

Session 20 Gerald Dworkin's "Paternalism"

Mill's Harm Principle:

"[T]he sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." (p. 251)

Dworkin is interested in the negative half of this principle: Mill's claim that neither the state nor any individual or smaller collective is ever justified in interfering with a person's freedom, against his or her will, simply for their own good.

Dworkin describes this negative claim as Mill's objection to "paternalistic interferences with a man's liberty."

Dworkin's "rough" definition of paternalism:

" By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced." (p. 281)

Is this an adequate definition? In what ways might it be too rough?

- Do all cases of paternalism involve *coercion*?
 - E.g. – Doctor making decisions for the unconscious patient, for her benefit but against her preferences (as in giving a Christian Scientist a blood transfusion)...
 - What about laws restricting what kinds of contracts may be upheld in court? Do those involve coercion? Are they paternalistic?
- Do all cases of paternalism limit a person's freedom of choice or liberty or interfere with his autonomy?
 - E.g. – matching 401k contributions, setting default options...
 - hiding your sleeping pills so your suicidal husband won't come across them
 - Leaving your financially irresponsible child money in the form of a trust controlled by someone else, rather than directly...
- Are all cases of interfering with another's liberty of action, or of coercing them, for their own good cases of paternalism?
 - E.g. – the schizophrenic who has gone off his meds...

Def. pure paternalism: "The class of persons whose freedom is restricted is identical with the class of persons whose benefit is intended to be promoted by such restrictions."

Def. impure paternalism: "in trying to protect the welfare of a class of persons, we find that the only way to do so will involve restricting the freedom of other persons besides those who are benefitted."

Some examples of legal paternalism:

- *Pure*, involving criminal or civil penalties:
 - ... Seat-belt laws
 - ... Laws against suicide
 - ... Law regulating sexual conduct between consenting adults
 - ... Laws regulating drug-use (esp. when such use is harmful to the user but does not cause anti-social behavior)
 - ... Laws required contributions to SS
 - ... Anti-gambling laws
 - ... Laws prohibiting swimming at public beaches when lifeguards aren't present
- *Pure*, not involving civil or criminal penalties or (in any obvious way) coercion:
 - ... Laws preventing civil suits or injunctions that could keep doctors from providing blood transfusions to unconscious members of religious sects that object to them
 - ... Giving of state subsidies in kind rather than cash
 - ... *Non-legal* examples are easier to come by here:
 - a wife who hides her sleeping pills from her suicidal husband
 - parents who instead of leaving a financially irresponsible child money directly, instead place it in the care of a trustee with instructions that it be used for the best interests of the child
- *Impure*, involving criminal or civil penalties
 - ... Laws regulating the sale of cigarettes, guns, drugs, food, alcohol, etc.
 - ... Laws requiring licenses for doctors, lawyers, etc. (by punishing practicing without a license)
 - ... Laws regulating the gambling industry
 - ... Laws granting the FDA control over which drugs are available on the market
 - ... Laws making assisted suicide illegal (if they threaten the physician with punishment)
- *Impure*, not involving penalties or obvious coercion
 - ... Laws limiting which kinds of contracts are legally enforceable

Why does Dworkin think even cases of impure paternalistic laws are best understood as cases of paternalism, rather than restrictions are harming others?

- Impure paternalistic laws restrict *consensual* behavior; e.g., laws that restrict cigarette sales/advertising seek to keep people from *voluntarily* buying a product that is bad for them, but they do so indirectly, by regulating the behavior of persons whose welfare is not threatened (cigarette sellers).
- Because such regulation also restricts the liberty of people whose welfare is not protected by the restriction, it may require additional justification...

Why does Dworkin (like Mill) think that laws limiting the number of days or hours workers can be required to work per week are not paternalistic?

- Dworkin, like Mill, thinks such laws simply help workers achieve goals through collective action that they cannot achieve acting unilaterally – they solve a

coordination problem. Work-week regulation can be presented as a prisoners' dilemma:

		Worker 1	
		Cooperate	Defect
Worker 2	Cooperate	5,5	6,1
	Defect	1,6	2,2

Cooperate = refuse to work >40hrs/wk.

Defect = be willing to work >40hrs/wk.

(A similar argument might provide a non-paternalistic defense of minimum wage laws.)

Some other important distinctions:

- Paternalistic interference for the sake of helping someone achieve their ends (e.g. if they are mistaken in their choice of means (maybe because they have false beliefs about some relevant non-evaluative facts) vs. paternalistic interference for the sake of correcting their choice of ends (mistaken *values*):
 - E.g. Compare helmet laws when we believe people care more about safety than "coolness", but don't know how much less safe biking without a helmet is vs. helmet laws even when we believe people are genuinely aware of the risks, but really care more about seeming cool than being safe
- Paternalistic interference when we don't *know* a person's preferences vs. paternalistic interference when we do know we're acting against their preferences
 - E.g. preventing someone from walking across a bridge when we don't know whether he knows the risks vs. when we know that he does
- Moral vs. welfare paternalism: interfering with a person's freedom of action for the sake of their moral character as opposed to their physical or mental well-being
 - E.g. perhaps laws regulating certain kinds of (safe) sexual conduct, or laws regulating prostitution or strip-clubs (in cases (if there are any) where the sex-worker is not exposed to health risks or financial exploitation)

We might find some of these forms of paternalism more defensible than others...

Should we start from the presumption that paternalism is wrong?

- Mill provides some reasons for thinking we should:
 - the individual is best-placed to decide what is in his best interests
 - allowing the state the power to make such decisions opens the door to mistakes and corruption (because the individual *cares more* for his own interests than the gov't does)

- ... giving people freedom of action in matters effecting only themselves allows for valuable “experiments in living”
 - ... even when people act against their own best interests, trying to coerce them into acting in their own best interest is unlikely to be the most effective (utility-securing) way of changing their behavior
- But Mill’s (utilitarian) arguments seem not to establish his stronger conclusion that paternalism is *never* justified...
 - ... Might there not be some situations where it is clear that the state does know best?
 - E.g. (from Mill) are there some goods “the want of which is least felt where the need is greatest?” (Perhaps education... Also other needs, like food, etc. – consider the important case of *adaptive preferences*)
 - Also, (again from Mill), our *bias towards the near* (and other factors) may make us give *our own future well-being* (especially in the distant future) less weight than it deserves...
 - ... Perhaps not all “experiments in living” are valuable...
- Is there, as Dworkin suggests, an important *non-utilitarian* thread in Mill’s argument, one that objects to paternalism not on the grounds that protecting people’s freedom leads to more *happiness for them* but rather that their freedom is valuable in its *own* right (not as a means to more happiness)?
 - ... Might this thought somehow be accommodated by Mill’s utilitarianism? Mill (elsewhere) defends a distinction between *higher* (and distinctly human) pleasures and *lower* pleasures (which we share with lower animals). Perhaps Mill thinks that the unique pleasures involved in developing our own aims cannot be achieved through state coercion...
- Some of Mill’s arguments suggest that paternalistic interference is very unlikely to ever achieve its *own* end: promoting its object’s *greater good*.
 - ... What if we consider only cases in which the subject’s greater good *is* promoted? Is paternalism justified in those cases?
 - Mill argues that the government shouldn’t be given the power to restrict people’s liberty for their own good *at all* because they’re much more likely to misuse or abuse it than to use it rightly.

Is paternalism (interference in someone’s actions for the sake of their own greater good) *always justified* (when it succeeds in promoting the subject’s good), *sometimes unjustified* (even when it succeeds in promoting the subject’s good), or *never justified* (even when it succeeds in promoting the subject’s good)?

- How often, if at all, paternalism is likely to successfully promote the welfare of the person it targets will depend on what welfare consists in.
 - If we think welfare consists largely in goods like happiness (utilitarianism), health, long life, and wealth, we may well be able to think of cases where the government could succeed in promoting welfare against the will of the subject.

- If we think that being respected as an independent agent, having the freedom to live one's life as one chooses, and pursue one's own conception of the good, and being autonomous are crucial elements of a person's welfare, we'll be much more skeptical about the potential to promote someone's welfare through paternalistic interference in her life.
 - But even in this case, some kinds of paternalistic interference – *autonomy-promoting* paternalistic interference – might be justifiable.

Dworkin's first suggestion:

Freedom-preserving paternalism: "paternalism is justified only to preserve a wider range of freedom for the individual in question." (p. 287)

- In some cases, paternalistic interference may prevent subjects from taking irrevocably harmful actions that severely limit their own capacity to make choices for themselves later on.
 - Consider, e.g., Mill's example of selling oneself into slavery.
 - What about restricting the use of highly addictive (and so will-power-undermining) drugs?
 - This kind of justification is often appealed to to justify paternalistic treatment of children...

Why do we think paternalism towards children is justified?

Another suggestion:

Future-oriented consent: paternalism is justified if the object of paternalistic interference would later see the correctness of the interference. (p. 287)

- *But might the person's later consent be secured by the paternalistic intervention itself? And in that case, might it not justify too much?*
 - E.g., Italian clown case.
 - Also, my later self might be glad were I to undergo some painful procedure sooner rather than later, because the pain is in *her past*, although it is in *my current self's future* (and we prefer our pains to be past rather than future). But that doesn't offer much comfort to my current self...
 - This kind of reasoning might be used to justify either of two conflicting courses of paternalistic action, if taking that action would itself secure the subject's later approval.
- *Indeed, isn't this, in the case of children, sometimes exactly the kind of thing the intervention is supposed to secure?*
 - We act paternalistically towards children in part to shape their conception of their own good.
- *We should be suspicious if this kind of "you'll be glad I did it" reasoning in cases where the future consent is causally dependent on the paternalistic interference.*
- *Relatedly, might the state be justified in intervening in my decisions now to prevent me from harming my much later self, much as it's justified in restricting my liberty to prevent me from harming someone else, against their will?*

- E.g., mandatory pension contributions...

Does consent now always justify later paternalistic interference?

- Consider the case of the schizophrenic who asks us to force him back onto his meds should he refuse to continue them. Also, Odysseus...
 - But what if I now give instructions to my family about my treatment should I later suffer from dementia, but my later (less competent self) refuses such treatment?

Another suggestion:

Paternalism as a rationally-consented-to "social insurance policy" against making decisions which are far-reaching, potentially dangerous, and irreversible.

- We might, for example, have such reason to introduce a system of paternalistic laws that help us secure "basic" or autonomy-promoting goods – valuable in pursuing any perception of the good.
 - E.g. compulsory education
- But does it matter whether we *actually consent* to such a policy, as opposed it's merely being the *rational thing for us to do*?
 - Can paternalistic interference be justified merely because we would have consented to such a policy if we were rational?
 - Or is paternalist intervention justified only if we've actually consented to such intervention in advance?
 - If the mere thought that such consent *would be rational* is sufficient to justify the intervention, why couldn't that thought be appealed to to justify much more extensive paternalistic interventions directly?

Dworkin's two principles:

- (1) "In all cases of paternalistic intervention there must be a heavy and clear burden of proof placed on the authorities to demonstrate the exact nature of the harmful effects (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence." (p. 291)
- (2) "If there is an alternative way of accomplishing the desired end without restricting liberty although it may involve great expense, inconvenience, et cetera, the society must adopt it." (p. 291)
 - If we act so as to harm our own interests because we have false beliefs about what will promote our interests (perhaps, e.g., we don't know that heavy smoking shortens life expectancy significantly), the education as opposed to paternalism will be the justified way of preventing that harm.

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