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# A Broader Liberty: JS Mill, Paternalism, and the Public's Health

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## Special Issue

## A broader liberty: J.S. Mill, paternalism and the public's health

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## SUMMARY

Is the 'harm principle', famously propounded by J.S. Mill and widely adopted in bioethics, an appropriate principle to guide public health regulation? The harm principle limits liberty-limiting interventions to those instances where the person poses a significant risk of harm to others. However, much of public health regulation is not primarily directed to avert risk to others, but to safeguard the health and safety of the individual him- or herself. Regulations regarding seatbelts, motorcycle helmets and the fluoridation of water are examples of pervasive public health regulations that are primarily intended to safeguard the individual's own health or safety. Even laws designed to reduce smoking are justified, at least in substantial part, by the reduction of risk to the smoker. Certainly, scholars argue that there are 'other-regarding' aspects to these types of laws, but there is little doubt that there are strong paternalistic features to these, and many other public health laws, such as bans on trans fat in foods. This article directly and forcefully questions the Millian principle, making the case for hard paternalism. When seen from a population-based perspective that counts the number of lives saved, paternalism becomes a plausible justification for interventions that do not pose a truly significant burden on individual liberty, but go a long way towards safeguarding the health and well-being of the populace.

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## Introduction

John Stuart Mill's theory of liberty is often invoked to limit state power to cases where individuals pose demonstrable harm to others. Few object to state regulation to deter or punish such externally imposed harms. Traditional public health activities of communicable disease control, for example, have deep historical roots and strong public support precisely because state intervention is designed to control risk. The citizenry may keenly debate the necessity of vaccination, treatment or quarantine in particular cases, but does not question the legitimacy of government efforts to control infectious diseases.

However, it follows from Mill's harm principle that the state should not exercise power to prevent or ameliorate harms that individuals inflict on themselves. Mill's central project was antagonistic to paternalism – the protection of competent adults irrespective of their expressed desires – because it is 'better for them'. Mill opposed regulation of 'self-regarding' behaviour, which affects only or at least primarily the person concerned.<sup>1</sup> However, some modern liberals disagree with the inflexibility of Mill's harm principle.<sup>2</sup> Mill's view on paternalism still resonates in Western political

culture, even if highly regarded philosophers such as Joel Feinberg,<sup>3</sup> Gerald Dworkin<sup>4</sup> and John Gray<sup>5</sup> have clarified the nature of Millian paternalism.<sup>6</sup>

On Mill's account of liberty, classical public health regulation would be out of bounds, including mandatory motorcycle helmet and seatbelt laws, gambling prohibitions, criminalization of recreational drugs, and fluoridation of drinking water. Taxes on unhealthy products such as cigarettes or alcoholic beverages also have a paternalistic quality because they create marked disincentives for self-regarding behaviour. Even professional licensing and Food and Drug Administration drug approvals prevent consumers from purchasing products and services when they are informed about the risks and willingly assume them. In addition, of course, there are fierce contemporary debates about the state monitoring and regulating what people eat; government strategies to reduce obesity can include highly contested paternalistic policies ranging from diabetes surveillance to tort liability, a 'fat tax' and a ban on trans fatty acids.<sup>7</sup>

In this article, 'paternalism' indicates 'strong' or 'hard' paternalism, as defined by Feinberg, where interventions are intended to benefit a person whose choices and actions are voluntary and autonomous.<sup>3</sup> In the authors' view, 'weak' or 'soft' paternalism (where individual decisions are non-voluntary or temporary intervention is necessary to establish whether they are voluntary) is so uncontroversial that it needs no particular defence. Such forms

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of paternalism have deep historical and jurisprudential support under the ancient doctrine of *parens patriae*.<sup>9</sup>

The authors' claim is that the political community should at least be open to the idea of paternalism to prevent or ameliorate harms in the population. If the collective benefits are high and the individual burdens are low, the rhetorical assertion that a policy is paternalistic should not operate as a political trump. Public health paternalism that markedly improves health and well-being within the population offers a 'broader freedom'. This term is used advisedly to mean that when people have better opportunities for health and longevity, and live in more vibrant, productive communities, they have enhanced prospects for life and a wider range of choices for now and into the future.

It will first be helpful to describe Mill's account of liberty and those who see Mill's liberty in more expansive terms, such as Joseph Raz. Next, traditional, well-rehearsed arguments for paternalism will be explored, which really are not defences of paternalism at all: the external economic and social costs of self-regarding behaviour. Traditional arguments similarly focus on an individual's limited capacity and willpower, which again are not true defences of paternalism. Finally, and most importantly, another way to view public health paternalism is offered, through the perspectives of populations and social justice. This is not a systematic theory of justice but, much more modestly, an explanation of why viewing paternalism from an individualistic perspective, wholly devoid from an individual's place in a wider society, is misplaced.

When government policy is seen from the vantage point of populations, rather than individuals, the emphasis is not so much on what any particular person may, or may not, do (or want). Instead, public policy is concerned with the overall effect of innumerable individual decisions on health and well-being in society. Put another way, the consequence of government passivity in the face of demonstrable harm to the public is significant morbidity and premature mortality, increased socio-economic disparities and impoverished cultures that eschew social solidarity, shared responsibility and a sense of community.

Put very simply, liberalism rejects paternalistic interventions, and its explanation is sharply individualistic: autonomous persons know best about their interests and preferences and no one can compel them to perform, or refrain from performing, an act that affects only themselves. Paternalists make the mistake of engaging liberals on their own terms, using some variation of this type of argument: persons do not always know what is in their best interests due to internal (e.g. lack of understanding or willpower) or external (e.g. insufficient information) limitations, or simply insufficient attention to long-term, over short-term, needs. Scholars talk of implied, or future consent, contract theory, and the like, to suggest that individuals really want to be forced to do what is good for them. This is ultimately a losing argument.

Both sides of this debate – liberal and illiberal – focus on the individual's wants, needs and capacities. Framing the argument this way is sure to make it difficult to contest the basic premises of liberalism, and perhaps it is for this reason that, as Feinberg states, paternalism is a derogatory word: 'Paternalism is something we often *accuse* people of. It suggests the view that the state stands to its citizens as a parent (or perhaps a male parent!) stands to his children... This sounds so outrageous that we would expect hardly anyone to confess to paternalistic tendencies.<sup>3</sup> And this critique continues to have political bite, with public health paternalism colloquially known as 'the nanny state'.

But suppose a different type of question was asked; one in which the focus is on the aggregate effects on the population, rather than the individual: what type of society is beneficent and just, and what public policies would vastly reduce disease, disability and

premature death? There is no need to ask each individual this question, nor would one individual be allowed to stand in the way of this greater good. Rather, it might be concluded that government has a responsibility to pursue such policies, so long as there is sufficient evidence that the intervention would achieve these public goods, and the burden on any individual was reasonable compared with the benefits. That is public health paternalism, or a 'broader freedom', properly conceived.

### J.S. Mill's conception of liberty

J.S. Mill's theory of liberty takes the individual as the unit of measure for determining the utility of social policies. Individuals are self-interested and most informed about their own needs and value systems.<sup>11c</sup> Other individuals, and society itself, have no better conception – and thus no special privilege to dictate – how a person should think or behave. Society, therefore, should give individuals the widest possible berth by conducting 'experiments of living'.<sup>1</sup> The state, the argument continues, should only regulate actions that directly cause, or have a very high probability of causing, unacceptable harm to others. This is Mill's harm principle; in his view, this allows for the maximum amount of autonomy in the maximum number of instances by limiting society's interference with individuals' speech, choice and action.

Mill is not simply saying that individuals make wiser decisions by taking their own value systems into account. Rather, he finds intrinsic value in permitting an individual to decide for himself even if, objectively, he makes the 'unhealthy' choice. It is for this reason that liberal scholars maintain, 'as long as individuals understand the hazards involved, they should be free to engage in [any] risky activity that provides them with personal satisfaction'.<sup>12</sup> Mill's harm principle has the admirable merit of assuring the widest sphere of freedom. Yet, in an age of myriad risk that individuals and societies face, his claim that the state should provide citizens with the greatest possible leeway is unsatisfying and provides an incomplete foundation for erecting a theory of liberty.

Other political philosophers such as Joseph Raz offer a more expansive conception of individual liberty.<sup>13</sup> For Raz, autonomy does not require that individuals be able to choose any option, but only 'an adequate range of options'. In his view, paternalistic regulations are acceptable, even required, if they ultimately enhance autonomy by, for example, preventing the use of damaging narcotics that diminish a person's decision-making capacity. His view of 'positive liberty' and interpretation of the harm principle is emblematic; harm should encompass harm to self as well as others, which diminishes the possibilities open to individuals, thus undermining autonomy. He argues that the harm principle should not restrain the 'pursuit of moral goals by the state', but should indicate 'the right way in which the state could promote the well-being of people'.

Raz's conception of liberty both narrows and broadens Mill's theory. Raz argues that harm only includes damage to personal autonomy, which is narrowing in that the state can intervene only to protect and promote self-sovereignty. However, the extension of the harm principle to harming one's self broadens Mill's theory, for it suggests that, at times, the state can (and should) intervene in the personal sphere of individual choice and action. Raz's harm principle is thus designed to advance the positive liberty of enhancing autonomy and therefore promoting the good life.

<sup>c</sup> Ian Kennedy's definition exposes the problematic assumptions of paternalism: 'Decisions concerning a particular person's fate are better made for him than by him, because others wiser than he are more keenly aware of his best interests than he can be.'<sup>11</sup>

Raz's expansion of Mill's harm principle is helpful to this project in that it is reasonable to argue that a certain level of health is a necessary condition for self-sovereignty. Debilitating illness or disability can be just as harmful to the exercise of freedom as the addictive effects of narcotics. However, this does not enable one to claim that paternalism is justified, not simply for enhancement of personal autonomy, but for its desirable effects on populations and societies. Before making these arguments, based on population and social justice perspectives, it will be helpful to explore more traditional arguments, which, as highlighted above, are probably not defences of paternalism at all, but do underscore some of the vulnerabilities of Mill's central claims.

Mill, in effect, uses a series of simplifying assumptions. Provided the reader accepts each of them, his argument is nearly unassailable. However, when one recognizes that these assumptions are far from simple or true, then it requires further thinking about Mill's claims. Here are some of Mill's basic assumptions, each of which presents a false dichotomy:

- individuals either have free will and full autonomy or lack capacity;
- individual behaviour is either self-regarding or other regarding;
- expressions are either true or false; and
- state passivity is liberty enhancing and state action is liberty limiting.

It will be clear from the following discussion that none of these assumptions are self-evidently correct.

### Social and economic costs

Thinking and speaking in terms of 'the right to take risks' ignores the fact that it is a rare driver, passenger or biker (or smoker) who does not have a child, a spouse or a parent. It glosses over the likelihood that if the rights-bearer comes to grief, the cost of his medical treatment, rehabilitation or long-term care will be spread among many others. The independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward.<sup>14</sup>

Although regulation of self-regarding behaviour is pervasive in law and widely judicially sanctioned, few people are willing to concede that their beliefs or actions are paternalistic; seldom will one see a frank defence of paternalism. Instead, scholars, practitioners and judges usually justify regulation of self-regarding behaviour as if the real reason were protection against harm to others. After all, harm to others, or in economic terms 'negative externalities',<sup>15,d</sup> can be found in almost any activity.<sup>16</sup> Commentators support the regulation of classically self-regarding behaviours by emphasizing the aggregate consequences for society's health and economic resources. Common sense suggests that bans on smoking in public places are intended to discourage tobacco use, but they are usually justified by the risks of side-stream smoke.<sup>17</sup> The same can be said of helmet or seatbelt laws where the unprotected motorist is said to present a traffic hazard<sup>18</sup> or pose an economic burden (e.g. urgent care costs and government

expenditures under Medicaid).<sup>19</sup> Consider one court's view of motorcycle helmet laws:

*'From the moment of the [motorcycle] injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits plaintiff to think that only he himself is concerned.'*<sup>20</sup>

It is particularly fashionable to employ economic arguments in response to claims that government policy is paternalistic. The 'economic burdens' argument is unsatisfying because it asserts that the primary justification for public health regulation is cost savings rather than avoidance of human suffering and disability. It is also vague and subject to limitless exceptions.<sup>6</sup> Whenever an individual engages in activities that risk injury or disease, there are bound to be economic costs that are not internalized. So, if indirect or secondary harms were an adequate defence of paternalism, this would swallow up Mill's harm principle.

Consider the contemporary debates over obesity regulation such as a ban on trans fat. Obesity-attributable medical expenditures reached \$75 billion in 2003, with substantial additional indirect costs in lost productivity.<sup>22</sup> The costs of obesity, moreover, are increasing rapidly.<sup>23</sup> Critics of state regulation argue that individuals absorb the cost of their own illness, so there is no 'public' issue at play.<sup>24</sup> However, taxpayers finance about half of all medical costs through Medicare and Medicaid, and employers cover most of the rest. Does the government have a legitimate interest in controlling medical and social costs of individuals' unhealthy behaviours that are borne by society at large?<sup>25</sup> Probably yes, but cost alone may not be a sufficient justification for over-riding personal liberty.

The truth is that these types of explanation for regulation of self-regarding behaviour fail to confront the real issue of paternalism. They reduce the justification to a strained conception of social harms rather than recognizing certain public health interventions as justified paternalism.<sup>26</sup> Too often, paternalism is not evaluated candidly in scholarly and judicial discourse. Rather, it is masked by a legal fiction that the real reason is control of 'other-regarding' behaviour. Yet the principal reason that society requires conformance with an array of health and safety standards is to protect the person himself.

### Limited capacity, information and willpower

Another defence of paternalism holds that people face constraints (both internal and external) on the capacity to pursue their own interests.<sup>4,28,e,f</sup> As personal behaviour is heavily influenced and not simply a matter of free will, it is argued, state regulation is sometimes necessary to protect the individual's health or safety. Individuals have to make decisions despite cognitive limitations. There are a myriad of decisions that people make in their lives that influence their health, ranging from the foods, beverages, and drugs they consume to their daily activities and habits. Most people cannot begin to assess the levels of harm or risk

<sup>d</sup> A negative externality is a 'spillover' harm that extends outside the market and affects third parties. For example, activities that transmit an infectious disease have negative externalities. The burdens of behaviour posing a risk of disease transmission are borne by other specific individuals (close contacts or sexual partners) or by the population at large, but without the benefits of the behaviour. Individuals infected with a contagious disease have diminished incentives to reduce risk behaviours because the burdens of the unsafe activity do not affect them directly, but fall primarily on others.

<sup>e</sup> Dworkin offers the philosophical perspective: 'We are all aware of our irrational propensities, deficiencies in cognitive and emotional capacities, and avoidable and unavoidable ignorance, lack of will-power, and psychological and sociological pressures.'

<sup>f</sup> The discipline of law and economics offers the perspective that individual capacity to pursue utility is constrained by 'bounded rationality', 'bounded will-power' and 'bounded self-interest'.



in their decisions, nor can they process complex scientific information to arrive at an informed choice.

People also face informational deficits; decision-making without full and accurate information about the risks. The public is bombarded with information and it is hard to tell which is true, which is false and which is merely exaggerated. Foods are sold without clarity about the nutritional content or harmful effects. Labels on packaged foods are often obfuscatory by design with respect to serving size, percentage of ingredients and inaccurate weights<sup>29</sup>; restaurants usually make no disclosures at all<sup>30</sup>; and many consumers are not even aware of the risks from added sodium, fat and sugar in highly processed foods. Some information is simply obscure and not widely appreciated, such as the risk of severe injury to a child from front-seat air bags or to families from radon in the home. Even when information is available, consumers may misapprehend the risks. Media discussions of a 'good diet' or the health effects of vigorous exercise are, at best, contradictory and confusing. Some information is provided precisely to persuade consumers to make unhealthy decisions such as advertisements about tobacco, alcoholic beverages or fast food.

In addition to cognitive and informational constraints, individuals have limited willpower to defer immediate gratification for longer-term health benefits; a point often reinforced in psychobehavioural studies.<sup>31</sup> People may objectively know what is in their best interests but find it difficult to act accordingly. They struggle with their immediate cravings and fail to safeguard their longer-term interests. This point is obvious in the case of physical and psychological dependencies on illicit drugs, alcoholic beverages, tranquilizers or nicotine, as Raz points out.<sup>13</sup> However, individuals may have difficulty controlling many behaviours that are not conventionally regarded as addictive. A person understands that high-fat foods or a sedentary lifestyle will cause adverse health effects, or that excessive spending or gambling will cause financial hardship, but it is not always easy to refrain. The activities themselves may be so enjoyable in the short term that long-term consequences are insufficiently considered.

Finally, individuals face social and cultural constraints on their behaviour. Human behaviour is influenced by many external factors including parents and family, peers and community, and media and advertising. An adolescent's decision about whether to use a condom is affected not only by what he knows about sexually transmitted infections, but also by the social meaning associated with condoms among his peers and particularly his sexual partners.<sup>33,g</sup> Similarly, a person's decision about what to eat and whether to smoke cigarettes or drink alcoholic beverages (and what brand) is, at least in part, culturally determined. Subtle, but ubiquitous, cultural influences on risk behaviour are seen in billboards and the media, in corporate logos and advertising, in the utterances of celebrities and government officials, and in norm-influencing laws and regulations.

State paternalism has the power to alter the culture in a positive direction, making it easier for individuals to make healthier or safer choices. Bans on smoking in public places, for example, have contributed to a shift in social norms about tobacco.<sup>34,35</sup> Proposals to alter the built environment to address the obesity epidemic are acutely discussed, such as bans on fast food restaurants, green spaces, and bicycle or walking paths.<sup>36</sup> The goal is to make healthy

foods and exercise an easier choice for individuals, particularly those living in poor neighbourhoods.<sup>37,38</sup>

Taken together, arguments about limited capacity, information and willpower have force, particularly on matters of health. Goodin (1989) provides a good account of these arguments for paternalism in the context of tobacco control.<sup>39</sup> Individuals may be given unfettered freedom to smoke cigarettes, take narcotic drugs, drink and gamble to excess, or eat artery-clogging foods. However, the consequences of satisfying all these needs for immediate gratification are longer-term detriments to health. When a person becomes seriously ill or disabled, the adverse effects on his or her autonomy, let alone full enjoyment of life, are palpable. This does not even take into account the losses that accrue to society when countless people develop preventable injuries and diseases due to their own activities. Thus, some limits on behaviour now may result in greater liberty and happiness for years or decades to come, affording a wider freedom.

These arguments based on insufficient capacity, information or willpower get at something important about human behaviour and help explain why paternalism can sometimes be justified. However adults, even with limitations, still have decision-making capacity, can act knowing that their judgements are flawed, and can take responsibility for their own actions. Regulation to protect people against their own temptations is explicitly paternalistic, and does not overcome prevailing cultural and political concerns. There is another way to frame the political and moral question of justified paternalism. Rather than taking the individual as a measure of utility, as in Mill's theory (Mill wanted his theory to be applicable to as many people as possible), public health paternalism is best understood from a population-based perspective. Here, utility is not measured by enhancing short-term individual preferences, but by maximizing overall societal welfare; savings in pain, disability and life within the populace.

### A population-based perspective on paternalism

Perhaps it is not even accurate to think of public health paternalism as directed at the individual at all, but instead directed towards overall societal welfare. Dan Beauchamp notes that public health practices are '*communal in nature, and concerned with the well-being of the community as a whole and not just the well-being of any particular person*'.<sup>40</sup> Policy, and here public health paternalism, operates at the level of practices and not at the level of individual behavior. Public health aims its policies towards the community and counts its results in improved health and longevity in the population.

Public health paternalism is concerned primarily with overall societal welfare rather than individual preferences. It is intended to benefit the community as a whole rather than any given person. It purports to save statistical, rather than individual, lives.<sup>41</sup> Its goal is not to affect personal choices, but to build a healthier population. Government's responsibility is to the collective, as well as the individual, so it may be just as important to safeguard the population from chronic disease as infectious disease.

Even if conduct is primarily self-regarding, the aggregate effects of persons choosing to smoke, abuse alcohol or drugs, or live an unhealthy lifestyle can be thousands of preventable injuries and deaths.<sup>42</sup> Poor diet and physical inactivity alone cause 320,000 to 400,000 deaths per year. Smoking tobacco causes even higher levels of premature death.<sup>43,44</sup> Paternalistic laws can reduce preventable deaths. For example, more than 4000 Americans died on motorcycles in 2004; an increase of more than 85% from 1997. Reduced helmet use, due to repeal or relaxation of many state helmet laws, is the primary factor in the rising death rates.<sup>45</sup> There is little doubt that if society could be structured in ways that make it

<sup>g</sup> There are at least two possible social meanings in condom use. First, imagine a world where condom use is the exception such that asking another to use it signals the belief that there is a special reason to use a condom and interrupt sex. Second, imagine a world where people ordinarily use condoms and where an ordinary part of sex is the use of a condom.

even slightly easier for individuals to make healthier choices, it would result in greater societal well-being and productivity. Thus, while risk to self is often the least politically acceptable reason for regulation, it is nonetheless clear that paternalistic policies can be effective in preventing injuries and deaths in the population.

The population perspective recognizes that public health activities are designed to benefit all or most of the population without any specific benefit to individuals. Public health theory stresses a shared bond among members; organized society safeguards the common goods of health, welfare and security, while members subordinate themselves to the welfare of the community as a whole.<sup>46</sup> Admittedly, a person of means and education may be able to procure many of the necessities of life and choose to behave in ways that are health enhancing. However, if that individual lives in a community characterized by excess disease and death, with marked inequalities, it simply is not worth privileging the wealthy few at the expense of the many.

Perhaps there is no way to honestly frame obesity regulation to overcome the objection that it is paternalistic, and all one can do is argue that there remains a role for benign paternalism in the modern state. If state measures are, in the words of Hermann Biggs, 'plainly designed for the public good', then the polity should at least consider them.<sup>47</sup> If paternalistic measures reduce illness and premature death significantly with minimal burdens on individual freedom, should they be out of bounds simply because they fail to meet a philosophical standard of self-sovereignty? Should a caring society refuse to act when its members suffer such high burdens of preventable disease? If so, public health agencies would become powerless to respond effectively to the most common causes of disability and death; personal lifestyle choices.<sup>48</sup>

### A social justice perspective on paternalism

There is another way to view the problem of paternalism, which offers a justification for government intervention related to the population perspective.<sup>49</sup> The social justice perspective recognizes that there are basic health protections which are fair, and which are in everyone's interest to take together.<sup>50</sup> Racial minorities and the poor suffer substantial disproportionate burdens from injury and disease. Poor diet, sedentary lifestyles, smoking and substance abuse are undoubtedly a contributing cause of socio-economic disparities in health.<sup>51</sup> Government passivity, leaving individuals free to make unfettered choices, will almost certainly perpetuate health disparities. A social justice perspective requires the state to identify and ameliorate the common causes of disease and premature death among the most deprived.<sup>52,53</sup> It supports systematic action to redress persistent patterns of disadvantage, even if ill health is attributable to personal lifestyles.<sup>54</sup>

The most disadvantaged do not have even remotely the same chances for living a healthy life that are afforded to more prosperous people. They are bombarded with commercial messages about unhealthy products; their communities are inundated with stores selling fast food, tobacco, alcoholic beverages and firearms; their neighbourhoods do not have playgrounds and fields for recreation; and they live in poorly lit, violent areas that discourage outside activity. The poor cannot afford the whole foods, health clubs and leisure time that make it so much easier for the prosperous to live a healthy lifestyle. A central tenet of social justice is the obligation to help give everyone a fair chance to live a healthier life.

### Health as social utility

It is commonly observed that Mill rarely expressed his hallmark idea of social utility when it came to paternalism.<sup>4,56</sup> Mill was categorical in his opposition to paternalism without weighing

benefits and burdens. However, affording the population a greater measure of health and well-being has enormously positive consequences. Health is foundationally important because of its intrinsic value and singular contribution to human functioning. Health has a special meaning and importance to individuals and the community as a whole.<sup>57</sup> Every person understands, at least intuitively, why health is vital to well-being. Health is necessary for much of the joy, creativity and productivity that a person derives from life. Individuals with physical and mental health recreate, socialize, work and engage in family and social activities that bring meaning and happiness to their lives.

Perhaps not as obvious, however, health is also essential for the functioning of populations. Without minimum levels of health, people cannot fully engage in social interactions, participate in the political process, exercise rights of citizenship, generate wealth, create art and provide for the common security. A safe and healthy population builds strong roots for a country's governmental structures, social organizations, cultural endowment, economic prosperity and national defence. Population health becomes a transcendent value because a certain level of human functioning is a prerequisite for engaging in activities that are critical to the public's welfare: social, political and economic.

Health has an intrinsic and instrumental value for individuals, communities and nations. People aspire to achieve health because of its importance to a satisfying life, communities promote the health of their neighbours for the mutual benefits of social interactions, and nations build healthcare and public health infrastructures to cultivate a decent and prosperous civilization.

### Antipaternalism: self-sovereignty, personal responsibility and efficiency

If Mill's defence of paternalism is not based purely on utility, then perhaps it relies on the normative value that each person should have dominion over his or her life. Individuals, according to Mill, should not be forced to behave contrary to their better judgements, but should be able to determine their own good. Ethicists continue to defend antipaternalism by appeals to principles of respect for autonomy, privacy and the imperative of treating people as moral equals.<sup>58</sup> Along the same lines, government ought not to distrust its citizens. Mill's is an argument about fallibility, that no state official is in a better position to determine personal good than the individual him- or herself.

Mill's argument assumes that what is 'good' is inherently subjective, but public health is positivistic and objective. It seeks answers based on science and the scientific method. Science, of course, is also fallible. It cannot tell an individual which benefit is more important: health or another good (e.g. immediate gratification from a cigarette, a drink or an exhilarating ride without a motorcycle helmet versus long-term health and safety). However, it may be the best way to arrive at the 'right' answer about health and safety because it is the only generally recognized method that objectively evaluates health behaviours and interventions.

This still leaves open the question about the appropriateness of paternalism. Seen from an individual's perspective, it is hard to refute Mill's argument that there are 'good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise'.<sup>1</sup> However, seen from the population perspective, moving the activities of millions of people in the direction of behaviours guided by rigorous science will almost certainly improve overall health. A population that smokes less, drinks in moderation, eats well and exercises will have improved health and longevity.



It is also helpful to view paternalism from the state's perspective, and its role of acting on behalf of the population. Most people understand that government has a duty to promote the well-being of its citizens.<sup>59</sup> In addition, there are certain goods that can only be achieved through collective state action and which individuals acting alone cannot attain. This is self-evident in the case of infectious disease control, occupational health and product safety, which clearly require state action. However, it can also be true for state paternalism. If it is simply more difficult to choose the healthy option (whether it is healthy food, exercise or some other beneficial activity), then only the government can make the choice easier. It may mean altering the informational, built or socio-economic environment, which is beyond the ability of any single individual or group.

Consider obesity regulation as an example. Currently, the market makes it very difficult to choose healthy foods and adequate exercise because those options are less comprehensible, available and affordable. However, if government used its power to change the environment, it could have potent effects for everyone. The state could educate and limit misleading advertising to make choices more understandable, tax and spend to make nutritious foods more affordable, and regulate fast food and recreational facilities in schools, workplaces and neighbourhoods to make healthy products and activities more accessible. Highly educated individuals of means could probably do much of this on their own, but for the vast majority of the population, the state can legitimately make it easier to make the beneficial choice. On this view, the state has the obligation to provide the best level of health for the population, and it is particularly obliged to act when individuals cannot realistically attain these goods on their own.

Sometimes hidden beneath the claims of antipaternalists (and sometimes not so hidden) are arguments about morality and fault. Those who choose an unhealthy or risky path are deemed 'responsible' or 'at fault' for their own condition, and unworthy of state assistance or protection. These antipaternalists, of course, want individuals to 'internalize' all the consequences of their immoral behaviour, such as by paying for medical and social costs. Apart from being somewhat callous and indifferent to human happiness, 'fault' is a notoriously inexact concept. Fault assumes first that individual choices are all a matter of free will and not conditioned on an individual's social, cultural and economic circumstances. It also assumes that certain behaviours are 'good' and others 'bad'. However, all people engage in multiple, complex behaviour patterns. Some socio-economic classes harm themselves by eating fast foods, smoking cigarettes and ingesting illicit drugs. Other classes do so by eating crême brûlée, driving fast cars, skydiving and flying private aeroplanes. Questions of fault are malleable and socially constructed.

Finally, antipaternalists simply point out that public health regulation of self-regarding behaviours is simply ineffective and inefficient. Lifestyle choices are ubiquitous, deeply rooted and a central element of human existence: what one eats, drinks, smokes and the activities of daily life. 'To oversee these decisions would require a larger bureaucracy than anyone has yet conceived and methods of surveillance bigger than big brother.'<sup>60</sup>

Thus, there remains a strong consequential argument about whether government interventions would, in fact, reduce injury, disease and premature death and, if so, what interventions would work best. Many of the strongest critiques of paternalistic state action suggest that it does not work and would provoke a popular backlash against heavy-handed governmental interference. Centralized solutions will fail, they argue, because they cannot take account of the wide variation in circumstances among individuals, ranging from differences in genetics to environmental factors.<sup>24</sup>

Even if interventions are effective, it is argued that they are inefficient. Those who support market solutions to social ills believe that free enterprise, consumer autonomy and unfettered individual decision making are much more likely to achieve desirable goals, taking into account not just health but also prosperity.

The idea that centralized solutions cannot work due to individual differences misses the point of the public health sciences. The core understanding of epidemiology is captured in Geoffrey Rose's prevention paradox: a prevention measure, which brings much benefit to the population, will not benefit each participating individual.<sup>61</sup> For example, tiny changes in the eating and exercise habits by millions of people may have little effect on any given person, but would have enormous benefits for overall population health, precisely because excess weight is such a prevalent cause of chronic disease. The same could be said about seatbelts, which, in truth, rarely benefit any given individual, but the collective benefits of seatbelt laws are thousands of lives saved each year. The prevention paradox, in turn, creates a sociopolitical problem because individuals are less likely to accept and support interventions that offer them little personal advantage. This is particularly true if individuals believe they have the right to make ill advised, or beneficial, decisions on their own without the state meddling in their personal lives.

The pro-market point about the need for evidence to support public health paternalism is undoubtedly correct. For each proposed intervention, public health professionals must demonstrate a reasonable likelihood of success. Also, of course, market-based claims also need empirical support. It is all too easy for economic conservatives to insist that public health officials demonstrate positive benefits. Conservatives are not tolerant of interventions taken under conditions of scientific uncertainty, but they rarely offer rigorous evidence that markets do better in creating overall well-being for society. For both sides (those favouring regulation and those favouring markets), it is insufficient to express their preferences (either pro- or antipaternalistic) without evidence.

### What type of paternalism?

It has been argued that most modern defences of paternalism are not really defences at all, but strained attempts to frame paternalism as coming within the harm principle. There are, in addition, scholars who defend 'weak' forms of paternalism; not in Feinberg's sense of involuntary action, but simply in the sense that the intervention is not 'too' coercive.<sup>62–64</sup> The problem with arguments for this type of 'weak' paternalism is that they fail to meet Mill's critique, and lack clarity or consistency. Defenders of weak paternalism rarely define it, or separate it logically from 'hard' paternalism; it is more a matter of degree of coercion rather than the nature of coercion itself. Instead, weak paternalism is explained through illustration of historically accepted, low-level forms of coercion such as taxation on alcohol and tobacco, restrictions on illicit drugs, smoking bans in public places, and health education or mild advertising restrictions.

Arguments for paternalism (weak or strong) need to be made on a case-by-case basis. What is the seriousness of the harm to be avoided? How likely is the intervention to be effective in reducing the harm? What opportunity costs are incurred by the state's decision to act or not to act? What level of burden is imposed on the individual or business in exchange for the collective good to be achieved? There are some public harms that are so pervasive, and which can be ameliorated without unreasonable burdens, that society should confront the question of whether they are justified. Simply to say that the interventions are unwarranted because the

harm is self-inflicted does not do justice to the claim that there are profound effects on the population, particularly the poor.

### Conclusion: the utility of freedom or of health

Government can give people the information, legislate and regulate to encourage sustainable living, and help business to function in a more environmentally responsible way but it cannot 'do it' by itself. 'Doing it' will depend on the decisions and choices of millions of individuals and companies. Our task is to empower them to make the right decisions and choices. Government has to encourage and inform; if necessary, in a tougher way than ever before. Our public health problems are not, strictly speaking, public health questions at all. They are questions of individual lifestyle: obesity, smoking, alcohol abuse, diabetes and sexually transmitted disease. These are not epidemics in the epidemiological sense. They are the result of millions of individual decisions at millions of points in time. These individual actions lead to collective costs. The question still hangs in the air: whose responsibility is it? The individual? The state? The company? Should it be a proper area for government intervention at all?

Mill's principle of liberty purports to be instrumental. It is put in place to promote personal autonomy, which Mill believes transforms society in a way that promotes utility (i.e. happiness).<sup>65</sup> However, if utility is the purpose, what are the instrumental effects of social policies that champion selfish individualism and the undeterred entrepreneur? If the above argument is true, then state passivity in the face of demonstrable harm in the population will result in societal damage that adversely affects most members of the community. Strict limits on paternalism predictably will result in higher levels of illness and premature death, greater inequalities based on race and socio-economic status, and lonely cultures lacking in social solidarity, shared commitments and community spirit.

Perhaps this consequential argument will never convince those who hold the formalistic view that certain norms can never be breached irrespective of the good to be achieved. However, suppose a paternalistic public health intervention was effective in preventing a high consequence event such as contracting human immunodeficiency virus infection or developing diabetes.<sup>1,67,68</sup> Would a relatively small invasion of autonomy or privacy be justified considering the benefits?

Thus, the utility of freedom simply may not be worth it in certain cases; the potential disutility of particularly hazardous activities may be immeasurably greater than the utility of exercising autonomy in that small sphere. The Millian logic that individuals must exercise unfettered discretion in order to be happy is unconvincing; this logic is particularly unpersuasive when seen from the perspective of millions of decisions, taken by millions of individuals, leading to pervasive illness and death. It just may be possible, counter to all prevailing liberal tradition and political posturing, that people gain greater comfort when asked to forego a little bit of freedom in exchange for a healthier and safer community. In addition, it just may be possible that well-directed paternalism promotes a 'broader freedom' for the many.<sup>69</sup> One should, therefore, remain open to the idea that the state can sometimes validly regulate harms that are apparently self-imposed, but which are deeply socially embedded and pervasively harmful to the populace.

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