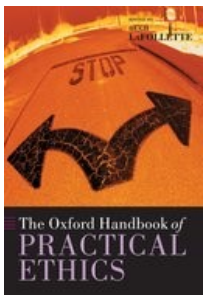

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CHAPTER

15 Legal Paternalism

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Abstract

This article's central interest is to examine the special philosophical difficulties that arise in attempts to think about paternalism in legal contexts. Most moral philosophers have focused on *personal relationships* in their efforts to understand both the nature and the justification of paternalism. That is, they have endeavoured to identify the conditions under which what they define as paternalism might be justified in situations in which one person (for example, a parent, a doctor, or a friend) interacts with another person (for example, a child, a patient, or a friend). The article is largely concerned with the problems that inhere in efforts to apply to the domain of law any theories about paternalism that might be derived from these personal contexts. It proposes tentative solutions to several of these problems.

Keywords: legal paternalism, moral philosophy, personal relationship, philosophical difficulties, personal autonomy, soft paternalism

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1. Introduction

MY central interest in this chapter is to examine the special philosophical difficulties that arise in attempts to think about paternalism in legal contexts. Most moral philosophers have focused on *personal relationships* in their efforts to understand both the nature and the justification of paternalism. That is, they have endeavoured to identify the conditions under which what they define as paternalism might be justified in situations in which one person (for example, a parent, a doctor, or a friend) interacts with another person (for example, a child, a patient, or a friend). I will be largely concerned with the problems that inhere in efforts to apply to the domain of law any theories about paternalism that might be derived from these personal contexts. I will propose tentative solutions to several of these problems.

2. The Nature of Paternalism

In this section I will describe how our understanding of what paternalism *is*becomes complicated and problematic as we move from personal relationships to

I would like to thank Professors Hugh LaFollette and Seana Shiffrin for valuable assistance with earlier drafts of this chapter.

p. 388 legal contexts. In order to support my claim that the nature of paternalism itself is less clear in legal situations, I must begin with a brief discussion of how paternalism is typically defined in a personal relationship.

On most occasions in which *A* is justified in not allowing *B* to act according to his preferences, A's objective is to protect persons other than *B* who would be harmed or adversely affected by *B's* behaviour. When *A* treats *B* paternalistically, however, *B* is prevented from adopting some course of action on the grounds that it would be bad for *B.* As a rough approximation, one person *A* treats another person *B* paternalistically when *A* interferes with *Bys* freedom for *B's* own good—to protect or promote 5's health and safety, economic interests, or moral well-being. *A* may interfere with *B's* freedom by disregarding either his judgement or his preferences; for simplicity, I will suppose that *A* disregards J5's preferences in treating him paternalistically. I will refer to any example that conforms to this description as a paradigm case of paternalism.

When philosophers attempt to be more precise about the nature of paternalism, however, the details of their definitions vary, sometimes considerably (Archer 1990). Philosophers have engaged in lively debates about whether particular examples that deviate from the foregoing paradigm do or do not qualify as genuine instances of paternalism. Accounts have been offered; counterexamples have been advanced; modifications have been proposed. I will mention two (of many) such debates briefly. Still, for reasons that will become clear, I will avoid commitment about how paternalism should ultimately be defined.

Two disagreements about the nature of paternalism may be noteworthy. First, some philosophers have argued that the paternalist need not *interfere* in the freedom of the person treated paternalistically (Gert and Culver 1976). Suppose, for example, that a doctor encounters an unconscious accident victim whose life can be saved only by a blood transfusion. This doctor happens to know that the victim has a religious objection to the treatment, but proceeds to save his life anyway. Since the patient was unconscious throughout the procedure, it is hard to conclude that the transfusion involved an interference in his liberty. Still, we are invited to conclude, the doctor treated the patient paternalistically.

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Secondly, some philosophers have pointed out that paternalism need not involve the simple two-party case described in my rough characterization. In some cases, only one party is involved. Suppose that Green understands his proclivity to incur debt, so he tears up the credit cards he receives in the mail. Is his act of destroying the credit cards an instance of paternalism in which Green plays the role of both *A*(his present self) and *B* (his later self whose preferences he disregards)? In other cases, three or more parties are involved. Suppose that parent *A* forbids his older son C from sharing cigarettes with his younger son *B* on the ground that tobacco is bad for *B's* health. This case is unlike a typical situation in which *C* is coerced to prevent him from harming *B*, since *B* may be willing and eager to engage in the proscribed transaction. In this case, we again are invited to conclude, *A* treats *B* ↳ paternalistically. Paternalism in this case might be
p. 389 called *indirect* or *impure* (Dworkin 1972), since A interferes directly with the liberty of C, and only indirectly with that of *B*, the intended beneficiary.

Are these two kinds of non-standard cases genuine counterexamples to my rough approximation, so that modifications of my definition are required? Probably. But I am not altogether confident that a 'right answer' to such questions can be defended. That is, I am sceptical that we can decide definitively whether each non-standard case is or is not a 'real' instance of paternalism. I suspect that whether a given example is a genuine instance of paternalism is a matter of degree. That is, some cases are simply *better* or *worse* examples of paternalism than others. We should not expect decisive reasons for or against categorizing any given example as an instance of paternalism. Ultimately, a philosopher who insists on a yes-or-no answer to the question of whether a given case is or is not an instance of paternalism must simply resort to stipulation and announce that he means thus-and-so by the term. The more important issue, I submit, is whether the behaviour of A in the foregoing examples is justified. Generalizations about whether and under what circumstances paradigmatic cases of paternalism are justified may or may not be defensible when applied to the foregoing non-standard situations. These latter cases may present distinct justificatory issues that need not arise in paradigm cases of paternalism.

Whatever exactly paternalism is taken to be, I believe it should be understood as a person's *reason* or *motivation* for failing to regard as decisive the preference of the person treated paternalistically—a reason that aims to promote or protect the wel- fare or interest of the person so treated. The decision to construe paternalism as a motivation has several important implications I will briefly discuss.

First, an interference with liberty should not be construed as paternalistic in virtue of its *effects.* Consider two kinds of cases in which effect and motivation diverge. Suppose that *A* somehow succeeds in advancing 5's interests even though A's reason for interfering in B's freedom is to enrich himself. Or suppose that A fails to advance B's interests despite A's best efforts to do so. I believe that the latter, but not the former kind of case should be categorized as an instance of paternalism. This categorization follows from defining paternalism in terms of the motives that lead A to interfere with B's freedom, rather than in terms of how A's interference actually affects *B's* welfare. Although I will contend (in Section 4) that consequences are important to decide whether legal paternalism is *justified*, I believe that con- sequences are unimportant to understand what paternalism *is.*

Even when construed as a reason, there is room for doubt about whether A can treat *B* paternalistically if *B* lacks the preference with which A is prepared to interfere. Consider a case in which *B* lacks the slightest inclination to perform the act that A would not allow. Suppose, for example, that A writes a will providing a large inheritance for *B. A* believes that expeditions to the South Pole are too risky for anyone to undertake, and makes the bequest contingent on *Bys* agreement not to attempt the perilous journey. Suppose further
p. 390 that *B* happens to share A's opinion, ↳ and never develops any desire to leave the country. In this example, *A* seems to have a paternalistic reason not to treat as decisive a preference of *B* that is purely hypothetical—that is, *A* hopes to dissuade *B* from acting according to a preference that *B* need not actually have. If such cases did not qualify as genuine instances of paternalism, we could not classify A's motivation as paternalistic unless and until *B* formed an inclination to travel to the South Pole. Admittedly, difficulties in

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justifying paternalism might be somewhat less worrisome in these kinds of cases. After all, *B* is less likely to resent a clause in A's will that discourages him from engaging in conduct he has absolutely no desire to perform. Still, difficulties in justifying paternalism do not disappear altogether here. Many persons report strong reservations about being made to do something (for example, buckle a seat belt) that they are quick to admit they would do in any event.

For present purposes, a different implication of construing paternalism as a motivation is especially important. If paternalism is understood as a reason for failing to regard the (real or hypothetical) preference of a person as decisive, disagreements about whether a particular law (or a practice, policy, or institution) is or is not paternalistic may be misguided and futile. *Laws* do not seem to be the kinds of things that *can* be paternalistic; only *reasons* can be paternalistic. Still, allegations that a Jaw (or a policy, practice, or institution) *is* paternalistic are frequently made by philosophers, and should not be dismissed as confusions or category mistakes. How should such claims be understood? Perhaps we should classify a law as paternalistic when it exists for paternalistic reasons.

Several obvious difficulties arise in this attempt to understand how a law can be paternalistic—how it can 'exist for paternalistic reasons'. Many of these difficulties are familiar to legal philosophers who defend theories of statutory or constitutional interpretation that attach significance to legislative intent. Thefirstkinds of problems arise even when a legislator is a single individual like a monarch. A legislator is not gener- ally required to disclose his motivation for enacting legislation. In most cases, his reason must be inferred from various sources, many of which can be ambiguous or even contradictory. In addition, a legislator may have no single reason in favour of enacting a given law; he may have several distinct purposes in mind. When a philosopher categorizes a given law as paternalistic, he is probably guessing about what he sup- poses to have been the most important reason of the legislator who enacted it.

The second kinds of difficulties arise in a modern democracy, in which laws are enacted by a number of legislators rather than by a single individual. These problems involve combining the separate motives of several individuals into the purpose of a group. When many individuals collaborate in legislation, whose purposes should count? Should we include only those legislators who voted in favour of the law, or should we also consider the reasons of those legislators who opposed it? Even if we agree about which legislators should count, these persons are bound to have diverse reasons for enacting the statute. One legislator may vote in favour of a Bill for paternalistic reasons, another may vote for the Bill even though he explicitly
p. 391 rejects this paternalistic reason, while yet a third may support the Bill for reasons ↳ having nothing to do with its merits—because he hopes to gain support from the sponsor of the Bill in the next election, for example. How can we possibly decide whether to classify such a law as paternalistic?

In addition, the *persistence* of law complicates endeavours to categorize it as paternalistic. All the legislators who passed a statute may be dead. Suppose that most of the legislators who enacted a law did so for paternalistic reasons, but this rationale is now widely discredited among legislators. Still, these legislators have non-paternalistic reasons for not repealing the law. Since the law persists for altogether different reasons from those that led to its enactment, should we continue to classify the law according to the original motivation of those who created it? In the light of these (and other) difficulties, we might well despair of any prospects of identifying 'the reason' for a law. We might go so far as to conclude that persons who speak of the reason for a law are engaged in a legal fiction.

Problems in categorizing a given law as paternalistic arise whenever particular examples are discussed. Consider, for example, a statute forbidding child labour. Presumably, many legislators favoured such a law in order to protect the welfare of children who would otherwise work. An additional reason for the statute, of course, is to protect the jobs and wages of adults who would otherwise be forced to compete with underage workers. As far as I can tell, there is simply no definitive answer to the question of whether such a statute is or *is not* paternalistic. A very general lesson should be learned from this example. I believe that

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every actual law that anyone has ever been tempted to categorize as paternalistic resembles the example of child labour in this respect.

Here, then, is the first of many difficulties that arise in attempts to apply philosophical insights about paternalism in personal relationships to contexts involving law. Admittedly, on some occasions, the motivations for interference can be complicated and unclear even in personal relationships. I assume, however, that a father who requires his 6-year-old daughter to finish her vegetables before she is allowed to eat dessert may be relatively confident about his reason for not deferring to her preference. The difficulties in classifying a given interference as paternalistic are seldom as formidable in personal relationships as in legal contexts.

This fact will become important when we turn to issues of whether and under what circumstances paternalism is justified. Most philosophers, it is fair to say, have relatively strong intuitions against the justifiability of paternalism, at least when it is imposed on sane adults. Suppose that a philosopher becomes persuaded of a theory according to which paternalism is never justified, or is justified only under a narrowly specified set of conditions. Of what value is his theory in assessing legislation in the real world? It is hard to see how his theory could be used to condemn any existing law. That is, he cannot demand that any particular law must be repealed because he is convinced that such a theory is correct. All that he is entitled to conclude is that such a law is unjustified in so far as it exists for paternalistic reasons.

Nonetheless, a theory about the conditions under which paternalism is justified will have some limited
p. 392 relevance in legal contexts. Such a theory might constrain ↳ the set of considerations to which legislators are allowed to appeal in their deliberations about whether to support or oppose a given piece of legislation. That is, a legislator may be persuaded that, unless given conditions are satisfied, some kinds of reasons that he might otherwise cite in support of a proposed law should not be permitted to count in its favour. Alternatively, such a theory might constrain the considerations to which citizens are allowed to appeal in making judgements about whether a given law is justified (Waldron 1989). In a democracy, I assume that citizens have special reasons to form their own opinions about whether or not given laws are warranted. A theory about the conditions under which paternalism is acceptable as a rationale should be useful for this purpose.

Despite these formidable obstacles, I remain hopeful that the label ‘paternalistic’ can meaningfully be applied to given laws, and that a theory of when paternalism is justified is relevant to the issue of whether such laws are justified. Perhaps the most promising proposal for interpreting the claim that a given law is paternalistic is that ‘the most plausible rationale’ or ‘the best rationale’ in favour of the law is to limit the freedom of persons for their own good. According to this proposal, a law can be paternalistic even though no one, past or present, ever thought to defend it for paternalistic reasons. ‘The rationale’ of a law can be something other than the reasons that actually led anyone to enact it. Of course, enormous controversy may surround the judgement that one rationale for a law is more plausible or better than another. But those who conclude that the best reason in favour of a given law is paternalistic are committed to categorizing that law as paternalistic.

Despite its promise, this proposal to understand how a law can be paternalistic is problematic. Eventually, we will struggle to decide whether and under what circumstances paternalistic laws are justified. This effort requires us to apply normative principles to particular cases of paternalism. In order to undertake this effort, we must first identify whether a law is paternalistic. The foregoing proposal to identify when a law is paternalistic will complicate the task of deciding whether any such laws are justified. According to this proposal, normative principles about whether paternalistic laws are justified will turn out to have a direct bearing on whether laws *are* paternalistic. Suppose, for example, that we conclude that no paternalistic laws can be justified. If paternalistic laws are those laws for which the best rationale is paternalistic, we are likely to decide that *no* laws are paternalistic. Our normative principles tell us that the best rationale for a law will

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never be paternalistic; some other rationale for a given law is almost certain to be better than a paternalistic rationale. This result should be avoided. Ideally, the criteria to identify whether a law *is* paternalistic should be independent of the criteria to decide whether such a law is justified. For these reasons, I have serious reservations about this proposal to understand how a law can be paternalistic. Nonetheless, I see no better alternative—unless we deny that laws *can* be paternalistic. Perhaps some better proposal is available, or the problem I have described can be solved. In any event, we should remain cautious and tentative whenever the label 'paternalistic' is attached to a given law (or a policy, practice, or institution).

p. 393 Thus far, I have pointed out some of the difficulties in applying a definition of paternalism to particular laws. Still, I have done little to support my claim that our understanding of what paternalism is becomes less clear as we move from non-legal to legal contexts. My central basis for this claim is that laws are necessarily general and applicable to groups of persons whose circumstances differ widely. The fact that law is applicable to a group of persons—whereas a paradigm case of paternalism in a personal relationship is applicable only to a single individual—gives rise to many of the perplexities in understanding the nature and justification of legal paternalism. Suppose that we (somehow) decide that legislators have enacted a given law to limit the freedom of persons for their own good. Even so, we are likely to find that the law does not disregard the preferences of each and every person whose liberty is restricted. Some limitations of liberty are best construed as devices that *enable* persons to attain an objective that they want, but (for one reason or another) are not especially successful in obtaining. I am doubtful that we should understand a rationale as paternalistic when it enables a person to achieve an objective that he recognizes as desirable but is unlikely to attain in the absence of the legislation that limits his liberty (Dworkin 1972).

A good example of this phenomenon is a statute that requires persons to set aside a given percentage of their income in a retirement plan. Consider Smith, who does not want to spend all his income in the present, but is well aware of his inability to save the amount of money he realizes is optimal. Although he grumbles occasion- ally, he usually approves of the legislation that prevents him from succumbing to his own weakness. If the legislator who enacted this statute believed that everyone resembled Smith in these respects, I would be hesitant to categorize his motivation as paternalistic. The legislator is not disregarding Smith's preference, but helping him to attain that which he prefers or judges to be best.

Complications arise, of course, because legislators know that many of the per- sons to whom the law applies will *not* resemble Smith. Consider Jones, who, like Smith, is made to contribute to the retirement plan. Unlike Smith, however, Jones would prefer to spend all his income in the present. The law does not regard Jones's preference as decisive, and he is certain to perceive the law as a paternalistic interference in his freedom. How should the rationale for the law be categorized when legislators realize that the liberty of both Smith and Jones will be restricted? When the preferences of many but not all the persons whose liberty is restricted are regarded as decisive, I am not confident that we can identify a 'right answer' to the question of whether the rationale of the law is paternalistic.

I have mentioned a crucial respect in which Smith and Jones differ. Of course, the persons whose liberty is restricted by the foregoing law will vary in countless other ways as well. The foregoing statute benefits both Smith and Jones, but it actually disadvantages other individuals. Consider White, who is like Smith in that he does not prefer to spend all his income in the present, but who differs from Smith in that he is
p. 394 sufficiently disciplined to save the amount of money he realizes ↳ is optimal. White believes that he would be able to provide more money for his retirement if he were allowed to invest his income himself, instead of being forced to contribute to the plan mandated by the state. Suppose—as is almost certainly true—that legislators know that some of the persons who resemble White are *correct* in their belief about their ability to invest more wisely than the state. In other words, we are aware that this law will actually make such persons worse off than they would have been without the law. On these assumptions, is their rationale for the law still paternalistic? Should we continue to say that the law is paternalistic? Yet again, stipulation is needed to answer this question.

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This ambivalence about the rationale of given laws—which some persons recognize as enabling them to achieve a good, and others criticize as interfering with their freedom to attain a good—can be detected throughout American legal history. Consider *Lochnerv. New York* (1905)—perhaps the most discredited Supreme Court decision in the twentieth century. Is a statute that forbids bakery employees from working more than sixty hours a week a paternalistic interference in their freedom of contract, as Justice Peckham, who wrote the majority opinion, insisted? Or is it instead a device by which workers can gain collective protection from unwanted exploitation, as Justice Holmes, in his famous dissent, seemed prepared to believe? My inability to answer this question is only partly based on the difficulties I described in identifying 'the rationale' of a law. My inability is also due to the fact that the law is general and applicable to many different persons whose circumstances differ, so that no single answer to this question pertains to each and every baker whose freedom is restricted.

3. Difficulties in Justifying Legal Paternalism

Since at least the time of John Stuart Mill, many moral and political philosophers in the liberal tradition have expressed strong reservations about the justifiability of paternalism, tolerating it under very narrow conditions. As I have indicated, personal relationships have typically been used to develop theories about whether and under what circumstances paternalism is justified. As I will argue in this section, however, few of the central distinctions such theories invoke are helpful in efforts to justify paternalism in legal contexts.

Perhaps the single most important distinction that has been introduced in the course of attempts to justify paternalism in personal relationships is that between hard and soft paternalism (Feinberg 1986). According to the *soft* paternalist, *A* may treat *B* paternalistically only when B's conduct is *non-voluntary.* According to
p. 395 the *hard* paternalist, *A* sometimes may treat *B* paternalistically even though B's conduct ↳ is *voluntary.* Many philosophers, of course, believe that some instances of hard paternalism can be justified (Kleinig 1984). Still, the appeal of soft paternalism is evident. The soft paternalist favours intervention in *B's* choice for his own good only when there is a sense in which B's choice is not really his own. If B's conduct is fully voluntary—and expresses his will—soft paternalists insist that no interference for B's own good is warranted.

Clearly, the significance of the distinction between hard and soft paternalism depends on a theory of what choices are truly ours—on an account of the voluntary. According to a sensible proposal by Joel Feinberg (1986), voluntariness should be conceptualized as a matter of degree. Feinberg develops a model of a *perfectly voluntary choice*, in which the agent is fully informed of all the relevant facts and contingencies, and makes a decision in the absence of any manipulation or coercive pressure. Perhaps no choice in the real world fully corresponds to this ideal; particular choices are relatively non-voluntary to the extent that they deviate from it. Inevitably, troublesome cases on this continuum will arise in which we are unsure whether a choice is sufficiently voluntary to render paternalistic interference unjustifiable (according to the soft paternalist). For example, philosophers have struggled to decide when consent to medical treatment is sufficiently voluntary (Buchanan 1989).

Feinberg illustrates how the distinction between hard and soft paternalism should be used to decide whether a given paternalistic interference is justified by presenting three scenarios in which Doctor Doe refuses to prescribe to patient Roe a drug that Doe knows will cause Roe physical harm (Feinberg 1986). In the first scenario, Roe responds: 'You are mistaken. [The drug] will not cause me physical harm.' According to Feinberg, Roe's decision is not fully voluntary; he does not actually choose to take a substance that will in fact harm him. Feinberg maintains that Doe—who has expertise about whether the substance will cause physical harm—is entitled to withhold the drug. In the second scenario, Roe responds: 'That's just what I want. I want to harm myself.' In this case, Feinberg claims that Roe's decision *appears* to be non-voluntary.

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Roe's stated goal of harming himself is so odd that it gives rise to a presumption that he is deprived of the full use of his reflective faculties. Thus, Doe again is justified in withholding the drug, at least temporarily. In the third scenario, Roe responds: 'I don't care if [the drug] causes me physical harm. I'll get a lot of physical pleasure first, so much pleasure in fact, that it is well worth running the risk of physical harm.' Feinberg's appraisal of this final case is altogether different from that of the previous two. Since there is no basis on which to call Roe's decision non-voluntary, Feinberg is inclined to describe the case as 'easy'. No paternalistic interference in Roe's decision to take the pleasurable but dangerous drug is justified.

For present purposes, I am not concerned about whether one shares Feinberg's sympathies with soft paternalism, or is persuaded by his general objections to hard paternalism. Instead, my point is that any
p. 396 lesson to be learned from the foregoing ↳ three scenarios is of limited significance when we turn to questions of law. The distinction between hard and soft paternalism, although potentially helpful in identifying the conditions under which paternalism can be justified in personal relationships, is much less valuable in identifying the conditions under which legislators are justified in enacting laws for paternalistic reasons. This lack of relevance is a product of a phenomenon I have already noted: law is necessarily general and applicable to large numbers of persons whose circumstances vary in several crucial respects.

Perhaps the most obvious variable in the circumstances of the persons who are subject to law is their differing motivations for wanting to engage in the conduct the law would prohibit. Suppose that a legislator is weighing the arguments for and against proscribing the harmful but pleasurable drug described in the foregoing three scenarios. He scrutinizes Feinberg's reasoning and becomes persuaded of the evils of hard paternalism and the merits of soft paternalism. How does he apply what he has learned to the issue before him? Suppose that this legislator finds that a great many prospective users resemble Roe in the first of the three scenarios. Since such persons are misinformed about the health hazards of their decisions, the legislator will infer that their choices are not sufficiently voluntary. Thus, he will tend to favour proscription. But suppose that this legislator alsofindsthat a small minority of prospective users resemble Roe in the second scenario. Such persons want to use the drug precisely because they desire to harm themselves. If the legislator is persuaded by Feinberg's analysis, he will conclude that the choices of these users are presumptively non-voluntary. Finally, suppose that this legislator also finds that the majority of prospective users conform to Roe in the third scenario. Such persons neither desire to harm themselves nor are misinformed of the health risks of their decisions. Like many persons who elect to take lifts rather than walk upstairs, or to eat fatty foods rather than salads, these prospective users have simply decided that the benefits of pleasure (or convenience or superior taste) outweigh the risks to their health. Since this legislator rejects hard paternalism, and finds that the preferences of these latter persons are sufficiently voluntary, he will tend to allow the drug to be used.

What conclusion, then, should this legislator reach about whether or not to enact the law? The proscription seems justified in its application to those persons whose choices are non-voluntary, but unjustified in its application to those persons whose choices are voluntary. Ideally, the legislator will search for a solution that manages to treat each person individually, so that the drug is permitted for those persons whose decisions are voluntary, but is banned otherwise. The drug might be distributed under a system of licensure, so that it would be available only to those adults who demonstrate their knowledge of the relevant risks. But this ideal solution encounters both pragmatic and principled difficulties. Consider the practical difficulties. Would a person be required to obtain a licence to use each drug—alcohol, tobacco, marijuana, and the like—
p. 397 that is potentially harmful? And why license ↳ only drugs? Would a person need a licence to ski, ride a bicycle, or play football? In short, licensing would be extraordinarily cumbersome, inefficient, and subject to error and abuse. Since the state cannot be expected to adjust its approach to the distinct circumstances of each person, it needs a default position. Prohibiting the drug unless the prospective user demonstrates the voluntariness of his decision has a paternalistic flavour. Perhaps, then, the default position should be to

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permit the drug unless the state has reason to believe that the decision of the prospective user is *not* voluntary.

The crux of the problem is as follows. In Feinberg's example of a personal relationship, the doctor is able to engage in a dialogue with each patient to ascertain the extent to which his choice is voluntary. If Roe proposes to undertake some activity but is unaware of its risks, Doe can provide him with information, and quiz him until he is confident that Roe understands the relevant facts. Virtually all deficiencies of knowledge can be rectified in the personal arena. But no such rectification is possible in law (Kennedy 1982). Certainly, cigarettes and dangerous products can contain warnings. Empirical research, however, provides ample indication that consumers seldom process such warnings. Doe can quiz Roe; the law cannot ensure that consumers pay attention to warnings. Since the state can hardly afford to initiate an extended conversation with individual citizens about each potentially harmful decision, it must adopt some policy in the absence of these dialogues.

What, then, should this legislator do? No answer can be derived directly from a theory of the conditions under which paternalism is justifiable in personal relationships. If this legislator decides to vote in favour of the law, he must engage in a *trade-off*-—that is, he must balance his judgement about the merits of soft paternalism against the demerits of hard paternalism. The principles that govern these trade-offs—that govern the application of a theory of justified paternalism to legal contexts—might be described as *mediating maxims.* I will return to a discussion of these mediating maxims in Section IV; at this point, I simply point out the necessity of employing such principles if insights about the conditions under which paternalism is justified in personal relationships are to be applied to the domain of law.

This legislator will find additional important differences in the circumstances of persons. Some prospective users of the drug are adolescents, while others are adults. Every philosopher concedes that paternalistic intervention in the preferences of adolescents is justified more easily than in the preferences of competent adults. How should this legislator take account of this concession in his deliberations about whether to proscribe the drug? The most obvious solution is to adopt the kinds of regulations that govern the availability of alcohol and tobacco. The harmful but pleasurable drug would be permitted only for persons over a given age, typically 18 or 21. This solution is problematic. Whenever a substance is made available to adults, 'leakage' to adolescents is bound to occur. In other words, greater numbers of adolescents will
p. 398 succeed in using the drug illegally if it is permitted for adults ↳ than would manage to do so if it were prohibited for persons of all ages. Thus, this legislator will be tempted to proscribe the drug altogether if he is greatly concerned about its deleterious effects on adolescents. Again, such a legislator must engage in a trade-off—on this occasion, he must balance the freedom of adults against the welfare of adolescents. Some heretofore unidentified mediating maxim is required to govern the justifiability of whatever trade-off he decides to make.

To this point, I have described various kinds of differences in the circumstances of the persons whose preferences are disregarded by a given law, and how these differences create complications in attempts to apply to the domain of law a theory of justified paternalism derived from personal relationships. The differences I have mentioned thus far are all (roughly) psychological—law applies to persons of different degrees of sanity and maturity, with disparate motivations, and distinct levels of knowledge about the consequences of engaging in the activity to be proscribed. But purely physical differences between persons may be important as well. Because of physical dissimilarities between individuals, a given law may protect the welfare of some while jeopardizing that of others. Air bags in cars provide an excellent illustration of this phenomenon. The deployment of an air bag reduces the severity of injuries for the vast majority of persons involved in auto- mobile accidents. In some kinds of collisions, however, persons who are very short are more likely to be injured by the deployment of the air bag than by the crash itself. Ideally, of course, air bags should be designed to benefit *all* occupants of cars. But engineers may be unable to design an air bag to realize this ideal. If a legislator decides to require air bags to protect the safety of persons

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involved in car accidents, he necessarily trades a reduction in some injuries for an increase in others. Alternatively, engineers may be able to design an air bag to benefit all occupants, but only at an exorbitant cost. If a legislator declines to require this expensive but optimal air bag, he necessarily balances the value of money against the desirability of reducing injuries.

The foregoing phenomenon provides an occasion to return to some of the difficulties in defining paternalism with which I began. Suppose that a legislator must vote for or against a regulation mandating that cars contain air bags. He is inclined to support the regulation because he believes that occupants of cars should be protected from injuries. But he is aware that this regulation will actually decrease the safety of a minority of persons. If he ultimately supports the law, should we categorize his motivation as paternalistic? That is, should we describe his reason *as paternalistic* when he knows he will jeopardize the welfare of some persons, because he knows he will promote the welfare of most of the persons in the group of those whose liberty is restricted? This question has no straightforward answer.

Consider additional difficulties in applying to law some of the familiar efforts to justify paternalism in personal relations. Gerald Dworkin proposes that what he calls 'future-oriented consent' is crucial in
p. 399 deciding when a parent is justified in ↳ treating his child paternalistically. According to this proposal, 'paternalism may be thought of as a wager by the parent on the child's subsequent recognition of the wisdom of the restrictions. There is an emphasis on what could be called future- oriented consent—on what the child will come to welcome rather than on what he does welcome' (Dworkin 1972: *76-y).* This endeavour to justify paternalism in the context of the parent-child relationship is not without difficulties; I will mention only two. First, if the principle of'future-oriented consent' is acceptable at all, why confine its application to the parent-child relationship? Suppose that an adult eventually comes to appreciate the paternalistic intervention of his friend. Why is such an interference not justified here as well? Moreover, the principle entails that the parent cannot know whether his paternalistic restriction is justified until long after he imposes it, when the child (hopefully) is sufficiently mature to make a judgement about its wisdom. Clearly, the parent would like some guidance about whether his restriction is justified at the moment he imposes it. Again, however, I am less interested in assessing this proposed justification in the context in which it was developed (namely, the parent-child relation) than to assess its potential application to law. The obvious difficulty in implementing a principle of future-oriented consent in the legal domain is the overwhelming likelihood that some but not all the persons whose liberty is restricted will eventually come to appreciate the wisdom of any given restriction. Apparently, such a law would then be justified with respect to those who subsequently welcome it, but not with respect to those who do not. This conclusion, however, does not take us very far. We still need to know: is the law justified or not?

In this section, I have argued that many of the distinctions that philosophers have believed to play a central role in attempts to justify paternalism in the context of personal relationships are less valuable when applied to matters of law. My point should not be overstated. A few such distinctions, if relevant to the justifiability of paternalism in personal relations, are relevant to legal paternalism as well. Consider, for example, the familiar distinction between action and omission. Philosophers have long debated whether this distinction has or lacks moral relevance. A parallel debate surrounds the justifiability of legislation—paternalistic legislation in particular. Some laws (presumably) enacted largely for the good of the persons whose liberty is restricted require them to perform a given action—to wear a helmet while riding a motorcycle, for example. Other laws with a similar rationale forbid persons to perform a given action—to borrow money at too high a rate of interest, for example. If the distinction between action and omission is (or is not) morally relevant in personal contexts, it probably has (or lacks) the same relevance when applied to matters of paternalistic legislation.

For the most part, however, we should not anticipate that the distinctions that have proved so helpful in attempts to identify the conditions under which paternalism is justified in personal contexts can be readily applied to assess the justifiability of paternalism in law.

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4. Principles to Justify Legal Paternalism

I have spoken frequently of the need to make trade-offs in adapting to law a theory about when paternalism is justified in personal relations. Difficulties arise in the legal realm that seldom if ever are replicated in paradigm cases in which one person treats another person paternalistically. I have suggested, for example, that a given law that disregards the preferences of some may simultaneously enable others to gain an objective that they want but know themselves to be unable to obtain. Moreover, a single law that constitutes hard paternalism in its application to A, and soft paternalism in its application to *B*, may not be paternalism of any kind in its application to C. In addition, one and the same law will restrict the liberty of both adolescents and adults. And a single law might increase the welfare of some of the persons whose liberty is restricted, but decrease that of others. Finally, some but not all the persons whose preferences are disregarded may eventually come to appreciate the wisdom of a given paternalistic statute. What verdict should be pronounced about such laws? Are they justified or unjustified *simpliciter?* In order to answer these questions, we must supplement a theory about the conditions under which paternalism is justified in personal relationships. Mediating maxims are needed to supplement the theory.

I will describe, and quickly dismiss, two very simple mediating maxims. The first is *absolutist.* According to the absolutist maxim, no paternalistic law should be enacted unless it is justified in its application to each and every person. Almost certainly, this maxim would preclude the state from enacting *any* instance of legal paternalism. Suppose that a few persons would choose to save a tiny amount of money by buying spectacles that would shatter on impact, thus creating serious risks to vision. The great majority of such persons, let us imagine, are simply mis- informed of the relevant facts. But suppose that at least one person—call him Dan—fully understands the risks, but foolishly opts to buy the cheaper lens. The state regulation that bans these lenses represents hard paternalism to Dan. Can a philosopher who rejects hard paternalism in personal relations seriously conclude that this regulation must be unjustified, in so far as its rationale is paternalistic? I think not. Absolutism has little appeal in most normative enquiries; it fares no better in its application to paternalistic legislation (Goldman and Goldman 1990).

The second simple mediating maxim I will describe—and also dismiss—is *majoritarian.* Unlike absolutism, the majoritarian maxim does not give single individuals (like Dan) a trump over majorities, but, more sensibly, gives majorities a trump over minorities. Two examples should suffice to illustrate how this maxim might be applied. If more persons than not would eventually come to appreciate the wisdom of a given paternalistic restriction, the majoritarian maxim could readily adapt Dworkin's theory of future-
p. 401 oriented consent to the domain of law. The ↳ distinction between hard and soft paternalism could be salvaged by enacting only those laws that represent soft paternalism to the majority of persons whose preferences they disregard. And so on.

The application of the majoritarian maxim gives rise to some results that might or might not be acceptable. The number of adults whose liberty is restricted by a given law will nearly always be greater than the number of adolescents. Is the fact that an activity is deleterious to minors *never* a good reason to bar that activity altogether? Must the law tolerate the leakage to which I have referred, regardless of the extent to which the conduct is harmful to adolescents? Perhaps. Adults are treated like minors when they are prohibited from engaging in an activity on the ground that it is bad for minors. However this issue is ultimately resolved, the application of the majoritarian maxim seems clearly counter-intuitive in other kinds of cases. Return to my example of a law requiring persons to contribute a given percentage of their income to a state retirement plan. Recall that this statute represents hard paternalism to Jones, while enabling Smith to achieve a desired outcome. Suppose that the Joneses of the world outnumber the Smiths by a 3 to 2 ratio. Presumably, then, the majoritarian principle would condemn the state plan. The failure to implement this plan, however, would greatly increase the numbers of elderly persons who are impoverished. The spectre of a society with a large population of poor senior citizens may be unacceptable.

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To prevent this consequence, a legislator might well decide to endorse the state plan, notwithstanding its incompatibility with the majoritarian maxim.

Theorists who continue to embrace the majoritarian maxim might reply that, over time, persons would learn to save effectively for their own retirement, so that the numbers of impoverished senior citizens would eventually decline. I see no evidence for this optimistic prediction about the triumph of rationality when persons are left to their own devices. Instances in which adults tend to take inadequate care of themselves—by unhealthy diets, for example—are too numerous to discount. In any event, the transition costs in conducting this experiment are far too high. The plausibility of the majoritarian maxim is not sufficiently great to warrant the immediate (and perhaps permanent) increase in poverty among the elderly. Therefore, I conclude that the majoritarian maxim should be rejected. We still lack a principle to adapt into law a theory about the conditions under which paternalism is justified in personal relations.

One might hope that philosophers who have thought primarily about the justification of paternalism in personal contexts would have provided some guidance about the mediating maxims needed to translate their theories into the legal domain. Most moral philosophers, however, have tended to employ a deonotological framework to approach the issue of whether and under what circumstances paternalism can be justified in personal relationships. That is, they have rejected the supposition that paternalism is justified whenever it produces optimal results. Nonetheless, I believe that consequentialist reasoning is essential to develop the mediating maxims needed to justify paternalism in law. Consequentialism best allows us to
p. 402 recognize—and thereby to resist—the horrors of a world with large ↳ numbers of impoverished senior citizens—even if that world contains less paternalism and more freedom.

It is worthwhile commenting on the general kinds of deontological objections philosophers have tended to raise against the justifiability of paternalism in personal relations. The most plausible objections invoke a conception of *personal autonomy* with which paternalistic interferences are said to be incompatible. Three difficulties surround these efforts. One must (a) identify what autonomy is, *(b)* show why it is valuable, and (c) argue that its value is always greater than the value of reducing whatever harm is prevented by the paternalistic restriction. Each of these three difficulties is formidable.

Any philosopher who objects to some (or all) paternalistic interferences because they infringe personal autonomy should be pressed to formulate the conception of autonomy on which he relies. The supposed incompatibility between paternalism and autonomy must be defended rather than presupposed. Of course, autonomy might be *defined* so that its incompatibility with paternalism is guaranteed; one might characterize autonomy as the freedom to do what one wants. According to this conception, respect for autonomy requires complete deference to personal preferences (Husak 1980). I think that this conception of autonomy is implausible. Any alternative conception, however, is likely to be compatible with some instances of paternalism. I will not endeavour to support this claim in any detail; too many different versions of the principle of personal autonomy have been proposed (May 1994). But, even if we conclude that paternalism is incompatible with autonomy, we should not condemn all instances of paternalism unless we are persuaded that autonomy, as so construed, has value; indeed, it must have enough value to out- weigh whatever good the instance of paternalism promotes. It seems unlikely that the value of personal autonomy could be sufficiently great to outweigh *all* competing considerations that might lead a state to favour paternalistic legislation.

Suppose, however, that we conclude that the value of protecting autonomy is greater than the disvalue of the harm to be prevented by each instance of paternalism. The next difficult issue is to ask how this conclusion can be translated into legal policy. The difficulties here should be familiar. A general law restricts the liberty of persons in very different circumstances. As I have indicated, a single law may vio- late the autonomy of some persons, while enabling others to attain a good they want. If our primary objective is to

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protect autonomy, what should we conclude about such a law? This kind of question points to the need for (yet unidentified) mediating maxims.

I now want to propose that the concept of personal autonomy, which has figured so prominently in philosophical endeavours to object to paternalism in personal relations (Feinberg 1986), might actually provide the key to justifying some instances of paternalism in law. Suppose we construe persons to be autonomous when they make their own lives (Raz 1986). Philosophers have offered very different kinds of
p. 403 accounts of what it means for someone to 'make his own life', and how ↳ anyone might succeed in this endeavour. On any explication, however, this conception of autonomy provides *a* reason to oppose instances of legal paternalism. The ability of persons to make their own lives is decreased whenever they are subjected to a legal interference for any reason—paternalistic or otherwise. At the same time, however, this conception of autonomy provides a reason to *favour* some instances of legal paternalism. Many restrictions on liberty will improve the opportunities of persons to make their own lives by promoting what might be called the *conditions*of autonomy—the conditions under which persons are likely to develop into autonomous agents. Laws that limit the number and severity of physical injuries help to preserve opportunities for persons to lead the lives they choose. For example, an athlete whose toes are cut off by a lawn mower without a safety guard has lost a significant part of his ability to make his own life. Since the value of autonomy gives us a reason to create the conditions in which this sort of accident is less likely to occur, we have a reason to enact a law that requires that lawn mowers include safety guards. Thus, we have a reason to oppose this law, and a countervailing reason to support it—both of which are derived from the value of personal autonomy. Whether one ultimately accepts or rejects this example (as well as other examples) of legal paternalism depends largely on how one balances these conflicting reasons. Many factors enter into this difficult balancing. Of special significance, however, is the means by which the paternalistic law is enforced—an issue to which I will return in Section 5.

I propose, then, that the key to developing a theory of justified paternalism in legal contexts is to understand how various paternalistic laws affect the conditions of autonomy—that is, how they enhance or undermine the ability of persons to make their own lives. This determination does not simply involve the counting of heads—an alternative I dismissed when discussing the majoritarian maxim. Instead, a paternalistic law may be justifiable because its contributions to the conditions of autonomy for the minority are more important than its detriments for the majority. No precise formula for balancing these variables exists. I can only identify some of the factors that are relevant to this determination, and illustrate their application in one or two examples.

Consider the example of mandatory seat belts. Suppose that the majority of occupants of cars will never be involved in an accident in which the use of a seat belt would prove beneficial. If so, a law requiring that belts be worn can promote the conditions of autonomy for only a minority. Still, I contend that the gains to the minority are likely to outweigh the losses to the majority. Consider the trivial losses to the majority who are made to fasten their seat belts, but will never benefit thereby. They may dislike the feeling of restraint, resent the wrinkling of their clothes, disapprove of the waste of a second or so of their time, and so on. But no theory of liberty should deem these sacrifices to be especially serious; nothing of great value has been lost. Now consider the enormous gains to the minority who will benefit from the regulation. The injuries
p. 404 they will avoid will greatly enhance ↳ their ability to make their own lives. If we really hope to create the conditions under which persons are likely to be able to lead lives of their own choosing, it is hard to see why we would condemn this example of paternalistic legislation.

Philosophers who agree so far will reach different judgements as other real (or hypothetical) examples of legal paternalism are evaluated. Consider a proposal to make occupants of cars wear the kinds of helmets that some states require of motorcyclists. Again, suppose that the majority of occupants will never be involved in an accident in which the use of a helmet would prove beneficial. When compared to seat belts, this law would impose greater losses for the majority in each of the three respects I have mentioned.

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Helmets give rise to greater feelings of restraint than belts, distort personal appearance more substantially, and take more time to install. Thus, the value of the liberties that are lost is somewhat greater. Is this imaginary statute therefore unjustifiable? I think so. But exactly where is the line to be drawn? Again, no precise answer to this question is possible, as reasonable minds will draw lines in very different places.

For example, reasonable minds have differed about whether paternalistic reasons ever suffice to prohibit adults from using drugs for recreational purposes (Husak 1989). This issue is noteworthy because of the sheer numbers of persons who are severely punished simply for using (or possessing) illicit substances. Some prohibitionists have advanced paternalistic reasons for waging an ongoing 'war on drugs'. The justifiability of drug proscriptions cannot be assessed without empirical data about the extent to which given substances create risks of physical and psychological harm. Moreover, the fact that some illicit drugs are addictive raises concerns about voluntariness, thereby bringing proscriptive laws under a rationale of soft paternalism.

I can only sketch the general line of enquiry I believe to be relevant if such issues are to be resolved. On my view, one must balance the significance of the various losses of freedom the law will impose against the resultant gains in the ability of persons to lead lives of their own creation. More specifically, attempts to evaluate instances of legal paternalism require,first,a set of principles about the value of different liberties; secondly, a theory about how given interferences affect the conditions under which persons are able to make their own lives; and, thirdly, some means to balance these (hopefully commensurable) values against one another. Small wonder that judgements about legal paternalism are so controversial!

5. Paternalism in Various Areas of Law

To this point, I have talked indiscriminately about paternalistic laws, with no indication of what *kind* of law is involved. But distinctions between kinds of law are tremendously important in endeavours to justify legal
p. 405 paternalism by applying the ↳ mediating maxims I have sketched above. In particular, paternalistic laws enforced by the criminal sanction are unlike those not backed by punishment.

A simple reason shows why paternalistic rationales seldom justify the enactment of a criminal law. One side of the balance in endeavours to justify legal paternalism involves a judgement about how the law in question affects the conditions of autonomy. Punishment—at least when it is severe—always undermines these conditions to an extraordinary degree. Persons are far less able to make their own lives when a criminal sanction is inflicted upon them. The punishment for violating a criminal law is almost always more detrimental to an offender's ability to make his own life than is the harm that he risks to himself by engaging in the proscribed conduct (Bayles 1974).

The following example will help to explain my reservations about paternalism as a rationale for criminal legislation. Suppose that some activity—boxing, for example—risks substantial injuries to persons who engage in it. Suppose also that some persons are foolishly inclined to perform this activity, perhaps because it is exciting, euphoric, or profitable. Why not protect these persons from their own foolishness by enacting a criminal statute to punish boxers (Dixon 2001)? My answer is simple. A criminal law merely proscribes behaviour, but cannot always prevent it. In a world of perfect deterrence, no instances of the proscribed activity would occur. Perfect deterrence, of course, is unattainable. The threat of criminal punishment may succeed in reducing the incidence of the activity, but some persons will persist in boxing, whatever the law may say. Suppose that Bill is one such person. What should be done to him if he is detected? Presumably, Bill must be punished, unless the state does not mean what it says in classifying the statute as criminal.

What might be the justification for punishing Bill? Two answers might be given. First, Bill's punishment might be justified in order to preserve whatever efficacy the criminal law has as a deterrent. But punishing

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Bill in order to deter others from following his foolish example can hardly be thought to promote the interests of Bill himself. That is, the state does not treat Bill paternalistically when he is punished to deter others. If the law purports to treat Bill paternalistically, punishment must be thought to be in *his* interest—which is the second possible answer to the question of how his punishment might be justified. This second answer, however, seems implausible. How can punishment be in Bill's interest? Is Bill really better off if he were punished than if he were free to box? The answer probably depends on further details about *how* Bill is punished. A small monetary fine would not seriously undermine Bill's ability to make his own life. If the threat of further fines induces him to stop boxing, the law will have succeeded in protecting the conditions of his autonomy. The difficulty, of course, is that Bill may continue to box even though he pays the fine. Suppose, then, that Bill is imprisoned. This mode of punishment has (perhaps!) a greater probability of successfully preventing him from continuing to box. But it is hard to believe that imprisonment is really in
p. 406 Bill's interest. Can a legislator believe that Bill is actually better off not boxing in jail than boxing out of jail?
↳ If the answer to this question is negative, Bill's punishment cannot be justified paternalistically.

Only rarely can an affirmative answer be given to the foregoing kind of question. Almost no conduct that sane adults are voluntarily inclined to perform is so destructive of their autonomy that they are better off in jail. Perhaps a few counterexamples to this generalization can be found. Consider a promoter who offers enormous sums of money to induce persons to engage in gladiatorial contests to the death. I concede that the welfare of combatants would probably be enhanced by their imprisonment. Few examples in the real world, however, are analogous. Since paternalists should be unwilling to impose a 'cure' that is worse than a 'disease', they should not back paternalistic laws with the criminal sanction.

Criminal paternalism may be easier to justify, however, when it is indirect, and imposed on a third party. In the gladiator example, the state may imprison promoters who profit by persuading others to fight. Clearly, punishment would be designed to benefit the combatants, not the promoters. Criminal legislation might be easier to justify in such cases, since the state succeeds in promoting the conditions of autonomy of numerous persons by punishing a single individual. When paternalism is direct, however, criminal law should almost never be used.

Here again, paternalism in personal relations is unlike paternalism in law. Return to the case of the father who attempts to induce his stubborn daughter to eat her vegetables. What strategies are available to him? Clearly, a severe beating or a lengthy term of incarceration in a cupboard would cause her greater harm than the lack of vegetables in her diet. Thus, the father should resort to less extreme measures: he might forbid her to eat dessert, prevent her from watching television, or confine her to her room for a short period of time. These mild sanctions are legitimate means to accomplish his paternalistic end. If the father were to invoke more draconian devices, we would have good reason to suspect that he did not really have his daughter's best interests at heart. The criminal law, by contrast, rarely has such trivial sanctions available to it. Severe measures, such as imprisonment, are almost certain to be more harmful than the conduct for which they are imposed.

Since direct criminal paternalism is rarely justified, many of the more interesting questions about legal paternalism are not questions about the criminal law. Instead, they are questions about other areas of law. Sometimes, paternalistic rationales for law give rise to little dispute, as when states create and support social institutions to encourage persons to take better care of themselves. Health and safety regulations may be enacted, such as requirements that water contain fluoride. States can sponsor advertisements to discourage unhealthy behaviours such as excessive alcohol use. These sorts of regulations are not enforced through criminal penalties, and only occasionally have given rise to objections from philosophers who purport to dislike legal paternalism. The reluctance of these philosophers to complain about such examples probably indicates that they do not oppose legal paternalism altogether, but only direct legal paternalism
p. 407 enforced by the criminal sanction. On my ↳ view, these non-criminal modes of law are more easily justified

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because they can be given force without seriously undermining the autonomy of the persons who are subject to them.

Unquestionably, the particular safety regulation most often attacked by opponents of paternalism is the law in many states requiring occupants of cars to wear seat belts. Why is this law singled out sofrequently?Seat-belt requirements, after all, are only the tip of the paternalistic iceberg in car regulations. Cars are required to conform to over 1,000 rules that mostly serve to protect the safety of occupants. Consider, for example, rules that require manufacturers to install shatterproof windshields and pads on dashboards and steering wheels. Philosophers who reject legal paternalism are rarely (if ever) heard to demand that consumers should be allowed to endanger themselves by having the option to drive with harder dashboards. Why, then, do these philosophers tend to complain so vociferously about seat-belt laws? I suspect that these laws are perceived as problematic because they require occupants to *do*something for their own good. Drivers must buckle a belt; nothing is required of drivers to 'activate' the padding in their interior. If seat belts buckled automatically when a door was closed, no *action* on the part of the occupant would be required, and quasi-criminal fines imposed on drivers who failed to buckle their belts would no longer be needed. A driver who disassembled the automatic mechanism could be treated like a driver who ripped the padding from his steering wheel. He would not be punished, but his car might fail to pass the inspection that most states currently require, and thus would not be certified as safe to drive.

Paternalistic rationales are prominent in civil contexts. In contract law, such rationales are often invoked against the enforcement of given kinds of agreements. Of course, agreements are not enforced unless the parties are competent (Wikler 1978). Some agreements are unenforceable, however, even when made by parties whose competence is unquestioned. Agreements about given kinds of subject matters—involving the sale of bodily organs, for example—are unenforceable. Other agreements involve legitimate subject matters, but contain terms or conditions that are unenforceable according to the doctrine of unconscionability. This doctrine allows a court not to enforce agreements that are one-sided, overreaching, or exploitive. Some terms in agreements cannot be waived, and thus are imposed as a matter of law. For example, a consumer cannot voluntarily relinquish his statutory right to be paid a minimum wage, or to repay a loan at less than the rate of usury. Nor can a consumer waive his statutory right to a 'cooling-off period' in a door-to- door sale. Seemingly, each of these aspects of contract law is underlied by a paternalistic rationale.

The famous issue posed by Mill and discussed by a host of subsequent commentators (Hodson 1981)—whether persons should be free to abdicate their freedom by voluntarily becoming slaves—is a question about the scope and limits of freedom of contract. Suppose that Sue agrees to become Jane's permanent
p. 408 slave. Courts have no reason to become involved as long as Sue remains content to keep ↳ her agreement; no law prevents persons from entering into a *de facto* arrangement of slavery. But what should the law do if Sue changes her mind and Jane seeks to enforce this agreement? In such an event, courts would declare the agreement unconscionable and unenforceable on grounds of public policy—presumably for paternalistic reasons.

A few legal philosophers have contested, however, whether the doctrine of unconscionability is really based on a paternalistic rationale. If they are correct, contract law can retain this doctrine without admitting to paternalism. Some have proposed that this doctrine can be derived from a commitment to economic efficiency (Zamir 1998). More plausibly, a judge might refuse to enforce an unconscionable agreement because of his unwillingness to facilitate and become implicated in the unfair arrangements of others (Shiffrin 2000). Here again, we see the difficulty of identifying a law (or a legal doctrine) as paternalistic.

Paternalism also appears to play a role in tort law—and has contributed to a blur- ring of the line between contract and tort. The doctrine of assumption of risk, for example, is not invoked very often in contemporary tort law (Sugarman 1997). Consumers are frequently unable to trade decreases in safety for

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lower prices. Some courts, for example, have allowed drivers of a car to recover compensatory damages for injuries that would not have occurred had their car been equipped with an air bag—even though the drivers seemingly had assumed the risk of injury by electing not to buy a safer but more expensive car. The erosion of such defences as assumption of risk in tort law might be explained by a growing acceptance of paternalism among the judiciary.

Although I have claimed that a criminal statute is almost never justified as an instance of direct paternalism, perhaps *defences* from criminal liability may be dis- allowed on paternalistic grounds. Rules that withhold defences for paternalistic rea- sons may or may not have a different impact on autonomy than rules that create criminal offences. Consider, for example, the defence of consent, which typically functions as a justification for persons who infringe a criminal statute. Consent is not a defence, however, to a number of crimes—most notably, those that prohibit *serious* bodily harm. The most frequently cited rationale for disallowing consent as a defence for these offences is that persons who acquiesce in such behaviour are acting contrary to their own interest.

The unwillingness of the law to allow consent as a justification for what is other- wise criminal behaviour has proved especially controversial in the context of mercy killings. The fact that the patients (or victims) of Dr Kevorkian consented to die is legally immaterial to his liability. A reason commonly given against allowing con- sent as a defence is that some people will agree to have their lives terminated for the wrong reasons. Some patients may actually prefer to die sooner rather than later in order to reduce their medical bills, and thus to preserve a larger inheritance for their heirs. Certainly, a great many patients who wish to end their lives have motives that seem perfectly reasonable. But many legislators are prepared to disregard
p. 409 the ↳ reasonable preferences of some fatally ill patients. They fear that a general policy of honouring these preferences would allow other patients to die whose preferences seem far less reasonable. Here again, trade-offs are needed to justify a general policy about assisted suicide and voluntary euthanasia.

Even the most far-reaching proposals to allow assisted suicide tend to include a residue of paternalism. Many commentators are persuaded that persons should be permitted to enlist the assistance of physicians to terminate their lives, but only when they satisfy certain conditions—that they be incurable and suffering from severe pain, for example. But why should persons not be allowed to seek assistance in ending their lives when they choose to die for other reasons—that is, even when they are *not* incurable or suffering from extreme pain? As long as their decision is sufficiently voluntary, opponents of paternalism will be hard-pressed to justify *any*restrictions on the availability of assisted suicide and euthanasia.

6. Moral Paternalism

What *kinds* of harms may be prevented by paternalistic legislation? If the state has the authority to use law to prevent any kinds of self-inflicted harms, I assume that personal injury and economic loss are among the kinds of harms that may be pre- vented. Far more controversial, however, is state action designed to improve character, or to prevent persons from engaging in wrongful or immoral conduct. The principle of *moral legal paternalism* authorizes the state to strive to make persons better off morally. The issue of whether the state may enact law with the objective of improving the morality of its citizenry has proved enormously divisive among political philosophers. Many (but not all) liberals have argued that the state lacks such authority, while *perfectionists* believe that some instances of moral paternalism are justified.

Some of the debate has centred on empirical grounds for doubting that the state should be granted the authority to use legislation to improve morality. The state could be mistaken, of course, in its empirical determination that fluoride reduces the incidence of tooth decay. But mistakes about matters of morality are more probable than mistakes about matters of fact. Before the state is granted the authority to prevent moral harm, citizens must have confidence that the state is likely to be correct in its determinations that

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given instances of conduct are immoral. Citizens should have reservations about moral paternalism to the extent that they are deeply divided about matters of morality.

Equally unsettled is the conceptual question of whether the morality of citizens *can* be improved by legislation. Many philosophers believe that it is impossible to force persons to be better from a moral point
p. 410 of view. They contend, roughly, that ↳ persons deserve moral praise only when they perform the right action for the right reasons. Clearly, the law can provide carrots and sticks to increase the probability that persons will perform the right action. Laws can proscribe wrongful acts such as theft, and potential offenders can be deterred by the threat of punishment. What is far more dubious, however, is whether the law can do much to ensure that per- sons act for the right reasons. Arguably, an agent is not improved morally unless he personally *endorses* the goods he chooses. A person who abstains from wrongful conduct because of the fear of punishment fails the endorsement condition, and does not deserve moral praise.

Whether endorsement is a precondition for moral praise—and how the endorsement condition can be satisfied—are enormously controversial. In what follows, however, I will assume that some version of the endorsement condition is true in order to pursue a different line of enquiry. The endorsement condition is frequently taken to provide a reason to believe that law cannot succeed in improving persons morally, and thus to provide a decisive objection to moral paternalism. This conclusion, however, does not follow. In the long run, at least, I believe that law *can* improve persons morally, the endorsement condition notwithstanding. That is, law can provide the means by which persons come to endorse the goods they pursue. After all, we come to endorse whatever values we have because of the influences to which we are subjected. Law can be an especially powerful such influence. Even though a person who performs the right action because of fear of legal sanctions may not immediately deserve moral praise, law may provide the mechanism by which he eventually comes to endorse the values he is initially compelled to adopt (Sher 1997). This phenomenon should be familiar. We should all recall occasions in which we were made to engage in some activity against our immediate preferences—to take a required course in college, for example—but subsequently came to appreciate its value. The same phenomenon may occur when we are forced to be good.

Disagreement about whether the law should strive to improve persons morally has been prominent in recent attempts to justify the institution of criminal punishment. Despite my rejection of paternalism as a rationale for criminal legislation, paternalistic rationales are occasionally invoked as a justification for the 'hard treatment' of punishment. Some philosophers (Morris 1981) have argued, for example, that punishment is partially justified in promoting the offender's 'identity as a morally autonomous person attached to the good'. Others (Duff 1999) contend that punishment should aim at the 'self-correction and self-reform' of offenders. Such theories encounter many problems (Dolinko 1999)—not the least of which is their commitment to perfectionism.

My concession that the law *can* be used to improve the morality of persons does not show that moral paternalism is thereby justified. I contend that instances of moral paternalism must be defended by the same theory I have sketched above. I have suggested that the justifiability of instances of legal paternalism
p. 411 should be assessed by balancing the significance of the various losses of freedom the law will ↳ impose against the resultant gains in the ability of persons to lead autonomous lives. I suspect that applications of this general theory will sometimes allow particular cases of moral paternalism. Consider the weights to be placed on each side of the scale. The freedom that is lost by laws that discourage immoral behaviour hardly seems to be of great value. The freedom to act wrongfully cannot be as significant as the freedom to act permissibly. Next, consider the other side of the equation— how these laws affect the conditions of autonomy—that is, the conditions under which persons are able to make their own lives. Wrongful choices may seem to be just as much a matter of self-creation as those deserving of moral praise. Nonetheless, I have reservations about describing as autonomous a choice that merits moral condemnation. If I am mistaken, and a wrongful choice *can* be autonomous, the autonomy that such a choice exemplifies does not seem to be especially valuable. Thus, some (non-criminal) instances of moral paternalism might pass my

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justificatory test. They result in insignificant sacrifices of freedom, without losses in the ability of persons to lead autonomous lives of value. Because of empirical misgivings about whether states can correctly distinguish moral from immoral behaviour, support for perfectionism should remain cautious and tentative. In principle, however, I conclude that the state has as much authority to enact paternalistic legislation to prevent moral harm as to prevent personal injury or economic loss.

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