

PATERNALISM

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I assume that most of the controversy about the topic of paternalism involves the question of whether and under what circumstances it is justified. An answer must address two preliminary matters: what paternalism is, and what would qualify as a *justification* for it. Since each of these background issues could consume an entire essay, I will attempt to say as little as possible about them in order to move directly to what I hope is more central. But these matters cannot be avoided altogether. I further assume that legal philosophers are less likely to be interested in paternalism per se than in paternalism in the domain of law. Thus I will concentrate on the special problems that arise in justifying legal paternalism. As we will see, these problems are formidable. Little of the progress that moral philosophers have achieved in justifying paternalism in personal relations is readily adaptable to legal contexts.

What Paternalism Is and What Counts as a Justification for It

On most occasions in which *A* is justified in not allowing *B* to act according to his preferences, *A*'s objective is to protect persons who might be harmed by *B*'s behavior. When *A* treats *B* paternalistically, however, *B* is prevented from acting because of the adverse effects on *B* himself. As a very rough approximation, *A* treats *B* paternalistically when *A* interferes with *B*'s freedom for *B*'s own good—to protect or promote *B*'s health, safety, economic interests or moral well-being.

When philosophers attempt to be more precise about the nature of paternalism, however, the details of their definitions vary considerably (Archer 1990). They debate whether particular examples that deviate from the foregoing approximation do or do not qualify as genuine instances of paternalism. I will mention two (of many) such debates briefly. Still, for reasons that will become clear, I avoid commitment about how paternalism should ultimately be defined.

First, some philosophers point out that paternalism need not involve two parties. In some examples, only one party is needed. Suppose that Jane understands her proclivity to gain weight, so she locks her refrigerator at night. Is her act of making food inaccessible an instance of paternalism in which Jane plays the role of both *A* (her present self) and *B* (her later self whose preferences she disregards)? In other examples, three or more parties are involved. Suppose that parent *A* forbids his oldest son *C* from sharing cigarettes with his youngest son *B* on the grounds that tobacco is bad for *B*'s health. This case is unlike a typical situation in which *A* coerces *C* to prevent him from harming *B*, since *B* may be eager to engage in the proscribed transaction. In this case, we again are invited to conclude, *A* treats *B* paternalistically. Paternalism in this case is said to be

impure or indirect (Dworkin 1972), since A interferes directly with the liberty of C, and only indirectly with that of B, the intended beneficiary.

A second debate about the nature of paternalism stems from the claim that the paternalist need not *interfere* in anyone's freedom (Gert and Culver 1976). Suppose, for example, that doctors in an emergency room are presented with an unconscious victim whose life can be saved only by surgery. Since the patient remains unconscious throughout the procedure, it is hard to conclude that the surgery interferes with her liberty. Still, it seems apparent that the doctor treats the patient paternalistically.

So-called *libertarian paternalism* poses a possible counter example to the claim that paternalists interfere with liberty (Sunstein 2006). Libertarian paternalism works primarily by designing default rules to correct for well-known cognitive biases and volitional lapses, thereby minimizing the likelihood that persons will make decisions that are contrary to their own interest (Trout 2005). Consider the following two examples. Rather than explicitly choosing to participate in an efficient company health plan, employees might be enrolled automatically unless they opt out. Seat belts might be constructed to buckle immediately upon closing a car door, although occupants could unbuckle them if they choose. Are these provisions really paternalistic? As long as persons can change these default rules, no *interference* with choice has occurred. Notice that individuals "can" alter the default rule in two senses. First, persons face no penalty if they elect not to comply. Second, opting out is not onerous, requiring a mere stroke of the pen or push of a button. When these two conditions are satisfied, it seems more accurate to construe these rules as designed to *influence* persons to pursue their self-interest.

Are these two kinds of nonstandard cases genuine counter examples to my rough approximation, requiring that my definition be modified? Probably. But I am skeptical that a "right answer" to such questions can be defended. That is, I am unsure that we can decide whether each nonstandard case is or is not a "real" instance of paternalism. I suspect that some cases are simply *better* or *worse* examples than others. We should not expect decisive reasons for or against categorizing an example as an instance of paternalism. Ultimately, a philosopher who insists on a yes-or-no answer to the question of whether a given case is an instance of paternalism must resort to stipulation. The more important issue, I submit, is whether the behavior of A (or the default rule in question) is justified in the foregoing examples. Generalizations about whether and under what circumstances paradigmatic cases of paternalism are justified may or may not be defensible when applied to nonstandard situations.

Whatever else paternalism is taken to be, I suggest it should be understood as a *reason* or *motivation* for acting (Grill 2007). An interference with liberty should not be construed as paternalistic in virtue of its *effects*. Consider two kinds of case in which effect and motivation diverge. Suppose that A somehow succeeds in advancing B's interests even though A's reason for interfering in B's freedom is to enrich himself. Or suppose that A fails to advance B's interests despite A's best efforts to do so. I believe that the latter but not the former case should be categorized as an instance of paternalism. This categorization follows from defining paternalism in terms of the motives that lead A to interfere with B, rather than by how A's interference actually affects B's welfare. Although consequences may be important in deciding whether paternalism is *justified*, I believe they are unimportant in understanding what paternalism *is*. The decision to construe paternalism as a reason or motivation has several important implications that I will later discuss, with special emphasis on the law.

It may be helpful to present a concrete, ordinary case from which to generalize about the nature and justifiability of paternalism as well as to highlight the difficulties of defending it in the legal domain. The best examples are drawn from personal relations. When asked about his preference, four-year-old Bobby objects to taking his oral flu vaccine. His father has tried to persuade him, but Bobby is unmoved. I stipulate that the father's only reason for wanting Bobby to take his vaccine is to safeguard his child's health. It seems reasonable for his father not to permit Bobby to eat ice cream, his favorite dessert, unless he takes the vaccine. This example not only describes a situation in which Bobby is treated paternalistically, but also represents a relatively clear case in which the treatment is justified. In any event, I make these two assumptions about this case.

Five criteria conspire to make this example a relatively clear case of justified paternalism. *First*, the intrusion involves a minor interference in Bobby's liberty. Bobby is not beaten or deprived of something of great significance to induce him to change his behavior. *Second*, the objective sought by his father is obviously valuable. No one contests the importance of health and the ill effects of contracting flu. *Third*, the means chosen are likely to promote this end. The vaccine is effective, and Bobby is likely to agree to take the vaccine if his desire for ice cream is strong. *Fourth*, Bobby himself is not in a favorable position to make the right decision. Children have notorious cognitive and volitional deficiencies relative to competent adults that prevent them from recognizing their best interests or from acting appropriately when they do. *Fifth*, his father stands in an ideal relationship to Bobby to treat him paternalistically. Parents have special duties to protect and enhance the welfare of their children. My example satisfies each of these five criteria, and the easiest cases of justified paternalism do so as well. I do not insist that any of these conditions is necessary to justify paternalism. I simply allege that particular examples will prove more difficult to justify as they deviate from this paradigm.

Can Laws Be Paternalistic?

If paternalism is construed as a particular reason for failing to regard the preference of a person as decisive, disagreements about whether a given law is or is not paternalistic may be misguided and futile. *Laws* do not seem to be the kinds of things that *can* be paternalistic; only *reasons* can be paternalistic. Still, claims that a law is paternalistic are frequently voiced by philosophers and should not be dismissed as confusions (Goldman and Goldman 1990). How should these claims be understood? Perhaps a law should be categorized as paternalistic when it exists for paternalistic reasons.

Several difficulties plague this attempt to understand how a law can be paternalistic. What does it mean to "exist for paternalistic reasons"? Many of these difficulties are familiar to legal philosophers who defend theories of statutory or constitutional interpretation that attach significance to legislative intent. The first kind of problem arises even when a legislator is a single individual, like a monarch. A legislator is not generally required to disclose his motivation for enacting legislation. In most cases, his reason must be inferred from various sources, many of which can be ambiguous or even contradictory. In addition, a legislator may have no single reason to favor a given law; he may have several distinct purposes in mind. The second kind of problem arises in a modern democracy in which laws are enacted by a number of representatives. How can we combine the separate motives of several individuals into the purpose of a group?

Should we count only those legislators who voted in favor of the law, or should we also consider the reasons of those who opposed it? Even if we agree about which legislators should count, these persons are bound to have diverse reasons for enacting the statute. One legislator may vote in favor of a bill for paternalistic reasons, another may vote for the bill even though he rejects this paternalistic reason, while yet a third may support the bill for reasons having nothing to do with its merits. How can we possibly decide whether to classify such a law as paternalistic? Finally, the *persistence* of law complicates endeavors to categorize it. All of the legislators who passed a statute may be dead. Suppose that most of the legislators who enacted a law did so for paternalistic reasons, but this rationale is now widely discredited and legislators have non-paternalistic reasons for not repealing the law. Since the law persists for altogether different reasons than those that led to its enactment, should we continue to classify the law according to the original motivation of those who created it? In light of these (and other) difficulties, we might despair of any prospects of identifying "the reason" for a law.

Problems in categorizing laws as paternalistic arise whenever particular examples are discussed. Consider a statute forbidding child labor. Presumably, many legislators favored such a law in order to protect the welfare of children. An additional reason for the statute, of course, is to preserve the jobs and wages of adults who otherwise would be forced to compete with underage workers. As far as I can tell, there simply is no definitive answer to the question of whether such a law is or is not paternalistic. I suspect that every actual law that anyone has ever been inclined to categorize as paternalistic resembles the example of child labor in this respect. Here, then, is the first of many difficulties that arise in attempts to apply philosophical insights about paternalism in personal relationships to legal contexts. Admittedly, on some occasions, the motivations for interference can be complicated and unclear even in personal relationships. Flu vaccines, for example, help to prevent other persons from contracting the disease. I assume, however, that Bobby's father may be confident about his reason for requiring his son to take the vaccine. The difficulties in classifying a given interference as paternalistic are seldom as formidable in personal relationships as in legal contexts.

This fact will become important when we turn to whether and under what circumstances paternalism is justified. Most philosophers, it is fair to say, have relatively strong intuitions against the justifiability of paternalism, at least when it is imposed on sane adults. Suppose that a philosopher becomes persuaded of a theory according to which paternalism is never justified, or is justified only under narrowly specified conditions. Of what value is his theory in assessing legislation in the real world? It is hard to see how his theory could be used to condemn any existing law. That is, he cannot demand that any particular law must be repealed because he is convinced that his theory is correct. All that he is entitled to conclude is that such a law is unjustified insofar as it exists for paternalistic reasons.

Nonetheless, a theory about the conditions under which paternalism is justified would have some limited relevance in legal contexts. Such a theory might constrain the considerations to which legislators are allowed to appeal in their deliberations about whether to support a given piece of legislation. That is, a legislator may be persuaded that some kinds of reasons he might otherwise cite in support of a proposed law should not be permitted to count in its favor. Alternatively, such a theory might constrain the considerations to which citizens are allowed to appeal in making judgments about whether a law is justified (Waldron 1993). After all, citizens in a democracy should be encouraged to make their own judgments about whether laws are good or bad. A theory

about the conditions under which paternalism is acceptable as a rationale could be useful for these purposes.

Despite these enormous obstacles, I remain hopeful that the label "paternalistic" can meaningfully be applied to given laws, and that a theory of when paternalism is justified in personal relations is relevant to the issue of whether such laws are justified. Perhaps the most promising proposal for interpreting the claim that a given law is paternalistic is that "the most plausible rationale" or "the best rationale" in favor of the law is to limit the freedom of persons for their own good. According to this proposal, a law can be paternalistic even though no one, past or present, ever thought to defend it on paternalistic grounds. "The best rationale" of a law can be something other than the reasons that actually led anyone to support it. Of course, commentators are bound to disagree about whether one rationale is more plausible than another. But those who conclude that the best reason in favor of a given law is paternalistic are committed to categorizing it as paternalistic. Even though I tend to favor this approach, we should remain cautious and tentative when we attach the label "paternalistic" to a given law.

Thus far, I have pointed out some of the difficulties in applying a definition of paternalism to particular laws. In addition, our understanding of what paternalism is becomes less clear as we move from nonlegal to legal contexts. My central basis for this claim is that laws are necessarily general and applicable to groups of persons whose circumstances differ widely. The fact that a law is applicable to a group of persons—whereas a paradigm case of paternalism in a personal relationship is applicable only to a single individual—gives rise to many of the perplexities in understanding the nature and justification of legal paternalism. Suppose we (somehow) decide that legislators have enacted a given law to limit the freedom of persons for their own good. Even so, we are likely to find that the law does not disregard the preferences of each and every person whose liberty is restricted. Some limitations of liberty are best construed as devices that *enable* persons to attain their antecedent objective. I am doubtful that we should deem a rationale as paternalistic when it enables a person to achieve an objective that he recognizes as desirable but is unlikely to attain in the absence of the legislation that limits his liberty (Dworkin 1972).

A good example of this phenomenon is a statute that requires persons to contribute to a social security plan. Consider Smith, who does not want to spend all of his income in the present, but is well aware of his inability to save the amount of money for the future that he realizes is optimal. Although he grumbles occasionally, he usually approves of legislation that prevents him from succumbing to his own weakness. If the legislator who enacted this statute believes that everyone resembles Smith in these respects, I would be hesitant to categorize his motivation as paternalistic. The legislator is not disregarding Smith's preference, but helping him to attain the end he prefers or judges to be best. Complications arise, of course, because legislators know that many of the persons to whom the law applies will *not* resemble Smith. Consider Jones, who, like Smith, is made to contribute to the retirement plan. Unlike Smith, however, Jones would prefer to spend all of his income in the present. The law does not regard Jones's preference as decisive, and he is certain to perceive the law as a paternalistic interference in his freedom. How should the law be categorized when legislators realize that the liberty of both Smith and Jones will be restricted? When the preferences of many but not all of the persons whose liberty is restricted are regarded as decisive, I see no basis for identifying a "right answer" to the question of whether the rationale of the law is paternalistic.

How Not to Justify Legal Paternalism

In order to decide whether given laws are justified, we need criteria of justification applicable to the legal domain. Obviously, this task is incredibly difficult, dividing political philosophers for eons. Suppose, however, that we invoke a simple justificatory theory: utilitarianism. The foregoing problems of categorization do not arise under this theory, since the very same justificatory criteria apply whether or not the law in question qualifies as paternalistic. Although John Stuart Mill famously argued that no paternalistic laws could pass the test of utility, his reasoning seems curiously *a priori* and unwilling to address empirical realities (Shafer-Landau 2005). Mill's reservations aside, I see no reason to be confident that laws we are inclined to classify as paternalistic *cannot* produce more good than bad overall.

Whether or not they adhere to some version of utilitarianism, it is fair to generalize that most moral and political philosophers have expressed strong objections to paternalism, tolerating it under very narrow conditions. As I have indicated, examples involving personal relationships typically have been used to develop theories about whether and under what circumstances paternalism is acceptable. In this section I will argue that the progress that has been made in this direction is of little or no use in efforts to justify paternalism in legal contexts. Two examples support my position and indicate that a fresh start is needed.

First, the contrast between *hard* and *soft* paternalism is the single most important distinction that has been introduced in attempts to justify paternalism in personal relationships (Feinberg 1986). According to soft paternalists, A may treat B paternalistically only when B's conduct is *nonvoluntary*. According to *hard* paternalists, A sometimes may treat B paternalistically even though B's conduct is *voluntary*. Although some philosophers contend that a few instances of hard paternalism can be justified (Kleinig 1984; Scoccia 2008), the appeal of soft paternalism is evident. The soft paternalist favors intervention in B's choice for his own good only when it seems that B's choice is not really his own. If B's conduct is fully voluntary and expresses his will, soft paternalists insist that no interference for B's own good is warranted.

Clearly, the significance of the distinction between hard and soft paternalism depends on a theory of what choices are truly ours—on an account of the voluntary. The contrast between hard and soft paternalism has proved difficult to draw (Pope 2004). According to a sensible proposal by Joel Feinberg (1986), voluntariness should be conceptualized as a matter of degree. He develops a model of a *perfectly voluntary choice* in which the agent is fully informed of all the relevant facts and contingencies and makes a decision in the absence of any manipulation or coercive pressure. Perhaps no choice in the real world corresponds to Feinberg's ideal; particular choices are relatively nonvoluntary to the extent that they deviate from it. Inevitably, troublesome borderline cases on this continuum will arise in which we are unsure whether a choice is sufficiently voluntary to render paternalistic interference unjustifiable (according to the soft paternalist). For example, philosophers often struggle to decide when consent to medical treatment is sufficiently voluntary (Buchanan 1989).

But the distinction between hard and soft paternalism, potentially helpful in identifying the conditions under which paternalism is justified in personal relationships, is much less valuable in identifying the conditions under which legislators are justified in enacting laws for paternalistic reasons. This lack of relevance is largely a product of a phenomenon I have already noted: law is necessarily general and applicable to large numbers of persons whose circumstances vary.

Perhaps the most obvious variable in the circumstances of the persons who are subject to law is their differing motivations for wanting to engage in the conduct the law would prohibit. Suppose that a legislator who accepts soft but not hard paternalism deliberates about whether to proscribe a potentially harmful but pleasurable drug (Husak 1989). He finds that a great many actual and prospective users are misinformed about the health hazards of their decisions. Other existing users are addicts. If ignorance and/or addiction undermine voluntariness, the legislator may infer that the choices of these persons are not sufficiently voluntary. Hence he will tend to favor proscription on soft-paternalist grounds. But suppose that this legislator also finds that large numbers of actual and prospective users are neither addicted nor misinformed about the risks of the substance. Like many persons who elect to eat fast food rather than nutritious meals, these users have decided that the benefits of pleasure outweigh the risks to health. Since this legislator finds that the preferences of these latter persons are sufficiently voluntary, he will tend to allow the drug to be used.

What conclusion, then, should this legislator reach about whether or not to enact the law? The proscription seems justified in its application to those persons whose choices are nonvoluntary, but unjustified in its application to those persons whose choices are voluntary. Ideally, the legislator will search for a solution that manages to treat each person individually, so that the drug is permitted for those persons whose decisions are voluntary, but is banned otherwise. The drug might be distributed under a system of licensure, so that it would be available only to those adults who demonstrate their ability to quit and their knowledge of the relevant risks. But this ideal solution encounters both pragmatic and principled difficulties; licensing is extraordinarily cumbersome, inefficient and subject to error and abuse. Since the state cannot be expected to successfully adjust its approach to the distinct circumstances of each person, it needs a default position (Kennedy 1982). The legislator must engage in *trade-offs*; that is, he must balance his judgment about the merits of soft paternalism against the demerits of hard paternalism. The principles that govern these trade-offs—that govern the application of a theory of justified paternalism to legal contexts—are highly controversial. If the default position results in drug prohibition, many persons will be subjected to hard paternalism.

This legislator will find additional important differences in the circumstances of the persons in his jurisdiction. Some prospective users of the drug are adolescents, while others are adults. Everyone agrees that paternalistic intervention in the preferences of adolescents is justified more easily than in the preferences of competent adults. How should this legislator take account of this fact in his deliberations? The obvious solution is to permit the drug for users over a given age, typically 18 or 21. But this solution is problematic. Whenever a substance is made available to adults, "leakage" to adolescents is bound to occur. In other words, greater numbers of adolescents will succeed in using the drug illegally if it is permitted for adults than would manage to do so if it were prohibited for persons of all ages. Thus, this legislator will be tempted to proscribe the drug altogether if he is greatly concerned about its deleterious effects on adolescents. Again, such a legislator must engage in trade-offs. On this occasion, he somehow must balance the freedom of adults against the welfare of adolescents.

To this point, I have described various kinds of differences in the circumstances of the persons whose preferences are disregarded by a given law, and how these differences complicate attempts to apply to the domain of law a theory of justified paternalism derived from personal relationships. The differences I have mentioned thus far are

all (roughly) psychological—law applies to persons of different degrees of sanity and maturity, with disparate motivations and distinct levels of knowledge about the consequences of engaging in the activity in question. But purely physical differences between persons may be important as well. Because of physical dissimilarities between individuals, a given law may protect the welfare of some while jeopardizing that of others. Air bags in automobiles illustrate this phenomenon. The deployment of an air bag reduces the severity of injuries for the vast majority of drivers involved in automobile accidents. In some kinds of collisions, however, persons who are very short are more likely to be injured by the deployment of the air bag than by the crash itself. Ideally, of course, air bags should be constructed to benefit *all* occupants of cars. But engineers may be unable to design an air bag to realize this ideal. If a legislator decides to require air bags to protect the safety of persons involved in automobile accidents, he necessarily trades a reduction in injuries to some drivers for an increase in injuries to others. Alternatively, engineers may be able to design an air bag to benefit all occupants, but only at an exorbitant cost. A legislator who declines to require this expensive but optimal air bag necessarily balances the value of money against the desirability of reducing injuries.

The foregoing phenomenon provides an occasion to return to some of the difficulties in defining paternalism with which I began. Suppose that a legislator must vote for or against a regulation mandating that automobiles contain air bags. He is inclined to support the regulation because he believes that occupants of cars should be protected from injuries. But he also is aware that this regulation will actually decrease the safety of a minority of drivers. If he ultimately supports the law, should we categorize his motivation as paternalistic? That is, should we describe his reason as *paternalistic* even though he knows he will jeopardize the welfare of some persons because he also knows he will promote the welfare of many of the persons in the group of those whose liberty is restricted? This question lacks a straightforward answer.

The second prominent effort to justify paternalism in personal relations is similarly hard to apply to legal domains. This effort attempts to justify paternalism by reference to *consent*. Of course, the beneficiaries do not consent at the moment the interference takes place. According to Gerald Dworkin's pioneering article, however, "future-oriented consent" is the key to justifying paternalism. Dworkin construes paternalism "as a wager by the parent on the child's subsequent recognition of the wisdom of the restrictions. There is an emphasis on what could be called future-oriented consent—on what the child will come to welcome rather than on what he does welcome" (Dworkin 1972). Return to my example of Bobby. Dworkin's proposal, as I understand it, entails that his father's paternalistic intervention is justified if and only if Bobby subsequently comes to appreciate it. If Dworkin is correct, my stipulation that the father is justified in withholding ice cream entails that Bobby eventually will consent to the restriction.

Elsewhere, I have contended that this rationale fails for three reasons (Husak 2009). First, I doubt that Dworkin is really talking about consent at all. It is unlikely that consent *can* be retrospective (but see Chwang 2009). Clearly, I do not consent to everything I subsequently come to welcome. Often I am in a better position to assess how events affect my welfare long after they occur, but this superior perspective should not be mistaken for consent because I later come to realize that the treatment I disliked at the time operated to my benefit. Second, criteria are needed to justify paternalism *ex ante*, when the parent must decide whether to impose it. We do not offer helpful advice to Bobby's father if we inform him that no one can tell whether his proposed interference is justified until some moment in the future. Finally, which of several possible

future moments should we privilege? Bobby may *vacillate*, changing his mind throughout his lifetime (Kasachkoff 1994). He might resent the interference for a short while, welcome it subsequently, only to object to it again later. As this possibility suggests, the fundamental problem with Dworkin's proposal is that Bobby's *ex post* opinion is irrelevant to whether his father is justified—even if we could accurately predict what Bobby would come to welcome: We should not conclude that his father is unjustified in treating Bobby paternalistically simply because actual consent is never given. Bobby may fail to appreciate the wisdom of the restriction because he grows up to be stubborn, stupid or—in the most extreme case—does not grow up at all. The decision is justified *whatever* may happen to Bobby at a later time.

Consent may be utterly irrelevant to the justification of paternalism (Husak 2009). Still, I am less interested in assessing this proposed justification in the context in which it was developed (*viz.*, the parent-child relation) than to assess its potential application to law. The obvious difficulty in implementing a principle of future-oriented consent in the legal domain is the overwhelming likelihood that some but not all of the persons whose liberty is restricted will eventually come to appreciate the wisdom of any given interference. Apparently, such a law would be justified with respect to those who subsequently welcome it, but not with respect to those who do not. This conclusion, however, is not especially helpful. We still need to know: Is the law justified or not? I conclude that at least two of the principles that philosophers have believed to play a central role in attempts to justify paternalism in the context of personal relationships are problematic when applied to the domain of law.

A Possible Justification of Legal Paternalism

If neither nonvoluntariness nor consent (“future-oriented” or otherwise) is helpful to show why his father is justified in treating Bobby paternalistically, what is? To answer this question, it is instructive to identify the general kinds of deontological objections philosophers tend to raise against the justifiability of paternalism in personal relations. The most familiar such attempts invoke a conception of *autonomy* with which paternalistic interferences are said to be incompatible. Three difficulties surround these objections. One must (a) specify the nature of autonomy; (b) show why it is valuable; and (c) weigh its value against the value of reducing whatever harm is prevented by the paternalistic restriction. Each of these three difficulties is formidable.

Any philosopher who objects to some (or all) paternalistic interferences because they infringe on autonomy must specify the conception of autonomy on which he relies. The supposed incompatibility between paternalism and autonomy must be defended rather than presupposed (Husak 1980). Of course, autonomy might be *defined* so that its incompatibility with paternalism is guaranteed; one might characterize autonomy as the freedom to do what one wants. According to this conception, respect for autonomy always requires deference to personal preferences. I think, however, that this conception of autonomy is implausible. A preferable alternative, however, is likely to be compatible with some instances of paternalism. I will not endeavor to support this claim in any detail; too many different conceptions of autonomy have been proposed (May 1994). But even if we conclude that paternalism is incompatible with our favored conception of autonomy, we should not condemn all instances of paternalism unless we are persuaded that autonomy, as so construed, has value. Indeed, autonomy must have *enough* value to outweigh whatever good the instance of paternalism promotes. It seems

unlikely that the value of autonomy can be sufficiently great to outweigh *all* competing considerations that might lead a state to enact paternalistic legislation.

Efforts to preserve autonomy need not lead to anti-paternalism. I propose that the concept of *personal* autonomy, which has figured so prominently in philosophical endeavors to object to paternalism in personal relations (Feinberg 1986) might actually provide the key to justifying some instances of paternalism in law. Suppose we construe persons to be autonomous when they make or author their own lives (Raz 1986). Philosophers have offered very different kinds of accounts of how someone may succeed in “making his own life.” On any explication, however, this conception of autonomy provides a reason to oppose instances of legal paternalism. The ability of persons to author their own lives is diminished whenever they are subject to a legal interference for any reason—paternalistic or otherwise. At the same time, however, this conception of autonomy provides a reason to *favor* some instances of legal paternalism. Many restrictions on liberty improve the opportunities of persons to make their own lives by enhancing what might be called the *conditions* of autonomy—the conditions under which persons are likely to develop into autonomous agents who succeed in authoring their own lives. These conditions contribute to autonomy regardless of the details of what one happens to value in life. For example, laws that limit the number and severity of physical injuries help to preserve opportunities for persons to lead the lives they choose. A motorcyclist whose skull is fractured in an accident in which he failed to wear a helmet has lost a significant part of his ability to make his own life. Since the value of autonomy gives us a reason to create the conditions in which these accidents are less likely to occur, we have a basis for enacting a law that requires motorcyclists to wear helmets. Thus we have both a reason to oppose this law and a countervailing reason to support it—each of which is derived from the value of personal autonomy. Whether one ultimately accepts or rejects this example (as well as other examples) of legal paternalism depends largely on how one weighs these conflicting reasons.

Many factors will enter into this difficult balancing; no precise formula can be provided. Two matters, however, are of special significance. First, we must weigh the value of the liberty with which we interfere. Of course, it is hard to defend criteria to weigh the value of various freedoms. I assume, however, that the liberty to drive a car without a seatbelt does not rank especially high on anyone’s list of precious freedoms. The experience of driving while belted is not drastically unlike the experience of driving while unbelted. Although controversial, such judgments about the value of given liberties must be made if a theorist hopes to decide when legal paternalism is justified. A second important matter that enters into a viable balancing test is the means by which the paternalistic law is enforced—an issue to which I return in the final section of this essay.

One might attempt to bolster my defense of legal paternalism by appeals to *hypothetical* consent—to the agreements that a rational person would make under idealized circumstances (Rawls 1972). This strategy, of course, moves far beyond endeavors to justify an interference with liberty by reference to the actual consent of the person treated paternalistically. It seems plausible to suppose that rational persons who value personal autonomy would consent to subject themselves to instances of legal paternalism that contribute to the conditions of autonomy and thereby increase the probability that they will succeed in leading autonomous lives (but see Valdman 2010).

I suggest, then, that the key to developing a theory of justified paternalism in legal contexts is to understand how various laws enacted for paternalistic reasons affect the

conditions of autonomy—that is, how these laws enhance or undermine the ability of persons to make or author their own lives. More specifically, attempts to evaluate instances of legal paternalism require, first, a set of principles about the value of different liberties; second, a theory about how given interferences affect the conditions under which persons are able to make their own lives; and third, some means to balance these (hopefully commensurable) values against one another. Small wonder that judgments about legal paternalism remain so controversial!

Paternalism in Various Domains of Law

Up to this point, I have talked indiscriminately about paternalistic laws, with no indication of what *kind* of law is involved. But distinctions between kinds of law are tremendously important in endeavors to justify legal paternalism by applying the theory I sketched above. In particular, paternalistic laws enforced by the *criminal* sanction are much harder to justify than those in the civil domain.

The criteria I invoked to justify the decision of the father to induce his son Bobby to take his vaccine help to show why criminal paternalism is so difficult to justify. Consider the first condition. A paternalistic interference becomes harder to defend when the means required to attain its objective involve a greater hardship or deprivation of liberty. The criminal law, by definition, subjects persons to *punishment*. If the state must resort to punishing persons in order to protect their interests and well-being, we should suspect that the cure is worse than the disease. It may be bad for persons to smoke tobacco, for example, but it might be even worse to punish them to try to get them to stop. When punishments are severe, their gains typically will not be worth their costs for the persons on whom they are inflicted (Bayles 1974). But when punishments are not severe, they rarely will create adequate incentives for compliance and thus will fail to improve the behavior of the persons coerced. An acceptable set of constraints to limit the imposition of the criminal sanction will require that criminal laws be reasonably effective in attaining their objectives (Husak 2008). A criminal law motivated by a paternalistic end that does not succeed in altering conduct will fail to satisfy this condition. I doubt that paternalistic reasons will justify state punishment in more than a handful of cases.

In addition, most proposals to treat competent adults paternalistically are rendered problematic by the fourth criterion I described. Susceptibility to the flu may be no less unhealthy for middle-age individuals than for Bobby, but sane adults rarely suffer from the deficiencies of typical four-year-olds. Of course, age is simply a crude proxy for what is relevant: the set of cognitive and volitional capacities characteristic of sane adults. An adult who is cognitively and volitionally comparable to a child would seem to be an equally plausible candidate for paternalistic intervention. Although some such persons exist, the paternalistic treatment of adults is less often justified.

The following example helps to explain my reservations about paternalism as a rationale for criminal legislation. Suppose that some activity—boxing, for example—risks substantial injuries to persons who engage in it. Suppose also that some adults are foolishly inclined to perform this activity, perhaps because it is exciting, euphoric or profitable. Why not protect these persons from their own foolishness by enacting a statute to punish boxing (Dixon 2001)? My answer is simple. A criminal law merely proscribes behavior, but cannot always prevent it. In a world of perfect compliance, no instances of the proscribed activity would occur. Total deterrence, of course, is unrealistic.

The threat of criminal punishment may succeed in reducing the incidence of boxing, but some persons will persist in it, whatever the law may say. Suppose that Rocky is one such person. What should be done to Rocky if he is detected? Presumably, he must be punished unless the state does not mean what it says in classifying the statute as criminal.

How might Rocky's punishment be justified? Two answers might be given. First, Rocky's punishment might be justified in order to preserve the efficacy of the criminal law as a deterrent. But punishing Rocky in order to deter others from following his foolish example can hardly be thought to promote the interests of Rocky himself. In other words, the state does not treat Rocky paternalistically when he is punished to deter others. If the law purports to treat Rocky paternalistically, punishment must be thought to be in *his* interest. This second answer, however, seems implausible. How can punishment be in Rocky's interest? Is Rocky really better off if he were punished than if he were free to box? The answer probably depends on further details about *how* he is punished. A small monetary fine would not seriously undermine Rocky's ability to make his own life. If the threat of further fines persuades him to stop boxing, the law will have succeeded in protecting the conditions of his autonomy. The difficulty, of course, is that Rocky may continue to box even though he pays the fine. Suppose, then, that Rocky is imprisoned. This mode of punishment has (perhaps!) a greater probability of successfully preventing him from continuing to box. But it is hard to believe that imprisonment is really in Rocky's interest. Can a legislator sincerely believe that Rocky is better off not boxing in jail than boxing out of jail? If the answer to this question is negative, Rocky's punishment cannot be justified paternalistically. Almost no conduct that sane adults are voluntarily inclined to perform is so destructive of their autonomy that they are worse off if allowed to continue than severely punished.

Perhaps a few counterexamples to this generalization can be found (Hurd 2009). Suppose that large sums of money induce impoverished persons to engage in gladiatorial contests to the death. I concede that the punishment of potential combatants would probably enhance their welfare. Few examples in the real world, however, are analogous. Since paternalists should be unwilling to impose a "cure" that is worse than a "disease," they should be reluctant to back paternalistic laws with the criminal sanction. Criminal paternalism may be easier to justify, however, when it is indirect and imposed on a third party. In the gladiator example, the state might punish promoters who profit by paying others to fight. Clearly, punishment would be designed to benefit the combatants, not the promoters. In such a case, it seems plausible to conclude that the state can succeed in furthering the conditions of autonomy of numerous persons by punishing a single individual. When paternalism is direct, however, the criminal sanction should rarely be used.

Since criminal paternalism rarely is justified, especially when it is direct, many of the more interesting questions about legal paternalism are not questions about the criminal law. Instead, they are questions about other legal domains. Sometimes paternalistic rationales for law give rise to little dispute, as when states create and support social institutions to encourage persons to take better care of themselves. Health and safety regulations may be enacted, such as requirements that water contain fluoride. States can sponsor advertisements to steer citizens toward healthy lifestyles. Taxes may be used to dissuade persons from consuming dangerous products such as tobacco. These sorts of state actions are not enforced through criminal penalties, and only occasionally give rise to objections from philosophers who purport to dislike paternalism. The reluctance of

these philosophers to complain about such examples probably indicates that they do not oppose legal paternalism altogether, but only direct legal paternalism enforced by the criminal sanction. On my view, these noncriminal modes of law are more easily justified because they can be effective in promoting the personal autonomy of the individuals who are subject to them.

Paternalistic rationales are more defensible in civil than in criminal contexts. In contract law, such rationales are often invoked against the enforcement of given kinds of agreements. Of course, agreements are not enforced unless the parties are competent, thereby protecting the incompetent from their own commitments (Wikler 1978). Some agreements are unenforceable, however, even when made by parties whose competence is unquestioned. Agreements about given kinds of subject matter—involving the sale of body organs, for example—are unenforceable. Other agreements involve legitimate subject matter, but contain terms or conditions that are unenforceable because they are unconscionable. This controversial doctrine authorizes a judge to refuse to enforce agreements that are one-sided, overreaching or exploitive. In addition, some terms in agreements cannot be waived, and thus are imposed as a matter of law. For example, a consumer cannot voluntarily relinquish his statutory right to be paid a minimum wage, or to repay a loan at more than the rate of usury. Nor can a consumer waive his statutory right to a “cooling-off” period in a door-to-door sale. Seemingly, each of these aspects of contract law is supported largely by a paternalistic rationale (but see Shiffrin 2000).

Paternalism also plays an important role in tort law—and has contributed to a blurring of the line between contract and tort. Critics of contemporary tort law frequently allege that its rules erode individual responsibility—the duty to take adequate care of oneself. The transition across the country from contributory to comparative negligence, for example, allows plaintiffs to recover some of their accident costs even when they are partly at fault for causing their own injuries. Moreover, the doctrine of assumption of risk is invoked much less often today than in the past (Sugarman 1997). Consumers often are unable to trade decreases in safety for lower prices. Some courts, for example, have allowed drivers of an automobile to recover compensatory damages for injuries that would not have occurred had their car been equipped with an air bag—even though the drivers seemingly had assumed the risk of injury by electing not to buy a safer but more expensive automobile. The gradual disappearance of this defense in tort law might be explained by a growing acceptance of paternalism among the judiciary. If my reasoning is cogent, paternalism is less objectionable in civil contexts than in the criminal domain because it more often enhances than undermines the conditions under which persons are able to lead autonomous lives.

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Further Reading

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