

## **The Right to Autonomy and the Justification of Hard Paternalism**

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Principled anti-paternalism comes in different forms. One alleges that interference with the choices of well-informed, competent adults *cannot* benefit them because each is the best judge of where his self-interest lies. This “best judge” principle is usually defended on the grounds that a preferentialist account of prudential value is true and each knows his own preferences better than anyone else does. A second form of anti-paternalism alleges that even if the paternalist knows what’s best for you, being *forced* to conform to his judgment is a harm that outweighs any benefit derived from voluntarily conforming to it. This view implies that all coercive paternalism is necessarily self-defeating, while the first implies that any attempt even to *persuade* another well-informed adult that his choice is foolish, because its aim is foolish, is misguided. Both rest on dubious assumptions about what well being is. For this reason a third form of principled anti-paternalism may seem more promising. It grants that some coercive paternalistic interference may leave its target better off but insists that it remains wrong because it violates a *right* to personal autonomy or “sovereignty.” Not all paternalism is supposed to violate this right; “soft” paternalism is not. But many liberal theorists—the most prominent and influential of whom is Joel Feinberg—hold that *any* paternalism that does violate it (i.e. any “hard” paternalism) is wrong because the right in question is absolute.

This paper critically examines some different views about the content, strength, and justification of a right to autonomy. The first section explains some background assumptions I make about the right to autonomy, the concept of paternalism, and the soft/hard distinction. The second section contrasts choice and preference-based accounts of the right and defends a “hybrid” account that combines features of both. In the third section I distinguish three respects in which the right might be thought absolute, and I argue that a right that is absolute in the way Feinberg supposes—*vis-à-vis* interferences aimed at increasing one’s own welfare or autonomy—will be quite implausible unless some limits are imposed on its scope. I note some possible limits but find that it is unclear whether they are justifiable on the basis of the Kantian moral theory usually invoked to justify a right to autonomy. The fourth and final section offers some reasons why we should reject a right that’s absolute.

### Hard/soft and strict/loose paternalism

Most writers assume that the right to autonomy is purely “negative,” and I shall do so as well: to violate another’s right you must “interfere” in some sense with either the choices she has already made or her decision-making as regards prospective choices. Hindering the execution of already made choices requires compulsion of some sort. Coercion, deception, and manipulation are *possible* forms of “interference” with prospective choices. Whether only restrictions on

liberty can violate the right, or whether deception and other non-coercive types of manipulation can also, is an issue on which different accounts of the right disagree. However, all of the accounts to be considered agree that only “interfering acts” can violate it. Failure to prevent you when you are very drunk from playing Russian roulette (when I could) might violate a positive duty of beneficence, but it could not violate a merely negative duty not to interfere with your autonomy.

The notion of “interference” belongs in the concept of violating a negative right to autonomy—only (not all) interference can violate it—and *not* in the concept of paternalism. Consider a father who pays his teenage son \$50 for every random drug test he submits to and passes. The son willingly submits to the arrangement because it rewards him for doing what he says he would do anyway. The father believes that his son is sincere when he says this but distrusts his son’s strength of will, suspecting that a monetary incentive is needed to help him choose wisely in cases where he faces strong peer pressure to join the fun. The father’s system of rewards for passed tests is surely paternalistic even though it may influence but does not “interfere with” the son’s prospective drug use choices. Since it is not “interference,” it cannot violate any negative right to autonomy that the son may have. Thus, this is a clear example of soft paternalism. Another example is limiting the forms of supererogatory help we provide to others, or expanding their options by a smaller rather than a larger number, for their own good—e.g. giving an overweight, out of shape friend a membership to a gym for his birthday instead of the deep fry cooker that one knows he prefers.

If there is no “interference” with choices in either of these cases, why think that they qualify as paternalistic acts? The answer is that in both one is attempting to influence another’s choices in a way that doesn’t present him with reasons. One is using “nonrational” means rather than rational persuasion to elicit a prudent choice from the object of one’s solicitude. Threats of punishment for making bad choices and offers of rewards for making good ones engage one’s rational agency, but they are not an attempt to convince *via* rational argument that a particular choice *is* good or bad for one. They do not engage one’s rational agency in the right way. The use of means that are “nonrational” in this sense seems to me crucial to paternalism.<sup>1</sup> A smug and patronizing lecture about why one should refrain from some activity for one’s own good is not paternalism even if one finds it offensive and asks the person delivering it to stop.

Another assumption about the right that I’ll make—about its scope—is that it protects only “self regarding” choices, by which are meant choices that do not threaten to violate the rights of others. This conception of “self-regarding” has an important implication that’s noted in section III below.

I assume that hard paternalism *by definition* infringes a negative right to autonomy however it is cashed out, while soft paternalism does not. Feinberg and many other writers define hard paternalism differently: as interference with *voluntary* or sufficiently voluntary self-regarding choices for the chooser’s own

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<sup>1</sup> See Seana Schiffrin, “Paternalism, Unconscionability Doctrine, and Accommodation,” *Philosophy and Public Affairs* 29 (2000) 205-49, p. 213.

good. What they are doing is building into their definition a certain assumption about what the right to autonomy protects. My definition is weaker than theirs, allowing for the possibility that some other account of the right's content is correct.

Does paternalistic interference in another's life have to be motivated by beneficence or a desire to promote the target's prudential good? As many use the term, it does not.<sup>2</sup> Paternalistic acts are "for the sake of" the targeted person's "good," but "her good" is ambiguous between "her prudential good" and "her conception of the good" or "what she thinks is best overall." Let's say that paternalism is "strict" when undertaken for the sake of its target's prudential good or well-being and "loose" when undertaken to enable her better to realize her conception of the good or considered view about what "self-regarding" choice it would be best to make.<sup>3</sup> The two "goods" are not the same because psychological egoism is false: one may choose to sacrifice what she reasonably judges to be *best for her* to realize other values, such as impersonal goods (e.g. the preservation of endangered species) or the well-being of other persons. "Loose" and "strict" paternalism will disagree over whether interference is warranted with some of these choices. Suppose that Brother Francis believes that he should volunteer to be the guinea pig in a lethal biomedical experiment to test a new drug. Only if he volunteers will several lab rats be spared, and he believes that several rat lives have more value than his one human life. The "strict" but not the "loose" paternalist sees a *prima facie* case for blocking his choice to volunteer.<sup>4</sup> Suppose, alternatively, that when it comes time to volunteer Brother Francis does not, owing to weakness of will. Should we force him to be the guinea pig? The "loose" but not the "strict" paternalist sees a good reason for doing so.

Another possible view, distinct from both strict and loose paternalism, is what I'll call "autonomy enhancement" (AE). According to it we should intervene when others are about to make substantially "impaired" (e.g. uninformed, impetuous, psychologically coerced, etc.) choices, to remove the impairment so that their choices will be more autonomous. We should inform them of important facts of which they are ignorant, or delay their choice, if they are emotionally agitated, till they've "cooled off." Impairment is sufficient to justify intervention; a threat of harm to self is not necessary. The reason for intervening is to remove

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<sup>2</sup> E.g. Schiffrin, pp. 215-6.

<sup>3</sup> On the assumption that whenever one acts one's end is to do what is all things considered best, "loose" paternalism is equivalent to what Gerald Dworkin calls "weak" paternalism. For Dworkin paternalism is weak when it targets choices based on mistaken or ineffective means to the target's own ends, and it is "strong" when it interferes with choices based on misguided ends. (See his article "Paternalism" at [plato.stanford.edu/entries/paternalism/](http://plato.stanford.edu/entries/paternalism/)).

<sup>4</sup> The Brother Francis example is from Donald VanDeVeer, *Paternalistic Intervention: The Moral Bounds of Beneficence* (Princeton, 1986), p. 126. I should note that in cases where someone chooses to sacrifice his own life to save the lives of many other persons, the sacrifice is "heroic" rather than foolish or imprudent, and no reasonable strict paternalist can support interference there.

the impairment, not protect the person from self-inflicted harm or get him to do what he thinks best. AE assumes that rational autonomy has value whether or not it helps one to realize one's conception of the good or contributes to one's long term well-being. Kant's Principle of Humanity enjoins us to respect and promote this non-prudential value in everyone.

Strict paternalism is motivated by beneficence, and beneficence is like prudence in requiring a sort of temporal neutrality as regards judgments about what is best for someone. That is, no matter which account of prudential value is correct (hedonism, simple or restricted preferentism, an objective list theory, or some hybrid combination of these theories), if something is slightly good for you in the short run but very bad for you in the long run, then it is all things considered bad for you.<sup>5</sup> Loose paternalism and AE may or may not require the same temporal neutrality as regards one's present and future conceptions of the good or one's present and future ability to make fully autonomous choices. If they reject temporal neutrality and instead privilege the present, then they should not support interference with highly autonomous choices that accurately reflect one's present conception of the good but seriously threaten one's future capacity for autonomous choice or ability to pursue different conceptions of the good in the future. Only strict paternalism and temporally neutral versions of loose paternalism and AE can support interference with those choices.

When Feinberg first sets out the soft/hard distinction in *Harm to Self*, he says that the law's concern should be with whether one's self-regarding choices are truly one's choices and *not* their "wisdom, prudence, or dangerousness."<sup>6</sup> That sounds like an AE that privileges the present. If that were the view he wished to defend, and if (as he seems to have thought) paternalism has to be of the "strict" type, then his claim that "soft antipaternalism" is the more accurate label for his position than "soft paternalism" would make sense.<sup>7</sup> But it clearly isn't the view he defends. Feinberg thinks that the law should concern itself with *both* the voluntariness *and* "prudence" of people's self-regarding choices. Its aim should be to "prevent people from suffering harm that they have not truly chosen to suffer."<sup>8</sup> The criterion that he thinks the state should use for determining whether a choice is involuntary enough to justify interference—choices that threaten greater, more probable, more permanent harm to self require a higher degree of voluntariness than those that threaten smaller harms—clearly reflects a concern for the prudential good of the chooser. Hence, Feinberg defends soft but strict paternalism, not "soft antipaternalism" or AE.

#### Some competing accounts of the right to autonomy: Feinberg's, the libertarian's, and CP

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<sup>5</sup> See my "In Defense of Hard Paternalism," *Law and Philosophy* 27 (2008) 351-81.

<sup>6</sup> Joel Feinberg, *Harm to Self* (Oxford University Press, 1986), p. 12.

<sup>7</sup> *Harm to Self*, p. 15.

<sup>8</sup> *Harm to Self*, p. 119.

When does “interference” with self-regarding choices infringe the right to autonomy? There are two basic approaches to spelling out the content of the right: choice-based and preference-based. Feinberg’s view that the right protects only self-regarding choices that are voluntary enough is one example of the former. According to Feinberg it is no violation of autonomy to interfere with Mill’s bridge crosser, whose ignorance of the bridge’s unsafe condition renders his choice to cross it substantially involuntary. Interference would not violate autonomy even in the variant of the case where the bridge crosser receives a warning but disregards it because he believes the person warning him is untrustworthy or playing a practical joke.<sup>9</sup>

Two other choice-based accounts are worth noting. The first agrees that the right covers only voluntary enough choices but says that Feinberg errs in setting the bar for full voluntariness too high. In particular, it insists that whenever people are at fault for their mistaken means-ends or empirical beliefs, the voluntariness of their choices is undiminished. This view is more “libertarian” than Feinberg’s, implying that continued interference with the bridge crosser after we warn him of the danger but he refuses to believe us and demands that we leave him alone violates his right to autonomy.<sup>10</sup> The second account is even more libertarian and anti-paternalist than this. It holds that the right covers all self-regarding choices, even the most impaired, involuntary, or nonautonomous; that only modes of interference that restrict liberty can violate it; and most importantly, that explicit, actual, prior authorization is necessary for interference to respect one’s autonomy. Assuming that the bridge crosser in the original variant of the example (where there is no time to warn him, and he is blameless in thinking that the bridge is safe) never gave anyone such authorization, this view (unlike the other two choice-based accounts) implies that interference with his choice violates his autonomy.<sup>11</sup>

According to preference-based accounts of the right’s content, interference does not violate one’s autonomy if one *would* consent to it under certain conditions, given one’s preferences and values. William Talbott has recently defended an account of the right that focuses on one’s *future* preferences and values in both the case where the interference occurs and the

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<sup>9</sup> *Harm to Self*, p. 131.

<sup>10</sup> This *might* be J.S. Mill’s view, but in my opinion his discussion of the bridge crosser leaves it unclear what he would say about the permissibility of continued interference in this variant of the case. Richard J. Arneson in “Mill vs. Paternalism,” *Ethics* v. 7 no. 4 (July 1980) 470-89 defended this choice-based account of the right.

<sup>11</sup> This account of the right might be what Feinberg has in mind when he refers to the possibility of “hard anti-paternalism” (*Harm to Self*, p. 15). It is the one that Lockean political philosophy and its “self ownership” principle support. Its defender would surely reject Feinberg’s label, insisting that she is a soft paternalist with a better account of what the right to autonomy protects than Feinberg’s.

case where it does not.<sup>12</sup> A more popular preference-based account focuses on the preferences and values one has at the time of the interference. According to a *current* preferences account (“CP”), interference does not violate one’s autonomy if one would consent to it, given one’s *current* preferences and values, *if one were instrumentally rational and well informed* about relevant, empirically ascertainable causal or means-ends matters.

Some versions of CP may hold that only interference that restricts liberty can infringe the right. Others may require that deception and other types of manipulation satisfy its hypothetical consent condition to avoid infringing it. The latter imply that at least some of the “libertarian paternalism” defended by Thaler and Sunstein is “hard” despite the fact that it uses noncoercive “nudges.”<sup>13</sup>

There are different ways to cash out the condition of being well informed. It can be understood as requiring that one has all “relevant” information and fatigue, alcohol, and the like do not impair one’s ability to weigh it and form a judgment; or that one has all of the available evidence and full epistemic rationality; or that one’s beliefs about these matters are true. John Hodson and Donald VanDeVeer oppose all hard paternalism as a violation of an absolute autonomy right the content of which is fixed by a version of CP that understands “well informed” in the first way.<sup>14</sup> Note that none of these ways of spelling out the meaning of “well informed” requires that one have either true or reasonable metaphysical beliefs about the existence of God, a supernatural realm accessible via mystical intuition, or the like. CP treats a person’s beliefs about such matters as givens, like her preferences and values. Hence, it implies that forcing a life-saving blood transfusion on an adult Jehovah’s Witness, in disregard of her own conviction that “eating blood” contravenes God’s law, infringes her autonomy.<sup>15</sup>

Some version of CP seems to me to provide a better account of the right’s content than any of the choice-based accounts, including Feinberg’s. It is better, especially if the duty to respect autonomy is supposed to derive from a Kantian “respect persons” principle requiring that interference be “justifiable” to

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<sup>12</sup> See his *Human Rights and Human Well-Being* (Oxford University Press, 2010), esp. chapter twelve. Talbot calls his account the “most reliable judgment standard” based on “future bilateral endorsement.”

<sup>13</sup> Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin Books, 2008); “Libertarian Paternalism is Not an Oxymoron,” *University of Chicago Law Review* 70 (Fall 2003) 1159-1201.

<sup>14</sup> Donald VanDeVeer, *ibid.*, and John Hodson, “The Principle of Paternalism,” *American Philosophical Quarterly* 14 (1977) 61-69.

<sup>15</sup> It’s also worth noting that the CP account implies that loose paternalism cannot violate the right to autonomy. [This may be Dan Brock’s point when he says, “autonomy trumping rights views ... do not have significantly different implications for paternalism than does a plausible interpretation of the promotion-of-the-good justification.” See his “Paternalism and Autonomy,” *Ethics* 98 (April 1988) 550-65]. For paternalism that is both loose and hard to be possible, one of the libertarian choice-based accounts would have to be correct.

the person interfered with.<sup>16</sup>

Consider those drivers who *voluntarily* choose not to wear their seat belts owing to laziness or weakness of will. Suppose that at least some of them never *actually* consented to a seat belt law but *would* support its enforcement against themselves as (in Gerald Dworkin's words) a "social insurance policy" against their own acknowledged irrationality.<sup>17</sup> Feinberg's view implies that enforcing the law against them violates their autonomy, whereas CP implies that it does not. His view yields the wrong verdict here if "respect for autonomy" is linked to justification in the way alleged by the Kantian principle, because we can justify the threat of fine to these drivers by appeal to their own preferences. The law does not "impose" on them "other people's" preferences, so its paternalism at least in relation to them should be deemed "soft" even though it coercively interferes with voluntary choices without prior, actual authorization.

Another example that CP gets right and Feinberg's view does not is the following:

*Clint and his militia buddies.* Clint belongs to an Idaho militia committed to survivalist values and a social Darwinist ethic. He is committed to an extreme ideal of self-reliance, one that requires him to suffer the bad consequences of all of his imprudent self regarding choices, *voluntary and involuntary*, rather than allow any of them blocked by others for his own good. One day Clint decides to accept a dare to prove his manhood by participating in a game of Russian roulette with his militia buddies after they've all consumed large quantities of bourbon. Clint would never accept the dare if he were sober.

Clint's decision to play Russian roulette while drunk is surely "substantially involuntary" on any plausible view about where to set the bar for full voluntariness. So both Feinberg and defenders of the other voluntary choice-based account must judge an intervention that thwarts it to be autonomy respecting. But surely coercion here would impose "other people's values" on Clint and infringe his right to autonomy. Feinberg himself often describes hard paternalism as seeking to "impose" on someone "other people's" values. The Clint example proves that he is entitled to use that characterization only if he abandons a choice-based account of the right in favor of a preference-based one. It also demonstrates that interference aimed at removing a condition that impairs voluntariness or autonomy can infringe the right. AE, if it rejects temporal neutrality and privileges the present, can be "hard."<sup>18</sup>

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<sup>16</sup> Presumably this Kantian principle too holds only for "self-regarding" choices. It allows us to prevent a religious fanatic from killing those whom he thinks have blasphemed his deity even if we cannot justify our interference to him by appeal to his own beliefs and values.

<sup>17</sup> Gerald Dworkin, "Paternalism," *The Monist* 56 (1972) pp. 64-84.

<sup>18</sup> Another example of hard AE is forcing someone who prefers to make a choice in ignorance of certain facts to be informed—something that Feinberg condemns in *Harm to Self*, p. 311.

The more radical of the libertarian choice-based accounts correctly implies that interference would infringe Clint's autonomy. The objection to it is that it supports the wrong judgment in the weak-willed drivers example, as well as the original bridge crosser case and cases like it (i.e. a warning is not feasible and there was no prior consent to the interference). Especially in the latter cases the claim that there is *any* infringement of autonomy at all, much less a wrongful one, seems implausible in the extreme.<sup>19</sup>

It might be objected that CP does not support the right judgment in other cases. Consider Clint's pal:

*Tea Party Thomas.* Thomas drives a pick-up with an "I love my country but fear my government" bumper sticker. He is convinced that gun registration laws and any state paternalism, including seat belt laws, put us on a "road to serfdom." Thomas's distrust of bureaucrats and experts runs so deep that he doubts their assurances that statistics bear out the wisdom of always buckling up. "I've heard stories about people who burned to death in accidents when their cars caught fire and they couldn't escape because their seat belts wouldn't unbuckle."

Thomas's beliefs that seat belt laws put us on the "road to serfdom" and that wearing a seatbelt is more dangerous than not wearing one are false and unreasonable. In light of that, doesn't CP imply, incorrectly, that forcing Thomas to wear his seat belt respects his autonomy?

It does not. Different people have different preferences about whether anyone should ever interfere with their self-regarding choices, and if so, how and when. At one extreme are people who want a trusted moral or "spiritual" authority to interfere with any of their choices whenever it judges them misguided. Dostoevsky's Grand Inquisitor insisted that most people are like this. At the opposite extreme are people like Clint. Most people in our society lie between these extremes. We all necessarily "prefer" rational or optimal to irrational or suboptimal choices. However, having made a suboptimal choice, many of us *prefer* to be allowed to act on it rather than to be *forced* by others to do what maximizes our preference satisfaction—at least when we are responsible for the irrationality (unlike the sailors who hear the Sirens' song) and the choices would not create too high a risk of imminent and irreversible harm to self. A "full instrumental and epistemic rationality" version of the CP test implies that enforcing seat belt laws against drivers with either this weaker preference for autonomy or Clint's stronger one (and Tea Party Thomas surely has one or the other) *does* violate their right to autonomy.<sup>20</sup> On the assumption that a bridge

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<sup>19</sup> For further discussion of this libertarian account of the right to autonomy and its shortcomings, see Steve Wall, "Self Ownership and Paternalism," *The Journal of Political Philosophy* v. 17, no 4 (2009) 399-417.

<sup>20</sup> VanDeVeer (*Paternalistic Intervention*, p. 72) imagines a chess playing computer that monitors a human chessplayer and prevents him from making any poor moves. He objects to a full economic and epistemic rationality version of CP on the grounds that it permits the computer's overbearing paternalism. But

crosser who ignores warnings of grave danger has the weaker preference—he values making and acting on his own choices even when they are bad but not when they are imminently and disastrously so—then the CP test agrees with Feinberg (and disagrees with the other two, more libertarian choice-based accounts) that coercive interference in his case respects his right to autonomy.

There is one feature of the right to autonomy that the choice-based accounts get right and CP as described so far does not. Suppose that a member of a religious cult authorizes the other members to kidnap and reprogram him should he ever try to leave it because he no longer accepts its teachings. One day he decides to leave for that reason, and the next day the others drag him back to their compound, kicking and screaming, for the reprogramming that he earlier authorized but no longer supports. The cult's interference with his choice to leave does not violate his right to autonomy even though it does not pass the CP test. All of the choice based accounts get this case right because they agree that interference with fully voluntary choices is no violation of autonomy if one earlier explicitly authorized it.<sup>21</sup> This shows that the CP test should be amended to say that interference does not violate one's autonomy just in case: i) one's rational, well-informed self would authorize it given one's current preferences, OR ii) one previously explicitly authorized it. Prior, actual authorization that is not the result of coercion, brainwashing, etc. is not necessary for interference to respect one's autonomy, but it is sufficient for it. Call this the hybrid CP test. It is hybrid because it combines elements of the preference and choice-based accounts.

Consider now:

*Live For Today Larry.* Larry has strong now-for-now preferences for the euphoria produced by using meth and weak or non-existent now-for-much later preferences for a long and happy life with a high level of autonomy. Larry's motto is "Live for today, die tomorrow, and leave a beautiful corpse."

Does interfering with Larry's meth use for his own good—say, forcing him to enter a drug rehab program—infringe his right to autonomy? The hybrid CP test says "yes" because Larry never previously authorized it and would not now do so if he were instrumentally rational and well informed. Instrumental rationality, or what Derek Parfit called the "present aim" theory of practical rationality, does not require that one have any concern for either one's future well being or one's future preference satisfaction.<sup>22</sup> "Yes" seems the right answer even though there is a clear sense in which coercion that prevents Larry's meth use would be

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CP does *not* have that implication if, as VanDeVeer assumes, the human prefers making his own unassisted moves to making the very best ones.

<sup>21</sup> Arneson noted this feature of the right to autonomy in "Mill vs Paternalism." I take it that while our cult member's right to autonomy has not been violated, it's a separate question whether his abductors should be subject to criminal sanctions.

<sup>22</sup> Derek Parfit, *Reasons and Persons* (Oxford University Press, 1984), pp. 117-26.

“justifiable to him” even if not justifiable to him on the basis of his current preferences and values. The claim that because of his present preferences, there is nothing unreasonable about Larry’s desire for meth-induced euphoria now, even at the cost of a high probability of misery, low autonomy, and premature death years later, presupposes Humean skepticism about the limits of practical reason. Such skepticism is mistaken; reasonable people are prudent and value their future well being. Still, it would be dishonest to say that the coercion does not “really” infringe Larry’s autonomy at all because it is justifiable to a hypothetically prudent Larry. Any version of a hypothetical consent test that ignored one’s actual values and assumed that one’s “true, rational self” could not have any false values or foolish goals would be, as Isaiah Berlin put it, a “monstrous impersonation” of what respect for autonomy requires.<sup>23</sup> Anyone who defends forcing Larry into a rehab center for his own sake ought to be honest and admit that the strict paternalism or temporally neutral AE she favors here is hard.

### Some possible views about the right’s strength and scope

Earlier we said that the right to autonomy protects choices that are self-regarding only in the sense that they do not violate others’ rights. It is possible for some restrictions on choices that are “self-regarding” in this sense to benefit others. This means that there are at least three ways to understand the claim that the right to autonomy is “absolute.” It could mean that the right may *never* be infringed in order to:

- i) promote the prudential good, increased autonomy, or conceptions of the good of *others*,
- ii) promote the right bearer’s *own* prudential good, increased autonomy, or conception of the good, or
- iii) prevent a “harmless immorality” by the person in question, that is, a wrong act that violates no one’s rights and reduces no one’s welfare or autonomy.

The claim that the right is absolute vis-à-vis “moralistic” reasons means that *when* moralistic interference infringes the right to autonomy, it is always wrong. If the right to autonomy is cashed out in terms of a hybrid CP test, then an example of “soft” moralism might be one orthodox Jew’s forcing a second to wait to eat till his craving for a delicious but non-kosher food passes. Note that this will be moralism, not either AE or “loose” paternalism, only if the first Jew is motivated by the conviction that God’s laws must be followed, not by any worry about the second Jew’s weakness of will. His motivation determines whether his interference is moralism, AE, loose paternalism, or strict paternalism but is irrelevant to whether it would infringe a right to autonomy.

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<sup>23</sup> Isaiah Berlin, “Two Concepts of Liberty” in *Four Essays on Liberty* (Oxford University Press, 1969), p. 134.

We noted one way in which Feinberg's choice-based account of the right's content differs from the libertarian's. Another important difference in their views is that for Feinberg the right is absolute only in respects ii) and iii), whereas for the libertarian it is absolute in all three respects. Feinberg perhaps nowhere explicitly says that the right is not absolute vis-à-vis the good of others, but he *must* believe that it isn't given the legal policies he supports on soft paternalist grounds. These policies include requiring all motorcycle license applicants to attend seminars that inform them of the risks of helmetless riding, detaining for psychiatric screening those intent on self-mutilation, and the state's refusal to enforce any perpetual slavery contracts.<sup>24</sup> In each case the state infringes the autonomy of a few (e.g. the motorcyclists who are already well informed about risks, don't wish to wear helmets, and don't wish to attend the seminars) in order either to increase the autonomy of the many or verify that the choices of the many are "voluntary enough." To the few Feinberg says (my paraphrase): "the restrictions on your liberty are for the sake of the many, not you."<sup>25</sup> The libertarian, by contrast, denies that the autonomy rights of the few may be limited in order to promote the greater autonomy or welfare of the many. Thus, she must oppose all three of the legal policies just mentioned that Feinberg finds acceptable. Libertarians who follow Nozick in treating rights as absolute side-constraints must say that it is wrong for the state to violate the autonomy rights of *just one person* in order to ensure that *millions* of others are not harming themselves involuntarily.

I assume that Feinberg is right and the libertarian wrong on this issue. Seat belt laws may infringe the autonomy rights of people like Clint and Tea Party Thomas, but they are clearly justified on account of the enormous good they do—the lives saved and crippling injuries prevented—for society as a whole. Therefore, the right to autonomy is not absolute vis-à-vis the goal of increasing the welfare of others. In this respect it is no different from other rights. If I cross your land without your permission then I infringe your property rights. But if the trespass is necessary to get a seriously injured accident victim to the hospital in a timely fashion for life saving treatment, there is no doubt that it's justified (even if neither of us can pay you adequate compensation for the trespass).

Is the right to autonomy absolute in the respect that Feinberg alleges—vis-à-vis one's own prudential good? One way to defend an affirmative answer to this question is by arguing that there is not even a *prima facie* case in favor of strict, hard paternalism. The hard paternalist must claim that her target holds a mistaken view of where his prudential good lies or a mistaken view of its value compared to other values (e.g. respecting God), and it might be objected that any

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<sup>24</sup> For the argument concerning motorcycle helmets, see *Harm to Self*, p. 136; for voluntary slavery contracts, p. 79; and for detention and screening for self-mutilators, p. 126.

<sup>25</sup> To prudent savers with no wish to contribute to Social Security, Feinberg's response is, "you must participate even if you think that it is not in your interest to do so, because it is manifestly in the interests of all the others, and the public interest too, that you do so. The compulsion is for their sakes, not yours." *Harm to Self*, p. 18.

such claim is undercut by *skepticism about the good*. Such skepticism seems to me to inform much recent theorizing about the liberal state and its justification. The case for “liberal neutrality” seems to me to rest on it. But there are many reasons why we should reject it, perhaps the main one being that it would if warranted render pointless much first person practical reflection. Consider, for example, the smoker who wonders what is the minimum average number of years in reduced lifespan suffered by lifelong smokers such that she should be willing to forego the pleasures of smoking to avoid that reduction. In seeking an answer to this question she hopes to avoid error. I don’t claim that the question has a specific, correct answer (e.g. “8.5 years”). But if skepticism about the good were warranted, there would not be even a range of correct answers, and thus, no point to our smoker’s fretting over whether her answer lies within it. In trying to determine which she should prefer more, pleasure or longevity, she might as well flip a coin.

An absolute right does not have to be defended on the basis of skepticism about the good. Some may insist that it is a natural right neither capable of nor in need of further justification. But suppose that through an act of deception I can prevent my immature, 18 year old son who just graduated from high school from partying with delinquent classmates heavily into hard drug use. Tomorrow he leaves for Notre Dame, where he will live in the dorms and be surrounded by highly virtuous students whose virtue I hope and expect will rub off on him as he matures. He’ll never find out about my deception or the lost partying opportunity. It seems to me that even if my paternalistic deception violates his right to autonomy according to the hybrid CP test, I as his father needn’t lose much sleep over whether I acted unjustly.

There are countless examples of a similar sort, where a private person or the state employs noncoercive (but still “nonrational”) means to get others to avoid acting in very imprudent ways. Consider manipulative anti-tobacco ads that portray smoking as uncool and unsexy in an attempt to induce impressionable teens and young adults to avoid it. Or suppose that the state in an attempt to reduce supply and thereby use criminalizes only the selling and manufacture, not the purchase or use, of meth or crack. Though this policy reduces the options of would be users, its coercive threats are aimed at sellers and manufacturers, so its paternalism as regards users is “indirect” or “impure.” It is hard to take seriously the suggestion that these examples of state paternalism are wrong *no matter how much good they do* their intended beneficiaries because they violate a natural right to autonomy that is absolute vis-à-vis promotion of one’s own welfare.

To sidestep this objection, defenders of an absolute right are well advised to accept limits on its scope—on the kinds of “interference” that can possibly violate it. They might stipulate that it is absolute only as regards: i) any interference that restricts liberty; or ii) any *state* imposed restrictions on liberty; or iii) any state restrictions on liberty *via criminal sanctions*. The last, strongest limit is the one that Feinberg supports in *Harm to Others*.<sup>26</sup> Feinberg judges criminalization to be special because it is stigmatizing in a way that other

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<sup>26</sup> See *Harm to Others*, pp. 23-4.

restrictions on liberty like taxation are not. For this reason he judges taxation but not fines to be a means by which the state can pursue the paternalistic goal of discouraging smoking without violating smokers' right to autonomy.

The problem with building any of the three suggested limits into the right in order to sidestep the objection based on the examples of lying to my son, manipulative anti-smoking ads, etc. is that it is bound to seem *ad hoc* unless there is some deeper theoretical motivation for doing so. But it is hard to see what that motivation could be. If one gives up on the idea that the right is "natural" and defends it on the basis of a Kantian "respect for persons" principle requiring that one's treatment of others be justifiable to them, then there is no reason to treat compulsion and coercion—even criminalization—as special. Deceiving you for your own good when you haven't and wouldn't consent to it "uses" you as a "means" to an end that cannot be justified to you by appeal to your own values, no less than coercing you in the same circumstances would. The Kantian principle also provides no reason to think that coercion or manipulation by the state is more wrong than similar coercion or manipulation by an individual.

#### Against an "absolute" right to autonomy

If the Kantian principle of respect for persons cannot justify a right to autonomy that is absolute vis-à-vis promotion of one's own good but limited such that only state imposed restrictions on liberty ever violate it, then we should suspect that imposing that limit on the right is *ad hoc*. I now want to argue that even if there were some principled way to motivate the limit, such a right should still be rejected. Its absoluteness has several unacceptable implications.

One reason why we should reject it is that it, in combination with the view that it exists only when certain thresholds are met, supports moral distinctions that we should find arbitrary and irrational. Consider who is supposed to have an absolute autonomy right as defined by the hybrid CP test. The answer, presumably, is all and only competent persons, not small children, the severely cognitively disabled, the demented, etc. Having some right to autonomy is part of what it means to be a normative person. Normative personhood supervenes on psychological personhood, which is not (metaphysical) libertarian free will, a capacity that is mysterious (not subject to the laws of nature), indivisible, and all-or-nothing, like a soul. Rather, it consists in the possession of several natural, psychological capacities—to form a conception of one's long term good, anticipate the consequences of acting on different options, control one's impulses, and so on. These capacities ("autonomy capacities"), being natural, admit of degrees. Liberal egalitarianism implies that psychological personhood is a threshold concept, meaning that everyone whose autonomy capacities surpass some minimal level enjoys the normative status equally.<sup>27</sup> So even though Jill's

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<sup>27</sup> For a defense of psychological personhood as a range or threshold concept, see John Rawls, *A Theory of Justice* (Harvard University Press, 1971), pp. 504-512; and Daniel Wikler, "Paternalism and the Mildly Retarded," *Philosophy and Public Affairs* v. 8 no 4 (Summer 1979) 377-92. For criticism of

self-control and ability to do complicated cost-benefit analyses on her options are greater than Jack's, if his autonomy capacities just barely surpass the minimal level, then he is a normative person no less than Jill. According to the view we are considering, that means that he has a right to autonomy that's no less absolute than hers. Now this view has the following implication: interference with Jack's self-regarding choices that fails the hybrid CP test is impermissible even if it would benefit him *enormously*, while interference with *any* of the choices of those whose autonomy capacities fall *just short* of the threshold (the average 16 year old?) is permissible even if it benefits them only marginally. This seems arbitrary and irrational.<sup>28</sup>

Feinberg's view is not vulnerable to this objection because Feinberg does not hold that one's autonomy capacities must surpass some minimal level in order for one to possess the right. Lack of "competence" is for him only one voluntariness-diminishing factor among many. But precisely because Feinberg does not limit a right to autonomy in this way, his view is vulnerable to another objection. It implies that the right protects an eight year old child's choice between wearing the red or the green shirt to school today as much as it protects the adult Jehovah's Witness's choice to accept or refuse a blood transfusion. Surely that extends the reach of the right (the moral rather than the legal one) too far. It is counterintuitive in the extreme to think that the right protects the harmless and trivial self-regarding choices of those with low competence as much as it protects the momentous self-regarding choices of those with high competence. The mother who dictates to her third grader every detail of how he should dress for school is guilty of poor parenting, not a rights violation.

A second reason why we should reject an absolute but limited right to autonomy is that it does not provide the *right* explanation for the wrongness of the following paternalism. Consider a state that attempts to coerce its citizens via fines and short jail sentences to convert to what it insists is the true religion, belief in which is necessary to avoid eternal damnation. The coercion infringes the right to autonomy of anyone who rejects its view that it knows best how to save her soul. But if this state's claims about the religion that it favors are *true*, then the benefit of its paternalism, if successful, will be *infinite*. Even if the probability of its successfully producing sincere belief change in any one person via its coercion is small, as long as it is greater than zero its expected benefits will still be infinite. Wouldn't it be right for a state to infringe its citizens' autonomy via mildly coercive measures if the expected benefits were *infinite*? I do not see how this can sensibly be denied. Yet if the right to autonomy were absolute, this state's coercion would be wrong even if *it really did know* that it would save many from an eternity in Hell. Surely liberal political morality is not committed to so

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this view and of attempts to ground a commitment to moral and political equality on it, see Richard Arneson, "What, If Anything, Renders all Humans Morally Equal?" in Dale Jameson (ed.), *Peter Singer and His Critics* (Blackwell, 1999).

<sup>28</sup> Kalle Grill, "Anti-paternalism and the Invalidation of Reasons," *Public Reason* 2 (2010) 3-20, lodges a similar objection to an absolute right to autonomy.

outlandish a claim.<sup>29</sup> The right explanation for why this paternalism is wrong seems to be that it is “reasonable” for this state’s citizens to doubt its claim to know that belief in one particular religion promises infinite prudential benefit. It is reasonable to doubt this either because of what Rawls calls “the burdens of judgment” or because religious skepticism is true. This objection to the paternalism is at bottom consequentialist rather than rights-based.

Though an absolute autonomy right does not provide the right explanation for why all liberals condemn this paternalism, it might be objected that it is necessary to explain other moral judgments that are bedrock for all liberals. Isn’t a commitment to it necessary to explain why liberals of all stripes condemn forcing a life-saving blood transfusion on an unwilling Jehovah’s Witness? This is an important objection to the view I’m defending. But instead of trying to answer it here, I wish to turn the tables on the objector. There is another reason why at least those of us who are nonlibertarian liberals must reject an absolute autonomy right: it probably rules out as impermissible many state restrictions on individual liberty that we regard as permissible at least *in principle* (which is consistent with rejecting some of them on grounds of efficiency, costly side-effects, and so forth). These restrictions include a law requiring motorcyclists to wear helmets, an anti dueling law, usury laws, Social Security, and limiting eligibility for physician-assisted suicide to the terminally or severely ill. I don’t claim that there is no nonpaternalist or soft paternalist rationale for any of these measures. But it is disingenuous to pretend that hard paternalism does not figure in the justification of any of them.

Consider mandatory contributions to a publicly run retirement annuity—in the U.S., Social Security. Its main beneficiaries are those who would fail to save enough for retirement if left to their own devices. Suppose that they make up the majority of society’s members. The law must also apply to the minority, that is, prudent persons who would be excellent retirement planners. It must apply to both groups simply because it is neither wise nor feasible to set up a government agency charged with determining who is prudent enough to manage her own retirement savings plan. Social Security harms those in the prudent minority because the money they must contribute to it would have gone into a privately managed account that nets them a higher return. Perhaps some of them would consent to the law despite the fact that it leaves them worse off because they are public-spirited and see it as promoting their communitarian values. Still, many have not and would not consent to it, so the law violates their autonomy. That does not make it hard paternalism, though, because none in the prudent minority are among the law’s intended beneficiaries.<sup>30</sup> Suppose that the majority of those

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<sup>29</sup> This example lends credence to Arneson’s assertion that “absolutist antipaternalism, like absolutist insistence on upholding any moral right, is fanaticism.” See his “Joel Feinberg and the Justification of Hard Paternalism,” *Legal Theory* 11 (2005) 259-284

<sup>30</sup> I assume that a law that restricts the liberty of everyone in a class is paternalistic insofar as its purpose is to protect *some* in the class (not necessarily a majority) from self-inflicted harm. It is hard paternalism insofar as it does that *and* infringes the autonomy right of *some* of those whom it is meant to benefit.

in the imprudent majority fail to save owing to weakness of will, and they would support mandatory contributions as a precommitment strategy to cope with their own admitted irrationality, just as Ulysses agreed to have himself tied to his ship's mast. Then the law is soft paternalism as applied to them. It will also be soft paternalism for others in the imprudent majority who would fail to save only because they do not appreciate the power of compound interest and mistakenly believe that postponing saving for a couple of decades would leave them enough time to build up a large enough nest egg. But the imprudent majority includes some with Live-for-Today Larry type values as regards promoting their present vs. future wellbeing, and Social Security's mandatory withholding applied to them infringes their autonomy. Since they are among the law's intended beneficiaries, the law's justification depends *in part* on hard paternalism.

A possible rationale for a compulsory savings policy that avoids paternalism altogether appeals to what Dworkin and Feinberg call the "psychic costs" that non-savers would impose on others.<sup>31</sup> The idea is that in a society filled with elderly people who cannot support themselves and are indigent because of their earlier, imprudent failure to save for retirement, others who are benevolent and well off will feel compelled to support them, and that imposes on them an unfair burden. So people like Live for Today Larry should be forced to save, to prevent these unfair burdens on others.

But there is something odd about this rationale. If I am benevolent and value Larry's welfare, then it's true that my knowing of his suffering creates psychological costs for me. But if I am truly benevolent then the reason I want to block his imprudent choices is that they are *bad for him*; it is not that watching him suffer is *bad for me*. If the latter were my reason, I should ingest a magic pill that reduces my benevolence if such a pill is available and less costly than trying to thwart his imprudence. I would have to regard not just Larry's imprudence but my benevolence toward him as creating a burden on me. Perhaps it is not impossible for someone to be genuinely benevolent and at the same time wish for egoistic reasons that he weren't so benevolent. But I am pretty sure that I am not such a person and that many others who support a policy of mandatory saving for retirement aren't either. Neither soft paternalism nor the psychic costs argument can explain their support for the policy as it applies to people like Live-for-Today Larry. Only hard paternalism can.

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Thus, I disagree with Douglas Husak, who argues that the hard/soft distinction is clearly applicable only to paternalistic acts that target a single person and not to laws that target a large class of persons. See his "Legal Paternalism" in Huge LaFollette (ed.), *Oxford Handbook of Practical Ethics* (Oxford University Press, 2003).

<sup>31</sup> See *Harm to Self*, pp. 139-41 and Gerald Dworkin, "Paternalism: Some Second Thoughts," in Rolf Sartorius (ed.), *Paternalism* (University of Minnesota Press, 1982).