So A wrongs B when A violates B's rights: it is A's violation of B's rights that makes B a victim. As I understand Feinberg, for the community to have jurisdiction over some action, that is, for the community to have the moral standing to regulate that action via the criminal law, that

¹ The harm principle is that “the need to prevent harm to persons other than the actor is always a morally relevant reason in support of proposed state coercion.” Feinberg understands harms as wrongful (rights-violating) setbacks of interests. The offense principle is that the need to “prevent hurt or offense (as opposed to injury or harm) to others” is always a morally relevant reason in support of proposed state coercion. Feinberg understands offenses as disliked mental states, such as repugnance, that are caused by the wrongful (rights-violating) conduct of others. Joel Feinberg, *Harmless Wrongdoing* (Oxford: Oxford University Press, 1990), ix, also x-xix.

² *Harmless Wrongdoing*, xix. Feinberg refers to this claim as “The Liberal Position (on the moral limits of the criminal law).”

³ *Harmless Wrongdoing*, xxviii.

action must have a victim.⁴ The question, according to Feinberg, when considering whether the community can legitimately criminalize an action, is always “Who is harmed [wronged]? Who can voice a personal grievance?”⁵

The community can only legitimately criminalize actions that have victims, Feinberg claims, because of standing reasons of personal autonomy. In order to understand this claim, let us consider Feinberg’s conception of personal autonomy. Feinberg writes that personal autonomy is valued by liberal theorists and legal moralists alike; in its most general form, it is the idea that people own their own lives, that they have a right to live however they see fit, so long as they are neither harming nor offending others.⁶ More specifically, to be personally autonomous is to have sovereignty over one’s own life—it is to have the sole authority to make decisions about oneself, about the course of one’s life. In order to clarify what falls under the somewhat vague notion of “one’s own life,” Feinberg follows Mill in recognizing a distinction between self- and other-regarding decisions.⁷ Other-regarding decisions primarily and for the most part affect the interests and rights of other people, while self-regarding decisions “primarily and directly affect only the interests of the decision maker.”⁸ Of course, this is a somewhat rough distinction, in that there will be cases at the edges that are hard to classify, but for the most part it is serviceable.⁹ So Feinberg claims that people’s sovereignty

⁴ Note that, according to Feinberg, the harm and offense principles limit criminalize-able actions to those that wrong other people. See his argument against hard paternalism (the prohibition, for the sake of one’s own good, of consented-to actions that harm oneself) in *Harm to Self*, especially Chap. 17-20.

⁵ *Harmless Wrongdoing*, 73.

⁶ *Harmless Wrongdoing*, 62-4.

⁷ *Harm to Self*, 56. For Mill’s distinction between self- and other-regarding decisions, see John Stuart Mill, *On Liberty* (New Haven: Yale University Press, 2003), Chap. 4, para. 3.

⁸ *Harm to Self*, 56.

⁹ Both Feinberg and Mill acknowledge the point that this distinction, while serviceable, is not perfectly clear-

extends to their self-regarding decisions; put simply, people have the right to control their own lives. Feinberg thus classifies personal autonomy as “the sovereign right of self-government.”¹⁰

Furthermore, Feinberg places absolute priority on this “doctrine” of “sovereign self-rule;” while he admits that “demonstration of the doctrine is not possible,” he writes that “the reader may find that it resonates with something in his most fundamental moral attitudes.”¹¹ And it does seem to resonate—think about the strong moral indignation we feel when someone else tries to control our life choices. We often say, when this occurs, things like “he has no right to stick his nose into my business. It’s *my* life, after all” and “he should leave me alone—my life belongs to *me*.”¹² Feinberg argues that this notion of personal autonomy as sovereign is morally basic; he contends that personal autonomy is fundamentally valuable in its own right.¹³ This conception of personal autonomy, he thinks, “accords uniquely with a self-conception deeply embedded in the moral attitudes of most people.”¹⁴ Now, regarding personal autonomy as sovereign and thus as *underderivatively* valuable is a departure from Mill, who argues that the value of personal autonomy is derived from the contribution that it makes to a person’s own good.¹⁵ However, Feinberg does not regard this as a drastic departure; he maintains that regarding personal autonomy as the sovereign right

cut. See Feinberg’s *Harm to Self*, 56, and Mill’s *On Liberty*, Chap. 4, para. 8-11.

¹⁰ *Harm to Self*, Diagram 19-1.

¹¹ *Harm to Self*, 52.

¹² For similar locutions, see *Harm to Self*, especially Chap. 18-19.

¹³ *Harm to Self*, 59-62.

¹⁴ *Harm to Self*, 62.

¹⁵ *On Liberty*, Chap. 3, para. 1-8.

of self-government is in the spirit of Mill's *On Liberty*.¹⁶ But drastic departure or not, Feinberg maintains that the right of self-government is sovereign, and that, because it is sovereign, it takes precedence even over one's own good.¹⁷

Given this understanding of personal autonomy as sovereign rule over one's self-regarding decisions, (i.e. one's personal domain), we can see more clearly why Feinberg thinks that the community can *only* legitimately intervene, via the criminal law, in cases where there are victims.¹⁸ It is because this is the best way to respect personal autonomy: it blocks both the community and other individuals from unwarrantedly violating people's personal domains. Protecting people's personal domains from unwarranted violations by others by limiting those others' liberty, Feinberg maintains, is not a violation of autonomy. As he says, "there is nothing offensive to autonomy in the practice of limiting some person's liberty for the sake of...the protection of other persons, but [the practice is] morally odious when the end is anything else."¹⁹ While it is legitimate to intervene in order to protect those people who would be made into victims by some other person's actions, it is not legitimate to intervene in order to protect a person from the bad consequences of her own decisions. Such an intervention is morally odious, that is, illegitimate, because it is a violation of her sovereign authority to rule herself. Feinberg puts his view succinctly when he writes:

If we assume with John Stuart Mill (excluding his occasional lapses) and the grand liberal tradition that the domain of the sovereign individual consists of

¹⁶ This is in part because Feinberg thinks that Mill does not take a consistently utilitarian position regarding personal autonomy. See *Harm to Self*, Chap. 19, note 7.

¹⁷ *Harm to Self*, 61.

¹⁸ Feinberg argues from considerations of personal autonomy that the community's moral standing to intervene is limited: he does not, however, give a complete argument for why the community has the moral standing to intervene at all, in any case. As Larry Alexander points out, "Feinberg scatters some hints about such matters but he does not provide sustained arguments." Larry Alexander, "When Are We Rightfully Aggrieved? A Comment on Postema," *Legal Theory* 11 (2005): 325.

¹⁹ *Harmless Wrongdoing*, 68.

all his activities that do not seriously impinge on the important interests of other people, then we can say that *respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him*. Whenever a person is compelled to act or not to act on the grounds that he must be protected from his own bad judgment even though no one else is endangered, then his autonomy is infringed.²⁰

We can see, then, that Feinberg's commitment to the absolute priority of personal autonomy,²¹ which he maintains is a shared conviction among theorists,²² provides a strong reason for limiting the criminal law's jurisdiction to those actions that have victims.

Feinberg views personal sovereignty as "a moral trump card, not to be merely balanced with considerations of [self-] harm diminution in cases of conflict, but always and necessarily taking moral precedence over those considerations."²³ This leads him, I think, to talk about personal sovereignty in terms of rights; he maintains that personal autonomy is the sovereign right of self-government, that the "kernel of autonomy" is our right to make our critical life-decisions for ourselves, our right to arbitrate how we move (literally and metaphorically) through our lives.²⁴ Throughout both *Harm to Self* and *Harmless Wrongdoing*, Feinberg seems to use rights-talk as a convenient way of specifying autonomy-talk. However, while he does prefer to talk about personal autonomy in terms of rights, the exact nature of the relation between personal autonomy and rights is not clear. There seem to be at least three ways to make out the relation: 1) rights constitute personal autonomy, 2) rights are a contingent means to personal autonomy, or 3) rights are a necessary means to personal

²⁰ *Harm to Self*, 68, italics in original.

²¹ *Harmless Wrongdoing*, 130.

²² *Harmless Wrongdoing*, 60-1.

²³ *Harm to Self*, 26.

²⁴ *Harm to Self*, 54.

autonomy. In support of his view that personal autonomy is the sovereign right of self-government, I think that Feinberg would be likely to accept either (1) or (3).²⁵ However, which one he would favor is irrelevant for my purposes: what is important is that Feinberg tends to put his appeals to personal sovereignty in terms of rights. As he puts it, “there must be a *right* to err, to be mistaken, to decide foolishly, to take big risks, if there is to be any meaningful self-rule...insofar as we force a person against his will into a condition he did not choose, we undermine his status as a person in *rightful* control of his own life.”²⁶ We are in rightful control of our own lives, that is, we have sovereign self-rule, only if we each have the right to control our own life; so if we each have such a right, which Feinberg thinks we do, then violations of that and similar rights are violations of our personal autonomy. Feinberg, regarding personal autonomy as a moral trump card, cashes it out in terms of self-regarding rights that operate as trumps in the personal domain.²⁷

So while the precise nature of the relationship between rights and personal autonomy is not clear, there is a significant connection between the two. This is understandable, I think, because Feinberg seems to hold the standard Hohfeldian view that rights are bundles of four elements—privileges, claims, powers, and immunities. These four elements together determine both what the right-bearer may do and what is owed to the right-bearer by others.²⁸ In Feinberg’s own words, rights give their bearers the ability to make valid claims

²⁵ Given his comments in “The Nature and Value of Rights,” it seems very unlikely that Feinberg would accept (2). Joel Feinberg, “The Nature and Value of Rights,” *Journal of Value Inquiry* 4:4 (1970): esp. 252.

²⁶ *Harm to Self*, 62-70, emphasis added.

²⁷ Ronald Dworkin introduced the idea of rights as trumps. See his “Rights as Trumps” in *Theories of Rights*, ed. J. Waldron (Oxford: Oxford University Press, 1984), 153-67.

²⁸ Wesley Hohfeld, *Fundamental Legal Conceptions: as applied in Judicial Reasoning*, ed. W. Cook (New Haven: Yale University Press, 1946). Briefly, A has a privilege to do X iff A has no duty not to do X. A has a claim against B iff B has a duty to A to do X. A has a power iff A has the ability to alter her own or another’s privileges, claims, powers, or immunities. A has an immunity iff B lacks the ability to alter A’s privileges, claims, powers, or

on others, because someone's having a right imposes a duty on others to respect that right.²⁹ So, when another does not respect her right, the right-bearer, in virtue of being a right-bearer, can make a valid claim against that person. For example, my right of self-determination gives me the power to demand of another that she not interfere with my voluntary choice to dye my hair, and if she does, it gives me the power to voice a grievance against her—I can say that she interfered when she had a duty not to do so (this duty is imposed on her by my right). However, it seems that I am not *required* to make a claim against the person who violated my right, because included in my right is the power to waive and/or adjust the duties that others owe to me in virtue of my having that right. Whether I exercise my ability to make a valid claim is up to me, because, in Hohfeldian terms, included in my right is the power to alter my own privileges, claims, powers, and immunities such that what duties others owe to me are changed in turn. Put simply, rights necessarily carry with them control-according normative power, such that their bearers have control over the duties that others owe to them. So, while having rights may not be everything there is to having personal autonomy, it does seem that personal autonomy is well-served by thinking about it in terms of rights.³⁰

This view of rights as necessarily including control-according normative power, along with Feinberg's prioritization of personal autonomy, allows us to see why Feinberg adheres unconditionally to the *Volenti* maxim. The *Volenti* maxim, short for *volenti non fit*

immunities. Any particular right, according to the Hohfeldian view, is a more or less complex set of these four elements.

²⁹ "The Nature and Value of Rights," 253.

³⁰ Thanks to Jerry Postema for helping me to see the connection between rights and autonomy in this way.

injuria, states that “to one who has consented no wrong is done.”³¹ Feinberg interprets this to mean that one’s rights cannot be violated by another person’s action if one has consented to that action.³² He claims that this interpretation of the *Volenti* maxim “finds ample support in common sense;” he points out that “we don’t normally take seriously the person who” fully consents to some action of ours and then complains when we do it.³³ Viewed in terms of rights, when a person consents to some action being done to her, she exercises her power to alter her own privileges, claims, powers, and immunities in a specific way; namely, she waives them so that they no longer impose a duty on the actor not to do the action. (More simply, we can say that she waives her right.) This waiving, because it takes away the duty that the other person has, makes it the case that, when the other person does perform the action in question, he does not violate her right. Precisely because she has (through waiving her right) waived his duty not to perform the action, he does not *wrong* her, that is, he does not violate her right, when he does perform the action. As Feinberg puts it, no wrong is done to the person who consents, because her “consent to the action makes it as if it were [her] own.”³⁴ So, assuming that a person cannot be wronged by, or a victim of, her own voluntary actions, it seems that she cannot be a victim in cases where she consents to others’ actions, because her consent is an exercise of a normative power to waive her right that she necessarily has in virtue of having that right.

Furthermore, because Feinberg prioritizes personal autonomy, he claims that a person cannot be wronged by, or made a victim of, her own voluntary actions. Remember

³¹ *Harm to Others*, 115.

³² *Harm to Others*, 115.

³³ *Harm to Others*, 115.

³⁴ *Harm to Self*, 100.

that he regards sovereign self-rule as morally basic; this leads him to the conclusion that voluntary self-regarding actions do not fall within the purview of the criminal law. To say otherwise would be to subordinate a person's sovereign self-rule to her own good; it would be to say that the community *has* the moral standing (regardless of whether it chooses to exercise it) to legislate people's self-regarding decisions. This is precisely what Feinberg rejects. He thinks, rather, that we ought to accept the doctrine of sovereign self-rule, and that this doctrine entails that each person's own voluntary self-regarding actions do not fall under the purview of either the harm or offense principles. Insofar as the *Volenti* maxim places "a person's self-affecting actions and the consented-to behavior of others that affects him...in the same moral category," then, such consented-to actions (like self-affecting actions) do not fall under the purview of either the harm or offense principles.³⁵ So, Feinberg concludes that the *Volenti* maxim ought to hold in *all* cases where there is consent, lest we infringe on people's personal autonomy.³⁶

At this point, it is important to note that Feinberg combines his unconditional adherence to the *Volenti* maxim with the claim that the maxim does not apply to cases where the consent is not fully voluntary. That is, he argues that, for a person's exercise of her normative power to waive her right to count as consent, she must have exercised it freely and knowingly, in the absence of coercion. If her exercise of this normative power is coerced, then her action does not count as consent and so the *Volenti* maxim does not apply. As Feinberg puts it, the *Volenti* maxim "denies title to complain only to him whose consent was *fully voluntary*, and a person's consent is fully voluntary only when he is a competent and

³⁵ *Harm to Self*, 100.

³⁶ *Harmless Wrongdoing*, esp. 165.

unimpaired adult who has not been threatened, misled, or lied to about relevant facts, nor manipulated by subtle forms of conditioning.”³⁷ While there is a question about exactly what conditions must be in place for a person’s exercise of her normative power to waive her right to count as fully voluntary and thus as consent, I take it that this is a separate question for Feinberg, one whose answer is not determined by his adherence to the *Volenti* maxim. All that is required for the *Volenti* maxim to play a substantive role in Feinberg’s theory is that the conditions for consent are such that ordinary people in everyday life can meet them.³⁸ For the purposes of this paper, I shall assume, as I think Feinberg does, such plausible conditions of consent. Nevertheless, not much turns on this assumption; what does the work is the assumption that if there are conditions that must be met for the exercise of one’s normative power to waive one’s right to count as consent, they are fulfillable, such that it is always possible, in principle, for a person to consent to some action being done to him.

II. The Gladiator Case

Feinberg’s prioritizing of personal autonomy, as we have seen, leads him to adhere unconditionally to the *Volenti* maxim. He concludes that where there is consent, there is no victim, and thus that the community may not legitimately intervene in such cases via the criminal law. Nevertheless, even he admits that there are certain cases that are intuitively very troubling for his theory. These cases are ones where, despite there being no victim according to Feinberg’s theory, we, and Feinberg, still have a sense that the action described in the case should be prohibited by the criminal law. Importantly, the intuition in these troubling cases

³⁷ *Harm to Others*, 116.

³⁸ Feinberg endorses soft paternalism, the position that the community can legitimately put certain safeguards in place, such as required psychiatric testing, in order to protect people against *involuntarily* consenting to harmful actions. He points out that if the risk to the actor is especially high, we do have good reason to make sure that his consent is fully voluntary and thus that he is not being made into a victim. However, if his consent is fully voluntary and informed, then, Feinberg concludes, the community cannot legitimately intervene. See *Harm to Others*, Chap. 3 §5, esp. 116-7, *Harm to Self*, 61-2, and *Harmless Wrongdoing*, 129-30.

does not seem to be that such actions should be criminalized for purely practical reasons, such as the difficulty of ensuring fully voluntary and informed consent; rather, it is that the actions should be criminalized because they are morally wrong.³⁹ Feinberg struggles at length with two such cases, Irving Kristol's gladiator case and Derek Parfit's unnecessary suffering case.⁴⁰ For the purposes of this paper, which is concerned with the limits of consent, I shall focus on Feinberg's description of and response to Kristol's gladiator case.

Kristol presents the gladiator case as a counterexample to Feinberg's type of liberalism, which, because of the fundamental value that it accords to personal autonomy, claims that only those actions that have victims, in the sense described above, can legitimately be prohibited by the criminal law. Kristol writes that "I know of no one, no matter how free in spirit, who argues that we ought to permit gladiatorial contests in Yankee Stadium, similar to those once performed in the Colosseum at Rome—even if only consenting adults were involved."⁴¹ The challenge here to the liberal, and by extension, Feinberg, is straightforward: assuming that everyone involved (both the gladiators and the adult audience) truly consents,⁴² it seems clear that there is no victim, and yet, it seems equally clear that such contests ought not to be permitted, that is, that they ought to be prohibited by the criminal law. And furthermore, as Feinberg admits, the challenge is a legitimate one; it cannot be dismissed on the grounds that it is a far-fetched example, nor diffused by the claim that we are responding on the basis of the practical problems inherent

³⁹ *Harmless Wrongdoing*, 129 and 332-3.

⁴⁰ For Feinberg's discussion of Parfit's case, see *Harmless Wrongdoing*, Chap. 28, §8 and 325-8. For Feinberg's discussion of Kristol's case, see *Harmless Wrongdoing*, Chap. 30, §2 and 328-31.

⁴¹ Irving Kristol, "Pornography, Obscenity, and the Case for Censorship," in *Morality, Harm, and the Law*, ed. Gerald Dworkin (Boulder: Westview Press, Inc., 1994), 47.

⁴² That is, that everyone involved meets whatever conditions are necessary for the exercise of their normative powers to count as consent.

in ensuring that all involved have consented. On the contrary, Feinberg writes, it is all too easy to imagine an enterprising businessman setting up such a contest, and, more importantly, that

Almost anyone would concede that the bloody contest would be an evil, and most would be willing to concede (at least at first) that the evil would be in the non-grievance category, since in virtue of the careful observance of the *Volenti* maxim, there would be no aggrieved victim. Moreover, the evil involved, in all of its multiple faces, would be a moral one.⁴³

Thus, it seems that there is a real clash between Feinberg's liberal theory and our intuitions here, a clash that demands a substantive answer. Assuming that we feel the pull of the intuition that such contests ought to be prohibited by the criminal law, Kristol's case presents a real problem: how, Feinberg asks, without resorting to hypocrisy, "could we advocate legal prohibition without abandoning the liberal position?"⁴⁴

Feinberg, in the spirit of crafting a reasonable liberal theory, (i.e., a liberal theory that most people might actually accept), wants to accommodate our strong intuition that gladiator contests of this sort ought to be prohibited by the criminal law. He acknowledges that, according to his theory, there are no victims in the case that Kristol describes—because everyone consented, no one's rights have been violated. Whatever the conditions on consent might be (see above), Feinberg assumes, rightly I think, that a) they have been met by all of the participants in the case and b) that this does not solve the problem. The intuition that such a gladiatorial contest ought to be legally prohibited seems to remain strong, regardless of the fact that, in the imagined case, both the gladiators and the crowd consented. Given this, Feinberg offers two possible avenues of response: the first involves admitting that the gladiator case may well be a limiting case for his liberalism, while the second involves

⁴³ *Harmless Wrongdoing*, 129.

⁴⁴ *Harmless Wrongdoing*, 128.

insisting that what we are intuitively reacting to when we respond to the case is the “clear and present danger” inherent in it for a massive amount of indirect harm to others.⁴⁵ As I shall explain in detail below, neither of these two responses is satisfactory—the first requires Feinberg to give up a major tenet of his liberal theory, and the second essentially misdescribes the intuition that Feinberg is trying to accommodate.

III. Feinberg’s Solutions and Why They Fail

The first available response, Feinberg claims, is simply to admit that, despite the fact that there is no victim in the gladiator case, the community can nevertheless legitimately prohibit it via the criminal law. However, to say this is to give up the claim that the community can legitimately prohibit via the criminal law *only* those actions that violate either the harm or offense principles, because it is to admit that some action, despite being victimless, can nonetheless be prohibited. To go this route is to accept the general principle that “it is always right, other things being equal, to prevent evils; that the need to prevent evils *of any description* is a good kind of reason in support of a legal prohibition.”⁴⁶ In short, because preventing evils is good, ‘that it will prevent an evil’ counts as a reason in favor of prohibition via the criminal law. The implication here is that the community can legitimately prohibit via the criminal law *all* evils, including those that wrong no one, that are, in other words, victimless. If Feinberg takes this line, then the mere fact that the gladiator case is a moral evil gives the community the moral standing to prohibit it via the criminal law; the only question left is whether the community is justified in doing so.⁴⁷ The key point to notice

⁴⁵ *Harmless Wrongdoing*, 132.

⁴⁶ *Harmless Wrongdoing*, 5, emphasis added.

⁴⁷ Whether or not the gladiator case is actually a moral evil may be up for debate; however, I assume, with Feinberg, that it is one. For if it is not, then it seems that the initial challenge to the liberal does not get off the ground.

here is that, if Feinberg gives this response, he has essentially changed his view about the criminal law's jurisdiction; it is no longer limited to actions that have victims, but encompasses all evils, even those that neither violate anyone's rights nor seriously offend anyone without her consent.

However, to say this, that the community has the jurisdiction to prohibit such "free-floating" evils via the criminal law (they are free-floating because there is no victim to whom they can be attached), is to accept a version of the legal moralist position.⁴⁸ As Gerald Postema points out, this is a significant weakening of Feinberg's position; rather than maintaining that the harm and offense principles exhaust the scope of the community's jurisdiction, Feinberg at this point acknowledges that the prevention of free-floating evils is a relevant reason for the criminalization of actions, albeit not a very weighty, or strong, reason.⁴⁹ As Postema writes, Feinberg, with this move, "*abandoned* the liberal project of drawing a line on a principled basis between those considerations that may ground criminal-law interference with individual liberty and those that may not. This is no merely marginal adjustment; it is a change that goes to the heart of the liberal project as Feinberg (following Mill) and many others have understood it."⁵⁰ Especially because Feinberg, unlike Mill, regards sovereign self-rule as morally basic, his admittance of a liberty-limiting principle that allows the community to legitimately interfere with people's self-regarding choices seems to constitute a major change in his position. I agree with Postema that Feinberg's taking the position that the community has the jurisdiction to prohibit *all* evils via the criminal law is a mistake, insofar as it constitutes an abandonment of the particular liberal position that

⁴⁸ *Harmless Wrongdoing*, 4.

⁴⁹ Gerald Postema, "Politics is about the Grievance: Feinberg on the Legal Enforcement of Morals," *Legal Theory* 11 (2005): 301-2.

⁵⁰ "Politics is about the Grievance," 302, italics in original.

Feinberg has worked so hard to defend. To view the gladiator case in this way, as a limiting case for his liberalism, is to give up on the claim that personal sovereignty acts as a moral trump card. In order to maintain this essential component of his liberal theory, Feinberg ought to go for another solution, one that does not require him to give up his stance that the community's jurisdiction is limited to those actions that have victims.

The second response that Feinberg offers to the problem of the gladiator case would allow him to maintain his liberal position. However, this response, I argue, is also unsatisfactory, because it does not actually track all of our intuitions about the case. Feinberg argues that when we judge the gladiator case to be a moral wrong, we are not responding to the death of one of the gladiators; although this result is an “evil,” Feinberg writes that “so long as we adhere to the doctrine of the absolute priority of personal autonomy, that sort of evil is always more than counterbalanced (indeed it is as if cancelled out) by prior consent to the risk.”⁵¹ Because the gladiator consented, he is not a victim; he has no grievance against his killer, or against anyone else involved, for that matter. What strikes us as intuitively wrong in the gladiator case, according to Feinberg, is not that someone is killed—his unconditional adherence to the *Volenti* maxim rules this out. No, he claims that the “evil consists in the objective regrettability of millions deriving pleasure from brutal bloodshed and others getting rich exploiting their moral weakness...even though no one actually was wronged by it, and there is no one to voice a personal grievance at it.”⁵² We recoil from this evil, claims Feinberg, because when we imagine such a case, we inevitably think about what a society that enjoyed such blood sport would be like, and naturally suppose that it would be a horrifying mess of violence and terror.

⁵¹ *Harmless Wrongdoing*, 130.

⁵² *Harmless Wrongdoing*, 130.

As he puts it, “we import into the example a nightmare of unconsented-to indirect harms...[imagining] a brutal society full of thugs and bullies who delight in human suffering, whose gladiatorial rituals concentrate and reinforce their callous insensitivity and render it respectable.”⁵³ The sort of people who enjoy such contests, we imagine, are the sort of people who are extremely likely to severely harm others; thus, when we respond to the case, Feinberg argues, what we are really responding to is the supposed presence and actions of these very dangerous people. Now, if Feinberg is correct to say that this is what we are responding to when we conclude that the gladiator case should be prohibited by the criminal law, then it seems that this is not really a case of intuitively wanting to prohibit a free-floating evil. What we are trying to prevent when we prohibit the gladiator case is not simply the objective regrettability—the free-floating evil—mentioned earlier; rather, we are trying to prevent the strong likelihood that others will be harmed as a result of the gladiatorial contest’s occurring. What we want to avoid, according to Feinberg, is the “clear and present danger that some innocent parties (identities now unknown) will suffer” at the hands of the spectators, and we think that this suffering will occur because we imagine that such spectators must be brutes.⁵⁴ Why else, after all, would they attend the gruesome spectacle of the gladiatorial contest? If this is an accurate reconstruction of our thought processes, then it seems that we wish to prohibit the gladiator case via the criminal law in order to prevent harm to others. Of course, the harm that we are responding to is indirect—it is the suffering of people not directly mentioned in the hypothetical scenario—but still, it is a case of wishing to prevent harm to others, and insofar as it is a case of harming others, according to Feinberg, it rightly falls under the community’s auspices.

⁵³ *Harmless Wrongdoing*, 131.

⁵⁴ *Harmless Wrongdoing*, 132.

In claiming that the problem with the gladiator case is that it involves indirect harm to others, this response places the case squarely within the community's jurisdiction as spelled out by the harm and offense principles. However, this response does require Feinberg to admit that, if Kristol explicitly denies that the spectators in the case are brutes and thugs, then there is no reason to legally prohibit the contest. If, by stipulation, the spectators are harmless, then Feinberg contends that we lose our strong intuition that the contest ought to be prohibited via the criminal law; he writes that when we think that no third parties at all are endangered, the intuition to which Kristol appealed, "that the gladiator show is a sufficiently great evil to counterbalance autonomous liberty on the scales, is...substantially weakened."⁵⁵ However, I think that this is a mistake; even when we think that no innocent people will ever suffer at the hands of the spectators, it seems that we still intuitively think that the gladiator case ought to be prohibited by the criminal law. In other words, I think that Feinberg's second response, because it focuses solely on the possibility of indirect harm to others, does not actually track all of our intuitions about the case.

Now, this is not to say that Feinberg is entirely incorrect; I agree that part of what we are responding to when we consider Kristol's case is the thought that people who would pay dearly to watch a gladiatorial contest are the sort of people who are likely to inflict harm on others. We wish to prevent that harm, and that desire is part of what leads us to conclude that the gladiator contest should be prohibited by the criminal law. However, there is another aspect of the case that I think we are responding to, as can be seen when we imagine that the spectators are perfectly harmless. It seems that, in this slightly altered case, we still intuitively think that the contest ought to be prohibited by the criminal law, even when it is guaranteed that no indirect harms will occur as a result. I suggest that our intuitive response

⁵⁵ *Harmless Wrongdoing*, 133.

here is the result of the thought that the gladiators themselves should not have been allowed to consent to the contest. In this case, we seem to feel that the gladiators' consent does not cancel out the wrong done to them—despite their *ex hypothesi* fully voluntary consent, it seems that we think that they have still been wronged. The problem with the case is not just that the spectators are likely to be brutal, harmful people; it is also that the gladiators themselves are seriously wronged. More generally, it seems that we intuitively think that the *Volenti* maxim does not hold unconditionally; there are times when a person's fully voluntary consent does not nullify the wrong done to her. The gladiator case, I suggest, is an instance of this—we think that the *Volenti* maxim does not apply to the gladiators' consent, despite the fact that their consent is, *ex hypothesi*, fully voluntary. Feinberg, as we have seen, denies this; he argues that the *Volenti* maxim does hold unconditionally, and thus that, because the gladiators fully voluntarily consented, no wrong is done to them.

I think that this is the wrong thing for Feinberg to say here. I argue that our intuitive thought that the gladiators are wronged, despite their consent, is correct, because our intuition that the *Volenti* maxim does not hold unconditionally is correct. Furthermore, I think that Feinberg can accommodate this intuition into his theory. In the next section, I shall attempt to demonstrate that his theory, in virtue of its adherence to the doctrine of sovereign self-rule, can allow for limits to the *Volenti* maxim. Placing principled limitations on the *Volenti* maxim will enable Feinberg to support the intuition that the gladiators are wronged, and thus wholeheartedly support the strong intuition that the gladiator contest ought to be prohibited by the criminal law.

IV. Feinberg's Liberalism: Limiting the *Volenti* Maxim

As I have diagnosed it, the problem is that Feinberg does not allow limitations to the *Volenti* maxim. He adheres to the maxim unconditionally because it upholds personal

autonomy, and he regards personal autonomy as “even more important than personal well-being.”⁵⁶ Feinberg clearly demonstrates the relation between the *Volenti* maxim and personal autonomy when he writes that, “so long as we adhere to the doctrine of the absolute priority of personal autonomy,” the evil done to the gladiators “is always more than counterbalanced (*indeed it is as if cancelled out*) by prior consent to the risk.”⁵⁷ The *Volenti* maxim, for Feinberg, is in service to the doctrine of the absolute priority of personal autonomy, i.e. the doctrine of sovereign self-rule. He adheres to the *Volenti* maxim unconditionally because he thinks that doing so properly respects each person’s status as a sovereign self-ruler. However, because the *Volenti* maxim is in service to the doctrine of sovereign self-rule, it seems that it would be absurd to hold to the *Volenti* maxim when to do so would be to abandon the doctrine of sovereign self-rule. What Feinberg cares about is properly respecting each person’s status as a sovereign self-ruler. So if, in certain cases, application of the *Volenti* maxim deeply undercuts or contravenes this status, then it seems that the maxim, and not respect for the status, should be given up. In short, if it is possible for the *Volenti* maxim and the doctrine of sovereign self-rule to come apart in this way, then it seems that Feinberg, given his prioritization of sovereign self-rule, ought to limit the *Volenti* maxim so that it does not apply in such cases. I shall argue first that it is possible that adherence to the *Volenti* maxim, in some cases, can constitute an abandonment of the doctrine of sovereign self-rule, and then will proceed to demonstrate that such an abandonment occurs in the gladiator case.

Above, I understood Feinberg as maintaining that each substantive right confers on its bearer the normative power of waive-ability. Thus, it is in principle possible for a person to waive each of her rights, and, following the *Volenti* maxim, Feinberg maintains that she is

⁵⁶ *Harm to Self*, 59.

⁵⁷ *Harmless Wrongdoing*, 130, emphasis added.

not wronged if she has fully voluntarily consented to an action being done to her that would normally violate one or another of her (now waived) rights. Similarly, it is in principle possible for a person to waive all of her rights,⁵⁸ and again, following the *Volenti* maxim, Feinberg maintains that she is not wronged by any actions that would normally violate any of her (now waived) rights. Rights, by their nature, are waive-able by their bearers, and it seems that the doctrine of sovereign self-rule requires us to respect each person's control over her own rights. However, it is not clear that people have control over their *status* as sovereign self-rulers in the same way that they have control over their rights. To waive one's status as a sovereign self-ruler would be not only to waive all of one's rights, but also to declare that one is not the sort of being who is capable of having the normative powers accorded by rights. This is subtly different from simply waiving all of one's rights, because, even in waiving all of one's rights, one remains eligible, so to speak, to have rights. (One *could*, in principle, re-gain old rights or acquire new rights.) To waive one's status as a sovereign self-ruler is to deny that one is eligible to have rights; it is to deny that one is "an appropriate locus of rights and duties."⁵⁹

We cannot take such a denial literally, however, because a person's status as the sort of being who is an appropriate locus of rights and duties is not fully under her control. As John Kleinig puts it, "this status is not alienable as other claims might be."⁶⁰ This becomes apparent when we remember that any person who waives her rights still, as an appropriate locus of rights and duties, has duties to others. As a person in Feinberg's sense, she still has

⁵⁸ This is possible because, as we saw above, each right necessarily includes the normative power of waive-ability.

⁵⁹ *Harm to Self*, 50.

⁶⁰ John Kleinig, "Consent as a Defence in Criminal Law," *Archiv für Rechts- und Sozialphilosophie* Vol. LXV, No. 3 (1979): 343.

an obligation to respect other people's rights, and this obligation is not nullified by her renunciation of her own rights. Feinberg seems to recognize this when he writes, in his discussion of voluntary slavery, that "no man can make himself into a *mere* instrument of another's will. Even an autonomous agent cannot alienate his ultimate accountability."⁶¹ The voluntary slave can and does give up all of her rights; what she cannot give up are her obligations to treat others in certain ways, obligations she has in virtue of her status as an appropriate locus of rights and *duties*. For example, say that Allie has given up all of her rights to Bertrand (she has voluntarily consented to be Bertrand's slave). Bertrand then tells Allie to kill Carol. Allie, I think, still has an obligation not to kill Carol, because Carol has a right to life and Allie is the sort of being for whom another's right generates a corresponding duty. Despite Allie's being a slave, i.e., having given up her rights, it seems true that Carol can still make a valid claim against Allie, because Carol's right imposes a duty on Allie. We strongly resist the thought that Allie is not accountable for her action at all, because we regard her, even though she is a slave, as the sort of being who both has obligations to others and has control over those obligations.⁶² More generally, we resist the thought that she can give up her *status* as an appropriate locus of rights and duties; thus, we agree that Carol can make a valid claim against her. As Feinberg puts it, slaves, despite their slavery, are still ultimately accountable for their actions.

As I have said, I understand this to mean that Allie not only retains her obligation to Carol, but also retains the *choice* of whether or not to fulfill that obligation. For Feinberg, choice is at the heart of his understanding of persons as autonomous: to say that Allie retains

⁶¹ *Harm to Self*, 79.

⁶² This is not to say that Bertrand is not partially accountable for Allie's action. Rather, it seems appropriate to say that, in this case, we hold *both* Bertrand and Allie accountable for Allie's violation of Carol's right, because both Bertrand and Allie are obligation-bearers.

her obligations to others (which he strongly suggests with his use of “accountability”) without retaining the ability to choose whether or not to fulfill those obligations would be to abandon his moral conception of persons as sovereign self-rulers. It would be to agree that Allie has a personal domain but to deny that she has any control over it whatsoever. Feinberg, I think, should deny this, because to accept it would deeply undermine his conception of persons as personally autonomous. He should instead maintain that, insofar as people are the sorts of beings who are obligation-bearers, they are the sorts of beings who have the ability to choose whether or not to fulfill those obligations. So he should conclude that Allie, insofar as she cannot waive those obligations that are imposed on her by others’ rights, cannot waive the ability to make choices regarding those obligations. If he does not reach this conclusion, it is difficult to see how Allie is accountable for her actions. On the other hand, if she cannot waive her ability to make choices about her obligations, then we can make sense of the claim that she is accountable. As Feinberg puts it, people cannot “become in every moral and legal respect exactly like cattle because human negotiators cannot agree to alienate their *personhood*.”⁶³ Allie still has personal autonomy, despite having given up her rights; that is, she still has the *choice* of whether or not to fulfill the obligations that she has to others, and this is a choice that she cannot give up because she cannot give up the obligations that she has in virtue of her status as an appropriate locus of rights and duties. So, insofar as a person does not have full control over the duties imposed on her by others, she cannot waive her status as an appropriate locus of rights and duties, and thus cannot completely waive her personal autonomy.⁶⁴ To say otherwise is to abandon the

⁶³ *Harm to Self*, 386, note 35, italics in original.

⁶⁴ Put another way, the ability to make certain choices necessarily comes along with being an obligation-bearer, and whether or not you are an obligation-bearer is not under your control.

normative conception of persons as personally autonomous to which Feinberg is committed.

If this is correct, then it seems that refusing to regard voluntarily waiving one's status as personally autonomous as possible actually supports Feinberg's understanding of personal autonomy. Allie is *not* "free not to be free," in a sense, because she always necessarily maintains her ability to choose whether or not to fulfill her obligations: this is not a choice that she, as an autonomous being, can give up.⁶⁵ So, given Feinberg's prioritization of personal autonomy, he should say that the *Volenti* maxim does not apply to cases where the person in question attempts to consent to treatment that denies her sovereignty over decisions regarding her obligations, because such treatment would necessarily be a violation of her personal autonomy. Gerald Postema seems to feel the force of this when he writes, during a discussion of the *Volenti* maxim, that "fully competent moral agents *lack the power* to release others from certain forms of treatment of them."⁶⁶ Bertrand violates Allie's personal autonomy when he takes the decision of whether or not to fulfill her obligation to Carol out of her hands, and Allie lacks the power to make Bertrand's action a non-violation of her personal autonomy because her control over her own obligations is not something that she can give up. Allie's consent cannot nullify the wrong done to her by Bertrand because she cannot waive her status as sovereign over her duties. By recognizing this fact, and thus refusing to recognize Allie's consent as a legitimate waiver, we actually respect her personal autonomy far more than if we were to recognize her ability to consent to such treatment. Because adhering to the *Volenti* maxim in such a case would contravene, rather than respect, personal autonomy, we should, in light of the importance of personal autonomy, limit the *Volenti* maxim so that it does not apply when the consented-to treatment denies the status of

⁶⁵ *Harm to Self*, 77. Originally in Mill, *On Liberty*, Chap. 5, para. 2.

⁶⁶ "Politics is about the Grievance," 316, emphasis added.

the consenting person as an appropriate locus of rights and duties.

If this is correct, then the community can legitimately intervene, via the criminal law, in cases where a person is being treated as though she does not have the normative status of a sovereign self-ruler. The reason that the community can legitimately intervene is because such treatment is harmful; it wrongs the person so treated because it infringes on her personal autonomy (which she necessarily retains in virtue of retaining her obligations to others). To demonstrate this, I shall try to say something more about what such treatment would look like in the voluntary slave case. Broadly, it involves denying that Allie has any obligations to other people; to say that she does not have the appropriate normative status is to say that she is not accountable for any of her actions. She is, rather, akin to a tool, and as such, cannot be morally mistreated. She can perhaps be morally misused, in the way that a gun can be morally misused when someone uses it to kill people, but she cannot be morally mistreated, because to say this would be to suggest that she has a normative status that demands certain forms of treatment as morally appropriate.⁶⁷ So however Bertrand treats Allie, when he treats her as lacking the normative status of a sovereign self-ruler, he is not treating her that way because he *owes* such treatment to her; rather, he is treating her that way because he feels like it.⁶⁸ The problem with the treatment, then, is not its specific content, but rather its *context*. What is wrong with Bertrand's treatment of Allie is that it is not done out of his recognition of her status as a personally autonomous being; it is done out of his

⁶⁷ In much the same way, one can misuse, but not mistreat, rocks, trees, coke machines, etc. I suspect that one mistreats, rather than misuses, certain sufficiently complex animals, and I think that this shows that such animals do have a normative status. If they do, though, I think that it is not the same type of normative status that is under discussion here, because animals, regardless of their complexity, cannot owe obligations either to each other or to persons. I add the modifier 'sufficiently complex' here because it seems that one cannot mistreat ants, amoebas, etc.

⁶⁸ Or because he thinks that such treatment is appropriate for some other reason. I view a certain form of treatment of my hammer as appropriate, but not because I think that the hammer *deserves* it. Rather, I think it is appropriate because it is conducive to the purposes to which I put the hammer.

recognition that no treatment of her would count as wronging *her*. It might count as wronging someone else (such as Carol), but it cannot wrong Allie, because, as Bertrand regards her, she lacks the normative status necessary to be wronged. His treatment of her effectively severs the relevant connection between her existence and her personal autonomy. Such treatment, however benevolent, thus *wrongs* Allie, because it arises out of and occurs in a context that, because it denies her status as an appropriate locus of rights and duties, utterly demeans and denies her personal autonomy.

If I am correct in saying both that such treatment wrongs Allie and that we ought not to recognize her consent to such treatment as legitimate, then it seems that I can conclude that, according to Feinberg's theory, the community can legitimately intervene via the criminal law in order to prevent such treatment. At this point, I shall attempt to show that the gladiator case is morally on a par with the voluntary slave case, and thus that the community can legitimately intervene to prevent such a gladiatorial contest from occurring. The context in the gladiator case, I shall argue, is relevantly similar to that of the voluntary slave case—the gladiators are being treated, both by their fellow gladiators and by the promoters, supporters, and spectators of the contest, as though they lack the normative status required for personal autonomy. To begin, notice how the gladiators treat each other. As Postema puts it, they deny to each other “the most basic forms of moral decency owed by one person to another.”⁶⁹ More specifically, each gladiator treats each other gladiator solely as a tool to be used, as something to be treated in a certain way so as to further the acting gladiator's own ends. Along these lines, it seems more natural to say that the gladiators, from their internal point of view, misuse, rather than mistreat, each other. While not conclusive proof, this may be a sign that each one is treating the others as though they

⁶⁹ “Politics is about the Grievance,” 315.

lack the normative status required for personal autonomy. After all, what could count as mistreatment of one gladiator by another? Intuitively, if gladiator David poisoned gladiator Edmund's food, this might count as David mistreating Edmund. (Edmund, after all, agreed to risk his life in the gladiatorial arena, not at the dinner table.) But it seems that, in the context of the gladiatorial contest, David would be viewed, both by himself and by the promoters, supporters, and spectators, not as having mistreated *Edmund*, but rather as having broken the rules of the game. David, the promoters, the supporters, and the spectators appear to view David's behavior as inappropriate not because it constitutes moral mistreatment of Edmund, but because it cheats them out of their spectacle. But to view David and his actions, and also Edmund, in this way just is to view them as the sort of beings who are not appropriate loci of rights and duties. Thus, however David and Edmund actually treat each other, that treatment arises from a context that utterly denies both David's and Edmund's personal autonomy. So, in order to respect the gladiators' personal autonomy, it seems that Feinberg ought to say that the community can legitimately intervene to prevent such a personal-autonomy-denying context from occurring.

Furthermore, it is easy to imagine that the promoters, supporters, and spectators encourage the gladiators' callous treatment of each other. However, even if they do not do so, it seems that the promoters, supporters, and spectators are treating the gladiators as tools rather than as persons, because the context is such that no treatment of the gladiators counts, in the promoters', supporters', and spectators' eyes, as wronging *the gladiators*. Some treatment might count as ruining the contest (such as shooting the gladiators with a long-range rifle), but it is far from clear that such treatment would count, from the promoters', supporters', and spectators' point of view, as violating the gladiators' personal autonomy. The promoters, supporters, and spectators regard the gladiators as able to be misused, but

not as able to be mistreated. Their treatment of the gladiators, like Bertrand's treatment of Allie, is thus rooted in a denial of the gladiators' normative status as appropriate loci of rights and duties. Feinberg seems to think that it is only the gladiators' lives that are at stake.⁷⁰ This is erroneous, because, as I have attempted to demonstrate, the gladiators consent not only to the risk to their lives, but also to being treated as though they do not have a normative status that demands certain forms of treatment as morally appropriate. The gladiators, if allowed to consent to the contest, would effectively be giving up their moral accountability; morally, they would be on a par with the voluntary slave who is viewed merely as chattel. So, to recognize the gladiators' consent as legitimate and thus as nullifying the wrong done to them would, just as in the voluntary slave case, be to uphold the *Volenti* maxim at the expense of personal autonomy. If we are to maintain Feinberg's position that personal autonomy takes priority, then we should conclude that the community can legitimately criminalize gladiatorial contests, because allowing such contests to occur would deeply undermine Feinberg's principle message of the doctrine of sovereign self-rule.⁷¹

Notice that it is the context in which the gladiatorial contest occurs that leads us to the conclusion that allowing such a contest to happen would be to abandon our commitment to upholding personal autonomy. Because it is the context that is doing the work, we can distinguish between the gladiator case, on the one hand, and soldier and dueling cases on the other. Consider a soldier; at first glance, he may look a lot like the gladiator. He has given up his right to life, and he takes orders from his superiors. However, it seems that the soldier is different than the gladiator because he continues to be recognized

⁷⁰ *Harmless Wrongdoing*, 129-30.

⁷¹ One could of course take the line that personal autonomy does not have absolute priority. Insofar as I am working within Feinberg's view, though, I do not think that this is a viable option.

as having a normative status, as the sort of being that is an appropriate locus of rights and duties. More specifically, the soldier maintains his accountability: he is held responsible for choosing whether or not to obey orders. Moreover, this responsibility is not merely formal or empty; the soldier is expected to disobey orders that he regards as morally atrocious, that force him to disregard the obligations imposed on him by others' rights. It seems that there is a moral line past which the soldier's defense that he was "just following orders" does not apply—it seems that we rightly hold the soldiers involved in the My Lai massacre, and not just their commanding lieutenant, accountable for their actions. To suggest that the soldiers did not morally mistreat the Vietnamese when they killed them, while maintaining that the lieutenant *did* morally mistreat the Vietnamese when he gave the order to kill them, is to deny that the soldiers are personally autonomous; it is to treat the soldiers as mere tools of the lieutenant rather than as persons in their own right. We respect the soldiers' autonomy by holding them accountable; unlike the gladiators, the context surrounding the soldiers is such that it (at least minimally) respects their personal autonomy. I suggest that if the military context surrounding the soldiers is not such that their personal autonomy is recognized in this way, then the soldiers are relevantly like gladiators. If the soldiers are forced to blindly follow orders in all situations, then it seems plausible to say that their normative status as personally autonomous beings is not being respected. In such a case, despite the soldiers' consent to such treatment, I would argue that the community can legitimately intervene either to prevent the creation of, or to destroy, the elements of the military context that are responsible for the soldiers being regarded and thus treated as though they are merely chattel.⁷²

⁷² This would not entail criminalizing the existence of the military, of course. Rather, it may include making ethics training mandatory for all soldiers, requiring military courts to allow soldiers to defend their disobedience

Considering the dueling case, I think that Feinberg can say that the problem with dueling is the culture that usually surrounds it. Dueling, historically, is a product of honor-based societies; as such, there was an incredible amount of social pressure both to challenge a person to a duel if he slighted one's honor, and to accept a duel if one was challenged. Under these circumstances, it seems that Feinberg can deny that the participants in such duels in fact fully voluntarily consented to the actions being done to them. Remember his comments about what it takes for consent to count as fully voluntary: he points out that "both force and fraud can invalidate consent, and that "force" can be very subtle indeed."⁷³ The immense social pressure that was historically put on participants to consent to dueling, I think, counts as force. If this is correct, then it seems that the duel participants did not fully voluntarily consent, and so that the *Volenti* maxim, as Feinberg understands it, does not apply to their situation. However, in the modern era, there is not usually any serious social pressure to consent to participate in a duel.⁷⁴ Thus, it seems that if one did fully voluntarily consent to a duel in present-day society, she would not be wronged—in Feinberg's sense—if she were to be wounded or killed during the course of the duel. Of course, as Feinberg points out, when the risks are great, it seems like the community can legitimately intervene in order to ensure that the participants are fully voluntarily consenting. However, if it is determined that they are (perhaps through extensive psychiatric testing), then the community cannot legitimately interfere with their choice, because to do so would be to violate their

on ethical grounds, and promoting a culture of self-sovereignty ("we may be soldiers, but we're not animals," etc).

⁷³ *Harm to Others*, 116.

⁷⁴ Exactly how strong the social pressure must be in order to count as coercion is an interesting question, one that, unfortunately, is beyond the scope of this paper. Roughly, I think that coercion is a vague concept: there are clear case where it is occurring and clear cases where it is not occurring, but it may be impossible to adjudicate cases in the middle on a principled basis.

personal autonomy. So, while on the face of it dueling looks similar to the gladiator case, it is contextually quite different, and so can be easily accommodated by Feinberg's theory.⁷⁵ Respecting the *Volenti* maxim in the modern-day dueling case, unlike in the gladiator case, seems to uphold the doctrine of sovereign self-rule; thus, we should conclude that, assuming fully voluntary consent, the community cannot legitimately intervene in cases of modern-day dueling.

This is importantly different from the gladiator case: as I have attempted to demonstrate, respecting the *Volenti* maxim in the gladiator case does *not* uphold the doctrine of sovereign self-rule. I have argued that the wrongful treatment suffered by the gladiators at the hands of each other, the promoters, the supporters, and the spectators should still be recognized as wrongful treatment, despite the gladiators' consent, because to not recognize it as such would be to ignore what is demanded by the doctrine of sovereign self-rule. If this is correct, then it seems that the gladiator case does fall within the legitimate jurisdiction of the criminal law as spelled out by Feinberg's harm and offense principles. So, for the sake of respecting the personal autonomy of the gladiators, Feinberg should conclude that the *Volenti* maxim has limits, and thus that the community can legitimately criminalize gladiatorial contests. Such a conclusion would allow Feinberg to readily endorse both the strong intuition that the gladiators are wronged and the strong intuition that the gladiatorial contests ought to be prohibited by the criminal law.

V. A Friendly Suggestion to Feinberg?

Throughout, I have tried to present my argument as a friendly amendment to

⁷⁵ People may have the intuition that it is not enough to ensure that fully voluntary consent is occurring, and that modern communities should outlaw dueling altogether. I have suggested that our intuitions come from our thought that the participants have not really consented, but have been coerced in some way. If people's intuitions persist, even after the conditions that must be met for the consent to count as fully voluntary are enumerated in detail, then it seems that their intuitions may just not be friendly to the generally liberal line of thought being pursued.

Feinberg's view, one that allows him to make sense of the troubling gladiator case while still sticking to his liberal guns, so to speak. In an effort to avoid having to take up a version of legal moralism, I have presented an argument for limiting the *Volenti* maxim while still maintaining that the criminal law only has jurisdiction over those actions that are picked out by the harm and offense principles. When we think about why Feinberg adheres to the *Volenti* maxim in the first place, namely, in order to uphold the doctrine of sovereign self-rule, we can see that the *Volenti* maxim ought to be limited to apply only to those situations where its application ensures, rather than infringes on, the exercise of personal autonomy. Applying the *Volenti* maxim to the gladiator case actually infringes on the gladiators' personal autonomy by creating a context wherein they are treated as utterly lacking personal autonomy. To treat people as utterly lacking personal autonomy goes against the doctrine of sovereign self-rule. So, for the sake of upholding the doctrine of sovereign self-rule, we should hold that the *Volenti* maxim does not apply to cases where people attempt to consent to being treated as though they lack the normative status of personally autonomous beings.

While the gladiator case is the one with which I have been concerned in this paper, it does seem possible that there are other sorts of cases where enacting the *Volenti* maxim might amount to an abandonment of the doctrine of sovereign self-rule. The key elements to look for in such cases would be that the participants are being misused, rather than mistreated, that their ability to make choices regarding fulfilling their duties to others is not being recognized, and that the surrounding context is such that their treatment does not arise out of any acknowledgement of them as the sort of beings who are the appropriate loci of rights and duties. While none of these conditions alone are necessary, I think that together they are jointly sufficient. If all of them are fulfilled by a particular case, then, in order to uphold the doctrine of sovereign self-rule, the *Volenti* maxim ought not to apply to that case.

Accepting these conditions as limiting the *Volenti* maxim would provide Feinberg with a fresh way of evaluating a range of problematic cases, and, insofar as they might lead his theory to deliver different verdicts in those cases, would make his theory more amenable to those who support personal autonomy but are nevertheless troubled by the thought that consent, at least as far as the community is concerned, nullifies all wrongdoing. Ultimately, my proposal is meant as a friendly suggestion to Feinberg: it enables him to accommodate our intuitions without abandoning the essential tenets of his liberalism.

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