Moralism and moral paternalism are discussed here as views about the eligibility of certain reasons for government policy.

Moralism: If an action will make the world a morally worse place, apart from any harm to individuals, this is a good reason for government policies that reduce such actions (although this reason might be outweighed by countervailing reasons).

Moral Paternalism: If an action will cause moral harm to the agent, this is a good reason for government policies that reduce such actions (although this reason might be outweighed by countervailing reasons).

To illustrate the difference, consider two different kinds of reasons for drug laws.

Moralistic Reason: It is bad for people to use mind-altering drugs when doing so is medically unnecessary, because a person misuses his mind in doing so. This misuse of the mind is bad independent of any harm to the drug-user or others, simply because the world is a morally worse place when minds are misused in this way.

Moralism implies that, if constituted by true propositions, reasons of this kind ought to be counted in favor of policies that reduce recreational drug use.

Moral Paternalistic Reason: It is bad for people to have the vice of intemperance because in having this vice they have a morally worse character. This is bad for them independent of any other harm, simply because it is non-instrumentally bad for a person to have a morally worse character.

Moral paternalism implies that, if constituted by true propositions, reasons of this kind ought to be counted in favor of policies that reduce intemperance. If drug laws do this, this is a good reason for them.

The terms moralistic and paternalistic are sometimes used to characterize government policies by reference to the motives of those who support them. For example, it might be said that drug laws are paternalistic because they are motivated by a desire to protect drug users from their own
self-destructive conduct. And it might be said that sodomy laws are moralistic because they are motivated by the belief that sodomy is sinful, quite apart from any harm it might cause. Here I set aside the motivational use of these terms, and focus exclusively on the eligibility of reasons. If moralistic or paternalistic reasons should never be counted, this would explain what is wrong with moralistic or paternalistic motives. If, however, moralistic or paternalistic reasons should be counted, it is hard to see what is wrong with moralistic or paternalistic motives. Furthermore, when we evaluate a government policy our primary concern is with whether there is sufficient reason for it, something on which the eligibility of reasons bears directly. In contrast, it is not clear how the motives of those who support a policy are relevant to whether there is sufficient reason for it. If there is decisive reason for a government policy, the government should adopt it, regardless of the motives of those who support it.

In this chapter, I consider moralism and moral paternalism as views about the eligibility of reasons for government policy, and, specifically, for legal prohibitions. They might also be considered as views about the eligibility of reasons in practical deliberation more generally. For example, they might be considered as views about the reasons that doctors should count in deliberating about their treatment of patients, and they might be considered as views about the reasons that family members should count in deliberating about their treatment of other family members. The most influential theoretical discussions of moralism and paternalism, however, have been about the eligibility of reasons for government policy (for example, Mill 1978 [1859]; Hart 1963; and Feinberg 1984). Furthermore, the idea that certain considerations, although good reasons in themselves, should not be counted in favor of government policy has played a central role in liberal political theory, at least since Mill’s On Liberty, whereas this idea has not played such a central role in the theory of practical reasoning more generally. Finally, the primary function of this chapter is analytical, not prescriptive. The primary goal is to clarify the difference between moralism and moral paternalism. If we understand the difference as applied to reasons for government policy, we will also understand how they differ as applied to personal and professional relationships.

The next section introduces Feinberg’s influential formulations of legal moralism and moralistic legal paternalism. Most of this chapter is then devoted to understanding the content of these two principles. Toward the end, some questions are raised about the normative validity of legal moralism.

1 Feinberg’s formulations

In The Moral Limits of the Criminal Law, Joel Feinberg distinguishes two views:

Legal Moralism (in the broad sense): It can be morally legitimate for the state to prohibit certain types of action that cause neither harm nor offense to anyone, on the grounds that such actions constitute or cause evils of other (“free-floating”) kinds.

Moralistic Legal Paternalism: It is always a good reason in support of a proposed prohibition that it is probably necessary to prevent moral harm (as opposed to physical, psychological, or economic harm) to the actor himself. (Moral harm is “harm to one’s character,” “becoming a worse person,” as opposed to harm to one’s body, psyche, or purse).

(Feinberg 1984: 27)
Moralism and moral paternalism

Understanding the difference between these two views requires understanding the difference between moral harm, mentioned in the second principle, and “evils of other kinds,” mentioned in the first. Because moral harm is a kind of harm, we need to identify what kind of harm it is. Because evils of other kinds are not harms, we need to identify what kind of evils they are.

Although Feinberg uses the phrase “free-floating evils” in first stating the (broad) principle of legal moralism, he later distinguishes free-floating evils from another kind of harmless wrongdoing, which he calls “welfare-connected non-grievance evils” (Feinberg 1988: 19). “Evils,” as he uses the term, are regrettable states of affairs (Feinberg 1988: 18). Because they are regrettable, we ought, other things equal, avoid bringing them about, if we can.

Feinberg does not define the notion of a free-floating evil, but illustrates it with a list, which includes “the wanton, capricious squashing of a beetle . . . in the wild” and “the extinction of a species” (Feinberg 1988: 20–25). He illustrates the notion of a welfare-connected non-grievance evil with an example from Derek Parfit which illustrates Parfit’s non-identity problem (Feinberg 1988: 27–28). Parfit introduces this problem in Reasons and Persons with the following example:

*The 14-Year-Old Girl.* This girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout this child’s life, his life will, predictably, be worth living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life.

(Parfit 1984: 358)

Parfit believes there is a good reason for the girl to wait to have a child, which is that any child she has now will have a worse start in life than a child she has later. For this reason, he thinks, there is something wrong with the girl’s choice. But this wrong does not consist in harm to the child. Harming someone requires making that person worse off than he otherwise would have been and no one (the example assumes) is worse off as a result of the girl’s choice. The child she has now is not worse off because his life is worth living, and he never would have come into existence had she waited to have a child. Nor are the children worse off that she would have had later had she not had a child now, because they do not exist. Consequently, if the girl’s choice is wrong, it is a kind of harmless wrongdoing.

Feinberg recognizes harmless wrongdoing of this kind (Feinberg 1988: 25–33), and he distinguishes welfare-connected non-grievance evils of this kind from free-floating evils. This kind of evil is welfare-connected because it consists in the fact that there is less welfare in the world than there could otherwise be (on the assumption that a child the girl had later would be better off than the child she has now). Feinberg thinks many liberals would regard welfare-connected non-grievance evils of this kind as legitimate considerations in evaluating and justifying government policy (Feinberg 1988: 32–33). Furthermore, it seems that reducing evils of this kind might warrant legal prohibitions of some kind. If so, then the (broad) principle of legal moralism is valid.

2 Personal and impersonal reasons

To grasp the content of legal moralism, we must understand the kinds of evils that are produced by harmless wrongdoing, as opposed to harmful wrongdoing. To grasp the content of moralistic legal paternalism, we must understand moral harm as distinguished from other kinds of harm. And to understand the difference between legal moralism and moralistic legal paternalism, we must understand the difference between harmless wrongdoing and moral harm. I propose that
we understand the general distinction between harm and harmless wrongdoing in terms of T.M. Scanlon’s distinction between personal and impersonal reasons, and then understand moral harm in terms of a subset of personal reasons.

Personal reasons, as Scanlon understands them, are reasons “grounded in the moral claims or the well-being of individuals” (Scanlon 1998: 219). Impersonal reasons are reasons of other kinds – not grounded in the moral claims or well-being of individuals. Illustrating the notion of an impersonal reason, Scanlon writes:

Many people, for example, believe that we have reason not to flood the Grand Canyon, or destroy the rain forests, or to act in a way that threatens the survival of a species (our own or some other), simply because these things are valuable and ought to be preserved and respected, and not just because acting in these ways would be contrary to the claims or interests of individuals.

(Scanlon 1998: 219)

Applying this distinction to reasons for government policy — and going beyond what Scanlon actually writes here — I propose that we understand the distinction between personal and impersonal reasons in the following way. Personal reasons for the government to adopt a policy are reasons for a person to prefer his or her own situation when the government adopts this policy. Impersonal reasons for the government to adopt a policy are reasons for someone to prefer the world that is likely to result when the government adopts this policy, as distinct from the reasons there are for anyone to prefer his or her own situation in that world.

To illustrate this distinction, consider Ronald Dworkin’s discussion of the morality of abortion. In Life’s Dominion, Dworkin distinguishes two different objections to abortion, which he calls the derivative objection and the detached objection (Dworkin 1994: 11). The derivative objection is that abortion is wrong because it violates the rights of the fetus, which, Dworkin assumes, must be grounded on interests the fetus has in continuing to live. The detached objection is that abortion is wrong “because it disregards and insults the intrinsic value . . . of human life” (Dworkin 1994: 11). By “intrinsic value” Dworkin means value that is not reducible to interests (Dworkin 1994: 69). Because a first-trimester fetus has no mental life, is not conscious, and has never been conscious, there is no reason for it to care about continuing to live, and so there is no interest in continuing to live which abortion laws might protect. Dworkin believes that it nonetheless makes sense to think that first-trimester fetuses have intrinsic value, and he believes this can provide a rational basis for abortion laws, on the general principle that the government may limit individual liberty to protect things of intrinsic value (Dworkin 1994: 149).

To say, as Dworkin does, that a first-trimester fetus has no interest in continuing to live that could justify the government in prohibiting abortion is to say that there is no reason for a fetus to prefer its own situation when abortion is prohibited. Having no mental life and never having been conscious, there is no reason for a fetus to care whether or not it is aborted, and so no reason to prefer its own situation when abortion is made less likely by legal restrictions. To say, as Dworkin also does, that a first-trimester fetus has intrinsic value is to say that, other things being equal, there is good reason to prefer a world in which first-trimester fetuses are not intentionally destroyed for no good reason or destroyed thoughtlessly or carelessly. If legal restrictions reduce the number of fetuses that are destroyed in these ways, there is consequently a reason to prefer a world in which the government adopts these restrictions.

Considered as a reason for government policy, the reduction of harm, including moral harm, can be reduced to personal reasons. If a government policy will reduce an action that inflicts moral harm on someone, there is a reason for this person to prefer his own situation when this
policy is adopted. In contrast, the reduction of harmless wrongdoing – considered as a reason for government policy – can be reduced only to impersonal reasons. If a government policy will reduce an action that causes harmless wrongdoing, there is a reason to prefer the world that is likely to result when this policy is adopted, but it is not a reason for anyone to prefer his own situation in that world. Formally, this is what distinguishes moral harms from non-grievance evils, considered as reasons for government policy.

3 Moral harm

Considered as reasons for government policy, all harms, including moral harms, can be reduced to personal reasons. But what distinguishes moral harms from other kinds of harm, and what kinds of moral harm are there?

Feinberg characterizes moralistic legal paternalism as follows:

\[\text{It is always a good reason in support of a proposed prohibition that it is probably necessary to prevent moral harm (as opposed to physical, psychological, or economic harm) to the actor himself.}\]

\text{(Feinberg 1984: 27)}

It is doubtful, though, that Feinberg would count as moral harm every harm that is not physical, psychological, or economic.

Suppose a young person will not suffer economic harm if he does not attend high school because he has an ample trust fund, and that he will also not suffer psychologically as a result (for whatever reason). In not attending high school he still loses valuable opportunities: to develop intellectually, to develop understanding and appreciation of the arts and sciences, to develop mentoring relationships with educated and caring adults, to participate in high school athletics and other organized activities such as high school plays, to socialize with other young people in an educational setting, and so on. The loss of these opportunities can be bad for a person, even if they do not result in psychological or economic harm as normally understood, but I doubt Feinberg would conclude from this that the loss of these opportunities is therefore a kind of moral harm. If the government were to require all students to attend high school so as to ensure that they have these opportunities, I doubt he would regard this as an instance of moralistic paternalism. So although we can use the idea of harm that is not physical, psychological, or economic as a guide to identifying moral harm, we should not define it this way.

Feinberg and other influential commentators also identify moral harm with harm to one’s character. Feinberg writes:

\[\text{Moral harm is “harm to one’s character,” “becoming a worse person,” as opposed to harm to one’s body, psyche or purse.}\]

\text{(Feinberg 1984: 27)}

Danny Scoccia writes:

By moral paternalism I understand the principle that it is right for the state to restrict people’s liberty in order to prevent a deterioration in their character that is bad for them or contrary to their best interests, or in order to produce an improvement in their character that is to their benefit.

\text{(Scoccia 2000: 53)}
Peter de Marneffe

Gerald Dworkin characterizes moral paternalism as follows:

It is a distinct claim, and one made by Plato and Epictetus among others, that improvement in one's moral character is a good for the person. It is this last claim that differentiates MP [moral paternalism] from LM [legal moralism].

(Dworkin 2005: 308)

Below I consider reasons to identify moralistic paternalism with protecting a person's character. First I identify two other things that might count as moral harm to show that the identification of moralistic paternalism with protecting a person's character is intellectually optional, not forced on us by the concept.

Moral harm, we might say, is the harm we do to ourselves in doing something morally wrong. If so, there are at least two things other than harm to one's character that might count as moral harm. First, there is the harm we do to ourselves in failing in our obligations to others. Second, there is the harm we do to ourselves in failing to treat what is precious with due care or respect.

There is good reason for each of us to meet our obligations to others, to want this for ourselves, to want it for its own sake and not only as a means to other goods, and to regret it if we fail. When we violate our obligations to others, we alter and impair our relationships with them by treating them with disrespect. Insofar as it is non-instrumentally good for us to maintain respectful relations with others, we harm ourselves in failing to meet our obligations to them. We might not be harmed physically, psychologically, or economically. We might not lose valuable opportunities as a result. But this does not mean we are not harmed by it.

There is also good reason for each of us to treat what is precious with due respect, to want this for ourselves, to want it for its own sake and not only as a means to other goods, and to regret it if we fail. When we treat what is precious carelessly, thoughtlessly, with contempt, “like trash,” we are contemptible ourselves. Insofar as it is non-instrumentally good for us to treat what is precious with respect, we harm ourselves in failing to do so. We might not be harmed physically, psychologically, or economically. We might not lose valuable opportunities as a result. But this does not mean we are not harmed by it.

The two categories of moral harm just identified show that, if a person's character is understood to consist in his settled psychological dispositions to act, things might count as moral harm other than harm to one's character. Why, then, have commentators identified moralistic paternalism with the goal of protecting a person's character?

4 Why identify moral harm as harm to character?

The reason Feinberg does this is connected to his endorsement of a subjective conception of harm. He defines harm in terms of interests (Feinberg 1984: 65), and he understands interests in terms of what people actually want (Feinberg 1984: 42, 67). If we want something for its own sake, then it is in our interest to have it. If having \( x \) makes it more likely that we will have \( y \), which we want for its own sake, then it is also in our interest to have \( x \), even if we do not actually want \( x \). Feinberg identifies moral harm with harm to character because he recognizes that some philosophers, such as Plato, have held that we can harm ourselves by acting viciously even if we do not want to act virtuously, and even if acting viciously does not prevent us from getting anything we want for its own sake. He writes:

No doctrine was more central to the teaching of Socrates, Plato, and the Stoics than the thesis that a morally degraded character is itself a harm quite independently of its
Moralism and moral paternalism

effect on its possessor's [desire-based] interests. On this issue, the implications of our own analysis of harm in terms of set-back interest are clear. If a person has no ulterior interest in having a good character [because he does not want this for its own sake], and if such a character is not in his (other) interests [because it does not help him achieve things that are useful to achieving what he does want for its own sake], then his depraved character is no harm to him (pace Plato et al.), and even if he becomes worse [in some sense], he does not necessarily become worse off.

(Feinberg 1984: 66)

If, however, we reject Feinberg’s subjective conception of interests, it is possible to make sense of moral harm without identifying it with harm to character.

According to a subjective conception of interests, which Feinberg endorses, a person has an interest in something if and only if (a) she actually wants it non-instrumentally for herself, or (b) it makes it more likely that she will have something she wants non-instrumentally for herself. According to an objective conception of interests, a person has an interest in something if and only if there is good reason for her to want it for herself. This conception of interests is objective in two ways. First, someone can have an interest in something they do not actually want, even if it does not bring about something they want. Second, if there is no good reason for someone to want something, they do not have an interest in it, even if they want it.

If we accept an objective conception of interests and recognize the two categories of moral harm identified in the previous section, we can explicate the notion of moral harm without identifying it with harm to a person’s character. We can say that a person is harmed in failing to meet his obligations to others and in treating what is precious with disrespect, even if meeting his obligations to others and treating what is precious with respect is not something that he wants for its own sake, and even if this does not help him achieve something he wants for its own sake. This is because there is good reason for him to want to meet his obligations to others and to treat what is precious with respect, and to want this non-instrumentally for himself.

Feinberg recognizes that an objective conception of interests is possible, and he contrasts his own subjective conception of interests with an objective conception that he calls “the ideal-regarding theory”:

The ideal-regarding theory holds that it is in a person’s interest ultimately not only to have his wants and goals fulfilled, but also (and often this is held to be more important) to have his tastes elevated, his sensibilities refined, his judgment sharpened, his integrity strengthened: in short to become a better person. On this view, a person can be harmed not only in his health, his purse, his worldly ambition, and the like, but also in his character. One’s ultimate good is not only to have the things one wants, but (perhaps more importantly) to be an excellent person, whatever one may want. We not only degrade and corrupt a person by making him a worse person than he would otherwise be; on this view, we inflict serious harm on him, even though all his interests flourish. Socrates and the Stoics even went so far as to hold that this “moral harm” is the only genuine harm. Epictetus was so impressed with the harm that consists simply in having a poor character that he thought it redundant to punish a morally depraved person for his crimes. Such a person is punished enough, he thought, just by being the sort of person he is.

(Feinberg 1984: 67–68)

This passage and the previous one suggest the following interpretative hypothesis: Feinberg identifies moral harm with harm to character because the only non-subjective conception of
harm that occurred to him when he wrote was one held by the ancient Greeks, who also held that one could be harmed by becoming a vicious person as a result of performing vicious acts. Had he not focused so much on ancient Greek thought, he might not have glossed “moral harm” as “harm to one’s character.”

Scoccia suggests another reason for identifying moral paternalism with the prevention of harm to character, which is that defenders of “morals laws,” such as James Fitzjames Stephen and Robert George, have relied on the following assumptions:

1. Intemperance, lack of self-control, increased weakness of will, laziness, recklessness— all are vices that are bad for or harmful to the person who has them.
2. Prostitution, homosexuality, and the consumption of pornography, marijuana, or hard drugs promote some or all of these “self-regarding” vices in whoever engages in them.
3. A criminal ban on these activities will discourage a significant number of the people tempted to engage in them from doing so.
4. By doing that, a ban will elevate the character of these people, or at least prevent its further deterioration, thereby conferring a valuable benefit on them (Scoccia 2000: 53).

Even if defenders of moral laws have relied on these assumptions, however, there is no reason, in explicating the nature of moral paternalism, to equate moral harm entirely with harm to a person’s character.

5 How relevant is moralistic legal paternalism?

Although moral harm is a kind of harm, and the good of reducing harm seems like a good reason in favor of a law that reduces it, it is possible that the following is also true: for every legal prohibition, either it can be fully justified as reducing non-moral harm alone or it is not justifiable. If so, then although the truth of moral paternalism might remain an interesting theoretical issue, it would be practically irrelevant to the evaluation and justification of government policy.

Consider two scenarios, suggested by Scoccia’s discussion:

_Harmless Intemperance:_ Smith’s habitual drug use leads to intemperance in the following sense: he uses drugs more than he believes he ought to and more than he actually ought to. No serious consequences follow from this. If he used drugs less often he would read more ancient Roman history. If he read more ancient Roman history, his general understanding of the world would be better. This would be a good thing in itself, but aside from this his habitual drug use has no bad effects.

_Harmful Intemperance:_ Jones’s habitual drug use leads to intemperance in the following sense: he uses drugs more than he believes he ought to and more than he actually ought to. As a result of this intemperance he fails to show up for work, fails to hold a steady job, fails to make enough money to live on, fails to take proper care of his health, develops feelings of contempt for himself and unwarranted feelings of resentment toward the world, all of which interfere with his emotional development, his friendships, and his family relationships, and prevent him from developing into a mature, self-reliant person.

Suppose the benefit of reading more ancient Roman history cannot on its own justify the government in prohibiting Smith from using drugs, and that adding the good of reducing his intemperance in using drugs does not tip the balance of reasons in favor of prohibition. Suppose, in contrast, that the good of preventing the bad consequences of Jones’s habitual drug use can
Moralism and moral paternalism

justify the government in prohibiting him from using drugs, and that this policy can be justified without counting in addition the good to him of reducing his intemperance in using drugs. Then although reducing the vice of intemperance would be a good thing in itself, it would be practically irrelevant in these cases to justifying prohibition. If all the relevant cases were like this one, then the truth of moralistic legal paternalism would be practically irrelevant.

6 The validity of legal moralism

The primary goal of this chapter is to explicate the content of legal moralism and moralistic legal paternalism and to identify the key differences between them. In this section I consider the normative validity of legal moralism. Many leading theorists of rights ground rights on interests, in one way or another (Rawls 1971: 11–16; Scanlon 2003: 26, 99; Raz 1986: 166, 180; Dworkin 1994: 11, 23–24). If rights are grounded on interests, it would not be surprising if the principle of legal moralism were invalid.

Suppose that rights are valid moral rules, and that a system of moral rules is valid only if it optimally protects individuals’ interests. Suppose a system of rules optimally protects people’s interests only if the following is true: if any other system of rules protects someone’s interests better, it also protects someone’s interests worse, and this loss in interest-protection to the second person is at least as great as the gain in interest-protection to the first person. Suppose, finally, that interests are constituted only by personal reasons: reasons to prefer one’s own situation under one system of rules or another.

If a theory of rights like this one is correct, it is open to doubt that legal moralism is valid. Legal moralism allows impersonal reasons to count in favor of legal prohibitions. Legal prohibitions always threaten interests, and impersonal reasons do not constitute interests. So, it seems, no system of rules that optimally protects individuals’ interests will allow impersonal reasons to count in favor of legal prohibitions. If they are not to count, legal moralism is invalid.

One possible response to this line of reasoning is to accept the conclusion: legal moralism is invalid. Another possible response is to reject the view that rights are grounded on interests. Another possible response is to argue that although rights are grounded on interests, our interests are optimally protected by a system of rules permitting the government to adopt policies that can be justified only by counting impersonal reasons. The upshot is that legal moralism might be valid and it might be invalid. Its validity depends on whether our rights are grounded on interests and, if so, on what systems of rules optimally protect our interests.

Scoccia has recently identified another kind of reason for thinking legal moralism is invalid. He argues that if the government may prohibit harmless wrongdoing to prevent free-floating evils, then the justification for punishing violations of these prohibitions must rest on either a retributivist or a moral education theory of punishment (Scoccia 2013: 523, 525). If these theories are false, as many believe, this would seem to show that the government may not impose penalties on harmless wrongdoing to reduce free-floating evils.

Scoccia supposes that what is bad about free-floating evils consists largely in the evil will of the person who intentionally causes them. If, for example, the careless or thoughtless destruction of a fetus is bad, much of the badness consists in the carelessness or the thoughtlessness. This leads Scoccia to conclude that the function of moralistic penalties is to punish people for their evil states of mind, but this does not follow. Retributivism, as Scoccia understands it, is the view that the primary reason for punishment is to give evil-doers their “just deserts” (Scoccia 2013: 524). One could consistently reject this view while holding that moralistic penalties are justified. By moralistic penalties I mean penalties that are justified as reducing free-floating evils. We can think of free-floating evils as those whose presence in the world makes it a worse place, apart
from any negative effect on human or animal welfare. The absence of these evils is therefore desirable in making the world a better place. The desirability of a better world might provide sufficient reason for penalties that reduce these evils by deterring actions that produce them, provided these penalties are not too burdensome. No reference to the goal of giving evil-doers their just deserts is necessary here.

7 The scope of legal moralism

Suppose the government is permitted to limit individual liberty to prevent harmless wrongdoing, either because rights are not grounded on interests or because a system of rules that optimally protects our interests would permit the government to limit individual liberty to prevent harmless wrongdoing. Is there any reason to think that, although the government is permitted to limit individual liberty to reduce welfare-connected non-grievance evils, it is not permitted to limit individual liberty to reduce free-floating evils? Feinberg thinks many liberals would regard welfare-connected non-grievance evils as legitimate considerations in evaluating and justifying government policy (Feinberg 1988: 32–33), but he suggests there is something inherently illiberal about limiting individual liberty to prevent free-floating evils (Feinberg 1988: 20). In contrast, Ronald Dworkin, another influential liberal theorist, holds that the reduction of free-floating evils can justify some legal restrictions.

Dworkin does not offer a theoretical defense of this principle. Instead he argues that rejecting it would conflict too much with settled constitutional practice (Dworkin 1994: 149). The US Supreme Court, he says, recognizes the validity of laws that protect works of art, animal species, and the quality of life of future generations, and these laws are justified, at least partly, as protecting things of intrinsic value.

This argument is inconclusive. For one thing, it is possible that all the laws that Dworkin has in mind can be fully justified as protecting individuals’ interests. It is possible, for example, that the protection of endangered animal species can be fully justified as protecting the interests of scientists in biological research or the interests of nature lovers in discovering and observing different species. Moreover, even if it is settled constitutional practice to recognize the protection of something of intrinsic value as a rational basis for limiting liberty, this sociological claim about current legal practice does not show that it is morally permissible for the government to enact laws solely to protect things of intrinsic value.

Suppose, though, that this is permissible. How does Dworkin address the challenge that if the government may limit individual liberty to prevent free-floating evils, it may limit individual liberty in all sorts of objectionable ways? Consider the traditional Christian belief that non-procreative sex acts are “intrinsic evils.” By non-procreative sex acts I mean those that cannot possibly result in procreation, even when engaged in by persons with fully functioning reproductive organs. If such acts are intrinsic evils, and the government may limit individual liberty to prevent intrinsic evils, then, it seems, the government may legitimately enact sodomy laws. Few policies seem more contrary to liberal principles than this one. How, then, does a liberal, like Dworkin, address this objection?

First, he would deny that non-procreative sex acts are, in fact, intrinsic evils. Second, he would argue that sexual freedom is a fundamental liberty, and the prevention of intrinsic evils – even genuine ones – cannot justify restriction of a fundamental liberty. This second claim is Dworkin’s position on abortion laws.

The freedom to have an abortion, Dworkin holds, is a fundamental liberty. Fundamental liberties may be limited only to protect rights and important interests of individuals. Criminal prohibitions of abortion in the first trimester are not necessary to protect rights and important
Moralism and moral paternalism

interests (because a first-trimester fetus has no interests and therefore no rights). Dworkin does not infer from this that there is no rational basis for abortion laws. To the contrary, he thinks that first-trimester fetuses have intrinsic value, and that the protection of things of intrinsic value can provide a good reason for government policy. His defense of a right to abortion is that fundamental liberties may be limited only in ways that are necessary to advance a compelling state interest, and the protection of things of intrinsic value does not constitute a compelling interest of this kind. So Dworkin’s endorsement of the principle of legal moralism, as interpreted here, does not commit him to allowing unjustifiable restrictions of sexual and reproductive freedom.

The previous section identified some theoretical reasons to think that the prevention of harmless wrongdoing cannot justify the government in restricting individual liberty. These general theoretical considerations, however, apply with equal force to both welfare-connected non-grievance evils and to free-floating evils. If there is no valid theoretical reason to exclude welfare-connected non-grievance evils from consideration, it is hard to see a valid justification for excluding free-floating evils. On this point, then, it seems that Dworkin is right. If the government may limit individual liberty to prevent harmless wrongdoing, then it may limit individual liberty to prevent free-floating evils as well as to prevent welfare-connected non-grievance evils.

Related topics

Paternalism and Duties to Self; Paternalism and the Criminal Law; Paternalism and Well-Being; The Concept of Paternalism.

References