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# Counting the Dragon's Teeth and Claws: the Definition of Hard Paternalism

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# Counting the Dragon's Teeth and Claws: the Definition of Hard Paternalism

## **Abstract**

In his classic 1897 essay, *The Path of the Law*, Oliver Wendell Holmes Jr. warned against blind imitation of the past and called for "enlightened skepticism" toward the law. He described the first step of this critical examination as getting "the dragon out of his cave and on to the plain and in the daylight" so that "you can count his teeth and claws and see just what is his strength." Over the past thirty years, disagreements over the appropriate definition of "paternalism" have often masked further disputes over the circumstances under which the restriction of substantially autonomous self-regarding conduct is permissible. Holmes' dragon, hard paternalism in this case, has remained hidden in its cave.

In this article, I pull the dragon out of its cave so that we can get a good look at him. I address the conceptual problems surrounding paternalism by rigorously defending a definition of "hard paternalism" containing logically individually necessary and jointly sufficient conditions. Moreover, the benefits of a clear and comprehensive definition are not only conceptual. Defining hard paternalism with an adequate degree of precision will enable more useful normative dialogue about the conditions under which hard paternalistic restrictions are justifiable.

## **Keywords**

Paternalism, Autonomy

## **Disciplines**

Civil Rights and Discrimination | Law and Society

# COUNTING THE DRAGON'S TEETH AND CLAWS: THE DEFINITION OF HARD PATERNALISM

Thaddeus Mason Pope\*

## ABSTRACT

In his classic 1897 essay, *The Path of the Law*, Oliver Wendell Holmes, Jr. warned against blind imitation of the past and called for enlightened skepticism toward the law.<sup>1</sup> He described the first step of this critical examination as pulling “the dragon out of his cave and on to the plain and in the daylight” so that “you can count his teeth and claws and see just what is his strength.”<sup>2</sup> Over the past 30 years, disagreements over the appropriate definition of “paternalism” have often masked further disputes over the circumstances under which the restriction of substantially autonomous self-regarding conduct is permissible. In the case of Holmes’ dragon, hard paternalism has remained hidden in its cave.

In this Article, I pull the dragon out of its cave to closely examine it. I address the conceptual problems surrounding paternalism by rigorously defending a definition of “hard paternalism” that contains logical, necessary, and jointly sufficient conditions. Moreover, the benefits of a clear and comprehensive definition are not only conceptual. Defining hard paternalism with an adequate degree of precision will enable more useful normative dialogue about the conditions under which hard paternalistic restrictions are justifiable.

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1. See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

2. *Id.*

## INTRODUCTION

Paternalism is the restriction of a subject's self-regarding conduct primarily for the good of that same subject.<sup>3</sup> The concept of "paternalism" is widely employed by writers of academic legal literature, judicial opinions, and legislative reports.<sup>4</sup> It is a basic organizing principle in the law.<sup>5</sup> Paternalism is, for example, the operative (even if often unrecognized) rationale limiting the assumption of risk doctrine in tort law.<sup>6</sup> Paternalism is at the

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3. See *infra* notes 3-7 and accompanying text. John Kultgen argued that the term "parentalism" is preferable to "paternalism" because it does "not incorporate a negative evaluation in its very definition . . . as to bias judgment." JOHN KULTGEN, *AUTONOMY AND INTERVENTION: PARENTALISM IN THE CARING LIFE* 61 (1995); see also *id.* at 48; AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 400 n.69 (1996) ("As John Locke long ago pointed out, the more appropriate term is 'parentalism' . . ."); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 2D TREATISE §§ 52-53, at 345-46 (Cambridge Univ. Press 1960) (1698). However, philosophers and commentators have generally rejected Kultgen's proposed usage. See generally TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 319 n.25 (4th ed. 1994); JAMES F. CHILDRESS, *WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE* 8 (1982) ("I will use 'paternalism' more frequently because it has a sharper and clearer 'system of associated commonplaces.' It is also hallowed by numerous practical and theoretical discussions."); JOHN KLEINIG, *PATERNALISM* xiii (1984) (admitting the attractiveness of the alternate vocabulary but choosing, nevertheless, to "bow to convention"); NINA NIKKU, *INFORMATIVE PATERNALISM: STUDIES IN THE ETHICS OF PROMOTING AND PREDICTING HEALTH* 18 n.2 (1997) (choosing the "notion paternalism" because "it has a sharper and clearer association"); DENNIS F. THOMPSON, *POLITICS ETHICS AND PUBLIC OFFICE* 148 (1987); Gillian Brock, *Review of Autonomy and Intervention: Parentalism and the (Overly?) Caring Life*, 6 *BUS. ETHICS Q.* 533, 539 (1996) [hereinafter Brock, *Parentalism*] (rejecting the use of the term "parentalism" because it has "connotations which are just as negative as the term 'paternalism'"); Eyal Zamir, *The Efficiency of Paternalism*, 84 *VA. L. REV.* 229, 229 n.1 (1998) (using "paternalism" because "it is the term almost invariably used in the relevant philosophical, economic, and legal literature").

4. See, e.g., *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 85-86 (2002) (stating that the Americans with Disabilities Act ("ADA") was meant to outlaw "workplace paternalism" only in the form of "sham protection" offered by employers to prevent disabled workers from working); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (rejecting paternalistic justifications for restrictions on speech); H.R. REP. NO. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356 (identifying "paternalism" as "perhaps the most pervasive form of discrimination for people with disabilities"); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763 (1983); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 *VA. L. REV.* 519 (1988).

5. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563, 631-36 (1982).

6. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 18 (4th ed. 1971).

The attitude of the courts has not, in general, been one of paternalism. Where no public interest is contravened, they have left the individual to work out his own destiny, and are not concerned with protecting him from his own folly in permitting others to do him harm. In the field of negligence, this policy has been given effect by the doctrine of assumption of risk, which relieves the defendant of the obligation to exercise care.

*Id.* § 101; see also 4 JOEL FEINBERG, *HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW* 214-15 (1990) [hereinafter FEINBERG, *HARMLESS WRONGDOING*] ("[T]he harm principle unmediated by *Volenti* collapses into paternalism."); KULTGEN, *supra* note 3, at 166 (providing as an

normative center of increasingly pressing public health questions concerning the permissibility of restrictions on the consumption of tobacco products and sugary, fatty foods.<sup>7</sup>

Nevertheless, despite its pervasive use, the concept of paternalism lacks a clear and crisp definition. Some writers use the term paternalism to mean "soft paternalism." Other writers use the term paternalism to mean "hard paternalism." However, these two forms of paternalism must not be confused. Soft paternalism, restricting a subject's self-regarding conduct where the conduct is *not* substantially voluntary, is morally uncontroversial.<sup>8</sup> Hard paternalism, restricting a subject's self-regarding conduct where the conduct is substantially voluntary, on the other hand, is very morally controversial and presents interesting and difficult moral questions.<sup>9</sup>

Because considerable and meaningful differences exist between the two main *types* of paternalism—"hard" (also known as "strong") paternalism and "soft" (also known as "weak") paternalism—writers ought not to use the term paternalism by itself, without adjectival modifiers. Rather, they should always refer to the specific type of paternalism with which they are dealing. Otherwise, writers might readily endorse a policy option under the assumption that it involves soft paternalism when it really involves hard paternalism. On the other hand, writers might dismiss a policy option as unavailable under the assumption that it involves hard paternalism when it really involves soft paternalism. In other words, the failure to distinguish hard paternalism from soft paternalism may cause writers to employ

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example of indirect pure paternalism "denial of assumption of risk as a defense against actions against a person for violation of safety statutes"); DONALD VANDEVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS ON BENEVOLENCE 172 (1986) ("The effect of consent . . . is that no tort has occurred . . ."); Gerald Dworkin, *Paternalism, in MORALITY AND THE LAW* 107, 109 (Richard Wasserstrom ed., 1971) [hereinafter Dworkin, *Paternalism—MORALITY*] (providing as an example of paternalism "[n]ot allowing assumption of risk as a defense to an action based on the violation of a safety statute").

7. See, e.g., *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003); Daniel Callahan & Bruce Jennings, *Ethics and Public Health: Forging a Strong Relationship*, 92 AM. J. PUB. HEALTH 169 (2002); Note, *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161 (2003); Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 472-97 (2000) [hereinafter Pope, *Smoking Regulations*]; Jacob Sullum, *Thinning the Herd: Is Your Weight the Government's Business?*, REASONONLINE, June 13, 2003; Kate Zernike, *Food Fight: Is Obesity the Responsibility of the Body Politic?*, N.Y. TIMES, Nov. 9, 2003.

8. See *infra* Part II.

9. See *infra* Part IV.A-B.

the wrong set of justificatory criteria and, as a result, to incorrectly frame important questions concerning the protection of persons from themselves.<sup>10</sup>

I contend that the confusion between hard paternalism and soft paternalism results in large measure from the lack of a precise definition of hard paternalism.<sup>11</sup> Without a clear conceptual demarcation, the boundary between hard paternalism and soft paternalism remains blurred. This Article attempts to bring the boundary into focus.

In Part I, I explain that both soft paternalism and hard paternalism are liberty-limiting principles.<sup>12</sup> Each concept provides a basis for overcoming the liberal presumption against interference with liberty. In Part II, I briefly define soft paternalism as the limitation of a subject's liberty where the subject does not act substantially autonomously.<sup>13</sup> In other words, soft paternalism is the restriction of self-regarding conduct to which the subject does not consent. While soft paternalism is often difficult to implement, it is no longer of serious theoretical interest.<sup>14</sup> Both ethical rules and legal doctrines already employ a well-developed explanation of the circumstances under which nonconsensual conduct may be restricted.

On the other hand, an explanation of the circumstances under which consented conduct may be restricted requires attention. Such an explanation is outside this Article's scope, but in order to better frame such inquiries, I carefully define hard paternalism in Part III.<sup>15</sup> By defending a set of logically necessary and sufficient conditions, I define hard paternalism as, roughly, the limitation of a subject's liberty where the subject acts substantially autonomously. In other words, hard paternalism is the restriction of self-regarding conduct to

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10. See Shapiro, *supra* note 4, at 522 ("Commentators have disagreed about the appropriate definition of paternalism, and sometimes these disagreements mask further disputes over what is morally permissible.")

11. However, some of the confusion of hard paternalism and soft paternalism is a result of deliberate attempts by writers to mask the latter as the former. See Thaddeus M. Pope, *Is Paternalism Really Never Justified? A Response to Joel Feinberg*, 29 OKLA. CITY U. L. REV. (forthcoming 2004) [hereinafter Pope, *A Response*].

12. See *infra* Part I.

13. See *infra* Part II.

14. See, e.g., Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 752 (2003).

15. See *infra* Part III.

which the subject consents. In Part IV, I present and respond to objections and counterexamples to my definition of hard paternalism.<sup>16</sup> Finally, I conclude that my definition will introduce needed clarity and precision into important and ongoing dialogues concerning the conditions under which an agent may justifiably restrict an individual's substantially autonomous self-regarding conduct.<sup>17</sup>

### I. LIBERTY-LIMITING PRINCIPLES

As a matter of social, political, and moral fact, our culture places a high value on autonomy.<sup>18</sup> This has become a generally recognized

16. See *infra* Part IV.

17. See *infra* Part V.

18. In the United States, a strong liberal "individual rights" attitude exists which indicates that "as long as individuals understand the hazards involved, they should be free to engage in [any] risky activity that provides them with personal satisfaction." SMOKING POLICY: LAW, POLITICS, AND CULTURE 7 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). Modern Western society places a high value on individual rights, autonomous decision making, and the protection of the private sphere from government intrusion. See *generally* *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . ."); *Natanson v. Kline*, 350 P.2d 1093, 1104 (Kan. 1960) ("Anglo-American law starts with the premise of thorough-going self-determination."); *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . ."), *overruled on other grounds*, *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957); PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 44-51 (1982) [hereinafter PRESIDENT'S COMMISSION REPORT]; Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 137 (1969); 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 9 (1984) [hereinafter FEINBERG, *HARM TO OTHERS*] ("[M]ost writers on our subject have endorsed a kind of 'presumption in favor of liberty' . . ."); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 9, 14, 207, 211-12 (1986) [hereinafter FEINBERG, *HARM TO SELF*]; MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 22-36 (1962); WILLARD GAYLIN & BRUCE JENNINGS, *THE PERVERSION OF AUTONOMY: THE PROPER USES OF COERCION AND CONSTRAINTS IN A LIBERAL SOCIETY* 58 (1996) ("Autonomy has ceased to be one value among many and has assumed pride of place as the moral touchstone of our personal lives and our social institutions."); *id.* at 54 ("[Autonomy] has been elevated to first place among the things we value and want to protect."); UDO SCHÜKLENK, *ACCESS TO EXPERIMENTAL DRUGS IN TERMINAL ILLNESS: ETHICAL ISSUES* 9-10 (1998); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 *STAN. L. REV.* 875, 875-76 (1994); Perri 6, *The Morality of Managing Risk: Paternalism, Prevention and Precaution, and the Limits of Proceduralism*, 3 *J. RISK RES.* 135, 155 (2000); Kevin P. Quinn, *Viewing Health Care as a Common Good: Looking Beyond Political Liberalism*, 73 *S. CAL. L. REV.* 277, 286, 302 (2000) (calling "liberal individualism" "America's predominant *weltanschauung*," "the de facto public philosophy in America," and "[o]ur cultural gestalt"); Robert L. Rabin, *Some Thoughts on Smoking Regulation*, 43 *STAN. L. REV.* 475, 479 (1991) ("Once information about risk has been adequately conveyed, the standard liberal position holds that individual choice should be respected rather than limited."); *id.* at 482 ("[O]ur political culture has resisted telling individuals what is good for them . . ."); Albert Weale,

feature of the Western-American classical liberal tradition, particularly as society has reinvigorated that tradition since the consumer revolution of the 1960s.<sup>19</sup> Given the fact that "self-determination is highly valued in the cultural climate of western societies," any interference with individual liberty is presumptively invalid and demands justification.<sup>20</sup> As John Stuart Mill explained, "[T]he onus of making out a case always lies on the defenders of legal prohibitions."<sup>21</sup> Joel Feinberg similarly explained, "[T]he burden of proof is on the shoulders of whoever advocates legal coercion."<sup>22</sup> In short, the proponent of liberty-limiting state action always bears the burden of proving its moral justifiability.<sup>23</sup>

The presumption of noninterference with individual liberty, while strong, is rebuttable.<sup>24</sup> It is, after all, only a presumption. As Tom

*Paternalism and Social Policy*, 7 J. SOC. POL'Y 157, 169 (1978) [hereinafter Weale, *Paternalism*] ("[T]he chief objection to paternalistic intervention is that it interferes with the autonomy of the individual . . ."); Gary B. Weiss, *Paternalism Modernised*, 11 J. MED. ETHICS 184, 185 (1985) ("Civil rights, woman's [sic] equality movements, and consumerism have all emphasised the desire of people to be treated as self-determining agents."); Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 36-37 & nn.66-69 (1991); Peter L. Berger, *Furtive Smokers—and What They Tell Us About America*, COMMENTARY, June 1994, at 21, 26 ("[A] strong tradition of individual autonomy has existed in America, expressed in folklore and literature, in everyday patterns of interaction ('it's a free country!'), and of course in political institutions and law.").

19. See NIKKU, *supra* note 3, at 114; Dan W. Brock, *A Case for Limited Paternalism*, 4 CRIM. JUST. ETHICS 79, 84 (1985) [hereinafter Brock, *Limited Paternalism*]; Richard Bronaugh, *Review of JOHN KLEINIG, PATERNALISM*, 25 DIALOGUE-CAN. PHIL. REV. 800, 803 (1986); Bill New, *Paternalism and Public Policy*, 15 J. ECON. & PHIL. 63, 82 (1999).

20. See NIKKU, *supra* note 3, at 344.

21. 3 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 938 (J.M. Robson ed., 1965) [hereinafter PRINCIPLES OF POLITICAL ECONOMY]; *id.* at 950 ("Laissez-faire, in short, should be the general practice: every departure from it, unless required by some great good, is a certain evil.").

22. FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at 4; TOM L. BEAUCHAMP, PHILOSOPHICAL ETHICS 268 (3d ed., 2001) [hereinafter BEAUCHAMP, ETHICS] ("Liberalism embodies an attitude of distrust toward use of the coercive power of the state[.];"); VANDEVEER, *supra* note 6, at 92-94 (arguing that "there is a moral presumption against the legitimacy of invasive interference"); Loretta M. Kopelman, *Moral Problems in Psychiatry: The Role of Value Judgments in Psychiatric Practice*, in MEDICAL ETHICS 275, 301 (Robert M. Veatch ed., 2d ed. 1997) ("[I]nterference with the liberty of adults requires a heavy burden of proof . . .").

23. See *supra* notes 18-22.

24. See NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS 76, 80, 91-92 (1997); FEINBERG, HARM TO OTHERS, *supra* note 18, at 9 ("Liberty should be the norm; coercion always needs some special justification[.] . . . the 'presumptive case for liberty.'"); *id.* at 108; FEINBERG, HARM TO SELF, *supra* note 18, at 57 ("[W]e must reject legal paternalism, or at least hold it under grave suspicion ('presumptively false')."); FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at 66-67, 321; GERALD F. GAUS, VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY 396 (1990); JOHN KEKES, AGAINST LIBERALISM 8 (1997) ("[T]he claims of freedom may be legitimately restricted—the disagreements are over the question of how far and under what circumstances and for what reasons



Beauchamp and James Childress explained, respect for autonomy "has only prima facie standing and can be overridden by competing moral considerations."<sup>25</sup> This makes sense. Rejecting the legitimacy of all liberty-limiting principles—a position that one writer names "radical consumer autonomy"<sup>26</sup>—would be tantamount to a form of Max Stirner's unworkable radical individual anarchy.<sup>27</sup> An anarchic

its restrictions may be legitimate . . . ."); KLEINIG, *supra* note 3, at 4-5 (comparing paternalism to "killing," where, although no moral judgment is embodied, there is accorded sufficient importance to the life/death distinction to warrant our marking the circumstance" and "raises a moral question about it"); KULTGEN, *supra* note 3, at 38 ("Until all exceptive clauses are spelled out, rules [like autonomy] assert prima facie rights and may be overruled."); *id.* at 112; *id.* at 176 ("Since liberty is a central good, there is a moral presumption against all liberty-limiting measures.") (footnote omitted); NIKKU, *supra* note 3, at 19 ("[S]elf-determination . . . is not an absolute value but a prima facie value . . . ."); VANDEVEER, *supra* note 6, at 92-94 (arguing that "there is a moral presumption against the legitimacy of invasive interference"); *id.* at 306, 335-36; Sin Yee Chan, *Paternalistic Wife? Paternalistic Stranger?*, 26 SOC. THEORY & PRAC. 85, 87 & n.9 (2000) ("[T]here is a strong presumption against [autonomy's] violation, so that paternalism requires weighty reasons to be justified."); James F. Childress, *If You Let Them, They'd Stay in Bed All Morning*, in PRACTICAL REASONING IN BIOETHICS 59, 66 (1997); Ellen L. Fox, *Paternalism and Friendship*, 23 CANADIAN J. PHIL. 575, 579 (1993) (discussing, like Kultgen, paternalism in personal relationships); Lawrence O. Gostin, *Public Health Law in a New Century: Part III: Public Health Regulation: A Systematic Evaluation*, 283 JAMA 3118, 3118 (2000); Robert N. Harris, Jr., Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 581 (1967) [hereinafter Harris, *Adult Behavior*]; Tziporah Kasachkoff, *Paternalism and Drug Abuse*, 58 MT. SINAI J. MED. 412, 412 (1991) ("[S]ince we value the right of individuals to lead their own lives, . . . any interference with another's life . . . demands some justification."); Robert C. L. Moffat, *Cloning Freedom: Criminalization or Empowerment in Reproductive Policy?*, 32 VAL. U. L. REV. 583, 586 (1998); Michael Moore, *Liberty and Drugs*, in DRUGS AND THE LIMITS OF LIBERALISM: MORAL AND LEGAL ISSUES 61, 69 (Pablo De Greiff ed., 1999); Perri 6, *supra* note 18, at 140; Shapiro, *supra* note 4, at 570 (explaining that the presumption "should operate . . . as a screen at the legislative level"); *id.* at 544 ("[A]ntipaternalism is the presumption, at least when it comes to action on behalf of the state, and that the paternalist therefore always has the burden of persuasion."); Albert Weale, *Invisible Hand or Fatherly Hand? Problems of Paternalism in the New Perspective on Health*, 7 J. HEALTH POL. POL'Y & L. 784, 802-03 (1983) [hereinafter Weale, *Invisible Hand*].

25. BEAUCHAMP & CHILDRESS, *supra* note 3, at 126; see also TOM L. BEAUCHAMP, PHILOSOPHICAL ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY 388 (2d ed. 1991) [hereinafter BEAUCHAMP, MORAL PHILOSOPHY] ("Some valid restrictions on our liberty are entirely appropriate."); TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 5 (5th ed. 2001) ("All moral norms can be justifiably overridden in some circumstances.") [hereinafter BIOMEDICAL ETHICS].

26. Michael H. Cohen, *U.S. Dietary Supplement Regulation: Belief Systems and Legal Rules*, 11 HASTINGS WOMEN'S L.J. 3, 8 n.32 (2000).

27. See HETA HAYRY, THE LIMITS OF MEDICAL PATERNALISM 78 (1991) [hereinafter HAYRY, MEDICAL PATERNALISM]; Nicholas Capaldi, *Liberal Value Versus Liberal Social Philosophy*, 4 PHIL. & THEOLOGY 283, 286 (1990); James F. Childress & Courtney C. Campbell, "Who Is a Doctor to Decide Whether a Person Lives or Dies?": Reflections on Dax's Case, in PRACTICAL REASONING IN BIOETHICS 121, 123 (1997); Douglas N. Husak, *Liberal Neutrality, Autonomy, and Drug Prohibitions*, 29 PHIL. & PUB. AFF. 43, 54 (2000) [hereinafter Husak, *Liberal Neutrality*] ("Liberals must impose some limitations on the conception of the good that persons are allowed to pursue; they are not resigned to impassivity when persons pursue a conception of the good that includes a preference for murder or rape."); KURT MELVIN ARMSDEN, PATERNALISM: ITS SCOPE AND LIMITS 37-38 (unpublished dissertation 1989). Even libertarians do not permit individuals to do anything to themselves, drawing the line where individuals thereby undermine obligations to third parties. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 58 (1974). In contrast, anarchists would disallow not only paternalism

political system in which the state can *never* intervene is as untenable as a totalitarian one in which the state can *always* intervene.<sup>28</sup> Between the two extremes of anarchy and totalitarianism lies a wide range of potentially legitimate liberty limitation.

Almost no one disputes the vague proposition that liberty limitation is *sometimes* morally justifiable. Isaiah Berlin observed that "a frontier must be drawn between the area of private life and that of public authority. Where it is to be drawn is a matter of argument, indeed of haggling."<sup>29</sup> However, for what reasons and under what circumstances ought the state to restrict individual liberty?

The answer is that the state should limit liberty only when a justifiable reason for doing so exists.<sup>30</sup> Philosophers refer to these justified reasons as "liberty-limiting principles,"<sup>31</sup> "coercion-legitimizing principles,"<sup>32</sup> or "autonomy-limiting principles."<sup>33</sup> The term liberty-limiting principle seems to have more pervasively influenced the literature on the subject, and I will use it here. Liberty-limiting principles need not state either necessary or sufficient conditions for moral justifiability.<sup>34</sup> Rather, as Joël Feinberg stressed, "[E]ach liberty-limiting principle puts forth a kind of reason it claims always to be relevant—always to have some weight—in support of

but also the harm principle as a legitimizing ground for governmental intervention. *See, e.g.*, MAX STIRNER, *THE EGO AND HIS OWN* (Steven T. Byington trans., James J. Martin ed., 1963).

28. *See* Berlin, *supra* note 18, at 123-24 ("[T]he area of men's free action must be limited by law. But . . . there ought to exist a certain minimum area of personal freedom which must on no account be violated . . ."); *id.* at 126 ("[S]ome portion of human existence must remain independent of the sphere of social control. To invade that preserve, however small, would be despotism."); KULTGEN, *supra* note 3, at 132; NIKKU, *supra* note 3, at 114-15; JONATHAN C. SCHONSHECK, *ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW* 49-50 (Law and Philosophy Library v.19, 1994); Christine Pierce & Donald VanDeVeer, *Grounds for Restricting Liberty, in AIDS: ETHICS AND PUBLIC POLICY* 61, 71 (1988); Moore, *supra* note 24, at 65.

29. Berlin, *supra* note 18, at 124.

30. CONTEMPORARY ISSUES IN BIOETHICS 32-33 (Tom L. Beauchamp & LeRoy Walters eds., 4th ed. 1994) [hereinafter CONTEMPORARY ISSUES].

31. *E.g., id.*; FEINBERG, HARM TO OTHERS, *supra* note 18, at 9-10; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at ix.

32. *E.g.*, FEINBERG, HARM TO OTHERS, *supra* note 18, at 9; FEINBERG, HARM TO SELF, *supra* note 18, at ix; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at ix.

33. *See, e.g.*, BEAUCHAMP, MORAL PHILOSOPHY, *supra* note 25, at 389; BEAUCHAMP, ETHICS, *supra* note 22, at 353.

34. *See* FEINBERG, HARM TO OTHERS, *supra* note 18, at 187; FEINBERG, HARM TO SELF, *supra* note 18, at 374; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at 66.

proposed legal coercion, even though in a given instance it might not weigh enough to be decisive.”<sup>35</sup>

In short, liberty-limiting principles are merely “relevant reasons”; reasons that can have—but do not necessarily have—“decisive weight” when balanced, in particular contexts, against the presumptive case for liberty.<sup>36</sup> Hard paternalism and soft paternalism are two liberty-limiting principles.

## II. THE DEFINITION OF SOFT PATERNALISM

### A. *The Core Notion of Soft Paternalism*

The sort of paternalism that is justified on the basis that the subject lacks the requisite decision-making capacity to engage in the restricted conduct is described as either soft<sup>37</sup> or weak<sup>38</sup> paternalism. Soft paternalism legitimizes intervention with a subject's conduct where that subject's decision to engage in the restricted conduct is one of the following: (1) not factually informed, (2) not adequately understood, (3) coerced, or (4) otherwise not substantially voluntary.<sup>39</sup> In short, soft paternalism justifies interference with a

35. FEINBERG, HARM TO OTHERS, *supra* note 18, at 10.

36. *See id.*; FEINBERG, HARM TO SELF, *supra* note 18, at ix, 25; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at 321, 323; *see also* FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 226, 249 (1984); Richard A. Posner, *On Liberty: A Reevaluation*, in ON LIBERTY (David Bromwich & George Kateb eds., 2001) (“Properly speaking, the existence of an externality is a necessary rather than sufficient condition for government intervention, since the cost of that intervention must be considered, along with the actual and not merely the potential benefit.”).

37. *E.g.*, GERALD DWORIN, THE THEORY AND PRACTICE OF AUTONOMY 124 (1988) [hereinafter DWORIN, AUTONOMY]; FEINBERG, HARM TO SELF, *supra* note 18, at 12; Childress & Campbell, *supra* note 27, at 124.

38. *E.g.*, BEAUCHAMP, MORAL PHILOSOPHY, *supra* note 25, at 413; BEAUCHAMP, ETHICS, *supra* note 22, at 375; CHILDRESS, *supra* note 3, at 17, 25 (employing the terms “limited” and “restricted” as well); FEINBERG, HARM TO SELF, *supra* note 18, at 12 n.16; SUSAN B. RUBIN, WHEN DOCTORS SAY NO: THE BATTLEGROUND OF MEDICAL FUTILITY 84 (1998) (also employing the term “limited”); VANDEVEER, *supra* note 6, at 81-86; Tom L. Beauchamp, *Paternalism*, in ENCYCLOPEDIA OF BIOETHICS 1914, 1914-15 (Warren T. Reich ed., 1995) [hereinafter BEAUCHAMP, *Paternalism*] (“[T]he terms ‘weak’ and ‘strong’ seem to have more deeply influenced the bioethics literature and will be used here.”); Heta Häyry, *Paternalism*, in 3 ENCYCLOPEDIA OF APPLIED ETHICS 449, 453-54 (Ruth Chadwick ed., 1998) [hereinafter Häyry, *Paternalism*] (uniquely employing the terms ‘hard’ and ‘soft’ to draw a second distinction to distinguish conduct that constitutes a mere prima facie interference with autonomy).

39. *See generally* BEAUCHAMP & CHILDRESS, *supra* note 3, at 277; JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION ch. XIII, § 3 (1988) (1789); LOCKE, *supra* note 3, 1ST TREATISE §§ 54-76, at 169-74; RUBIN, *supra* note 38, at 84 (“In limited or weak paternalism, a patient's

subject's liberty to benefit that same subject only if—indeed, precisely because—her choices are not substantially voluntary.<sup>40</sup>

Moreover, soft paternalistic intervention is proper not only when the subject's conduct is *known* for certain to be not substantially voluntary but also when the subject's conduct is very *probably* or strongly *suspected* to be not substantially voluntary. Because voluntariness must be ascertained one way or the other, soft paternalism legitimizes temporary intervention necessary to determine whether a subject's conduct is, in fact, substantially voluntary.

For example, if you were about to eat an apple that only I knew was poisoned, then on soft paternalistic grounds, I could justifiably interfere with your liberty and prevent you from eating that apple. My interference would be justified because you, in fact, were unaware of this important feature of your action. In other words, I did not stop you from doing what you wanted to do (eat an apple). Rather, I stopped you from doing something that you did not want to do (eat a *poisoned* apple).<sup>41</sup> Alternatively, my interference might be justified because I had to determine, one way or the other, whether you were unaware of this important feature of your conduct.

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preferences, decisions, and actions are overridden because there are internal or external constraints on his ability to think and act freely."); Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129, 1161-64 (1986) [hereinafter Sunstein, *Legal Interference*]. Joel Feinberg provided an extended analysis of voluntariness-vitiating or voluntariness-nullifying factors. FEINBERG, HARM TO SELF, *supra* note 18, at 12, 143-315. These factors are outlined in Diagram 20-5 and in paragraphs B, C, and D. *Id.* at 115.

40. See *supra* note 39. I employ the term substantially voluntary as equivalent to substantially autonomous.

41. Voluntariness will, of course, vary inversely relative to the thickness of the description of the act. See FEINBERG, HARM TO SELF, *supra* note 18, at 71-74 (noting that voluntariness will vary depending on what is taken as the relevant background or perspective, the "norms of expectability," the "benchmark," the "baseline"); *id.* at 128 (noting that "the term 'harm' can always mask an evaluative element"); *id.* at 123, 129, 132, 277, 282, 294, 304-05; VANDEVEER, *supra* note 6, at 30; Richard Arneson, *Mill Versus Paternalism*, 90 ETHICS 470, 484 (1980) [hereinafter Arneson, *Mill Versus*] ("If one thinks of voluntariness as relative to the description of an act, then I may be acting voluntarily in putting what I believe to be salt on my food and involuntarily at the same moment in putting what is in fact deadly poison on my food."); David Gordon, *Comment on Hospers*, 4 J. LIBERTARIAN STUDIES 267, 268 (1980) ("[A]n action can often be referred to by different descriptions . . ."); Cass R. Sunstein, *A Note on "Voluntary" Versus "Involuntary" Risks*, 8 DUKE ENVTL. L. & POL'Y F. 173, 179 (1997) [hereinafter Sunstein, *A Note*]; Weale, *Invisible Hand*, *supra* note 24, at 788 ("[T]here is a certain indefiniteness about the identification of actions; by redescribing the affected behavior we can make it clear that a paternalist concern with consequences also involves a restriction upon actions.") (footnote omitted).

The choices that individuals make do not always reflect their desires and preferences. "People do not always mean what they say; they do not always say what they want; and they do not always want what they say they want."<sup>42</sup> A lack of information, maturity, or voluntariness can thwart the realization of desires.<sup>43</sup> For these reasons, commentators have widely accepted soft paternalism as an appropriate basis for intervention.<sup>44</sup> Indeed, to disallow soft paternalism would be to espouse the widely rejected principle of absolute anti-paternalism or, what Feinberg called, "hard antipaternalism."<sup>45</sup>

## B. *Soft Paternalism Is a True Liberty-Limiting Principle*

### 1. *Soft Paternalism Constrains Only Conduct to Which the Subject Does Not Consent*

The core idea of the soft paternalism liberty-limiting principle is that only "real" decisions (that is, those decisions free from cognitive and volitional defects) are worthy of respect.<sup>46</sup> Soft paternalism is soft because it does not call for the constraint of any real decisions.<sup>47</sup>

42. Carl Elliott, *Meaning What You Say*, 4 J. CLINICAL ETHICS 61, 61 (1993).

43. See, e.g., Cass R. Sunstein, *Disrupting Voluntary Transactions*, in MARKETS AND JUSTICE 279, 282 (John W. Chapman & J. Roland Pennock eds., New York Univ. Press 1989); *id.* at 290 ("Absence of information is . . . a conventional basis for the disruption of voluntary transactions."); Sunstein, *Legal Interference*, *supra* note 39, at 1158-66.

44. See, e.g., Beauchamp, *Paternalism*, *supra* note 38, at 1915; Gerald Dworkin, *Paternalism*, in ENCYCLOPEDIA OF ETHICS 939, 940 (Lawrence C. Becker & Charlotte B. Becker eds., 1992) [hereinafter Dworkin, *Paternalism*—ENCYCLOPEDIA]; Gostin, *supra* note 24, at 3119.

45. Joel Feinberg, *Paternalism*, in ENCYCLOPEDIA OF PHILOSOPHY 390, 391 (Donald M. Borchert ed., Supp. 1996) [hereinafter Feinberg, *Paternalism*]. Even professed libertarians allow regulation on soft paternalistic grounds. See, e.g., CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION 104 (1997); John Hospers, *Libertarianism and Legal Paternalism*, 4 J. LIBERTARIAN STUDIES 255, 256, 265 (1980). Though, arguably, the justificatory appeal for these theorists comes from the harm principle. See BEAUCHAMP, MORAL PHILOSOPHY, *supra* note 25, at 389.

46. See *supra* notes 34-35 and accompanying text.

47. See, e.g., HANS BLOKLAND, FREEDOM AND CULTURE IN WESTERN SOCIETY 136-75, 286-89 (Michael O'Loughlin trans., 1997) (explaining that Mill would approve of restricting substantially nonvoluntary choices because they are "just as alien to the individual as someone else's choices"); FEINBERG, HARM TO SELF, *supra* note 18, at 12 ("[S]oft paternalism would permit us to protect him from 'nonvoluntary choices,' which, being the genuine choices of no one at all, are no less foreign to him."); FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at xviii (arguing that soft paternalism protects subjects "from dangerous choices that are not truly his own"); DOUGLAS N. HUSAK, DRUGS AND RIGHTS 130 (1992) ("[A]n agent's apparent choice is not truly *his* if it is nonvoluntary, so interference with it would not violate his autonomy.") [hereinafter HUSAK, DRUGS AND RIGHTS]; NIKKU, *supra* note 3, at 126; Feinberg, *Paternalism*, *supra* note 45, at 391-92 ("To restrict his liberties in such circumstances . . . we will not be interfering with his real self or blocking his real will . . .");

Rather, it calls for the constraint of only impaired decisions, decisions that are the product of "compulsion, misinformation, excitement or impetuosity, clouded judgment . . . or immature or defective faculties of reasoning."<sup>48</sup> As Feinberg explained, soft paternalism protects the subject "from dangerous choices that are not truly his own."<sup>49</sup> Thereby, soft paternalism, instead of counteracting autonomy, actually helps to protect and to promote it.<sup>50</sup> Despite its nomenclature, soft paternalism is arguably not truly paternalistic and is not a true liberty-limiting principle.<sup>51</sup>

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Husak, *Liberal Neutrality*, *supra* note 27, at 62 ("Since nonautonomous choices lack value, the state has no reason to allow persons to make such choices."); Henrik Kjeldgaard Jørgensen, *Paternalism, Surrogacy, and Exploitation*, 10 KENNEDY INST. ETHICS J. 39, 40 (2000) ("[A]n individual ought only to have her decisions respected if the decision reflects autonomous self-expression.").

The possibility of justifiable paternalism has made a particular type of argument plausible to some proponents of the modern principle of respect for autonomy. The idea is to regard some types of paternalistic intervention as instances of *weak* paternalism . . . . On this view, certain interventions are legitimate because they are aimed at nonautonomous "persons" who do harm to "themselves."

*Id.* at 48; Kasachkoff, *supra* note 24, at 413 ("Paternalistic restrictions in these cases—sometimes called cases of 'soft' or 'weak' paternalism—can be countenanced by a liberal society because they do not deprive the individual of any autonomous choice that he or she is in fact capable of making."); Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, in ETHICS TEACHING IN HIGHER EDUCATION 245, 245 (Daniel Callahan & Sissela Bok eds., 1980) ("If a paternalistic intervention restricts only decisions that are already unfree . . . the paternalism can be consistent with the principle of liberty.").

48. Joel Feinberg, *Legal Paternalism*, in PATERNALISM 3, 7 (Rolf Sartorius ed., 1983) [hereinafter Feinberg, *Legal Paternalism*].

49. FEINBERG, HARM TO SELF, *supra* note 18, at 99; *see also id.* at 119 ("The defining purpose of the soft paternalist is to prevent people from suffering harm that they have not truly chosen to suffer . . ."); *id.* at 126, 130; *id.* at 143 ("[T]he soft paternalist would justify interference with [the subject] when, but only when, there is a well founded suspicion that the actor's choice was not really his own.").

50. *E.g.*, KLEINIG, *supra* note 3, at 100; Häyry, *Paternalism*, *supra* note 38, at 454 ("The core idea of all weak paternalism is [justified because] interventions can actually support [the subject's] autonomy instead of suppressing it."); Thaddeus Mason Pope, *The Maladaptation of Miranda to Advance Directives: A Critique of the Implementation of the Patient Self-Determination Act*, 9 HEALTH MATRIX 139, 188-90 (1999) ("There is no usurpation of autonomous decision-making because there was none to usurp. On the other hand, soft paternalism is needed to *ensure* autonomous decision-making.").

51. *See, e.g.*, BEAUCHAMP, MORAL PHILOSOPHY, *supra* note 25, at 413; BEAUCHAMP, ETHICS, *supra* note 22, at 375-77; BEAUCHAMP & CHILDRESS, *supra* note 3, at 277-78; Tom L. Beauchamp & Laurence B. McCullough, *Medical Paternalism*, in MEDICAL ETHICS: THE MORAL RESPONSIBILITIES OF PHYSICIANS, at 93-94, 96 (1984) ("Weak paternalism is thus not a form of paternalism that can be distinguished in any morally relevant respect from antipaternalism."); Berlin, *supra* note 18, at 142 ("To be ruled by myths . . . from psychological or sociological causes, is a form of heteronomy, of being dominated by outside factors . . . not necessarily willed by the agent. . . . Knowledge liberates . . ."); SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 203, 209 (1978); FEINBERG, HARM TO SELF, *supra* note 18, at 12 ("It is not as clear that 'soft paternalism' is 'paternalistic' at all, in any clear sense."); *id.* at 14 (arguing that it is "severely misleading to think of [soft paternalism] as any kind of paternalism"); FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at xvii ("[S]oft paternalism . . . is, properly speaking, no kind of paternalism at all."); HUGO GROTTIUS, THE LAW OF WAR AND PEACE (Louise E. Loomis trans., 1949) (1625) ("[S]ince infants and insane persons do

The classic example of soft paternalism, from John Stuart Mill, involves detaining a subject who is about to unknowingly cross a dilapidated, dangerous bridge.<sup>52</sup> Mill explained that the agent "might seize him and turn him back without any *real* infringement of his liberty, for liberty consists in doing what one desires, and he does not desire to fall into the river."<sup>53</sup> Under these circumstances—where the subject is unaware of the condition of the bridge—it cannot fairly be said that the subject was free or autonomous in the first place because he did not understand what he was doing.

With soft paternalism, the agent does not bring about usurpation of autonomy because there is none to usurp. An agent cannot take control away from someone who does not have it in the first place. Beauchamp and Childress explained that with soft paternalism, the agent "protect[s] persons from harm caused *to* them by conditions *beyond* their control."<sup>54</sup> Indeed, soft paternalistic regulation actually

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not have liberty of judgment, it is impossible for wrong to be done them in respect to such liberty."); HAYRY, *MEDICAL PATERNALISM*, *supra* note 27, at 29-30, 34; JOHN D. HODSON, *THE ETHICS OF LEGAL COERCION* 45 (1983); KEKES, *supra* note 24, at 16 ("[I]f autonomy were impossible for some individuals . . . then the extent to which the basic values [for example, liberty] ought to be provided for them would be diminished by an amount proportional to their diminished capacity to attain autonomy."); JONATHAN RILEY, *MILL ON LIBERTY* 198 (1998) ("Mill's absolute ban on paternalism *can be* compatible with what is often called 'soft' or 'weak' paternalism."); THOMPSON, *supra* note 3, at 149; Tom L. Beauchamp, *Medical Paternalism, Voluntariness, and Comprehension*, in *ETHICAL PRINCIPLES FOR SOCIAL POLICY* 123, 136 (John Howie ed., 1983) [hereinafter Beauchamp, *Medical Paternalism*]; Tom L. Beauchamp, *Paternalism and Biobehavioral Control*, 60 *MONIST* 62, 67 (1977) [hereinafter Beauchamp, *Biobehavioral Control*] ("['W]eak paternalism' is not paternalism in any interesting sense, because it is not a liberty limiting principle *independent* of the 'harm to others' principle."); Beauchamp, *Paternalism*, *supra* note 38, at 1917 ("Weak paternalism, then, seems to be a defensible but noncontroversial position that nearly everyone accepts in some form."); Childress, *supra* note 24, at 64; Childress & Campbell, *supra* note 27, at 123; Feinberg, *Paternalism*, *supra* note 45, at 391 ("Clarity would be improved if philosophers would speak of paternalism only when what is meant is hard paternalism . . ."); Søren Holm, *Autonomy*, in 1 *ENCYCLOPEDIA OF APPLIED ETHICS* 267, 272 (1998) ("If the decision overridden is not fully autonomous . . . the problem is not a problem of paternalism . . ."); New, *supra* note 19, at 67-69 (making the argument in economic terms); Donald H. Regan, *Justifications for Paternalism*, in *THE LIMITS OF LAW* 189, 191 (J. Roland Pennock & John W. Chapman eds., 1974) ("Since the person who lacks information is unfree even if we do not intervene to constrain his choice, we are not really decreasing his freedom by intervening . . ."); Robert F. Schopp, *Behavioral Control*, in 1 *ENCYCLOPEDIA OF BIOETHICS* 221, 225-26 (Warren T. Reich ed., 1995); Shapiro, *supra* note 4, at 547 (stating that some defenses of soft paternalism "justify a particular intervention on the grounds that the preconditions for autonomy are not present").

52. Udo Schüklenk noted that Mill "leaves open whether this translates into a minor inconvenience, such as getting wet clothes, or whether he believes this is also true in the case of a very high bridge where the fall into the water might be lethal." SCHÜKLENK, *supra* note 18, at 33. The consensus in the literature on Mill is that Mill intended the latter meaning.

53. JOHN STUART MILL, *ON LIBERTY* 166 (Penguin ed., 1974) (1859) (emphasis added) [hereinafter *ON LIBERTY*].

54. *BIOMEDICAL ETHICS*, *supra* note 25, at 181.

protects autonomy by ensuring that the subject's choices reflect her true preferences.<sup>55</sup> Robert Goodin explained:

If it is autonomy that we are trying to protect in opposing paternalistic legislation in general, then the same values that lead us to oppose such legislation in general will lead us to welcome it in those particular cases where what we are being protected from is something that would deprive us of the capacity for autonomous choice.<sup>56</sup>

Goodin further illustrated the point, writing: "Where people 'wish to stop smoking, but do not have the requisite willpower[, intervention is] not imposing a good on someone who rejects it. [It is] simply using coercion to enable people to carry out their own goals.'"<sup>57</sup>

## 2. *While Soft Paternalism Does Not Usurp Autonomy, It Does Limit Liberty*

Notwithstanding soft paternalism's protective role and notwithstanding the fact that soft paternalism does not usurp

55. See, e.g., LOCKE, *supra* note 3, 2D TREATISE § 63:

The freedom of Man and Liberty of acting according to his Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will. To then turn him loose to an unconstrained Liberty, before he has Reason to guide him, is not allowing him the privilege of his Nature, to be free; but to thrust him amongst the Brutes, and abandon him to a state as wretched and as much beneath that of Man, as theirs.

*Id.*; Dworkin, *Paternalism—MORALITY*, *supra* note 6, at 124 (arguing that there is "no theoretical problem [in] . . . simply using coercion to enable people to carry out their own goals"); Robert E. Goodin, *Permissible Paternalism: In Defense of the Nanny State*, 1 RESPONSIVE COMMUNITY 42, 48 (1991) (arguing that intervention in the case of addiction "helps people implement their own preferred preference . . . It overrides people's preferences, to be sure. But the preferences which it overrides are ones which people themselves wish they did not have"); Kopelman, *supra* note 22, at 297 ("When people are very ill, they are 'not themselves' and cannot protect their own interests. In short, they are not choosing autonomously and others may have to help them.").

56. ROBERT E. GOODIN, *NO SMOKING: THE ETHICAL ISSUES* 7 (Univ. of Chicago Press 1989).

57. *Id.* at 28; see also Lawrence O. Gostin et al., *FDA Regulation of Tobacco Advertising and Youth Smoking: Historical, Social, and Constitutional Perspectives*, 277 JAMA 410, 412 (1997) ("The principal objection to stricter tobacco regulation—that it represented an inappropriate form of paternalism—began to erode. In its place, regulators could argue, based on science, that nicotine actually diminishes the capacity of an individual to make reasoned choices about whether to continue smoking.").



autonomy, it is conceptually lucid usage to treat soft paternalism as an independent liberty-limiting principle. This is true because soft paternalism still entails some tangible interference with the subject's freedom of liberty.<sup>58</sup> "[A physical] infringement there is: the man wants to step on the bridge and he is prevented from doing so."<sup>59</sup> Although the agent does not violate the subject's autonomy, it remains true that the paternalistic agent restricts the subject's liberty.<sup>60</sup>

The characterization of soft paternalism as a liberty-limiting principle is evident by looking at how philosophers defend the justifiability of soft paternalism while attending to the distinct meanings of "liberty" and "freedom." John Rawls wrote that "persons are at liberty to do something when they are free from *certain constraints* either to do it or not to do it."<sup>61</sup> Philosophers distinguish between two basic types of constraints on individual conduct: formal constraints and material constraints.<sup>62</sup> They define "liberty" as the absence of a formal constraint—the absence of a positive external normative constraint or duty requiring one to act (or refrain from acting) in a particular way.<sup>63</sup> So, to have the liberty to do *x* is to have

58. *E.g.*, GUTMANN & THOMPSON, *supra* note 3, at 264 (arguing that in the case of soft paternalism that the "tendency of denying that there is any 'real' infringement of liberty . . . is especially dangerous" and that "[i]t is preferable, even from a Millian perspective, to concede that liberty is limited in this case"); KULTGEN, *supra* note 3, at 118, 219-20; Rosemary Carter, *Justifying Paternalism*, 7 CANADIAN J. PHIL. 133, 138 (1977) ("Mill . . . ignor[es] the fact that the subject *does* want to cross the bridge, and that we are preventing him from attempting to satisfy that desire.").

59. KLEINIG, *supra* note 3, at 58.

60. *Cf.* Cass. R. Sunstein & Richard Thaler, *Libertarian Paternalism Is Not An Oxymoron*, 71 U. CHI. L. REV. (forthcoming 2003) ("A slightly more aggressive form of paternalism occurs when the default plan is accompanied by procedural constraints, designed to ensure that any departure is fully voluntary and entirely rational. When procedural constraints are in place, it is not costless to depart from the default plan.").

61. JOHN RAWLS, *A THEORY OF JUSTICE* 202 (1971) (emphasis added).

62. *See, e.g.*, BEAUCHAMP & CHILDRESS, *supra* note 3, at 168 & n.92 (drawing a distinction between decisional and executional autonomy); Kent Greenawalt, *Some Related Limits of Law*, in *THE LIMITS OF LAW* 76, 77 n.1 (J. Roland Pennock & John W. Chapman eds., 1974) (making a distinction between positive liberty and negative liberty); Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 653 n.4 (1992) (distinguishing between "material freedom (freedom in fact)" and "formal freedom (freedom in principle)").

63. *Cf.* FEINBERG, *HARM TO OTHERS*, *supra* note 18, at 8-9, 246 n.4; FEINBERG, *HARM TO SELF*, *supra* note 18, at 62-65; Joel Feinberg, *Freedom and Liberty*, in 3 *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* 753, 753 (Edward Craig ed., 1998) [hereinafter Feinberg, *Freedom*]; Harris, *Adult Behavior*, *supra* note 24, at 581. Rawls described physical constraints as affecting the "worth of liberty." RAWLS, *supra* note 61, at 204. But I prefer to describe such constraints as impacting the individual's freedom.

the de jure ability to do *x*.<sup>64</sup> Philosophers, on the other hand, define freedom as the absence of a material constraint—the absence of a physical (or other effective) constraint preventing one from acting in a particular way.<sup>65</sup> So, to have the freedom to do *x* is to have the de facto ability to do *x*.

Jonathan Schonsheck explained that “the enactment of a criminal law does not, strictly speaking, ‘prevent’ people from electing the proscribed activity.”<sup>66</sup> The law typically affects only one’s liberty and not one’s freedom. Tim Gray, for example, contended that “a legal impediment . . . does not render an agent unfree, since she can (physically) perform the illegal act, and take the consequences.”<sup>67</sup> Rather, Gray argued that “laws . . . leave the agent free in another respect—to yield or not yield to the sanction.”<sup>68</sup>

The following examples help to clarify the difference in meaning between liberty and freedom. I am not at *liberty* to drive faster than 75 miles per hour on the interstate highway because state law imposes on me a duty to drive within the posted speed limits. However, because I drive a Cadillac and because there is not much traffic on the highway, I am *free* to drive faster than 75 miles per hour. That is, although I may be punished for speeding or for reckless driving, I am physically able to drive at that speed. I *can* drive 75 miles per hour but *may* not do so. Conversely, were I driving in rural Montana, where the legal speed limit is 100 miles per hour, and a rock slide made the road impassable, that would affect only my freedom, not my liberty. I would be physically unable to drive at 75 miles per hour (or to drive at all), but this constraint on my conduct is a feature of my material circumstances and not a legal duty. I *may* drive 75 miles per hour but *cannot* do so.

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64. This corresponds to Hohfeld’s first sense of “right.” See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., 1919).

65. Cf. FEINBERG, *HARM TO OTHERS*, *supra* note 18, at 8-9 & n.4; FEINBERG, *HARM TO SELF*, *supra* note 18, at 62-65; Feinberg, *Freedom*, *supra* note 63, at 753.

66. SCHONSHECK, *supra* note 28, at 9; see also HAYRY, *MEDICAL PATERNALISM*, *supra* note 27, at 41-42; Husak, *Liberal Neutrality*, *supra* note 27, at 69; Grant LaMond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39 (2000); H. Steiner, *Individual Liberty*, 75 PROC. ARISTOTELIAN SOC’Y 33, 36 (1974-75).

67. TIM GRAY, *FREEDOM* 23 (1991).

68. *Id.* at 26.

While soft paternalism is not an autonomy-limiting principle under these definitions, it is a liberty-limiting principle. Gerald Dworkin argued that with soft paternalism, “[i]n limiting his liberty . . . we promote, not hinder, his [autonomy].”<sup>69</sup> John Kleinig similarly argued that “in the case of invasions of liberty, autonomy may not always be threatened[:] weak paternalism need involve no threat to autonomy.”<sup>70</sup> Donald VanDeVeer was even more explicit, arguing: “Even if we concede that stopping S against his will . . . does not thwart any intention of S . . . it remains true . . . that the intervener does restrict S’s liberty of action.”<sup>71</sup>

Heta Häyry drew a helpful distinction, which might elucidate how soft paternalism can be a liberty-limiting principle yet still protect and preserve the subject’s autonomy. Häyry distinguished actions that do not interfere with individual liberty at all, such as the mere provision of information, from those that do interfere with individual liberty pursuant to any liberty-limiting principle.<sup>72</sup> Unfortunately, Häyry used the terms “hard” and “soft” to make this new distinction.<sup>73</sup> These terms bear little relationship in meaning to the terms I employ. To mark the distinction between the concepts that I define as “hard” and “soft,” Häyry used the terms strong and weak. I have subscripted an “H” to Häyry’s alternative vocabulary in order to avoid confusion.

Paternalism		
Soft <sub>H</sub>	Hard <sub>H</sub>	
(Not in need of justification)	Weak <sub>H</sub>	Strong <sub>H</sub>
		(i.e. Soft)

69. DWORKIN, *AUTONOMY*, *supra* note 37, at 106.

70. KLEINIG, *supra* note 3, at 21, 58, 100.

71. VANDEVEER, *supra* note 6, at 30 n.20.

72. HETA HÄYRY, *INDIVIDUAL LIBERTY AND MEDICAL CONTROL* 42 (1998) [hereinafter HÄYRY, *MEDICAL CONTROL*]; *see also* HÄYRY, *MEDICAL PATERNALISM*, *supra* note 27, at 76-77; Häyry, *Paternalism*, *supra* note 38, at 453; NIKKU, *supra* note 3, at 128 n.22.

73. HÄYRY, *MEDICAL CONTROL*, *supra* note 72, at 42.

For Häyry, measures such as education and rational persuasion—what Mitsuhiro Umezo, interestingly, called “verbal paternalism”<sup>74</sup>—were not even *prima facie* in need of justification because they do not limit individual liberty.<sup>75</sup> Häyry called such measures soft paternalism.<sup>76</sup>

Even Mill allowed that an individual’s own good is “good reason for remonstrating with him, or persuading him, or entreating him.”<sup>77</sup> In contrast to force and threats, (1) education, (2) advice, and (3) rational persuasion do not violate the subject’s autonomy.<sup>78</sup> Indeed,

74. MITSUHIRO UMEZO, *PATERNALISM IN JAPANESE BUSINESS ETHICS* 21 (unpublished dissertation 1999).

75. HÄYRY, *MEDICAL CONTROL*, *supra* note 72, at 41, 50, 57-65, 73; *see also* NIKKU, *supra* note 3, at 198; Dan W. Brock & Steven A. Wartman, *When Competent Patients Make Irrational Choices*, in *CONTEMPORARY ISSUES IN BIOETHICS* 109, 110 (Tom L. Beauchamp & LeRoy Walters eds., 4th ed. 1994) (“Noncoercive and nonmanipulative attempts to persuade patients of the irrational and harmful nature of their choices do not violate their right of self-determination. Instead, they reflect an appropriate responsibility and concern for the patients’ well-being.”); Moore, *supra* note 24, at 108; Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *PHIL. & PUB. AFF.* 205, 213 (2000) (“By engaging with B’s capacities and showing respect for B’s power to decide what to aim for, A respects and engages with B’s agency . . . .”); Sunstein, *Legal Interference*, *supra* note 39, at 625; Weale, *Invisible Hand*, *supra* note 24, at 789 (“Because measures of persuasion still allow individuals the final freedom of choice as to whether to engage in the action or not, we might say that the use of the policy instrument of persuasion is not paternalist in the way that the use of other policy instruments is.”).

76. HÄYRY, *MEDICAL CONTROL*, *supra* note 72, at 42.

77. ON LIBERTY, *supra* note 53, at 68; *see also id.* at 142 (“[D]isinterested benevolence can find other instruments to persuade people to find their good than whips and scourges, either of the literal or the metaphorical sort.”).

78. *See, e.g.*, BEAUCHAMP & CHILDRESS, *supra* note 3, at 166; NORMAN DANIELS, *JUST HEALTH CARE* 158 (1985); DWORKIN, *AUTONOMY*, *supra* note 37, at 21; FEINBERG, *HARM TO SELF*, *supra* note 18, at 134 (“The way for the state to assure itself that [smoking] practices are truly voluntary is continually to confront smokers with the ugly medical facts so that there is no escaping the knowledge of what the medical risks exactly are.”); KULTGEN, *supra* note 3, at 101 (“[K]nowledge enhances her chance of choosing actions that will succeed in their purpose.”); *id.* at 70 (“[R]ational persuasion hardly needs justification.”); PETER MCWILLIAMS, *AIN’T NOBODY’S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN OUR FREE COUNTRY* 608-09 (1996); RULEY, *supra* note 51, at 122, 145 (“[G]overnment should provide relevant information but otherwise leave individuals alone . . . .”); *id.* at 162 (“[P]ersuasion, advice, counsel, encouragement, attempts to inform and the like, are not the same thing as coercion.”); VANDEVEER, *supra* note 6, at 128 (“[I]t is permissible to use fair, open, [sic] means to dissuade him.”); *id.* at 317 (“[A]n information-providing policy is defensible . . . .”); *id.* at 321-22, 424; J. Howard Beales III, *Modification and Consumer Information: Modern Biotechnology and the Regulation of Information*, 55 *FOOD & DRUG L.J.* 105, 112 n.42 (2000) (“There is nothing ‘paternalistic’ about relying on scientific assessments of risk to determine whether mandatory labeling is appropriate.”); Beauchamp, *Medical Paternalism*, *supra* note 51, at 132; Dworkin, *Paternalism—MORALITY*, *supra* note 6, at 110, 124; Feinberg, *Legal Paternalism*, *supra* note 48, at 11; Richard M. Gilbert, *Ethical Considerations in the Prevention of Smoking in Adults and Children*, 8 *MEDICOLEGAL NEWS* 4, 5 (1980); Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 114-15 (Rolf Sartorius ed., 1983); Daniel Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles*, in *PATERNALISM* 35, 53 (Rolf Sartorius ed., 1983); Daniel Wikler & Dan E. Beauchamp, *Health Promotion and Health Education*, in *ENCYCLOPEDIA OF BIOETHICS* 1126, 1127 (Warren T. Reich ed., 1995).

these measures often enable subjects to be *more* autonomous by making the subjects more aware of their options. Admittedly, education might influence a subject's decisions, but only an extreme form of influence—manipulation—comes close to forcing or determining choice.<sup>79</sup> In contrast to the use of persuasion and education (two forms of soft<sub>H</sub> paternalism), the use of force and threats does restrict individual liberty. Häyry called such measures hard<sub>H</sub> paternalism.<sup>80</sup> Thus, what this Article refers to as hard and soft paternalism—and Häyry referred to as weak<sub>H</sub> and strong<sub>H</sub> paternalism—are *each* categories of Häyry's hard<sub>H</sub> paternalism. Only hard<sub>H</sub> paternalism, in Häyry's sense, requires justification pursuant to a liberty-limiting principle because only it limits liberty.<sup>81</sup> Not all interpersonal interaction is liberty-limiting, but soft paternalism is liberty-limiting.<sup>82</sup>

Häyry's model illustrates that soft paternalism does restrict liberty, although for a justifiable reason.<sup>83</sup> That is, soft paternalism is a form of hard<sub>H</sub> paternalism. It demands a justification, which soft<sub>H</sub> measures do not demand.<sup>84</sup> Furthermore, soft paternalism provides reasons that are sufficiently distinct from those provided by the harm principle. For these reasons, we ought to retain soft paternalism as an independent liberty-limiting principle.

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79. See, e.g., BERNARD GERT ET AL., *BIOETHICS: A RETURN TO FUNDAMENTALS* 211-12 (1997) (providing an example of informative paternalism); KULTGEN, *supra* note 3, at 71, 214, 221-22; NIKKU, *supra* note 3, at 23 (“[I]nformative actions can be performed paternalistically . . . .”); *id.* at 199 (“[T]he purpose of health information is not only improved knowledge but also a *steering* of habits towards what authorities consider health-promotive and right behavior. . . . When this is performed through information we may talk about informative paternalism.”) (emphasis added); Allen E. Buchanan, *Medical Paternalism*, in *PATERNALISM* 61, 62 (Rolf Sartorius ed., 1983); Ruth R. Faden & Alan I. Faden, *Preface, to Ethical Issues in Public Health Policy: Health Education and Lifestyle Interventions*, 6 HEALTH EDUC. MONOGRAPHS 177, 180 (1978) (arguing that although education facilitates voluntary choice, as it becomes more persuasive, government bears a heavier burden of justification); Perri 6, *supra* note 18, at 156-57; Douglas J. Uyl, *Smoking, Human Rights, and Civil Liberties*, in *SMOKING: WHO HAS THE RIGHT?* 267, 272 (Jeffrey A. Schuler & Magda E. Schuler eds., 1998) (arguing that the expenditure of public funds for smoking education is unjustifiable hard paternalism).

80. HÄYRY, *MEDICAL CONTROL*, *supra* note 72, at 63-64, 71, 129-30. Education is, in Heta Häyry's terminology, not only *not* strong<sub>H</sub> (that is, hard as used in this Article) paternalism but it is not even hard<sub>H</sub> paternalism (that is, *prima facie* in need of justification). *Id.* at 73; see also *id.* at 57-65; NIKKU, *supra* note 3, at 198; Sunstein, *Legal Interference*, *supra* note 39, at 1165.

81. HÄYRY, *MEDICAL CONTROL*, *supra* note 72, at 42.

82. *Id.*

83. *Id.*

84. *Id.*

### C. Admonitions for Using Soft Paternalism

There are two final points about soft paternalism. First, motive is an underemphasized defining condition of soft paternalism. Soft (or weak) paternalism does not authorize intervention simply because the subject acts (that is, happens to act) without substantial voluntariness.<sup>85</sup> As John Kleinig explained, “[w]eak paternalistic impositions are not justified merely because their beneficiaries lack autarchy. As Mill makes clear, such impositions must be directed to the ‘improvement’ of those on whom they are laid . . . . In other words, the end of weak paternalism must be autarchy.”<sup>86</sup>

To qualify as soft paternalism, the agent’s motive for liberty limitation must be either (1) to protect the subject from harm or from failure to procure a benefit, to which the subject did not consent, or (2) to ensure or confirm that the subject really did consent to the harm or failure.<sup>87</sup> An agent cannot justify intervention with a subject’s liberty as soft paternalism simply because the subject happens to be acting without substantial voluntariness.<sup>88</sup> That would be post hoc rationalization. A subject’s lack of substantial

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85. See, e.g., ARMSDEN, *supra* note 27, at 93; GERT ET AL., *supra* note 79, at 226 (arguing that “[j]ust because people are not competent to make a rational decision does not mean that it is justified to violate any moral rule with regard to them”); HÄYRY, *MEDICAL PATERNALISM*, *supra* note 27, at 70; KLEINIG, *supra* note 3, at 141 (“The fact that a paternalistic imposition is weak does not mean that it is therefore morally unproblematic.”); KULTGEN, *supra* note 3, at 8 (“This solicitude is constructive.”); *id.* at 20; *id.* at 53 (“The kinds and extent of control which they legitimately exert, however, are strictly limited by the ultimate objective—to prepare their children for autonomy . . . .”); *id.* at 54, 59, 78; LOCKE, *supra* note 3, 2D TREATISE § 57, at 348 (“[T]he end of Law is not to abolish or restrain but to preserve and encourage freedom . . . .”); VANDEVEER, *supra* note 6, at 354-55 (arguing that the mere presence of some lack of voluntariness does not imply a forfeiture of ascriptive autonomy); Fred R. Berger, *Paternalism and Autonomy*, in *THE RESTRAINT OF LIBERTY* 37, 47-48 (Thomas Attig et al. eds., 1985); Joan C. Callahan, *Liberty, Beneficence, and Involuntary Confinement*, 9 J. MED. & PHIL. 261, 286 (1984); Childress & Campbell, *supra* note 27, at 125 (denying that soft paternalism automatically justified intervention and requiring that soft paternalism employ the least restrictive means, prevent serious harm, and be proportional to its negative effects); Jack D. Douglas, *Cooperative Paternalism Versus Conflictful Paternalism*, in *PATERNALISM* 171, 174-75 (Rolf Sartorius ed., 1983) (contrasting “cooperative paternalism” in which the agent helps the subject become more competent and “conflictful paternalism” in which the agent does not have that aim); Hospers, *supra* note 45, at 265 (arguing that the agent must not impose his values onto the subject—even when the subject acts without substantial voluntariness; under such circumstances, the agent must act to help the subject); Jørgensen, *supra* note 47, at 48; Michael Lavin, *Substance Abuse: Smoking*, in 5 *ENCYCLOPEDIA OF BIOETHICS* 2422, 2423 (Warren T. Reich ed., 1995).

86. KLEINIG, *supra* note 3, at 31, 214.

87. See C. Edwin Harris, Jr., *Paternalism and the Enforcement of Morality*, 8 SW. J. PHIL. 85, 91 (1977) [hereinafter Harris, *Paternalism*].

88. See *supra* note 85 and accompanying text.

voluntariness is not a forfeiture of the right to autonomy. The agent's motive matters. A causal connection between the subject's lack of substantial voluntariness and the agent's intervention must exist. The agent must intervene primarily because the subject acts without substantial voluntariness.<sup>89</sup>

Second, philosophers often propound soft paternalism not only as a positive thesis for liberty limitation but also as a negative thesis. This negative thesis is that only soft paternalism, and no other form of self-regarding liberty-limiting principle, is ever justified.<sup>90</sup> Thus, John Kultgen described soft paternalism as "hard antipaternalism" because it is hard set against (real, strong, or hard) paternalism.<sup>91</sup> In contrast, hard paternalism, as the next subsection discusses, is soft antipaternalism; it sanctions intervention with even substantially voluntary conduct.<sup>92</sup>

### III. THE DEFINITION OF HARD PATERNALISM

Typical examples of hard paternalism include the state-mandated utilization of seatbelts, motorcycle helmets, protective clothing, vaccination, red caps for hunters, and fluoridation. Other examples include state-mandated prohibition or controls on the use of recreational drugs, gambling, alcohol, and tobacco. These are all politically, morally, and ethically controversial issues. So, it should come as no surprise that academics consider hard legal paternalism to be both the most interesting and the most striking liberty-limiting principle.<sup>93</sup>

89. Sunstein & Thaler, *supra* note 60 (arguing that soft paternalistic "constraints are justified not on the ground that the planner disagrees with people's choices, but because identifiable features of the situation make it likely that choices will be defective"). Michael D. Bayles, Book Review, 7 L. & PHIL. 107, 115 (1988) (reviewing FEINBERG, HARM TO SELF, *supra* note 18) (noting that the agent's motive for interfering must be to counteract the subject's lack of understanding).

90. See, e.g., FEINBERG, HARM TO SELF, *supra* note 18, at 3, 15.

91. KULTGEN, *supra* note 3, at 132; see also BEAUCHAMP & CHILDRESS, *supra* note 3, at 279 ("It is therefore doubtful that weak paternalism as a moral position can be distinguished from antipaternalism . . .").

92. See, e.g., KULTGEN, *supra* note 3, at 132; FEINBERG, HARM TO SELF, *supra* note 18, at 15; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at xvii.

93. Tom L. Beauchamp, *Paternalism and Refusals to Sterilize*, in RIGHTS AND RESPONSIBILITIES IN MODERN MEDICINE 137, 142 (Marc D. Basson ed., 1981) [hereinafter Beauchamp, *Refusals to Sterilize*];

A clear and complete definition of hard paternalism is essential to an inquiry regarding the moral justifiability of hard paternalistic measures. Bernard Gert and Charles Culver, for example, recognized that the definition of hard paternalism is not a mere preliminary matter, writing that "a dispute about the proper use of a word . . . can have significant practical consequences."<sup>94</sup> Duncan Kennedy wrote even more forcefully, describing the conceptual questions surrounding paternalism as "intertwined with the [moral] question."<sup>95</sup>

The definition of the hard paternalism liberty-limiting principle has almost everything to do with whether it is justified, and to what extent.<sup>96</sup> Richard J. Arneson cautioned that "[p]aternalism will look

Beauchamp, *Medical Paternalism*, *supra* note 51, at 138-39; Beauchamp, *Paternalism*, *supra* note 38, at 1916.

94. GERT ET AL., *supra* note 79, at 196, 227; see also JULIAN BAGGINI & PETER S. FOSSL, *THE PHILOSOPHER'S TOOLKIT: A COMPENDIUM OF PHILOSOPHICAL CONCEPTS AND METHODS* 28-29 (2003); Arthur L. Caplan, *The Concepts of Health, Illness, and Disease*, in *MEDICAL ETHICS* 57, 61 (Robert M. Veatch ed., 2d ed. 1997).

95. Kennedy, *supra* note 5, at 644.

96. See, e.g., BLOKLAND, *supra* note 47, at 158 ("Before going into a number of possible justifications of paternalism, it is desirable to first demarcate this concept somewhat and make some distinctions."); CHILDRESS, *supra* note 3, at 12 ("My task is to determine the adequacy of paternalistic justifications in health care. It is thus necessary to *define* paternalism more precisely.") (emphasis added); CONTEMPORARY ISSUES, *supra* note 30, at 33.

Here the central problem is whether this form of justification [(paternalism)] for a restriction of liberty may ever validly be invoked, and, if so, how the principle that stands behind this judgment is to be formulated. In order to answer this question, we must look more closely at the *nature* of paternalism.

*Id.* (emphasis added); FEINBERG, *HARM TO OTHERS*, *supra* note 18, at 16 ("Philosophical inquiries into principles and concepts can have practical usefulness if and only because in the present stage of public discussion of legislative issues, the abstract level is where the most serious confusions are located.") (emphasis omitted); *id.* at 17; *id.* at 65 ("[V]agueness cannot be tolerated in a concept that is to be put to such important normative uses."); KLEINIG, *supra* note 3, at xii ("As it turns out, not everything that is dubbed 'paternalistic' is so, and even where some paternalism is involved, it is not always the kind of paternalism charged by critics."); NIKKU, *supra* note 3, at 32 ("Before this ethical conflict is further analyzed we need to *define* the paternalistic action . . .") (emphasis added); *id.* at 61 ("[L]eave the ethical analysis and the moral judgement of the action until after the *definition* . . .") (emphasis added); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 19-20 (1993); JULIE ANNE WHITE, *DEMOCRACY, JUSTICE AND THE WELFARE STATE: RECONSTRUCTING PUBLIC CARE* 13 (2000); Beauchamp, *Biobehavioral Control*, *supra* note 51, at 66 ("Whether paternalistic reasons are *good* reasons will occupy us momentarily, but first some agreement must be reached concerning proper use of the word 'paternalism.'"); M. Gregg Bloche, *Beyond Autonomy: Coercion and Morality in Clinical Relationships*, 6 *HEALTH MATRIX* 229, 240 (1996) ("[C]onceptual analysis . . . is a prerequisite for [moral assessment] to be fruitful."); Caplan, *supra* note 94, at 61 ("[T]he definition of these terms is more than a philosophical exercise."); *id.* at 70; Moore, *supra* note 24, at 62 ("Political philosophy maximizes its chances of arriving at better answers when its questions are well framed . . ."); Valdar Parve, *Value-Neutral Paternalism*, 219 *BOST. STUD. IN THE PHIL. OF SCIENCE* 271 (2001); Shapiro, *supra* note 4, at 525 (noting "the close relationship between questions of *definition* and of justification") (emphasis added); *id.* at 522; Alan Soble, *Paternalism, Liberal Theory, and Suicide*, 12 *CANADIAN J. PHIL.* 335, 335 (1982); Weale, *Invisible Hand*, *supra* note 24, at 787 ("[T]wo of these problems [of



more inviting morally than in fact it is, if we fail to *separate* actual cases of paternalistic restriction from cases which look similar but upon examination prove to be based on reasons of an altogether different sort."<sup>97</sup> VanDeVeer echoed this concern, writing:

Our ultimate focus in this study concerns the *justifiability* of paternalistic acts. We want to *evaluate* them. But when is an act correctly *described* as a "paternalistic act"? The latter is a conceptual issue; the former is an evaluative one. In familiar discussions these two questions often get confused and, as a result, the inquiry or dispute gets muddled.<sup>98</sup>

In short, before addressing moral issues surrounding hard paternalism, focusing on the conceptual issues is important in order to know precisely what we are talking about.<sup>99</sup>

To help prevent the muddling of conceptual and normative issues, I will carefully and precisely define hard paternalism. First, I will

paternalism] are *definitional* and two are judgmental. An underlying theme of my argument will be that it is difficult in many respects to separate these two types of issues" (emphasis added); Albert Weale, *Paternalism*, in THE BLACKWELL ENCYCLOPAEDIA OF POLITICAL THOUGHT 367, 368 (David Miller ed., 1987) (explaining that identification and justification are separate tasks); Weale, *Paternalism*, *supra* note 18, at 172 (noting that the "difficulty comes not so much with stipulating what conditions paternalism has to satisfy before it is legitimate, but in knowing when cases fall under the appropriate heading"); *id.* at 157; Winick, *supra* note 18, at 18, 26.

97. Arneson, *Mill Versus*, *supra* note 41, at 472 (emphasis added); see also CONTEMPORARY ISSUES, *supra* note 30, at 34 ("One critical element of this controversy thus concerns the quality of understanding and also of consent or refusal by the persons whose autonomy might be restricted by such policies."). More precisely, shaping the available conceptual boxes is particularly important given at least one (legal realist) model of decisionmaking. Suppose a judge or legislator reaches a decision based on her emotions. She must then find a rationale for her decision. If the available rationales are well-defined, the judge or legislator may sometimes find that she cannot plausibly employ the available rationales, and she will find that she must reconsider her decision. Cf. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 75 (1928); Brian Leiter, *Legal Realism*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 261 (Dennis Patterson ed., 1996).

98. VANDEVEER, *supra* note 6, at 5, 16.

99. See, e.g., G.E. MOORE, ETHICS v (1947) ("It appears that in ethics, as in all other philosophical studies, the difficulties and disagreements of which history is full, are mainly due to a very simple cause: namely to the attempt to answer questions, without first discovering precisely *what* question it is you desire to answer."); JOHN SHAND, ARGUING WELL 48 (2000) ("If there is uncertainty over the meaning of words used in an argument, we will be at a loss as to how to assess it and determine whether it is a good argument or not."); Michael Wreen, *The Definition of Euthanasia*, 48 PHIL. & PHENOMENOLOGICAL RES. 637, 637 (1988); see also BEAUCHAMP, ETHICS, *supra* note 22, at 4 ("The purpose of ethical theory is to introduce clarity, substance, and precision of argument into the domain of morality."); *id.* at 27, 39-40 (noting that what might seem like moral conflict can often be resolved by clarifying the concepts involved).

provide a very brief etymology of hard paternalism. Second, I will propose a definition of hard paternalism containing logically individually necessary and jointly sufficient conditions. In Part IV, I will consider and rebut objections and counterexamples to my definition.

### A. A Brief Etymology of "Hard Paternalism"

Legal and ethical issues surrounding hard paternalism date back to at least the early days of the Enlightenment. Three notable examples exist. First, in his 1698 *Second Treatise on Government*, John Locke cautioned against confounding "paternal" and "political" power.<sup>100</sup> Second, in his 1793 *On the Old Saw: That May Be Right in Theory But It Won't Work in Practice*, Immanuel Kant similarly cautioned that "[i]f a government were founded on the principle of benevolence toward the people, as a father's toward his children—in other words, if it were a paternalistic government (*imperium paternale*) . . . —such a government would be the worst conceivable despotism."<sup>101</sup> Third, also before the end of the 18th century, Jeremy Bentham, in *The Principles of Morals and Legislation*, questioned whether "self regarding offences" are a proper subject of the criminal law.<sup>102</sup>

Nevertheless, the concept of paternalism did not acquire a distinct philosophical identity for another half-century, when it was systematically attacked by Mill in his 1859 monograph *On Liberty*.<sup>103</sup> Mill helped refine the issue of paternalism, but Mill never employed the term. The term paternalism did not appear in published literature until the 1880s.<sup>104</sup>

It was not until the early 1960s—during and after the famous and widely read debate between H.L.A. Hart and Patrick Devlin over the legal enforcement of morality—that "paternalism" was materially

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100. LOCKE, *supra* note 3, 2D TREATISE §§ 52, 170.

101. IMMANUEL KANT, *ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE* 58-59 (E.B. Ashton trans., 1974) (1793) (emphasis omitted).

102. BENTHAM, *supra* note 39, at ch. XIII, § 1, para. iv; ch. XVI, paras. viii, xv, xiv.

103. See *ON LIBERTY*, *supra* note 53.

104. CHILDRESS, *supra* note 3, at 4; KLEINIG, *supra* note 3, at 3; KULTGEN, *supra* note 3, at 249 ch. 5 n.1.

refined and specified beyond what Mill had done.<sup>105</sup> Following the Hart-Devlin debate, philosophers devoted significant attention to the issue of paternalism. Soon, philosophers further refined the concept, and the narrower concept hard paternalism emerged. Feinberg first introduced the concept of hard paternalism in his widely reprinted 1971 article *Legal Paternalism*.<sup>106</sup>

Rather than surveying the literature on definitions of "hard paternalism," I will proceed to formulate my own definition, drawing upon the definitions of other philosophers and law professors as appropriate.

### *B. The Four Logically Necessary and Sufficient Conditions Which Define Hard Paternalism*

My definition of hard paternalism is an evaluatively neutral, nonprescriptive definition. Here, I identify the conditions under which liberty limitation is hard paternalism, but I leave for another day the question of whether and when hard paternalism is justifiable. I will define hard paternalism by intension as action by the agent of liberty-limitation that restricts the subject's liberty when the agent satisfies four necessary and sufficient conditions.<sup>107</sup> After briefly stating these four conditions, I will defend each as logically necessary and the four as jointly sufficient to define hard paternalism.

First, the paternalistic agent must intentionally limit the subject's liberty. The limitation must be hard<sub>H</sub> in Häyry's sense of the term.<sup>108</sup> Hard paternalism is, after all, a liberty-limiting principle.<sup>109</sup> Second, the agent must limit the subject's liberty primarily because she

105. See FEINBERG, HARM TO SELF, *supra* note 18, at 375. See generally PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 132-35 (1965); H.L.A. HART, LAW, LIBERTY, AND MORALITY 31-33 (1963).

106. Feinberg, *Legal Paternalism*, *supra* note 48.

107. See SHAND, *supra* note 99, at 49, 55.

108. See Häyry, *Paternalism*, *supra* note 38, at 453.

109. See, e.g., ARMSDEN, *supra* note 27, at 16-17, 23-24; CHILDRESS, *supra* note 3, at 12-13; DWORKIN, AUTONOMY, *supra* note 37, at 123 ("There must be a usurpation of decision making . . ."); JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES 77 (1977); KLEINIG, *supra* note 3, at 7; KULTGEN, *supra* note 3, at 213; NIKKU, *supra* note 3, at 50; VANDEVEER, *supra* note 6, at 17; Arneson, *Mill Versus*, *supra* note 41, at 471; Beauchamp, *Refusals to Sterilize*, *supra* note 93, at 138; Beauchamp, *Medical Paternalism*, *supra* note 51, at 125; Buchanan, *supra* note 79, at 62; Dworkin, *Paternalism*—ENCYCLOPEDIA, *supra* note 44, at 940; Marion Smiley, *Paternalism and Democracy*, 23 J. VALUE INQUIRY 299, 308-09 (1989); Thompson, *supra* note 47, at 247-48.

believes that intervention will contribute to the subject's welfare. The agent must intervene with a benevolent motive either to confer a benefit upon or to avert harm from the subject. Third, the agent's benevolent motive must be independent from the subject's contemporaneous preferences. Otherwise, the agent will be a facilitator rather than a limiter. Fourth, the agent must either (1) disregard the fact that the subject engages in the restricted conduct substantially voluntarily (that is, substantially free both from controlling influences<sup>110</sup> and from epistemic defects<sup>111</sup>) or (2) deliberately limit the subject's substantially voluntary conduct. Otherwise, the agent's limitation would be soft paternalism.

### *1. Condition One: The Agent Must Intentionally Limit the Subject's Liberty*

The most basic condition of hard paternalism, and any liberty-limiting principle, is that the paternalistic agent must intentionally and actually limit the subject's liberty. Liberty-limiting principles are, after all, reasons for overcoming the presumption of non-interference with individual liberty.<sup>112</sup> So, first the agent must cause some interference. As Gerald Dworkin explained, "P acts paternalistically toward Q if and only if . . . P's act is a limitation of Q's autonomy or liberty."<sup>113</sup> It is a necessary condition of hard paternalism that the agent intentionally limit the subject's liberty.<sup>114</sup>

110. See generally RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* 238, 256-62 (1986); FEINBERG, *HARM TO SELF*, *supra* note 18, at 145-59, 189-228; C.L. TEN, *MILL ON LIBERTY* 60 (1980).

111. See generally FADEN & BEAUCHAMP, *supra* note 110, at 238, 248-55; HARM TO SELF, *supra* note 18, at 159-62; TEN, *supra* note 110, at 60.

112. See, e.g., BEAUCHAMP, *MORAL PHILOSOPHY*, *supra* note 25, at 389; BEAUCHAMP, *ETHICS*, *supra* note 22, at 353; CONTEMPORARY ISSUES, *supra* note 30, at 32; FEINBERG, *HARM TO OTHERS*, *supra* note 18, at 9-10, 187; FEINBERG, *HARM TO SELF*, *supra* note 18, at ix, 25, 374; FEINBERG, *HARMLESS WRONGDOING*, *supra* note 6, at ix, 66, 321, 323. Moreover, this condition is necessary for distinguishing paternalism from other species of benevolence. See Simon Clarke, *A Definition of Paternalism*, 5 *CRITICAL REV. INTL. SOC. & POL. PHIL.* 81, 82-83 (2002).

113. Gerald Dworkin, *Paternalism*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 649, 649 (Robert Audi ed., 2d ed. 1995) [hereinafter Dworkin, *Paternalism*—CAMBRIDGE]; see also Richard J. Arneson, *Paternalism*, in 7 *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* 250, 250 (Edward Craig ed., 1998) [hereinafter Arneson, *Paternalism*] ("The paradigm of paternalism . . . is the restriction of people's liberty . . ."); Beauchamp, *Paternalism*, *supra* note 38, at 1914; Gerald Dworkin, *Paternalism: Some Second Thoughts*, in *PATERNALISM* 107 (Rolf Sartorius ed., 1983) [hereinafter Dworkin, *Second Thoughts*] ("There must be a usurpation of decision making . . ."); Dworkin, *Paternalism*—

We should construe limitation broadly in this context.<sup>115</sup> It is sufficient that the paternalistic agent intentionally acts as an obstacle to either the subject's formulation or implementation of substantially voluntary decisions.<sup>116</sup> An agent may intentionally limit a subject's liberty in at least three distinct ways, which are illustrated below in the context of a doctor-patient relationship.<sup>117</sup> First, a paternalistic physician could physically limit a subject, constraining both the subject's liberty and her freedom.<sup>118</sup> The physician might, for example, administer a blood transfusion to a Jehovah's Witness against that patient's substantially voluntarily expressed preference to not receive a blood transfusion.<sup>119</sup>

Second, the paternalistic physician might limit the patient's liberty by omission or nonacquiescence.<sup>120</sup> Instead of actively doing something contrary to the patient's wishes, the physician might refuse to facilitate the subject's decisions. For example, the physician might

ENCYCLOPEDIA, *supra* note 44, at 940; Gerald Dworkin, *Paternalism*, in ENCYCLOPEDIA OF ETHICS 1282 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001) [hereinafter Dworkin, *Paternalism—ETHICS*]; Shiffrin, *supra* note 75, at 218 (“[P]aternalism by A toward B may be characterized as behavior . . . that involves the substitution of A’s judgment or agency for B’s . . .”).

114. Dworkin, *Paternalism—CAMBRIDGE*, *supra* note 113, at 649.

115. *E.g.*, Clarke, *supra* note 112, at 82-83; Dworkin, *Paternalism—ENCYCLOPEDIA*, *supra* note 44, at 940; George W. Rainbolt, *Prescription Drug Laws: Justified Hard Paternalism*, 3 *BIOETHICS* 45, 46 (1989). Commentators have debated whether paternalism includes noncoercive measures. *See, e.g.*, GERT ET AL., *supra* note 79, at 200. As indicated in Section I, noncoercive measures can be paternalistic. For example, nondisclosure of material information is a limitation of liberty that can be done for paternalistic reasons. *Id.* at 210 (broadening the notion of limiting freedom). Paternalism may even sometimes include the deliberate manipulation of default rules and arrangements. *See* Sunstein & Thaler, *supra* note 60. Sunstein and Thaler focus their argument on cases which would appropriately be characterized as soft paternalism. However, their “libertarian paternalism” cuts across the distinction between hard and soft paternalism.

116. The limitation is, in other words, with the subject's negative liberty. A failure to expand the subject's available options is not a limitation. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 317 (1980). Of course, the distinction between negative and positive liberty is vague and depends on the specification of a baseline of opportunity. *Id.*

117. The agent might also accidentally or unintentionally limit the subject's liberty. In a crowded world, people are always getting in each other's way. However, absent a deliberate act, neither hard paternalism nor any other liberty limiting principle applies.

118. Bernard Gert & Charles M. Culver, *Paternalistic Behavior*, 6 *PHIL. & PUB. AFF.* 45, 46 (1976).

119. *Id.*

120. *E.g.*, BEAUCHAMP & CHILDRESS, *supra* note 3, at 127, 270-71, 288; CHILDRESS, *supra* note 3, at 19, 132, 241; KULTGEN, *supra* note 3, at 213; Childress & Campbell, *supra* note 27, at 124 (“In *active* nonacquiescence, the paternalist refuses to accept a patient's request for nonintervention or noninterference, while in *passive* nonacquiescence, a paternalist refuses to carry out the wishes or choices of a patient or to assist the patient in his or her action.”); Shiffrin, *supra* note 75, at 213.

refuse to implement the patient's request for a treatment that the physician considers inappropriate.<sup>121</sup>

Third, the paternalistic physician might limit the patient's liberty by altering the patient's options.<sup>122</sup> For example, the physician might lie to the patient about her chances for recovery, thereby limiting her options by concealing their availability.<sup>123</sup> Deception limits the subject's liberty to exercise choice by interfering with the choice-making process.<sup>124</sup>

Philosophical literature has captured many of the various methods through which an agent can limit a subject's liberty in several conceptual distinctions.<sup>125</sup> The pervasiveness of these distinctions in the philosophical literature and the foundational nature of the interference condition warrants a brief discussion of these distinctions. The distinctions describing the manner of the agent's liberty limitation include those between: (1) direct and indirect paternalism; (2) active and passive paternalism; (3) compulsive and coercive paternalism; and (4) contemporaneous, retrospective, and prospective paternalism.

### *a. Direct and Indirect Paternalism*

To be paternalistic, the agent must limit the subject's liberty.<sup>126</sup> However, the agent need not do so directly; philosophers have

121. *E.g.*, BEAUCHAMP & CHILDRESS, *supra* note 3, at 288.

122. Allen Buchanan, *Medical Paternalism*, 7 PHIL. & PUB. AFF. 370, 371-72 (1978).

123. *E.g.*, *id.* at 373; Dworkin, *Second Thoughts*, *supra* note 113, at 106.

124. *E.g.*, Gerald Dworkin, *Autonomy and Informed Consent*, in PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP: VOLUME THREE: APPENDICES STUDIES ON THE FOUNDATIONS OF INFORMED CONSENT 63, 69-70 (1982); BEAUCHAMP & CHILDRESS, *supra* note 3, at 126 ("This lie denies the patient information he may need to determine his future course of action . . ."); DAN W. BROCK, *Informed Consent*, in LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS 21, 29-30 (1993); THOMPSON, *supra* note 3, at 152, 164; Beauchamp, *Paternalism*, *supra* note 38, at 1916 ("Strong paternalism usurps autonomy either by restricting the information available to a person or overriding the person's informed and voluntary choices. . . . For example, a strong paternalist would prevent a patient capable of autonomous choice from receiving diagnostic information that might lead to suicide."); Jane S. Zembaty, *A Limited Defense of Paternalism in Medicine*, in BIOMEDICAL ETHICS 60, 62 (Thomas A. Mappes & Jane S. Zembaty eds., 1981).

125. These are "accidental" properties of hard paternalism because they are neither necessary nor sufficient for liberty limitation to be hard paternalism. See SHAND, *supra* note 99, at 49-50.

126. Dworkin, *Paternalism*—CAMBRIDGE, *supra* note 113, at 649.

distinguished between direct and indirect paternalism.<sup>127</sup> With direct paternalism, the agent limits the liberty of only the subject for the benefit of the subject.<sup>128</sup> An example of direct paternalism is banning the *smoking* of cigarettes.<sup>129</sup> The state restricts the liberty of only smokers (primarily) for the good of the smokers. In indirect paternalism, on the other hand, the agent restricts the liberty of third parties for the benefit of the subject.<sup>130</sup> An example of indirect paternalism is a ban on the *manufacture and sale* of cigarettes.<sup>131</sup> The state restricts the liberty of manufacturers, not for their own benefit but rather for the benefit of their customers (smokers).

The intended effect in both the direct paternalism and the indirect paternalism examples is the same: to prevent individuals from smoking tobacco and harming their health.<sup>132</sup> However, with indirect paternalism, the agent has not aimed the restrictive power of law at the smokers who are the intended beneficiaries of the law. Rather, the law aims to stop the manufacturers who provide the product that is instrumental to the smokers' harm.<sup>133</sup>

Indirect paternalism is a complex and sometimes confusing concept, and it might, at first, seem subsumable under the harm principle.<sup>134</sup> After all, both liberty-limiting principles seem to

127. *E.g.*, CHILDRESS, *supra* note 3, at 18; FEINBERG, HARM TO SELF, *supra* note 18, at 9; KLEINIG, *supra* note 3, at 11-14; KULTGEN, *supra* note 3, at 165-66; Nils Holtug, *The Harm Principle*, 5 ETHICAL THEORY & MORAL PRACTICE 357, 360 (2002) (using the terms "origin-centered" and "origin-neutral"); Weale, *Paternalism*, *supra* note 18, at 161-62; *see also* MICHAEL D. BAYLES, PRINCIPLES OF LEGISLATION: THE USES OF POLITICAL AUTHORITY 119, 121 (1978); Paul Turner Hershey, *A Definition for Paternalism*, 10 J. MED. & PHIL. 171, 180-81 (1985); Steven Lee, *On the Justification of Paternalism*, 7 SOC. THEORY & PRAC. 193, 194 (1981). Unfortunately, this distinction is sometimes referred to using the terms "pure" and "impure."

128. *See, e.g.*, DWORKIN, AUTONOMY, *supra* note 37, at 125 (isolating "safety cases" where the focus is individual conduct).

129. *See* CHILDRESS, *supra* note 3, at 18.

130. *Id.*

131. *Id.*

132. *See id.*; KLEINIG, *supra* note 3, at 14.

133. Scholars sometimes find that indirect paternalism is harder to justify because those whose liberty is restricted do not even receive a so-called benefit. *See, e.g.*, DWORKIN, *Paternalism—MORALITY*, *supra* note 6, at 111; KLEINIG, *supra* note 3, at 11, 14. *But see* TORBJÖRN TÄNNSJÖ, COERCIVE CARE: THE ETHICS OF CHOICE IN HEALTH AND MEDICINE 76-77 (1999) (defending "well-behaved paternalism," which is limited to indirect paternalism).

134. *See* ARMSDEN, *supra* note 27, at 9. The harm principle is well-stated in its most famous elaboration:

[T]he fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. . . . As such as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it. . . .

sanction preventing tobacco companies from harming smokers. However, indirect paternalism is clearly distinguishable from the harm principle. The harm principle sanctions interference with one party, A, in order to protect another party, B, from *unconsented* harm. Indirect paternalism, on the other hand, sanctions interference with one party, A, to protect another party, B, from *consented* harm.<sup>135</sup>

Where the subject party (a smoker) consents to the harm (the smoker substantially voluntarily purchased and smoked cigarettes), then the other party's conduct (in manufacturing and selling cigarettes) is not wrongful. So, the harm principle does not apply.<sup>136</sup> In other words, when the *volenti* (consent) maxim applies, the harm principle cannot apply, but indirect paternalism can apply. To be paternalistic, the agent must directly or indirectly interfere with the subject's liberty.

### b. *Active and Passive Paternalism*

To be paternalistic, the agent must limit the subject's liberty. However, that interference need not be through prohibition. Philosophers distinguish active and passive paternalism.<sup>137</sup> In active paternalism, which some have described as promotive paternalism, the agent limits the subject's liberty by *demanding* positive action from the subject.<sup>138</sup> In requiring the subject to take affirmative action (for example, forcing the subject to wear sunscreen), the agent seeks to prevent the subject from encountering some otherwise unavoidable harm (for example, skin cancer). On the other hand, in passive paternalism, also known as protective paternalism, the agent limits

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[I]f he has infringed the rules necessary for the protection of his fellow creatures, individually or collectively, [t]he evil consequences of his act do not then fall on himself, but on others; and society, as protector of all its members, must retaliate against him . . .

ON LIBERTY, *supra* note 53, at 141.

135. See FEINBERG, HARM TO SELF, *supra* note 18, at 8-9.

136. See, e.g., ON LIBERTY, *supra* note 53, at 157 (explaining that "the infringement complained of is not on the liberty of the seller, but on that of the buyer and consumer").

137. E.g., ARMSDEN, *supra* note 27, at 13; BEAUCHAMP & CHILDRESS, *supra* note 3, at 288; FEINBERG, HARM TO SELF, *supra* note 18, at 8; KLEINIG, *supra* note 3, at 6, 14; KULTGEN, *supra* note 3, at 68; NIKKU, *supra* note 3, at 45-46; UMEZO, *supra* note 74, at 6-7; Beauchamp, *Biobehavioral Control*, *supra* note 51, at 65-66; Brock, *Parentalism*, *supra* note 3, at 541 (distinguishing protective and promotive paternalism).

138. FEINBERG, HARM TO SELF, *supra* note 18, at 8; Brock, *Parentalism*, *supra* note 3, at 541.



the subject's liberty by *prohibiting* the subject from engaging in some conduct.<sup>139</sup> In requiring the subject to refrain from some conduct (for example, smoking), the agent seeks to prevent the subject from encountering some otherwise avoidable harm (for example, lung cancer).

The distinction between "constraints," (that is, forcing one to do what he does not want to do) and "restraints" (that is, preventing him from doing what he does want to do) may capture the difference between active and passive paternalism.<sup>140</sup> For a wide range of cases, this is an accurate description. However, the distinction between active and passive paternalism looks quite different when the agent and the subject are in a fiduciary relationship and the subject expects the agent to accede to the subject's requests. Then, even when the agent does nothing (that is, imposing neither restraint nor constraint on the subject), the relationship can be paternalistic.

Typically, we think of paternalism as when the paternalistic agent refuses to accept a patient's request for nonintervention or noninterference. That is, although the subject wishes to be left alone, in spite of the subject's preferences, the agent intervenes.<sup>141</sup> Childress called this "active nonacquiescence."<sup>142</sup> For example, a physician might administer a blood transfusion to a Jehovah's Witness who refused the procedure. Childress contrasted active nonacquiescence with what he called "passive nonacquiescence."<sup>143</sup> In passive nonacquiescence, the paternalistic agent "refuses to carry out the wishes or choices of a patient or to assist the patient in his or her action."<sup>144</sup> For example, a physician might refuse the patient's request for a particular treatment or procedure, believing it to be medically futile.

The distinction between active and passive paternalism is unclear. Häyry explained that the boundaries between active and passive paternalism in practice cannot be very distinct because the distinction

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139. FEINBERG, HARM TO SELF, *supra* note 18, at 8; Brock, *Parentalism*, *supra* note 3, at 541.

140. See KULTGEN, *supra* note 3, at 158.

141. See CHILDRESS, *supra* note 3, at 19.

142. *Id.* at 19, 115; Childress & Campbell, *supra* note 27, at 124.

143. CHILDRESS, *supra* note 3, at 19; Childress & Campbell, *supra* note 27, at 124.

144. Childress & Campbell, *supra* note 27, at 124; see CHILDRESS, *supra* note 3, at 19, 115.

refers to “matters of *degree* rather than matters of clear-cut classes. So, although the variety of possible reasons for paternalistic intervention ought to be registered and recognized, it seems probable that the finer details of the divisions will not be able to carry much weight in justificatory considerations.”<sup>145</sup>

One reason for the lack of sharpness in the distinction between active and passive paternalism is that an act of liberty limitation can vary along the continuum of active to passive according to how the subject’s conduct is characterized.<sup>146</sup> For example, requiring motorcyclists to wear helmets is arguably active paternalism because it requires them to take affirmative steps to purchase and use special equipment. Yet, perhaps this requirement is really passive paternalism because it prevents riders from engaging in the arguably discrete activity of helmetless motorcycle riding.<sup>147</sup> In any case, the distinction between active and passive paternalism at least suggests the range of interference that can satisfy the first condition of hard paternalism.

### *c. Compulsive and Coercive Paternalism*

To be paternalistic, the agent must limit the subject’s liberty, but the agent need not do so by force. Philosophers distinguish “compulsive” and “coercive” paternalism.<sup>148</sup> In compulsive

145. HAYRY, *MEDICAL PATERNALISM*, *supra* note 27, at 24 (emphasis added); see also CHILDRESS, *supra* note 3, at 203.

146. *E.g.*, FADEN & BEAUCHAMP, *supra* note 110, at 244 & n.13; FEINBERG, *HARM TO SELF*, *supra* note 18, at 123, 129, 132, 277, 282, 294, 304-05; VANDEVEER, *supra* note 6, at 6, 30; Carl Ginet, *The Individuation of Actions*, in *ON ACTION* 45-71 (1990) (discussing key literature on individuation (citing DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (1980) and ALVIN I. GOLDMAN, *A THEORY OF HUMAN ACTION* (1970)); Gordon, *supra* note 41, at 268 (“[A]n action can often be referred to by different descriptions . . . .”); Sunstein, *A Note*, *supra* note 41, at 179; Weale, *Invisible Hand*, *supra* note 24, at 788 (“[T]here is a certain indefiniteness about the identification of actions . . . .”).

147. *Cf.* FEINBERG, *HARM TO OTHERS*, *supra* note 18, at 164, 259 n.48.

148. *See, e.g.*, KULTGEN, *supra* note 3, at 68 (“[J]ustifiability is a function of the strength of the subject’s desires which they frustrate, the *severity of the measures*, and the magnitude of the goods and harms produced.”) (emphasis added); *id.* at 97 (discussing control of internal and external factors); NIKKU, *supra* note 3, at 189; SCHONSHECK, *supra* note 28, at 150-51; VANDEVEER, *supra* note 6, at 15; David Archard, *For Our Own Good*, 72 *AUSTRALASIAN J. PHIL.* 283, 288-89 (1994); Edward Sankowski, *Paternalism and Social Policy*, 22 *AM. PHIL. Q.* 1, 8-9 (1985) (offering eight sorts of regulation). *See generally* Joel Feinberg, *Coercion*, in 2 *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* 387, 387-89 (Edward Craig ed., 1998). The distinction parallels that between the “libertarian paternalist” (who insists on preserving choice) and the “non-libertarian paternalist” (who is willing to foreclose choice). *See* Sunstein & Thaler, *supra* note 60.

paternalism, the agent forcibly limits the subject's freedom.<sup>149</sup> For example, a physician might administer a blood transfusion to a patient against her substantially voluntary expressed preferences. In coercive paternalism, on the other hand, the agent intervenes with a subject's liberty through threat or sanction.<sup>150</sup> While compulsive paternalism definitively closes the subject's chosen options, coercive paternalism merely destroys the appeal of some options by making them difficult, by making them inconvenient, or—to employ the metaphor of a price tag—by increasing their cost.<sup>151</sup>

Hobbes observed that “law is always a fetter.”<sup>152</sup> The degree to which the law limits a subject's liberty falls on a continuum: it can be more or less severe.<sup>153</sup> The agent can limit options by imposing low or high costs. Moreover, a significant difference seems to exist between, for example, the use of physical force by the police and the mere promulgation of a statute.

Laws themselves are not compulsive.<sup>154</sup> Jonathan Schonsheck explained that “[t]he enactment of a criminal law does not, strictly speaking, ‘prevent’ people from electing the proscribed activity.”<sup>155</sup> The law typically affects only one's liberty and not one's freedom.<sup>156</sup> Gray contended that “a legal impediment . . . does not render an agent unfree, since she can (physically) perform the illegal act, and take the consequences.”<sup>157</sup> Rather, Gray argued, “laws . . . leave the agent free

149. FEINBERG, HARM TO SELF, *supra* note 18, at 190. See, e.g., Sunstein & Thaler, *supra* note 60 (illustrating the point with the example of designing the placement of food in a cafeteria line: “Putting the fruit before the desserts is a fairly mild intervention. A more intrusive step would be to place the desserts in another location altogether, so that diners have to get up and get a dessert after they have finished the rest of their meal”).

150. FEINBERG, HARM TO SELF, *supra* note 18, at 191.

151. *Id.* at 191-92.

152. THOMAS HOBBS, LEVIATHAN ch. XIV (Penguin ed., 1968) (1647).

153. See, e.g., FEINBERG, HARM TO OTHERS, *supra* note 18, at 24; Chan, *supra* note 24, at 86; N. Fotion, *Paternalism*, 89 ETHICS 191, 194-95 (1979); Häyry, *Paternalism*, *supra* note 38, at 456 (describing one kind of hard paternalism: “maternalism,” where the agent uses emotional blackmail); Lee, *supra* note 127, at 193-94; Allison D. Murdach, *Benevolence Re-examined: Protective Intervention in Mental Health*, 41 SOC. WORK 26, 27 (1996).

154. See *supra* notes 66-68 and accompanying text.

155. SCHONSHECK, *supra* note 28, at 9; see also HÄYRY, MEDICAL PATERNALISM, *supra* note 27, at 41-42; Husak, *Liberal Neutrality*, *supra* note 27, at 69; LaMond, *supra* note 66; Steiner, *supra* note 66, at 36.

156. FEINBERG, HARM TO OTHERS, *supra* note 18, at 8-9, 246 n.4; FEINBERG, HARM TO SELF, *supra* note 18, at 62-65; Feinberg, *Freedom*, *supra* note 63, at 753; Harris, *Adult Behavior*, *supra* note 24, at 581.

157. GRAY, *supra* note 67, at 23.

in another respect—to yield or not yield to the sanction.”<sup>158</sup> Furthermore, one who violates the law only suffers a penalty if authorities catch her, and even then the penalty (for example, for smoking) is typically a mere fine.<sup>159</sup>

In contrast to coercive interventions such as laws, compulsive interventions more acutely limit liberty.<sup>160</sup> For example, if a doctor administers a blood transfusion to a patient against her will, perhaps while she is unconscious, she cannot do anything about it. The doctor has physically restricted her freedom *de facto*.<sup>161</sup> This seems more severe than a mere *de jure* restriction of liberty which structures incentives or sets the “costs” of some conduct.<sup>162</sup>

Nevertheless, the distinction between coercive and compulsive interventions is not very sharp in practice. While laws themselves are not compulsive, their application certainly can be compulsive. The difference between law-as-such and law-as-applied roughly tracks the difference between law-as-passed by a legislature and law-as-enforced by police or other enforcement agents.<sup>163</sup> Law in both senses affects individual liberty, but law in the latter sense also affects freedom. An individual can choose to disregard her legal duty

158. *Id.* at 26.

159. *Cf.* FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at 289 n.2. Sunstein and Thaler overstate the point in writing that “[l]ibertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off.” Sunstein & Thaler, *supra* note 60. The fact that, for example, severely coercive laws leave options (technically) open hardly seems sufficient to make the paternalism nonintrusive. Admittedly, Sunstein and Thaler largely paint their libertarian paternalist as one who will ensure that people can easily avoid the paternalist’s option. *Id.* However, the position also includes the paternalist who is willing to impose real costs. *Id.* Furthermore, some laws affect the market to such a degree that the option is effectively removed from consumers. For example, outlawing the smoking (as opposed to the manufacturing) of tobacco leaves individuals with the *freedom* to smoke. But the incentive provided by the law might diminish consumption such that the tobacco companies would go out of business. Then, there would be no cigarettes to smoke, even if one were willing to take the risk of apprehension and punishment.

160. Interestingly, the emphasis of the distinction between *de jure* and *de facto* limitations of liberty is the essence of the typical defense of Mill’s prohibition of slavery contracts. John Kleinig, for example, argued that this prohibition is not inconsistent with Mill’s anti-paternalistic stance: “Mill is not advocating interference with self-enslavement as such, but only opposing the contractualization of such arrangements.” KLEINIG, *supra* note 3, at 158; *see also* FEINBERG, HARM TO SELF, *supra* note 18, at 71.

161. *Cf.* NIKKU, *supra* note 3, at 46.

162. GRAY, *supra* note 67, at 26 (“[I]t is not the issuing of the threat that prevents a person from doing what she was previously able to do, but the carrying out of that threat.”); TREBILCOCK, *supra* note 96, at 6. *But see* Weale, *Paternalism*, *supra* note 18, at 160 (arguing that legal sanctions are more coercive). *See generally* ARMSDEN, *supra* note 27, at 30; Feinberg, *Freedom*, *supra* note 63, at 753 (comparing liberty and freedom).

163. *Cf.* KLEINIG, *supra* note 3, at 11; KULTGEN, *supra* note 3, at 161-62.

to drive within the posted speed limits, but once the police handcuff her or lock her in a jail cell, she cannot drive at all.<sup>164</sup> In any case, the distinction between compulsive and coercive paternalism at least suggests the range of interference that can satisfy the first condition of hard paternalism.

*d. Contemporaneous, Retrospective, and Prospective Paternalism*

To be paternalistic, the agent must limit the subject's liberty. However, the agent's interference can share different temporal relationships with the subject's conduct. First, in "contemporaneous paternalism," the agent restricts the subject from doing something that she was preparing to do immediately. For example, a police officer might physically restrain an individual from bungee jumping off a bridge. Second, in "prospective paternalism," the agent restricts the subject from doing something in the future. For example, the state legislature might promulgate a statute which requires that, effective January 1, 2005, motorcycle riders wear crash helmets. Third, in "retrospective paternalism," the agent restricts the subject's liberty by releasing her from the consequences of the poor choices to which she previously consented. For example, a court might not enforce a valid

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164. Cf. Zamir, *supra* note 3, at 261 n.80, 281. The difference between these two senses of law, as promulgated and as applied, is relevant in another way. A legislature might promulgate a law for non-paternalistic reasons. State agents might, nevertheless, enforce the law in a paternalistic manner. Conversely, the legislature might promulgate a paternalistic law. State agents might, nevertheless, enforce the law in a non-paternalistic manner. This Article focuses on legislation and the authorization of liberty restriction, rather than on implementation of that authority. See, e.g., BEAUCHAMP, MORAL PHILOSOPHY, *supra* note 25, at 421; BEAUCHAMP & CHILDRESS, *supra* note 3, at 10; ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 7 (1989); DANIEL CALLAHAN, FALSE HOPES: WHY AMERICA'S QUEST FOR PERFECT HEALTH IS A RECIPE FOR FAILURE 197 (1998); FEINBERG, HARM TO OTHERS, *supra* note 18, at 4, 10, 16; FEINBERG, HARM TO SELF, *supra* note 18, at ix, 25; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at 30, 258, 321, 323; *id.* at 66 (distinguishing moral legitimization and justifying reasons on balance); NEW ETHICS FOR THE PUBLIC'S HEALTH 7 (Dan E. Beauchamp & Bonnie Steinbock eds., 1999); RILEY, *supra* note 51, at 114-15, 191; SCHONSHECK, *supra* note 28, at 67; Joel Feinberg, HARM TO OTHERS—A Rejoinder, 5 CRIM. JUST. ETHICS 16, 16-17 (1986); Harris, *Adult Behavior*, *supra* note 24, at 588; Regan, *supra* note 78, at 114 ("My hypothetical paternalist does not make mistakes . . . I am ignoring serious practical problems, because it seems to me that before we can decide what sorts of paternalism are justified in practice, we need to have some idea of what sorts would be justified for my ideal paternalist.").

contract or might allow a party to recover in tort for injuries which she voluntarily assumed.<sup>165</sup>

*e. Summary of Condition One*

The agent's limitation of the subject's liberty is a necessary condition of hard paternalism because hard paternalism is, after all, a liberty-limiting principle. The concept of hard paternalism involves an agent's limitation of a subject's liberty under certain circumstances and for particular reasons. So, even before specifying these circumstances and reasons, a necessary condition of hard paternalism is that liberty limitation must be present in the first place.<sup>166</sup>

*2. Condition Two: The Agent Must Limit the Subject's Liberty Primarily Out of Benevolence Toward the Subject*

The second condition of hard paternalism is perhaps its most distinctive. All liberty-limiting principles are ethical bases for limiting the subject's liberty. What distinguishes them from each other is the agent's motive in restricting the subject's liberty. Professor Daniel Thompson correctly explained that "paternalism refers not to a distinct class of *actions* but [refers instead] to a class of *reasons* that we may use to justify or condemn restrictions."<sup>167</sup> What kind of reasons for liberty limitation are hard paternalistic?

165. See, e.g., DWORKIN, *AUTONOMY*, *supra* note 37, at 109; HART, *supra* note 105, at 31; KLEINIG, *supra* note 3, at 188; KULTGEN, *supra* note 3, at 166; PROSSER, *supra* note 6, at 101; Smiley, *supra* note 109, at 313.

166. Distinctions between (1) direct and indirect; (2) active and passive; (3) compulsive and coercive; and (4) contemporaneous, retrospective, and prospective paternalism all permit philosophers to describe the manner of liberty limitation more precisely. These distinctions represent only contingent, and not necessary, features of hard paternalism.

167. THOMPSON, *supra* note 3, at 153; Thompson, *supra* note 47, at 249; see also FEINBERG, *HARM TO SELF*, *supra* note 18, at 22; GUTMANN & THOMPSON, *supra* note 3, at 235; HUSAK, *DRUGS AND RIGHTS*, *supra* note 47, at 64 ("The distinction between harm to oneself and harm to others . . . is a distinction between *rationales* for laws."); KLEINIG, *supra* note 3, at 12 ("What is important so far as paternalism is concerned is not whether it is possible to isolate a class of 'paternalistic' impositions, but whether a particular (e.g., paternalistic) rationale for imposing upon others has any moral standing, and if so, how much."); *id.* at 14; *id.* at 18 ("Unless something like this [distinction] is assumed, the whole issue of paternalism is rendered academic."); *id.* at 16 ("[T]he harm principle is not concerned with harm merely in the sense of damage. It is concerned with harm as an injury, a wrong."); *id.* at 33-36 (suggesting that even this definition might not be sufficient and it might be better to focus on the

To be properly described as "paternalistic," an agent's motive for restricting a subject's liberty must be subject-focused. Specifically, it must be benevolent toward the subject. As Dworkin explained, "P acts paternalistically toward Q if and only if . . . P acts with the intent of averting some harm or promoting some benefit for Q."<sup>168</sup> VanDeVeer similarly explained, "[I]f A acts paternalistically he does so with an altruistic motive; he aims at promoting the good of another."<sup>169</sup>

A necessary condition of paternalism is that the paternalistic agent limit the subject's liberty with the primary motive either to confer a benefit upon or to avert harm from the subject.<sup>170</sup> This motive

motivation for restriction rather than the conduct restricted); NIKKU, *supra* note 3, at 122-24; SCHONSHECK, *supra* note 28, at 109 ("Strictly speaking . . . 'paternalistic' is a predicate of justifications."); Douglas M. Husak, *Legal Paternalism*, in OXFORD HANDBOOK OF PRACTICAL ETHICS 387-412 (Hugh LaFollette ed., 2003) [hereinafter Husak, *Legal Paternalism*]; Robert Marples, *Review of JOHN KLEINIG, PATERNALISM*, 2 J. APPLIED PHIL. 288, 288 (1985) ("[P]aternalism is seen as a rationale for acting rather than as a form of behaviour."); Moore, *supra* note 24, at 72; *id.* at 76 (noting that what is distinctive about paternalism lies "not so much in the content of recommended restrictions or legislation, but in the form of the argument for those restrictions") (emphasis added); Perri 6, *supra* note 18, at 160 ("[P]aternalism is a category of reason for action, not an empirically observable discrete natural kind of action.").

168. Dworkin, *Paternalism*—CAMBRIDGE, *supra* note 113, at 649; see also Dworkin, *Paternalism*—ENCYCLOPEDIA, *supra* note 44, at 940 ("[I]ts purported justification would be in terms of reasons referring to the promotion of the person's good or the prevention of harm to the person."); Dworkin, *Paternalism*—ETHICS, *supra* note 113, at 1282.

169. VANDEVEER, *supra* note 6, at 12.

170. See, e.g., ARMSDEN, *supra* note 27, at 21, 124; BAYLES, *supra* note 127, at 119-20; BEAUCHAMP & CHILDRESS, *supra* note 3, at 274, 417; Beauchamp & McCullough, *supra* note 51, at 84; CHILDRESS, *supra* note 3, at 12-13; FEINBERG, HARM TO SELF, *supra* note 18, at 4-7 (comparing benevolent and non-benevolent paternalism and considering only the former as true paternalism); *id.* at 377 n.23; GERT ET AL., *supra* note 79, at 197; KLEINIG, *supra* note 3, at 10; ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 254 (1979); KULTGEN, *supra* note 3, at 62-63, 67, 72, 173, 212; ON LIBERTY, *supra* note 53, at 170-71 (arguing that taxing hazardous products is acceptable in order to raise revenue but unacceptable with the objective to discourage their use); NIKKU, *supra* note 3, at 45, 155; THOMPSON, *supra* note 3, at 151; VANDEVEER, *supra* note 6, at 22, 24 (noting that Hart lacks this element); *id.* at 28, 56, 306, 423; David Archard, *Paternalism Defined*, 50 ANALYSIS 36, 36, 38-39 (1990); Arneson, *Mill Versus*, *supra* note 41, at 471-72; Arneson, *Paternalism*, *supra* note 113, at 250 ("The paradigm of paternalism . . . is restriction of people's liberty . . . for their own good."); Beauchamp, *Paternalism*, *supra* note 38, at 1914-15; Beauchamp, *Biobehavioral Control*, *supra* note 51, at 123; Buchanan, *supra* note 79, at 372; Carter, *supra* note 58, at 133; Chan, *supra* note 24, at 86; Clarke, *supra* note 112, at 82-83; Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 121 n.287 (1999); Norman O. Dahl, *Review Essay—Against Legal Paternalism*, 7 CRIM. JUST. ETHICS 67, 69 (1988); Dworkin, *Paternalism*—ENCYCLOPEDIA, *supra* note 44, at 940; Fotion, *supra* note 153, at 197; Hershey, *supra* note 127, at 172; Nancy S. Jecker, *Is Refusal of Futile Treatment Unjustified Paternalism?*, 6 J. CLINICAL ETHICS 133, 134 (1995); Kasachkoff, *supra* note 24, at 412; Kennedy, *supra* note 5, at 570-71; Perri 6, *supra* note 18, at 160; Shapiro, *supra* note 4, at 522, 525; Shiffrin, *supra* note 75, at 218 ("[P]aternalism by A toward B may be characterized as behavior . . . directed at B's own interests . . ."); C.L. Ten, *Paternalism and Morality*, 13 RATIO 56, 64 (1971); Weale, *Paternalism*, *supra* note 18, at 163; *id.* at 168 ("[N]o policy instrument or process can be labelled paternalist irrespective of the policy

condition allows us to distinguish the benevolent despot, who seeks the good of the subject (albeit according to his own conception of the good) from the tyrant, who is in no way concerned with the subject's good (and just wants to impose his will).<sup>171</sup>

### a. Benevolence Versus Beneficence

Explaining the benevolent motive condition with a bit more specificity may be helpful. In particular, distinguishing "benevolence," which is essential, from "beneficence," which is not essential, is important.<sup>172</sup> Although some commentators often portray paternalism as an application of the principle of beneficence at the expense of the principle of autonomy,<sup>173</sup> paternalism is, in fact, neither necessarily nor intrinsically beneficent.

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aims it is meant to achieve."); Weale, *Invisible Hand*, *supra* note 24, at 790. To the extent the agent's motive is not wholly to benefit the subject, the paternalism is "mixed." FEINBERG, HARM TO SELF, *supra* note 18, at 8. While the agent's motive to benefit the subject may not be the agent's only motive for intervening, it is necessary and sufficient. Other motives are accidental.

171. Cf. ARMSDEN, *supra* note 27, at 143. James Childress noted that "[o]ne common argument against paternalistic practices is that their alleged benevolence or beneficence really masks self-interest." CHILDRESS, *supra* note 3, at 43. Indeed, it is useful to observe that people have often employed and continue to employ paternalistic rationales to justify gender, racial, and other invidious discrimination. See KULTGEN, *supra* note 3, at 78, 171; Douglas, *supra* note 85, at 197-98; Weiss, *supra* note 18, at 186 ("Paternalism, in which a patient's freedom is lessened for the patient's ultimate benefit, should not be confused with authoritarianism, where this freedom is lessened for the physician's power."); Zamir, *supra* note 3, at 281. For gender discrimination, see *Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973) (striking on Fifth Amendment due process grounds a military regulation that presumed dependency for female spouses but not for male spouses for benefits purposes) (citing *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (upholding a state law refusing to grant women, for their own good, the license to practice law)); *id.* at 684-85 ("Traditionally, [discrimination against women] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."). For racial discrimination, see Anita L. Allen & Thaddeus Pope, *Social Contract Theory, Slavery, and the Antebellum Courts*, in A BLACKWELL COMPANION TO AFRICAN AMERICAN PHILOSOPHY 125 (Tommy L. Lott & John P. Pittman eds., 2003) and KLEINIG, *supra* note 3, at 171. For disability discrimination, see Harlan Hahn, *Paternalism and Public Policy*, 20 SOCIETY 36 (1983) and Mike Jackman, *Enabling the Disabled: Paternalism Is Enemy No. 1*, 15 PERSPECTIVES 22, 22 (1983). Nevertheless, this usage is not an indictment of paternalism because tyrannical, agent-self-interested liberty-limitation, in spite of the rhetoric it may employ, is not really paternalism.

172. Here, I use these terms in their standard etymological sense rather than in the technical jargonistic sense they have in normative ethics. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 144 (1986).

173. See, e.g., Beauchamp, *Paternalism*, *supra* note 38, at 1914 ("[A]n act of paternalism overrides the value of respect for autonomy on some grounds of beneficence."); CONTEMPORARY ISSUES, *supra* note 30, at 33 ("The essence of paternalism is an overriding of the principle of respect for autonomy on grounds of the principle of beneficence."); FEINBERG, HARM TO SELF, *supra* note 18, at 58 (noting that although conceptually related, the subject's good is conceptually distinct from the subject's right of self-determination); FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at xvii ("Legal paternalism . . .



The paternalistic agent need not actually do (*facere*) good (*bene*) for the subject. The definition of paternalism does not require that the paternalistic agent be successful in achieving good for the subject.<sup>174</sup> Paul Turner Hershey explained:

While it seems correct to say that a necessary condition for the definition of paternalism is that such acts are taken for the recipient's own good, it seems incorrect to say that such actions are paternalistic only if they succeed in being for the recipient's own good. One needs to temper such a necessary condition with the fact that not all paternalistic actions produce the good for which they are intended. We might instead only require that paternalistic actions are *intended* to benefit their recipients. Allowances can then be made for failing to benefit the recipient while still being able to say that such actions are paternalistic.<sup>175</sup>

For example, I might try to thwart a subject's suicide attempt by shoving that person out of the way of an oncoming truck. Despite my efforts, the truck might still strike and kill the suicidal individual. This would be unsuccessful paternalism, but it is paternalism nonetheless because I interfered with another's liberty *for her own good*.<sup>176</sup>

Furthermore, success is not a sufficient condition of paternalism either. It is not enough that the consequences of the intervention happen to, coincidentally or unintentionally, confer a benefit onto the

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subordinates a person's *right* of self-determination to the person's own *good*."); KLEINIG, *supra* note 3, at 5; Childress & Campbell, *supra* note 27, at 122.

174. See, e.g., CHILDRESS, *supra* note 3, at 21; KLEINIG, *supra* note 3, at 76; Archard, *supra* note 170, at 37; Chan, *supra* note 24, at 86 ("[T]he intention to benefit the subject, and not the success in doing so, defines paternalism."); Hershey, *supra* note 127, at 172.

175. Hershey, *supra* note 127, at 172.

176. E.g., CHILDRESS, *supra* note 3, at 21; Hershey, *supra* note 127, at 177. If the agent's limitation is not reasonably calculated to be effective in achieving good for the subject, then the agent's paternalism may be a pretext for another perhaps less palatable motive for intervention. Alternatively, the ineffectiveness may have an impact on the justifiability of hard paternalism. Limiting individual liberty is unacceptable when doing so fails to produce any good. Effectiveness does not factor into the *definition* of paternalism. The implementation of any liberty limiting principle may fail to achieve the principle's core aim (for example, prevent harm to others). Hard paternalism, like all liberty limiting principles, takes an *ex ante* rather than an *ex post* perspective on the agent's liberty limitation.

subject.<sup>177</sup> If I restrict your liberty either for my own selfish reasons or for other-regarding reasons and without any altruistic motive, but it nevertheless turns out that (accidentally) you benefit, that accidental result does not make my intervention paternalistic.<sup>178</sup> Notwithstanding the actual results of my intervention, I did not intervene with your liberty with the motive of protecting or benefiting you.<sup>179</sup>

Although paternalism is not necessarily beneficent, it is, on the other hand, necessarily benevolent. The paternalistic agent must have the will (*volens*) to promote the good (*bene*) of the subject. If an agent's motive for restricting a subject's liberty were selfish, moralistic, or for some other motive that does not involve benefiting the subject or saving the subject from harm, then the agent's restriction of the subject's liberty would not be paternalism.<sup>180</sup> Liberty limitation must be for the subject's good and not for the general good. Otherwise, the liberty limitation would fall under another liberty-limiting principle or, if selfishly motivated, would fall under no liberty-limiting principle.<sup>181</sup>

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177. See, e.g., FEINBERG, HARM TO SELF, *supra* note 18, at 21; KLEINIG, *supra* note 3, at 38; Husak, *Legal Paternalism*, *supra* note 167.

178. VanDeVeer criticized Hart's definition, "the protection of people against themselves," for being deficient because it suggests that successful protection is sufficient. VANDEVEER, *supra* note 6, at 24. VanDeVeer suggested the counterexample where an enraged husband punches out his wife and thereby unwittingly prevents her from taking cyanide pills. *Id.* The husband "protected" his wife, but he did not act paternalistically.

179. See, e.g., FEINBERG, HARM TO SELF, *supra* note 18, at 17-18; Weale, *Invisible Hand*, *supra* note 24, at 790.

180. See, e.g., FEINBERG, HARM TO SELF, *supra* note 18, at 4-7 (comparing benevolent and nonbenevolent paternalism and considering only the former as paternalism); KULTGEN, *supra* note 3, at 55 ("Conflictful parentalism is actually pseudo-parentalism since genuine parentalism entails the intention to benefit the subject, but here it is only pretended."); *id.* at 200; Chan, *supra* note 24, at 89, 90 n.13 (arguing that if agents "interfere on the ground of interwoven interests, they do not interfere qua paternalists, for then they are interfering for the sake of their own interests rather than ours. An act is paternalistic only if the subject's interest is the reason for which the act is done, rather than the agent's own interest."); Zamir, *supra* note 3, at 281 (describing the case where the agent's "benevolent rhetoric may disguise other, less legitimate motivations" as "false paternalism").

181. "Paternalistic interventions contrast with state limitations on individual action that are based on other concerns (for example, the rights of others or public health and safety)." Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 293 n.55 (2003). Other liberty limiting principles include: (1) the harm principle, (2) the offense principle, and (3) moralism. See generally BEAUCHAMP, MORAL PHILOSOPHY, *supra* note 25, at 352-73; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at xix-xx.

*b. Mixed Versus Unmixed Paternalism*

While a paternalistic liberty limitation requires a benevolent motive, determining the presence of this motive is often difficult because much liberty limitation is motivated by several reasons at once.<sup>182</sup> Philosophers refer to this as “mixed paternalism.”<sup>183</sup> In mixed paternalism, the agent intervenes on the basis of not only paternalism but also on the basis of some other liberty-limiting principle. For example, the paternalistic agent might restrict the subject’s liberty with the intention of providing a benefit to or averting harm from not only the subject but also to and from others.<sup>184</sup> In “unmixed paternalism,” on the other hand, the paternalistic agent restricts a subject’s liberty either in order to protect only the subject from harm or in order to provide a benefit to only the subject herself.<sup>185</sup>

The distinction between mixed and unmixed paternalism is, in one respect, the flipside of the distinction between direct and indirect paternalism regarding the effect of the agent’s intervention. In mixed paternalism, the agent restricts the subject’s liberty with the motive of benefiting not only the subject but also others. In unmixed paternalism, the agent restricts the subject’s liberty with the motive of benefiting only the subject. The following two diagrams illustrate the relationship between the “mixedness” of paternalism and the directness of paternalism.

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182. See, e.g., BEAUCHAMP & CHILDRESS, *supra* note 3, at 179.

183. E.g., FEINBERG, HARM TO SELF, *supra* note 18, at 8, 16.

184. GERT ET AL., *supra* note 79, at 197; NIKKU, *supra* note 3, at 33, 45, 120; Hershey, *supra* note 127, at 172; Shapiro, *supra* note 4, at 526 n.21 (noting that distributive policies like food stamps may have paternalistic aspects).

185. FEINBERG, HARM TO SELF, *supra* note 18, at 8, 16-21; KULTGEN, *supra* note 3, at 79; see also, e.g., BEAUCHAMP & CHILDRESS, *supra* note 3, at 275; Shapiro, *supra* note 4, at 526-27.

	Direct	Indirect
Unmixed	(1)	(2)
Mixed	(3)	(4)

	(1)	(2)	(3)	(4)
Who is Restricted	A	B	A	B
For Whose Benefit	A	A	AB	AB

Four possible combinations exist.<sup>186</sup> The first combination, (1) unmixed-direct, is the sort of paternalistic intervention addressed in this Article.<sup>187</sup> This is the restriction of only A's liberty with the primary objective of benefiting only A. For example, a helmet law restricts the liberty of only motorcyclists (A) with the primary objective of benefiting the riders (A) themselves.<sup>188</sup>

The second combination, (2) unmixed-indirect, is the restriction of the liberty of B with the primary intent of benefiting only A. For example, regulation of the tobacco industry restricts the liberty of cigarette companies (B) with the primary objective of benefiting individual smokers (A).<sup>189</sup>

The third combination, (3) mixed-direct, is the restriction of only A's liberty with the primary objective of benefiting not only A but also B. For example, restricting a smoker (A) will help not only the smoker (A) but also those exposed to her environmental tobacco smoke (B).<sup>190</sup>

186. Kultgen suggested that these distinctions generate only three cells, denying the possibility of direct-mixed paternalism. See KULTGEN, *supra* note 3, at 165-66. However, as I argue below, surely situations exist where a paternalistic agent can directly restrict a subject for her own good and, to a lesser degree, also for the good of others.

187. See discussion *supra*.

188. See KULTGEN, *supra* note 3, at 166-67.

189. *Id.* at 166.

190. *Id.*

The fourth combination, (4) mixed-indirect, is the restriction of the liberty of B with the primary objective of benefiting not only A but also B. For example, licensure requirements impose restrictions on professionals (B) but benefit both professionals (B) economically and their customers (A) by ensuring quality.<sup>191</sup>

### c. *Pure Versus Impure Paternalism*

It is helpful to distinguish "mixed" and "unmixed" paternalism, which refers to the purity of the agent's motive, and "direct" and "indirect" paternalism, which refers to whose liberty is restricted, from "pure" and "impure" paternalism, which refers to the purity of the consequences of the agent's intervention.<sup>192</sup>

In pure paternalism, the agent primarily benefits only those subjects whose liberty the agent limits. For example, a law requiring hunters to wear bright orange jackets protects only the hunters themselves.<sup>193</sup> If an unmarried, childless hunter neglects to wear his orange jacket, and his fellow hunters subsequently mistake him for a deer and shoot him, then only the jacketless hunter will suffer.

In impure paternalism, on the other hand, the consequence of an agent's restriction of the subject's liberty has spillover effects onto

191. *Id.*

192. See, e.g., ARMSDEN, *supra* note 27, at 10; Dworkin, *Paternalism—MORALITY*, *supra* note 6, at 108, 110-11; KLEINIG, *supra* note 3, at 12; UMEZO, *supra* note 74, at 26; VANDEVEER, *supra* note 6, at 28, 66; see also FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at 8-9 (using the terms "impure" and "pure" to indicate when moralistic justifications do and do not also appeal to the harm principle). This builds on my distinction between benevolence and beneficence.

193. The plausibility of pure paternalism precisely correlates to the plausibility of the notion of self-regarding conduct. Cf. *Atwater v. City of Lago Vista*, 165 F.3d 380, 385 (5th Cir. 1999) (comparing four examples of self-regarding and four examples of other-regarding restrictions in Texas law); FEINBERG, HARM TO SELF, *supra* note 18, at 22 ("We can assume . . . a line can be drawn . . . between other-regarding behavior and conduct that is primarily and directly self-regarding and only indirectly and remotely, therefore trivially, other-regarding."); VANDEVEER, *supra* note 6, at 433-34; Bayles, *supra* note 85, at 109 n.3 ("Feinberg deftly handles the much-discussed question of whether there is any purely self-regarding conduct. He admits that conduct in which persons harm themselves always involves the public interest at least to a slight extent, but often not enough to invoke the harm to others principle."). At some point, harm-to-others justifications become so tenuous that characterizing the paternalism as pure is appropriate. See FEINBERG, HARM TO SELF, *supra* note 18, at 22 (admitting that conduct in which persons harm themselves always involves the public interest to some extent but often not enough to invoke the harm principle); see also *id.* at 56 ("As John Stuart Mill pointed out, however, a rough and serviceable distinction . . . can be drawn between decisions that are plainly other-regarding . . . and those that are 'directly,' 'chiefly,' or 'primarily' self-regarding. There will be a twilight area of cases that are difficult to classify, but that is true of many other workable distinctions, including that between night and day.").

third parties.<sup>194</sup> For example, a law banning the smoking of tobacco would protect the health not only of smokers but also the health of others, under most circumstances, because of reduced environmental tobacco smoke. With impure paternalism, the benefited class of liberty-restricted persons whose good is involved is not identical with the class of persons whose liberty is restricted. Specifically, the former class, those benefited, is typically wider than the latter class, those restricted, because the restricted individuals posed harm not only to themselves but also to others.

The following four-cell diagram represents the relation between mixed/unmixed and pure/impure paternalism.

		Consequences	
		Pure	Impure
Motive	Unmixed	(1)	(2)
	Mixed	(3)	(4)

194. Very impure measures, such as the provision of clean water, are often more effective at achieving public health objectives than education or coercion. See generally NIKKU, *supra* note 3, at 203-05; Tom Christoffel, *The Role of Law in Reducing Injury*, 17 LAW MED. & HEALTH CARE 7, 9 (1989). The more impure the interference, the more it is appropriately characterized as a limitation of freedom rather than as a limitation of liberty. In such circumstances, individuals' existing options are unlimited but the very array of available options is restructured. See generally FEINBERG, *HARMLESS WRONGDOING*, *supra* note 6, at 290-91; VANDEVEER, *supra* note 6, at 317 ("[G]overnments . . . determine a broad range of options."); *id.* at 336. Governments regularly restructure available options by providing spending or incentives. See FADEN & BEAUCHAMP, *supra* note 110, at 355 ("environmental manipulation"); KLEINIG, *supra* note 3, at 107; NANCY MILIO, *PROMOTING HEALTH THROUGH PUBLIC POLICY* 73-76 (1981); *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 21, at 956 ("There are matters in which the interference of law is required, not to overrule the judgment of individuals respecting their own interests, but to give effect to that judgment; they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law."); *id.* at 803 ("There is a multitude of cases in which the government, with the general approbation, assumes powers and executes functions for . . . general convenience . . . paving, lighting, and cleansing the streets . . ."); Fotion, *supra* note 153, at 197; William C. Powers, Jr., *Autonomy and the Legal Control of Self-Regarding Conduct*, 51 WASH. L. REV. 33, 42-43 (1975) ("In these situations, the ability to choose autonomously one's own lifestyle cannot be exercised by individuals: rather it must be exercised by communities of individuals."); Shapiro, *supra* note 4, at 547-48 (describing measures "not designed to help some people in spite of themselves, but to help realize a particular objective"); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 522 (2000) ("[I]nsofar as the argument stresses a collective action problem faced by individual consumers, paternalism is not at work at all.").

Cells (1) and (4) are uncomplicated. Cell (1) represents the case in which an agent limits a subject's liberty to benefit only that subject and through the intervention, in fact, benefits only that subject. Cell (4) represents the case in which an agent limits a subject's liberty for the good of both the subject and also of others and through the intervention, in fact, benefits both the subject and others.<sup>195</sup>

Cells (2) and (3) are more complicated. They illustrate the importance of drawing a distinction between purity of motive, mixed or unmixed, and purity of consequences, pure or impure. Cell (2), unmixed motive, impure consequences, represents the case in which an agent limits a subject's liberty with the intention to benefit only that subject but, nevertheless, coincidentally benefits third parties. For example, one might stop another from experimenting with controlled substances for that other's own good. In actuality, the liberty restriction also prevents harm to neighbors that the same hazardous fumes would have caused without the intervention. This intervention would be pure in motive but impure in result and is described as "unmixed impure direct paternalism."

Cell (3), impure motive, pure consequences, represents the case in which an agent limits a subject's liberty with an impure motive but, nevertheless, produces a purely paternalistic result. For example, one might stop a subject from smoking both in order to protect that subject from mainstream smoke and in order to protect the subject's family from secondary smoke. In actuality, the subject smokes only on his outside deck, where the environmental tobacco smoke dissipates to safe concentrations. Thus, the intervention will not help the subject's family as intended; it will help only the smoker. This intervention would be impure in motive but pure in result and is described as "mixed pure direct paternalism."

While one can draw and assess the distinction between pure and impure paternalism, regarding effects and consequences,

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195. Of course, the agent's primary or sole motive in intervening might be to prevent harm to others or to preserve either morality in general or the morality of the subject. These considerations, however, should be secondary. Otherwise, the paternalism will be too impure and other liberty-limiting principles could independently justify the liberty restriction. In other words, if the subject's welfare is too small a motivating factor, relative to either the welfare of others or to the agent's own interests, then the liberty limitation might not be impure paternalism but might not be paternalism at all.

independently from the distinction between mixed and unmixed paternalism, regarding the agent's motives, these two notions are interdependent in one sense.<sup>196</sup> When the purity of the intervention is very high or very low, imputing, respectively, a mixed or unmixed motive to the paternalistic agent will rarely be plausible. If too impure, the intervention will not meet the necessary condition of hard paternalism—that the agent interfered with the subject's liberty primarily out of benevolence toward the subject.<sup>197</sup> Sufficient evidence must exist for the agent to believe that limiting the subject's liberty will benefit the subject.<sup>198</sup>

#### *d. Summary of Condition Two*

In sum, the second condition of hard paternalism requires that the primary motive of the liberty-limiting agent in limiting the subject's liberty be benevolence toward the subject. Were the agent's motive benevolent toward someone other than the subject or were it not benevolent at all, the agent's limitation of the subject's liberty would not be hard paternalism.

### *3. Condition Three: The Agent Must Disregard the Subject's Contemporaneous Preferences*

The third condition of hard paternalism requires that the agent's motive for intervention be independent from and without regard to the subject's contemporaneous preferences.<sup>199</sup> Dworkin explained

196. Cf. FEINBERG, HARM TO SELF, *supra* note 18, at 8.

197. See *supra* Part III.B.2.

198. See *supra* Part III.B.2.

199. See, e.g., ARMSDEN, *supra* note 27, at 7; BAYLES, *supra* note 127, at 119-20; FEINBERG, HARM TO SELF, *supra* note 18, at 20-21; GERT ET AL., *supra* note 79, at 198, 203; HÄYRY, MEDICAL PATERNALISM, *supra* note 27, at 54, 139 (giving the "concept of an intervention a rather wide interpretation"); KULTGEN, *supra* note 3, at 62-63, 212 (criticizing VanDeVeer's requirement that the intervention be *contrary* to the subject's preference, and also criticizing Gert and Culver's requirement that the actor believe he is violating a moral rule); NIKKU, *supra* note 3, at 55; VANDEVEER, *supra* note 6, at 18-20, 22 (expanding the definition of the condition to include intervention such as indoctrination to mold the creation of the preferences); Archard, *supra* note 170, at 36, 39 ("[S]ince [the agent] thinks that [the subject] shares [the agent's] judgement of [the subject's] good, . . . the behavior does not count as paternalist."); *id.* at 39-40 (requiring, wrongly, a denial or diminishment of choice or opportunity); Arneson, *Paternalism*, *supra* note 113, at 250 ("The paradigm of paternalism . . . is restriction of people's liberty against their will . . ."); Beauchamp, *Paternalism*, *supra* note 38, at 1914; Douglas, *supra* note 85, at 172; Dworkin, *Paternalism*—ENCYCLOPEDIA, *supra* note 44, at 940; Häyry,



that "P acts paternalistically toward Q if and only if . . . P acts contrary to (or is indifferent to) the current preferences, desires, or values of Q."<sup>200</sup> Childress explained that the paternalistic agent acts on the subject's behalf but not at the subject's behest.<sup>201</sup>

The need to distinguish hard paternalism from cases of gift-giving, philanthropy, charity, and general altruism requires this condition.<sup>202</sup> No one would consider it hard paternalism for an agent to limit the liberty of a subject at the subject's request. It was not hard paternalism, for example, for Odysseus' crew to bind him to the mast. They were merely following Odysseus' orders.<sup>203</sup>

If the subject wants the agent to intervene and if the agent intervenes because the subject wants her to intervene, then the agent's intervention is not paternalistic. If the agent's intervention is neither contrary to nor independent of the subject's contemporaneous preferences, then the agent's intervention is altruism rather than paternalism.<sup>204</sup>

The subject's consent to intervention itself does not make the agent's liberty limitation non-paternalistic.<sup>205</sup> The subject's consent

*Paternalism*, *supra* note 38, at 451 ("[A]ctions are paternalistic when those in positions of authority . . . refuse to act according to people's wishes . . ."); Hershey, *supra* note 127, at 178 ("This independence in A's decision to act characterizes B's consent or dissent as irrelevant or motivationally impotent."); *id.* at 179 (explaining that liberty limitation is paternalistic only if the subject's consent is not a relevant consideration for the agent); New, *supra* note 19, at 65 n.2 (suggesting that this condition is met automatically with state paternalism because there is no individualized assessment of preferences or consent); Shapiro, *supra* note 4, at 523-24; Peter Suber, *Paternalism*, in 2 *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 632, 632 (Christopher Berry Gray ed., 1999) ("Paternalism . . . is to act for the good of another person without that person's consent . . .").

200. Dworkin, *Paternalism*—CAMBRIDGE, *supra* note 113, at 649.

201. CHILDRESS, *supra* note 3, at 4.

202. See Hershey, *supra* note 127, at 177.

203. *THE ODYSSEY OF HOMER* Book XII, 189 (Richmond Lattimore trans., Harper & Row ed., 1967).

204. See Raymond B. Marcin, *Review of PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE*, 41 *REV. METAPHYSICS* 637, 639 (1988).

205. Serious conceptual incoherencies arise from using consent as the basis to justify paternalistic intervention. The agent cannot have his cake and eat it too. The more the agent draws on the justificatory force of consent, the less the intervention is a paternalistic one. See generally ARMSDEN, *supra* note 27, at 81, 114-48; BEAUCHAMP & CHILDRESS, *supra* note 3, at 129 (calling consent arguments "misleading and dangerous"); FEINBERG, *HARM TO SELF*, *supra* note 18, at 182-83 (subsequent consent); HÄYRY, *MEDICAL PATERNALISM*, *supra* note 27, at 118-19 (same); HODSON, *supra* note 51, at 63; KLEINIG, *supra* note 3, at 66; *id.* at 61-63 (charging subsequent consent arguments with ad-hocery); KULTGEN, *supra* note 3, at 119-21, 123, 139, 224 (arguing that consent arguments "could be extended to almost any intervention by the enthusiastic parentalist" and that they go down the "road of implausibility"); NIKKU, *supra* note 3, at 81-88, 110 (subsequent consent); VANDEVEER, *supra* note 6, at 66-70 (same); David Archard, *Self-Justifying Paternalism*, 27 *J. VALUE INQUIRY* 341, 342 (1993); Beauchamp, *Paternalism*, *supra* note 38, at 1916 ("A justification based on consent may do more to obscure than to

makes the agent's intervention non-paternalistic only if the subject's consent is the primary factor that motivates the agent to intervene.<sup>206</sup> If the agent was going to intervene anyway, regardless of the subject's consent, the fact that the agent and subject happen to agree (that the agent should intervene) does not make the agent's intervention non-paternalistic.

Moreover, the paternalistic agent and the subject may agree that the agent should intervene, but to be paternalistic, the agent and subject must not agree on *why* the agent should intervene. The agent's decision to limit the subject's liberty must be independent from the subject's consent such that it is "motivationally impotent."<sup>207</sup> The subject might think the agent should intervene because that is what she, the subject, wants. However, the truly paternalistic agent does not care that the subject wants him to intervene; it is not a relevant consideration. The agent intervenes for his own, albeit benevolent, independent reasons. The paternalistic agent intervenes because he thinks that he knows better than the subject how the subject ought to behave in the circumstances of liberty limitation.

#### *a. Ascertaining the Agent's Motive: Reconstructed Intent*

Because motive plays such an important role in defining liberty-limiting principles, one ought to know how to ascertain it. Unfortunately, epistemological difficulties (for example, how can we know a legislature's intent) and thorny individuation problems (for example, does the legislature want to ban smoking in order to protect

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clarify the issues."); Chan, *supra* note 24, at 91 & n.17 (subsequent consent); Douglas N. Husak, *Paternalism and Autonomy*, 10 PHIL. & PUB. AFF. 27, 33 (1980) (same); Tziporah Kasachkoff, *Paternalism: Does Gratitude Make It Okay?*, 20 SOC. THEORY & PRAC. 1, 6-20 (1994); Rainbolt, *supra* note 115, at 57 ("This view has little plausibility."); Soble, *supra* note 96, at 351; Cynthia A. Stark, *Hypothetical Consent and Justification*, 97 J. PHIL. 313, 321 (2000) ("Only actual consent sanctions coercion."); Weale, *Paternalism*, *supra* note 18, at 171-72 (subsequent consent); James Woodward, *Paternalism and Justification*, in NEW ESSAYS IN ETHICS AND PUBLIC POLICY (Kai Nelson & Steven C. Patten eds.), published as 8 CANADIAN J. PHIL. 67, 70-71 & n.5 (Supp. 1982).

206. Weale, *Paternalism*, *supra* note 18, at 171-72.

207. Clarke, *supra* note 112, at 88 ("A paternalist may believe that his target shares his view that the intervention is for his own good. He remains a paternalist insofar as his reason for intervening is the target's good rather than the target's desires."); Hershey, *supra* note 127, at 178-79.

smokers themselves, in order to protect third parties, or in order to protect both) plague efforts to determine motive.<sup>208</sup>

Feinberg contended that the solution to both the epistemological and individuation problems of ascertaining motive is to use a “reconstructed intent” rather than attempting to ascertain the actual psychological intent of the paternalistic agent.<sup>209</sup> Feinberg urged that we should look to “the implicit rationale of the law—the account of its role, function, and motivation that most coheres with the known facts.”<sup>210</sup> In short, we must determine the “most plausible” intent of the paternalistic agent and use that intent as the basis for establishing whether the agent’s liberty limitation is paternalistic.<sup>211</sup>

### *b. Summary of Condition Three*

The third condition of hard paternalism requires that the agent limit the subject’s liberty without regard for the subject’s desires contemporaneous with the liberty limitation. Were the agent to limit the subject’s liberty pursuant to the subject’s desires, then the agent’s limitation would not be paternalistic.

208. HAYRY, *MEDICAL CONTROL*, *supra* note 72, at 23; *see* KLEINIG, *supra* note 3, at 17 n.10, 178; Husak, *Legal Paternalism*, *supra* note 167.

209. FEINBERG, *HARM TO SELF*, *supra* note 18, at 16 (“[T]he reason that in fact supports [a law], may not then be the reason that impelled a legislator to vote for it.”); *id.* at 17 (“Sometimes we can construct an implicit rationale for the law . . . that . . . provides it with a plausibly coherent rational reconstruction.”); *id.* at 19 (“So it is useful to look for an ‘implicit rationale’ . . . .”); *id.* at 25 (“[T]here are many laws now on the books that *seem* to have hard paternalism as an essential part of their implicit rationales, and that some of these at least, seem to most of us to be sensible and legitimate restrictions.”); FEINBERG, *HARMLESS WRONGDOING*, *supra* note 6, at xvii (“In favor of the principle is the fact that there are many laws now on the books that *seem* to have hard paternalism as an essential part of their *implicit rationales* . . . .”) (emphasis added); *id.* at 220 (suggesting use of “the most plausible rationale we can reconstruct”); *id.* at 224 (“[T]here was a harm principle rationale . . . even though, in many instances, it may not have been [the legislators’] rationale.”); *see also* GUTMANN & THOMPSON, *supra* note 3, at 253 (“If we probed officials and citizens . . . we would no doubt find many different kinds of reasons . . . . But the dominant reasoning and the most cogent justifications for the ban rely on moralist categories . . . .”) (emphasis added); KLEINIG, *supra* note 3, at 178; KULTGEN, *supra* note 3, at 167; THOMPSON, *supra* note 3, at 171; Husak, *Liberal Neutrality*, *supra* note 27, at 60-61 (“[T]he quest for the rationale of a law seems no less elusive than the quest for legislative intent. . . . [H]ow can anyone pretend to have identified the rationale of a law? . . . Liberals should struggle to decide whether any *plausible rationale* for drug proscriptions can satisfy the neutrality constraint.”) (emphasis added); Weale, *Invisible Hand*, *supra* note 24, at 790 (discussing when one is justified in “attributing” paternalistic intentions to policymakers).

210. FEINBERG, *HARM TO SELF*, *supra* note 18, at 21.

211. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542-46 (1993) (analyzing whether municipal ordinances prohibiting animal sacrifice “targeted” religious conduct protected by the First Amendment).

4. *Condition Four: The Agent Must Either Disregard Whether the Subject Engages in the Restricted Conduct Substantially Voluntarily or Deliberately Limit the Subject's Substantially Voluntary Conduct*

The fourth condition of hard paternalism requires that the agent either (1) disregard whether the subject engages in the restricted conduct substantially voluntarily or (2) deliberately limit the subject's substantially voluntary conduct. This condition allows one to distinguish hard paternalism from soft paternalism.<sup>212</sup>

My specification of this condition is broader than that provided by any other writer. Philosophers distinguish hard paternalism from soft paternalism based on the idea that hard paternalism restricts substantially voluntary conduct while soft paternalism restricts conduct that is not substantially voluntary.<sup>213</sup> So, the standard distinguishing feature of hard paternalism is the extent to which the subject's conduct is substantially voluntary.

I contend that this condition, like the other three conditions, should be agent-focused. The important consideration is not whether the subject, in fact, acts substantially voluntarily. Rather, what matters for purposes of the definition of hard paternalism is whether the agent knows or cares that the subject acts substantially voluntarily. First, however, I will explicate the concept of substantial voluntariness.

a. *The Threshold Concept: "Substantial Voluntariness"*

At the outset of *Harm to Self*, Feinberg explained that hard paternalism is a principle by which the state limits the liberty of

212. See *supra* Part II.

213. See, e.g., BAYLES, *supra* note 127, at 122; FEINBERG, HARM TO SELF, *supra* note 18, at 12; KLEINIG, *supra* note 3, at 8; Arneson, *Paternalism*, *supra* note 113, at 251 ("The hard paternalist position holds that paternalism can be justifiable even if the individual action that is restricted is substantially voluntarily chosen."); Beauchamp, *Paternalism*, *supra* note 38, at 1915 ("In strong paternalism . . . it is proper to protect or benefit a person by autonomy-limiting measures even if the person's contrary choices are [substantially] autonomous."); Dworkin, *Paternalism*—ENCYCLOPEDIA, *supra* note 44, at 941; Feinberg, *Paternalism*, *supra* note 45, at 390 ("Hard paternalism justifies the forcible prevention of some . . . activities even when those activities are done in a fully voluntary (i.e. free and informed) way."); Häyry, *Paternalism*, *supra* note 38, at 454 ("Those who advocate strong paternalism . . . control . . . behavior even if the decisions leading to these are not, in any detectable sense, impaired.").

"competent adults, against their will, from the harmful consequences even of their *fully* voluntary choices and undertakings."<sup>214</sup> Ten years later, in his 1996 *Encyclopedia of Philosophy* chapter on paternalism, Feinberg defined hard paternalism as the restriction of "fully" or "wholly" voluntary self-regarding conduct.<sup>215</sup>

Feinberg surely stated a stronger definition than necessary. Hard paternalism need not endorse so extreme a position.<sup>216</sup> First, little, if any, human behavior is *fully* voluntary.<sup>217</sup> Feinberg's definition is so broad that it encompasses interference with conduct that does not even exist.<sup>218</sup> Second, hard paternalism can be made more modest so that it is at least plausible as a liberty-limiting principle.<sup>219</sup> If we want to explore whether hard paternalism might, to some extent, be justifiable, we will want a definition that does not predetermine a negative answer.

It is surely too demanding to require that a subject's conduct be completely free from all epistemic and volitional defects before assessing that she has "consented" to her own conduct.<sup>220</sup> So, philosophers—and the law—require only that a subject be

214. FEINBERG, HARM TO SELF, *supra* note 18, at 12 (emphasis added); *see id.* at 15 ("[L]egal paternalism' [is] that principle which legitimizes interfering with the *fully* voluntary, self-regarding choices of competent adult persons.") (emphasis added); FEINBERG, HARM TO OTHERS, *supra* note 18, at 115-17. Later, Feinberg clarified that the relevant distinction is between "more or less fully voluntary and not fully voluntary assumption of a risk." FEINBERG, HARM TO SELF, *supra* note 18, at 104-05, 115, 117; *id.* at 158 ("His act need not be close to the extreme of total involuntariness in order to be 'involuntary enough' to warrant interference."); *id.* at 160. Still, Feinberg continued to use the concept of full voluntariness. *Id.* at 107, 112, 248, 255, 299, 341; *see also* FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at xvii, 180, 202. VanDeVeer noted this inconsistency and that it has the effect of making soft paternalism "overly interventionist." VANDEVEER, *supra* note 6, at 85. He then uses the same definition himself later in his own book. *Id.* at 339; *see also* DWORKIN, AUTONOMY, *supra* note 37, at 124.

215. Feinberg, *Paternalism*, *supra* note 45, at 390-91. Oddly, Arneson criticized Feinberg on this imprecision long before the publication of *Harm to Self* in 1986. *See* Arneson, *Mill Versus*, *supra* note 41, at 482-84 (arguing that even substantial voluntariness is too high a standard); KULTGEN, *supra* note 3, at 228.

216. Arneson, *Mill Versus*, *supra* note 41, at 482-84.

217. The evidence on this point is the subject of increasing scholarly interest. *See generally* Daniel Kahneman, *Maps of Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003) (Nobel Prize lecture); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003).

218. Arneson, *Mill Versus*, *supra* note 41, at 484.

219. *Id.* at 482.

220. *Id.* at 482-84.

substantially free to at least a "substantial degree."<sup>221</sup> Employing this threshold permits philosophers to economically refer to classes of cases where distinct moral issues lie.<sup>222</sup>

Threshold accounts are efficient. However, it is important to not confuse the terms used to describe threshold concepts with those used to describe the "background variables" that go into determining whether the threshold concept applies.<sup>223</sup> Unfortunately, some commentators often confuse these two sorts of terms.<sup>224</sup>

Nevertheless, one can avoid the confusion by remembering that the voluntariness of a subject's conduct is a linear function of her

221. See, e.g., BEAUCHAMP & CHILDRESS, *supra* note 3, at 123 ("For an action to be autonomous we should only require a substantial degree of understanding and freedom from constraint . . ."); *id.* at 157 ("[A] substantial grasp of central facts and other descriptions is generally sufficient."); *id.* at 166 ("[W]e need only establish general criteria for the point at which autonomous choice is imperiled, while recognizing that no sharp boundary can be drawn in many cases . . ."); *id.* at 266 (stating that although it is difficult to specify "significant," the implication is clear); BEAUCHAMP & CHILDRESS, *supra* note 3, at 59, 89, 181; FEINBERG, HARM TO SELF, *supra* note 18, at 56 ("There will be a twilight area of cases that are difficult to classify, but that is true of many other workable distinctions, including that between night and day."); *id.* at 309; Beauchamp, *Paternalism*, *supra* note 38, at 1916 ("These choices [restricted by hard paternalism] may not be fully autonomous or voluntary, but in order to qualify as strong paternalism, the choices of the beneficiary of paternalistic intervention must be *substantially* autonomous or voluntary."); James Woodward, *Paternalism and Justification*, 7 CAN. J. PHIL. SUPPL. 67, 73 (1982); Michael Wreen, *The Definition of Suicide*, 14 SOC. THEORY & PRACTICE 1, 8 (1988) ("The distinction here [between a strong and a weak sense of "want"] is admittedly imprecise, but so are many well-founded and serviceable distinctions, such as the red/orange distinction, the tall man/not so tall man distinction, and so forth."). The subject's actual restricted conduct might not be substantially voluntary, but the subject may have made a separate substantially voluntary choice (a meta choice) to face the consequences of that epistemically or volitionally impaired conduct. See FEINBERG, HARM TO SELF, *supra* note 18, at 160-61, 278, 310-12; Joan C. Callahan, *Paternalism and Voluntariness*, 16 CAN. J. PHIL. 199, 218 (1986).

222. See KLEINIG, *supra* note 3, at 10.

223. See Steven Lee, *A Puzzle of Sovereignty*, 27 CAL. W. INT'L L.J. 241, 245-46 (1997).

224. For example, in clinical medicine, the concept of "competence" refers both to a status and to a particular factual state, more properly referred to as "capacity." See, e.g., FADEN & BEAUCHAMP, *supra* note 110, at 36 ("Competence can be either a factual or a presumptive, categorical determination."); *id.* at 289-90 (describing competence as a continuum concept for which a threshold must be set for it to serve as an "informed consent" gatekeeper); FEINBERG, HARM TO SELF, *supra* note 18, at 319; ALAN MEISEL, THE RIGHT TO DIE 114 (2d ed., 2003) (distinguishing *capacity* as factual status and *competence* as legal status); ALBERT R. JONSEN ET AL., CLINICAL ETHICS 56-57 (1982) (recommending "competence" to describe the value-laden legal status and "mental capacity" to describe a clinical description); Elyn R. Saks & Stephen H. Behnke, *Competency to Decide on Treatment and Research: MacArthur and Beyond*, 10 J. CONTEMP. LEGAL ISSUES 103, 115 (1999) (distinguishing capacity and competence); Smiley, *supra* note 109, at 300 ("[A]ll individuals are mentally impaired to some extent . . . [and] it is necessary to locate the point . . ."); Robert M. Wettstein, *Competence*, in ENCYCLOPEDIA OF BIOETHICS 447, 447 (Warren T. Reich ed., 1995) ("[C]ompetence determinations are not essentially factual, objective, or empirical matters but are value-laden judgments about the relative importance of autonomy . . . . Competence is typically inferred from the person's behavior rather than observed directly . . ."); *id.* at 446 (using "legal competence" and "clinical competence"); Winick, *supra* note 18, at 41, 61.

epistemic and volitional powers.<sup>225</sup> Like the classic sorites problems, voluntariness is a vague predicate with a smooth continuum.<sup>226</sup> Only when the voluntariness of a subject's conduct reaches a certain threshold is the subject's conduct said to be substantially voluntary.<sup>227</sup>

*b. The Standard Distinguishing Feature of Hard Paternalism*

Most researchers typically formulate the condition that distinguishes hard paternalism from soft paternalism as whether the subject's conduct is substantially voluntary.<sup>228</sup> On this account, the subject's lack of substantial voluntariness negates the value of autonomy with regard to that conduct.<sup>229</sup> Under these circumstances,

225. FADEN & BEAUCHAMP, *supra* note 110, at 239-40.

226. See BEAUCHAMP & CHILDRESS, *supra* note 3, at 123.

227. Just as the term "minor" applies categorically to persons under the age of 18, "substantial voluntariness" applies in an all or nothing fashion when certain conditions are satisfied. Just as the age of either a minor or non-minor can vary, so can the voluntariness of either substantially voluntary or non-substantially voluntary conduct. See KLEINIG, *supra* note 3, at 75; see also ARMSDEN, *supra* note 27, at 142; BEAUCHAMP & CHILDRESS, *supra* note 3, at 181; FADEN & BEAUCHAMP, *supra* note 110, at 239, 300; KULTGEN, *supra* note 3, at 94-95, 200 (defending relativistic conceptions instead of threshold ones); Brock, *Limited Paternalism*, *supra* note 19, at 86-87. It is important to remember that the voluntariness of a subject's conduct can vary significantly without crossing the threshold. Coercion, for example, makes conduct not substantially voluntary. Extra forceful coercion, therefore, is surfeit; the subject's conduct is already below the threshold. Similarly, extra understanding becomes "unused surplus." See Rainbolt, *supra* note 115, at 47; Daniel Wikler, *Paternalism and the Mildly Retarded*, 8 PHIL. & PUB. AFF. 377, 384 (1979); see also BEAUCHAMP & CHILDRESS, *supra* note 3, at 123 ("Actions therefore can be autonomous by degrees[;] a broad continuum exists."); FEINBERG, HARM TO SELF, *supra* note 18, at 115-16; *id.* at 278 ("[H]is less-than-fully-voluntary consent will be 'voluntary enough' for a valid and irrevocable contract."); *id.* ("It is hard paternalism when circumstances satisfy A, B, C, and D. The conditions in E represent properties that can range within hard paternalism."); RUSSELL HARDIN, MORALITY WITHIN THE LIMITS OF REASON 139-40 (1988) (noting that the strength of paternalism falls on a continuum); KLEINIG, *supra* note 3, at 157; KULTGEN, *supra* note 3, at 90; SCHONSHECK, *supra* note 28, at 181-82; Robert E. Goodin, *Democracy, Preferences and Paternalism*, 26 POL'Y SCI. 229, 236 (1993) ("Epistemic or volitional failings are points [on] a continuum. Any given individual may display any of [those] failings to a greater or lesser extent.").

228. Some philosophers use the term "competence" in the same way that Feinberg used "voluntary enough" and Beauchamp used "substantially autonomous." See Pope, *A Response*, *supra* note 11.

229. See BLOKLAND, *supra* note 47, at 171 (explaining that Mill would approve of restricting substantially nonvoluntary choices because they are "just as alien to the individual as someone else's choices"); FEINBERG, HARM TO SELF, *supra* note 18, at 12 ("[S]oft paternalism would permit us to protect him from 'nonvoluntary choices,' which, being the genuine choices of no one at all, are no less foreign to him."); *id.* at 28; FEINBERG, HARMLESS WRONGDOING, *supra* note 6, at xviii (arguing that soft paternalism protects subjects "from dangerous choices that are not truly his own"); HUSAK, DRUGS AND RIGHTS, *supra* note 47, at 130 ("[A]n agent's apparent choice is not truly *his* if it is nonvoluntary, so interference with it would not violate his autonomy."); NIKKU, *supra* note 3, at 126-27; Feinberg, *Paternalism*, *supra* note 45, at 391-92 ("To restrict his liberties in such circumstances . . . we will not be interfering with his real self or blocking his real will . . ."); Husak, *Liberal Neutrality*, *supra* note 27, at 62 ("Since nonautonomous choices lack value, the state has no reason to allow persons to make such

soft paternalism legitimizes intervention with the subject's conduct.<sup>230</sup> Only when the subject acts with substantial autonomy is intervention with her conduct for her own good characterized as hard paternalism. Deciding whether any particular case satisfies this condition requires an inquiry into whether the subject "consents" to her own conduct. This inquiry consists of three sub-conditions.

First, the subject must be a rational agent capable of making choices (that is, she must be autarchic).<sup>231</sup> Nonautarchic individuals cannot act with substantial voluntariness.<sup>232</sup> Thus, restriction of their conduct (for self-regarding reasons) is necessarily soft paternalism. Newborn infants, lunatics, and those in a persistent vegetative state are not capable of making decisions. Autarchic individuals, on the other hand, might make foolish, unwise, reckless, and positively perverse decisions, but they are at least capable of making such decisions.<sup>233</sup> As Feinberg noted, "There is a kind of minimal compliment in being called 'foolish.'"<sup>234</sup> Only the conduct of autarchic individuals can be substantially voluntary.<sup>235</sup> Only the

choices."); PATRICIA ILLINGWORTH, AIDS AND THE GOOD SOCIETY 67 (1990); Jørgensen, *supra* note 47, at 40 ("[A]n individual ought only to have her decisions respected if the decision reflects autonomous self-expression."); *id.* ("The possibility of justifiable paternalism has made a particular type of argument plausible to some proponents of the modern principle of respect for autonomy. This idea is to regard some types of paternalistic intervention as instances of *weak* paternalism. On this view, certain interventions are legitimate because they are aimed at nonautonomous 'persons' who do harm to 'themselves.'"); Kasachkoff, *supra* note 24, at 413 ("Paternalistic restrictions in these cases—sometimes called cases of 'soft' or 'weak' paternalism—can be countenanced by a liberal society because they do not deprive the individual of any autonomous choice that he or she is in fact capable of making."); Jeffrie G. Murphy, *Incompetence and Paternalism*, in RETRIBUTION, JUSTICE, AND THERAPY 165 (1979) (using the term "competent"); Thompson, *supra* note 47, at 245 ("If a paternalistic intervention restricts only decisions that are already unfree . . . the paternalism can be consistent with the principle of liberty.").

230. See, e.g., BAYLES, *supra* note 127, at 122, 125; BEAUCHAMP & CHILDRESS, *supra* note 3, at 277; Beauchamp & McCullough, *supra* note 51, at 90-91; DWORKIN, AUTONOMY, *supra* note 37, at 124; FEINBERG, HARM TO SELF, *supra* note 18, at 125-26, 157; GERT ET AL., *supra* note 79, at 205-09; KLEINIG, *supra* note 3, at 8-10, 14; TEN, *supra* note 110, at 110-11; VANDEVEER, *supra* note 6, at 81-87; Beauchamp, *Medical Paternalism*, *supra* note 51, at 140; Shapiro, *supra* note 4, at 528.

231. See S.I. Benn, *Freedom, Autonomy, and the Concept of a Person*, 76 PROC. ARISTOTELIAN SOC. 109 (1975-76); see also FEINBERG, HARM TO SELF, *supra* note 18, at 317-18; KULTGEN, *supra* note 3, at 91-93; PRESIDENT'S COMMISSION REPORT, *supra* note 18, at 57.

232. See FADEN & BEAUCHAMP, *supra* note 110, at 235.

233. See NIKKU, *supra* note 3, at 171; see also BEAUCHAMP & CHILDRESS, *supra* note 3, at 121-23; Beauchamp & McCullough, *supra* note 51, at 91; FADEN & BEAUCHAMP, *supra* note 110, at 235-37; FEINBERG, HARM TO SELF, *supra* note 18, at 146; Bruce Miller, *Autonomy*, in ENCYCLOPEDIA OF BIOETHICS 215, 215 (Warren T. Reich ed., 1995); Wettstein, *supra* note 224, at 447.

234. FEINBERG, HARM TO SELF, *supra* note 18, at 380 n.8; see also *id.* at 30; BEAUCHAMP & CHILDRESS, *supra* note 3, at 93-98; HAYRY, MEDICAL PATERNALISM, *supra* note 27, at 58-59.

235. See FADEN & BEAUCHAMP, *supra* note 110, at 235, 249.



restriction of their conduct, and indeed only a subset of it, can be hard paternalism.<sup>236</sup>

Second, to act substantially voluntarily, the subject must act substantially free from controlling influences such as coercion, duress, or manipulation. The nature of such influences and substantial freedom from them is thoroughly examined in Faden and Beauchamp's *A History and Theory of Informed Consent* and in Feinberg's *Harm to Self*, and I do not develop their analysis here.<sup>237</sup>

Third, to act substantially voluntarily, the subject must act substantially free from epistemic defects such as ignorance of the nature of her conduct or its foreseeable consequences.<sup>238</sup> The nature of substantial understanding is also thoroughly examined in Feinberg's *Harm to Self* and in Faden and Beauchamp's *A History and Theory of Informed Consent*, and I do not develop their analysis here.<sup>239</sup>

The standard condition that philosophers offer to distinguish hard paternalism from soft paternalism (assuming the other three definitional conditions are satisfied) is: "If the subject's conduct is substantially voluntary, then liberty limitation with respect to such conduct is hard paternalism." Conversely, "if the subject's conduct is not substantially voluntary, then liberty limitation with respect to such conduct is soft paternalism."

236. FEINBERG, HARM TO SELF, *supra* note 18, at 131.

237. FADEN & BEAUCHAMP, *supra* note 110, at 238-41, 259; FEINBERG, HARM TO SELF, *supra* note 18, at 28-31, 316-43; *see also* BEAUCHAMP, ETHICS, *supra* note 22, at 351-52; BEAUCHAMP & CHILDRESS, *supra* note 3, at 133; PRINCIPLES OF POLITICAL ECONOMY, *supra* note 21, at 951-53; SCHONSHECK, *supra* note 28, at 151; VANDEVEER, *supra* note 6, at 15.

238. Some authors have identified further personal properties of the subject, such as nonage and brain damage. *See* FEINBERG, HARM TO SELF, *supra* note 18, at 316; Soble, *supra* note 96, at 345. However, these are derivative of the other categories, being just specific instances of cognitive or volitional defects. *See* BEAUCHAMP & CHILDRESS, *supra* note 3, at 136 ("[C]ompetence is a threshold and not a continuum concept like autonomy."). This distinguishing feature between soft and hard paternalism has led at least some writers to sort paternalism into the roughly analogous categories, fact-paternalism and value-paternalism. *See* Simon N. Whitney et al., *Morally Distinct Types of Paternalism: Fact- Versus Value-Based, and Means- Versus End-Directed*, unpublished manuscript, presented at the 131st Annual Meeting of the American Public Health Law Association, Nov. 18, 2003.

239. FADEN & BEAUCHAMP, *supra* note 110, at 298-336; FEINBERG, HARM TO SELF, *supra* note 18, at 269-315; *see also* BEAUCHAMP & CHILDRESS, *supra* note 3, at 88-93.

c. *A Revised Distinguishing Feature of Hard Paternalism*

I contend that the standard condition distinguishing hard paternalism from soft paternalism is too narrowly formulated. Whether the subject's restricted conduct happens to be substantially voluntary is not sufficient to distinguish hard paternalism from soft paternalism. Hard paternalism is a liberty-limiting principle, a purported justification of the agent's presumptively wrongful conduct.<sup>240</sup> Hard paternalism, like all liberty-limiting principles, is distinguished by the *reason* the agent limits the subject's liberty.<sup>241</sup> Accordingly, one must define it in terms of the agent's perspective.<sup>242</sup>

Soft paternalism, for example, does not authorize liberty limitation simply because the subject acts (that is, happens to act as a matter of fact) without substantial voluntariness.<sup>243</sup> As Kleinig explained, "Weak paternalistic impositions are not justified merely because their beneficiaries lack autarchy. As Mill makes clear, such impositions must be directed to the 'improvement' of those on whom they are laid . . . . In other words, the end of weak paternalism must be autarchy."<sup>244</sup>

240. See *supra* Part III.

241. See *supra* Part III.B.2.

242. See *supra* note 85 and accompanying text.

243. See, e.g., ARMSDEN, *supra* note 27, at 93; GERT ET AL., *supra* note 79, at 226 (arguing that "[j]ust because people are not competent to make a rational decision does not mean that it is justified to violate any moral rule with regard to them"); HAYRY, MEDICAL PATERNALISM, *supra* note 27, at 70; KLEINIG, *supra* note 3, at 141 ("The fact that a paternalistic imposition is weak does not mean that it is therefore morally unproblematic."); KULTGEN *supra* note 3, at 8 ("This solicitude is constructive."); *id.* at 20; *id.* at 53 ("The kinds and extent of control which they legitimately exert, however, are strictly limited by the ultimate objective—to prepare their children for autonomy . . . ."); *id.* at 54, 59, 78; LOCKE, *supra* note 3, at 57; VANDEVEER, *supra* note 6, at 354-55 (arguing that the mere presence of some lack of voluntariness does not imply a forfeiture of ascriptive autonomy); Michael D. Bayles, *Harm*, in PRINCIPLES OF LEGISLATION; THE USES OF POLITICAL AUTHORITY 95, 115 (Michael D. Bayles ed., 1978) (noting that the agent's motive for interfering must be to counteract the subject's lack of understanding); Berger, *supra* note 85, at 47; Callahan, *supra* note 85, at 286; Childress & Campbell, *supra* note 27, at 125 (denying that soft paternalism automatically justified intervention and requiring that soft paternalism (1) employ the least restrictive means, (2) prevent serious harm, and (3) be proportional to its negative effects); Douglas, *supra* note 85, at 174-75 (contrasting "cooperative paternalism" in which the agent helps the subject become more competent and "conflictful paternalism" in which the agent does not have that aim); Hospers, *supra* note 45, at 256 (arguing that the agent must not impose his values onto the subject—even when the subject acts without substantial voluntariness; under such circumstances, the agent must act to help the subject); Jørgensen, *supra* note 47, at 48; Lavin, *supra* note 85, at 2423.

244. KLEINIG, *supra* note 3, at 31, 214.

Instead, to qualify as soft paternalism, the agent's *motive* for liberty limitation must be either (1) to protect the subject from harm or from failure to procure a benefit to which she did not consent to or (2) to ensure or confirm that the subject really did consent to the harm or failure.<sup>245</sup> Soft paternalism does not justify intervention with a subject's liberty simply because the subject happens to be acting without substantial voluntariness. That would be post hoc rationalization. A subject's lack of substantial voluntariness is not a forfeiture of her right to autonomy.

The agent's motive matters. There must be a causal connection between the subject's lack of substantial voluntariness and the agent's intervention. In order to be soft paternalism, the agent must intervene primarily because the subject acts without substantial voluntariness. Consider Mill's bridge-crossing example. If the agent were to stop the subject bridge crosser because the subject does not cross substantially voluntarily, then that would be soft paternalism.

However, what if the agent knows the subject does not cross substantially voluntarily but does not care, such that the subject's status is motivationally impotent for the agent? Additionally, what if the agent acts without regard to the subject's status—neither knowing nor caring whether the subject crosses substantially voluntarily? The agent's limitation of the subject's liberty under either of these other two circumstances is hard paternalism no less than in circumstances where the agent deliberately limits the liberty of a subject whose conduct the agent knows to be substantially voluntary.

Before defending this expansion of hard paternalism's scope, it is useful to lay out the four ways in which the agent's motive correlates to the subject's conduct:

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245. Cf. Harris, *Paternalism*, *supra* note 87, at 91.

	Subject's Conduct	
	Substantially Voluntary (SV)	Not Substantially Voluntary (non-SV)
Agent's Motive	(1) Deliberately limit SV (Hard)	(2) Deliberately limit non-SV (Soft)
	(3) Disregard whether SV (Hard)	(4) Disregard whether non-SV (Hard)

Cell (1) illustrates the classic distinguishing feature of hard paternalism.<sup>246</sup> The agent deliberately limits the subject's substantially voluntary conduct.<sup>247</sup> Cell (2) illustrates the classic distinguishing feature of soft paternalism.<sup>248</sup> The agent deliberately limits the subject's non-substantially voluntary conduct.<sup>249</sup> What about Cells (3) and (4)? Here, the agent either fails to determine one way or the other whether the subject's conduct is substantially voluntary or simply does not care whether it is substantially voluntary. In Cell (3), the subject's conduct actually is substantially voluntary—as in Cell (1). The agent is prepared to limit the subject's substantially voluntary conduct. Therefore, Cell (3) should be treated like Cell (1), as a case of hard paternalism.<sup>250</sup>

Perhaps more controversial is the argument for treating Cell (4) like Cell (1). Here, the subject's conduct is not substantially voluntary. Nevertheless, the agent does not limit the subject's liberty because the subject's conduct is not substantially voluntary. The agent neither knows nor cares that the subject is in fact not autarchic, not substantially free from controlling influences, or not substantially free from epistemic defects.

The agent does not purport to protect the subject from a choice that is not her own.<sup>251</sup> Rather, the agent purports to protect the subject

246. FEINBERG, HARM TO SELF, *supra* note 18, at 12.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Mill's contemporary, Alexis de Tocqueville observed that the power of a *hard* paternalistic agent "would be like the authority of a parent [for example, soft] if like that authority, its object was to prepare

from a choice that the agent judges to be bad. The agent's reason for liberty limitation is the same in Cell (4) as it is in Cell (1). Therefore, Cell (4), like Cell (1), should be treated as an instance of hard paternalism.

*d. Summary of Condition Four*

The fourth condition of hard paternalism requires that the agent limit the subject's liberty without regard to the desires of the subject contemporaneous with the liberty limitation. This condition distinguishes hard paternalism from soft paternalism.

*5. Summary of the Four Conditions*

An instance of liberty limitation is hard paternalism only if: (1) the agent intentionally limits the subject's liberty, (2) the agent limits the subject's liberty primarily out of benevolence toward the subject, (3) the agent disregards the subject's contemporaneous preferences, and (4) the agent either disregards whether the subject engages in the restricted conduct substantially voluntarily or deliberately limits the subject's substantially voluntary conduct.<sup>252</sup> Each of these conditions is necessary, and they are jointly sufficient to define "hard paternalism."

#### IV. OBJECTIONS AND COUNTEREXAMPLES TO MY DEFINITION

I now consider two types of objections and counterexamples to my definition of hard paternalism. First, I will consider whether my definition is too narrow and whether each of the four conditions of my definition is necessary. Second, I will consider whether my definition is too broad and whether the four conditions of my definition are jointly sufficient. As Kultgen explained, a definition of paternalism should maintain "continuity with the popular uses of

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them for manhood; but it seeks on the contrary to keep them in perpetual childhood." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* vii (Harvey C. Mansfield & Debra Winthrop trans., 2000) (1835).

252. See *supra* Part III.B.1-4.

'paternalism'" and "should be true to firmly established, widely shared, critical intuitions that suggest the range of actions to be evaluated according to similar considerations."<sup>253</sup>

*A. Objection One: The Definition Is Too Narrow: Some of the Four Conditions Are Not Necessary*

A definition of hard paternalism is too narrow when it fails to include within the definition instances of liberty limitation typically associated with hard paternalism.<sup>254</sup> If my four conditions are necessary conditions, an instance of hard paternalism cannot exist which does not satisfy my four conditions. So, if one can think of a genuine instance of hard paternalism that does not satisfy one of my four conditions, then that instance would serve as a counterexample to my argument that such a condition is necessary.

The statutes, adopted in many states, requiring motorcyclists to wear helmets represent a classic case of hard paternalism.<sup>255</sup> Let us test whether it satisfies all four of my conditions. First, the agent (the state) intentionally limits the liberty of the subject (the motorcyclist) because it imposes a legal duty on the subject to wear a helmet. The coercive power of the state affects the way the cyclist rides. Second, the agent's primary motive in restricting the subject's liberty is benevolence toward the subject. Helmet laws aim to protect cyclists from injury to themselves.<sup>256</sup> Third, the agent's motive is independent from the subject's contemporaneous preferences. Legislators did not enact helmet laws at the behest of motorcyclists. Fourth, the agent either disregards whether the subject acts substantially voluntarily or deliberately limits the subject's substantially voluntary conduct. Legislators did not enact helmet laws to protect cyclists from choices

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253. KULTGEN, *supra* note 3, at 61; *see also* NIKKU, *supra* note 3, at 43; VANDEVEER, *supra* note 6, at 23.

254. *Cf.* GERT ET AL., *supra* note 79, at 196 ("[T]he definition must include all of the clear cases, and exclude behavior which is commonly not regarded as paternalistic."); BAGGINI & FOHL, *supra* note 94, at 159-60; Tom L. Beauchamp & Arnold I. Davidson, *The Definition of Euthanasia*, 4 J. MED. & PHIL. 294, 308 (1979).

255. Pope, *Smoking Regulations*, *supra* note 7, at 435-38.

256. *See, e.g.*, Donald A. Dripps, *The Liberal Critique of the Harm Principle*, 17 CRIM. JUST. ETHICS 3, 8 (1998); Jonathan M. Purver, Annotation, *Validity of Traffic Regulations Requiring Motorcyclists to Wear Protective Headgear*, 32 A.L.R. 3d 1270, § 4 (1970 & Supp. 1998).

that are not really their own.<sup>257</sup> Indeed, as Feinberg observed, "It seems unlikely that we can justify compulsory helmet legislation on soft paternalistic grounds . . . . [T]he 'typical' motorcyclist . . . is not simply mistaken about the factual basis of the risks he takes."<sup>258</sup>

I have already defended each of my four conditions as necessary in the course of explicating each condition. I provided examples in the course of my description and defense of each condition. Therefore, rather than consider additional counterexamples to the necessity of my conditions, I turn now to counter the objection that my four conditions are not jointly sufficient.

### *B. Objection Two: The Definition Is Too Broad: The Four Conditions Are Not Jointly Sufficient*

A definition of hard paternalism is too broad when it includes within the definition instances of liberty limitation not typically associated with hard paternalism.<sup>259</sup> If my four conditions are jointly sufficient, then if all four conditions are satisfied, we must have an instance of hard paternalism. If we can think of an instance in which all four conditions are satisfied but we still do not have hard paternalism, that instance would serve as a counterexample to the argument that my four conditions are jointly sufficient.

#### *1. Objection from Dworkin and VanDeVeer*

One objection to the joint sufficiency of my four conditions comes from Dworkin and VanDeVeer. Dworkin's definition of hard paternalism is one of the most influential. In each formulation of his definition from 1971 to 1992, Dworkin included a condition that the agent act contrary to the subject's contemporaneous preferences.<sup>260</sup> VanDeVeer, who is himself an important figure in paternalism literature, also required that the agent believe that his liberty

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257. See, e.g., Purver, *supra* note 256.

258. FEINBERG, HARM TO SELF, *supra* note 18, at 136.

259. Cf. BAGGINI & FOSL, *supra* note 94, at 159-60; Beauchamp & Davidson, *supra* note 254, at 304.

260. See, e.g., Dworkin, *Paternalism—MORALITY*, *supra* note 6, at 112; Dworkin, *Paternalism—ENCYCLOPEDIA*, *supra* note 44, at 940.

limitation "is *contrary* to [the subject's] operative preference, intention, or disposition at the time" the agent limits the subject's liberty.<sup>261</sup> He wrote that "[a]n agent's commission . . . must be *contrary* to a subject's operative preference, intention, or disposition to count as paternalistic."<sup>262</sup>

Dworkin and VanDeVeer's objection challenges the sufficiency of my third condition. I require only that the agent act independently of the subject's preferences. In contrast, Dworkin and VanDeVeer require more specifically that the agent act contrary to the subject's preferences.

But the Dworkin/VanDeVeer condition is too demanding.<sup>263</sup> The agent might act in circumstances where the subject simply had no preferences on the issue but nonetheless wished to not be limited. Alternatively, the agent might act in circumstances where the subject's preferences and the agent's preferences were actually in harmony—though not causally related.

Perhaps the subject wanted the agent to intervene and even left a written authorization for the agent's liberty limitation. Nevertheless, the agent did not receive the authorization and was unaware of the subject's preferences. The agent's limitation of the subject's liberty (from the agent's perspective) is not different from the case where there is no authorization at all. A thief who steals a necklace, which unbeknownst to her, the owner was going to give to the thief as a gift the next day, is still a thief. In each case, the agent fails to act pursuant to the subject's consent and consequently fails to respect the subject's right to control her own decisions. The agent acts independently of the subject's preferences either because the subject has none or because the agent ignores them or is unaware of them.

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261. VANDEVEER, *supra* note 6, at 22 (emphasis added).

262. *Id.* at 202. Beauchamp and Childress similarly required that the agent override the subject's "known preferences." BEAUCHAMP & CHILDRESS, *supra* note 3, at 178.

263. Dworkin later broadened his third condition to demand only that the agent "act contrary to (or is indifferent to)" the subject's contemporaneous preferences. Dworkin, *Paternalism*—CAMBRIDGE, *supra* note 113, at 649. Dworkin did not explain the reason for this modification. Gert and Culver formulated their analogous condition in the same fashion, requiring that the agent "not believe that his action has [the subject's] past, present, or immediately forthcoming consent." GERT ET AL., *supra* note 79, at 201.



Liberty limitation under either of these circumstances can be hard paternalism.<sup>264</sup>

## 2. *Objection from Gert and Culver*

A second objection to the joint sufficiency of my four conditions comes from Gert and Culver. Gert and Culver have argued in a series of publications over the past 25 years that liberty limitation cannot be paternalism unless it implicates a moral rule.<sup>265</sup> In their most recent formulation, Gert and Culver required that the agent "recognize (or should recognize) that his action toward [the subject] is a kind of action that needs moral justification."<sup>266</sup> Gert and Culver described this condition as a "key element" of paternalistic behavior.<sup>267</sup> So, Gert and Culver's objection to my definition is that an act of liberty limitation could satisfy all four of my conditions and still not be hard paternalism because it does not satisfy their moral rule condition.

As a concrete counterexample to the sufficiency of my four conditions, Gert and Culver would likely offer the following case: a husband, knowing that his wife is suicidal, hides his sleeping pills. The husband (agent) does not violate a moral rule. Therefore, Gert and Culver would contend that his act is not an act of hard paternalism.<sup>268</sup> Yet, on my four conditions, hiding the sleeping pills is hard paternalism. Therefore, Gert and Culver would contend, because all four of my conditions are satisfied but because this case is not a case of hard paternalism, my four conditions are not sufficient to define hard paternalism.

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264. E.g., Clarke, *supra* note 112, at 85-86; KULTGEN, *supra* note 3, at 62-63; Hershey, *supra* note 127, at 178. Joan Callahan suggested that we employ the term "fraternalistic" to distinguish the situation where the agent acts without the subject's expressed dissent. Callahan, *supra* note 85, at 264.

265. See, e.g., GERT ET AL., *supra* note 79, at 198-203. Gert and Culver did not aim to define *hard* paternalism, but they did intend for their necessary and sufficient conditions to apply to all forms of paternalism.

266. *Id.* at 196.

267. *Id.* at 198.

268. Actually, Dworkin first offered this case as an argument against Gert and Culver's moral rule condition. Dworkin, *Second Thoughts*, *supra* note 113, at 106. Gert and Culver simply stuck to their definition and denied that this case was an instance of paternalism. GERT ET AL., *supra* note 79, at 202. Of course, the suicidal nature of the wife suggests that, even if this is a case of paternalism, it is a case of *soft* paternalism. However, we can set that concern aside for present purposes.

There are several problems with Gert and Culver's argument. First, it establishes only that my four conditions are not sufficient to define hard paternalism *as they define hard paternalism*. Gert and Culver would have resisted (rather implausibly) the intuitive judgment that this pill-hiding case is a case of hard paternalism. Second, Gert and Culver's definition is not value neutral. Conceptually, we ought not build normative judgments into the definition of hard paternalism. Often, the morally interesting cases of hard paternalism happen to involve the violation of a moral rule. However, to craft such a restrictive definition begs the tough and interesting normative questions surrounding the justifiability of hard paternalism.<sup>269</sup>

#### CONCLUSION

Legal writers put hard paternalism to important justificatory uses. Yet, this usage can be fruitful only if hard paternalism is clearly defined. In this Article, I have defended four logically necessary and sufficient conditions that define "hard paternalism."<sup>270</sup> Use of the hard paternalism concept, only where it satisfies this definition, should introduce clarity and precision of argument to the discourse. It should permit that discourse to more effectively address the classic question of political philosophy and normative jurisprudence: Under what conditions (if any) is hard paternalism justified?

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269. Cf. Clarke, *supra* note 112, at 85.

270. See *supra* Part III.