

# THEISM AND THE CRIMINALIZATION OF SIN

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**Abstract.** The free will theodicy (a standard theistic response to the problem of evil) places significant value on free will: free will is of such substantial value, that God's gift of free will to humans was justified, even though this gift foreseeably (and regularly) results in the most monstrous of evils. I will argue that when a state criminalizes sin (by punishing producers of sinful materials such as illicit drugs, or punishing consumers), it can restrict or eliminate citizens' exercise of metaphysical free will with respect to choosing to partake in or refrain from these activities. Given the value placed on free will in the free will theodicy, theists who endorse this theodicy should thus oppose the criminalization of what I will call *Millian sins*—that is, actions which are immoral, but which do not directly harm another person. In other words, such theists should oppose legal moralism.

Recently, Yoweri Museveni, the evangelical Christian President of Uganda, a nation which is itself overwhelmingly Christian, signed into law a bill harshly criminalizing homosexual acts, with penalties ranging from 14 years in prison for first-time offenders to life imprisonment for those convicted of “aggravated homosexuality.”<sup>1</sup> Museveni himself has claimed that homosexual relationships are against God's will,<sup>2</sup> and the bill was strongly lobbied for by the influential Ugandan pastor Martin Ssempe, founder of the Makerere Community Church, who describes the anti-homosexuality bill as an attempt “to save us from the great punishment coming on the earth when the sins of Sodom are practiced.”<sup>3</sup> Both before and after the 2009 introduction of the bill, Ssempe

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1 Sudarsan Raghavan, “Ugandan leader signs harsh anti-gay bill, ignores ‘warning from Obama’,” *The Washington Post*, 24 February 2014, A06.

2 Xan Rice, “Uganda considers death sentence for gay sex in bill before parliament,” *The Guardian*, 30 November 2009, 16.

3 Martin Ssempe, “Anti-Homosexual Bill in Uganda Causes Global Uproar ABC News,” <http://martinssempe.blogspot.com/2010/03/anti-homosexual-bill-in-uganda-causes.html> (10 March 2010).

and the bill's sponsor, David Bahati, were lobbied by US evangelicals such as Scott Lively and Lou Engle, who urged Ugandans to oppose gay rights.<sup>4</sup> (Lively and Engle have since disavowed Uganda's anti-homosexuality bill.)

This is an extreme case. And surely not all, perhaps not even most, theists (particularly academic theists) advocate using the coercive power of the state to punish behavior they deem sinful. Nevertheless, the practical impetus for the criminalization of immoral behavior often derives from theistic motivations. In this paper, I will argue that many, if not most, theists have collateral commitments that should lead them to oppose legal moralism. In particular, given the value most theists are committed to placing on metaphysical free will, theists should, for the most part, oppose legal moralism as involving a highly problematic restriction on the metaphysical free will of would-be sinners.

When confronted with the problem of moral evil, most theists respond with a free will theodicy or defense.<sup>5</sup> A central premise of this theodicy is that free will is of such great value that even though human possession of free will foreseeably results in great (even monstrous) evils, it is better for humans to possess this sort of free will than for them to possess no free will, or even a substantially truncated form of free will (either of which option would reduce or eliminate the moral evil produced by humans). I will argue in this paper that endorsing the free will theodicy gives one good reason to reject legal moralism. We can provisionally define legal moralism as follows: *A state may legally proscribe activities viewed by society as immoral, even if such activities do not harm others.* Thus, legal moralism is the view that the state may criminalize what I will call *Millian sins* — that is, actions which are immoral, but which do not directly harm another person. I will argue that when a state criminalizes Millian sin (by punishing producers of sinful materials such as illicit drugs, or punishing consumers), it can restrict or eliminate citizens' exercise of metaphysical free will with respect to choosing to partake in or refrain from these activities. Given the substantial value placed on free will the free will theodicy, theists endorsing this theodicy (whom I shall call *free will*

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4 Frederick Nzwili, "Uganda's anti-gay bill refocuses attention on US evangelical influence," *The Christian Science*, <http://www.csmonitor.com/layout/set/print/World/2014/0225/Uganda-s-anti-gay-bill-refocuses-attention-on-US-evangelical-influence-video>, 25 February 2014.

5 For ease of phrasing, I will simply refer to free will theodicies, and not to defenses. The two are technically distinct, but I do not think the distinction has a bearing on the course of my argument.

*theodicy theists*, or for ease of reference, *FWT theists*) should agree that criminalizing Millian sin is an unwarranted restriction on the free will of citizens.

As noted above, one might not find a coincidence of these two views (the free will theodicy and legal moralism) among very many academic theists. However, there is good reason to think that these two views are widely held outside of academic circles: a recent survey (n = 3178) revealed that 25% of American adult theists *both* (a) agreed or strongly agreed with the thesis of legal moralism, *and* (b) endorsed some version of the free will theodicy. (See appendix.) This fact alone makes it reasonable to subject these views to critical scrutiny.

A few final notes before beginning. First: many wish to refute the legal moralist by arguing that the typical targets of moral legislation (homosexual acts among consenting adults, for example) are not actually immoral. I will grant, for the sake of this essay, that such actions are immoral. I will argue that even granting the immorality of such actions, the FWT theist should in most cases oppose their criminalization.

Second, this paper is not addressed to theists who reject a free will theodicy; nor is it addressed to those who reject legal moralism. As I said, empirical data suggests that a substantial proportion of ordinary theists *do* hold both of these views under discussion; and it is the coincidence of these two views that is the target of this paper.

Finally, some argue that there is no such thing as a purely Millian sin, and that all sin harms others. Although I will briefly address later in the paper the indirect (e.g., social) costs of Millian sin (as this seems to be the focus of many legal moralists, such as Devlin), this paper is not directed toward those who simply deny the existence of a category of sins which do not, in Mill's terms, violate "a *distinct and assignable* obligation to any other person or persons."

## I. THEISM AND THE LEGISLATION OF SIN

Although much contemporary discourse (particularly that outside of academic circles) surrounding the legislation of morality is couched in religious terms, historically, mainstream theistic thinkers have been divided on the question of whether it is the job of the state to enforce God's law. Augustine, for example, argued that because humans are fallen and sinful, a temporal political state (employing coercive authority) is needed to allow people to live together in (relative) peace. However, because any leaders of such a state are

also fallen and sinful, they are fundamentally unsuited to attempt to enforce God's law, or to try to make their subjects virtuous. Thus, for Augustine,

temporal justice...consists in maintaining as far as possible a secure and orderly environment to conduct the external aspects of life in...Human law cannot make us good; for the most part, it can create only the conditions that make it possible for us to sin in safety.<sup>6</sup>

Thus, a well-ordered state need not even be a Christian state. As one commentator writes, "earthly justice consists in the maintenance of external peace and order. But earthly order does not depend on the blessing of the Church: even well-ordered or well constituted pagan States can exhibit it."<sup>7</sup>

Similarly, Calvin and Luther subscribed to a 'two-kingdoms doctrine': God's law is sovereign over spiritual matters, and earthly (civil) authority extends not to the spiritual lives of men and women, but only to maintaining order.<sup>8</sup> This isn't to say that Augustine, Luther, and Calvin would have opposed punishing various 'victimless' crimes; but they did not think it was the proper function of the state to compel its citizens to live Christian lives.

There have been significant historical attempts to use state power to compel citizens to follow Christian morality — notably, the puritans in England during the late 17<sup>th</sup> and early 18<sup>th</sup> centuries, who (through the Societies for the Reformation of Manners) attempted "to marshal the resources of the coercive state toward the effective prosecution of immorality and vice in order to bring about a godly order."<sup>9</sup> Puritans such as John Disney argued that God would punish the English nation as a whole for tolerating vice among its subjects, and that "laws that prohibited vice were...signs of compassion on the part of the ruling class for the miserable sinners entrusted them by God."<sup>10</sup>

Many contemporary Christians also argue for the legislation of morality. Norman Geisler and Frank Turek, for example, argue that while states should not legislate according to specifically scriptural law, they should legislate ac-

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6 Robert W. Dyson, *St. Augustine of Hippo: The Christian Transformation of Political Philosophy* (Continuum, 2005), 66, 71.

7 Dyson, *St. Augustine of Hippo*, 153.

8 See, for example, Luther, "On Secular Authority"; and Calvin, *Institutes of Christian Religion*, 3.19.15.

9 Brendan L. Hill, "Puritans in the Public Sphere: The Societies for the Reformation of Manners and the Continuity of Calvinism in Early Eighteenth-Century England", (PhD Diss., Georgetown University, 2004), 1.

10 Hill, "Puritans in the Public Sphere", 124.

cording to the moral law given to us by God. Geisler and Turek write, “The Bible was not designed by God to be the normative basis for civil government. For that, He gave the Moral Law.”<sup>11</sup> They argue that “legislating morality is not only constitutional but unavoidable and necessary,”<sup>12</sup> and suggest that contemporary states should criminalize homosexual acts, recreational drug use and distribution, prostitution, abortion, and other typical targets of morals legislation.<sup>13</sup> Other popular authors, such as Rod Dreher, lament the increasing secularization of the law; Dreher, for example, writes that “The U.S. Supreme Court’s Obergefell decision declaring a constitutional right to same-sex marriage was the Waterloo of religious conservatism,”<sup>14</sup> and argues that Christians should exercise the ‘Benedict option’ and retreat from secular society into like-minded Christian communities until such a time as they are better-able to influence the political order.

It is, of course, far beyond the scope of a single paper to rebut all of the arguments in favor of legal moralism (or even all the theistic arguments). But I do wish to argue that theists who endorse a free will theodicy as a response to the problem of moral evil have a powerful reason to resist using the coercive power of the state to inhibit citizens’ behavior on grounds that it is sinful. Let us begin by examining the notion of free will endorsed by most defenders of the free will theodicy.

## II. WHAT KIND OF FREE WILL IS AT ISSUE?

Typically, defenders of the free will theodicy endorse a libertarian conception of metaphysical free will. Van Inwagen’s free will libertarianism is motivated largely by his endorsement of the Principle of Alternate Possibilities. Van Inwagen states free will’s reliance on the principle as follows: “A belief in one’s free will is the belief that one can sometimes do otherwise.”<sup>15</sup> Plantinga, in a

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11 Norman Geisler and Frank Turek, *Legislating Morality: Is It Wise? Is It Legal? Is It Possible?* (Wipf and Stock Publishers, 1998), 102.

12 Geisler and Turek, *Legislating Morality*, 24, emphasis removed.

13 Thinking in other religious traditions displays the same bifurcation between those who desire a separation between religion and state and those who seek their union.

14 Rod Dreher, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (Penguin Publishing Group, 2017), 9.

15 Peter Van Inwagen, “When is the Will Free?” In *Philosophical Perspectives*, Vol. 3: Philosophy of Mind and Action Theory, ed. by James Tomberlin (Ridgeview Publishing, 2009), 404.

similar vein, writes, “If a person is free with respect to a given action, then he is free to perform that action and free to refrain from performing it; no antecedent conditions and/or causal laws determine that he will perform the action, or that he won’t. It is within his power, at the time in question, to take or perform the action and within his power to refrain from it.”<sup>16</sup> C.S. Lewis expresses similar commitments: “Some people think they can imagine a creature which was free but had no possibility of going wrong; I cannot. If a thing is free to be good it is also free to be bad.”<sup>17</sup> By contrast, Swinburne argues that libertarian free will could include merely the freedom to choose (uncaused) among various goods, but that such free will would be worth little; and so God created us with the free will to choose between good and evil:

Free and responsible choice is not just free will in the narrow sense of being able to choose between alternative actions, without our choice being causally necessitated by some prior cause. I have urged...that humans do have such free will. But humans could have that kind of free will merely in virtue of being able to choose freely between two equally good and unimportant alternatives. Free and responsible choice is rather free will (of the kind discussed) to make significant choices between good and evil, which make a big difference to the agent, to others, and to the world.<sup>18</sup>

Theists’ reasons for preferring libertarian accounts of free will are, I suppose, well-known, and display significant overlap with the usual reasons for preferring libertarian accounts of free will to compatibilist accounts of free will. I will continue based on what I take to be the consensus view among theists — that libertarianism is true. There are compatibilist theists, but I see no reason to think that compatibilist version of theism are immune to the argument laid out in this essay.

### III. THE VALUE OF FREE WILL

In discussions of the problem of evil, the sort of free will discussed above is taken to be of such great value that even though human possession of this type of free will results in great (even monstrous) evil, it is better for humans to possess this sort of free will than for them to possess no free will or a sub-

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16 Alvin Plantinga, *God, Freedom and Evil* (Harper and Row, 1974), 29.

17 C.S. Lewis, *Mere Christianity* (HarperCollins, 1977), 48.

18 Richard Swinburne, *The Existence of God*, 2<sup>nd</sup> edition (Clarendon Press, 2004), 86–7.

stantially truncated form of free will, though either of these options might reduce or eliminate the amount of moral evil produced by humans. For example, Plantinga writes,

A world containing creatures who are significantly free (and freely perform more good than evil actions) is more valuable, all else being equal, than a world containing no free creatures at all. Now God can create free creatures, but he can't *cause* or *determine* them to do only what is right. For if He does so, then they aren't significantly free after all.<sup>19</sup>

A similar thought is expressed by C.S. Lewis in *Mere Christianity*:

Why, then, did God give [His creatures] free will? Because free will, though it makes evil possible, is also the only thing that makes possible any love or goodness or joy worth having. A world of automata — of creatures that worked like machines — would hardly be worth creating...Of course, God knew what would happen if they used their freedom the wrong way: apparently He thought it worth the risk.<sup>20</sup>

Similarly, van Inwagen writes:

God made the world and it was very good. An important part of its goodness was that it contained creatures...that were fit to be loved by God and to love Him in return and to love one another. But love implies freedom: for A to love B is for A freely to choose to be united to B in a certain way. Now even an omnipotent being cannot *insure* that some other being *freely* choose *x* over *y*. For God to create beings capable of loving Him, therefore, it was necessary for Him to take a risk: to risk the possibility that the beings He created would freely choose to withhold their love from Him.<sup>21</sup>

As noted above, Swinburne holds that the ability to make morally significant choices, free choices between good and evil, is of great value:

It is good that the free choices of humans should include genuine responsibility for other humans, and that involves the opportunity to benefit or harm them...A world in which agents can benefit each other but not do each other harm is one where they have only very limited responsibility for each other...A God who gave agents only such limited responsibilities for their fellows would not have given much.<sup>22</sup>

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19 Plantinga, *God, Freedom and Evil*, 30.

20 Lewis, *Mere Christianity*, 48–9.

21 Peter Van Inwagen, "The Magnitude, Duration, and Distribution of Evil: A Theodicy", *Philosophical Topics* 16, no. 2 (Fall 1988), 163.

22 Swinburne, *The Existence of God*, 87–8.

The idea expressed by these various FWT theists is similar: it is surely not a good thing when someone performs an evil action. But free will is such a great good, God's gift of free will to humanity is justified even if one foresees (as God no doubt did) that it would be misused for evil (even great evil).

#### IV. FREE WILL AND THE LEGISLATION OF SINFUL BEHAVIOR

Clearly, a common belief among many (perhaps most) theistic philosophers is that free will, and the ability to make morally significant choices, is a central part of God's plan for humans. This naturally suggests the following conclusion: if God judges free will to be so valuable that the gift of free will to humans is justified even granted the terrible evils that foreseeably result from this gift; and if God judges that a substantially truncated form of free will (e.g., one that would render humans unable to perform the worst sorts of atrocities, like the Holocaust) is not a suitable substitute for our current broad (albeit still limited) free will; then we would have to have a very compelling reason indeed to interfere in someone's free will.

In this section, I will endeavor to establish two theses. First, I will argue that given the value of free will, the criminalization of purely moral offenses should be opposed by the FWT theist. Second, I will establish that the criminalization of victimless moral crimes does, in fact, result in a restriction on perpetrators' metaphysical free will, and not merely their civil liberty.

##### *IV.1. Criminalization of Sin*

The FWT theist must agree that any infringement upon the metaphysical free will of citizens in a state is a serious matter, not to be undertaken lightly. Recall, again, that on a free will theodicy, free will is of such significant value, that God's gift of free will to humans was justified, even though this gift foreseeably (and regularly) results in the most monstrous of evils; and God has sufficient reason *not* to intervene to prevent these monstrous evils which we see unfolding around us. Thus, we must be very clear that any restriction we impose on free will may only be done when clearly required.

This strongly suggests that a FWT theist should oppose legal moralism. We have defined legal moralism as follows: *A state may legally proscribe activities viewed by society as immoral, even if such activities do not harm others.* Granted, the behavior in question is immoral, but if God didn't think that people's in-



evitable misuse of free will was a good reason to deprive humans of free will, then there is no justification for *our* placing a lower value on free will. I have called such actions—actions which are immoral, but which do not directly harm another person—*Millian sins*, as these are roughly the sorts of behaviors Mill designated by his category of actions which do not violate “a *distinct and assignable* obligation to any other person or persons.” Thus, a more compact definition of legal moralism is: *A state may criminalize Millian sins.*

The core of the argument is this<sup>23</sup>: the FWT theist acknowledges that free will is a great good. But of course, people have other interests that are also considered good; and so in society there is often a ‘balancing of goods’ whereby we restrict a person’s free will in order to protect the interests of others. However, Millian sin is sin that by definition doesn’t adversely affect the interests of anyone but the agent sinning,<sup>24</sup> and so a restriction of the agent’s free will is not offset by a protection of other people’s interests. While we can readily acknowledge that a consideration of other people’s interests can justify restricting an individual’s free will—there is a legitimate ‘balancing of goods’ here—if the agent’s interests are the only ones adversely affected by her actions, then the ‘balancing of goods’ consideration is not in play, and restricting the agent’s freedom will be difficult to justify for a FWT theist. (Does the fact that a Millian sin might harm the agent committing the sin justify coercively preventing the sin? I will take up this question shortly.)

A few comments are in order. First, despite the reference to Mill, my criticism of legal moralism is not based on utilitarianism. My argument starts with the idea that metaphysical freedom is of such value that infringement of it can only with difficulty be justified. Second, citing Mill does not imply that I think that the harm principle is the only legitimate basis upon which the state may limit the liberty of its citizens. I do not defend any theory of the extent of state authority in this essay, beyond arguing that the FWT theist should oppose legal moralism.

Third, the question of which behaviors harm others (in the sense of violating an obligation to others) is contested territory. But a paper cannot settle every debate, and must simply take certain assumptions as given. I will assume a certain division of actions into those that are criminalized chiefly because

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23 A referee for *EJPR* suggested this way of clarifying the core argument.

24 And others who consent, but we can consider them to be agents by this definition.

they violate the rights of others, and those Millian sins that are (or may be) criminalized chiefly because they are sinful. I take it that we have a rough idea of this division, even if the edges of this distinction are blurry and/or contested.

Millian sins do not directly harm others, but some Millian sins can be harmful to the participant. Is this a compelling reason for making such behaviors illegal? First, this is a question of harm to self, not others; and paternalistic legislation is technically a separate issue from legal moralism. Second, not all Millian sins are necessarily harmful to the participant. While drinking to excess and alcoholism are harmful to the participant, moderate drinking (for example) is probably not harmful.

Finally, it is not clear that harm to self is a good reason for criminalizing a behavior, when starting from a FWT theistic standpoint. Let us begin by considering a somewhat different point. Atheists have often argued that what is valuable about free will is not the outcome, but the act of choosing; and that God can allow people freely to choose evil, but arrange things so that the evil outcome is not realized. FWT theists have, to my knowledge, uniformly rejected such proposals. Responding to such a proposal by Steven Boër and Robert McKim, Frank Dillely writes,

To be deprived of doing evil (or dreadful evil) to some other person is not to be able to regret having done so, and regrets of that type are genuinely character building. If I have nothing to fear, if no evils or dreadful evils can happen to me, what about the virtues of courage? What about sympathy for undeserving victims if something evil or dreadfully evil befalls them? No doubt natural evils might take up some of the slack left by the absence of moral evils, but they cannot provide for those virtues which relate to our humanity or inhumanity toward each other.<sup>25</sup>

Hick, responding to the much more radical suggestion that God could prevent all evils (moral and natural) by intervening each time at the appropriate moment, writes that,

Courage and fortitude would have no point in an environment in which there is, by definition, no danger or difficulty. Generosity, kindness, the *agape* aspect of love, prudence, unselfishness, and all other ethical notions which presuppose life in a stable environment, could not even be formed.<sup>26</sup>

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25 Frank B. Dillely, "The Free-Will Defence and Worlds without Moral Evil", *International Journal for Philosophy of Religion* 27, nos. 1–2 (February–April 1990), 14.

26 John Hick, *Philosophy of Religion* (Prentice Hall, 1963), 45.

Theists like Dilley and Hick point out that if we lacked the free will to harm each other, then there would be less scope for virtues like courage, generosity, kindness, etc. But a similar argument can be made for the kinds of self-harms that can be the result of Millian sins — not being allowed to engage in Millian sins prevents one from regret, atonement, heroic recovery from addiction and sin. It limits the opportunity for friends and loved ones of the sufferer to display virtues such as compassion, generosity, and so forth. Granted, many who sin will fail to achieve regret and atonement; many of their friends and loved ones will fail to display compassion and generosity. But isn't this just as true when one is harmed by another as when one harms oneself? Thus, it seems like the FWT theist has no more business trying to prevent people from sinning (even when they thereby harm themselves) than we have asking why God doesn't intervene to prevent us from harming each other.

#### *IV.2. Free Will and the Legislation of Morality*

Now I must argue that criminalization of Millian sin restricts (would-be) perpetrators' metaphysical freedom, and not just their civil liberty. Legislating morality works on both the demand side and the supply side. That is, when immoral acts are made illegal, legislators typically make illegal not only the consumption of sinful materials, but also the production and distribution (if the sinful act is such that it requires production and distribution). Thus, criminalization of drugs involves punishment not just of users, but also of producers, suppliers, and so on.

Let us focus first on the supply side of legislating morality. The thought behind targeting the supply of immoral products like drugs or sexual services is that if such products are not available for purchase, then it doesn't matter how much demand there is, for there will be no supply. Clearly, if the supply of pornography or drugs is eliminated, then procuring these products will be impossible. This, in turn, would make it impossible for people freely to choose to consume pornography or drugs. As Frank Dilley points out, "One is not free(i) with regard to what is impossible"<sup>27</sup> (where the 'i' distinguishes the indeterminist/incompatibilist sense of free will from the compatibilist sense of free will). Thus, targeting the supply side of the immoral trade with

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27 Frank B. Dilley, "A Modified Flew Attack on the Free Will Defense", *Southern Journal of Philosophy* 20, no. 1 (Spring 1982), 28.

the aim of eliminating such supply has as its ultimate aspiration a goal which directly entails limiting people's free will with respect to violating religious morals.

One might argue that such efforts at eliminating the supply of sinful products are never entirely successful, and thus, that access to them is never rendered impossible. Therefore, people's free will with respect to choosing to consume these products is never eliminated. I would offer two responses to this argument.

First, making a product more difficult to acquire (either merely by limiting the supply, or indirectly by making it prohibitively expensive for some due to limited supply and the dangers of transport) arguably can limit the free will of consumers even if it doesn't completely eliminate it. And someone who holds free will to be of tremendous value should not regard imposing limitations on free will as a morally unproblematic alternative to elimination of free will.

Second, even if interdiction efforts are never entirely successful, the *goal* of such interdiction efforts is not to be partially successful. If a legal moralist targets drug producers, the intention is never to stop some smuggling, and to allow others. An interdiction effort would not be regarded as having failed to meet its original design or intention if it had a 100% success rate; on the contrary, it would be trumpeted as a resounding success. Thus, even if interdiction efforts necessarily fall short of full effectiveness, the *intention* behind them is to deprive would-be sinners of the option to sin, and the practical effect of this policy would be to limit the metaphysical free will of would-be sinners. To say, "If we succeeded in our intended policy, it would deprive people of their free will, which would be wrong; but it won't, so we should be allowed to pursue our policy to the fullest extent possible" has the same paradoxical air as saying, about a bumbling but persistent attempted murderer, "If he succeeded in committing murder, that would be wrong, but he always fails, and always will, so his attempts are not immoral."

Turning to the demand side, legislation of morality often takes the form of punishing the consumers of sinful products. This is particularly the case when the sin in question is a behavior (e.g., consensual homosexual behavior), and there is no product to be produced or distributed (i.e., the sin in question cannot be targeted on the supply side). Does this punishment of consumers limit their free will?

One way in which laws criminalizing Millian sin might abrogate the free will of would-be sinners is by coercing them into behavior that is outwardly moral. Of course, one of the main points of legal penalties associated with undesirable actions is that they are supposed to change the calculus of costs and benefits associated with various actions, thereby altering people's behavior. Could these legal penalties serve as a sufficiently coercive threat that they undermine the free will of would-be sinners?

Part of how one answers this question depends on how sensitive free will is to negation by coercion. Michael Murray writes that "one cannot act freely when one is in the condition of compulsion by another in the context of a threat",<sup>28</sup> but goes on to outline very stringent conditions on what counts as compulsion. By comparison, van Inwagen writes, "There are...few occasions in life on which — at least after a little reflection and perhaps some investigation into the facts — it isn't absolutely clear what to do...An incompatibilist should believe that on such occasions the agent cannot do anything other than the thing that seems to him to be clearly the only sensible thing."<sup>29</sup> Thus, van Inwagen thinks we seldom act freely, and on his account, the threat of a severe legal penalty associated with a sinful act would coercively negate the free will of most (but perhaps not all) agents. A different possibility altogether is again suggested by Murray, who says one might hold that one acting under compulsion might act freely, but his or her action is robbed of the sort of moral significance theists wish for free actions to have. Thus, one might hold that "[b]ecause praise or blame are not justifiably imputed in such cases of compulsion it would appear that although freedom *simpliciter* is not eliminated, the moral significance of the action performed is."<sup>30</sup>

Again, though, Murray has a very strict definition of what counts as "compulsion by another in the context of a threat" — a gun to one's head counts, as does God revealing himself in a way that is rationally undeniable and guaranteeing punishment for evildoers. But does threat of punishment by temporal authority count as compulsion or coercion of the sort that undermines free will? Indeed, the defender of legal moralism might say that the legal penalties associated with Millian sins do not (and are not intended) to rob would-be

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28 Michael J. Murray, "Coercion and the Hiddenness of God", *American Philosophical Quarterly* 30, no. 1 (January 1993), 29.

29 Van Inwagen, "When is the Will Free?", 415.

30 Murray, "Coercion and the Hiddenness of God", 30.

sinner of their free will, but are merely intended to provide them with additional reasons to incline them freely to choose not to sin. This argument, however, is not compelling in light of how legal penalties are actually structured: the escalating nature of legal penalties for repeat offenders shows that legal penalties are not merely in the nature of a fee to participate, intended to discourage participation (but not to coerce non-participation), but are eventually intended to make participation prohibitively expensive, either in terms of money, jail time, or other legal or social costs. Thus, legal penalties are designed to escalate (for repeat offenders) until a coercive level is achieved.

The problem is particularly acute when we consider those who are imprisoned for the commission of Millian sins. Recall the earlier formulations of the Principle of Alternate Possibilities, which state that an action is free only if one could have done otherwise. If one is imprisoned, one is obviously not free to choose to purchase drugs, or solicit sexual services from a prostitute, etc.<sup>31</sup> (And it will do no good to say that prisoners are free to *choose* to buy drugs, etc., even though they are not free to *actually purchase* them, unless we are assuming serious delusiveness on the part of our prisoners locked up for moral crimes. As we discussed earlier, FWT theists are generally critical of atheists who claim that God could allow us to *choose* sin, but not *actually perform* sin. See, for example, Dilley (1982).)

This point about incarceration, and other sorts of punishments which clearly limit free will, is worth dwelling on for a moment. An oft-banded statistic in the United States is that nearly half (over 99,000) of all inmates in US federal prisons are incarcerated in drug charges.<sup>32</sup> In US state prisons, almost 223,000 inmates are incarcerated on drug charges—over 55,000 merely for possession.<sup>33</sup> Of the 71,000 inmates in England and Wales as of June 2013, 10,000 are imprisoned for drug offenses.<sup>34</sup> An inmate incarcerated in a prison where there

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31 At least, not in an ideal world. For example, drugs are available for purchase in some prisons, but this is not a situation a legal moralist can view with equanimity. Presumably, if the legal moralist wishes to prohibit (for example) the sale and purchase of certain drugs in society at large, he or she also does not wish for them to be available for purchase or barter by criminals imprisoned by that society.

32 Anne E. Carson and Daniela Golinelli, “Prisoners in 2012: Trends in Admissions and Releases, 1991–2012,” NCJ 243920 (US Dep. of Justice Bureau of Statistics, 2013), 5, Table 3.

33 Carson and Golinelli, “Prisoners in 2012,” 5, Table 3.

34 Gavin Berman and Aliyah Dar, “Prison Population Statistics,” SN/SG/4334 (House of Commons Library, Social and General Statistics Section, 2013), 21, Table B.

is no access to drugs (as a legal moralist must surely intend) is not free with respect to using or abstaining from drugs; his or her freedom is abridged. Similar comments apply to incarceration for any other moral crime, where access to the sin in question (and many other activities, besides) is rendered impossible: the inmate's freedom with respect to choosing to participate or refrain from engaging in this sin (or *anything* that cannot be done within the confines of prison) is removed by secular authorities. Thus, secular authorities in a state with legal moralism (as in the US) are engaged in a widespread abridgement of the free will of individuals. I have argued that if the FWT theist supports this, it can almost certainly not be on theistic grounds.

I will conclude this section by noting that the legislation of sin is particularly problematic for theists like Swinburne, who aren't merely concerned with free will *per se*, but with morally significant choice. Remember, Swinburne argues that libertarian free will could include merely the freedom to choose (uncaused) among various goods, but that such free will would be worth little; morally significant choice requires not merely the ability freely to choose, but the ability freely to choose either to benefit or to harm, freely to choose good or evil. So the ability to make morally significant choice entails the existence of libertarian free will, but the latter does not entail the former. This means that a limitation imposed on us by the state which did not rob us of our libertarian free will could nevertheless prevent us from exercising morally significant free choice by removing certain options. So it seems as though morally significant choice may be even more sensitive to negation through morals legislation than is libertarian free will; and so a philosopher who endorses a theodicy like Swinburne's has a powerful *prima facie* reason to oppose the criminalization of Millian sin.

Thus, it would seem that attempts by FWT theists to use the coercive power of the state to control Millian sin do, in fact, diminish metaphysical free will or eliminate opportunities for its exercise, and as such must be regarded as impermissible by those theists who regard free will as of sufficient value to serve as a general justification for God's forbearance of moral evil.

Before concluding, let us consider a final objection. One might object that although the free will defense provides God a reason not to interfere to prevent even terrible evil, this reason for God not to interfere cannot be a reason for humans not to interfere.<sup>35</sup>

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35 I owe this objection to a referee for *EJPR*.

This objection cannot be correct, though, if we think about how the free will defense is actually structured: God is not confronted with human creatures, who are already created with free will, and faced with a decision as to whether or not to interfere in their exercises of free will. Thus, the question is not merely a question of whether (and who) is allowed to interfere. Instead, God is confronted with the question of *whether to create humans with free will in the first place*. Thus, the question addressed in the free will defense is primarily one of the *value* of free will: is the value of free will sufficient to compensate for the evils that will (and do) inevitably result from its misuse? Therefore, the question of whether (and who) may intervene is in an important sense a secondary question, which is parasitic on this primary question of the value of free will, and must be answered in terms of it. If God may not intervene in human free will, it's because that would defeat the purpose of giving us this valuable gift in the first place.

But if we then acknowledge that free will is such a valuable and important gift, then it seems clear that it is not only wrong for God to intervene in human free will. It seems that it is at least *prima facie* a serious wrong for us humans to intervene in other humans' exercise of free will. Because the question of the free will defense is in the first instance a question of the value of free will, it seems that this value serves not merely as a reason against God's intervention, but also against human intervention.

## V. OBJECTIONS

### *V.1. Justifying State Use of Coercive Authority*

One objection immediately arises: if my thesis is successful, wouldn't it prove too much? Wouldn't it argue the state out of existence? Surely, without some mechanism to enforce rules to protect the individual, the dreaded state of nature looms. But won't these mechanisms often deprive people of at least some measure of free will—involved imprisonment for serious or repeat offenders, for example?

I shall give a cursory explanation (for that is all I have space for) why a state can use coercion (short of legal moralism) without offending against the basic thesis of this essay (that given the value of free will in a common theistic world-view, restrictions on free will are very difficult to justify). I have argued that some civil punishments a state might levy upon an individual (particu-



larly incarceration) will restrict that person's metaphysical free will. I have also argued that the value of free will (for a FWT theist) constitutes a strong *prima facie* reason against using the state's coercive power to limit people's free will by enforcing theistic morality. But it would be implausible to argue the state out of existence. Surely it is sometimes justifiable to limit people's free will, particularly when those individuals are threatening the lives of others. But if I am arguing that free will is of such value, isn't it incumbent upon me to explain how a state is ever justified in infringing upon the free will of its subjects — or even having any subjects?

Two comments are appropriate at this point. First, it is the FWT theist who places such significant value on free will; and so ultimately, it is incumbent upon the FWT theist to explain why the state is justified in infringing upon the free will of its subjects. A second, more sympathetic comment, is this: it seems to me that a FWT theist can explain without too much difficulty why a state is justified in exercising various forms of coercive authority (short of legal moralism) over its citizens. Obviously, I don't have the space to defend an entire theory of political authority (even if I *had* such a theory), but an obvious place to start would be with defense of the person. Starting from the plausible idea that people may exercise self-defense against aggression (even if this compromises the life or freedom of the aggressor), it is a short step to the conclusion that the state may legitimately exercise this power on behalf of its subjects.

A familiar way of elaborating this story is, of course, Locke's: one begins with the idea that in a state of nature, one has the right to defend oneself against aggression and punish those who commit crimes against ones "life, liberty, health, or possessions."<sup>36</sup> When one forms a commonwealth, one transfers this 'executive power,' this right to use coercive force against aggressors, to the state. However, even if one may transfer to the state the coercive power to defend oneself and others, that doesn't mean one may authorize the state to infringe upon people's liberty with regard to purely self-regarding actions (particularly when one did not originally have this right in the state of nature).

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36 Locke, *Second Treatise*, II.6. Of course, Locke also thinks you have the right to seek restitution for damages caused, but I am ignoring this complication.

One needn't give a social contract account. One could give a Humean, social-utility type of justification for the authority of the state to punish certain crimes in order to maintain order:

A small degree of experience and observation suffices to teach us, that society cannot possibly be maintained without the authority of magistrates, and that this authority must soon fall into contempt where exact obedience is not paid to it.<sup>37</sup>

Implicit in this idea, again, could be the idea that even though the subjects do not (through their consent) authorize the government to defend them from aggression, the government is enforcing a right that people at any rate do have.

Although I have started out modestly — with a cautious defense of a relatively minimal state — the reader should not infer that I am defending political libertarianism. Indeed, I think it quite plausible that someone who cares deeply about negative liberty (including, as this may well, the FWT theist) can defend far more than a minimal libertarian state. For example, G.A. Cohen has famously argued that those who care about negative liberty — that is, freedom from interference — should care about poverty (and by extension should think that a comprehensive theory of justice includes redistribution). Cohen imagines an able-bodied woman who wishes to visit her sister in Glasgow, but who cannot save enough money to purchase a train ticket. Cohen writes, “If she attempts to board the train, she is consequently without the means to overcome the conductor’s prospective interference... There is no deficiency in her ability to [go to Glasgow] which restricts her *independently* of the interference that she faces.”<sup>38</sup> Her lack of negative liberty results directly from her lack of money: “So to lack money *is* to be liable to interference... Money provides freedom because it extinguishes interference with access to goods and services.” (Cohen 2011, pp. 177 and 181). Thus, there is good reason to think that beginning with premises a libertarian would accept need not lead one to embrace a minimal state.

I will say no more about what kinds of state coercion are permitted, for the thesis of this paper concerns primarily what kinds of state coercion are

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37 Hume, “Of the Original Contract.”

38 G.A. Cohen, “Freedom and Money”, in *On The Currency of Egalitarian Justice, and Other Essays in Political Philosophy*, ed. Michael Otsuka (Princeton University Press, 2011), 176.

*not* permitted for the FWT theist. I merely wish to emphasize that I am not defending a libertarian state, or any particular vision of political authority; I only wish to offer a brief defense against the objection that my thesis argues the state out of existence.

### *V.2. Legal Moralism and Social Harms*

Although I do not have the space to address every argument advanced in favor of legal moralism, I would be remiss in not addressing perhaps the best-known advocate, Patrick Devlin. Devlin argues that significant harm is done when the criminal law does not enforce a common moral code, but the harm is done to society as a whole:

[A]n established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.<sup>39</sup>

A couple of comments are required. First, even Devlin acknowledges that considerations like the ones above must be balanced against the requirement that "there must be toleration of the maximum individual freedom that is consistent with the integrity of society."<sup>40</sup> So Devlin, too, acknowledges the value of freedom (although it is unclear whether Devlin is speaking here of free will or political liberty; he likely means the latter).

More importantly, though, a FWT theist should regard a Devlin-style attempt to justify legal restrictions on Millian sins with a healthy skepticism. Again, given the substantial value of free will, the mere infliction of harms cannot in all cases justify its restriction. If that were the case, then the free will theodicy could never get off the ground in the first place. In particular, as potential harms become more indirect and diffuse, concern about preventing them must give way before the imperative of respecting the metaphysical free will of persons.

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39 Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1996), 13–14.

40 Devlin, *The Enforcement of Morals*, 16.

Indeed, the sort of argument advanced by 20<sup>th</sup>-century legal moralists — that tolerance of Millian sins causes harm to other members of society<sup>41</sup> — was foreseen by Mill, who imagined such advocates of legal moralism arguing as follows (in favor of temperance laws):

I claim, as a citizen, a right to legislate whenever my social rights are invaded by the social act of another...If anything invades my social rights, certainly the traffic in strong drink does. It destroys my primary right of security, by constantly creating and stimulating social disorder...It impedes my right to free moral and intellectual development, by surrounding my path with dangers, and by weakening and demoralizing society, from which I have a right to claim mutual aid and intercourse.<sup>42</sup>

Mill also saw the dangers inherent in such a standard, arguing that “So monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify; it acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them.”<sup>43</sup> While there is perhaps something hyperbolic in Mill’s statement of the case, it is true that appealing to social harm does threaten greatly to expand the scope of government interference in the free will of citizens. This is a prospect FWT theists should regard with alarm. FWT theists have argued in their theodicy for the great value of free will, and now must demonstrate a commitment to this claim in their political philosophy. Let us examine the various ways in which Millian sins might harm society, and see whether, from the FWT theistic point of view, these social harms might justify infringing upon citizens’ free will.

First, a sinful behavior might present a *bad example* to others, and tempt another into sin. However, this argument seems weak: if free will is of such value, then surely making people choose good options by limiting their acquaintance with bad options is a morally dubious strategy. Someone who chooses the good only because she has been kept deliberately ignorant of the available bad options has not exercised her free will in any significant or important sense.

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41 This is also one of the lines of argument Geisler and Turek (*Legislating Morality*) advance in favor of legal moralism.

42 John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Hackett Publishing, 1859/1978), 87.

43 Mill, *On Liberty*, 87.

Second, sinful behavior might impose *indirect costs* on society. Thus, alcohol consumption might increase health care costs for everyone (due to the necessity of caring for alcohol-related diseases), or cost the economy money by increasing worker absenteeism. This may well be the case, but if we are trading off between two values, we must assess the relative weight of these two values. And if we consider the weight of free will (extremely high) vs. the value of these indirect costs (money, whose value is obvious), it seems clear that it will be difficult to justify restricting people's metaphysical free will for purely economic reasons.

Finally, sinful behavior might cause *direct harms to individuals*. Thus, a drunk driver might kill someone; an addict might mug someone to acquire money for another fix; alcohol might fuel a date rape; etc. These harms fall much more heavily on individuals, and it is much more difficult to justify these in the name of free will. But in the absence of a necessary or even a regular connection between the sinful activity and direct harm to other individuals, it is difficult to justify interference in the free will of sinners. Most consumers of alcohol do not kill; drug use does not always (or even usually) lead to violent crime. When direct harms to individuals are perpetrated, intervention by the state is surely justified. But when one is engaged in sinful behavior that is correlated with direct harms being inflicted on individuals, without the sinner actually engaging in those direct harms, then it seems like there is no case to be made for restricting the free will of the individual in question. True, allowing these sinful activities will result in an increase in direct harms to individuals. But then so does allowing free will, generally, result in direct harms to individuals; and this is not taken as a decisive objection to allowing free will, or as a reason for God to give us a significantly truncated type of free will. Again, I would like to reiterate that given the value placed on free will in the theodicy, the FWT theist must admit that certain harms (perhaps even serious ones) must be tolerated in name of free will, and that there must be a *prima facie* presumption against further restrictions on free will. If these claims are not true, then it becomes difficult to see how the FWT theist can argue that a world in which we are free, but commit terrible evils, is better than (or just as good as) a world in which we are unfree, but do no evil.

## VI. CONCLUSION

Many contemporary theists recognize a tension between theistically-based moral values on the one hand, and political liberty on the other hand; but many, recognizing the value of freedom, argue that liberty ought not be compromised. Thus, Julián Carrón recently wrote, “The combination of these two factors, the collapse of what is self-evident and freedom, might suggest that because the exercise of freedom is risky, the surest way to defend values would be to impose them, so freedom would not go astray.”<sup>44</sup> Carrón rejects this path, arguing instead that “The truth cannot be imposed from the outside; it must be embraced and appropriated by man in freedom.”<sup>45</sup> Carrón interprets the parable of the prodigal son as teaching a lesson about the necessity of freedom. Discussing Carrón’s presentation of the parable, Jason Blakely writes,

Carrón stresses Jesus’ famous parable of the prodigal son whose father gives him his inheritance early so he may fully pursue his freedom and desires even to the point of complete moral dissipation. Why does the father not intervene by the use of force? Why is he not scandalized by the muck of his son’s desires? Central to the Christian claim is that every human heart has a desire for the infinite, such that every other desire remains restlessly unsatisfied until a relationship with God is formed. Jesus recognized that real faith must always pass through the free desire of the human heart. Instead of coercion, Jesus’ approach was to offer people a bigger, more engaging love.<sup>46</sup>

As Mill pointed out in *On Liberty*, society has many tools besides the law for infringing on the liberty of its citizens. Thus, it may be that the argument of this paper has broader implications for theistic social and moral philosophy. For example, although it may be customary in certain cultures or sub-cultures for a person to appeal to a theistic justification to limit the liberty of family members on moralistic grounds (or to limit their acquaintance with ‘worldly’ options, and thereby foreclose the possibility of certain free choices), the argument of this paper might be extended to demonstrate that this practice is

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44 Julián Carrón, *Disarming Beauty: Essays on Faith, Truth, and Freedom* (University of Notre Dame Press, 2017), 27.

45 Carrón, *Disarming Beauty*, 32.

46 Jason Blakely, “The Book Christians Should Read Instead of ‘The Benedict Option’”, <https://www.americamagazine.org/arts-culture/2017/06/14/book-christians-should-read-instead-benedict-option> (14 June 2017).

inconsistent with the very theistic values which are appealed to to justify it. My argument may also demonstrate that it is inconsistent for a society to appeal to theistic grounds to justify the use of other, extra-legal methods (of the sort discussed by Mill) to limit the liberty of its members to engage in Millian sin. It is beyond the scope of this essay to explore these options; I only wish to point out some further possible implications of this argument.

But even if I cannot explore these issues, I hope I have made the case that theists who endorse a free will theodicy cannot defend (on theistic grounds) the sort of legal moralism that we have recently seen in Uganda and other places. Such an appeal to theistic morality to justify the criminalization of Millian sin is inconsistent with the FWT theist's claims about the importance of free will and the overwhelming value of its exercise.

## APPENDIX<sup>47</sup>

A survey of 5159 adults residing in the US was conducted in October 2016. Of these, 3178 either agreed or strongly agreed with the statement, "I believe in the existence of a personal God, who created the universe and all living things." Of these 3178, 796 *both*:

agreed or strongly agreed with the statement, "I believe that a country or state should be allowed to make some activities illegal (such as homosexual acts, or blasphemy, or private recreational use of mind-altering substances, etc.) just because society sees these activities as immoral (even if these activities don't directly harm society);"

*and*

answered the question, "Why does God allow humans to perform immoral actions, like murder and rape, which harm other people?" by choosing (from among four options) the following answer: "God gave humans the valuable gift of free will, which allows humans to choose between good and evil."

We can say with 95% confidence that the proportion of US theists holding both views (legal moralism and the free will theodicy) is within the interval [.235 to .265].<sup>48</sup>

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47 I am very grateful for Daniel Westbrook's assistance in the statistical analysis of the data.

48 The outcome of the survey is very sensitive to the wording of the survey questions. A pilot survey (n = 505) in which the legal moralism question was worded slightly differently resulted in 48% of theists affirming both views (legal moralism and the free will theodicy). In the full

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survey, the legal moralism question was edited for greater clarity. I am grateful to Anne Nebel for helping me revise the survey questions for clarity and precision.



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