

In Defense of Hard Paternalism\*

Danny Scoccia  
Department of Philosophy  
New Mexico State University  
Las Cruces, NM 88003  
Phone: 505-646-4616  
E-mail: [dscoccia@nmsu.edu](mailto:dscoccia@nmsu.edu)

\* I'd like to thank Walter Schaller and Peter DeMarneffe for their critical comments on an earlier draft of this paper.

“Hard” paternalism—restricting a person’s liberty for his own good under conditions that “violate his autonomy”—is rejected as morally wrong by the majority of liberal theorists who write on the paternalism issue.<sup>1</sup> When the state engages in such paternalism, it imposes on its citizens a “conception of the good life” that some of them reject, thus violating the requirement (upheld by many of these theorists) that the state remain “neutral” on the question of the good life. An individual who engages in hard paternalism towards a competent adult may be faulted for arrogance or a failure to treat other persons with proper respect. The following discussion will ignore the objection to hard paternalist laws that derives from the neutrality principle. Instead, it will focus on the claim—pressed most vigorously by Joel Feinberg—that the principle of autonomy is absolute or inviolable, and thus, trumps beneficence whenever the two values clash. If it is correct, then hard paternalism, whether practiced by the state or an individual, is always wrong. This paper argues that it is not correct. It begins with an analysis of what paternalism is and then turns to the “soft”/“hard” distinction, arguing that it needs to be redrawn. After criticizing Feinberg’s absolutist anti-hard paternalism (AAHP), it considers a more pragmatic form of the view but rejects it on the grounds that it cannot accommodate liberal support for the legalization of physician-assisted suicide with eligibility limited to the terminally ill. Neither soft paternalism nor “respect for the dignity of persons” can justify this limit on eligibility; liberals who support it have to do so on hard

---

<sup>1</sup> I shall also use “hard paternalism” to refer the normative principle that it is sometimes permissible to restrict a person’s liberty for his own good even when it would violate his autonomy. Opponents of hard paternalism include: Richard J. Arneson, “Mill versus Paternalism,” *Ethics* 90 (July 1980): 470-89; Gerald Dworkin, “Paternalism,” reprinted in Gerald Dworkin (ed.), *Mill’s On Liberty: Critical Essays* (Lanham, MA, Rowman and Littlefield: 1997), pp 61-82; Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986); Alvin Goldman, “The Refutation of Medical Paternalism,” reprinted in John D. Arras and Bonnie Steinbock (eds.), *Ethical Issues in Modern Medicine*, 5<sup>th</sup> ed. (Mayfield Publishing, 2001); John D. Hodson, “The Principle of Paternalism,” *American Philosophical Quarterly* 14 (1977) 61-69; and Donald

paternalist grounds. Next, this paper suggests a couple of strategies for explaining why hard paternalism is permissible in this case but not others, such as forced blood transfusions for adult Jehovah's Witnesses. In the final section we'll tackle the issue of "moral" paternalism—what it is and why it should be opposed.

### Paternalism defined; Simple Kantianism; Three Objections to Paternalism

Paternalism is the attempt to induce other people to act in ways that will benefit them or not act in ways that will harm them, which: i) is motivated and/or justified by a beneficent concern for their welfare, and ii) uses means other than reasoned persuasion.<sup>2</sup> The "justified by" in i) does not refer to good arguments that really would justify one's actions but one is completely unaware of. Rather, it refers to the reasons that one would offer in support of one's actions if challenged to defend them. Legislators who vote for, say, a ban on recreational marijuana use may be motivated by nothing more than a political calculation about which stand on the "War on Drugs" is most likely to get them reelected. The law counts as paternalistic, however, if the majority of those who support it cite the need to protect marijuana users from self-inflicted harm as its justification.

As regards condition ii), a common mistake is to define "paternalism" in a way that limits the means to coercive ones. But threats and restraints are not the only means by which paternalism can operate. It can employ other unsavory methods, such deception, withholding information, manipulation, and trickery, as well as methods that are not unsavory at all. Incentives, for example, expand rather than limit one's options, and they

---

VanDeVeer, *Paternalistic Intervention* (Princeton, N.J.: Princeton University Press, 1986).

<sup>2</sup> This analysis of "paternalism" differs from the one offered by Gerald Dworkin in his article "Paternalism" in the *Stanford Encyclopedia of Philosophy* [available online, at <http://plato.stanford.edu/entries/paternalism/>]. Dworkin assumes that a paternalistic act

belong in the paternalist's repertoire too. Offering my teenage son monetary rewards for earning good grades in school treats him paternalistically.<sup>3</sup>

Few would deny that paternalism is permissible with young children, the severely mentally retarded, or paranoid schizophrenics. Under what circumstances, if any, is it a permissible way of dealing with competent adults? The Kantian Principle of Humanity (PH), requiring that we treat the "humanity" in ourselves and others always as an "end" and never as a "mere means," can be interpreted as implying that the answer is almost never. The "humanity" in us is our capacities for free will and rationality, and respecting persons (on this interpretation of PH) requires that we try to elicit prudent conduct from them *via* those capacities by showing them why the conduct in question is good or bad for them. If they are not persuaded by our arguments and remain determined to act foolishly, we may not block their choice. Creating incentives or making threats does not *offer* reasons but instead changes the balance of them so that even the short sighted will be motivated to act in the desired way (namely, so as to obtain the reward or avoid the punishment). PH on this interpretation of it implies that paternalism toward persons with the ability to appreciate and act on good reasons is always wrong, no matter which of the "nonrational" means it employs, whenever the opportunity to engage in persuasion rather than paternalism exists. I'll call this view "simple Kantianism."

Simple Kantianism offers a *nonconsequentialist* objection to most paternalism.

Moral objections to paternalism are of three types, alleging that: i) it is wrong because on balance it harms rather than benefits its intended beneficiaries; ii) it is wrong because

---

must "interfere with" the targeted person's "liberty or autonomy."

<sup>3</sup> Another noncoercive method available to the paternalist is to structure others' options so that the default option is the one that best for them and less beneficial options can be selected only by opting-out of the best one. This method works by exploiting people's inertia. See Cass Sunstein and Richard Thaler, "Libertarian Paternalism is not an Oxymoron," *University of Chicago Law Review*, 70(4), Fall, 2003.

even though it may benefit those whom it targets, its negative side-effects (i.e. impact on the welfare of others) outweigh that benefit; and iii) it is wrong because even if it benefits its target and harms no one else, it still violates some deontological side-constraint (which may but need not be absolute) on permissible action. i) and ii) are consequentialist while iii) is a nonconsequentialist objection. The objection to paternalism that grounds AAHP, invoking the principle of autonomy, is of this latter kind. Unlike simple Kantianism, however, it condemns only paternalism that employs the unsavory means of deception, coercion, withholding information, and the like, not paternalism that employs incentives.

#### The Principle of Autonomy; the Soft/Hard Distinction

A preliminary statement of the principle of autonomy (to be replaced later by a more precise one) is that competent adults should be left free to make their own decisions about how to live their lives based on their own preferences, religious beliefs, conceptions of justice and virtue, beliefs about honor and dignity, and views about what's prudentially best for them. Commonsense morality holds that this principle sometimes conflicts with the principle of beneficence (the principle that motivates paternalistic interference with others' actions), and in some of those cases beneficence overrides autonomy.<sup>4</sup> Feinberg and other defenders of AAHP deny this, insisting that autonomy always trumps beneficence when they conflict.

The autonomy principle as formulated above cannot possibly be absolute, because it is surely permissible to prevent a religious fanatic from killing people whom he thinks have blasphemed his religion even if his own deepest views about piety and God's commands require that he do so. The principle needs to be qualified so that it applies

only to “substantially self-regarding” choices or actions that do not violate others’ rights. Preventing fanatics from murdering blasphemers would not violate an autonomy principle so qualified. I shall assume that it is a principle of this sort that defenders of AAHP insist is absolute.

Paternalism, as we’ve seen, can employ incentives rather than threats, deception, or manipulation. When it does, it will not violate the autonomy of the persons it targets. It follows that upholding the autonomy principle as absolute does not force one to condemn all paternalism. Those who defend AAHP on the basis of an absolute autonomy principle do not oppose all paternalism, however. They only oppose “hard” paternalism. If “hard” paternalism were defined as paternalism that violates autonomy, there would be no problem. But “hard” paternalism is defined by Feinberg and others as paternalism that uses coercion to interfere with *fully voluntary* choices, while “soft” paternalism uses coercion to interfere with *nonvoluntary* ones.<sup>5</sup> The problem is that: i) not all coercive interference with fully voluntary choices violates the autonomy principle, and ii) some coercive interference with substantially nonvoluntary choices does violate the principle. If opposition to hard paternalism is supposed to follow from an absolute principle of autonomy, the “soft”/“hard” distinction will need to be redrawn.

Why think that i) is true? Consider cases of precommitment. Sometimes the point of precommitment is to guard against future (voluntary) weakness of will or (involuntary) psychological compulsion where one expects no change in one’s values or preferences between now and then. The story of Ulysses and the Sirens illustrates this, as does a Missouri law that excludes “gambling addicts” from its 11 riverboat casinos.<sup>6</sup>

---

<sup>4</sup> Dan Brock, “Paternalism and Autonomy,” *Ethics* 98 (April 1988) 550-565, p. 551.

<sup>5</sup> See Feinberg, *Harm to Self*, p. 12. Another usage (rejected in this paper) identifies “soft” with noncoercive and “hard” with coercive paternalism.

<sup>6</sup> Violators can be arrested and have their winnings confiscated. The law only

But it's possible for one's aim in precommitment to be to ensure that one will be unable to act on preferences and values different from those that one now holds. An example would be my authorizing the religious order to which I currently belong to kidnap and "reprogram" me should I ever convert to a different faith in the future. Such a conversion, I'm now convinced, would result in my eternal damnation, and I authorize the kidnapping and reprogramming as a precaution against such a spiritually disastrous eventuality. Enforcing my past precommitment wishes in this case would mean overriding my present, fully *voluntary* choice to act contrary to my old views about religion in accordance with my current ones. Yet it would not violate the autonomy principle, because it would only subject me to my own will, not someone else's.<sup>7</sup>

To see why ii) is true—why a choice could be "substantially nonvoluntary" yet interference with it still violates the autonomy principle—consider first a case of trivial choice that is due to ignorance/mistaken factual belief.<sup>8</sup> Suppose that I reach for and intend to drink the green can of soda rather than the red can because I prefer Sprite to Coke. In fact, the green can contains Coke and the red can Sprite. Though my choice is nonvoluntary, interference with it—forcing me to drink from the red can instead—might violate my autonomy by "imposing" on me a preference that I reject.<sup>9</sup> That preference is that it's better to be forced by others to drink a more liked beverage than to be left alone

---

applies to those who choose to put themselves on the list because they wish to overcome a "gambling addiction." See *The Economist*, April 8, 2006, p. 67.

<sup>7</sup> It might be objected that when my past will differs from my current will, it is just as alien to me as another person's. Such an objection is unconvincing, failing to take seriously personal identity over time.

<sup>8</sup> "If a person playfully illustrates the game of Russian roulette with a fully loaded six-shooter, it utterly vitiates the voluntariness of his actions to show that he doesn't know the gun is loaded, and any better-informed spectator owes it to him to intervene forcibly for his sake." *Harm to Self*, p. 159

<sup>9</sup> According to Feinberg, what makes hard paternalism objectionable is that it "imposes its own values and judgments on people." *Harm to Self*, p. 12

to drink a less liked one or none at all. I might prefer instead the freedom to make and act on my own choices, even if they are mistaken. Probably nobody prefers acting on her own choices to interference by others in cases where noninterference would result in imminent, extreme, irrevocable, and undesired harm to self. But in cases where the harm doesn't satisfy those conditions—as with the choice to drink a less liked beverage—such a preference may loom large.

A second example that supports ii) is the following. The typical smoker admits that smoking is bad for her and sincerely intends to quit at some time in the indefinite future. If her choice to continue smoking in spite of the admission that it's foolish is due to laziness or lack of resolve, then it remains substantially voluntary. The fact that the failure rate among those who try to quit is so high, however, is evidence that psychological compulsion (“nicotine addiction”) is present, making the choice substantially nonvoluntary.<sup>10</sup> Now suppose that most smokers, though they prefer freedom to coercion and not smoking to smoking, also have a strong preference as regards *types* of coercion. If they have to be coerced, they would rather be “internally” than “externally” coerced (even if the latter would extend their life expectancy by several years). If most smokers have a preference of this sort, as I surmise that they do, then a ban on smoking for their own good violates the autonomy principle even though it interferes with a substantially nonvoluntary choice.<sup>11</sup>

---

<sup>10</sup> Thaddeus M. Pope [“Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations,” *University of Pittsburgh Law Review* 61 (2000): 419-98] cites an FDA source from 1996 which claims that although “15 million smokers try to quit, fewer than 3% achieve one year of abstinence.” (p. 468).

<sup>11</sup> The existence of preferences like those in the soda and smoking examples is the reason why Gerald Dworkin is mistaken when he says about smokers who admit that smoking is bad for them that “[if we stop them from smoking] we are not imposing a good on someone who rejects it. We are simply using coercion to enable people to carry out their own goals” (“Paternalism,” p. 80). Dworkin argues that both restrictions on smoking and seat-belt laws are soft paternalism. I’m inclined to agree that the latter is soft



## Redrawing the “Soft”/“Hard” Distinction; Autonomy and Hypothetical Consent

The way to guarantee that hard paternalism is wrong if the principle of autonomy is absolute is to define “hard paternalism” as paternalism that violates autonomy. That is how I shall define it. “Soft paternalism” is paternalism that does not violate autonomy. Since only coercion, deception, and the like violates autonomy—influencing others’ behavior via incentives does not—it follows that hard paternalism must employ one of those unsavory means.

Consider a case that involves mistaken factual belief over a matter far more momentous than the choice of sodas. My friend has been poisoned and will die shortly unless he ingests the antidote in my possession. Unfortunately, he doesn’t know that he has been poisoned and refuses to believe me when I tell him that he has. Instead, he suspects—perhaps with good reason—that I’m trying to play a practical joke on him. My alternatives are only two: do nothing and let him die or force feed him the antidote “for his own good.” Do I violate his autonomy if I do the latter? According to the libertarian, who identifies autonomy with liberty, the answer is “yes.” Hence, the libertarian judges this to be a case of hard paternalism. But if a violation of autonomy requires “imposing” a value or preference on someone who does not share it, then there is no violation of autonomy in this case and it is soft paternalism.<sup>12</sup> Forcing my friend to swallow the antidote does not impose on him “other people’s values,” because he *would* authorize it if he were

---

paternalism, on the assumption that most drivers would support the threat of a fine for not buckling up in order to help them overcome weakness of will.

<sup>12</sup> Note that Feinberg would agree that this is soft paternalism, because my friend’s choice is nonvoluntary. The coercion here does not violate the autonomy principle even on our earlier, preliminary statement of it, because my friend’s refusal to swallow the antidote is not really “based on” his own deepest values and preferences. He does not want to die.

thinking clearly (calmly, deliberately) and were fully informed of relevant, empirically demonstrable facts about his situation.

A more precise statement of the principle of autonomy is that it is wrong to use coercion (or any of the other unsavory means) to thwart another person's "self-regarding" choices, except when: a) he gave actual prior authorization for the coercion, or b) he would now authorize it if he were calm, reflective, and well-informed. It is not paternalistic coercion *per se* that violates autonomy but paternalistic coercion that doesn't satisfy a) or b) that does. The reason why there is a violation of autonomy in the soda and smoking cases but none in the poisoned friend case is that the coercion doesn't satisfy the "hypothetical consent" test of b) in the first two cases but does satisfy it in the third.

Since the paternalism in the poisoned friend example is soft and permissible, "simple Kantianism" is wrong. A different, perhaps better interpretation of the Principle of Humanity is one according to which it implies the autonomy principle formulated in terms of a) and b). Indeed, PH can be read as implying that this autonomy principle always trumps beneficence. This would give us a Kantian defense of AAHP.

The "consent" required by b) is *not* "hypothetical rational consent," if by that is meant "what a person with perfectly rational values and preferences would consent to." b) requires that we take the person's preferences and values as given, "warts and all."<sup>13</sup> Some defenders of hard paternalism have claimed that it doesn't "really" violate the autonomy principle. According to their view, whenever someone on the basis of a false or unreasonable set of values opposes a paternalistic interference with his liberty, he doesn't "really" oppose the interference because his "true" will is the "ideally rational" one that affirms whatever the true values are, not the benighted "empirical" one in the thrall of

---

<sup>13</sup> VandeVeer calls this "hypothetical individualized consent." It is what one would consent to if fully informed and "one's normal capacities for deliberation and choice were

false normative belief. These hard paternalists are assuming a version of the autonomy principle that rests on a “hypothetical rational consent” condition. There is clearly something counterfeit about “autonomy” so conceived, as Isaiah Berlin, Feinberg, and others have noted.<sup>14</sup> The *honest* hard paternalist rejects this counterfeit version of the autonomy principle, admitting that she seeks to *override* autonomy for the coerced person’s own good.

A paradigm example of hard paternalism is forcing a life-saving blood transfusion on a competent adult who is a practicing Jehovah’s Witness. However false and/or unreasonable is his belief that a transfusion would violate God’s law, it really is his belief, and its existence is the reason why coercing him would not satisfy the hypothetical consent test. This case is easy, but others may be more difficult. Suppose that my friend is trapped in a burning truck and will suffer the horrible fate of being burned alive if I do nothing. I could kill him quickly and painlessly but he urges me not to.<sup>15</sup> Would killing him in spite of his refusal to authorize it count as hard paternalism? It depends on what his reasons are for the refusal. If it is due to an irrational belief (based on wishful thinking) that he will be rescued at the last moment, and in fact there is no chance that help will arrive in time, then the hypothetical consent test is satisfied and killing him for his own good is soft paternalism. But if the reason why he won’t consent is his belief in the “sanctity of life,” one implication of which is that it’s always wrong to intend one’s death,

---

not substantially impaired” (VandeVeer, p. 75).

<sup>14</sup> Feinberg calls it a “sham and an outrage” (*Harm to Self*, p. 187), while Berlin calls it a “monstrous impersonation” [Isaiah Berlin, “Two Concepts of Liberty,” in *Four Essays on Liberty* (1969), p. 134]. A recent paper by Thaddeus M. Pope [“Monstrous Impersonation: A Critique of Consent-Based Justifications for Hard Paternalism,” *UMKC Law Review* v. 73, no. 3 (Spring 2005)] argues that any attempt to defend hard paternalism by appeal to consent will disguise the autonomy vs. beneficence conflict that is at issue.

<sup>15</sup> I believe that this example comes from H.L.A. Hart.

then the hypothetical consent test is not satisfied. Euthanizing my friend in that case would be hard paternalism.

The defender of hard paternalism in cases like this last one insists that the absence of hypothetical consent is of no moral consequence, reflecting nothing more than the coerced person's *mistaken values*. Sometimes the claim will be that the person has a mistaken conception of what is prudentially best for him. The hard paternalist who supports a ban on smoking may claim that smokers exaggerate the prudential value of not being subject to state coercion and underestimate the prudential value of increased longevity and improved health. The example of the friend trapped in the burning truck shows that the "mistake" could lie elsewhere. The mistake there, if there was one, would be my friend's belief that a sanctity of life ethic is true and overrides the dictates of prudence.

### Autonomy vs. Beneficence

The correct version of the principle of beneficence will be based on whatever is the correct account of prudential value—pure hedonism, "informed pleasures," "self regarding" preference satisfaction, "informed" self-regarding preference satisfaction, an "objective list" or "perfectionist" theory, or some hybrid hedonistic/preference satisfaction/objective list theory. A common mistake that opponents of hard paternalism make is to think that it presupposes a strongly objectivist theory of the good. In fact, hard paternalism is compatible with just about any theory of prudential value. The autonomy principle requires deference to other people's *past and/or present* values concerning how they should live their lives. The principle of beneficence, by contrast, requires that we reckon what's good for others in a way that is temporally neutral as regards *present and*

*future*. That is, a good now doesn't count for more than a good in the future just by virtue of its being now. It is because of this difference in the temporal focus of the two principles that there is the possibility of conflict between them. No matter which account of prudential value is built into beneficence, this possibility of conflict will remain.<sup>16</sup>

Consider, for example, a principle of beneficence based on the not very plausible view that autonomy alone has intrinsic value. It will call for violating a person's autonomy whenever doing so *maximizes* his autonomy in the long run. It is impossible to coerce another into making autonomous choices, but that does not mean that it is impossible to safeguard or increase someone's *future* capacity for autonomous choice by means of coercion in the present. Forcing into rehab a meth addict who is not yet worried about his addiction might be an example of coercion that does this. It will be hard paternalism if the addict values not being coerced by others more highly than his future capacity for autonomous choice.

Even a principle of beneficence based on a subjectivist account of prudential value will require violations of autonomy in some cases. A subjectivist account identifies one's prudential good with the satisfaction of one's self-regarding desires or fulfillment of whatever views one happens to hold about what will make one's life go best. It implies that you can be mistaken about what's best for you over the long run because your preferences or views can change in ways that you fail to anticipate. If others can make reliable predictions about what your future values will be, they might be able to block some of the choices you now want to make that serve your present values but will thwart your future ones. Suppose that you wouldn't authorize their interference even if you

---

<sup>16</sup> David O. Brink examines a similar conflict between prudence and authenticity, which are self-regarding analogues of the duties we have to others to be beneficent and respect their autonomy. See his "Prudence and Authenticity: Intrapersonal Conflicts of Value," *The Philosophical Review* v. 112, no. 2 (April 2003) 215-45.

knew about the preference change, because you believe that it reflects corruption or error by your future self. In that case their interference will be hard paternalism that's motivated by a principle of beneficence based on a *subjectivist* theory of the good.

A strongly subjectivist view makes "X believes that y is good for him as an end" necessary and sufficient for "y is good for X as an end," while a weakly subjectivist view only makes it a necessary condition. Ronald Dworkin accepts the weak subjectivist thesis.<sup>17</sup> On the basis of it he maintains that any paternalism that provides a person with goods that he does not "endorse" as goods cannot possibly benefit him. But this is a mistake. A principle of beneficence based on weak subjectivism has to be temporally neutral as regards present and future, and thus, has to take into account our future as well as our present "endorsements." It too will support hard paternalism in some cases.

There are three possible views about what should be done when autonomy and beneficence conflict. The first is that of AAHP, namely, that autonomy always trumps beneficence because the autonomy principle is absolute, inviolable. The second is that beneficence always overrides autonomy because the right to self-determination has value only as a *means* to promoting one's good. This is a possible hard paternalist position, but not a very attractive one. The third view is that the autonomy principle is as basic as the principle of beneficence, each being a Rossian "prima facie" duty. In some cases beneficence overrides autonomy while in others autonomy overrides beneficence. As noted earlier, this is the view that is implicit in commonsense morality.<sup>18</sup> It is the other form that the hard paternalist view can take, and it is the one I shall adopt.

---

<sup>17</sup> Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000), Chapters Five and Six. He calls it "the constitutive view" of what adds value to a life.

<sup>18</sup> It is the "fourth" position described by Feinberg in *Harm to Self*, p. 61.

## Pure Legal Moralism, the Sanctity of Life Doctrine, and Hard Paternalism

Pure legal moralism, for Feinberg, is a liberty limiting principle distinct from the harm to others and legal paternalism principles. It holds that there is a type of immorality that “harms” neither self nor others and whose prevention (if it is egregious enough) can justify restrictions on individual liberty. The “harmless” immorality that the pure legal moralist would criminalize is wrongdoing that neither violates others’ rights nor harms the interests/prudential good of the person who performs it. Prostitution, especially as viewed through the lens of Kantian moral philosophy, might be an example of this. If it poses no risks to health (“safe sex” techniques are practiced), both parties are consenting adults, and treating sex as a commodity debases or degrades those who do so, then it is plausibly regarded as an immorality that is “harmless.”

Resistance to the legalization of voluntary euthanasia and physician-assisted suicide (PAS) on the grounds that these practices violate the sanctity of life principle (SL) provides another example of pure legal moralism. I take SL to be the principle that it is *never* permissible to do or omit anything with the aim of causing or facilitating the death of an innocent person, oneself or others, whether or not the person in question benefits from or consents to it. SL is not to be confused with the (bizarre) prudential value judgment that one is *always* better off alive than dead; hence, death is a harm even for permanently comatose patients like Terry Schiavo. SL does not presuppose any prudential value judgments at all. It is an absolute deontological side-constraint—like the principle of autonomy that underlies AAHP. The difference between the two principles, if Feinberg is right, is that it is always a serious rights violation to contravene the autonomy principle, whereas it needn’t violate rights or set back interests to contravene SL. The defender of hard paternalism can (and I think should) share Feinberg’s opposition to all pure legal

moralism and reject SL as an objection to legalizing PAS. We'll return to both PAS and pure legal moralism shortly.

### The Refutation of AAHP; Pragmatic AHP

Proving that AAHP is false—that beneficence *can* override autonomy—would not establish the stronger claim that hard paternalism is true—that beneficence sometimes *does* override autonomy in the actual world. In this section I argue for the weaker claim and in the next section I begin to argue for the stronger one.

It is possible not just to offer reasons against AAHP but to *prove* that it is false by imagining a case in which beneficence *clearly* trumps autonomy. Suppose that the state could know with near certainty that X is the true religion. X is theologically intolerant, implying that only those who accept it are saved; everyone else is eternally damned. Salvation for each of us consists in living an eternally long life each stage of which is excellent; eternal damnation consists in a life of unending, excruciating torture. Finally, suppose that there are mildly coercive measures the state can adopt that will increase the likelihood of citizens rejecting false faiths and embracing X. If AAHP were true, then it would be wrong for the state to adopt these measures no matter how mild they may be, for its citizens' own good. This, I claim, is absurd and constitutes a *reductio* of AAHP. Of course we should oppose any effort by the state to limit our religious freedom for our own good. The suggestion that the state could ever know with near certainty that some theologically intolerant religion is true is, to put it mildly, "unrealistic." But to say this is to doubt that *beneficence* supports the measures.<sup>19</sup> What AAHP implies is that because

---

<sup>19</sup> In "Neutrality, Skepticism, and the Fanatic" [*Social Theory and Practice* (January 2006): 35-60], I argue that to rebut this argument for religious intolerance one has to



autonomy always trumps beneficence, the state may not threaten me with small fines even if it knew that such action would probably protect me from *infinite* harm. That's not due respect for the right to self-determination. It's "fanaticism."<sup>20</sup>

In the face of counterexamples like this one, opponents of hard paternalism have to abandon a dogmatic, uncompromising AAHP based on an absolute principle of autonomy in favor of something more pragmatic. Their claim will have to be that while beneficence might override autonomy in some *conceivable* cases, it never does in the world we actually live in or under "realistic" assumptions. Even if, strictly speaking, AAHP is false, much less moral mischief will occur if we act as though it is true than if we stand ready and willing to restrict liberty on hard paternalist grounds. Call this "pragmatic AHP."

#### Legalizing PAS with Limits

An argument against hard paternalism as a principle that legitimates some restrictions on liberty is that it is inconsistent with our considered judgments about which restrictions are permissible and which aren't. Feinberg considers several examples of laws that seem clearly acceptable and appear to require a hard paternalist justification,

---

assume either skepticism or a dogmatism that rejects all theologically and politically intolerant religion as false. Since neither of those doctrines is "neutral," it follows that the liberal position on freedom of religion cannot be neutrally justified.

<sup>20</sup> Such is Richard J. Arneson's verdict on Feinberg's "absolutist antipaternalism" in his "Joel Feinberg and the Justification of Hard Paternalism," *Legal Theory* 11 (2005), pp. 259-84. Feinberg has an argument for the absoluteness of the autonomy principle (and thus, for AAHP) that rests on the premises that the right to national sovereignty is absolute and the rights to personal and national sovereignty are analogous. See Feinberg, *Harm to Self*, p. 55. Arneson criticizes this argument in his "Paternalism, Utility, and Fairness," p. 110. The problem is that for Feinberg the "absoluteness" of a nation's sovereignty entails that other countries may *never* interfere in its internal affairs for its own good, whereas the "absoluteness" of one's personal sovereignty is consistent with *some* paternalistic restrictions of one's liberty being permissible (since soft paternalism, for Feinberg, is permissible)

and he shows how each can be defended on either soft paternalist or nonpaternalist grounds. If this argument is successful, it provides some support for pragmatic AHP. Among the examples that Feinberg surveys are a ban on dueling, anti-usury laws, Social Security, and the criminal law's refusal to accept the consent of the victim as a justification for homicide. I find his analysis of these examples persuasive and would add to the list two more examples. The first is the state's refusal to enforce "slavery contracts" voluntarily entered into by both parties. Though given what looks like a hard paternalistic justification by J.S. Mill in *On Liberty*, it probably has a sound nonpaternalistic rationale. Slavery contracts, like employment contracts that forbid departing employees to work for a rival company for the rest of their lives, would make labor markets less fluid and competitive and thereby reduce economic efficiency. Social utility is the reason to uphold the inalienability of the rights to labor and freedom of contract. The second example is laws forbidding assisted suicide. The overwhelming majority of suicide attempts are made by people who are not terminally ill and who suffer from mental illness or extreme emotional disturbance. Most of them probably would, if rational and well-informed, consent to a prohibition on others' aiding their suicide attempts.<sup>21</sup> The laws are paternalistic, but soft rather than hard.

---

<sup>21</sup> Feinberg denies that the majority of suicide attempts are nonvoluntary: "In respect to suicide and other controversial self-regarding acts, there is commonly no reliable presumption at all [about their voluntariness] of a statistical sort. Where interference, detention, and inquiry into voluntariness are justified, they are so because of the magnitude of the risks and the gravity or irrevocability of the harms, not because of the initial probability of nonvoluntariness." (*Harm to Self*, p. 127) It may look like Feinberg is succumbing to hard paternalism here, but in fact his support for a policy of "detention and inquiry" is entirely consistent with soft paternalism. Suppose that only 10% of all suicide attempts are nonvoluntary. Feinberg could say that "detention and inquiry" for all attempts is justified "for the sake of" that 10%. (To those prudent savers forced to contribute to a Social Security system intended to benefit others who are not so prudent, Feinberg replies that "the compulsion is for their sakes, not yours." p. 18) The temporary detention of those whose suicide attempts are voluntary is an unavoidable side-effect of a policy whose purpose is to benefit those whose attempts are nonvoluntary. Even if that

This sort of law should be distinguished from the Oregon “Death with Dignity” law, which permits assisted suicide only by physicians and only for the “terminally ill” (defined by the law as those likely to die of natural causes within six months). Conservatives oppose the legalization of PAS altogether either on the pure legal moralist grounds that it violates SL or on the “prevention of harm to others” grounds that there is no feasible way to prevent rampant abuse. Libertarians insist that suicide assistance ought to be available to any competent adult who wants it. Many others (including me) support the legalization of PAS but with the limit that’s attached to it by the Oregon law—only the terminally ill are eligible for it. Anyone who is not terminally ill—including those who are perfectly healthy and able, at one extreme, and those with severe disabilities (like ALS), at the other—should be ineligible for it. I’ll call this position “legalization with limits.”

Imagine that Frank suffered a shoulder injury a year ago that will prevent him from ever again playing competitive golf, his life’s passion. He is no longer depressed about his situation but feels certain that he has nothing to live for and would be better off dead. Legalization with limits rightly denies PAS eligibility to Frank. To extend eligibility to people like him would, as Daniel Callahan says, be “self-determination run amok.”<sup>22</sup> They should be denied suicide assistance and hard paternalism explains why: the vast majority of them are better off alive than dead notwithstanding their belief to the contrary.<sup>23</sup>

---

group is only 10%, the harm that the policy protects it from is much larger than any burdens it imposes on the other 90%. Of course this argument is unnecessary if Feinberg is mistaken and the majority of suicide attempts are nonvoluntary (as I believe).

<sup>22</sup> See Daniel Callahan, “Self-Determination Run Amok” *Hastings Center Report*, March-April 1992, 52-55.

<sup>23</sup> Felicia Ackerman [in “Assisted Suicide, Terminal Illness, Severe Disability, and the Double Standard” in *Physician-Assisted Suicide: Expanding the Debate*, ed. by M. Pabst Battin (New York: Routledge, 1998)] has objected that beneficence/a quality of life ethic provides no justification for limiting PAS to the terminally ill; support for that limitation has to be the product of anti-disability bias. I attempt to answer her argument in my paper, “The Elitism Objection to a Quality of Life Ethic” (in progress).

If legalization harmed many more people than it benefited—perhaps a large number of abuses are inevitable (e.g. the elderly terminally ill being pressured into making “voluntary” requests for a quick death) or it would lead to reduced hospice and medical care for those terminally ill persons who don’t want PAS—then we should oppose it. I don’t think that legalization would have those consequences, but that’s not an issue we’ll consider here. The claim that I wish to defend here is that if legalization with limits is justifiable, and justifiable only on grounds of hard paternalism, that gives us a reason to reject “pragmatic AHP.”

#### Soft Paternalist and Kantian Defenses of Limits

The claim that a defense of “limits” demands hard paternalism might be doubted on the grounds that there are other ways to defend the limits: soft paternalism and the Kantian Principle of Humanity. I turn now to why neither of those defenses is successful.

Soft paternalism supports the criminalization of assisted suicide, because the hypothetical consent test will not be satisfied in the majority of unmonitored suicide cases. Shouldn’t it support limits on eligibility for PAS, for the same reason? No doubt it should, but not limits that exclude the terminally ill. The way to ensure that the majority of PAS applicants satisfy the hypothetical consent test is to require that all of them undergo psychiatric screening, so that applications from the clinically depressed, emotionally disturbed, etc. can be identified and rejected. Allowing those not terminally ill to apply for PAS would increase the workload of whatever bureaucracy is charged with overseeing the entire process, but probably not by very much. Soft paternalism implies that people like Frank should be eligible for PAS after their decisions to end their lives have been vetted to ensure that they are substantially voluntary and in accord with their deepest

values. The view of (nonlibertarian) liberals who support legalization with limits is that people like Frank should be ineligible for PAS, period. Hence, such liberals cannot defend their position by means of soft paternalism.

A Kantian argument for denying PAS eligibility to people like Frank has recently been defended by J. David Velleman.<sup>24</sup> The Kantian holds that all “persons” (beings with the capacities for free will and rationality) have a special value—“dignity”—that is distinct from the value that they attach to their goals. Dignity is an unconditional value, the very condition of one’s prudential good (a merely conditional value) mattering at all. For Frank to end his life because he does not enjoy it or cannot satisfy his strongest desires is to treat himself—his personhood capacities—as “mere means” to achieving happiness or promoting his prudential good, in violation of the Principle of Humanity.<sup>25</sup> Kantians like Velleman oppose assisted suicide for Frank because they think that it is respect for his dignity—not, as with the hard paternalist, concern for his prudential good—that overrides the autonomy principle.<sup>26</sup>

Unlike supporters of the sanctity of life ethic, Velleman does not oppose suicide assistance for the terminally ill. As terminal illness progresses, it often causes a deterioration of those personhood capacities that are supposed to be the basis of our

---

<sup>24</sup> J. David Velleman, “A Right to Self-Termination?” *Ethics* v. 109 no. 3 (April 1999): 606-28.

<sup>25</sup> Kantians assume either a hedonistic or a subjectivist account of prudential value. Kant himself said, “I cannot do good to anyone according to my conception of happiness (except to young children and the insane), but only according to that of the one I intend to benefit.” *Doctrine of Virtue* vi 453 [cited in Gerald Dworkin, “Moral Paternalism,” *Law and Philosophy* (2005) 24: 303-319].

<sup>26</sup> Note that this Kantian argument for denying Frank PAS eligibility assumes a reading of the Principle of Humanity different from the two that gave us simple Kantianism and an absolute autonomy principle. The Kantian who admits that respect for dignity can conflict with and override the autonomy principle is honest. The dishonest Kantian assumes the counterfeit version of the autonomy principle based on “hypothetical rational consent” and holds that since Frank’s true, rational will affirms PH, blocking his suicide doesn’t “really” violate his autonomy.

dignity. Velleman says that “dignity can require not only the preservation of what possesses it but also the destruction of what is losing it, if the loss would be irretrievable.”<sup>27</sup> Hence, PAS for the terminally ill who request it is permissible for the same reason that it is impermissible for people like Frank, namely, respect for the dignity of persons and personhood.

The Kantian argument for limiting PAS eligibility to the terminally ill seems to me less persuasive than the hard paternalist one for a couple of reasons. First, if the capacities by virtue of which one has dignity really do have an “unconditional” value that is “beyond all price,” as Kant claimed, then it would be wrong to impair or abandon them even *temporarily* for the sake of the greatest prudential good. That doesn’t seem right.<sup>28</sup> Second, Velleman claims that respect for dignity *requires* the destruction of whatever is losing its dignity. But consider a patient in a permanent vegetative state (PVS) whose advance directive says that because of his belief in SL, he wants “ordinary” care continued should he ever be PVS. SL assumes that it is mere biological life rather than Kantian personhood that grounds our “dignity.” (More precisely, all and only living human beings are created in the “image of God,” and it is being created in his image that is the source of our dignity). Since PVS patients have irretrievably lost their capacities for personhood, Velleman’s Kantianism apparently requires that we disregard this patient’s advance directive. This implication of his view is deeply implausible.

The Kantian rationale for denying PAS eligibility to people like Frank is neither paternalism nor the harm to others principle. Frank’s suicide is supposed to be wrong in the same way that prostitution and dwarf tossing are—as degrading to humanity even if they cause no harm to self or others. Hence, the Kantian argument for limiting Frank’s

---

<sup>27</sup> Velleman, “A Right to Self Termination?,” p. 617.

<sup>28</sup> See, for example, “Schelling’s Response to Armed Robbery” in Derek Parfit,

options is a species of pure legal moralism. We should reject it on the grounds that only the protection of rights and interests can justify restrictions on liberty.

### Limiting Hard Paternalism

If we deny PAS eligibility to people like Frank because their views about whether their lives are worth living are “simply mistaken,” where will we stop? Why not sometimes override the decisions of competent adults to reject unwanted medical care—such as the adult Jehovah’s Witness who refuses to consent to a life saving blood transfusion? Why not ban smoking? Pragmatic AHP alleges that trying to determine where to draw the line between permissible and impermissible hard paternalism is probably hopeless and certainly dangerous. It’s safer to assume that in the real world beneficence *never* overrides the autonomy principle.

Of course if the argument presented so far is correct, then accepting pragmatic AHP itself has costs: we have to reject the legalization with limits position on PAS. If that’s unacceptable, then we are stuck with hard paternalism and the slippery slope worry about how and where to limit it. I now wish to suggest a couple of ways to defend plausible limits on how much hard paternalism is permissible.

The defender of hard paternalism ought to concede that there are cases in which it would protect someone from serious harm yet remains clearly wrong. Forcing a life saving blood transfusion on an adult Jehovah’s Witness is such a case.<sup>29</sup> But it can be

---

*Reasons and Persons* (New York: Oxford University Press, 1984), p. 12

<sup>29</sup> Some have denied that beneficence properly understood calls for interference here. It’s been claimed that forcing a life-saving blood transfusion on the JW would leave him miserable for the rest of his life, because he would believe that he is eternally damned. But this misunderstands the tenets of the JW’s religion. The JW who “strenuously” objects to a blood transfusion but is given one anyway is supposed to be no

argued that the reason why paternalism is clearly wrong in these cases is not solely or even primarily that it violates a right to “self determination” or “personal sovereignty.” Rather, it is clearly wrong because it violates some *other* right. That right might be to free speech, freedom of religion, or the freedom to form personal relationships of one’s own choosing. It could be the right not to be physically assaulted, or not be killed without one’s consent. The idea is that these more specific and substantive rights are *not* derived from a more abstract right to self-determination but instead are to be justified in some other way. (If anything, the right to self-determination is derived *via* generalization from these specific rights). The reason why hard paternalism is wrong in the Jehovah’s Witness case is that the duty to respect his rights to freedom of religion and to be free from physical assault trump beneficence. By contrast, denying PAS eligibility to people like Frank does not violate any right more substantive than self-determination.<sup>30</sup> The hard paternalist needn’t deny that a right to self-determination exists and covers all of our self-regarding choices, including the ones not covered by other, more substantive rights. But she can say that if it does exist it is less weighty than these other rights and by itself not weighty enough to trump the dictates of beneficence in cases where paternalism would greatly benefit the subject.

Even in cases where self-determination is the only moral right at stake, some violations of it are more severe than others, and hard paternalism will be harder to justify the more severe is the violation of autonomy that it requires. Everyone will admit, I think, that forcing someone to forsake his religion for his own good is a more serious violation of

---

more guilty of sin than a woman who “strenuously” objects to being raped is guilty of fornication (*Watchtower*, 1991, 6/15, p. 17).

<sup>30</sup> Surely the “right to die” is an offspring of the right to self-determination and entirely dependent on it for its justification. One can reject a “right to die” without denying that there is a right not to be forced to suffer physical pain, mental anguish, and slow deterioration of mental faculties from terminal illness if a quick and painless death is



his autonomy than fining him for not having a life vest on his sailboat. It is a more severe violation simply because he is likely to value practicing his religion more than sailing without life vests. Arguably, another factor that affects the severity of a violation of autonomy is whether it is followed by retrospective approval. Consider, again, those smokers who prefer being free to do what they agree is foolish to being forced by others to do what they agree is in their long-term best interests. If it's likely that i) most of them in twenty or so years would thank us if we forced them to quit, and/or ii) most of them in twenty or so years would wish that we had ignored their earlier wishes and forced them to quit, if we hadn't, that would make a ban on smoking a less serious violation of their autonomy. For the purpose of determining whether the autonomy principle is violated, we should still attend only to the person's present and/or past values. I'm not suggesting that if there's subsequent, retroactive approval of the intervention, then there was *no* violation of autonomy. But for the purpose of determining *how grave* the violation is, we should adopt a more temporally neutral perspective that takes into account likely future values as well. When "you'll thank me later" turns out to be true, it diminishes the severity of the violation of autonomy.

If this is right, it provides another way to distinguish the case of forced blood transfusions for Jehovah's Witnesses from the case of denying people like Frank PAS eligibility. The violation of the Jehovah's Witness's autonomy is likely to be severe, because it is unlikely that he would later come to approve of it. The violation of Frank's autonomy is likely to be less severe, because retroactive authorization is statistically more probable. Most people who've suffered disabilities that shatter their life's dreams but are no obstacle to engaging in a wide range of other worthwhile and rewarding life activities adapt to their new circumstances with time. If he is patient, Frank will probably

---

possible.

find new challenges that he wants to tackle, in which case he will be grateful that his request for suicide assistance was denied.<sup>31</sup> It might be objected that if Frank is well-informed he would know this about himself and thus would consent to being denied PAS eligibility; this gives us a soft paternalist rationale for denying him PAS and makes a hard paternalist one otiose. But the objection overlooks the possibility that Frank may disapprove of such a change in his future self. He might regard adapting to a life without golf as corruption or “selling out.”

To return to the case of a ban on smoking, it seems clear that it would create all of the problems that Prohibition did (e.g. criminal syndicates that thrive by selling the contraband on the black market). The social costs of trying to enforce a ban would outweigh whatever good it does for smokers. But on the issue of whether or not a ban would be wrong *even if* it were perfectly and costlessly enforceable, I part company with AAHP. The gain to smokers would be great, the violation of autonomy would probably not be severe, and I can see no substantive right—only the thin, abstract right to self-determination—that a ban would violate.

### Hard Moral Paternalism

If we grant that some hard paternalism is permissible, some may worry that the specter of *moral* paternalism looms. Though traditional morals laws—including bans on gambling, “soft” drug use (marijuana, alcohol, etc.), “hard” drug use (heroin, crack, meth),

---

<sup>31</sup> The Philosopher’s Brief submitted to the Supreme Court in the case of *Washington v. Glucksberg* (1997) makes the same point. See Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith J. Thomson, “Assisted Suicide: The Philosopher’s Brief,” *New York Review of Books*, March 27 1997, pp. 41-47. It’s not clear whether the authors of the brief assume that there is no violation of autonomy at all whenever there is retrospective authorization, or that such authorization

prostitution, pornography, homosexuality, and fornication—have been defended on the basis of pure legal moralism and the prevention of harm to others, moral paternalism is probably the most common defense of them.<sup>32</sup> Feinberg has argued that the principle of moral paternalism is at bottom confused. I shall argue that the principle can and should be formulated in a way that avoids Feinberg's criticism, that the "virtue cannot be coerced" objection to the principle fails, but that there are good reasons to reject nearly all moral paternalism.

Feinberg defines "moral paternalism" as the principle that the state may restrict a competent adult's liberty to protect him from self-inflicted "moral harm." That is, it may prohibit activities that promote "vice" or "bad character" in the people who engage in them, for their own good. Feinberg's objection to this principle is that it confuses the moral with the prudential or nonmoral, because not all moral vices are necessarily opposed to one's prudential good. There is no guarantee that the unjust person, for example, will be unhappy; if he's clever and cunning enough, he may lead a long and prosperous life. Moral paternalism presupposes the dubious view held by the Stoics (among others) that it is in one's best interests to have *all* of the moral virtues, including the "other-regarding" virtues of justice and benevolence.<sup>33</sup>

There are a couple of problems with Feinberg's criticism. First, the claim that it is contrary to one's prudential good to have the other-regarding vices does not really depend upon the Stoic view. I take the Stoic view to be that there is no conflict between

---

only diminishes the seriousness of a violation.

<sup>32</sup> James Fitzjames Stephen, *Liberty, Equality, and Fraternity* (Indianapolis: Liberty Fund, 1993) and more recently Robert George, *Making Men Moral* (New York: Oxford University Press, 1993) both defend several of the laws on moral paternalism grounds. Both also defend them on the grounds that public vice, if left unpunished, is likely to spread to others. Stephen worries about the effects on others of "bad examples" (p. 90) and George worries about a "pollution of the moral environment." (p. 45).

<sup>33</sup> See Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984),

the *real* good of one person and that of others or the community, because there is a sort of preestablished harmony in the universe sustained by divine providence. Because of preestablished harmony, the virtues that promote social harmony—justice, loyalty to friends, deference to authority, kindness, etc.—*have* to be good for the individual. The view's reliance on the metaphysics of natural teleology makes it untenable. But it is not the only possible explanation of why it is in one's best interests to cultivate those virtues. The Hobbesian account of why it pays to be just (after we've left the state of nature) does not depend on such a metaphysics.

The second, more important problem with Feinberg's criticism is that it assumes an uncharitable definition of the moral paternalist principle. If we define moral paternalism as seeking to eliminate *all* moral vice, then it will have to support restrictions on activities that promote the "harmless" vices (dispositions to engage in acts of harmless immorality). That would make it absurd, since those vices are not harmful to self even if the Stoic view is correct. Feinberg might reply that this is simply another reason to reject moral paternalism as confused. It seems to me more charitable to redefine the principle as seeking restrictions only on activities that promote a subset of all moral vices. That subset definitely includes the "self-regarding" vices of intemperance, poor impulse control, laziness, being a spendthrift, and if orthodox Christian belief is true, impiety/lack of faith. It *might* include the other-regarding vices as well. But there really is no *need* for the moral paternalist to insist on the inclusion of those vices. If some activity promotes other-regarding vice in its participants, then the reason to prohibit it is to prevent harm to others, not harm to those participants.<sup>34</sup>

---

pp. 65-70 and *Harmless Wrongdoing*, pp. 277-87.

<sup>34</sup> Suppose, for example, that the widespread availability of violent pornography produces an increase in the total number of sexual assaults on women in society. The causal route by which the harm occurs is through the moral corruption of the males who

It's worth noting that if we limit moral paternalism to a concern with the self-regarding vices, then there will be another possible principle, distinct from both it and pure legal moralism, that can support a ban on activities like prostitution. The pure legal moralist ("act PLM") argument would be that "sex-for-money" exchanges are degrading to humanity and wrong even if they cause no harm to self or others; reducing the total number of them is by itself sufficient for a moral improvement in the world. The moral paternalism argument would be that prostitution should be prohibited in order to weaken the vice of intemperance, which is contrary to one's prudential good. The third view, which I'll call "vice PLM," is that the state should combat "harmless" vice; prostitution should be prohibited in order to combat the vice of "disrespect for humanity" had by those who commodify sex. This view seems more appealing (or less unappealing) than act PLM. If a ban on prostitution reduces the total number of sex-for-money exchanges but does not weaken anyone's "disrespect for humanity," it is hard to see why that would be a moral improvement in the world. The world is a better place with fewer murders in it even if there is no accompanying reduction in the desire to murder. But harmless immorality seems different. Assuming that prostitution is a harmless immorality, what should bother us about it is not the overt, physical act or its consequences but the bad desires, attitudes, and values that the act expresses. Prohibiting the act then makes sense only if it's likely to be an effective means of weakening or eliminating the bad desires.<sup>35</sup>

---

consume the pornography. Even if that moral corruption is bad for them, preventing the harm that they suffer would a far less urgent reason for restricting the pornography than preventing the harm suffered by women who are victims of sexual assault.

<sup>35</sup> "It is difficult to understand the assertion that conformity [to conventional sexual morality], even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom that it involves. The attribution of value to mere conforming behavior, in abstraction from both motive and consequences, belongs not to morality but to taboo." H.L.A Hart, *Law, Liberty, and Morality* (Oxford University Press, 1963), p. 57.

This brings us to an objection to vice PLM, to moral paternalism as Feinberg defines it, and to moral paternalism as we've limited it: all are *irrational*, because they seek to use means (prohibitions on bad acts) that cannot possibly achieve their own goals (weakening the bad desires/character traits that those acts express).<sup>36</sup> The criminal law can influence people's actions, not the motivations that produce them. A ban on prostitution can deter a man from frequenting prostitutes by exploiting his fear of discovery and arrest, but it will not thereby make him either less intemperate or less disrespectful of humanity. He will have exactly the same moral character as before; only his observable behaviors will be different. This objection—"virtue cannot be coerced"—is like Feinberg's, inasmuch as it alleges that moral paternalism rests on philosophical confusion (in this case, about the concepts of "virtue" and "vice").

The objection is not sound, however. It attacks a straw man. Surely few defenders of moral paternalism are so naïve as to think that forced prayers express piety or forced abstention from debauchery displays temperance. The moral paternalist's view is more charitably taken to be that bad acts when followed by pleasure are likely to reinforce the bad desires that they express; preventing the acts just might—over a long period of time—result in a gradual weakening of the desires.<sup>37</sup> The possibility that such a view is correct cannot be ruled out *a priori*.

An example of intemperance is gluttony, which is bad for one's health. On a "thin" conception of intemperance (or any other self-regarding vice) it is bad only because it increases one's chances of suffering the "physical" evils of death, serious injury, extreme poverty, and so forth. On a "thick" conception of it, its badness consists in its being a

---

<sup>36</sup> This is John Locke's main objection to a religious persecution whose purpose is to save souls by imparting piety or sincere belief in the true faith.

<sup>37</sup> Robert George is quite clear about this: morals laws can at best weaken vice, not impart virtue. They "cannot, in any direct sense, 'make men moral.'" George, p. 44.

hindrance to enjoying certain “higher” goods assumed to be necessary to a flourishing or truly excellent life—such as knowledge, beauty, friendship, and love. The moral paternalist argument for prohibiting prostitution (and “same sex sodomy,” fornication, and nonviolent pornography) seems to require a thick conception of the vices. The paternalist argument for banning hard drug use is more complex. Insofar as the motivation is to protect users from the risk of death due to accidental overdose and the like, it is simply nonmoral (“physical”) paternalism. Insofar as it’s to prevent the moral corruption that consists in the drugs’ controlling the lives of its users, it’s moral paternalism. If the objection is that addicts tend to ignore friends and family and lose interest in just about everything except getting high, then a thick conception of intemperance is being assumed. (Presumably the bohemian artist who remains productive in spite of his addiction is an aberrant case). If the objection is that the addict’s preoccupation with obtaining and using drugs leads him to neglect his diet, health, and physical appearance, then a thin conception of intemperance is assumed. Hence, there are two types of moral paternalist argument, in addition to the physical paternalist one, for banning hard drug use.

The objections that not all moral vice is contrary to one’s good, that virtue cannot be coerced, and that the right to self-determination is absolute, all fail to refute moral paternalism rightly construed. I suggest that instead there are four objections to the moral paternalist defense of traditional morals laws, one of which is telling against nearly every example of moral paternalism. These four objections are:

- i) The restriction doesn’t benefit its targets at all.
- ii) Though it might benefit them, the benefit is not of sufficient magnitude to make plausible the judgment that beneficence overrides autonomy.
- iii) The restriction violates a right, such as the right to form one’s own personal relationships.
- iv) The restriction’s negative side-effects (e.g. creation of black markets for criminal syndicates to exploit) outweigh whatever good it does for its targets.

Objection i) refutes the moral paternalist defense of bans on same sex sodomy, homosexual marriage, and heterosexual fornication. Those bans cannot benefit their intended beneficiaries at all; the defense rests on a mistaken view about what the virtues and vices are as regards sex. Same sex relationships based on love and commitment are good for the adults who are in them, and society ought to encourage them. Religious conservatives who insist that all homosexuality and all heterosexual sex outside of marriage are kinds of intemperance hold a mistaken conception of what that vice consists in. This is not an objection to any thick conception of intemperance, only some.

The defense of a ban on same sex sodomy is also refuted by objection iii): even if it did benefit homosexuals by discouraging a vice that is bad for them, it would remain wrong for the deontological reason that it violates rights. The right in question is not the right to self-determination or even “sexual autonomy” but the right to form one’s own “personal relationships.” The concept of “personal relationship” requires clarification, but this much seems clear: same sex romantic bonds qualify, whereas the commercial exchange between prostitute and customer does not. A ban on fornication is objectionable for the same, rights-based reason.<sup>38</sup>

i) and iii) are not especially persuasive as objections to the moral paternalist argument for banning prostitution. We should reject that argument for the reason stated in ii): the harm that a ban would protect prostitutes and their customers from is not of sufficient magnitude to render plausible the judgment that beneficence overrides autonomy here. The harm that a ban on smoking would protect smokers from (an

---

<sup>38</sup> “One night stands” (with no exchange of money) probably shouldn’t qualify as “personal relationships” either, but there is no way for a ban on fornication to apply to them only and not less casual relationships between unmarried, consenting adults that *are* fully protected by this right. An example of moral paternalism not mentioned so far is a ban on *speech* that promotes self-regarding vice (e.g. music or literature that



average of ten years reduced longevity) seems quite large. Perhaps it is large enough that its prevention justifies a violation of smokers' autonomy (especially if that violation is less serious because retroactive authorization is likely). But the harm suffered by those whose sexual habits make it difficult for them to experience romantic love is not even remotely of similar gravity. This judgment is not based on skepticism about a thick conception of intemperance that implies that acts of prostitution manifest that vice. Rather, it is based on the judgment that falling short of excellence or flourishing is not the same thing as suffering great harm. The case for hard paternalism is strongest when it is risk of large and irrevocable physical harm that the target of paternalism would be protected from. The harms to spirit and character caused by prostitution are neither especially severe nor irreversible. For that reason the judgment that beneficence overrides autonomy here is not plausible—whether or not the violation of autonomy is serious.<sup>39</sup>

Objection ii) seems to me fatal to nearly all moral paternalism. The one case where it may not be so persuasive is a ban on hard drugs, where we found three converging strands of the paternalist argument. The harm alleged by the strand that invokes a thick conception of intemperance may not *by itself* be large enough to render plausible the judgment that beneficence overrides autonomy, but the harms alleged by the three strands *taken cumulatively* might very well be. The paternalism here is usually thought to be soft on the grounds that the addicted user's choice to continue using is due to psychological compulsion. But most users probably have preferences similar to the ones attributed earlier to most smokers, making a ban on hard drugs, like a ban on

---

“glamorizes” drug use). The main objection to it is also the rights-based one.

<sup>39</sup> Of course, the failure of the moral paternalist argument here leaves open the possibility that a restriction can be justified on different grounds. A possible basis for restricting both prostitution and nonviolent pornography is that they harm all women by

smoking, hard paternalism. The argument of this paper is that the mere fact that a ban violates users' autonomy is not a sufficient reason to oppose it. If we imagine (as we did with smoking) a ban that is perfectly and costlessly enforceable, I can see no good reason to oppose it. The only objection to the real world ban on hard drugs that has any chance of succeeding is the one based on negative side-effects. Whether or not it succeeds is difficult to say. If it does not, then the fact that the ban is acceptable would be yet another reason to reject pragmatic AHP.

---

reinforcing sexism and patriarchy.