

# Conversion Therapy Bans and Legal Paternalism: Justifying State Intervention to Restrict a LGBTQIA+ Individual's Autonomy to Undergo Conversion Therapy

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## ABSTRACT

*Conversion therapy is harmful, ineffective and lacks scientific and medical justification; yet 2% of LGBTQIA+ individuals in the UK have undergone it, and a further 5% have been offered it. This begs the question: why is conversion therapy still not banned in the UK? This article aims to rebut a common argument employed against conversion therapy bans, that is the right of LGBTQIA+ individuals to choose to change their sexual orientation or gender identity, put simply, individual autonomy. Engaging with Gerald Dworkin's hard paternalism and Joel Feinberg's soft paternalism, it posits that conversion therapy bans are a legitimate form of state interference with an individual's autonomy, as the decision to undergo such therapy is non-rational and not voluntary enough. The argument relies on the logics behind existing paternalistic bans on physician-assisted suicide for persons with disabilities, consensual cannibalism and healthy limb amputation to show that a ban on conversion therapy similarly upholds LGBTQIA+ individuals' equality and dignity. Ultimately, this article defends the position that a paternalistic ban on conversion therapy is legally and morally justified, even if the decision to undergo therapy is consensual.*

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## INTRODUCTION

Legal paternalism has gone ‘out of fashion’ since its heyday in the 1970s<sup>1</sup> but continues to permeate our lives in subtle ways, from mundane seatbelt laws to the increasingly ‘fashionable’ trend of banning conversion therapy, recently seen in countries like Germany, Brazil and Taiwan. While states provide multiple justifications for conversion therapy bans, the crux of the matter often boils down to protecting lesbian, gay, bisexual, transgender, queer, intersex and asexual (LGBTQIA+) individuals from its harms even if they have given their consent, thus clearly being a paternalistic intervention. In this article, paternalism is defined as an act or omission by A (the state) affecting B (the LGBTQIA+ individual) in order to protect B from harm without regard to, or in spite of, B’s consent.<sup>2</sup> Conversion therapy refers to any therapeutic approach that attempts to bring about a change of sexual orientation or gender identity.<sup>3</sup> Conversely, supporters of conversion therapy champion the autonomy and self-determination of LGBTQIA+ individuals, arguing that those who freely choose to reduce or remove their homosexual feelings should have the right to do so.<sup>4</sup>

In May this year, the UK announced legislation to ban the ‘coercive and abhorrent’ practice of conversion therapy to protect LGBTQIA+ individuals,<sup>5</sup> three years after Theresa May pledged to eradicate it in 2018.<sup>6</sup> This provides a timely opportunity to consider whether the state should intervene paternalistically

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<sup>1</sup> Christophe Salvat, ‘Behavioural Paternalism’ (2014) 15 *Revue de Philosophie Économique* 109, 110.

<sup>2</sup> Robert Young, ‘John Stuart Mill, Ronald Dworkin, and paternalism’ in C L Ten (ed), *Mill’s On Liberty: A Critical Guide* (Cambridge University Press 2009) 211.

<sup>3</sup> UK Council for Psychotherapy (UKCP), ‘Memorandum of Understanding on Conversion Therapy in the UK Version 2’ (UK Council for Psychotherapy, October 2017) <[https://www.psychotherapy.org.uk/media/cptnc5qm/mou2-reva\\_0421\\_web.pdf](https://www.psychotherapy.org.uk/media/cptnc5qm/mou2-reva_0421_web.pdf)> accessed 14 August 2021, 2.

<sup>4</sup> Core Issues Trust, ‘Help’ (Core Issues Trust) <<https://www.core-issues.org/help-we-offer>> accessed 14 August 2021.

<sup>5</sup> UK Government, ‘Government sets out plan to ban conversion therapy’ (Gov.UK, 11 May 2021) <<https://www.gov.uk/government/news/government-sets-out-plan-to-ban-conversion-therapy>> accessed 2 July 2021.

<sup>6</sup> BBC, ‘Calls to ban LGBTQIA+ “conversion therapy” in UK’ BBC (London, 5 June 2020) 1.

to restrict individual autonomy to convert, or at least attempt to convert, their sexual orientation to fit the societal norm of cis heteronormativity. This analysis is pertinent, not only because conversion therapy remains at the edges of legal jurisprudence despite its recent proliferation in the press and public consciousness, but more importantly to also theorise the moral and legal legitimacy of a conversion therapy ban. Although the locus of this article's inquiry is largely focused on the UK, the productive tensions between paternalism and autonomy which lie at the core of conversion therapy appear universalisable, so are potentially applicable to other states' bans.

This article proceeds in three sections. In the first section, a literature review of the psychological and legal discourse on conversion therapy is provided to paint the picture of why a state might be compelled to intervene in an individual's autonomy to undergo it. The practices and purported iatrogenic harms of conversion therapy are drawn out through analysis of key interventions of the American Medical Association (AMA) and UK Council for Psychotherapy (UKCP). In the second section, Ronald Dworkin's anti-paternalistic principles of the constitutive view of the good life<sup>7</sup> and personal responsibility<sup>8</sup> is refuted by disputing his underlying assumption that individuals know their interests best.

In the final section, Gerald Dworkin's hard paternalism argument is applied to demonstrate that a conversion therapy ban best preserves an individual's ability to rationally carry out future decisions.<sup>9</sup> Alternatively, Joel Feinberg's soft paternalistic strategy is relied on to show that consent to conversion therapy is unlikely to meet the threshold of voluntariness, so a ban is required if autonomy is truly to be preserved.<sup>10</sup> Generally accepted paternalistic interventions, including restrictions on physician-assisted suicide for persons with disabilities, consensual cannibalism and healthy limb amputation, are also considered to the extent that similar paternalistic arguments might be made in support of a conversion therapy ban.

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<sup>7</sup> Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2000).

<sup>8</sup> Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press 2006).

<sup>9</sup> Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1998) 124.

<sup>10</sup> Joel Feinberg, *Harm to Self* (Oxford University Press 1986).

## I. EFFICACY, EFFECTS AND ETHICS OF CONVERSION THERAPY

Today in the UK alone, 2% of LGBTQIA+ individuals have undergone conversion therapy, 69% of which are between 16 to 34 years old and a further 5% have been offered it.<sup>11</sup> One in six UK registered therapists have engaged in conversion therapy at one point in time to reduce or change an individual's homosexual feelings, mainly through counselling.<sup>12</sup> While non-aversive psychoanalysis or 'talking therapy' is the primary form of treatment nowadays,<sup>13</sup> practitioners of conversion therapy still do employ aversive treatments on LGBTQIA+ patients with techniques like electroconvulsive shocks, drug-induced nausea and paralysis and orgasmic reconditioning that originate from the mid-19<sup>th</sup> century.<sup>14</sup>

Conversion therapy must not be confused with therapy which provides support for individuals questioning their sexuality without favouring a specific sexual orientation or gender identity over another, sometimes called affirming therapy.<sup>15</sup> Affirming therapy is a less risky alternative for questioning individuals to explore their sexuality with professional support without the pressures and expectations that accompany favouring a heterosexual identity over a homosexual one. It is worth noting here, in favour of affirming therapy, that at a fundamental

<sup>11</sup> Government Equalities Office, 'LGBTQIA+ Action Plan: Improving the Lives of Lesbian, Gay, Bisexual and Transgender People' (UK Government, July 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721367/GE\\_O-LGBTQIA+-Action-Plan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721367/GE_O-LGBTQIA+-Action-Plan.pdf)> accessed 14 August 2021, 14.

<sup>12</sup> Annie Bartlett, Glenn Smith and Michael King, 'The response of mental health professionals to clients seeking help to change or redirect same-sex sexual orientation' 9 *BMC Psychiatry* 11.

<sup>13</sup> Timothy F Murphy, *Gay Science: The Ethics of Sexual Orientation Research* (Columbia University Press 1997) 82, 83.

<sup>14</sup> American Psychological Association (APA), 'Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation' (APA, August 2009) <<https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>> accessed 14 August 2021, 22.

<sup>15</sup> UKCP, 'Conversion therapy – frequently asked questions' (UKCP) <<https://www.psychotherapy.org.uk/policy-and-research/public-policy/conversion-therapy/>> accessed 14 August 2021.



level sexuality and gender identity are fluid. A recent study by Andrea Ganna estimated that genetics influence between 8% to 25% of sexual behaviour while cultural and environmental factors influence the rest, but what these genetic variants do are unknown, and many genes are unidentified.<sup>16</sup> Moreover, four-fifths of those subjected to conversion therapy are young people under 24, who coincidentally have “nuanced and dynamic” developmental trajectories.<sup>17</sup> One-fifth are already susceptible to changes in their identities even without intervention like conversion therapy.<sup>18</sup>

The prevalence of conversion therapy persists despite both British<sup>19</sup> and American<sup>20</sup> mental health associations collectively expressing firm opposition to all forms of conversion therapy. This is due to the significant psychological, social and interpersonal harms that up to 77% of survivors face, including increased depression, anxiety, lowered self-esteem and social isolation.<sup>21</sup> The Ozanne Foundation’s 2018 Faith and Sexuality Survey found compelling evidence of conversion therapy’s harms in the UK specifically, with one-fifth of its survivors attempting suicide and nearly half having suicidal thoughts.<sup>22</sup> Similarly, a study by the Williams Institute at UCLA School of Law found that survivors were almost twice as likely to contemplate and attempt suicide compared to their LGBTQIA+ peers who had not undergone conversion therapy.<sup>23</sup> Conversion therapy is also

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<sup>16</sup> Andrea Ganna and others, ‘Large-scale GWAS reveals insights into the genetic architecture of same-sex sexual behavior’ (2019) 365(6465) *Science* 7693.

<sup>17</sup> J L Stewart and others, ‘Developmental patterns of sexual identity, romantic attraction, and sexual behavior among adolescents over three years’ (2019) 77 *Journal of Adolescence* 90, 92.

<sup>18</sup> *ibid.*

<sup>19</sup> UKCP (n 3).

<sup>20</sup> American Medical Association (AMA), ‘Issue Brief: LGBTQIA+Q change efforts (so-called “conversion therapy”)’ (*AMA*, 2019) <<https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf>> accessed 14 August 2021, 4.

<sup>21</sup> *ibid.* 2.

<sup>22</sup> Ozanne Foundation, ‘Executive Summary: Faith & Sexuality Survey 2018’ (Ozanne Foundation, February 2019) <<https://drive.google.com/file/d/19kLvZuJ7CjZ1o3GaIEJm1y6nOicLt4QS/view>> accessed 14 August 2021.

<sup>23</sup> John R Blosnich and others, ‘Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults’ (The Williams Institute, June 2020) <<https://williamsinstitute.law.ucla.edu/publications/lgb-conversion-therapy-suicide/>> accessed 7 September 2021.

ineffective: three-quarters of respondents in the Ozanne Foundation Survey stated that it did not work for them.<sup>24</sup> This is bolstered by an American Psychological Association study in 2007, which found that out of 55 publications on conversion therapy's efficacy between 1960 to 2007, only six were conducted with requisite methodological rigour and all six demonstrated that enduring change to sexual orientation resulting from conversion therapy was rare.<sup>25</sup>

Besides its severe and often irreversible health implications and overwhelming ineffectiveness, conversion therapy raises ethical concerns. A consensus statement released by the UKCP, representing the joint opinion of 21 UK-based professional organisations, stressed that conversion therapy is fundamentally unethical: it departs from the misguided and prejudicial assumption that homosexuality is an illness which should be treated when there is no diagnosable illness to treat<sup>26</sup> and irresponsibly insinuates that homosexuality is the root cause of LGBTQIA+ individuals' problems. The AMA concurred, adding that conversion therapy often proceeds with uninformed consent and breaches of patient confidentiality.<sup>27</sup> These findings accord with the Independent Forensic Expert Group's findings that the existence of conversion therapy itself, regardless of its form, efficacy or harms, is humiliating, degrading and counter-therapeutic, creating an 'inherently discriminatory environment' which attacks the human dignity of LGBTQIA+ individuals.<sup>28</sup> Indeed, since at least 1957, psychologist Evelyn Hooker's seminal study already proved that homosexual individuals functioned in essentially similar ways to their heterosexual counterparts and did not suffer from arrested development or abusive parent-child relationships, invalidating the categorisation of homosexuality as psychopathology.<sup>29</sup>

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<sup>24</sup> Ozanne Foundation (n 22).

<sup>25</sup> APA (n 14) 27-28.

<sup>26</sup> UKCP (n 3).

<sup>27</sup> AMA (n 20) 3.

<sup>28</sup> Independent Forensic Expert Group, 'Statement on Conversion Therapy' (International Rehabilitation Council for Torture Victims, 23 April 2020) <[https://irct.org/uploads/media/\(IRCT\\_version\)\\_Statement\\_on\\_Conversion\\_Therapy.pdf](https://irct.org/uploads/media/(IRCT_version)_Statement_on_Conversion_Therapy.pdf)> accessed 14 August 2021.

<sup>29</sup> Evelyn Hooker, 'The adjustment of the male overt homosexual' (1957) 21 *Journal of Projective Techniques* 18-31.

As evidence mounts against conversion therapy, academics have convincingly argued that all forms of conversion therapy violate the absolute prohibition on torture and cruel, inhuman or degrading treatment.<sup>30</sup> While therapy that inflicts physical pain like electroconvulsive shocks, rape or beatings clearly amount to torture,<sup>31</sup> the Human Rights Committee (HRC) has recognised that torture includes psychological pain even where there is no physical injury,<sup>32</sup> including threats of torture to the victim or their family and friends and death threats.<sup>33</sup> On these grounds, even the softer ‘talking therapy’ could arguably amount to torture, given the severe mental harm and suicidal ideation it has been shown to cause. In this context, arguments heard in American courts on whether talking therapy violates therapists’ freedom of speech seem fallible, especially since this is a qualified right in the UK, which can be limited for the protection of health.<sup>34</sup> This position is affirmed by Juan E Méndez, the UN Special Rapporteur on Torture, who notes that all forms of conversion therapy amount to torture and clearly violates international human rights standards due to the severe and lasting psychological and physical suffering caused to its survivors.<sup>35</sup> Victor Madrigal-Borloz, the UN Independent Expert on Sexual Orientation and Gender Identity (SOGI), adds that the asymmetrical relationship between the ‘enlightened converter’ and ‘benighted convert’ evokes the same dehumanisation, moral exclusion and delegitimation that characterised the ‘most gross human rights violations in recorded history.’<sup>36</sup> The idea of conversion itself seems innately

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<sup>30</sup> Ignatius Yordan Nugraha, ‘The compatibility of sexual orientation change efforts with international human rights law’ (2017) 35(3) *Netherlands Quarterly of Human Rights* 176; Christopher Romero, ‘Praying for Torture: Why the UK Should Ban Conversion Therapy?’ 51 *The George Washington International Law Review* 201.

<sup>31</sup> *Tshitenge Muteba v Zaire* (25 March 1983) Communication No. 124/1982 U.N. Doc. Supp. No. 40 (A/39/40).

<sup>32</sup> UN Human Rights Committee (UN HRC), ‘General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992) UN Doc HRI/GEN/1/Rev.1, para 5.

<sup>33</sup> *Miguel Ángel Estrella v Uruguay* (17 July 1980) Communication No. 74/1980 U.N. Doc. Supp. No. 40 (A/38/40) paras 1(6), 8(3).

<sup>34</sup> *Pickup v Brown*, 728 F.3d 1042 (9th Cir. 2013); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 10.

<sup>35</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) A/HRC/31/57, 13.

<sup>36</sup> UN Human Rights Council, ‘Practices of so-called “conversion therapy”: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ (1 May 2020) A/HRC/44/53, 16.

violent, as it suggests that matters going to an individual's core identity should be forcibly extracted and cured. Conversion therapy also infringes upon an LGBTQIA+ individual's right to sexual health, which according to the Committee on Economic, Social and Cultural Rights, encompasses respect for sexual orientation and gender identity.<sup>37</sup>

As a result, lawmakers and international organisations alike are calling for a global ban on conversion therapy for LGBTQIA+ youth and adults, including the Office of the High Commissioner for Human Rights and UN Independent Expert on SOGI.<sup>38</sup> In the UK, an early day motion was tabled last June to ban and criminalise conversion therapy and more than 250,000 people signed a petition this March to this end,<sup>39</sup> but a ban has not yet materialised. In support of a global or UK-wide ban, this article refutes the common objection that a ban would restrict an individual's autonomy to undergo conversion therapy.

## II. IN DEFENCE OF AUTONOMY

To begin, Ronald Dworkin's defence of individual autonomy, which presumably opposes a conversion therapy ban, must be addressed. Ronald Dworkin was a strong proponent of anti-paternalism, drawing inspiration from John Stuart Mill's harm principle, which states that society can only interfere with individual liberty to prevent harm to others but not to prevent harm to oneself, because a competent individual knows how best to promote and protect their own interests.<sup>40</sup> Mill argued that paternalistic interferences like bans are not only prone to error by relying on generalisable presumptions lacking specificity to the unique circumstances of the affected individual, but they also disrespect individual liberty, which is necessary for character development and to treat individuals equally.<sup>41</sup> Ronald Dworkin advanced a similar line of argumentation by making at

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<sup>37</sup> *ibid* para 60.

<sup>38</sup> UN Office of the High Commissioner for Human Rights (OHCHR), 'Living Free and Equal' (October 2016) HR/PUB/16/3, 45; UN HRC (n 54) 21.

<sup>39</sup> UK Government (n 5); UK Government and Parliament, 'Make LGBTQIA+ conversion therapy illegal in the UK' (Petitions, 8 March 2021) <<https://petition.parliament.uk/petitions/300976>> accessed 14 August 2021.

<sup>40</sup> John Stuart Mill, 'On Liberty' in Richard A. Wasserstrom (ed), *Morality and the Law* (Wadsworth Publishing Company Inc. 1971) 10-11.

<sup>41</sup> *ibid* 11-12.

least two anti-paternalistic claims, being the constitutive view<sup>42</sup> and personal responsibility,<sup>43</sup> which this article will examine in turn.

### Constitutive view

In *Sovereign Virtue*, Ronald Dworkin distinguishes between two senses in which individuals have interests, correlating to two kinds of paternalism. An individual's volitional wellbeing is improved when they achieve something that they already want, whereas an individual's critical wellbeing is improved when they achieve something that they should want.<sup>44</sup> In the same vein, volitional or superficial paternalism is acceptable coercion to help an individual achieve what they already want in line with their existing values, whereas critical or deep paternalism, which tries to change their existing values, is unacceptable coercion to help an individual achieve what they should want.<sup>45</sup>

Based on these two distinctions, Ronald Dworkin posits that it is not enough for an individual to live an objectively good life where all the combined components of their life combined make it good (the 'additive view'). An additive view falls short, because it cannot explain why that life is distinctively valuable or good for that specific person.<sup>46</sup> Instead, he prefers the 'constitutive view of the good life', where an individual endorses the components that make up their life as valuable for themselves in particular. If the constitutive view is accepted, critical paternalism must be rejected, since an individual's life can only be good if they endorse it.<sup>47</sup> As Mill argued, critical paternalism assumes that ethical values are transcendent, when in fact the individual is the best judge of their own interests.<sup>48</sup>

Applying Ronald Dworkin's theory, a conversion therapy ban only serves to infringe an LGBTQIA+ individual's critical wellbeing by preventing them from achieving what they already want, that is to at least confirm their sexual identity and to, at most, reject their homosexuality. LGBTQIA+ individuals that cannot

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<sup>42</sup> Dworkin, *Sovereign Virtue* (n 7).

<sup>43</sup> Dworkin, *Is Democracy Possible Here?* (n 8).

<sup>44</sup> Dworkin, *Sovereign Virtue* (n 7) 216.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid* 217.

<sup>48</sup> *ibid* 270.

convert to heterosexuality as a result of the ban would not endorse their “forced” homosexuality, thus failing to satisfy the constitutive view of the good life. They do not live a good life against the grain of their ‘most profound ethical convictions’<sup>49</sup> as their homosexual life lacks ethical integrity and coherence with their cis-heteronormative values.<sup>50</sup> Ironically, Ronald Dworkin uses an example of an individual who wants to live a homosexual life but instead lives a heterosexual life for fear of punishment to demonstrate that, without the endorsement of their heterosexual life as superior to the homosexual life they would otherwise have lived, their life has not improved.<sup>51</sup> Reversing this example, if an individual wants to live a heterosexual life but instead lives a homosexual life due to a ban on conversion therapy, their life also has not improved. Their life can only improve by living the heterosexual life that they endorse.

Ronald Dworkin’s argument can be refuted on practical and principled grounds. Practically speaking, conversion therapy cannot definitively improve an individual’s volitional wellbeing by guaranteeing less homosexuality and more heterosexuality because of its likely ineffectiveness. Where conversion therapy fails, an individual would not endorse their homosexual life any more after undergoing conversion therapy and remaining homosexual, than they would have without it. On the contrary, unlike Ronald Dworkin’s approach towards endorsement as all or nothing, endorsement should be a matter of degree.<sup>52</sup> Conversion therapy makes it more likely that the individual will endorse their homosexual life less, as it is grounded in the discriminatory belief that homosexuality is undesirable or even pathological.<sup>53</sup> This makes the individual’s life even more despicable to them and further from endorsement if and when conversion fails, shown by its prominent risks of suicide, depression and anxiety.

There is a possibility that some individuals may endorse their life more for merely having undergone conversion therapy even if their efforts are likely to be

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<sup>49</sup> *ibid* 217.

<sup>50</sup> *ibid* 270.

<sup>51</sup> *ibid* 218.

<sup>52</sup> Young (n 2) 223.

<sup>53</sup> APA (n 14) 21-23; Irving Bieber, ‘A Discussion of ‘Homosexuality: The Ethical Challenge’ (1976) 44 *Journal of Consulting and Clinical Psychology* 163, 165; Jack Drescher, ‘Out of DSM: Depathologizing Homosexuality’ (2015) 5 *Behavioral Sciences* 565.

unsuccessful, as they can claim a degree of coherence with their ethical convictions for having tried their best to convert their sexuality. However, it is fair to assume that most individuals choose to undergo conversion therapy with the desire of actually achieving conversion, as opposed to merely experiencing therapy but failing to convert. The AMA found that conversion therapy failure is often interpreted as an individual's failure<sup>54</sup> with patient blaming identified as an ethical concern.<sup>55</sup> Therefore, any increased endorsement would be negligible and likely combined with an overwhelming feeling of inadequacy and self-guilt. By ruling out conversion therapy as an option entirely through a ban, LGBTQIA+ individuals who would have otherwise elected for conversion therapy would be guided towards the healthier option of affirming therapy, giving them the opportunity to explore and endorse their own sexuality without any predetermined agenda and thus achieving greater ethical integrity and coherence in the long-term. Therefore, Ronald Dworkin's rejection of critical paternalism in the context of a ban on harmful conversion therapy is unpersuasive, because a ban would improve LGBTQIA+ individuals' critical wellbeing while also increasing endorsement of their actual gender identity and/or sexual orientation.

On principle, it is questionable whether LGBTQIA+ individuals' endorsement of heterosexuality, which compels them to seek conversion therapy, is a genuine endorsement. In his example of the homosexual individual who lives a heterosexual life for fear of punishment, Dworkin condemned state-sanctioned threats and inducements that would force them to convert their homosexuality. Even if the individual later appreciates the conversion and endorses it, this endorsement is not genuine as the mechanisms used to secure it weaken their ability to consider the merits of conversion critically and reflectively.<sup>56</sup> Dworkin however is approving of an individual's own 'choice' to convert their sexuality, as this decision would be genuinely endorsed.

While conversion therapy as it currently stands is not forced upon LGBTQIA+ individuals as state inducement, the pervasive religious, cultural and familial pressures causing most individuals to seek conversion therapy make their endorsement far from genuine and their 'choice' to convert illusory.<sup>57</sup> These types

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<sup>54</sup> APA (n 14) 50, 68.

<sup>55</sup> AMA (n 20) 3.

<sup>56</sup> Dworkin, *Sovereign Virtue* (n 7) 218.

<sup>57</sup> APA (n 14) 46.

of individualised pressures are further amplified and undergirded by larger systemic, historical and structural societal pressures, which account for the continued existence of conversion therapy. Resultantly, it appears difficult if not impossible to separate a history of enforced compulsory heterosexuality from an individual's internalised homophobia. The fears of exclusion and rhetoric of immorality that LGBTQIA+ individuals confront is very different but equally as persuasive as explicit threats or inducements by the state. As such, the constitutive view is not satisfied if the individual's endorsement of heterosexuality is the result of overlapping personal, religious and structural oppressions, which means that Ronald Dworkin's rejection of critical paternalism does not follow.

Whether heterosexuality can be considered an individual's 'most profound ethical conviction' is also challenged, because the idea of 'sexual orientation' is a social construct created as a means to control LGBTQIA+ individuals' 'deviant' erotic behaviour.<sup>58</sup> Christopher Wolfe raises a perceptive critique by saying that Ronald Dworkin makes his argument more plausible by casting it in extreme terms, when the more likely scenario is that most individuals hold rather superficial and conventional beliefs with relatively little sustained reflection, largely influenced by their environment.<sup>59</sup> He gives an example of the 'unthinking racist' who may be forced to change his racist actions and opinions by law, but who may nonetheless live a better life, not just because he does not harm others, but more importantly because dealing with people of different races would enrich his life and make him better off.<sup>60</sup>

Applying Wolfe's argument in this context, a conversion therapy ban would not only challenge the beliefs of 'unthinking homophobes' in society by prompting reflection, but also more fundamentally contribute to changing cis-heteronormative standards of society at large. Even if some LGBTQIA+ individuals are not better off from a conversion therapy ban, it would still be justifiable to contribute to the formation of good and arguably transcendent ethical convictions like equality, non-discrimination and dignity. A ban would be a concerted effort to correct a history of systemic oppression and to avoid the

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<sup>58</sup> *ibid* 217; Jennifer K Bosson, Joseph A Vandellos and Camille E Buckner, *The Psychology of Sex and Gender* (SAGE Publications 2018) 296.

<sup>59</sup> Christopher Wolfe, 'Liberalism and Paternalism: A Critique of Ronald Dworkin' (1994) 56(4) *The Review of Politics* 615, 626-628.

<sup>60</sup> *ibid*.



direct and indirect harms of conversion therapy, including the ancillary support given to other LGBTQIA+ individuals to convert their sexuality and gender identity.<sup>61</sup> It would send a clear message that society cannot and should not start from the assumption of an inherent desirability of any sexual orientation, much less provide harmful treatment to rectify society's misconceived impressions of LGBTQIA+ individuals – the same presumptions that conversion therapy endorses and perpetuates. It would affirm Hooker's thesis of the equality and humanity of LGBTQIA+ individuals by reflecting this position in the law; in the same way that there is no discriminatory conversion therapy for cis-heterosexual individuals. All in all, Ronald Dworkin's argument on the constitutive view is unconvincing in the context of a conversion therapy ban.

### Personal Responsibility

In his later works *Is Democracy Possible Here?* and *Justice for Hedgehogs*,<sup>62</sup> Ronald Dworkin advances a second argument in defence of autonomy, relating to human dignity. One of two aspects of dignity, he says, is personal responsibility, which provides that everyone has a special responsibility to realise the success of their own life. This responsibility includes judging independently what kind of life would be successful or good for them to live, in line with their ethical values.<sup>63</sup> Living a good life requires authenticity, which is compromised if an individual's options are limited by others who deem those options unworthy.<sup>64</sup> Although the values of others and our inescapable culture influence individuals in diffuse ways, it is crucial that they are not subordinated to the will of others and do not allow others to dictate what they deem to be a good life.<sup>65</sup> Kant makes a similar argument on human dignity: the Categorical Imperative states that each person must be treated as an end in itself and not merely a means and this valuation of dignity requires recognition of each person's status as a free rational agent.<sup>66</sup>

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<sup>61</sup> Wolfe (n 59) 633.

<sup>62</sup> Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011).

<sup>63</sup> Dworkin, *Is Democracy Possible Here?* (n 8) 10.

<sup>64</sup> Dworkin, *Justice for Hedgehogs* (n 62) 209-212.

<sup>65</sup> *ibid* 17-18.

<sup>66</sup> Stanford Encyclopedia of Philosophy (SEP), 'Kant's Moral Philosophy' (SEP, 7 July 2016) <<https://plato.stanford.edu/entries/kant-moral/#AutFor>> accessed 7 September 2021.

Personal responsibility appears to go further than the constitutive view, because not only is it desirable for an individual to endorse the components of their life, but because they also have a duty to do so. However, Dworkin adds a caveat to his theory. Whereas a state cannot exercise ethical paternalism to restrict our personal responsibility for our own ethical values because this would usurp our ethical independence, it can force us to live in accordance with moral principles that define our responsibilities to other people since these are non-ethical values,<sup>67</sup> reminiscent of Mill's harm principle. He categorises sexuality as plainly being an ethical value.<sup>68</sup> Thus, it follows that the state cannot restrict an individual's personal responsibility for their sexuality and constrain such foundational choices through banning conversion therapy.

Again, the article refutes Dworkin's arguments on practical and principled grounds. On principle, both his arguments - firstly that an individual should endorse their life and secondly that they have a responsibility to do so - assume that human dignity is maximised through exercises of autonomy. However, in the case of conversion therapy, autonomy is not the only value contributing to one's dignity. Rather, the 'profound psychological and physical damage' caused to LGBTQIA+ people through this autonomous exercise<sup>69</sup> - which has been argued above to amount to torture - are clear assaults on dignity, personal well-being and human rights and so should be enough to warrant a ban on autonomy. The UN Independent Expert on SOGI convincingly argues that the existence of such therapy is by its nature degrading, as it is premised on the harmful notion that sexual and gender diversity are disorders that require moral, spiritual and physical correcting.<sup>70</sup> Instead, it is only through recognising the equality of LGBTQIA+ people and the fact that their sexuality is a natural part of development that content can be given to the principle of dignity.<sup>71</sup>

In addition, Dworkin assumes that a clear divide can be drawn between inward-facing personal responsibility and outward-facing moral responsibility.

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<sup>67</sup> Dworkin, *Justice for Hedgehogs* (n 62) 71.

<sup>68</sup> *ibid* 72.

<sup>69</sup> UN Human Rights Council, 'Practices of so-called "conversion therapy": Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (n 36) para 86.

<sup>70</sup> *ibid* paras 63, 83.

<sup>71</sup> *ibid*.

However, this is not the case for conversion therapy, as these two kinds of responsibility are symbiotically linked. Conversion therapy harms other LGBTQIA+ individuals simply by virtue of its existence, as a modern-day vestige of prejudice, homophobia and discrimination. Even if sexuality and particularly cis-heterosexuality can be described as an ethical value, which has already been contested, the institution of conversion therapy, being intrinsically oppressive, would implicate our moral responsibility towards others. Following Dworkin's own logic, a state would therefore be able to exercise paternalism over it through a ban. Nevertheless, there need not be tension between sexuality as an ethical value and a conversion therapy ban, as it is plausible that an individual can exercise their personal responsibility in determining their preferred sexuality without undergoing conversion therapy by, for instance, seeking affirming therapy or, in the extreme, living a heterosexual life of their own accord.

In practice, exercising autonomy to undergo conversion therapy often causes irreversible, long-term physical and psychological harms lasting from several years to a decade,<sup>72</sup> which would plausibly lead to lesser autonomy in the future. An analogy can be drawn here: Jason Hanna, in arguing against unfettered autonomy, put forward the example that if a dangerous recreational drug became temporarily unavailable, we would not lament that individuals have fewer opportunities to learn from their mistakes, especially where such mistakes would severely limit one's future options.<sup>73</sup> Similarly, even though an individual may judge conversion therapy as optimal for a good life and seek it autonomously, its severe and crippling physical and psychological effects – especially suicide, suicidal attempts and suicidal ideation – would ultimately diminish one's autonomy, reducing one's ability to function and thereby eliminating certain choices that a healthy individual could have otherwise pursued. Conversion therapy's repressive, coercive and invalidating influences on one's sexuality and/or gender identity could also limit their future autonomous and healthy sexual awareness, exploration and expression.<sup>74</sup> Thus, it is difficult to conceive of conversion therapy as necessary for LGBTQIA+ individuals to undergo in order to live a good life.

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<sup>72</sup> UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (n 35) para 58.

<sup>73</sup> Jason Hanna, *In Our Best Interest: A Defense of Paternalism* (Oxford University Press 2018) 54.

<sup>74</sup> APA (n 14) 69.

### III. IN DEFENSE OF PATERNALISM

After challenging Ronald Dworkin's theories in defence of autonomy, justification for a ban can be seen from Gerald Dworkin's case for hard paternalism<sup>75</sup> and, in the alternative, Joel Feinberg's soft paternalistic strategy.<sup>76</sup> Both interventions lead to the conclusion that conversion therapy bans are a legitimate form of state interference with an individual's autonomy, although Feinberg's argument is weaker by resting on the requirement of involuntariness of an individual's choice. Other examples of generally accepted instances of paternalism are also considered to draw out additional arguments in defence of a conversion therapy ban.

#### **Hard Paternalism**

Gerald Dworkin defends hard paternalism, which is that interference with an individual's liberty for their own good is justified even where their actions are fully voluntary, because individuals may act in a non-rational fashion.<sup>77</sup> More specifically, paternalism is justified where an individual has evaluative delusions by attaching incorrect weight to some of his values, or cognitive delusions by neglecting to act in accordance with his actual preferences.<sup>78</sup> In the latter justification, the case for paternalism is stronger because the state is not imposing a good on the individual inasmuch as helping them achieve what they already deem to be good, whereas the former case carries a sense that if the state could convince the individual of the consequences of their actions, they would not wish to continue the action.<sup>79</sup>

The character of the decision is relevant in justifying hard paternalism. Where decisions are far-reaching, potentially dangerous and cause irreversible changes, are made under extreme psychological and sociological pressure, or involve dangers that are not sufficiently understood or appreciated by the individual, paternalism functions as an insurance policy to protect the individual

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<sup>75</sup> Gerald Dworkin, 'Paternalism' in Richard A Wasserstrom (ed), *Morality and the Law* (Wadsworth Publishing Company Inc. 1971) 107-126.

<sup>76</sup> Feinberg (n 10).

<sup>77</sup> Dworkin, *The Theory and Practice of Autonomy* (n 9) 124.

<sup>78</sup> Dworkin, 'Paternalism' (n 75) 121-122.

<sup>79</sup> *ibid* 122.

and preserve their ability to make rational decisions in the future.<sup>80</sup> The individual's character is also relevant. Irrational propensities, cognitive or emotional deficiencies and avoidable or unavoidable ignorance are rational reasons for the state to intervene.<sup>81</sup> The paternalistic state has the burden to prove the exact nature of harm and probability of its occurrence, as well as that the intervention is the least restrictive means available.<sup>82</sup>

A ban on conversion therapy can be justified as a hard paternalistic measure under this framework, as LGBTQIA+ individuals may exhibit evaluative and/or cognitive delusions. The APA found that most individuals seek conversion therapy to resolve their confusion, questions, fear and anxiety surrounding an LGBTQIA+ identity and/or in response to religious beliefs or familial and community pressures.<sup>83</sup> From this, it can be inferred that individuals incorrectly attach too much weight to the ability for conversion therapy to resolve all their actual and perceived problems relating to their sexuality and gender identity, when in fact, they would benefit more from affirming therapy as an alternative, safer form of exploration and resolution. This is exacerbated by the fact that conversion therapy is often prescribed without full disclosure of its risks and lack of efficacy, making it difficult if not impossible for an individual to correctly evaluate their desires to undergo treatment and to give informed consent.<sup>84</sup>

Alternatively, or in addition, conversion therapy is oftentimes not the actual preference of LGBTQIA+ individuals wishing to explore their sexuality. LGBTQIA+ individuals may neglect to act in accordance with their actual preferences to live a homosexual life due to external pressures. Some individuals are also pressured by their licensed medical health provider to choose conversion therapy.<sup>85</sup> A 2004 study by Smith and others found that individuals that presented with confusion and distress about their sexuality were offered and received conversion therapy without them ever requesting it.<sup>86</sup> In any event, conversion

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<sup>80</sup> *ibid* 122-125.

<sup>81</sup> Dworkin, 'The Theory and Practice of Autonomy' (n 9) 124.

<sup>82</sup> Dworkin, 'Paternalism' (n 75) 126.

<sup>83</sup> APA (n 14) 46.

<sup>84</sup> AMA (n 20) 3.

<sup>85</sup> APA (n 14) 46.

<sup>86</sup> Glenn Smith, Annie Bartlett, and Michael King, 'Treatments of homosexuality in Britain since the 1950s—an oral history: the experience of patients' (2004) 328(7437) *British Medical Journal* 427.

therapy involves clear dangers that are dangerous and irreversible<sup>87</sup>, and there is not enough evidence in favour of its efficacy to set aside such dangers. This satisfies the criteria laid out in Gerald Dworkin's paternalism theory.

### **Soft Paternalistic Strategy**

Alternatively, Feinberg's soft paternalistic strategy can be used to justify paternalism where individuals are protected from dangerous decisions that are less than fully autonomous,<sup>88</sup> perceptively basing an interference with autonomy on the state's concern to ensure autonomy.<sup>89</sup> Feinberg lays down three rules to determine the voluntariness of an individual's decision, which he conceives as a variable concept with a sliding marker determining when a choice is 'voluntary enough', depending on the interests at stake, nature of the circumstances and moral or legal purposes served.<sup>90</sup> First, the degree of voluntariness required is proportional to the gravity and probability of the risk of harm occurring.<sup>91</sup> Feinberg cautions against determining the reasonableness of the risk, because this requires us to impose our own judgment of the worthwhileness of the risk onto unwilling autonomous individuals; he instead posits that we should consider whether less risky means are available and if so, whether the individual knew of its availability.<sup>92</sup> Second, the degree of voluntariness required is proportional to the irrevocability of the risked harm, because greater care is required where the harm cannot be repaired or undone.<sup>93</sup> Third, the standard of voluntariness must be tailored to the individual's special circumstances, including whether various moral or legal effects may attach to the individual's decision.<sup>94</sup> Feinberg draws a distinction between standards applied to a person's decision against an unrestrictive or 'normal' background and standards that are relativised to the specific actual background that is restrictive in nature. He determines that legal

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<sup>87</sup> Ozanne Foundation (n 22).

<sup>88</sup> Feinberg (n 10) 99.

<sup>89</sup> Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 116.

<sup>90</sup> Feinberg (n 10) 117.

<sup>91</sup> *ibid* 118.

<sup>92</sup> *ibid* 119.

<sup>93</sup> *ibid* 120.

<sup>94</sup> *ibid* 123.

invalidity only requires involuntariness by standards applied from a normal perspective.<sup>95</sup>

Applying Feinberg's rules of voluntariness, a case can be made that an individual's decision to undergo conversion therapy is not voluntary enough. The gravity of harm from conversion therapy is serious and irreversible, with conversion therapy survivors reporting a one-fifth chance of suicide,<sup>96</sup> one-half chance of suicidal thoughts<sup>97</sup> and individual instances of anxiety, depression and self-hatred.<sup>98</sup> This is compounded by the fact that LGBTQIA+ individuals often already have vulnerable mental states prior to entering conversion therapy with higher rates of mental illnesses and substance dependence than heterosexual individuals. This is due to minority stress, which refers to the prejudice, discrimination, harassment and exclusion faced by LGBTQIA+ individuals as a result of being a sexual minority.<sup>99</sup>

For individuals seeking conversion therapy because of confusion, fear and anxiety about their sexuality, affirming therapy is a less risky alternative for them to explore their sexuality with professional support without the pressures and expectations that accompany favouring a heterosexual identity over a homosexual one. Those who face religious or familial pressures to convert their sexuality would have special circumstances raising the standard of voluntariness, since moral condemnation attaches to their decision, not to mention the underlying political institution of compulsory heterosexuality which presumes heterosexuality as the natural preference or innate orientation of all individuals.<sup>100</sup> Against a 'normal' background, we would doubt the voluntariness of any individual facing a therapy with risks of lasting negative effects, no concrete information on its success and immense individual and societal pressure to undergo an otherwise unnecessary therapy, so this should be the same standard applied for homosexual individuals undergoing conversion therapy.

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<sup>95</sup> *ibid.*

<sup>96</sup> Ozanne Foundation (n 22).

<sup>97</sup> *ibid.*

<sup>98</sup> APA (n 14) 43.

<sup>99</sup> Romero (n 30) 224; Michael King, 'Attitudes of therapists and other health professionals towards their LGB patients' (2015) 27(5) *International Review of Psychiatry* 396, 397.

<sup>100</sup> Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5(4) *Women: Sex and Sexuality* 631, 632-633.

Feinberg appeals to Gerald Dworkin's idea of psychic costs<sup>101</sup> as a separate line of argumentation, which he believes is the strongest non-paternalistic argument that can justify paternalistic legislation on its own.<sup>102</sup> Psychic costs refer to the moral extortion caused when we face the cruel dilemma of either paying unfair costs to repair the severe and irreversible harms from voluntary risk-taking when individuals 'get in too deep' in conversion therapy, or abandoning those in distress and allowing their continued suffering.<sup>103</sup> Laws based on psychic costs do not rest on paternalistic grounds but solely rest on the need to prevent harm to others in the form of this moral extortion.<sup>104</sup>

Although Gerald Dworkin concludes that psychic costs are not strong enough by itself to support paternalistic interventions,<sup>105</sup> Feinberg's invocation of psychic costs is a critical fallback position. It applies the logic of Mill's harm principle, capitalising on incidental harms to others which libertarians would agree should be prevented. This is especially valuable in the rare cases where voluntariness can be established. Seana Shiffrin adds an interesting dimension to Feinberg's argument by noting that a state's justification for paternalistic interventions may be its self-regarding concern not to assist in harmful actions,<sup>106</sup> extending the idea of psychic costs beyond the general public to the state itself. This is applicable to the UK, as the state has vowed to ban conversion therapy since 2018 but has not done so to date, despite being made aware of the psychic costs to LGBTQIA+ people who have undergone and are undergoing the therapy. Thus, the state may at least be morally implicated for its lack of concrete action to ban conversion therapy, as the current state of affairs both abandons LGBTQIA+ individuals in distress and may require survivors – and their family and friends – to pay the unfair costs of failed conversion therapy.

### **Physician-Assisted Suicide for Persons with Disabilities**

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<sup>101</sup> Dworkin, *The Theory and Practice of Autonomy* (n 9) 127.

<sup>102</sup> Feinberg (n 10) 140-141.

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*

<sup>105</sup> Dworkin, *The Theory and Practice of Autonomy* (n 9).

<sup>106</sup> Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29(3) *Philosophy & Public Affairs* 205, 217.



This article now turns to examples of paternalistic interventions that provide further grounds to support a conversion therapy ban. Physician-assisted suicide (PAS) for all persons is illegal under English law, forming an example of paternalism, albeit an unsettled one.<sup>107</sup> Jerome Bickenbach makes a powerful argument in favour of PAS remaining illegal for persons with disabilities by justifying paternalism on the grounds of equality, which is enlightening for our discussion on conversion therapy as inequality lies at its roots.<sup>108</sup> Bickenbach states that where the status quo is characterised by an ‘inequality of autonomy’, persons with disabilities may confront the question of suicide in different ways.<sup>109</sup> Specifically, persons with disabilities do not have the same autonomous ability to choose whether to take their lives, because they face psychological coercion from the pressure they face as a result of their disability.<sup>110</sup>

In particular, they face moral coercion both from the societal context and prevailing social attitudes towards disability which devalues their form of life and from the fact that their options for how to continue living are limited by other people’s choices.<sup>111</sup> For example, the devaluation of people with disabilities often translates into a ‘justification’ for allocating less resources to them, which is not coincidental but is in fact produced and maintained across generations and in different societies through the decisions and choices of able-bodied people.<sup>112</sup> Able-bodied people do not face these same coercive pressures by virtue of their existence, which is unfair for persons with disabilities and fundamentally unequal.<sup>113</sup> When a disabled person chooses to die, in a context where their lives are systematically devalued and their choices are coerced by the decisions of others, it may be more likely that their choice may not be autonomous but is in fact coerced.<sup>114</sup>

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<sup>107</sup> NHS, ‘Euthanasia and assisted suicide’ (NHS, 29 June 2017) <<https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/>> accessed 14 August 2021.

<sup>108</sup> Jerome Bickenbach, ‘Disability and life-ending decisions’ in Margaret P Battin, Rosamond Rhodes, Anita Silvers (eds), *Physician-Assisted Suicide: Expanding the Debate* (Routledge 1998) 126-128.

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

It is worth noting that criminalising PAS perpetuates the notion that persons with disabilities are ill-equipped to make autonomous decisions, which can be perceived as dehumanising and ableist as well.<sup>115</sup> A clear distinction can be drawn between persons with disabilities where capacity presents a further issue and LGBTQIA+ people. However, Bickenbach's argument is still highly relevant for LGBTQIA+ people in the context of the 'inequality of autonomy' regarding sexuality, simultaneously bolstering Feinberg's challenge of voluntariness and Gerald Dworkin's idea of cognitive delusion. Like persons with disabilities, the LGBTQIA+ community continues to face moral coercion and devaluation of their worth, as a result of a long and painful history of oppression that is maintained today, largely by the choices of straight, white men.<sup>116</sup> The fact that rigid categorisation of sexual orientation and gender identity and conversion therapy exists at all indicates the enduring need to control homosexuality despite it no longer being categorically 'deviant' and despite a greater understanding of sexuality as fluid.<sup>117</sup> Seeing this inequality of autonomy, it is apparent that as long as the lives of LGBTQIA+ individuals are systematically devalued and their choices are coerced by others, their choice to undergo conversion therapy cannot be fully autonomous and may in fact be coerced. A paternalistic ban is the only way to truly preserve the autonomy of LGBTQIA+ individuals and ensure equality of autonomy, given that like persons with disabilities and PAS, LGBTQIA+ individuals do not have the same autonomous ability to choose conversion therapy against the backdrop of homophobia and cis-heteronormativity.

### **Consensual Cannibalism**

Another instance of paternalism is the court's criminalisation of consensual cannibalism as murder. The conviction of Armin Meiwes for the murder of Bernd

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<sup>115</sup> Danny Scoccia, 'Physician-Assisted Suicide, Disability, and Paternalism' (2010) 36 *Social Theory and Practice* 479, 482-485.

<sup>116</sup> Chaka L Bachmann and Becca Gooch, 'LGBTQIA+ in Britain: Hate Crime and Discrimination' (Stonewall, 2017) <[https://www.stonewall.org.uk/system/files/LGBTQIA+\\_in\\_britain\\_hate\\_crime.pdf](https://www.stonewall.org.uk/system/files/LGBTQIA+_in_britain_hate_crime.pdf)> accessed 14 August 2021, 6.

<sup>117</sup> Christine E Kaestle, 'Sexual Orientation Trajectories Based on Sexual Attractions, Partners, and Identity: A Longitudinal Investigation From Adolescence Through Young Adulthood Using a U.S. Representative Sample' (2019) 56 *The Journal of Sex Research* 811, 823.

Brandes in 2005 by the Federal Court of Justice in Karlsruhe was a sensational case.<sup>118</sup> In justifying the court's judgment, Vera Bergelson convincingly argues that consensual harm is punishable when the victim is denied their dignity and equal moral worth.<sup>119</sup> By killing Brandes and cannibalising his flesh, Meiwes defeated Brandes' interest in continued living and used him as an object to obtain his desired sexual cannibalistic experience, thus disregarding Brandes' dignity despite having secured his consent.<sup>120</sup> However, Bergelson suggests that the perpetrator may have a partial defence to murder, if the victim has given consent and if, despite disregarding the victim's dignity, the harmful act produced objectively positive outcomes and the perpetrator intended for that to be the case.<sup>121</sup> The more disabling and irreversible the harms, the more significant the benefits should be.<sup>122</sup> In Meiwes' case, there was no objectively positive outcome emerging from cannibalism and Brandes' death was both disabling and irreversible.

Moral dignity is important because it is an essential characteristic of being human and of our collective humanity, so any threat to moral dignity affects society at large.<sup>123</sup> Dworkin himself held that the first dimension of human dignity is the principle of intrinsic value, which states that each human life has a special objective value of potentiality.<sup>124</sup> A life is good when its potential is realised, and it is bad when its potential is wasted; this success or failure is something we all have reason to want or deplore.<sup>125</sup> Since the objective importance of human life cannot belong to any one human without belonging to all humans, self-respect and respect for others are inseparable.<sup>126</sup> Similarly, Nicole Anderson expresses that consensual cannibalism is unethical, because it attacks the ideals of the state's body-politic and what it means to be human.<sup>127</sup> Indeed, the House of Lords in *R*

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<sup>118</sup> Bundesgerichtshof 2 StR 310/04 - Urteil vom 22. April 2005 (LG Kassel), <<https://www.hrr-strafrecht.de/hrr/2/04/2-310-04.php>> accessed 14 November 2021.

<sup>119</sup> Vera Bergelson, 'Consent to Harm' (2008) 28(4) *Pace Law Review* 683, 706.

<sup>120</sup> *ibid* 706.

<sup>121</sup> *ibid* 707.

<sup>122</sup> *ibid*.

<sup>123</sup> *ibid* 704-705.

<sup>124</sup> Dworkin, *Is Democracy Possible Here?* (n 8) 9.

<sup>125</sup> *ibid* 10.

<sup>126</sup> *ibid* 16.

<sup>127</sup> Nicole Anderson, 'The Ethics of consensual cannibalism: deconstructing the human-animal dichotomy' 14 *Antennae: the journal of nature in visual culture* 66, 67.

*v Brown* held that it was not in the public interest for consensual bodily harm to be legal unless it fell within already established categories of lawful activity like tattooing or reasonable surgery.<sup>128</sup> Following this, consensual sadomasochistic activity was deemed unlawful, as it was not an established lawful activity and was not in the public interest by breeding cruelty and harming family life and the welfare of society.<sup>129</sup>

The argument of human dignity can be applied to conversion therapy bans, which is also a consensual harm. Assuming an individual's consent to conversion therapy is effectively demonstrated, putting aside the seemingly insurmountable issues of involuntariness and coercion raised by Feinberg and Bickenbach, conversion therapy should still be banned because it denies LGBTQIA+ individuals of their dignity and equal moral worth. While providing conversion therapy, therapists lose sight of the client as an individual person and their moral worth and instead view them as pathological, flawed and 'Other'.<sup>130</sup> The practitioner's homophobia and heterosexism take centre stage, neglecting other equally valuable human characteristics of the LGBTQIA+ individual and insinuating that homosexuality is the root cause of their problems.<sup>131</sup> Applying the theories of Dworkin, Anderson and Bergelson, not only does this harm LGBTQIA+ individuals, but it also affects society's moral fabric at large by flouting our collective humanity. Additionally, as Dworkin finds, one aspect of what it means to be human that conversion therapy threatens is realising one's full potential, which is arguably best achieved when individuals reach self-acceptance rather than wasting their time, resources and efforts to fight against their natural sexual instincts.

Arguably, Bergelson's exception does not apply in the case of conversion therapy as it is unlikely for there to be objectively positive outcomes for

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<sup>128</sup> *R v Brown* [1994] 1 AC 212, 244-245.

<sup>129</sup> *ibid* 236-255.

<sup>130</sup> The International Lesbian, Gay, Bisexual, Trans and Intersex Association, 'Curbing deception - A world survey of legal restrictions of so-called 'conversion therapies'' (IGLA World, February 2020) <[https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/CSOsAJ/ILGA\\_World\\_Curbing\\_Deception\\_world\\_survey\\_legal\\_restrictions\\_conversion\\_therapy.pdf](https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/CSOsAJ/ILGA_World_Curbing_Deception_world_survey_legal_restrictions_conversion_therapy.pdf)> accessed 22 September 2021, 48.

<sup>131</sup> David Jenkins and Lon B Johnston, 'Unethical Treatment of Gay and Lesbian People with Conversion Therapy' (2004) 85 *Families in Society* 557, 559.

conversion therapy survivors. Any evidence of the benefits of non-aversive conversion therapy is merely anecdotal and tends to be overcome by its disabling and irreversible long-term harms.<sup>132</sup> For aversive therapy, methodologically sound studies, including recent ones,<sup>133</sup> show clear evidence indicating its long-term harms, including anxiety, depression and suicidality.<sup>134</sup> The existence of conversion therapy itself also perpetuates prejudicial stigma towards homosexuality. Thus, the dignity of LGBTQIA+ individuals, which implicates our common dignity, appears to provide a further ground to justify a paternalistic ban.

### Healthy Limb Amputation

The final instance of paternalism is healthy limb amputation, which is when an individual requests to amputate a perfectly healthy limb. Although the UK courts have not definitively ruled that healthy limb amputation is illegal, it is likely to be treated as a *prima facie* case of criminal assault.<sup>135</sup> Like Feinberg, Peter Barry bases his convincing argument in support of a healthy limb amputation ban on voluntariness, adding a further dimension to the soft paternalistic strategy. Barry argues that for an individual to genuinely consent to healthy limb amputation, they must have experienced the phenomenal state of being an amputee in order to determine with utter certainty the expected utility of the amputation.<sup>136</sup> Since wannabe non-amputees cannot experience this state prior to amputation and yet they place utmost importance on the phenomenology of being an amputee, there is a marked uncertainty about whether a healthy limb amputation will lead to the feelings of completeness and satisfaction that they imagine they will gain from it.<sup>137</sup>

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<sup>132</sup> Lee Beckstead and Susan Morrow, 'Mormon Clients' Experiences of Conversion Therapy: The Need for a New Treatment Approach' (2001) 32(5) *The Counseling Psychologist* 651.

<sup>133</sup> Ozanne Foundation (n 22).

<sup>134</sup> APA (n 14) 43.

<sup>135</sup> Josephine Johnston and Carl Elliott, 'Healthy limb amputation: ethical and legal aspects' (2002) 2 *Clinical Medicine* 431, 432.

<sup>136</sup> Peter Brian Barry, 'The Ethics of Voluntary Amputation' (2012) 26 *Public Affairs Quarterly* 1, 8.

<sup>137</sup> *ibid* 9.

Barry notes that requiring a phenomenal experience prior to amputation does not create an insurmountable barrier to action. For most other surgeries, prospective patients desire a return to their status prior to an injury or illness, which they were well acquainted with phenomenally and is often necessary for survival.<sup>138</sup> Aesthetic surgeries, like plastic surgery, usually do not cause harm that is as severe, nor as irreversible, as the harm amputation would cause.<sup>139</sup> Given that there is ample room for false consciousness, wannabe amputees are not in a position to consent to a far-reaching and irreversible surgery, so it would not ethically be wrong for the state to ban healthy limb amputation.<sup>140</sup>

Barry's argument can be applied to conversion therapy. Since an LGBTQIA+ individual who seeks conversion therapy cannot have experienced the constitutive phenomenal state of being heterosexual, there is ample room that they are mistaken as to the feelings of completeness and satisfaction that they will gain from it. In fact, it is questionable whether heterosexuality can be considered a phenomenal state at all, given the fluidity of sexual orientation. Rather than a certain state, sexuality may be better conceptualised as a spectrum of large and ever-changing varieties of non-straight classes of individuals.<sup>141</sup> As stated earlier, one-fifth of young people under 24 are susceptible to changes in their sexual identities, even without intervention like conversion therapy.<sup>142</sup>

Even if we assume that sexuality is fixed, Beckstead and Morrow found that survivors of non-aversive conversion therapy that initially reported satisfaction later acknowledged the long-term harms of conversion therapy, demonstrating how a lack of phenomenal experience can cause false consciousness.<sup>143</sup> Like wannabe amputees, LGBTQIA+ individuals place a great deal of importance on the feeling of being homosexual in their decision to convert, so the phenomenology of being heterosexual is clearly paramount to them. This is apparent from the APA's study, which found that one reason LGBTQIA+ individuals choose conversion therapy is due to the fear and anxiety surrounding

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<sup>138</sup> *ibid* 10-11.

<sup>139</sup> *ibid*.

<sup>140</sup> *ibid*.

<sup>141</sup> Kaestle (n 117).

<sup>142</sup> J L Stewart and others (n 17) 92.

<sup>143</sup> Beckstead and Morrow (n 132).

being LGBTQIA+,<sup>144</sup> suggesting that heterosexuality is seen as an antidote to these negative feelings. However, by blaming homosexuality for their fear and anxiety, LGBTQIA+ individuals may also have an overly rosy image of what being heterosexual would involve for them, suggesting that they are not able to consent to conversion therapy. This argument fits well with Feinberg's idea of voluntariness, relating to the third rule on the various moral effects that attach to an individual's decision, as well as Gerald Dworkin's idea of evaluative delusions.

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## CONCLUSION

A conversion therapy ban illuminates the tensions between two types of state responsibility, that is respecting the autonomy of LGBTQIA+ individuals to change their sexuality and helping them achieve their maximum potential, both of which are facets of freedom. Paternalism may be an unfortunate term that has derogatory, illiberal and pejorative connotations,<sup>146</sup> but this article proposes that a paternalistic ban on conversion therapy is legally and morally justified as the greater freedom comes from guaranteeing the dignity, human rights and equality of LGBTQIA+ individuals, rather than allowing them to seek out a potentially ineffective, irreversible and lethal treatment, thereby perpetuating the cycle of discrimination and cementing the categories of sexuality that were created by straight, white men to control "deviant" sexualities. Gerald Dworkin informs us that LGBTQIA+ individuals who voluntarily undergo conversion therapy may nonetheless act in a non-rational fashion, making it legitimate for the state to intervene to correct evaluative and cognitive delusions. At the same time, Feinberg addresses the issue of voluntariness, finding that where LGBTQIA+ individuals' decisions are not voluntary enough, state interference can preserve the greatest autonomy. The paternalistic examples give us convincing arguments to justify a ban, stemming from equality and dignity.

For governments looking to ban conversion therapy like the UK, the most immediate issue to address is to conduct methodologically sound research into its efficacy and effects, the results of which can be used to bolster Gerald Dworkin

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<sup>144</sup> APA (n 14) 46.

<sup>145</sup> Feinberg (n 10) 123; Dworkin, 'Paternalism' (n 75) 121-122.

<sup>146</sup> Feinberg (n 10) 4-5.

and Feinberg's theoretical arguments in favour of a paternalistic ban. However, as this will require time, resources and willpower which has thus far been disappointingly lacking, the existing conversion therapy literature combined with the widespread consensus among therapists attesting to the harms of conversion therapy and the paternalistic theories supporting it should be enough to justify a ban. Indeed, without a ban, LGBTQIA+ individuals, the wider society and the state cannot insure themselves from the legal and moral harms that have already arisen and will continue to arise as a result of conversion therapy.