

**A DEFINITION AND DEFENSE OF HARD PATERNALISM: A CONCEPTUAL
AND NORMATIVE ANALYSIS OF THE RESTRICTION OF SUBSTANTIALLY
AUTONOMOUS SELF-REGARDING CONDUCT**

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By

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ABSTRACT

In this dissertation, I define and defend the moral justifiability of hard paternalism. Over the past thirty years, disagreements about the appropriate definition of paternalism have often masked further disputes in law, bioethics, and political theory over what sorts of self-regarding liberty limitation are morally permissible. I first address the conceptual problems by rigorously defending a definition of hard paternalism containing logically individually necessary and jointly sufficient conditions. Then, after a comprehensive and thorough review of virtually all the literature on the subject, I outline the conditions under which hard paternalistic reasons for liberty restriction are valid.

In *Chapter One*, I describe the dominant liberal landscape in the United States. Within this landscape, hard paternalism is typically viewed as an illegitimate liberty limiting principle. It is viewed as a reason for interference that cannot overcome the presumptive case for individual liberty. In *Chapter Two*, I identify and defend the logically necessary and sufficient conditions that define hard paternalism. In *Chapter Three*, I defend my definition against the preeminent writer on hard paternalism, Joel

Feinberg. I argue that Feinberg has stretched the definition of soft paternalism to justify liberty limitation properly described as hard paternalism. I redraw the conceptual boundary between hard paternalism and soft paternalism. In *Chapter Four*, I address and then dismiss the widely-discussed consent-based or deontological arguments for the justifiability of hard paternalism. In *Chapter Five*, I provide my own beneficence-based or consequentialist normative defense of hard paternalism. Specifically, I contend that there are seven necessary and jointly sufficient conditions under which hard paternalism is justified.

CHAPTER FIVE: A NEW NORMATIVE DEFENSE OF HARD PATERNALISM

[T]here comes a point where the risks are so disproportionate to the benefits that, if persuasion is unsuccessful, there is justification for stronger pressure, and perhaps legislation.

– Glover (1979) at 179

I. OVERVIEW

In this chapter, I offer my own theory of justified hard paternalism. My theory is, as I will explain, a beneficence-based, consequentialist argument. *First*, because I am not the first to make such an argument, I quickly review other beneficence-based, consequentialist arguments for the justifiability of hard paternalism. I do not systematically evaluate this literature as I did with the consent-based, deontological arguments in Chapter Four. Rather, my objective, here, is only to provide some background.

Second, in the central section of this chapter, I defend seven conditions as logically individually necessary and jointly sufficient to justify hard paternalism. I first separately argue that each of the seven conditions is necessary for justified hard paternalism. I then argue that the seven conditions are jointly sufficient for justified hard paternalism.

Specifically, I argue that hard paternalistic liberty limitation (“HPLL”) is justified if and only if: (1) there is “strong evidence” that each of the following six conditions is satisfied, (2) the objective of the HPLL is to protect the subject from “significant harm,” (3) the subject has either a low autonomy interest or an irrational (though substantially autonomous) high autonomy interest in the restricted conduct, (4) the HPLL is imposed only if no morally preferable, less autonomy restrictive alternatives (*e.g.* soft paternalism) for achieving the objective are available, (5) the HPLL has a high probability of success/effectiveness, (6) the harm from which the HPLL protects the subject outweighs any harm caused by the HPLL itself, and (7) the HPLL is least restrictive as necessary.

Third, in the final section of this chapter, I deal with the most typical counterarguments to justified hard paternalism. While I will motivate and answer a number of objections and counterexamples in the course of defending -- in the middle section of this chapter -- the individual necessity and joint sufficiency of my seven conditions; in the final section of this chapter, I separately state and respond to the four strongest standard objections to hard paternalism. These objections are: (1) the slippery slope argument -- in both its logical and empirical forms, (2) the argument from paternalistic distance -- also known as the best judge argument, (3) the argument from the developmental value of choice, and (4) the argument from the oppression of

individuality.

II. INTRODUCTION TO BENEFICENCE-BASED CONSEQUENTIALIST ARGUMENTS FOR JUSTIFIED HARD PATERNALISM.

The list of those philosophers who have endorsed a beneficence based justification of hard paternalism is longer and more impressive than might be expected.¹ Nevertheless, the list of those philosophers who have made careful defenses of this position is far shorter. H.L.A. Hart, for example, in *Law, Liberty, and Morality*, stated an extreme and influential view: “Paternalism now abound[s] in our law, criminal and civil . . . [and] is a perfectly coherent rationale.”² However, Hart did not supply much of an argument for his position.³

1. Beauchamp & Childress (2001) at 181 (“[I]n contrast to much of the literature on paternalism, we will argue that beneficence does sometimes provide good reasons for justifiably restricting autonomous actions”); *id.* at 185, 214 (defending only acts, not policies, of hard paternalism); Dworkin (1993) at 362 (identifying Joseph Raz); Feinberg (1984) at 287 (identifying H.L.A. Hart); *id.* at 184-86 (identifying John Rawls); Feinberg (1996) at 392 (identifying the joint work of Bernard Gert and Charles Culver); Häyry (1991) at 78-85, 95 (identifying James Fitzjames Stephen as defending “very strong and extensive paternalism”); Kuklin (1992) at 654 n.7 (identifying Gerald Dworkin, Thomas C. Grey, John Kleinig, Anthony Kronman, David Shapiro, and Cass R. Sunstein); Rainbolt (1989) at 45 n.2 & 48 n.7 (identifying H.L.A. Hart and Gerald Dworkin as having “toyed with the idea” and John Kleinig and Robert Young as having “offered an extended defense”). In addition, philosophers have offered theories of justified hard paternalism which fail to own up to their implicit consequentialist appeals. These theories, while purportedly non-consequentialist, work only because a beneficence-based appeal is, at bottom, operative. Hoffmaster (1980) at 200 (“[M]any instances of medical paternalism are not recognized as paternalism simply because they are so obviously justified.”); Nuyen (1983) at 29.

2. Hart (1963) at 31-32.

3. Pierce (1975) at 207 (“Hart’s paternalistic views do not constitute a full-blown doctrine.”); Rainbolt (1989) at 45 n.2 & 48 n.7; Umezo (1999) at 25 (“Hart emphasizes the need to modify Mill’s position; however, he does not develop further his theory of paternalism.”).

Indeed, after an exhaustive review of numerous published and unpublished sources in philosophy, political theory, and bioethics, I found complete and thorough beneficence-based arguments for the justifiability of hard paternalism in the writings of only a handful of philosophers.⁴ Notwithstanding its limited volume, I will not summarize or otherwise review that literature here. This section is intended merely to provide the reader, in advance of my own argument for hard paternalism, with a basic overview of and introduction to beneficence-based arguments for hard paternalism.

A. The Model of “Balancing” or “Weighing” Autonomy Against Beneficence.

Hard paternalism presumes that there can be a cleaving of one’s good from one’s self-determination.⁵ Accordingly, beneficence-based justifications of paternalism are -- even though continued reliance on the metaphor has been carefully and sharply criticized⁶ -- often portrayed in terms of “balancing” or “weighing.”⁷

4. In his *Philosophical Ethics*, Tom Beauchamp, for example, observes that the beneficence approach “has been less popular than the consent justifications in recent philosophical literature.” Beauchamp (1991) at 419.

5. Beauchamp & Childress (2001) at 31, 185; Beauchamp & Walters (1994) at 33 (“The essence of paternalism is an overriding of the principle of respect for autonomy on grounds of the principle of beneficence.”); Childress (1997) at 122; Feinberg (1986) at 57 (explaining that hard paternalism “subordinates” self-determination to the person’s own good); *id.* at 58 (noting that although conceptually related, the subject’s good is conceptually distinct from the subject’s right of self-determination); Feinberg (1988) at xvii (“Legal paternalism . . . subordinates a person’s *right* of self-determination to the person’s own *good*.”); Kleinig (1983) at 5; Regan (1983) at 113.

6. Richardson (1990); Richardson (2000).

7. Beauchamp (1991) at 412; Beauchamp & Childress (2001) at 65, 185; Brock (1988) at 551-52; Feinberg (1986) at 61; Rainbolt (1989) at 58.

The subject's autonomy or self-determination, on the one hand, is balanced against the subject's well-being or good, on the other hand.⁸ As Jonathan Glover explains: "A rational social policy would be concerned with striking a *balance* between minimizing risks [on the one hand] and minimizing the kinds of restrictions that frustrate people in things that really matter to them [on the other hand]."⁹ Indeed, even when beneficence-based arguments for hard paternalism are not *explicitly* framed in these terms,¹⁰ or when they are framed in apparently different terms¹¹; the concept of

8. Crossley (1999) at 297; Gert & Culver (1997) at 223-25; Kleinig (1983) at 100, 108. The debate between beneficence and autonomy cannot get very far by simply defending one principle against the other. Beauchamp & Childress (1994) at 273, 284. These two fundamental principles must be specified. Beauchamp & Childress (2001) at 15, 187. This is the project that I tackle in the central section of this chapter.

9. Glover (1979) at 180 (emphasis added).

10. Some philosophers argue, for example, that the subject's autonomy should be balanced not against her "good" but against her "future ability to choose." James Woodward, for example, distinguishes between a diminishment of freedom rationale ("DFR") and diminishment of welfare rationale ("DWR"). Woodward (1982) at 68. Similarly, John Kleinig discusses what he calls the "Argument from Freedom Enhancement" and the "Argument from Instrumentality of Freedom." Kleinig (1983) at 48-55. *See also* Feinberg (1986) at 386 n.30; Regan (1983) at 118-20. Yet, these specifications do not change the fact that a subject's future ability to choose is still fairly described as a component of a subject's good. Feinberg (1986) at 68 ("One's own freedom or liberty cannot, any more than any other good of one's own, override *de jure* autonomy.") ("Whether an autonomous person's liberty is interfered with in the name of his own good or welfare, his health, or even his future options – which are themselves constituents of his well-being – it is still a violation of his personal sovereignty."); Feinberg (1988) at xviii ("[H]is health, his wealth, or even his future options (his liberty) . . . are themselves constituents of his well-being . . ."); Woodward (1982) at 69.

11 The model can be specified in various ways. Compare the "boundary-drawing" and traditional weight-balancing conceptions. Boundary Drawing Model: The boundary-drawing conception holds that autonomy is a component of a person's overall good which is outweighed by other ingredients of the good. Beauchamp & Childress (2001) at 176-77; Beauchamp & Childress (1994) at 272 (beneficence can either compete with autonomy or incorporate autonomy); Kultgen (1983) at 177. On this conception, "autonomy applies to and protects the decision to take a risk *unless* the extent of the risk exceeds a given critical threshold." Husak (1992) at 94. *See also* Beauchamp (1990) at 155 (arguing that Pellegrino and Thomasma's beneficence includes autonomy *as* a value of beneficence but that this does not avoid problems of balancing, it only masks them); Feinberg (1985) at 24 (comparing the models of balancing and drawing boundaries and concluding that although "[t]he metaphors are different; the actual models of reasoning are the same"); Feinberg (1986) at 55 (defending the boundary approach over the balancing approach); *id.* at

balancing or weighing beneficence against autonomy is still at their core.

B. Joel Feinberg and the Model of Balancing or Weighing.

In the 1980s, Joel Feinberg made one of the most forceful arguments for an absolutist approach since John Stuart Mill.¹² But upon completing his magnificent four-volume treatise on *The Moral Limits of the Criminal Law*, Feinberg recanted his

136; Moore (1999) at 65 (“There are two strategies. One is to circumscribe the kinds of actions protected by the right The other is to weaken the right so that it can be overridden”); Silver (2002) at 463 (“[W]e have two rhetorical choices: we can deny that the competent person ought to have her wishes respected . . . [or] we can redefine ‘competency’ so that even autonomous persons can be deemed incompetent.”). So, on this model, autonomy is not outweighed. Rather, the harm is such that autonomy confers no prima facie right in the first place. Raz (1986) at 411 (arguing that since autonomy is valuable only if it is directed at the good, it supplies no reason to protect worthless or bad options). Traditional Weight-Balancing Model: The traditional balancing model, on the other hand, holds that “autonomy applies to and protects the decision to take any risk, however great. But after the extent of a risk exceeds a given critical threshold, the protection afforded by the principle of autonomy is outweighed by the need to prevent persons from harming themselves.” Beauchamp & Childress (2001) at 5 (“All moral norms can be justifiably overridden in some cases.”); Childress et al. (2002) at 172 (arguing that the “range and scope” of general moral considerations determines the extent of conflict among them, while their “weight and strength” determines when different considerations yield to others in cases of conflict); Husak (1992) at 94.

12. By “absolutist,” I refer to the position, widely known by that name, that the principle of autonomy is given absolute or trumping weight when balanced against other principles such as beneficence. On this view, as Feinberg argues in *Harm to Self*, hard paternalism can never be justified. Feinberg (1984) at 15 (“Paternalistic and moralistic considerations . . . have no weight at all.”); *id.* at 60 (interests have a range of ulteriority -- from passing desires to welfare interests); Feinberg (1986) at 26 (“[P]ersonal autonomy . . . is a moral trump card, not merely to be balanced with considerations of harm diminution in cases of conflict, but always and necessarily taking moral precedence over these considerations.”); Feinberg (1986) at 54-55 (“[W]e cannot make certain compromises with paternalism. We cannot say, for example, that interference with the relatively trivial self-regarding choices involves only ‘minor forfeitures’ of sovereignty . . . for sovereignty is an all or nothing concept”); *id.* at 56, 202-06; *id.* at 59 (arguing that autonomy is “underivative, as morally basic . . . logically precluded from embracing legal paternalism”); *id.* at 61 (arguing that self-determination and one’s good “usually correspond, but in those rare cases where they do not, a person’s right of self-determination, being sovereign, takes precedence . . . provided only that the choices are truly voluntary.”); *id.* at 70; *id.* at 77 (rejecting assigning a weight to liberty interfered with); *id.* at 94 (“There is no such thing as a ‘trivial interference’ with personal sovereignty . . . nor is it simply another value to be weighed as a cost-benefit comparison [A] trivial interference with sovereignty is like a minor invasion of virginity; the logic of each concept is such that a value is respected in its entirety or not at all.”). *But see* Feinberg (1984) at 186 (allowing a “slight surcharge on liberty”); *id.* at 207 (interests might be small and the degree to which invaded might also be small).

absolutist approach for a balancing approach.¹³ This concession is a telling tribute to Feinberg's intellectual integrity. Feinberg found that his employment of an absolutist model strained plausibility and had to be abandoned.¹⁴ It is fruitful to examine the evolution in Feinberg's thinking on this matter.

In *Harm to Self*, the third volume in his four-volume treatise, Feinberg describes four ways in which autonomy can be related to the good:

13. Bayles (1989) at 397, 404; Brock (1988) at 565 (arguing that Feinberg's theory "in fact require[s] a balancing of respecting an individual's autonomy against protecting his good."); Gray (1990) at 32 (observing that "Feinberg's intellectual virtues of rigor and honesty compelled him to abandon the Liberal Position with which he began . . . and 'allow that . . . 'legal paternalism states reasons that are always relevant.'").

14. Feinberg (1988) at 5-6 (conceding that paternalism and the prevention of non-grievance evils in general is a valid liberty limiting principle that puts *some* weight on the balancing scales "even though paternalistic reasons are rarely, if ever, weighty enough to [override autonomy]"). Feinberg seems to move from a *de jure* position that autonomy always trumps to more of a *de facto* position that autonomy always (usually) trumps. Feinberg (1988) at 67 (explaining that it is empirically true that a human being weighs more than a mouse, but that a particularly obese mouse could weigh more than a particularly small premature infant). See also *id.* at 5-6, 20, 25-26, 38, 66-67, 131, 174, 321-23. Feinberg's concession is significant. *Id.* at 319 ("[I]t is impossible for me to claim . . . that I have shown legal paternalism . . . to be false."); *id.* at 321 ("Liberalism . . . is a matter of degree, depending on how great a surcharge the liberal would impose on the reasons that can outweigh liberty."); *id.* (admitting that giving paternalistic considerations "no weight at all" is "too extreme to be called 'plausible.'"); *id.* at 322 (arguing that paternalism "puts at least *some* weight, however slight, on the decisional scales"); *id.* ("All of the major coercion-legitimizing principles (. . . legal paternalism . . .) state reasons that are *always* relevant . . ."); *id.* ("[T]his concession is a trivial one . . . with no obvious implications for any substantive matter."); *id.* ("[L]egal paternalism . . . state[s] reasons . . . of very slight weight."); *id.* at 323 ("[H]arm and offense prevention . . . are, in short, the only considerations that are *always good reasons* for [interference]. The other principles [including paternalism] state [relevant] considerations that are at most sometimes (but rarely) good reasons."); *id.* at 323 ("A moderate or even large finite number is as if naught when compared with an infinite one."). Cf. *id.* at 25 ("But very often, at least, the voluntary setbacks (which would be harms proper if only they were not consented to) are much to be regretted . . ."); *id.* at 38. Later, in comparing a paternalist and an anti-paternalist with respect to a case by Gert and Culver, Feinberg concludes that "[t]hey might both be right." Feinberg (1996) at 391. See also Gray (1990) at 32 (explaining how Feinberg allows the liberal principle an "indeterminacy" where autonomy is "only one interest among many"); Harcourt (1999) at 130-31.

1. Autonomy and the good always and necessarily correspond.¹⁵
2. Autonomy and the good usually correspond, but when they do not, the good always has priority.¹⁶
3. Autonomy and the good usually correspond, but then they do not, autonomy always has priority.¹⁷
4. Autonomy and good usually correspond, but when they do not, they must be balanced against each other.¹⁸

Relationship (1) is where the “right to self determination [is derived] entirely from its conducibility to a person’s own good.” This makes autonomy “derivative and instrumental.”¹⁹ Autonomy is valued only because permitting individuals to control their own lives just happens to actually have the best consequences. Whether or not the subject really is always the best judge of his own good, Relationship (1) holds the empirical relationship to be invariant.

Relationship (2) is where the relationship between autonomy and the good is contingent. Although the subject’s right to self determination and her good *usually* correspond, where they do not, then the good always takes priority. In other words, the subject’s autonomy, in a circumstance of conflict, has value only to the extent it promotes her good. In contrast to Relationship (1), there is no presumption that autonomy always outweighs the good. Rather, in Relationship (2), autonomy’s

15. Feinberg (1986) at 58-59, 60.

16. Feinberg (1986) at 59, 60-61.

17. Feinberg (1986) at 59, 61.

18. Feinberg (1986) at 59-60, 61.

19. Feinberg (1986) at 58-59, 60. *See also* Beauchamp (2001) at 132.

conducibility to the good is empirically uncertain: autonomy may or may not correspond to the good. Where it does not correspond, it is automatically “outweighed” by the good.

Relationship (3) is where, as in Relationship (2), autonomy and the good *usually*, but do not necessarily, correspond. But Relationship (3) differs from Relationship (2) in holding that where the subject’s autonomy and the good diverge, autonomy (rather than the good) always takes precedence. In other words, Relationship (3) holds that the value of self-determination is not derived from its conducibility to the subject’s good. That conducibility is empirically uncertain. The value of self-determination is morally basic. In cases of conflict, the good cannot “outweigh” autonomy. Rather, in cases of conflict, autonomy always outweighs the good.

Finally, Relationship (4) is where, as in Relationships (2) and (3), autonomy and the good *usually*, but do not necessarily, correspond. However, Relationship (4) does not give *decisive* weight to the good as Relationship (2) does. Nor does Relationship (4) give decisive weight to autonomy as Relationship (3) does. Instead, Relationship (4) holds that in cases of conflict or divergence, neither principle (autonomy nor beneficence) *automatically* takes precedence. Rather, in cases of conflict, the two values must be *balanced* against one another.

Feinberg long espoused Relationship (3), defending the position that autonomy *always* trumps beneficence. He specifically rejected the notion of balancing, arguing that there is no such thing as a trivial (outweighable) interference with autonomy.²⁰ However, Feinberg later came to espouse Relationship (4).

Notwithstanding a vigorous defense of anti-paternalistic absolutism in *Harm to Self*; in *Harmless Wrongdoing*, his fourth and final volume of the *Moral Limits of the Criminal Law*, published two years later, Feinberg recanted his "bold liberalism" (the position that only the harm and offense principles state good reasons for liberty limitation) for a more "cautious liberalism" (which concedes that hard paternalistic reasons are sometimes good).²¹ He explains that while "bold liberalism is the doctrine I set out to defend . . . , cautious liberalism is the fallback position to which we must

20. Feinberg (1984) at 15 ("Paternalistic and moralistic considerations . . . have no weight at all."); Feinberg (1986) at 26 ("[P]ersonal autonomy . . . is a moral trump card, not merely to be balanced with considerations of harm diminution in cases of conflict, but always and necessarily taking moral precedence over these considerations."); Feinberg (1986) at 54-55 ("[W]e cannot make certain compromises with paternalism. We cannot say, for example, that interference with the relatively trivial self-regarding choices involves only 'minor forfeitures' of sovereignty . . . for sovereignty is an all or nothing concept . . ."); *id.* at 56; *id.* at 60 (interests have a range of ulteriority -- from passing desires to welfare interests); *id.* at 202-06; *id.* at 59 (arguing that autonomy is "underivative, as morally basic . . . logically precluded from embracing legal paternalism"); *id.* at 61 (arguing that self-determination and one's good "usually correspond, but in those rare cases where they do not, a person's right of self-determination, being sovereign, takes precedence . . . provided only that the choices are truly voluntary."); *id.* at 70; *id.* at 77 (rejecting assigning a weight to liberty interfered with); *id.* at 94 ("There is no such thing as a 'trivial interference' with personal sovereignty . . . nor is it simply another value to be weighed as a cost-benefit comparison [A] trivial interference with sovereignty is like a minor invasion of virginity; the logic of each concept is such that a value is respected in its entirety or not at all."). *But see* Feinberg (1984) at 186 (allowing a "slight surcharge on liberty"); *id.* at 207 (interests might be small and the degree to which invaded might also be small).

21. Feinberg (1988) at 324.

retreat.”²²

Now, Feinberg did not change his view that the harm, offense, and soft paternalism liberty limiting principles *always* state “good” and *frequently* “decisive” reasons for limiting liberty. But Feinberg did indeed change his position regarding hard paternalism.²³ In *Harmless Wrongdoing*, Feinberg retreated to a “fallback position,” and conceded that hard paternalistic reasons for liberty limitation can *sometimes* be good and even decisive.²⁴

22. Feinberg (1988) at 324.

23. Feinberg, unfortunately, never examined the implications of this revision. Furthermore, Feinberg never examined some philosophically interesting questions. He dismissed these as moot because he often just asserted his absolutist position. Feinberg (1986) at 70, 94. Lawrence Haworth criticizes Dworkin for doing the same thing with his non-absolutist position. Haworth (1991) at 139 (“[A] position is not rebutted by stating an opposing intuition.”).

24. Feinberg (1988) at 5-6 (conceding that paternalism and the prevention of non-grievance evils in general is a valid liberty limiting principle that puts *some* weight on the balancing scales “even though paternalistic reasons are rarely, if ever, weighty enough to [override autonomy].”). Feinberg seems to move from a *de jure* position that autonomy always trumps to more of a *de facto* position that autonomy always (usually) trumps. Feinberg (1988) at 67 (explaining that it is empirically true that a human being weighs more than a mouse, but that a particularly obese mouse could weigh more than a particularly small premature infant). See also *id.* at 5-6, 20, 25-26, 38, 66-67, 131, 174, 321-23. Feinberg’s concession is significant. *Id.* at 319 (“[I]t is impossible for me to claim . . . that I have shown legal paternalism . . . to be false.”); *id.* at 321 (“Liberalism . . . is a matter of degree, depending on how great a surcharge the liberal would impose on the reasons that can outweigh liberty.”); *id.* (admitting that giving paternalistic considerations “no weight at all” is “too extreme to be called ‘plausible.’”); *id.* at 322 (arguing that paternalism “puts at least *some* weight, however slight, on the decisional scales”); *id.* (“All of the major coercion-legitimizing principles (. . . legal paternalism . . .) state reasons that are *always* relevant . . .”); *id.* (“[T]his concession is a trivial one . . . with no obvious implications for any substantive matter.”); *id.* (“[L]egal paternalism . . . state[s] reasons . . . of very slight weight.”); *id.* at 323 (“[H]arm and offense prevention . . . are, in short, the only considerations that are *always good reasons* for [interference]. The other principles [including paternalism] state [relevant] considerations that are at most sometimes (but rarely) good reasons.”); *id.* at 323 (“A moderate or even large finite number is as if naught when compared with an infinite one.”). Cf. *id.* at 25 (“But very often, at least, the voluntary setbacks (which would be harms proper if only they were not consented to) are much to be regretted . . .”); *id.* at 38. Later, in comparing a paternalist and an anti-paternalist with respect to a case by Gert and Culver, Feinberg concludes that “[t]hey might both be right.” Feinberg (1996) at 391. See also Gray (1990) at 32 (explaining how Feinberg allows

In *Harmless Wrongdoing*, Feinberg abandoned the absolutism that he had defended in *Harm to Self*, for consequentialism.²⁵ Feinberg abandoned his position that hard paternalistic restriction of autonomy is never justified, whatever the consequences. Feinberg's final position, in short, is that beneficence always provides at least *some* weight (as an independent principle) to be balanced against autonomy.

The central question which I address in this chapter, irrespective of Feinberg's views, is: *Under what conditions is the weight of beneficence decisive?*

C. Under What Conditions Is the Weight of Beneficence Decisive Against the Weight of Autonomy?

Many philosophers argue that the particular balance which makes hard paternalism most plausible is where the good at issue is great (*i.e.* interference is necessary to prevent huge costs or to provide huge benefits) and the autonomy interest is small (*i.e.* the intrusiveness or interference with liberty is trivial).²⁶ Beauchamp and

the liberal principle an "indeterminacy" where autonomy is "only one interest among many"); Harcourt (1999) at 130-31.

25. Feinberg also defended bold liberalism in *Harm to Others*, *Offense to Others*, and in other work, where he endorses, for example, the *Volenti* maxim as a mediating maxim for liberty limiting principles. But it is in *Harm to Self* that he defends it against hard paternalism in particular.

26. Arneson (1998) at 251 ("Even if we need wide freedom to determine our individual natures, it might well be best if people are stopped from the *most* disastrous and stupid self-harming activities.") (emphasis added); Baergen & Baergen (1997) at 482-83; Beauchamp (1983) at 130; Beauchamp & Childress (2001) at 21, 185; Beauchamp & McCullough (1984) at 89, 99; Beauchamp & Walters (1994) at 34; D. Beauchamp & Steinbock (1999) at x; Buchanan (1983) at 78 (arguing that in the "more plausible understanding of rights" the agent would "refuse to allow rights claims to be overridden by appeals to [utility] except perhaps where the utility to be gained would be *very great*"); Childress et al. (2002) at 176 (identifying as relevant factors "about whether and when strong paternalistic interventions can be ethically

Childress, for example, write that “preventing major harms or providing major benefits while only trivially disrespecting autonomy has a highly plausible paternalistic justification.”²⁷

justified”: “the degree to which it infringes on an individual’s fundamental values” and “the magnitude of the risk to the individual apart from the intervention”; Demarco (2002) at 231 (“Paternalism is most appealing in those cases in which a patient’s decision puts her or him at high risk.”); Dworkin (1988) at 116; *id.* at 127 (life preserver example); Dworkin (1992) at 941 (hunter bright jacket example); Faden & Beauchamp (1986) at 292-93; Feinberg (1988) at 320 (“If the *cost* . . . in terms of other positions to which a defensible liberalism seems to commit . . . is excessive, then liberalism as we understand it in ordinary life may have to be abandoned”) (emphasis added); *id.* at 28 (“[T]he liberal, whose respect for liberty generally is limited only by his humanitarianism cannot help but feel a *strain* in his principles.”) (emphasis added); *id.* at 30 (describing “embarrassment”); Feinberg (1986) at 61; *id.* at 92-94 (discussing Dworkin); Fischer (1989) at 132-33; Gert & Culver (1997) at 232; Glick (2000) at 393 (“[W]hen the magnitude of the benefits is *huge* and the weight of the autonomy consideration weak, why not let beneficence ‘override’ autonomy?”) (emphasis added); Glover (1979) at 179 (“[T]here comes a point where the risks are *so disproportionate* to the benefits that, if persuasion is unsuccessful, there is justification for stronger pressure, and perhaps legislation.”) (emphasis added); *id.* at 179-80 (“[F]or the state to intervene to prevent us from taking any risk to life, however small, would involve an officious paternalism . . . [b]ut when the risks increase, the objections should diminish. Against this, we have to set the benefits for which the risks are run.”); *id.* (supporting seatbelt laws but not the banning of mountaineering) (“[F]reedom from such a trivial piece of compulsion is purchased at too great a *cost*”) (emphasis added); Gostin (2001) at 315 (“Although liberals exclude harm to the person himself (paternalism) as a sufficient justification for regulation, I will assume . . . that certain forms of paternalism that impose minimal burdens and high benefits can also be justified (e.g. compulsory seat belts, motorcycle helmets, and water fluoridation); Husak (1992) at 77; Husak (2002) at 29 (“It seems unlikely that the value of personal autonomy could be sufficiently great to outweigh *all* competing considerations that might lead a state to favor paternalistic legislation.”); Kleinig (1983) at 86, 108-09; Kultgen (1995) at 68 (“[J]ustifiability is a function of the strength of the subject’s desires which they frustrate, the severity of the measures, and the magnitude of the goods and harms produced.”); Lee (1981) at 199-200; Mill (1848) at 945 (“Laissez faire, in short, should be the general practice: every departure from it, unless required *by some great good*, is certain evil.”) (emphasis added); Pinet (1987) at 83, 90; Regan (1974) at 199; Shapiro (1988) at 545, 550; Unwin (1996) at 43 (arguing that there should be “balance between the *degree of infringement* of personal liberty and the amount of benefit to be gained”) (emphasis added); VanDeVeer (1986) at 22 (“[P]aternalistic interference may be justifiable if . . . there are *sufficient countervailing considerations* in the presence of such a wrong (e.g. beneficial consequences).”) (emphasis added); *id.* at 249-50 (regarding when have duty to aid); *id.* at 353; Wikler (1978) at 236; The Merchant of Venice IV: 216 (“To do a great right, do a little wrong.”); Wright (1995) at 1434 (“[I]t is not hard to think of cases in which rejecting paternalism *sacrifices* a person on the altar of a generally, but not invariably, sound principle.”) (emphasis added). The analysis parallels that employed in connection with the offense principle: the magnitude, seriousness, and intensity of the offense is balanced against the reasonableness of the conduct. Feinberg (1985) at 34.

27. Beauchamp & Childress (1994) at 281.

I share the intuitions of these philosophers. It would be officious for the state to restrict *any* type or scope of individual liberty to prevent *any* risk or to provide *any* benefit.²⁸ However, where the subject's conduct poses a particularly serious risk to the subject and where the subject's desires regarding her conduct -- the desires which would be frustrated by intervention -- are rather weak, then hard paternalistic intervention seems justifiable.

Take the classic example of what is generally considered to be a justified hard paternalistic public health measure: automobile seatbelt laws.²⁹ It is a minor inconvenience for passengers to buckle-up. Yet, wearing seatbelts prevents serious,

28. A harder hard paternalism that gives automatic trumping effect to beneficence is implausible. But while extreme hard paternalism might not be justifiable, hard paternalism that is less extreme might be justifiable. Accordingly, I defend only a more "limited paternalism." Beauchamp (1978) at 1196; Beauchamp (1983) at 129.

29. While I employ many real-life examples to illustrate and to test my arguments, it would be beyond the scope of the present project to provide empirical detail or citations for these issues. The examples I employ are accessible and are sufficient to drive the analysis without this detail. Indeed, as many material facts concerning many typical examples of hard paternalism may be disputed; it is more fruitful, here, to stipulate the facts. Analysis of the justifiability of hard paternalism in particular circumstances, of course, will require attention to these facts as well as to other contextual features such as the relationship between the agent and subject.

With regard to the seatbelt example in particular, Larry Gostin has questioned – notwithstanding philosophers' regular invocation of seatbelt laws as a classic example of justified hard paternalism – whether this is really a case of justified hard paternalism. Seatbelt laws, after all, have a very small chance of helping any one individual. Professor Gostin's concerns have rather important conceptual and normative implications for hard paternalism, and a response to his concerns merits a separate article. Here, it suffices to note that the justifiability of paternalistic laws is not examined vis a vis particular individuals. The justifiability is not assessed "as applied to Larry" or "as applied to Thad." Rather, the justifiability of paternalistic laws is assessed "as applied (collectively) to those the law governs." Professor Gostin's suggestion would merge what should be two separate inquiries: (1) is the law hard paternalism (definitionally) and (2) is the law justified (normatively). Seatbelt laws are definitionally hard paternalism because the objective is to protect the population from harm. In assessing the justifiability of these laws, we ought to, in accordance with the definition, seek the warrant in the law's effect on the population, not in its effect on particular individuals.

crippling injuries and deaths.³⁰ Much of my argument for the justifiability of hard paternalism involves drawing out this core intuition regarding minimal burdens and huge benefits with greater specification.

The specification (the seven necessary and sufficient conditions) that I provide below fills in and develops the abstract content of the principles of beneficence and autonomy, largely by “setting out substantive qualifications that add information about . . . the nature of the act or end enjoined or proscribed.”³¹ The seven conditions for justified hard paternalism that I defend in the next section substantively qualify both the subject’s autonomy interest in the restricted conduct and the harm caused by that conduct. It advances the dialogue, by clarifying and isolating the circumstances under which hard paternalism is justified.

However, I should note at the outset that my specification is significantly qualified. It is hardly complete, final, and definitive. Very few specifications of moral principles and rules ever can be.³² As Henry Richardson observes: “the complexity of

30. Berger (1984) at 252; Berger (1985) at 49; Feinberg (1986) at 55; George (1993) at 106-07; Kleinig (1983) at 104; Perri 6 (2000) at 141; Regan (1983) at 120; Van Wyk (1996) at 77-78.

31. Richardson (1990) at 296.

32. Indeed, it may be that in some circumstances we simply will not be able to determine whether hard paternalism is justified. Beauchamp & Childress (2001) at 21. “[W]e may not be able to reach a clear resolution in many cases. In these cases, the dilemma becomes more difficult and remains unresolved even after the most careful reflection.” Beauchamp & Childress (2001) at 11.

the moral phenomena always outruns our ability to capture them in general norms.”³³

III. THE SEVEN LOGICALLY INDIVIDUALLY NECESSARY AND JOINTLY SUFFICIENT CONDITIONS FOR JUSTIFIED HARD PATERNALISM

Joel Feinberg admits that “[l]iberalism as a legislative policy toward state coercion must perforce blind itself toward some human suffering insofar as it rejects paternalistic interventions.”³⁴ In his earlier work, Feinberg suggested that these costs are acceptable: “There must be a right to err, to be mistaken, to decide foolishly, to take big risks, if there is to be any meaningful self-rule.”³⁵ But even Feinberg now recognizes that there are limits. We ought not to be able (free of intervention) to make *any* mistake, make *any* bad decision, take *any* risk. Under the circumstances where my seven conditions obtain, the “costs” of anti-paternalism are excessive, and justifiably can be averted or reduced through hard paternalistic liberty limitation.³⁶

33. Richardson (1990) at 294.

34. Feinberg (1988) at 327-28.

35. Feinberg (1986) at 62.

36. Feinberg (1988) at 320 (“If the *cost* . . . in terms of other positions to which a defensible liberalism seems to commit . . . is excessive, then liberalism as we understand it in ordinary life may have to be abandoned”) (emphasis added); *id.* at 28 (“[T]he liberal, whose respect for liberty generally is limited only by his humanitarianism cannot help but feel a *strain* in his principles.”) (emphasis added); *id.* at 30 (describing “embarrassment”); Glover (1979) at 179 (“[F]reedom from such a trivial piece of compulsion is purchased at too great a *cost*”) (emphasis added); Wright (1995) at 1434 (“[I]t is not hard to think of cases in which rejecting paternalism *sacrifices* a person on the altar of a generally, but not invariably, sound principle.”) (emphasis added).

After a brief introduction to the method of my argument, in this section, I contend that seven conditions are logically individually necessary and jointly sufficient for hard paternalistic liberty limitation to be justified. I argue that hard paternalistic liberty limitation (“HPLL”) is justified if and only if:

- (1) There is “strong evidence” that each of the following six conditions is satisfied:
- (2) The objective of the HPLL is to protect the subject from “significant harm,”
- (3) The subject has either a low autonomy interest or an irrational (though substantially autonomous) high autonomy interest in the restricted conduct,
- (4) The HPLL is imposed only where no morally preferable, less autonomy restrictive alternatives are available,
- (5) The HPLL has a high probability of success/effectiveness,
- (6) The harm from which the HPLL protects the subject outweighs any harm caused by the HPLL itself, and
- (7) The HPLL is as least restrictive as necessary.

After first describing and arguing for the necessity of each of these conditions, I then argue that they are jointly sufficient to justify hard paternalism.

A. Introduction to the Method of Argument.

1. *Mediating Maxims.* In his analysis of the harm and offense principles, Joel Feinberg declares that “I shall use the term ‘*mediating maxim*’ as an umbrella term for further specifications of meaning . . . , for guides to the application of a liberty limiting principle.”³⁷ Feinberg explains that liberty limiting principles, “until they are

37. Feinberg (1984) at 187.

interpreted, qualified, and mediated by various standards, are largely vacuous.”³⁸

Accordingly, Feinberg concentrates his attention in *Harm to Others* and *Offense to Others*, on *fleshing out*” the harm and offense principles with normative substance and giving them meaning.³⁹

Like the harm and offense principles, hard paternalism, if it too is to be accepted as a valid liberty limiting principle, must be “interpreted, qualified, and mediated” by various standards.⁴⁰ Without “mediating maxims,” hard paternalism, like any other

38. Feinberg (1986) at 3.

39. Feinberg (1986) at 3. *See also* Feinberg (1984) at 13 (calling for “careful analysis of the concept of harm, and the formulation of relatively *precise maxims* to mediate the application of the harm principle”) (emphasis added); *id.* at 26, 36, 187-217; *id.* at 187 (arguing that the harm principles requires “*supplementary principles*”: “I shall use the term ‘*mediating maxim*’ as an umbrella term for further specifications of meaning . . . , for guides to the application of a liberty limiting principle.”) (emphasis added); *id.* at 214; *id.* at 245 (arguing that the harm principle must be “supplemented by additional principles” and “refined and shaped by conceptual analysis” and “*mediating maxims* [must be] prescribed to guide its application”) (emphasis added); Feinberg (1985) at x (“[*I*nterpretations and qualifications of the literal liberty limiting principles . . . are necessary of those . . . principles are to warrant our endorsement”) (emphasis added); *id.* at 10, 26, 49; Feinberg (1986) at x, xii-xiii, xvi; *id.* at 3 (arguing that liberty limiting principles, “until they are *interpreted, qualified, and mediated* by various standards, are largely vacuous. Accordingly, we have concentrated thus far on *fleshing them out* with normative substance.”) (emphasis added); Feinberg (1988) at x (explaining that even core liberal liberty limiting principles must be interpreted and qualified if they are to warrant our endorsement); *id.* at xii (offering “*supplementary criteria*” to guide application) (emphasis added); *id.* at xvi (offering “mediating maxims” to guide application of the offense principle); *id.* at 11, 58, 179; *id.* at 206 (explaining that classifying exploitative acts is a useful prerequisite to understanding what the law should do about it); *id.* at 319;

40. Beauchamp (2001) at 381 (“[*C*onditions can be specified by a hard paternalist that will severely restrict the range of justifiable interventions.”) (emphasis added); *id.* at 182 (“Careful defenders of paternalism would disallow these extreme interventions”); Blokland (1997) at 170 (observing that Kleinig, Dworkin, Feinberg, and Gert all propose “a number of *limiting guidelines*”) (emphasis added); Bronaugh (1986) at 801; Dahl (1988) at 78 (“[I]f one doesn't make the distinctions that Feinberg draws, one will be apt to be led astray.”); Gutman & Thompson (1996) at 263; Häyry (1991) at 70; *id.* at 77 (“The gravity of a given violation of autonomy, the seriousness of an instance of self-inflicted harm, and the degree of voluntariness of a decision are all factors that must be assessed and compared separately in each particular class of cases.”); Kultgen (1995) at 15, 81, 210 (offering “corollaries”); Mackie (1977) at 181; Perri 6 (2000) at 151 “[T]here must also be some *limitations* upon the scope of [liberty limiting

liberty limiting principle, would be too vague. It too would be susceptible to interpretation and application (in much the manner that I illustrated with respect to the harm and soft paternalism liberty limiting principles in Chapter Three) to an overly wide scope of individual conduct. Accordingly, the conditions for justified hard paternalism must be set forth with sufficient precision to guide application of the liberty limiting principle.

As I discussed in the last section, many philosophers agree that a small amount or trivial instance of autonomy may be justifiably traded off for a large benefit. However, Lawrence Haworth is right to argue that being "commonsensical and sensible" is insufficient for good ethical analysis. In addition, we need "a theoretical framework or principled basis for deciding *when* such tradeoffs [between autonomy and beneficence] are justified."⁴¹ Only if several sets of distinctions are taken into account, will "the justificatory problems surrounding paternalism be clarified."⁴²

principles.]") (emphasis added); Sankowski (1985) at 11; Schwartz (1990) at 73-74 ("[P]aternalistic authority . . . is useful if properly limited . . ."); Thompson (1980) at 260; Young (1986) at 65 (endorsing a "policy of (selective) strong paternalism"); *id.* at 77-78 (describing "criteria for limiting the scope of paternalism").

41. Haworth (1991) at 137 (emphasis added). *See also* Beauchamp & Childress (2001) at 18 ("[B]alancing consists of deliberation and judgment about the relative strength of norms."); Murphy (1979) at 176-77.

42. Kleinig (1983) at 14.

Beauchamp and Childress specify six conditions for overriding one *prima facie* moral principle in order to adhere to another:

1. Better reasons can be offered to act on the overriding norm than on the infringed norm.
2. The moral objective justifying the infringement must have a reasonable prospect of achievement.
3. The infringement is necessary in that no morally preferable alternative actions can be substituted.
4. The infringement selected must be the least possible commensurate with achieving the primary goal of the action.
5. The agent must seek to minimize any negative effects of the infringement.
6. The agent must act impartially in regard to all affected parties.⁴³

Beauchamp and Childress subsequently refine these conditions to address the specific case in which the principle of beneficence outweighs the principle of autonomy – but where each principle attaches to a different person so to justify good Samaritan laws:

1. Y is at loss of significant loss of or damage to life or health or some other major interest.
2. X's action is needed . . . to prevent this loss or damage.
3. X's action has a high probability of preventing it.
4. X's action would not present significant risks, costs, or burdens to Y.
5. The beneficence that Y can be expected to gain outweigh any harms, costs, or burdens that X is likely to incur.⁴⁴

Finally, Beauchamp and Childress refine these "balancing" conditions once again to apply to the case in which the principle of beneficence outweighs the principle

43. Beauchamp & Childress (2001) at 19-20. *See also* Beauchamp & Childress (1994) at 34, 263.

44. Beauchamp & Childress (1994) at 266. *See also* Beauchamp (2001) at 133; Faden & Beauchamp (1986) at 21 n.11; Feinberg (1984) at 163.

of autonomy – where both principles attach to the same individual. In other words, Beauchamp and Childress specify the conditions that "typically justify strong [hard] paternalism":

1. A [subject] is at risk of significant, preventable harm.
2. The paternalistic action will probably prevent the harm.
3. The projected benefits to the [subject] of the paternalistic action outweigh its risks to the [subject].
4. The least autonomy-restrictive alternative that will secure the benefit and reduce the risk is adopted.⁴⁵

Beauchamp and Childress note with regard to these conditions that their "*interpretation and limits need more analysis*."⁴⁶

In the rest of this chapter, I provide this analysis. A further specification (*i.e.* a "progressive, substantive delineation . . . pulling them out of their abstractness and giving them a more specific and practical content")⁴⁷ of Beauchamp and Childress' conditions, together with other conceptual analysis and elaboration of current social

45. Beauchamp & Childress (2001) at 186. *See also* Beauchamp (1996) at 1917 ("[T]he strong paternalist might maintain that interventions are justified only if: [1] no acceptable alternative to the paternalistic action exists; [2] a person is at risk of serious harm; [3] risks to the person that are introduced by the paternalistic action are not substantial; [4] benefits to the person outweigh risks to the person; [5] and any infringement of the principle of respect for autonomy is minimal."); Beauchamp & Childress (1994) at 283; Beauchamp & McCullough (1984) at 100 (similar); Childress (1990) at 15. *Principles of Biomedical Ethics* has certainly evolved over the past twenty years. Joel Feinberg describes Beauchamp & Childress, in the 1979 edition of *Principles of Biomedical Ethics*, as espousing an "unqualified antipaternalism." Feinberg (1996) at 392.

46. Beauchamp & Childress (2001) at 186. *See also id.* at 180, 187; Beauchamp & Childress (1994) at 284 (calling this a "messy and complicated problem").

47. Beauchamp & Childress (1994) at 28-32. *See also* Beauchamp & Childress (2001) at 16-18 ("Specification entails a substantial refinement of the range and scope of norms . . ."); *id.* at 406 ("[A] cautious form of specification combined with balancing can make progress in bioethics . . .");

practices, constitutes much of my argument for the justifiability of hard paternalism.⁴⁸

In short, I give additional content to the principles of autonomy and beneficence by specifying seven logically necessary and sufficient conditions under which hard paternalistic liberty limitation is warranted.

Of course, as I discussed at the end of the last section, the conditions for justified hard paternalism, like all moral rules, are somewhat indeterminate and are in need of continual adjustment.⁴⁹ The conditions must be continually pruned and adjusted because they will not stay in equilibrium with our considered judgments. There will always be new counterexamples to the conditions. There will always be novel situations that challenge the moral framework set by the conditions.⁵⁰

2. *The Accommodation of Considered Judgments.* According to Rawls and

48. Beauchamp & Childress (1994) at 284 ("Developing a position on issues of paternalism is a matter of appreciating the limits of principles and the need to give them additional content . . ."); Beauchamp & Walters (1994) at 34 ("Any careful proponent of a principle of paternalism will specify precisely which goods and needs deserve protection and the conditions under which intervention is warranted."); Childress et al. (2002) at 172 ("[A]ny priority rule that is plausible will probably involve tight or narrow specifications of the general moral considerations to reduce conflicts."). Indeed, this is much of what Feinberg does in the first two volumes of the *Moral Limits of the Criminal Law: Harm to Others* and *Offense to Others*. There, Feinberg offers "interpretations and qualifications of the liberty limiting principles" endorsed by what he calls a "liberal": the harm principle and the offense principle. Feinberg (1988) at x.

49. Beauchamp & Childress (2001) at 398-99.

50. Beauchamp & Childress (2001) at 398-99. *See also* Beauchamp (2000) at 344 ("[M]any already specified norms will need further specification to handle new circumstances . . ."); Childress et al. (2002) at 173 ("We do not believe it is possible to develop an algorithm to resolve all conflicts among general moral considerations. Such conflicts can arise in multiple ways.").

the dominant meta-ethical perspective, a conception of political philosophy or ethical theory such as my argument for justified hard paternalism, must be tested against how well it can accommodate our considered convictions and particular judgments.⁵¹

Buchanan and Brock, for example, recommend including applications “to demonstrate the power and practical application of the theory and to help refine and develop the theory in greater detail and with more specificity.”⁵²

Similarly, Feinberg notes that principles “must be clarified and tested against hypothetical possibilities [and] rendered compatible with our confident ‘intuitions,’ that is with our deeply entrenched informed convictions in particular cases, and rendered harmonious with one another.”⁵³ Even John Stuart Mill, in *On Liberty*, applies general

51. Rawls (1971) at 46-48; Rawls (1993) at 8, 381, 384, 399. *See also* Beauchamp (2001) at 91; Beauchamp & Childress (2001) at 398-401; Beauchamp & Childress (1994) at 20-26; Dworkin (1992) at 142 (arguing that the justification of hard paternalism is “not just a matter of how we react to particular examples. It is a matter of assessing competing principles in terms of their consistency, their coherence with other parts of our moral and political theory, their grounding in attractive conceptions of the type of persons we want to be, the conceptual and normative difficulties of alternative principles, and the quality of arguments we can muster in defense of the favored principles.”); Feinberg (1973) at 287; Feinberg (1984) at 16-17; Feinberg (1986) at 25 (“[W]e are challenged to reconcile our general repugnance for paternalism with the seeming reasonableness of some apparently paternalistic regulations.”); *id.* at 37; Feinberg (1988) at 20 (appeal to intuition); *id.* at 126, 326; Goldman & Goldman (1990) at 70; Hodson (1977) at 61, 69; Kultgen (1995) at 16-29, 74; Rawls (1971) at 19-21, 48-51, 577-82; Schonsheck (1994) at 98; VanDeVeer (1986) at 180 (“If its implications require revision of our intuitions . . . that will not be surprising and need not be seriously damaging, for that is a familiar byproduct of acceptable theories. If, however, the theory has *radically* counterintuitive implications in a *wide* array of cases, that provides reason to pause and to revise, or even to reject the theory . . .”).

52. Buchanan & Brock (1989) at 12.

53. Feinberg (1984) at 16. *See also* Feinberg (1986) (taking “examples of apparently reasonable [apparently] paternalistic legislation and argu[ing] case by case either that they are not reasonable, or that they are not (hard) paternalism.”); Feinberg (1988) at 126.

principles to a number of specific cases.⁵⁴

I employ the standard, recommended methodology. In making my arguments for the individual necessity and joint sufficiency of my seven conditions for justified hard paternalism, I offer several “considered judgments” and examine how well my argument can accommodate them.

I provide two very different sorts of examples -- largely from bioethics. First, I offer cases of hard paternalistic interventions (such as helmet laws) for which there is a consensus that intervention is justified.⁵⁵ I examine whether these paradigm cases satisfy each of my seven conditions. That is, I examine whether my conditions justify those cases of hard paternalism generally thought to be justified.⁵⁶ Second, I offer cases

54. Mill (1859) at Book IV.

55. The liberty limiting measures themselves might be justified, although perhaps on harm to others or soft paternalistic grounds. The relevant question here is whether they can be justified on hard paternalistic grounds (*i.e.* to the extent they have a hard paternalistic rationale). Philosophers must often put empirical questions aside and stipulate that the measure has a hard paternalistic rationale in order to get on to the normative analysis. Regan (1983) at 114 (“My hypothetical paternalist does not make mistakes I am ignoring serious practical problems, because it seems to me that before we can decide what sorts of paternalism are justified in practice, we need to have some idea of what sorts would be justified for my ideal paternalist.”); Riley (1998) at 114-15, 191; Schonsheck (1994); Wikler (1978) at 240 (“The contribution of a moral philosopher to a public policy debate is of necessity a limited one.”). Even with a clear definition with which to work, whether or not any particular measure actually has a hard paternalistic rationale is often difficult to ascertain. Husak (2002) at 4. For these reasons, I will not establish that each example really is hard paternalism (using the definitional conditions in chapter two) before assessing its justifiability. I will assume that the basis for the liberty limitation in each of my examples is hard paternalism, and will proceed immediately to analyze the justifiability of the intervention.

56. Feinberg (1988) at 126 (“Then, if the example is such that the liberal, reacting spontaneously, would be embarrassed to have to oppose criminalization, the example has telling probative impact. Indeed, such arguments, while technically *ad hominem* in form, have as much force as can normally be expected in ethical discourse.”); *id.* at 325-26.

of hard paternalistic interventions for which there is a consensus that intervention is *not* justified. I examine whether these cases satisfy each of my seven necessary conditions. That is, I examine whether my conditions justify those cases of hard paternalism generally thought *not* to be justified.⁵⁷ In short, by considering these two types of examples, I examine whether my argument must be pruned or adjusted because its justificatory scope is too narrow, too wide, or simply incongruous with our deliberated intentions.⁵⁸

3. *Acknowledgment of Special Circumstances Regarding Legal Paternalism, Medical Paternalism, and Other Contexts of Hard Paternalism.* The theory of justified hard paternalism (seven necessary and jointly sufficient conditions) that I defend below is comprehensive in that it applies to hard paternalism in any context – whether physician-patient paternalism, researcher-subject, state-citizen, wife-husband, or any other context of hard paternalism.⁵⁹

57. VanDeVeer (1986) at 71 ("One way to test the principle is to see if it proves too much . . .").

58. Of course, my theory also has "output power" in that it generates judgments that were not in our original database of judgments. For example, while it is not now a considered judgment in our culture, as discussed below, it would, on my theory, be justified hard paternalism to ban cigarette smoking. VanDeVeer (1986) at 180 ("If its implications require revision of our intuitions . . . that will not be surprising and need not be seriously damaging, for that is a familiar byproduct of acceptable theories. If, however, the theory has *radically* counterintuitive implications in a *wide* array of cases, that provides reason to pause and to revise, or even to reject the theory . . ."). This is an ongoing process. Beauchamp & Childress (2001) at 398-99.

59. The conditions might need to be modulated somewhat differently in different contexts, but the same seven conditions are necessary and sufficient for justified hard paternalism in all contexts.

However, a number of writers have emphasized the importance of paying attention to the institutional *context* of paternalism: to who limits the liberty of whom.⁶⁰

Allen Buchanan and Dan Brock, for example, argue that “isolated [paternalistic] decisions abstracted from institutional frameworks should give way to a more nuanced and multi-dimensional analysis of moral problems as institutionally imbedded.”⁶¹

Similarly, Ellen Fox regrets that “much less has been written about *who* may do the intervening,” and argues that this “is a substantial lacuna in our understanding of the

60. Armsden (1989) at 150-51, 160; Benn (1988) at 12-13 (“To interfere with a person, so conceived, one must show *standing*, that is, that one has a special authority to go beyond mere benevolence to beneficence.”) (emphasis added); Childress (1982) at 12; Hardin (1988) at 137-42; Jorgensen (2000) at 53, 55; Kasachkoff (1989) at 80, 82-84, 88; Kasachkoff (1997) at 412; Kleinig (1983) at 118-25 (comparing different doctor-patient models); *id.* at 124-25 (describing other institutional relationships); Kultgen (1995) at viii (“[T]he moral guidelines for paternalism should be somewhat different in its personal and public forms.”); *id.* at 41-43; *id.* at 56 (“The analysis of parentalism . . . must also take into account the social structure that provides the background of these relationships. What is legitimate on the individual level may not be so as a general practice, and vice versa . . .”); *id.* at 59; *id.* at 63- 64 (emphasizing the ontological differences and warning that it is “important not to transfer concepts uncritically from one level to another”); *id.* at 65, 127; *id.* at 135 (softening Mill as applied to the personal level); *id.* at 161, 191, 202, 230; Lomasky & Detlefsen (1981) at 97; Locke (1688) at sec. 71 (“But these two Powers, Political and Paternal, are so perfectly distinct and separate; are built upon such different Foundations . . .”); Miller (1996) at 216; Sankowski (1985) at 8-9; Schonsheck (1994) at 150; Shapiro (1988) at 520, 527; Thompson (1980) at 246 (referring to “the question of who imposes the constraint on whom” as the “locus of paternalism.”); Thompson (1987) at 150 (“The locus of paternalism refers to the relationship between those whose liberty is restricted and those who implement the restriction.”); Umezo (1999) at 9 (“Some kinds of human relationships will provide a justificational context paternalistic action while some other types of human relationships prohibit paternalistic action. In all cases, the context of human relationships should not be treated as peripheral aspect.”); White (2000) at 130 (“[T]he actual intervener always has an identity, and this identity is clearly relevant.”); Zamir (1998) at 236. Agent-subject relationships are as varied as people are diverse. Allen Buchanan, for example, once identified “aesthetic paternalism” as liberty limitation where an interior designer overrides a customer’s instructions and substitutes her own tastes.

61. Buchanan & Brock (1989) at 9.

nature of justified paternalism.”⁶²

Notably distinct among hard paternalistic agents is the state. Legal hard paternalism (which encompasses public health paternalism⁶³) is often thought to be more difficult to justify than hard paternalism in other contexts, such as that between a physician and patient.⁶⁴ The state is, after all, less closely involved in the lives of subjects than, for example, physicians. It is less able to consider individual factors; and

62. Fox (1993) at 575 (emphasis added). *See also id.* at 579 (“The nature of the relationship between the individuals has been consistently overlooked in the literature on paternalism.”); Umezo (1999) at 13 (“[T]here has not been much discussion in terms of the qualification and competency of the causative actor.”); White (2000) at 134, 137.

63. Beauchamp (1996) at 1914; Bowser & Gostin (1999) at 1232-46; Gostin, et al. (1999) at 61, 69 (“[M]any disputes in public health turn less on its goal . . . , and more on the proper scope of the government intervention to achieve it.”); Doxiadis (1987) at xii (“In preventive medicine . . . the direct responsibility of the state is often considerable.”); Shapiro (1988) at 527 & n.26 (commenting that although separated by a “notoriously indistinct” line, state paternalism is a clearly separate sphere).

64. Beauchamp & Childress (1994) at 277 (defending only “acts” of paternalism); *id.* at 317 (“We defend a version of paternalism that justifies strong paternalistic interventions under some conditions. However, we acknowledge that a policy or rule permitting strong paternalism . . . is often not worth the risk of abuse that it invites.”); Beauchamp & McCullough (1984) at 86 (noting “serious adverse consequences if paternalistic principles are institutionalized”); Chan (2000) at 85 (focusing specifically on this question); Childress (1982) at 48, 173; Douglas (1983) at 132 (calling state paternalism conflictual rather than cooperative because of its impersonal nature); Dworkin (1988) at 77 (noting that the state as agent is not always the “most appropriate instrument”); Feinberg (1984) at 7 (“[T]he proper zone of liberty against the state might still have no barriers against penetration by other private individuals.”); *id.* at 25-26 (discussing Ernest Nagel’s skepticism that paternalistic principles can be developed); Greenawalt (1974) at 85 (“[G]overnmental action may be inappropriate even when parallel private action would be justified.”); Hardin (1988) at 141; Häyry (1991) at 63; Häyry (1998) at 55 n.4 (“[T]he facts that there are instances of hard caring control (*i.e.* justified paternalism in the wide sense) is quite compatible with the view that large scale *policies* of caring control are always illegitimate.”); Hodson (1983) at 49; Kleinig (1983) at 71, 147; Kultgen (1995) at viii (“[T]he moral guidelines for paternalism should be somewhat different in its personal and public forms.”); *id.* at 41-43, 63, 65, 127; *id.* at 135 (softening Mill as applied to the personal level); Nagel (1968) at 27 (concluding that it is impossible to determine justifiable cases of paternalism except case by case); Rainbolt (1989) at 47 (“[H]ard paternalism in other contexts . . . would seem to be more plausible than hard paternalistic action by the state.”); Weale (1978) at 169 (“[P]aternalism . . . is more suited to individual judgment in particular cases than to general proscriptions.”).

it is less able to tailor interventions accordingly.⁶⁵ Several authors have even suggested that the justifiability of legal paternalism depends so heavily upon the conception of the state, that to bring in an antecedent notion of the state effectively begs the question of the justifiability of hard paternalism.⁶⁶

I reject the idea that one must develop a conception of the state *before* exploring the justifiability of hard paternalism. Once we have established the scope of justifiable hard paternalism and the scope of other liberty-limiting principles, we have *ipso facto* made substantial progress toward indicating our view of the state -- by establishing parameters for one of the rationales on which the state can interfere with the liberty of

65. Greenawalt (1974) at 85 ("[G]overnmental action may be inappropriate even when parallel private action would be justified. At least when the government acts through generalized rule of policy . . . it must be less closely involved . . . , less able to consider individual factors and to tailor attempted influence accordingly The state should, therefore, be much more cautious"); Jorgensen (2000) at 55 ("[I]ntimates are in a much better position to interfere in the right way. Primarily, this is because they often are better able to acquire knowledge of the [subject] . . . such knowledge is essential to the decision of whether to interfere paternalistically."); Rainbolt (1989) at 47 ("[H]ard paternalism in other contexts (e.g. between spouses) would seem to be more plausible than hard paternalistic action by the state. Laws must be general and the state has limited knowledge of special circumstances.") \

However, some philosophers have suggested considerations that weigh the other way. Bok (1978) at 214 ("The very closeness of the bonds turns out to *limit* the justifiability of lies even in those narrow categories."); Goldman & Goldman (1990); Kleinig (1983) at 173 (suggesting that political as opposed to individual paternalism is more politically palatable); Kultgen (1995) at 64 (finding it "fruitful to examine legal parentalism for insights into personal forms"); Schauer (1995) at 633-59; Thompson (1980) at 255 (arguing that even if an individual does not accept the good of intervention, the state's theory of primary goods might be such that it excludes relatively few lifeplans).

66. Buchanan (1983) at 77; Dworkin (1972) at 940; Dworkin (1993) at 359; Dworkin (1995) at 564 ("The analysis of the term is relative to some set of problems."); Dahl (1988) at 74 & n.3; *id.* at 77 (criticizing Feinberg for leaving out "an account of the nature and function of the state"); Faden & Faden (1978) at 189 ("[O]ne's position on the rightness of interventions targeted to the individual is directly related to one's political philosophy."); Kasachkoff (1989) at 82-83, 88; Kultgen (1995) at 236-37; VanDeVeer (1986) at 316.

its citizens.⁶⁷ In any case, I can develop and defend a conception neither of the state nor of any other paternalistic agent or institution as part of this dissertation.

Admittedly, the application of my conditions might need to be interpreted and modulated somewhat differently in various contexts of hard paternalism. What any one of the seven conditions requires in the physician-patient context may not be the same thing that it requires in the legal context. The relationship between the agent and the subject cannot be overlooked in applying the conditions for justified hard paternalism.

Nevertheless, these questions can wait. Joel Feinberg, in addressing the justifiability of hard paternalism, once suggested that "we must first decide whether there is adequate justification for the program or institution requiring this kind of power in the first place."⁶⁸ However, Feinberg also recognized that such analysis "would take us much too afield."⁶⁹ "Progress on the penultimate questions," Feinberg writes, "need not wait for solutions to the ultimate ones."⁷⁰

67. Kasachkoff (1989) at 91 n.9.

68. Feinberg (1984) at 21.

69. Feinberg (1984) at 21. *See also* Feinberg (1988) at 81, 111, 313; Kleinig (1983) at 71; Marshall (1998) at 561 (noting that Feinberg does not engage in general political theory but takes "a more contextualized, less abstract approach").

70. Feinberg (1984) at 18.

4. *The Argument is Limited to Philosophical Analysis.* Although I will test my defense of justified hard paternalism with considered judgments, I confine my discussion to pure normative philosophy. I do not consider practical policy questions.⁷¹ That is, I do not examine whether or how my ethical arguments should be *implemented* to justify or constrain individual liberty.

My focus is on what Jonathan Schonsheck calls a "principles filter,"⁷² on the criteria for the moral legitimacy of hard paternalism as opposed to criteria for justification on balance. Amy Gutmann and Dennis Thompson observe:

[T]he gap between agreement on the conditions of paternalism and paternalistic *policies* is great. It leaves plenty of room for democratic deliberation. Nevertheless, the principles we have presented provide guidance for that deliberation, and they rule out certain policies, and certain reasons for policies.⁷³

Joel Feinberg similarly notes:

This four-volume work, then is an account of the *moral constraints* of legislative action [I]t does not provide detailed answers to legislative questions. Rather, it attempts to provide a coherent and plausible set of moral principles to guide the legislator by locating the moral constraints that limit his options."⁷⁴

71. Wonnell (1987) at 125 (distinguishing "pure normative philosophy" which "seeks to identify types of arguments which, if true, would morally justify particular types of legal rules and political actions" from "applied political philosophy" which "seeks to identify a set of values that would produce morally appropriate *results* if the values identified by the philosopher were sincerely held by judges, legislators, and other political actors") (emphasis added).

72. Schonsheck (1994) at 67.

73. Gutmann & Thompson (1996) at 270.

74. Feinberg (1984) at 4 (emphasis added).

Liberty limiting principles provide necessary, not sufficient, reasons for intervention. I do not examine whether the implementation of any particular hard paternalistic acts, policies, or legislation is a "good idea" pragmatically speaking.⁷⁵ Rather, my focus is on whether and when the moral authority of agents may include hard paternalism.

* * *

Now, having set forth and qualified the method of my argument; I turn, in the next seven subsections, to defend the necessity of each of the seven conditions for justified hard paternalism. After that, I defend the joint sufficiency of the seven conditions for justified hard paternalism.

B. Condition One: There Must Be Strong Evidence That These Conditions Are Satisfied.

The first necessary condition for justified hard paternalism requires that the agent have strong evidence that each of the other six conditions is satisfied. Because the

75. Feinberg (1985) at 66 (distinguishing moral legitimization and justifying reasons on balance). *See also* Beauchamp (1983) ("No doubt we shall not possess such a comprehensive theory for some time, but we can at least begin to address the right issues and develop elements of the theory. Not to be neglected is the extent to which these issues are empirical."); Beauchamp (1991) at 421; Beauchamp (2001) at 18 ("Moral philosophy helps us think clearly about these problems, but it is no panacea for solving them."); Beauchamp & Childress (1994) at 10; *id.* at 138; *id.* at 144 ("Policies may legitimately take account of what is fair and reasonable to require of [institutions]."); Beauchamp & Childress (2001) at 8-9, 154, 247, 250; D. Beauchamp & Steinbock (1999) at 7; Buchanan & Brock (1989) at 7; Callahan (1998) at 197; Feinberg (1984) at 4, 10, 16; Feinberg (1986) at ix, 25; Feinberg (1986a) at 16-17; Feinberg (1988) at 30, 258, 321, 323; Gutmann & Thompson (1996) at 252; Harris (1967) at 588; Regan (1983) at 114 ("My hypothetical paternalist does not make mistakes . . . I am ignoring serious practical problems, because it seems to me that before we can decide what sorts of paternalism are justified in practice, we need to have some idea of what sorts would be justified for my ideal paternalist."); Riley (1998) at 114-15, 191; Schonsheck (1994); Wikler (1978) at 240 ("The contribution of a moral philosopher to a public policy debate is of necessity a limited one.").

stakes (the restriction of substantially voluntary self-regarding conduct) are so high and because we are, accordingly, very interested in avoiding mistakes; the agent must have high confidence and a reliable basis that the conditions are satisfied.

1. *Why Strong Evidence Is Required.* Allen Buchanan argues, as I do for my second condition, that hard paternalism is justifiable only where it saves the subject from serious harm. However, Buchanan also poses the “epistemic condition” that “prediction concerning the gain in utility enjoys a very high degree of certainty.”⁷⁶ It is insufficient that the agent believes intervention *might* protect the subject from serious harm. The agent must be rather sure that intervention *will* protect the subject from serious harm. For the same reasons that Buchanan required it of the significant harm condition, this epistemic condition should also apply to each of the other six conditions for justified hard paternalism.

In balancing beneficence and autonomy in the context of analyzing the justifiability of bad Samaritan laws, Feinberg acknowledges the existence of a “vast no-man’s land of uncertain cases.” He argues that “to err on the side of caution, we would hold no one in the uncertain category liable.”⁷⁷ It is unacceptable to trade a sum-certain amount of autonomy for an uncertain amount of beneficence. Accordingly, Feinberg

76. Buchanan (1983) at 78; Pellegrino (1984) at 89-90.

77. Feinberg (1984) at 156.

would hold liable only those “who *clearly* deserve to be liable, while exempting all those who do not clearly deserve to be liable.” Similarly, in balancing beneficence and autonomy in the context of hard paternalism, we must err on the side of caution and intervene in only the clear cases.

This strong evidence requirement comes from the initial presumption (from our liberal axioms) against liberty limitation. As I discussed in Chapter One, analysis of the moral justifiability of liberty limitation begins with a presumption against interference. Any departure from this presumption – whether for hard paternalistic or for other sorts of reasons – requires a heavy burden of proof.⁷⁸ That burden applies not only to the cogency of the moral reasons for the interference (the seven conditions) but also to the evidentiary basis for believing that those reasons are applicable.⁷⁹

It would ill-serve the end of establishing legitimate and comprehensible guidelines for the use of hard paternalistic liberty limitation to set forth conditions that

78. Beauchamp (2001) at 268; Chan (2000) at 85 & n.9; Kultgen (1995) at 82, 113, 131-32, 136; Mill (1848) at 938; Mill (1848) at 945; VanDeVeer (1986) at 92-94.

79. Beauchamp (2001) at 377; Childress (1982) at 200; Dworkin (1971) at 125 (“In all cases of paternalistic legislation there must be a heavy and clear burden of proof placed on the authorities to demonstrate the exact nature of the harmful effects”); Feinberg (1985) at 157 (explaining that the harm principle does not apply where the harm is speculative); Feinberg (1988) at 4 (“The burden of proof is on the shoulders of whomever advocates legal coercion.”); Gostin (2001) at 152, 212; Kultgen (1995) at 79, 83, 143; Leonard et al (2000); Pellegrino (1984) at 89-90; Stephens (1873) at 105 (“[L]egislation [is] apt to be most mischievous and cruelly unjust if they proceed upon imperfect evidence.”); Young (1986) at 78 (“[A] clear and heavy burden of proof rests on the state.”); Zamir (1998) at 261 (“The paternalist must be quite confident in her judgment that X is the correct choice even when the [subject] opts for Y.”).

could too easily be satisfied through carelessness or maneuver. The restriction of substantially autonomous self-regarding conduct is serious business, and errors (for example, not achieving the objective of the liberty limitation; causing more harm to the subject than it prevents) must be avoided.

So, just as – as I discussed in Chapter Three – the evidentiary standards for competence ought to be more strict where the harm at stake is more serious; here, where the stakes are high, so should the evidentiary standards be high.⁸⁰ The necessary conditions for justified hard paternalism need “real teeth.” Furthermore, without a strong evidence condition, my theory of justified hard paternalism would be more vulnerable to the slippery slope objections that I analyze later in this chapter.

2. Another Reason for the Strong Evidence Condition. The need for a strong evidence condition is further bolstered by the history of invidious discrimination in the

80. Beauchamp & Childress (1994) at 140; Beauchamp & Childress (2001) at 74-77; Cale (1999) at 145 n.25 (agreeing that “when more is at stake . . . there is reason to take measures to be *more certain* that the person making the decision is competent to do so,” but nevertheless, requiring that, “the *level* of abilities and capacities that must be possessed in order to be judged competent must remain the same.” Certainty measures, “only raise the question of whether or not overriding a decision made by those competent to decide can be justified.”) (emphasis added); *id.* at 148 (“While the risks related to a decision might be grounds for taking more *care in assessing* a person’s competence, they should not provide grounds for increasing the *standards* by which a person’s competence is assessed.”) (emphasis added); Engelhardt (1996) at 325; Faden & Beauchamp (1986) at 54, 290-91; Meisel (1995) at 343; Wicclair (1999) at 153 (“It is important to distinguish between (1) a requirement for more *cognitive ability*, and (2) a requirement for more *evidence* of cognitive ability.”). *But see* Moreno (1992) (requiring *both* “higher level competence” and “confidence in that competence”); Wilks (1999) (arguing that there is no material difference between higher reliability and a higher standard, but reaching this conclusion by confusing performance and decision standards of competence).

United States. As James Fitzjames Stephens observed in 1873: “[L]egislation [is] apt to be most mischievous and cruelly unjust if they proceed upon imperfect evidence.”⁸¹ “[T]here is a clear, present, and grave danger that special interest groups or venal agents of the state will use the mask of paternalism to promote their own self-interested agendas.”⁸²

The paternalist’s benevolent rhetoric, I discussed in Chapter Three, may disguise other, less legitimate motivations. As Eyal Zamir observes, “History provides numerous examples of *false paternalism*, where whole sectors of society (women, minority groups) were oppressed ‘for their own good.’”⁸³ Until the mid-twentieth century, widespread discrimination against women was often justified on purported paternalistic grounds. For example, women were not permitted to practice law because the “nature and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”⁸⁴ Women were not permitted to work more than ten hours in the laundry because women were deficient in “the amount of physical strength, in the capacity for long-continued labor, particularly when done standing.”⁸⁵

81. Stephens (1873) at 105.

82. Kultgen (1995) at 171.

83. Zamir (1998) at 281 (“A common argument against paternalism is that the paternalist’s benevolent *rhetoric may disguise* other, less legitimate motivations History provides numerous examples of false paternalism, where whole sectors of society (women, minority groups) were oppressed ‘for their own good.’”) (emphasis added).

84. *Bradwell v. Illinois*, 83 U.S. 130 (16 Wall.) (1872).

85. *Muller v. Oregon*, 208 U.S. 412 (1908).

Discrimination under the guise of paternalism is a danger not only in the gender context but also in the contexts of race, national origin, and disability. In response to the discrimination against the disabled, for example, Congress passed the Americans with Disabilities Act of 1990. A critical concern of the ADA was to prohibit employers from disqualifying otherwise qualified applicants out of concern for the disabled person's own safety.⁸⁶ For example, an employer could not use as an excuse for not hiring a person with HIV disease, the claim that the employer was simply protecting the individual from opportunistic diseases to which the individual might be exposed. In 2002, the Supreme Court determined that Congress' real concern in the ADA was to prohibit reliance on untested, pretextual stereotypes (e.g. that people with disabilities cannot make safe life choices). It determined that the ADA was meant to outlaw "sham protection."

The strong evidence condition prevents sham protection. For example, in *Chevron USA, Inc. v. Echazabal*, the plaintiff sought to work at a Chevron oil refinery. Chevron refused to hire him because medical tests (the plaintiff had a liver condition) indicated that the plaintiff's health would be endangered by performing the job. The Supreme Court held that Chevron did not violate the ADA because its "harm to self" defense was not a sham. It was based on "the best available objective evidence," and on

86. National Council on Disability (2002) (amicus curiae brief).

“specific and documented risks to the employer.”⁸⁷

Just as the Supreme Court demanded a strong evidence condition to ensure that Chevron’s paternalism pursuant to the ADA was no sham, a strong evidence condition for (morally) justified hard paternalism can prevent similar shams. If the conditions for justifiable hard paternalism could be too readily invoked, it would be easier for those with discriminatory motives to invoke hard paternalism as a pretextual justification for liberty limitation.

3. *Objection to the Necessity of the Strong Evidence Condition.* It might be objected that it would be make my theory simpler and more elegant by building the strong evidence requirement directly into the content of the other six conditions rather than including it here as an independent necessary condition. For example, the fifth condition could require that the paternalistic agent “have strong evidence *that* the intervention has a high probability of success/effectiveness.”

This objection fails for two reasons. First, it is unclear that such an approach really would be any simpler. It would complicate each of the other six conditions by adding the same sub-condition to each one. The same question, “Is there strong

87. 122 S. Ct. 2045, 2053 (2002).

evidence that this condition is satisfied?" would still need to be asked of each condition.

Second, including the strong evidence requirement as a separate, independent condition better ensures attention to the need for its satisfaction.

4. *What Constitutes Strong Evidence.* Throughout philosophy and law, there are cases where "no sharp boundary can be drawn."⁸⁸ Just as even the sharpest knife

88. Arnsden (1989) at 74; Beauchamp & Childress (1994) at 166; Beauchamp & McCullough (1984) at 85 ("On the continuum of autonomy, no sharp theoretical line can be drawn that suffices to distinguish all cases of the autonomous from the nonautonomous."); Faden & Beauchamp (1986) at 239-40 ("The decision how and where to draw [thresholds] is invariably based in moral and policy considerations, and no sharp line can be drawn purely on conceptual grounds to distinguish autonomous from nonautonomous action."); *id.* at 259 (noting "ambiguity in establishing thresholds" and explaining "[t]here are no definite criteria for distinguishing with exactitude"); *id.* at 290 ("Where the cutoff line should be . . . is a normative question . . . a difficult evaluative matter."); *id.* at 291 (illustrating the difficulty); *id.* at 302 ("Substantial understanding is merely a rough benchmark on the continuum of understanding The exact placement of this line is necessarily a matter of judgment"); *id.* at 360 ("We have no magical formulae for establishing the threshold"); Faden & Beauchamp (1986) at 241 ("[T]he placing of threshold points . . . can be carefully reasoned, if not precisely located, [only] in light of specific goals."); Feinberg (1986) at 102; Feinberg (1996) at 392 (observing the "vagueness of the distinction between voluntary and nonvoluntary"); Feinberg (1986) at xv ("[W]herever a line is drawn between permissible and prohibited conduct there will be cases close to the line on both sides of it."); *id.* at 117 ("It may not always be possible, even in principle, to say . . . that one has a certain quantifiable degree of voluntariness"); *id.* at 121 ("matters of degree"); *id.* at 153 ("[P]roblems . . . are those common to all voluntariness-defeating factors, namely problems in classifying borderline cases, and tailoring standards to special contexts."); *id.* at 294 ("all conceptual boundary lines are hard to draw"); *id.* at 326 ("[B]oundary lines are simply approximations Yet, the law cannot do without rigid lines"); Goodin (1993) at 236 ("Any individual may display any of these failings to a greater or lesser extent . . . points on a continuum The upshot is that paternalism is always going to be more or less justifiable"); Hayry (1991) at 77, 155 ("[T]he lines between soft and hard, weak and strong paternalism remain vague on a general level."); Husak (1992) at 82-83 ("Although autonomy itself may be colored in shades of gray . . . [b]right lines must be drawn."); Husak (2000) at 63 ("[T]he extent to which a given choice is autonomous is almost certainly a matter of degree."); *id.* at 70 ("Even if we *had* a clear conception of addiction, we would still have to decide not only *whether* but also *to what extent* addiction deprives persons of their autonomy."); Kleinig (1983) at 9-10 (comparing the continuum and threshold approaches); Kultgen (1995) at 200; *id.* at 220 ("[T]he lines demarcating various levels of competence are blurred, preclud[ing] rigid rules for sharply delimited categories of paternalistic behavior."); Lee (1997) at 246; Miller (1996) at 217 ("The autonomy of actions is a matter of degree"); Shapiro (1988) at 524 ("Almost any line that one might draw on these questions has an air of arbitrariness about it."); Tannsjo (1999) at 8 ("We need a line that is salient. However, the exact line must be arbitrary, in exactly the same manner that a speed limit must be

eventually fails to cut, so even the best defined concepts fail to discriminate.⁸⁹

Categories often cannot be strictly demarcated because vagueness surrounds their boundary and threshold lines.

Nevertheless, there is a wide range of cases where we can be sure about in which category they belong.⁹⁰ For example, while it might not be clear whether a 5'9" woman is "tall," it is quite clear that a 6'2" woman *is* tall and that a 5'1" woman is not. While there is no simple mathematical formula, there is, as Arthur Caplan writes, a "rough area in which consensus can be reached about what is good and what is bad."⁹¹ "Sure, there will be a twilight of cases that are difficult to classify, but that is true of many other

arbitrary.").

89. Lamb (1988) at 7.

90. Beauchamp (1978) at 296 ("No doubt, degrees of control and voluntariness rest on a multilevel continuum, but informed determinations can be made in many cases regarding the substantial voluntariness or nonvoluntariness of the action."); Beauchamp (1983) ("No doubt we shall not possess such a comprehensive theory for some time, but we can at least begin to address the right issues and develop elements of the theory. Not to be neglected is the extent to which these issues are empirical."); Feinberg (1986) at 56 ("There will be a twilight area of cases that are difficult to classify, but that is true of many other workable distinctions, including that between night and day."); *id.* at 102 ("There is no simple mathematical formula . . . [O]n the other hand, there are decisions that are manifestly unreasonable."); Goldman & Goldman (1990) at 74 ("That our criteria for justified paternalism imply borderline cases, however, does not show that the criteria themselves are not sufficiently clear or acceptable."); Holtug (1993) at 410 ("Maybe there is a grey zone where we are not sure . . . but there would also be cases where we were sure that it was. If this was the case, why can't we draw a line while making sure that if we err, we err on the side of safety?"); Kopelman (1997) at 301; Kultgen (1995) at 81, 90 ("Autonomy, then, is a matter of type and degree . . . but gross differences can be discriminated); Malm (1995) at 11; VanDeVeer (1986) at 132 ("This admitted imprecision about the criteria for deciding who is autonomous, however, seems no more reason to dispense with the concept than it is in the case of 'blue,' 'tall,' or 'sexy.'"); *id.* at 346 ("fuzzy at the edges of competence"); Van der Burg (1998) at 136 (arguing that while it's often unclear how to apply terms such as "bald" or "tall," often it is quite easy).

91. Caplan (1997) at 71.

workable distinctions, including that between night and day.’’⁹²

There is a grey zone where we cannot be sure whether or not the conditions for justified hard paternalism are satisfied. The effect of the strong evidence condition is to exclude the grey zone and to err on the side of safety (not restricting substantially autonomous self-regarding conduct unless such restriction is *clearly* justified). All grey cases are presumed to not be justified. Hard paternalism is justified only in the *clear* cases. For example, on my theory it would not be justifiable to ban silicone breast implants for hard paternalistic reasons because there is insufficient evidence that the significant harm condition (Condition Two) is satisfied. The scientific evidence has not established that these breast implants cause significant harm to implantees.⁹³

* * *

In sum, the first necessary condition for justified hard paternalism requires that the agent limit the subject’s liberty only where he has strong evidence that the other six conditions are satisfied. We can state this condition:

It is a necessary condition for the justifiability of hard paternalism that:

1. *The agent limit the subject’s liberty only when he has strong evidence -- that the seven conditions for justifiable hard paternalism are satisfied.*

92. Feinberg (1986) at 56.

93. The restriction of silicone breast implants for hard paternalistic reasons might not be otherwise justified. The subjects of such a restriction have a high autonomy interest in having the implants.

Without a strong evidence condition, the other conditions for justified hard paternalism could too easily be satisfied, and their qualifications – qualifications which are supported by cogent moral reasons – would lack teeth.

C. Condition Two: Hard Paternalistic Liberty Limitation Must Have the Objective of Protecting the Subject from Significant Harm.

In Chapter Two, I argued that it is a necessary condition for the *definition* of hard paternalism that the agent’s motive for restriction be benevolent toward the subject. To be hard paternalism, the agent must limit the liberty of the subject with the primary motive either to confer a benefit upon or avert harm from the subject. However, to be *justified* hard paternalism, the agent’s motive for restriction must be a certain type of benevolence.

The second necessary condition for justified hard paternalism requires that the agent interfere with not just any altruistic motive but with the specific objective of protecting the subject from “significant harm.” The harm posed by the subject’s conduct is often helpfully referred to as the “trigger” for hard paternalistic interference.⁹⁴ After all, the reason, the motivation for hard paternalistic liberty limitation, in the first

94. Childress (1982) at 103, 200.

place (by definition), is to protect the subject from harm.⁹⁵

But, the prevention or reduction of what *kinds* of harms constitutes an appropriate objective for hard paternalistic liberty limitation? Gert and Culver argue: “Any adequate theory of the moral justification of paternalistic behavior must take into account *the amount of harm* the paternalistic action is intended to prevent or eliminate.”⁹⁶ What kinds of harms are “significant”? When are the stakes high enough to justify the hard paternalistic limitation of individual liberty?

The severity and magnitude of harm surely factors into the justifiability of hard paternalism. If it is too low, then it’s just not worth interfering with the subject’s liberty. Some threshold level of significance or seriousness is required.⁹⁷ For example, an agent would not be justified in restricting a subject’s substantially autonomous self-regarding decision to cross a dilapidated bridge where the only possible adverse consequence is that the subject might get wet. On the other hand, the agent might be justified in restricting the subject from crossing the dilapidated bridge where it would

95. The objective of hard paternalism can also be to provide benefits to the subject. However, as I argue below, such “positive” hard paternalism is not justifiable. That is why I focus on harm-preventing hard paternalism.

96. Culver & Gert (1990) at 628 (emphasis added).

97. The significance or seriousness of harm might seem to fall on a continuum, such that there is no single *threshold* of significance. However, the philosophically sophisticated notion of harm that I employ below works well with a threshold account. Moreover, a threshold approach is desirable for its efficiency and practicability.

lead to the subject's death. Limiting substantially voluntary self-regarding conduct is serious business, and ought not be done except where the stakes are high, where significant interests of the subject will be protected.

Philosophers have offered a bunch of concepts in their attempts to capture the required sort of harm that warrants (as a threshold matter) hard paternalistic liberty limitation. They have found circumstances sufficiently compelling where, for example, the consequences of the subject's conduct are "far-reaching," "irreversible," "dangerous," "severe," and/or "serious."⁹⁸ Beauchamp and Childress, for example, require that hard paternalistic liberty limitation prevent "significant, preventable harm"

98. Arneson (1998) at 251; Baergen & Baergen (1997) at 482-83; Beauchamp (1983) at 130; Beauchamp (1991) at 414; Beauchamp (2001) at 37; *id.* at 381; Beauchamp & Childress (1994) at 34, 266, 281, 283; Beauchamp & Childress (2001) at 185; Beauchamp & McCullough (1984) at 89, 99; D. Beauchamp & Steinbock (1999) at x; Buchanan (1983) at 78; Callahan (1998) at 194-95; Dworkin (1971) at 123 (finding sufficiently compelling, those harms that are "far reaching, potentially dangerous, and irreversible"); *id.* at 124 ("If in addition the dangers are severe and far reaching, we could agree to allow the state a certain degree of power to intervene in such situations."); Dworkin (1988) at 116, 127 (life preserver example); Dworkin (1992) at 941 (hunter bright jacket example); Faden & Beauchamp (1986) at 292-93; Feinberg (1984) at 112; Feinberg (1986) at 92-94; Fischer (1989) at 132-33; Gert & Culver (1997) at 232; Glover (1979) at 75-76; *id.* at 179; Gostin (2001) at 68 ("Government must act only in the face of a demonstrable health threat."); *id.* at 92; *id.* at 95 ("[W]here individual liberty is at stake, the risk justifying regulation should be substantial."); Holtug (2002) at 361 ("While the harm principle is usually considered to be incompatible with state paternalism, perhaps there are cases in which the harm a person is about to inflict on herself is so severe that coercion is warranted and should not be ruled out by the principle."); Husak (1992) at 77; Kleinig (1983) at 30; *id.* at 76 ("In general the more serious the threatened detriment to welfare, the more likely it is that paternalism will be justified."); *id.* (In general the higher the risk involved, the more compelling the case for paternalism . . ."); *id.* (In general the more difficult it is to repair the harm or detriment, the more likely it is that paternalism will be justified."); *id.* at 86, 108-09; Kultgen (1995) at 68; Lee (1981) at 199-200; Mill (1848) at 945; Nikku (1997) at 86-87; Pinet (1987) at 83, 90; Regan (1974) at 199; Shapiro (1988) at 545, 550; VanDeVeer (1986) at 22; *id.* at 249-50 (regarding when have duty to aid); *id.* at 353; Weale 170-71; Wikler (1978) at 236; Young (1986) at 77 (describing "criteria to specify, closely and systematically, the nature of the harm to be prevented . . . [a] prominent consideration is whether the harm is of a serious kind.").

or “significant loss of damage to life, health, or some other major interest.”⁹⁹

Intervention with substantially autonomous, self-regarding exercises of individual liberty is, in short, a serious matter. It should not be done for trivial ends.¹⁰⁰

The difficulty, as Gerald Dworkin observes, “is specifying in advance, even vaguely, the class of cases in which intervention will be legitimate.”¹⁰¹

1. *Hard Paternalism Must Prevent Harm: Positive vs. Negative Paternalism.*

Before addressing the question of what *types* of harms constitute an appropriate objective for hard paternalistic liberty limitation, I must first establish (my implicit assumption) that preventing and/or reducing *harm* is the only appropriate objective.

That is, I must establish that providing a *benefit* to the subject, no matter how good the consequences, does not constitute a proper objective for hard paternalism.

99. Beauchamp & Childress (2001) at 19-20, 186; Beauchamp & Childress (1994) at 34, 263.

100. Armsden (1989) at 160 (“The severity and potency of self harm along with the degree of intimacy between the parties cast the right to self determination widely enough to permit intervention beyond the threshold of weak paternalism.”); Arneson (1998) at 251; Beauchamp (1996) at 1917; Beauchamp & Childress (1994) at 283; Callahan (1986) at 209; Childress (1997) at 66; Cohen (1986) at 313-14; Devlin (1977) at 80; Feinberg (1984) at 216; Feinberg (1986) at 103-04 (identifying this as an “objectively assessable component”); *id.* at 105, 118; Garet (1995) at 649; Gostin et al. (1999) at 120-24; Hobson (1984) at 301 (arguing that there are “two central features relevant to justifying paternalism” One must consider not just the subject but also “the beneficial consequences to be brought about.”); Kasachkoff (1997) at 413; Kleinig (1983) at 76; Kultgen (1995) at 142; Murphy (1979) at 176; Pellegrino (1981) at 376 (“principle of proportionality”); Rainbolt (1989) at 58; Scoccia (1990) at 323; Ten (1971) at 64; Thompson (1980) at 251.

101. Dworkin (1971) at 124.

The difference between benefit-providing and harm-reducing/preventing hard paternalism is well-framed by the widely-employed distinction between "positive" and "negative" paternalism.¹⁰² In "positive paternalism," also known as "promotive paternalism," "extreme paternalism," "benefit-conferring legal paternalism," or "beneficent paternalism," the agent restricts the subject's liberty to secure her a benefit. He intervenes to *further* the subject's interests. In "negative paternalism," also known as "preservative paternalism" or "protective paternalism," on the other hand, the agent restricts the subject's liberty in order to protect her from harm. He intervenes to *prevent frustration* of the subject's interests.

The distinction between positive and negative paternalism roughly corresponds to the distinction drawn in the public health literature between health "promotion" and disease "prevention."¹⁰³ An example of positive paternalism is requiring people to exercise for one hour each day. This requirement will presumably make people healthier and stronger than they would have been but for the hard paternalistic intervention. An example of negative paternalism is requiring people to wear seatbelts.

102. Armsden (1989) at 7; Bayles (1978) at 120 (describing "promotive" and "preservative" paternalism); Beauchamp (1978) at 1197 (describing "harm paternalism" and "benefit paternalism"); Callahan (1984) at 265; Chan (2000) at 85; Childress (1982) at 18, 107; Gert & Culver (1997) at 198; Feinberg (1973) at 33 ("extreme"); Feinberg (1984) at 27 ("benefit-conferring"); Feinberg (1986) at xvii ("benefit-conferring"); *id.* at 8; Feinberg (1988) at xx, 311-12 ("benefit-conferring"); Häyry (1991) at 24; Hodson (1983) at 43; Kleinig (1983) at 13-14; Kultgen (1995) at 66-67 (distinguishing "beneficent" and "protective" paternalism); Nikku (1997) at 51-52; Umezo (1999) at 13 ("extreme").

103. Pellegrino (1984) at 85.

Seatbelt laws don't make people better off than had they not buckled up. Rather, they protect people from injury and being worse off than had they not buckled up.

The general consensus, and the position that I espouse here, is that only negative hard paternalism is justifiable.¹⁰⁴ Hypothetical cases of positive hard paternalism, such as forcing couch potatoes to live more active lifestyles and forcing people to experience great art, are clearly *not* justified.¹⁰⁵ Beauchamp and Childress, for example, require that the subject of hard paternalism be “at risk of significant, preventable *harm*,” “*loss* of or significant *loss* of or damage to life or health or some other major interest.”¹⁰⁶

Joel Feinberg argues that negative paternalism is bad enough, but that positive

104. Bayles (1978) at 120 (“[P]reservative paternalism is more difficult to justify than harm paternalism.”); Beauchamp (1978) at 1197; Childress (1982) at 18 (“Ceteris paribus negative paternalism is easier to justify than positive paternalism.”); Feinberg (1988) at 299 (“If restricting a person’s liberty to prevent him from being physically harmed is an indefensible violation of his personal autonomy . . . then all the more so is legal coercion designed to prevent him from inflicting moral harm . . . on himself . . . [and] all the more so still is legal coercion to *promote* the actor’s own moral good.); *id.* at 311 (arguing that if legal paternalism is indefensible then positive paternalism is even more so indefensible) (“[B]eneficence theories . . . are not widely held”); Callahan (1984) at 265-66; Gert & Culver (1997) at 198 (“Paternalism acting on a utilitarian ideal is justified only if done by parents or others in a similar role.”); Kleinig (1983) at 13 (“[I]f paternalism is ever likely to be justifiable, it will most likely be so in cases where protection from harm constitutes its rationale.”); *id.* At at 30, 75; Perri 6 (2000) at 158; Weale (1983) at 803; Wikler (1979) at 378. The positions of some of these authors are expressed such that they imply *some* positive paternalism is justified. However, may be true largely because they do not distinguish between hard and soft paternalism in their analyses of positive versus negative paternalism.

105. Weale (1983) at 803 (“The objections to compulsory exercise sessions for all members of the population are too obvious to need elaboration.”).

106. Beauchamp & Childress (2001) at 186 (emphasis added); Beauchamp & Childress (1994) at 266 (emphasis added)..

paternalism – which he describes as "extreme paternalism."¹⁰⁷ and categorizes as a wholly separate and independent liberty limiting principle¹⁰⁸ – is even worse because “it would justify paternalistic interference not merely to prevent a person from harming himself, but also to force him (or teach him) whatever his own wishes in the matter, to *benefit* himself.”¹⁰⁹ Feinberg argues that positive paternalism is “a more extreme version of ordinary harm-preventing legal paternalism.”¹¹⁰ And he assesses that whatever the moral burden of justification for negative paternalism, the burden for positive paternalism is greater.

Although Feinberg does not examine *why* positive paternalism is less justifiable than negative paternalism – as he rejects *all* hard paternalism, we can get some insight from examining the reasons that Feinberg provides for rejecting a “benefit to others principle,” a positive analogue to the harm principle.¹¹¹ Feinberg notes: “Central to the idea of harm is the idea of a starting point or baseline from which the setback is charted and measured.”¹¹² It is part of the liberal framework that individuals pursue their

107. Feinberg (1973) at 33; Feinberg (1988) at 299. *See also* Armsden (1989) (comparing "moderate paternalism" and "extreme paternalism").

108. Feinberg (1988) at xx, 311-12 ("benefit-conferring legal paternalism").

109. Feinberg (1988) at 299.

110. Feinberg (1988) at 311-12.

111. Feinberg (1988) at 311-12 ("The distinction may be useful but also confusing."). *See also* Beauchamp (2001) at 15-16 ("It is noncontroversial that we must avoid *causing* harm to others, even when they are complete strangers. Much more controversial is the claim that morality actually requires us to *contribute* to and *promote* the betterment of the human condition . . .").

112. Feinberg (1984) at 53.

interests on their own and set their own baselines.

Liberty limiting principles merely correct for deviations or “curves” away from the baseline.¹¹³ They are, thereby, limited in that they are addressed to the obstacle/setback. A benefit to others principle (as would positive paternalism) leaves more room for manipulation and the imposition of alien conceptions of the good. If we analogize the baseline to flying a plane from point A to point B, then negative paternalism is where the agent intervenes to prevent the plane from crashing or veering off course. Positive paternalism, on the other hand, is where the agent intervenes because he thinks the subject should fly to C because that’s a better destination than B.

2. *First Objection to the Limitation of Justified Hard Paternalism to Negative Paternalism.* Like Feinberg, John Hodson recognizes that “more problematic are cases in which [subjects] are coerced in order to obtain for them some benefit rather than to protect them from some harm.”¹¹⁴ But Hodson argues that “even here, some paternalism (e.g. compulsory education) is widely accepted.” Hodson appears to have provided a counterexample to the necessity that justified hard paternalism be negative. However, Hodson’s purported counterexample fails. It is, as most purported positive

113. The harm principle legitimizes intervention to prevent X from setting back the interests of Y. Negative hard paternalism legitimizes intervention to prevent X from setting back his own interests. No accepted liberty limiting principle legitimizes intervention to *promote* the interests of the subject or another.

114. Hoidson (1983) at 43.

counterexamples invariably are, an instance of soft, not hard, paternalism.¹¹⁵

Compulsory education is directed toward children under eighteen years of age. Such persons are presumed to be incapable of making substantially autonomous decisions.

3. *Second Objection to the Limitation of Justified Hard Paternalism to Negative Paternalism.* It might be objected that the typical examples of positive hard paternalism (*e.g.* obligatory pushups) are dismissible because they are examples of trivial or moderate benefit. That hard paternalism is not justified on the basis of providing such benefits does not show that it is not justified where it provides *significant* benefits to the subject.

For example, suppose an opportunity came along that would enable the subject to significantly advance one of the central projects or general welfare of her life. The subject, however, though aware of the opportunity, is engaged in some trivial activity incompatible with pursuing this opportunity or is otherwise uninterested in seizing the opportunity. We might imagine a poor family forcing the daughter to marry (perhaps through institutionally arranged and sanctioned marriage) the rich prince. Or take the early twentieth century plastic surgeon who fixes up racial minorities so that they'll fit in better and have better career opportunities. The poor daughter and the Chinese

115. Callahan (1984) at 265 ("Most purely positive paternalistic laws concern minors.").

immigrant might be better off as a result of these interventions (and agree that they are better off). But we still find these cases to be unjustified hard paternalism. We do not like benefits being *foisted* upon us.

4. *Third Objection to the Limitation of Justified Hard Paternalism to*

Negative Paternalism. It might be objected that I cannot place such heavy reliance on the distinction between negative and positive paternalism. The distinction between harm and benefit corresponds to points on a continuum rather than to a difference of type. Individuation problems make it difficult to distinguish between harm and benefit.¹¹⁶ Thus, states the objection, little justificatory weight can rest on the fact that hard paternalism is negative rather than positive.¹¹⁷

However, this objection is stated too strongly. In many cases, it is quite clear whether the object of the intervention is to prevent a harm or to provide a benefit. In the following examples there is little doubt that the object of the intervention is to prevent harm: FDA drug bans, cigarette bans, motorcycle helmet laws, seatbelt laws, and the

116. Gordon (1980) at 268 (“[A]n action can be referred to by different descriptions”); Hayry (1991) at 24 (noting the distinction represents “matters of degree rather than the matters of clear-cut classes. So, although the variety of possible reasons for paternalistic intervention ought to be registered and recognized, it seems probable that finer details of the divisions will not be able to carry much weight in justificatory considerations”); Sunstein (1997) at 179; VanDeVeer (1986) at 30; Weale (1983) at 788 (“[T]here is a certain indefiniteness about the identification of actions”).

117. Brock (1983) at 242; Kultgen (1995) at 67 (“I see no reason why intervening in a person’s life to prevent her from failing to gain an important good isn any less justified than intervening to prevent her from harming herself.”); Nikku (1997) at 52.

physician therapeutic privilege. The objective of hard paternalism in these cases is to prevent the subjects from being worse off than they would have been had they engaged in the restricted conduct. In other cases, there is little doubt that the object of the intervention is to provide a benefit. For example: requiring couch potatoes to live more active lifestyles, forcing people to experience great art, requiring certain books to be read, requiring obligatory pushups and situps. The objective of hard paternalism in these cases is to make the subjects better off than they would have been had they failed to engage in the required conduct.¹¹⁸

While it may not be possible to identify with precision and certainty the point in the continuum that divides positive and negative paternalism (if there is one), a great many cases fall away from the borderline and are easy to classify. James Childress, for example, admits that the distinction between positive and negative paternalism “is not always easy to draw” and that “some acts may fall under both positive and negative beneficence.”¹¹⁹ Nevertheless, Childress maintains that the distinction “is still useful.” He offers the example of “the distinction between reducing the risks of morbidity and premature mortality, on the one hand, and promoting excellent health, on the other.”¹²⁰

118. Positive paternalism is not necessarily active, but cases of positive paternalism often turn out to be active, and cases of negative paternalism often turn out to be passive.

119. Childress (1982) at 107-08.

120. Childress (1982) at 107-08.

As I argued with regard to the self-regarding/other-regarding distinction in Chapter One, a “rough and serviceable” distinction can be drawn even though the dividing line is not altogether sharp and clear. As Feinberg put it: “There will be a twilight of cases that are difficult to classify, but that is true of many other workable distinctions, including between night and day.”¹²¹

5. *The Definition of “Harm.”* Now that I’ve established that hard paternalism is limited to preventing harm, I must identify what *types* of harm are proper subjects of hard paternalism. But first, it is useful to recall the definition of “harm” itself.

Feinberg defines “harm” as a wrongful setback to a person’s interests. A harm must thwart or defeat something both in which the subject has a stake and to which the subject has a right.¹²² Here, however, we must use “harm,” here, in its more natural and common sense – in Feinberg’s broader sense of the term, meaning only setback to the subject’s interest or welfare and not incorporating a notion of wrongfulness.¹²³ We cannot use Feinberg’s standard (narrow) concept of harm (with the concept of wrongfulness built into it), because that would presume answers to the very questions of hard paternalism under discussion.

121. Feinberg (1986) at 56.

122. Feinberg (1984) at 34-36.

123. Feinberg (1984) at 36, 102, 105-06, 215, 256 n.15.

Ian Hunt observes that if the subject's conduct is substantially autonomous, then, while it may be a setback to the subject's interests, it cannot be wrongful.¹²⁴ But the question of the justifiability of hard paternalism is whether substantially autonomous conduct can be justifiably restricted. To conclude that such conduct cannot be restricted because it is not wrongful and thereby not harmful, begs the question. The philosophically interesting question concerning the justifiability of hard paternalism, and the topic of this chapter, is whether *despite* the subject's autonomous choice, she should be permitted to engage in her conduct.¹²⁵ Accordingly, Beauchamp and Childress, for example, "[i]n order to avoid prejudging cases, . . . construe harm in the second and nonnormative sense of thwarting, or setting back some party's interests."¹²⁶

The analysis of what sorts of harm (*i.e.* setback to interest) are significant involves two elements: (1) the type of interests which are set back, and (2) the degree or extent to which they are set back. I analyze the second element here, and I will analyze the first element in the next two subsections.

As Feinberg notes, harm is the setback of an interest, and setbacks do differ in

124. Hunt (1995) at 314 n.14.

125. Childress (1982) at 79; Feinberg (1984) at 115; Feinberg (1986) at x, 10-11; Kleinig (1983) at 33.

126. Beauchamp & Childress (2001) at 116.

degree.¹²⁷ Unfortunately, Feinberg did not work out (in the context of the harm principle) with much precision the degrees to which setbacks differ. And, although it is important to constrain the paternalistic agent's discretion, I cannot measure setbacks here. "It is impossible to prepare a detailed manual with the exact weights of interests, the degree to which they are advanced or thwarted by all possible actions and activities . . . [I]t is the legislator himself [who must] use his own fallible judgment."¹²⁸

Nevertheless, we can set a minimum threshold level of necessity. In order to be significant, the subject's interest (the nature of which I will discuss next) must be setback to a consequential degree. It must be, as Feinberg puts it, "below a tolerable minimum [or adequate] level."¹²⁹ This threshold line is somewhat vague, but workable.¹³⁰ We can, for example, appreciate the difference in the setback to a subject's interest in financial security where, on the one hand, the agent intervenes to prevent her from blowing her life savings, and where, on the other hand, the agent intervenes to

127. Feinberg (1984) at 204.

128. Feinberg (1984) at 203.

129. Feinberg (1984) at 206.

130. Feinberg (1986) at 56 ("There will be a twilight of cases that are difficult to classify, but that is true of many other workable distinctions, including between night and day."); Holtug (1993) at 410 ("Maybe there is a grey zone where we are not sure . . . but there would also be cases where we were sure that it was. If this was the case, why can't we draw a line while making sure that if we err, we err on the side of safety?"); Kopelman (1997) at 301; Kultgen (1995) at 81, 90 ("Autonomy, then, is a matter of type and degree . . . but gross differences can be discriminated"); Lode (1999) at 1511 ("The terms "tall" and "bald" are vague, but they have not been expanded beyond a relatively fixed understanding of their relative scopes."); Malm (1995) at 11; VanDeVeer (1986) at 132 ("This admitted imprecision about the criteria for deciding who is autonomous, however, seems no more reason to dispense with the concept than it is in the case of 'blue,' 'tall,' or 'sexy.'"); *id* at 346 ("fuzzy at the edges of competence"); Van der Burg (1998) at 136 (arguing that while it's often unclear how to apply terms such as "bald" or "tall," often it is quite easy).

prevent her from placing a modest bet at the racetrack.

6. *The Harm Need Not Be Grave Physical Injury or Death.* Knowing how far an interest must be set back to be a significant harm is only half the answer. It is also necessary to examine the type of interests affected. The setback of some interests, even below a tolerable minimum level, will not constitute significant harm. Only the setback of certain *types* of interests constitutes significant harm.

While he never directly addressed the circumstances for justifiable hard paternalism, Joel Feinberg did address similar concerns in the course of defending a bad Samaritan rule. In this context, Feinberg conceded that the bad Samaritan rule “weakens the control people have over their own affairs.” Nevertheless, Feinberg argues, “that slight surcharge on liberty is easily balanced on the weighing scales by the requirement that the harm we are obligated to prevent be restricted to *grave physical injury or death.*”¹³¹ If the surcharge is outweighed in that context, then it is also outweighed (if of similar proportions) in the hard paternalism context.¹³²

Indeed, Feinberg’s approach is appealing. It is very tempting to limit justifiable

131. Feinberg (1984) at 186 (emphasis added).

132. In both the bad Samaritan context and in the hard paternalism context, the subject of liberty limitation has her autonomy restricted to provide beneficence to someone whom the subject does not want to provide beneficence.

hard paternalistic liberty limitation to cases involving relatively “blunt and visible”¹³³ harms, where the case for paternalistic intervention seems most plausible.¹³⁴ Culver and Gert refer to intervention to save the subject from very serious harm as the “paradigmatic case of justified paternalism.”¹³⁵ It would be “safe” to draw a “rough and serviceable distinction” by requiring that the necessary harm at stake for justified hard paternalism be death or major bodily disability.

However, such a condition cannot be a *necessary* condition for justified hard paternalism. Financial harm, psychological harm, and even harm to reputation can also sometimes be significant enough to warrant hard paternalism.¹³⁶ Tom Beauchamp offers the following counterexamples.¹³⁷ Suppose your friend, after saving for many years to provide for the financial security of his family, were about to (substantially autonomously) blow his entire life savings on a faddish gimmick he saw on a television

133. Feinberg (1984) at 3.

134. Feinberg (1986) at xvii; Feinberg (1986) at 42; Feinberg (1988) at 17 (“Physical injury, however, is a setback to the welfare interest all normal persons are presumed to have in the efficient functioning of their bodies.”); *id.* at 299 (arguing that interference to prevent physical harm is more defensible than interference to prevent moral harm); Kleinig (1983) at xii (“I commence with those areas in which the case for paternalism might seem strongest . . . physical protection to health”); *id.* at 13 (“[I]f paternalism is ever likely to be justifiable, it will most likely be so in cases where protection from harm constitutes its rationale.”); *id.* (arguing that the justificatory burden is less in part because in such cases the subject at least acknowledges the rejected good as a good); *id.* at 81, 201; Scoccia (2000) at 55; Smiley (1989) at 312; Ten (1971) at 57.

135. Culver & Gert (1990) at 628.

136. Moralistic paternalism may also be justifiable. For example, where maintaining a certain character is a central part of a subject’s life plan, an agent may intervene to prevent moral harm. In those circumstances, the agent may restrict immoral conduct that would defile the subject’s character.

137. Professor Beauchamp offered these examples (without the detail) both orally and in writing during my oral defense of this dissertation, on June 10, 2002.

infomercial. In these circumstances, where the friend is about to do something with catastrophic negative consequences for such a trivial end, it seems justifiable to intervene. Even though the only harm at stake is financial, hard paternalism seems justified.

Similarly, consider the longtime faithful White House employee who might have discovered President Clinton's "romantic" activities with intern Monica Lewinsky – before they were discovered by the press. Knowing how hard Bill Clinton had worked to get from rural poverty to the Arkansas Governor's mansion to the U.S. Presidency, and knowing how much importance Bill Clinton placed on earning a respected and revered place in American History; the employee intervenes and transfers (contrary to Clinton's preferences – as, we will assume, he has no direct managerial authority over interns) Ms. Lewinsky to another government post. In these circumstances, where Clinton is about to do something with catastrophic negative consequences for such a trivial end, it seems justifiable to intervene. Even though the only harm at stake is harm to reputation, hard paternalism seems justified.

What is it about the harm in these examples that, like the harm in cases of grave physical injury and death, that leads us to find (at least as a threshold matter – we still have five more conditions to satisfy) that the harm is sufficient to warrant hard

paternalistic liberty limitation?

7. The Criteria for “Significant Harm”: The Protection of Critical Interests.

If we want to determine a level of significance of harm, and if harm is defined in terms of setback to interests; then what we really need is a measure of interests. We need to evaluate (at least in a rough way) the importance of the subject’s interests which are set back by the consequences of her conduct.

While we cannot create a mathematical “scale” to measure interests, we can make some rough categorical, threshold distinctions. For example, just as we employed the substantial autonomy threshold in Chapter Two, here we can distinguish between interests that are substantially important to the subject and those that are not substantially important to the subject. Given the need, as discussed above, to restrict hard paternalism to serious harm, we ought to restrict it to preventing the setback of important interests.

Feinberg argues that some interests are “more important” because they are relatively deep rooted and stable. Feinberg calls these “ulterior interests” or “focal aims.”¹³⁸ He includes as examples of these interests: “producing good novels or works

138. Feinberg (1984) at 37-45, 55-61, 203-06, 215.

of art, solving a crucial scientific problem, achieving high political office, successfully raising a family, achieving leisure for handicraft or sport, building a dream house, advancing a social cause, ameliorating human suffering, and achieving spiritual grace.”¹³⁹ These interests are important to people because they constitute the more ultimate goals and aspirations they have for their lives.

In a manner similar to and that roughly tracks Feinberg’s distinction between interests and ulterior interests/focal aims, Ronald Dworkin distinguishes between what he calls “experiential” or “volitional interests” and “critical interests.” Dworkin explains that experiential/volitional interests are those that we have for pleasure, such as good food, playing softball, sailing well, avoiding the dentist, or listening to opera. We enjoy these things – at least while we’re engaged in them. However, Dworkin argues, we don’t think that these things are very important or that their satisfaction makes our lives genuinely better.

Dworkin explains that “critical interests,” on the other hand, are those interests in which we make a more substantial investment, such as having a close relationship with our children or success at work. We pursue critical interests even at the expense of experiential interests, because satisfaction of our critical interests makes life genuinely

139. Feinberg (1984) at 37.

better.¹⁴⁰ Furthermore, in addition to particular discrete critical interests, Dworkin suggests that we also aim to impose a coherent *structure* on these interests, as part of our self-defining commitment to a “vision of character.”¹⁴¹

Finally, drawing a distinction somewhat similar to Feinberg and Dworkin, John Kleinig argues that his "Argument from Personal Integrity" sanctions hard paternalistic intervention only where the subject's conduct "places [her] more permanent and central projects in jeopardy."¹⁴² Kleinig's "Argument from Personal Integrity" holds that a paternalistic agent may override an individual's ephemeral goals in order to help promote or protect her more stable goals.¹⁴³ Thereby, the agent's intervention does not impose on the subject a foreign conception of the good, but instead merely helps the individual achieve her *own* conception of the good. Kleinig summarizes his argument as follows:

Where our conduct or choices place our more permanent, stable, and

140. R.M. Dworkin (1989) at 484-85; R.M. Dworkin (1993) at 201-05, 235-36; R.M. Dworkin (2000) at 216, 242-43. This tracks Robert Young's distinction between "occurrent sense of autonomy," autonomy of the moment from the more important "dispositional sense of autonomy," where the focus is on the autonomous person's life as a whole. Young (1986) at 72-73.

141. R.M. Dworkin (1993) at 205.

142. Kleinig (1983) at 67-73. *See also* Cohen (1986) at 331 (giving a broader definition than Kleinig's integrity).

143. *See also* Young (1986) at vii ("[D]ispositional autonomy may require the emplacement of constraints upon inessential or short *term* or 'occurrent' autonomy which seriously threaten [the subject's] overarching life plan."); *id.* at 76 ("The strong paternalist may thereby be required to violate occurrent autonomy . . . such forfeitures worthwhile because they succor dispositional autonomy."); *id.* at 110.

central projects in jeopardy, and where what comes to expression in this conduct or these choices manifests aspects of our personality that do not rank highly in our constellation of desires, dispositions, etc., benevolent interference will constitute no violation of integrity. Indeed, if anything, it helps to preserve it.¹⁴⁴

* * *

The argument in question maintains that where a course of conduct would, in response to some peripheral or lowly ranked tendency, threaten disproportionate disruption to highly ranked concerns, paternalistic grounds for intervention have a legitimate place.¹⁴⁵

According to Kleinig's Argument from Personal Integrity, the paternalistic agent does not impose any alien and allegedly transcendental values onto the subject. Rather, a tension *already* exists among the subject's preferences. The subject's peripheral preferences are restricted in order to protect her more central preferences. The agent's intervention merely reflects (and helps resolve) this pre-existing tension within the subject's preference pattern.

Kleinig's Argument from Personal Integrity is also nicely summarized in

Kultgen's critique:

Rather than drawing the obvious conclusion that the parentalist should promote the beneficiary's objective good regardless of her decision, Kleinig proposes a set of restrictions that maximize the *probability* that his acts will *accord with* what her decisions would be were she not irrational or encumbered. Kleinig believes that the parentalist should honor her settled wishes and the decisions that best reflect her persona even if these are not directed toward her objective welfare. If this is Kleinig's position, the consequences of actions are *not* what is crucial for

144. Kleinig (1983) at 68.

145. Kleinig (1983) at 68.

him.¹⁴⁶

In short, Kleinig argues that hard paternalistic liberty limitation is justified when the subject's decision threatens the subject's integrity.

It is, of course, impossible to prepare a detail manual with the exact weighing of all human interests.¹⁴⁷ Whether we use the terminology of "integrity" (Kleinig), "critical interest" (Dworkin), or "ulterior interest" (Feinberg); we still cannot rank with precision the importance of subject's interests (and thus the significance of harm). Nevertheless, we can distinguish between important and unimportant harm.¹⁴⁸ And this is enough.¹⁴⁹

146. Kultgen (1995) at 232 (first emphasis added).

147. Feinberg (1984) at 203.

148. Beauchamp (1978) at 296 ("No doubt, degrees of control and voluntariness rest on a multilevel continuum, but informed determinations can be made in many cases regarding the substantial voluntariness or nonvoluntariness of the action."); Beauchamp (1983) ("No doubt we shall not possess such a comprehensive theory for some time, but we can at least begin to address the right issues and develop elements of the theory. Not to be neglected is the extent to which these issues are empirical."); Feinberg (1986) at 56 ("There will be a twilight area of cases that are difficult to classify, but that is true of many other workable distinctions, including that between night and day."); *id.* at 102 ("There is no simple mathematical formula . . . [O]n the other hand, there are decisions that are manifestly unreasonable."); Goldman & Goldman (1990) at 74 ("That our criteria for justified paternalism imply borderline cases, however, does not show that the criteria themselves are not sufficiently clear or acceptable."); Holtug (1993) at 410 ("Maybe there is a grey zone where we are not sure . . . but there would also be cases where we were sure that it was. If this was the case, why can't we draw a line while making sure that if we err, we err on the side of safety?"); Kopelman (1997) at 301; Kultgen (1995) at 81, 90 ("Autonomy, then, is a matter of type and degree . . . but gross differences can be discriminated); Malm (1995) at 11; VanDeVeer (1986) at 132 ("This admitted imprecision about the criteria for deciding who is autonomous, however, seems no more reason to dispense with the concept than it is in the case of 'blue,' 'tall,' or 'sexy.'"); *id.* at 346 ("fuzzy at the edges of competence"); Van der Burg (1998) at 136 (arguing that while it's often unclear how to apply terms such as "bald" or "tall," often it is quite easy).

149. I discuss specific examples of the sorts of conduct that entail consequences that cause significant harm in my argument for condition three. Those cases bolster the theoretical argument by illustrating why low harm, as opposed to significant harm, is not a legitimate objective for hard paternalism.

8. *The Criteria for “Significant Harm”: The Protection of Welfare Interests.*

Defining the significant harm that is necessary for justified hard paternalism as “a setback to the subject’s critical interests” answers the Clinton romanticizing example, and it captures much of what we want to include as a legitimate objective for hard paternalism. But it is too narrow. It does not seem to include some things that we want to include: the blowing life savings example, the grave physical injury and death example. Limiting significant harm to the setback of critical interests cannot be necessary. We need to expand significant harm (in a non-ad hoc manner) to include the prevention of these other harms that are also considered to be proper objectives of hard paternalism.

The solution is to supplement the scope of significant harm to include the setback not only to critical interests but also to what Feinberg calls “welfare interests.”¹⁵⁰ Welfare interests, Feinberg explains, are more basic than critical interests, and are generally essential for them. Feinberg provides as examples of welfare interests:

physical health and vision, integrity and normal functioning of one’s body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual activity, emotional instability, absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and

150. Feinberg (1984) at 57-60.

physical environment, and a certain amount of freedom from interference and coercion.¹⁵¹

These interests are, Feinberg argues, “reasonably ascribed to the standard person” because they are generally necessary and instrumental to most ulterior interests.¹⁵² Of course, some individuals might not have all these welfare interests. And for some (like Jehovah’s Witnesses) these welfare interests sometimes conflict with critical interests. Death, for example, sets back welfare interests. But for some, like Jesus, it also promotes critical interests. But that conflict situation is readily addressed by maintaining that where a welfare interest is *incompatible* with a subject’s critical interest, the critical interest trumps the welfare interest (which is only presumptive), so that a setback to that welfare interest will not constitute a significant harm.

The examples of blowing one’s life savings and grave physical injury or death, which could not be explained as setbacks to *critical* interests, can be explained as setbacks to *welfare* interests. They are setbacks to what Feinberg describes as interests in “at least minimal financial security” and “integrity of one’s body.” This expansion of the scope of “significant harm” for purposes of condition one (to include not only the setback below a tolerable minimum of a subject’s *critical interests* but also the setback below a tolerable minimum of a subject’s *welfare* interests) is sufficient to capture the

151. Feinberg (1984) at 37, 57-60.

152. Feinberg (1984) bat 112.

objectives considered legitimate for hard paternalism.¹⁵³

* * *

In sum, the second necessary condition for justified hard paternalism requires that the agent limit the subject's liberty only in order to protect the subject from significant harm. We can state this condition:

It is a necessary condition for the justifiability of hard paternalism that:

2. *The agent limit the subject's liberty with the objective of protecting the subject from significant harm.*

Only where the harm at issue is significant are the stakes high enough to warrant (and outweigh) the intrusion on the subject's autonomy.¹⁵⁴

D. Condition Three: Hard Paternalistic Liberty Limitation Must Restrict Only Conduct in Which the Subject Has Either a Low Autonomy Interest or an Irrational High Autonomy Interest.

Once the second condition is satisfied, and the objective of the hard paternalism meets the requisite threshold level of harm, we can turn to assess whether the third condition is satisfied. The third condition for justified hard paternalism requires that the agent interfere with conduct in which the subject has either a low autonomy interest or

153. I have not defended, but have simply imported, the model of critical interests upon which I rely. I have aimed to show that a distinction between critical and non-critical interests is generally well-regarded. A fuller examination of this condition will require a fuller examination of the concept of critical and welfare interests. Their soundness and workability should be tested.

154. In order to better guide hard paternalistic agents, this condition should be further specified to indicate, for example, how agents are to identify critical interests. I have provided, here, additional content to this guideline. An analysis of how it can be and should be operationalized must wait for another day.

an high autonomy interest that is irrational.

Where the second condition focuses on the content of the beneficence side of the equation (*i.e.* which interests of the subject are impacted and by how much are they impacted by the consequences of her conduct), the third condition focuses on the autonomy side of the equation (*i.e.* what interests does the subject have in the conduct that the agent aims to restrict).¹⁵⁵

We must look not only to the significance of the harm at stake but also to the subject's autonomy interests. John Gray explains: "To make sense of human freedom, some account of the Z factor is required, *i.e.* what it is that the agent is prevented from doing"¹⁵⁶ It matters just how severe the liberty limitation is from the individual's point of view.¹⁵⁷

155. Both sides of the equation are defined in terms of the subject's interests. The beneficence side of the equation is defined in terms of the interests that are adversely affected by the subject's conduct. The autonomy side is defined in terms of the interests the subject has in the conduct itself.

156. Gray (1991) at 20.

157. Beauchamp & Childress (1994) at 123 ("Actions therefore can be autonomous by degrees"); Berlin (1969) at 130 n.1 (arguing that one's "extent of freedom" depends on "*how important in my life plan*, given my character and circumstances, these possibilities are when compared with each other") (emphasis added); Blokland (1997) at 165 ("A consideration is which *role* this behavior plays in the life plan or the identity of the person in question.") (Paternalism is easier to justify where "no alien values are imposed.") (observing that most writers fear "making normative judgments" and claiming that one "particular manner of life is preferable" and aim instead at a "purely procedural theory"); Brock (1988) at 551; Dworkin (1971) at 125 ("A good deal depends on . . . *how important* to the nature of the activity is the absence of the restriction when this is weighed against the role that the activity plays in the life of the person.") (emphasis added); Feinberg (1986) at 102 (arguing that the *value or importance* of the conduct to the subject factor into its reasonableness); *id.* at 108-09, 123, 129, 132, 134, 137; *id.* at 154 (considering the subject's *reasons* for engaging in her conduct); *id.* at 168-69 (looking at the subject's *reasons* for

1. *The Four Threshold Categories.* Beauchamp and Childress explain, as I

discussed in the introduction to this chapter, that

The most plausible justification of hard paternalism places benefit on a scale with autonomy interests and balances both: As a person's interests in autonomy increase and the benefits for that person decrease, the justification of paternalistic action becomes less cogent; conversely, as the benefits for a person increase and that person's interests in autonomy decrease, the justification of paternalistic action becomes more plausible.¹⁵⁸

It is unclear whether, if we took Beauchamp and Childress literally, it is possible to devise carefully calibrated "scales" of harmfulness and intrusiveness¹⁵⁹ – and, in any case, I cannot do so here. Nevertheless, it is fruitful, at least as an initial move, to distinguish four threshold categories.

engaging in the restricted conduct); *id.* at 345; Glick (2000); Glick (2000a); Glover (1979) at 180 ("A rational social policy would be concerned with striking a balance between minimizing risks and minimizing the kinds of restrictions that frustrate people in things that *really matter to them.*") (emphasis added); Goodin (1993) at 236; Gutmann & Thompson (1996) at 266; Hardin (1988) at 139-40 (strength of paternalism falls on a continuum); Hobson (1984) at 299-300; Hunt (1995) at 319-20 (observing that it is difficult to determine what is an "unacceptable infringement" but also noting that it is not *all gray*); Hardin (1988) at 139-40 (arguing that the strength of paternalism falls along a continuum); Kleinig (1983) at 75 ("There is a presumption in favor of those paternalistic impositions that accord with the recipient's own conception of good.") ("*Ceteris paribus*, the stronger the paternalism, the heavier the burden on the interferer . . ."); *id.* at 76, 88-90, 110; Kultgen (1995) at 68 ("[J]ustifiability is a function of the strength of the subject's desires which they frustrate, the severity of the measures, and the magnitude of the goods and harms produced."); *id.* at 90; *id.* at 182 ("In a significant concession to common sense, Feinberg asserts that the line will differ according to the kind of intervention."); Nikku (1997) at 258; *id.* at 339 (focusing on the degree of intrusion); Nuyen (1983) at 29; Perri 6 (2000) at 141; Raz (1986) at 122; Regan (1974) at 196; Regan (1983) at 120; Schonsheck (1994) at 181-82; Unwin (1996) at 43 (arguing that there should be "balance between the *degree of infringement* of personal liberty and the amount of benefit to be gained") (emphasis added); Weale (1978) at 170 (requiring joint conditions that "interference with a person's own freely chosen plan of life must be severe" and "interference should be justified by reference to some element in the subject's own life plan").

158. Beauchamp & Childress (2001) at 185.

159. Bonnie & Guyer (2002) at 276 ("[A] restriction of individual freedom should be weighed as one of the 'costs' of any proposed intervention. . . . How does one quantify the 'costs' of this reduced freedom . . . and weigh them against the safety gains . . .").

Defending key threshold categories is the methodology that Feinberg employed in *Harm to Others*, in his discussion of bad Samaritan laws. Feinberg “divided up the spectrum of hypothetical cases into three segments”: (1) clearly justified cases – where beneficence outweighs autonomy (2) clearly unjustified cases – where autonomy outweighs beneficence, and (3) “everything in the vast no-man’s-land of uncertain cases in between the extremes.”¹⁶⁰

Rather than employ the model/metaphor of a two-pan balancing scale, and divide the cases into only three categories like Feinberg, I instead develop four categories by distinguishing between high (*i.e.* significant) and low (*i.e.* non-significant) harm and between high and low intrusiveness. These categories are represented in the table below, in which harm increases from bottom to top and intrusiveness increases from left to right.

(1) High harm, low intrusion	(4) High harm, high intrusion
(2) Low harm, low intrusion	(3) Low harm, high intrusion

With these four categories, we need not compare the more abstract principles autonomy and beneficence directly. We can instead compare these narrower, less indeterminate, and more refined categories; and secure some action-guiding content.

160. Feinberg (1984) at 156.

2. Category (1): High Harm, Low Intrusion. Category (1) is the classic category of justified hard paternalism. Satisfaction of the second condition means that the consequences of the subject's conduct will thwart one of her critical interests.

Where the subject does not engage in the conduct itself in furtherance of another critical interest, then the tradeoff seems rather easy.¹⁶¹ In those circumstances, the subject

161. Beauchamp & Childress (1994) at 281 ("[P]reventing major harms or providing major benefits while only *trivially disrespecting* autonomy has a highly plausible paternalistic justification.") (emphasis added); Beauchamp & Childress (2001) at 185 (arguing that hard paternalism is more cogent and plausible where it only trivially disrespects autonomy and the subject's interests in autonomy are weak); Beauchamp & McCullough (1984) at 100 ("[N]o significant values or beliefs of the patient are at stake in the proposed intervention . . . used to ascertain whether the limitation of autonomy is of relatively minor or greater importance . . ."); Dworkin (1983) at 127 (supporting intervention when it poses only a "minimal risk of harm to them at the cost of a *trivial interference* with their freedom") (emphasis added); Dworkin (1993) at 361; Engelhardt (1996) at 325 (explaining implicit fiduciary paternalism "assumed that individuals would wish to be protected against errors that are *not integral* to their plans or choices when such protection involves only a minor intrusion.") (emphasis added); Feinberg (1985) at 37 ("[C]onduct that is *trivial or frivolous* will have less weight on the balancing scales.") (emphasis added) (distinguishing a passing whim and a desire central to one's life); *id.* at 76; Feinberg (1986) at 137 (comparing one who doesn't wear a helmet because he "just can't muster up the initiative" and one who does so as a "symbolic reflection of his *commitment* to speed, excitement, even to danger") (emphasis added); Hospers (1980) at 258 (defending paternalism "in accordance with [a subject's] long-term goals for himself" -- "counter his present desires . . . to fulfill his long-term desire"); *id.* at 264 (defending "paternalistic action . . . taken in order to help a person achieve *his own goals*."); Husak (1980) at 43 (not all cases impose an agent's conception of the good, the agent can use the *subject's conception* as in self-paternalism) (emphasis added); Kekes (1997) at 17; Kleinig (1983) at 9, 13 (arguing that the justificatory burden is less in part because in such cases the subject at least *acknowledges* the rejected good as a good); *id.* 30, 53, 68-69, 73; Rainbolt (1989) at 58 ("Some infringements on autonomy are *more serious* than others. Paternalism is more likely to be acceptable when only a minor infringement is required.") (emphasis added); Raz (1986) at 122; Regan (1974) at 196; Regan (1983) at 120; Schone-Seifert (1997); Schonscheck (1994) at 181-82; Thompson (1980) at 255 ("To justify paternalism, we cannot appeal to what *rational* persons in general would desire if we can determine what a *particular* person would want in the circumstances.") (emphasis added); Thompson (1980) at 255; VanDeVeer (1986) at 95-163 (examining different conceptions of the good); *id.* at 317; *id.* at 447 ("[W]e may intervene paternalistically in the lives of other competent persons only in ways which respect their conception of the good *even if* mankind are not greater gainers."); Woodward (1982) at 72 (offering a similar argument in terms of consent: "reason to suppose that because of his most *deeply held projects* and values he will come to consent") (emphasis added); *id.* at 86; Young (1986) at 65 (arguing that "[t]hose who seriously value autonomy cannot remain content with weak paternalism"); *id.* at 65-70 (arguing in a manner similar to Kleinig that paternalism is justified to protect "dispositional autonomy" by infringing "occurrent autonomy"); Zamir (1998) at 264, 273; Zembaty (1986) at 65 (defending physicians' hard paternalism "on the basis of all the knowledge they can gather about their patients' values and emotional makeup").

thwarts a critical project by engaging in conduct in which the subject does not have a high autonomy interest. Restricting the conduct would not be very intrusive but would prevent significant harm.

Ronald Dworkin argues that an agent's interference with a subject's experiential interests would be only "superficial," "mild," or "volitional" hard paternalism.¹⁶² Such hard paternalism, Dworkin argues, is acceptable and easily defended. Dworkin suggests that this form of paternalism, which includes, for example seatbelt laws, helps subjects achieve what they already want.¹⁶³

Robert E. Goodin describes the imposition of a desire-dependent conception of the good as "soft₁" paternalism: Notwithstanding the similarity of vocabulary, this is not the same soft/weak paternalism I contrasted with hard/strong paternalism in Chapters Two and Three. Rather, it is a novel category, which I will designate as "soft₁" paternalism. Goodin writes: "What is involved here is a relatively weak form of paternalism, one that works within the individual's own theory of the good [not against, but *for*, her critical interests] and merely imposes upon him a better means of achieving

162. Dworkin does not fully discuss this form of paternalism, quickly moving on to his central concern: critical paternalism. Wolfe (1994) at 618, 626. Notwithstanding the different vocabulary, all three terms have the same denotation.

163. R.M. Dworkin (1991) at 77, 85. *See also* R.M. Dworkin (2000) at 217, 268; Neal (1997) at 176.

what after all are his own ends.”¹⁶⁴

Like Goodin, James Childress also identifies paternalistic intervention which appeals to the subject’s *own* values as soft₁ paternalism.¹⁶⁵ Childress suggests that a “principle of limited beneficence” or “limited active paternalism” can justify paternalism because while “beneficence provides the engine – the motivation and direction,” the “patient’s wishes, choices, and actions determine the tracks along which it runs.” Now, Childress offers this principle only where the presumption of competence has been rebutted. But Childress’ reliance on the subject’s own conception – which he variously refers to as “authenticity,”¹⁶⁶ “acting in character,”¹⁶⁷ and the “temporal dimension”¹⁶⁸ – is helpful and can be adapted to hard paternalism.¹⁶⁹

164. Goodin (1989) at 23. *See also* Goodin (1991) at 43 (“I shall always be searching for some warrant in that person’s *own* value judgments”) (emphasis added); *id.* at 44 (“The case for paternalism, as I have cast it, is that public officials might better respect your *own* preferences than you would have done through your own actions.”) (emphasis added); *id.* at 46-49 (discussing settled preferences, relevant preferences, and preferred preferences but not in a manner precise enough to know whether he defends only soft paternalism); Goodin (1993) at 234-36; Frohock (1989) at 239; Kronman (1983) at 774-86.

165. Childress (1997) at 124-25. *See also id.* at 18, 111-13, 131, 141, 170; Carter (1977) at 138 (using “soft” and “hard” in the same sense as Childress); *id.* at 139-40 (arguing that interference should be “in accordance with the permanent aims and preferences of the subject” and within “the broad outline of his life plan.”); Nuyen (1983) at 28 (using soft and hard to distinguish “a person’s own good as seen by himself” and “as seen by other people or by the state”); Rawls (1971) at 250.

166. Childress (1997) at 63

167. Childress (1997) at 63.

168. Childress (1997) at 128-29.

169. Hard paternalism seems more palatable where the subject is the ultimate definer of the good which the agent imposes. We might distinguish a defensible hard-soft₁ paternalism with an indefensible hard-hard₁ paternalism.

Fred R. Berger argues that some interferences with freedom, such as seatbelt laws, are less significant than others:

Laws requiring the wearing of seatbelts seem to me not significant interferences with autonomy. For the most part, people can lead their own lives, set their own style of living, even if required to buckle up in the car. This is to be distinguished from mountain climbing, for example, which, though it poses dangers to individuals, nonetheless is tied usually to a *chosen way of using leisure time and a sense of what sorts of activities are personally rewarding*. If seatbelt laws infringe on autonomy at all, the interference from this perspective is so minimal that it is hard to see how it can outweigh the benefits to be derived . . . the impingement is so small as to be outweighed.¹⁷⁰

Along similar lines, Robert George judges it dubious that:

people tend to act in the areas most commonly dealt with in morals legislation, out of *deep and settled convictions* as to what is valuable for them. With the possible (and even problematical and partial) exception of homosexuality, this is not generally the case. More often than not, I would suggest, people who use porn, patronize prostitutes, engage in drug abuse, etc. do not do so out of a *deeply held belief* that such activities are valuable for their human flourishing. Rather they are attracted and perpetuated in such conduct by emotional appeals, prospects of *gratifying unintegrated desires, habits, and the like*.¹⁷¹

Douglas Husak writes:

Consider the trivial losses to the [people] who are made to fasten their seatbelts . . . 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.¹⁷²

170. Berger (1985) at 49 (emphasis added). See also Berger (1984) at 252 (“Restrictions on freedom that leave us free to live the *sort of life we want*, despite ruling out *certain* choices, are not interdicted by the liberty principle.”) (emphasis added).

171. George (1993) at 106-07 (emphasis added).

172. Husak (2002) at 31. See also Husak (1992) at 98, 100.

Finally, Donald Regan observes that:

It is plausible to suppose that there are some people for whom it is very important to engage in particular high risk activities Such people ought not necessarily be restricted. The point about cigarette smoking and riding a motorcycle without a helmet is that these are activities which it would be difficult or impossible to build a *lifestyle* around and which few people would engage in because of the risks involved.¹⁷³

To require automobile drivers to wear seatbelts would not be intrusive. A driver or passenger's conduct in not wearing a seatbelt may be substantially voluntary, but it is rarely a very deliberate or meaningful decision. Rather, unrestrained drivers fail to buckle up due to habit, laziness, rashness, or indiscretion.¹⁷⁴ At the same time, the consequences of not buckling up cause significant harm. As Berger, George, Husak, and Regan all observe: seatbelt and helmet laws are classic cases of high harm-low intrusion hard paternalism.

Seatbelt and helmet laws are not the only acts or policies of hard paternalism that prevent significant harm through restricting only non-critical interest-furthering

173. Regan (1974) at 200 (emphasis added). *See also* Regan (1983) at 120 (“I do not suggest, however, that we would be justified in forbidding all risky activities. Consider mountain climbing. Although there are substantial risks involved in mountain climbing, the freedom that would be lost if mountain climbing were forbidden looms much larger, to my mind, than the freedom that is lost if cigarettes are prohibited or seatbelts required. For one thing, mountain climbing is likely to be much more important to people who want to climb mountains than cigarettes are to people who want to smoke cigarettes Also, climbing is more likely to be closely linked with the would-be patient's *sense of identity*.”) (emphasis added).

174. NHTSA (1997). *See also* Kleinig (1983) at 107, 110-11 (suggesting that where seatbelt and safety helmet legislation does not interfere with our significant concerns, our dietary and exercise habits, on the other hand, are often bound up with our self-identity).

conduct. It is, for example, generally not intrusive to ban commerce in human organs. The incentives for engaging in this conduct are largely financial and restricting this conduct will thwart few, if any, persons' critical interests.¹⁷⁵ At the same time, the consequences of selling certain organs causes high harm.

Beauchamp and Childress present a case where a patient with inoperable cancer asks her physician if she has cancer.¹⁷⁶ The physician knows that the patient is in a fragile psychological state and that she has planned a big long-anticipated (though brief) trip to Australia. So, the physician tells the patient that she is as good as she was ten years ago. The physician's lie is hard paternalism because it deprives the patient of information she needs to determine her future course of action. It prevents significant harm because disclosure in the patient's delicate psychological state would cause deleterious distress. At the same time, not disclosing the information is not very intrusive because it is very temporary.

Other examples of low intrusion restrictions of significantly harmful (because it thwarts critical interests) conduct include: "safety equipment" laws such as laws requiring the use of seatbelts in airplanes and automobiles, life jackets on boats, motorcycle helmets, and bright orange jackets when hunting; banning therapeutic drugs

175. *Kennedy Institute of Ethics Journal*, Symposium (Mar. 2002).

176. Beauchamp & Childress (2001) at 65, 180, 186, 418-19.

with dangerous side effects; compelling social security retirement savings; invoking the therapeutic privilege; banning the consumption of contaminated food such as high-mercury-content swordfish; banning cigarette smoking; and the previously described examples: stopping Clinton's adulterous activities, and stopping a friend from blowing his life savings.

It is important to note that it is not necessary that hard paternalism be in the high harm, low intrusion category. As I discuss below, hard paternalism in category (4) may, under special circumstances, may also be justified. But such cases will be rare. Accordingly, we might say that it is a necessary condition for justified hard paternalism that it be in category (2) -- unless the special circumstances of category (4) obtain.

3. Category (2): Low Harm, Low Intrusion. Category (2) is not justified hard paternalism because it fails to establish the requisite threshold level of harm in condition two. The conduct in this category, while it may have adverse effects on the subject's life, does not threaten any of the subject's critical or welfare interests. It is, consequently, not sufficient to warrant hard paternalism. As Donald VanDeVeer observes, "[C]ertain misfortunes . . . are acceptable."¹⁷⁷

177. VanDeVeer (1986) at 333.

For example, in the summer of 2002, the Michigan legislature defeated a bill that would have (hard paternalistically) outlawed tongue-splitting. Some individuals wanted their tongues surgically split to look like a serpent's tongue to create a devilish appearance.¹⁷⁸ As one Michigan tongue-splitter explained: "I feel I am different from other people, and I want to be different I set myself apart by changing the way I look."¹⁷⁹ Splitting the tongue can cause infections and speech impediments, but these effects are not such that they would typically disrupt anyone's critical interests.¹⁸⁰ Therefore, this conduct does not cause significant harm, but only low harm.

Other examples of low-harm conduct that has been the subject of proposed restriction, but which does not threaten critical interests include: tattooing, body piercing and beading, transdermal and coral implantation, and laser branding. The harm at stake with "body modification" or "body art" is real but not significant. Those with genital piercing, for example, may have trouble urinating because of holes in their urethra. And these procedures create open wounds that can lead to infections and irritation. Not only is the harm low but the autonomy interests at stake are similarly

178. Dzwonkowski (2002).

179. Dzwonkowski (2002).

180. Again, laws have general applicability, and must respond to the typical attitudes and preferences of the population. These are rarely 100% uniform. In individual cases, hard paternalism might be warranted because the tongue-splitting *would* threaten the subject's critical interest. For example, where an accomplished singer wanted (for trivial reasons) to split her tongue where that would ruin the singing career which meant so much to her, then hard paternalism might be warranted.

low. People usually get body art either because they want to portray an image of rebelliousness or because they enjoy the look of it and use it like a fashion accessory.

Take also the familiar (widely debated) case in which the physician lies to the cancer patient concerning her diagnosis. This lie is not justifiable hard paternalism because it spares the subject from only psychological discomfort.¹⁸¹ Such deception, though long widespread, has been roundly discredited.¹⁸² The scope of the therapeutic privilege exception to informed consent now considered to be ethical is much narrower. The patient must be at a definite and particular risk of depression or other adverse reaction.¹⁸³

Finally, consider the plethora of lawsuits brought by individuals seeking to get out from bad business deals they made. People often enter into contracts that, despite being substantially autonomously entered into, they later come to regret. They might, for example, purchase a car or house “as is,” and later become disappointed with the quality of their purchase and seek to escape their obligations under the contract. The courts are loathe to intervene with parties’ substantially autonomous agreements, and

181. Beauchamp & Childress (2001) at 65.

182. Faden & Beauchamp (1986) at 164; Wear (1998) at 168.

183. Beauchamp & Childress (2001) at 84; Berg et al. (2001) ch.4; Meisel (1995) § 3.25; Wear (1998) at 169.

protect plaintiffs from their unwise economic choices.¹⁸⁴ They do not want to restrict low harm conduct even if it is low intrusion on autonomy interests.

As I discussed above in connection with condition two, low harm does not constitute a legitimate objective for hard paternalism. Consequently, the fact that the intrusiveness is low makes no difference.¹⁸⁵ There just is not enough at stake. Furthermore, permitting the hard paternalistic restriction of low harm conduct (even when low intrusion) would permit too wide a range of interventions that would be officious and meddlesome. It would make hard paternalism more vulnerable to the slippery slope, developmental value of choice, and oppressions of individuality objections that are discussed later in this chapter.

4. Category (3): Low Harm, High Intrusion. Category (3) is not justified hard paternalism because, like category (2), it fails to establish the requisite threshold level of

184. *Owen v. CNA Ins. Co.*, No. A-1459-9872 (N.J. Super. A.D. May 11, 2000); *Nelson v. Rice*, No. 2 CA-CV-99-0085 (Ariz. Ct. App. Oct. 31, 2000) (“Courts should not assume an overly paternalistic attitude toward the parties to a contract by releasing one or another of them of the consequences of what is at worst a bad bargain”) (citation omitted); *Perez v. Progressive Ins. Co.*, No. 99-CA-956 (La. Ct. App. Jan. 25, 2000) (“Our respect for the citizenry of this state precludes us from following this unpleasantly paternalistic trend . . . declining to hold ordinary citizens accountable . . . for the economic choices they make”).

185. Intrusiveness is arguably always at least minimal, never negligible. Feinberg (1984) at 40 (any interference is a set back to our interest in being left alone); *id.* at 189; *id.* at 203 (“[A]ll restrictions of liberty are *pro tanto* harmful to the persons whose alternatives are narrowed”); *id.* at 216 (“[I]nterference with trivia will cause more harm than it prevents.”); Feinberg (1985) at 291 n.1 (“[A]ll my standards are ‘proportionality standards.’”); Feinberg (1988) at 67 (“[A]ll of us are harmed by criminal prohibitions to whatever extent they invade our ‘interest in liberty’”); *id.* at 114

harm in condition two. Furthermore, not only are harm and intrusiveness in balance (low-low) as in category (2), but the balance is just the opposite of what we would expect when trying to ascertain when beneficence *outweighs* autonomy: in category (3), the subject's autonomy interest outweighs the harm rather than the other way around.

Examples of conduct in this category might include religiously motivated tattooing or body piercing. This conduct is not that risky and the consequences of the conduct do not threaten critical interests. On the other hand, the conduct is itself undertaken, for example, to further critical interests in fulfilling religious expressive symbolism. If the hard paternalism cases in category (2) are not justified, then the cases in category (3) are even more assuredly not justified.

5. Category (4): High Harm, High Intrusion: Unjustified Cases. Category (4) is the tough and interesting category. Initially, it is tempting to dismiss the entire category as unjustified hard paternalism. The harm does not *outweigh* the subject's autonomy interest: they are both high. This is Ronald Dworkin's position: that "critical paternalism" is objectionable because it contradicts the subject's will and conviction, forcing the subject to act or abstain in ways that *she* thinks make her life worse. Furthermore, numerous familiar cases of hard paternalism that belong in this

category are generally considered to be morally unjustifiable.¹⁸⁶

Take “extreme sports” for example. The consequences of this conduct cause high harm. But intervention with this conduct would be highly intrusive. Participants engage in these sports not in spite of the danger but often precisely because of the danger. To regulate BASE jumping (*i.e.* parachuting from a fixed structure such as a building), for example, would take away the essential thrill.¹⁸⁷ The hard paternalistic restriction of extreme sports is not considered to be justified.

Similarly, take the widely discussed case where the physician transfuses the

186. Brock (1985) at 85 (arguing that “broader strong paternalism is illiberal and imposes an alien conception of the good”); Kleinig (1983) at 75 (“*Ceteris paribus*, the stronger the paternalism, the heavier the burden on the interferer”); *id.* at 76, 88-90, 100; Brody (1983) at 190 (“[C]hoices based upon *beliefs which are fundamental* to the person’s life are especially deserving of respect”) (emphasis added); *id.* at 192 (“If the decision is based on rational, stable thought processes and rooted in the fundamental beliefs and values held by the person, then his rights as an autonomous decision maker will be very strong and they should probably take precedence over our obligation to aid him”); Dahl (1983) at 262 (same as Brock); Daniels (1985) at 163 (“[I]t is more difficult to intrude paternalistically where people taking risks actually value the direct consequences associated with them. . . . [S]ome risk taking is psychologically satisfying”); Dworkin (1971) at 121-22 (distinguishing evaluative delusion from cognitive delusion and supporting intervention with the latter); Feinberg (1985) at 26 (arguing that the case for interfering with offensive behavior is weaker where the conduct is *important* to the offending party); Feinberg (1986) at 379 n.32 (finding ad hoc the exclusion of saints and heroes: excluding outlawing of self-regarding risky conduct for reasons to experience thrills, set records, conquer mountains, or altruistic reasons); Feinberg (1988) at 58.

187. Regan (1983) at 120 (“I do not suggest, however, that we would be justified in forbidding all risky activities. Consider mountain climbing. Although there are substantial risks involved in mountain climbing, the freedom that would be lost if mountain climbing were forbidden looms much larger, to my mind, than the freedom that is lost if cigarettes are prohibited or seatbelts required. For one thing, mountain climbing is likely to be much more important to people who want to climb mountains than cigarettes are to people who want to smoke cigarettes Also, climbing is more likely to be closely linked with the would-be patient’s *sense of identity*.”) (emphasis added).

adult Jehovah's Witness.¹⁸⁸ Again, the consequences of this conduct cause high harm.

And again, intervention would be highly intrusive. The subject's preferences are central and deeply held. For the agent to ignore the subject's preference regarding blood transfusion is a serious invasion of autonomy. Hard paternalistic restriction of Jehovah's Witnesses transfusion choices is not considered to be justified.

In one recent case, Maria Duran, a Jehovah's Witness, was a firm believer in the religious beliefs of her faith, and strictly adhered to the Bible's command to abstain from blood products and transfusions. So, when Maria needed a liver transplant, she went to the University of Pittsburgh Medical Center because that institution accommodated the preferences of Jehovah's Witnesses. Furthermore, in anticipation of the transplant, Maria executed a durable power of attorney for medical care which stated:

I am one of Jehovah's Witnesses. On the basis of my firmly held religious convictions . . . I absolutely, unequivocally, and resolutely refuse homologous blood and stored autologous blood under any and all circumstances, no matter what my medical condition. . . . Even if health-care providers believe that only blood transfusion therapy will preserve my life of health, I do not want it. Family, relatives, or friends may disagree However, their disagreement is legally and ethically irrelevant because it is my subjective choice that controls.¹⁸⁹

188. Kleinig (1983) at 217. *See also* Beauchamp & Childress (1994) at 137, 283; Feinberg (1986) at 145; Volokh (1999) at 630 (providing examples of attempted religious exemptions from paternalistic restrictions).

189. *In re Duran*, 769 A.2d 497 (Penn Super. 2001).

Maria's preference regarding a transfusion were clear, deliberate, and substantially autonomous. Overriding her preference would be (as the Superior Court of Pennsylvania held) a significant intrusion on her autonomy, an intrusion on religious and spiritual matters central to Maria's definition of her life's meaning. And it was, as the Court held, not permitted.

Other examples of conduct that threatens critical interests but, at the same time, is undertaken to further other critical interests include: physician-assisted suicide, rafting on wild rivers, bungee jumping, getting silicone breast implants, getting an artificial heart implanted, involuntarily committing a patient for lifesaving medical treatment, refusing to release a patient who will die outside the hospital. Hard paternalistic intervention in these high harm, high intrusion cases is not considered justified. It is, as I stated above, tempting to dismiss this category as a unjustified hard paternalism.

6. Category (4): High Harm, High Intrusion: Justified Cases. Indeed, many philosophers have agreed that hard paternalistic restriction of conduct that would be highly intrusive is not justified – even if high harm is at stake.¹⁹⁰ Even Beauchamp and Childress explain that they are tempted to add a condition that hard paternalistic

190. R.M. Dworkin (1989) at 484-85; R.M. Dworkin (1993) at 201-05, 235-36; R.M. Dworkin (2000) at 268-69.

interference “not substantially restrict autonomy” because such a condition would ensure that no vital or substantial autonomy interests are at stake.¹⁹¹ However, Beauchamp and Childress ultimately reject this condition, finding that hard paternalism can be justifiable without it.¹⁹²

At the heart of Beauchamp and Childress’ argument against the necessity of an minimal intrusiveness condition is the following counterexample:

A psychiatrist is treating a patient . . . who plucked out his eye and cut off his hand for religious reasons. Presume, now, that this patient is not insane and acts conscientiously on his unique religious views. Suppose further that this patient asks the psychiatrist a question about his condition, a question that has a definite answer but which, if answered, would lead the patient to engage in [further] self-maiming behavior in order to fulfill what he believes to be the requirements of his religion.¹⁹³

This is clearly a case where the consequences of the subject’s conduct cause high harm. They set back below a tolerable minimum the subject’s welfare interest in bodily integrity and absence of grotesque disfigurement.¹⁹⁴ Beauchamp and Childress argue that the physician (through lying) is justified in limiting the liberty of the patient for hard paternalistic reasons. Yet, the patient’s conduct is religiously motivated and is clearly very important to the patient. So, this is a case, Beauchamp and Childress argue,

191. Beauchamp & Childress (2001) at 186-87.

192. Beauchamp & Childress (1994) at 283-84.

193. Beauchamp & Childress (2001) at 187; Beauchamp & Childress (1994) at 283.

194. Feinberg (1984) at 37, 57-60.

where hard paternalistic liberty limitation is highly intrusive yet, nevertheless, seems to be justified.

Beauchamp and Childress admit that hard paternalism will *rarely* be justified in the high-harm, high intrusive situation.¹⁹⁵ But their counterexample appears to establish that a subject's high autonomy interest in her conduct is not itself sufficient to immunize that conduct from hard paternalistic intervention.

Category (4), the high harm, high intrusion category, unlike the other three categories, appears to be mixed. It contains both justified cases and unjustified cases of hard paternalism. Hard paternalistic restriction of both the eye plucker and the Jehovah's Witness would prevent high harm and would be highly intrusive. But while restriction of the eye plucker is justified, restriction of the Jehovah's Witness is not justified. How can these two cases be distinguished? What other factors (than harm and intrusiveness) are relevant?

I contend that we can intervene with the eye plucker but not the Jehovah's Witness because the eye plucker has *no rational basis* for the beliefs that lead him to cut

195. Beauchamp & Childress (2001) at 187.

off his limbs and pluck out his eyes. The Jehovah's Witness, on the other hand, has Biblical and other long-established bases for her beliefs concerning blood. Dan Brock and Steven Wartman recognize, for example, that patients can substantially autonomously "decline a recommended course of treatment because of an obvious and *understandable*, albeit unusual, belief – Jehovah Witnesses, for example declining blood transfusions."¹⁹⁶

Brock and Wartman contrast the Jehovah's Witness case with the case where "a seemingly competent patient wants something that *does not make sense* . . . and although the preference seems to reflect a deeply held, enduring value that is important in the patient's life . . . [the preference] is not attributable to a clearly recognizable religious belief or cultural preference." Brock and Wartman are careful to note that "even [such] truly irrational choices are not sufficient to establish a patient's incompetence and to justify overriding them."¹⁹⁷ But while a subject's choice should not be overridden just because it is irrational, irrationality can certainly be a necessary, though not a sufficient condition, for hard paternalistic restriction of category (4) cases.

Now, I am not contesting that either the eye plucker engages in her conduct substantially autonomously or that she has a high autonomy interest in her beliefs.

196. Brock & Wartman (1994) at 112.

197. Brock & Wartman (1994) at 114.

Rather, my point is that the eye plucker has no rational basis for her beliefs. Contrast the eye plucker with the BASE jumper.¹⁹⁸ With the BASE jumper, we may not agree that the thrill of rapidly falling toward the earth is worth the significantly increased risk of grave injury or death. But we can at least appreciate *why* the BASE jumper does what she does. We can appreciate that there is a tradeoff, even though we might not make the tradeoff in the same way. We know that the BASE jumper has a rational *reason* for jumping.¹⁹⁹ With the eye plucker on the other hand, we cannot appreciate why she must cut off her limbs. What is the reason?²⁰⁰

Beauchamp & Childress explain that the eye plucker's "actions follow 'reasonably from his religious beliefs.'"²⁰¹ But they also describe the eye plucker's beliefs as "unique religious views."²⁰² They explain that "the eye plucker regards himself as a true prophet of God and believes it is better for one man to believe and

198. We might also consider the 1995 survey where more than 200 aspiring Olympic athletes were asked whether they were willing to take a drug that would guarantee victory but that would kill them within five years. More than 50% were willing to take the drug. Longman (2001).

199. The paternalistic agent might often discover these bases in the course of verifying that the subject engaged in the activity substantially autonomously.

200. While the eye plucker is substantially autonomous, we might analogize the case to a case of futility where the subject is probably not substantially autonomous. In the analogous futility case the subject demands to have her arm amputated because she think that it will cure her headache. Rubin (1998) at 127-28. This is not the type of (widely criticized) futility judgment that involves a tradeoff, such as whether a certain treatment is *worth* the trouble where it provides the patients with only a couple extra days to live. In those circumstances, the physician cannot (on her own) really assess the treatment as futile because she does not know how the patient might value that extra time. But, in the amputation-headache case, there is overwhelming agreement that the requested treatment is irrelevant. It has no chance of being efficacious. There's really no tradeoff to be made.

201. Beauchamp & Childress (2001) at 73.

202. Beauchamp & Childress (2001) at 187.

accept an appropriate message from God to sacrifice an eye or hand according to the sacred scriptures rather than for the present course of the world to cause even greater loss of human life.”²⁰³

Granted, the eye plucker does seem to have Biblical support for his beliefs. In Matthew 5:29-30 (NIV), Jesus says:

If your right eye causes you to sin, gouge it out and throw it away. It is better for you to lose one part of your body than for your whole body to be thrown into hell. And if your right hand causes you to sin, cut it off and throw it away. It is better for you to lose one part of your body than for your whole body to be thrown into hell.

And in Mark 9:43-47 (NIV), Jesus says

If your hand causes you to sin, cut it off. It is better for to enter life maimed than with two hands to go into hell, where the fire never goes out. And if your foot causes you to sin, cut it off. . . . And if your eye causes you to sin, pluck it out.

But these are obvious hyperboles, not to be taken literally. Jesus is not endorsing self-mutilation. Rather, he wants people to eliminate motives, thoughts, attitudes, behavior, actions, or habits contrary to God’s will. He wants people to eradicate evil. The form of the verses magnify their figurative effect. In Matthew, for example, the immediate previous verse refers to committing adultery “*in his heart.*” The overwhelming consensus among scholars is that this text (as in many parts of the

203. Beauchamp & Childress (2001) at 183-84.

Bible) exaggerates to make the point that people should commit themselves and discipline themselves to do what is right. Jesus does not suggest, endorse, or require any physical maiming.²⁰⁴

Even the deferential constitutional test for protection under the First Amendment Free Exercise Clause does not direct respect for religious beliefs that courts find implausible.²⁰⁵ In *Brown v. Pena*, for example, the court rejected plaintiff's claim that his "personal religious creed" required him to eat "Kozy Kitten Cat Food" because it contributed to his work ability by increasing his energy.²⁰⁶ To the extent that the plaintiff's belief was based on physiological claims, they were subject to scientific verification, and readily established to be baseless.

In *EEOC v. Allendale Nursing Centre*, a nurse refused to get a Social Security Number but did not refuse to pay SSA taxes, recognizing that they were automatically

204. We can analogize to textual interpretation or translation of languages. While there is often indeterminacy such that multiple differing interpretations/translations can be made from the same text that are all equally plausible, it is also true that some interpretations are clearly implausible. R.M. Dworkin (1986) at 229-38 (describing the writing of a "chain novel" as a model to explain how judges are constrained by what was written/decided before).

205. *Thomas v. Rev. Bd.*, 450 U.S. 707, 715 (1981) ("[I]t is not for us to say that the line he drew was an unreasonable one One can, of course, imagine an asserted claim so bizarre . . . as not to be entitled to protection."). The eye plucker might also be unable to satisfy other stages of the analysis such as some of the elements of religiousness: focus on ultimate questions, comprehensiveness. *United States v. Meyers*, 95 F.3d 1475, 1482-84 (10th Cir. 1996). On the other hand, courts are reluctant to scrutinize the logic of religious beliefs, or arbitrate scriptural interpretation. They claim not to require beliefs to be logical, consistent, or comprehensible to others. In my theory (which addresses moral justifiability and not constitutionality) beliefs can be scrutinized more closely where they cause high harm.

206. *Brown v. Pena*, 441 F. Supp. 1382, 1384-87 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).

deducted by her employer.²⁰⁷ The nurse complained that the SSA takes money that people earn and redistributes it to those unwilling or unable to work, and that this violates the Bible's command that only the family and church take care of the poor. In rejecting her argument, the court determined that her refusal to get a SSN was unrelated to her religious beliefs. The court may not have recognized the nurse's right not to pay the SSA taxes. But at least if that were her complaint, it would have at least been related to her critical interests.

Take another example.²⁰⁸ An altruistic individual, Mary, does not have a great deal of money, but she wants to further medical research in cancer. Several members of her family have died from cancer, and she wants to contribute to scientific progress in the area. She read on the Internet about some particularly risky medical experiments being conducted in Thailand. She writes to the head of oncology and to the chair of the IRB at her local medical center, and offers, even though she is perfectly healthy, to be a

207. 996 F. Supp. 712 (W.D. Mich. 1998).

208. Beauchamp and Childress discuss a similar case where healthy subjects volunteered to try out artificial hearts in a University of Utah study. Beauchamp & Childress (2001) at 320; Beauchamp (2001) at 381. *See also* Beauchamp & Childress (2001) at 182. Dan Brock mentions a similar case where a Brother Francis volunteers for medical experiments because he thinks it is immoral to perform medical research on nonhuman animals. Brock (1988) at 554-55.

subject in similarly risky medical research.

Mary wants to participate in risky medical research for a noble social cause. While permitting Mary to participate in the study would threaten her welfare interests and cause high harm, to not allow Mary to participate would thwart Mary's substantially autonomous critical interest in helping aid cancer research. This is a case of high harm, high intrusion. Yet, like the eye plucker case, the cat food case, and the SSN case, it is generally considered justifiable to disallow Mary to participate in the study.

It is not the nature of the eye plucker's and Mary's conduct, nor is it the harmful consequences of their conduct that makes hard paternalistic intervention justified (while it usually is not justified in high harm, high intrusion cases). Rather, it is the basis of these subjects' *motivation* for engaging in their conduct. The reason that hard paternalism is justified in Mary's case is that, like the eye plucker, Mary's reasons are not rationally based. The contribution from her participation in the research would be negligible. Medical research based on too small a sample size cannot produce valid and meaningful findings. We might admire Mary's decision to be a martyr for science. However, although she intends her sacrifice to advance a cause or principle; her

sacrifice, in fact, bears little causal relationship to her cause.²⁰⁹

Take one final example of high harm, high intrusion hard paternalism. In the 1953 film (and novel by Jack Schaefer) *Shane*, homestead farmer Joe Starrett and his family are being tormented and driven from their homestead by cattle ranchers led by Rufus Ryker. Starrett is very committed to the homestead way of life, to the Wyoming farm he worked hard to create (by hand), and to the homestead community to which he was strongly tied.

When the tension builds and the conflict comes to a head, Starrett prepares to go into town to confront Ryker and his hired gunfighter, (fast-draw) Jack Wilson. But Shane, Ryker's hired hand (and a former gunfighter), offers that he should go instead because Starrett (as everyone recognizes, including Starrett himself) has no chance against Wilson. When Starrett declines – this is *his* battle – Shane and Starrett get into a fistfight that culminates in Shane knocking out Starrett unconscious with the butt of his gun. Shane then goes to confront (successfully) Ryker and Wilson on his own.

209. Contrast Martyrs and heroes who really accomplish something. In the 1982 film *Star Trek II*, Spock goes into the warp drive reactor's radiation chamber to save the ship. Dr. McCoy tried to talk him out of it but failed. It would not have been justified hard paternalism for Dr. McCoy to proceed to restrain Spock from going into the reactor. Spock's decision was substantially autonomous, and it was not irrational. He saved the ship.

Shane's restriction of Starrett's substantially autonomous decision to confront Ryker was hard paternalism. It was highly intrusive because Starrett felt very strongly about settling this dispute. For one thing, Ryker had just killed his good friend. Shane's intervention prevented high harm because Starrett would surely have been killed had he gone to the showdown.

Although this case falls into then high harm, high intrusion category, it is justified because Starrett's reason for confronting Ryker was not rational. It would not have achieved his goals of preserving the homestead way of life, helping his keep his farm, or helping his family. Rather, he would have been killed (like his friend). His death would have left his family fatherless, would have forced them to relocate, and would have induced the other homesteaders to relinquish their land claims.

Finally, I do not want to complicate the analysis with the conceptual baggage of other models and tests, but it is useful to analogize (at least loosely) the discretion that a hard paternalistic agent's finding a high autonomy interest to be irrational to the discretion that a trial judge has to overturn a jury's verdict. Generally all questions concerning the credibility of witnesses and the weight of the evidence are for the jury to answer. However, the judge may set the jury's findings aside where they are wholly unsupported by the facts and no rational juror could possibly have reached that finding. If reasonable minds *could* differ, then the judge must defer to the jury. So too with the

paternalistic agent. He must defer unless there is no room for dispute concerning the rationality of the subject's belief.²¹⁰

7. *Objection: How to Determine Which Interests Are Critical Interests.* It seems that application of the intrusiveness condition requires a great deal of personal knowledge of the subject, making it hardly workable for the state or other institutional paternalistic agents.²¹¹ It is, as Douglas Husak observes, “exceedingly difficult, even in personal relationships, to correctly distinguish more ‘permanent, stable, and central projects’ from those that are less significant to the subject.”²¹²

My argument presumes a plausible specification of low and high intrusive interference.²¹³ But there are at least two problems with this concept. First, there is an individuation problem. “[A]n action can be referred to by different descriptions . . . for almost every action one can imagine, one can produce some description of it that satisfies *some* long term goal of the person against whom the interfering action is

210. Although I cannot do so here, due to its increasingly complex and technical treatment, the notion of rationality can be fixed more precisely with concepts and models from work in decision science and behavioral economics.

211. Nikku (1997) at 185 (offering a normalcy standard).

212. Husak (1992) at 138; *see also* Arneson (1989) at 436 n.27; Rainbolt (1989) at 48; Williams (1989) at 516.

213. VanDeVeer (1986) at 41, 155.

directed.”²¹⁴

Second, even if we can individuate conduct, we might judge triviality on the agent’s values. C.L. Ten objects that the very characterization of a restriction *as trivial* begs the question at issue. “By rejecting their own assessment of their values we run the risk of evaluating the benefits of an activity by our own standards rather than by their standards.”²¹⁵

Husak argues that because the criteria are “susceptible to extraordinary abuse and mistake,” no general rule is warranted.²¹⁶ Ernest Nagel similarly argues that “in the absence of effective techniques for assessing the *relative importance* of the various interests involved . . . it does not seem possible to set fixed limits to justifiable legitimate control of men’s conduct.”²¹⁷ Instead, Nagel argues, “the question whether certain categories of action should be legally controlled and whether certain standards of conduct should be legally enforced . . . can be resolved only case by case”

214. Gordon (1980) at 268. *See also* Beauchamp & Childress (1994) at 176 (noting that proxies might “selectively choose from the patient’s life history those values that accord with the proxy’s own values, and then use only those selected values in reaching decisions.”).

215. Ten (1980) at 116. *See also* Safranek & Safarnek (1998) at 742-43 (describing a similar problem the Supreme Court has in choosing which rights are fundamental and constitutionally protected. An axiology must be imposed).

216. Husak (1992) at 140.

217. Nagel (1968) at 27.

8. *Response to the Objection: How to Determine Which Interests Are Critical*

Interests. My response is that we must assume a standard of *normalcy*. This is done with the other liberty limiting principles and should be done with hard paternalism too.²¹⁸ A normalcy standard is also regularly employed by implicitly and explicitly throughout the law. In *Toyota v. Williams*, for example, the United States Supreme Court recently employed such a standard. In determining the scope of the definition of “disabled” within the American with Disabilities Act of 1990, the Court ruled that in order to qualify as a statutorily protected disability, a limitation must impair activities of central importance to *most people’s daily lives*.²¹⁹

While it may not be possible to determine precisely what conduct is central to which individuals, the state can make a “rough and serviceable” distinction and can make some general presumptions.²²⁰ It could presume that intervention would be low

218. Feinberg (1984) at 45 (a mediating maxim of the harm principle is that the only thing that can set back our interests (as opposed to our wants) is a harm. There are, Feinberg argues, a variety of experiences that can “distress, offend, or irritate us, without harming any of our interests”); *id.* at 50-51 (“In general, the application of the harm principle requires some conception of *normalcy*. . . . [S]tatutes, to be effective, must *employ general terms* without the endless qualification that would be needed to accommodate the whole range of idiosyncratic vulnerabilities.”) (emphasis added); *id.* at 112, 188 (positing a “*standard person*”) (emphasis added); *id.* at 192, 216, 35; Feinberg (1985) at 33-34; Feinberg (1986) at 124-27 (using statistical and common sense expectations and arguing that deviations from these can justify intervention based on objective factors); Narayan (1990) (noting that Feinberg employs such a conception in making his presumptions of nonvoluntariness); Ten (1971) at 57 (“What is regarded as harmful depends on the *common values* of the community and the ideal patterns of life cherished by it.”) (emphasis added) (quoting Lucas (1966) at 173, 345); *id.* (also arguing that physical harm need not face such problems).

219. *Toyota Motor Mfg. v. Williams*, 122 S. Ct. 681 (2002).

220. Brody (1983) at 192 (“[A] decision to use an untested drug is not usually based upon a fundamental tenet of the person’s belief system. Thus, an interference with this decision will not encroach upon the person’s *deeply held beliefs* or upon his basic approach to life.”) (emphasis added); Burrows

intrusion for those sorts of conduct that are *statistically improbable* to be part of anyone's life plan.²²¹

By reference to a normalcy standard, the agent can infer that the subject's engagement with a particularly risky enterprise is casual, without imposing her own

(1995) at 501 (“[W]earing a seatbelt in a car, for example, cannot be said to seriously damage the participants’ reward from the activity concerned, and *drawing the line* to include such legislative restrictions does not involve much agonizing . . .”) (emphasis added); Dworkin (1988) at 116, 127 (life preserver example); Dworkin (1992) at 941 (hunter bright jacket example); Feinberg (1984) at 207 (*interests might be small* and the degree to which invaded might also be small) (emphasis added); *id.* at 56; *id.* at 60 (interests have a *range of ulteriority* -- from passing desires to welfare interests) (emphasis added); *id.* at 202-06; Feinberg (1985) at 37 (“[C]onduct that is *trivial or frivolous* will have less weight on the balancing scales.”) (emphasis added) (distinguishing a passing whim and a desire central to one’s life); Feinberg (1986) at 55 (conceding the reasonableness of “statutes requiring seatbelts, red shirts, and other trivial things”); Glover (1979) at 179-80 (supporting seatbelt laws but not the banning of mountaineering); Glover (1979) at 180-81 (“[T]he appeal to autonomy has much more force where the person’s decision is of such importance to him than it has when it concerns a person’s decision not to bother to put on his seat belt.”); Goldman & Goldman (1990) at 73-74 (contrasting seatbelt laws and prescription drug laws with “others that would block central values of agents” such as skydiving and boxing); Hart (1965) at 32-33 (defending hard paternalism where “choices may be made . . . in pursuit of merely transitory desires”); Hunt (1995) at 319-20 (observing that it is difficult to determine what is an “unacceptable infringement” but also noting that it is not *all gray*); Kleinig (1983) at 104 (“[S]uicide decisions generally differ from decisions not to wear a seatbelt or safety helmet. The latter, generally, do not manifest serious deliberation but only a casualness that generates unnecessary risk.”); Kultgen (1995) at 68 (“[J]ustifiability is a function of the *strength of the subject’s desires which they frustrate*, the severity of the measures, and the magnitude of the goods and harms produced.”) (emphasis added); Loeben (1999) at 106 (“One’s choice of dessert, for example, is not usually thought of as a decision of great significance or self-determination. Alternatively, many decisions are seen of as great value in defining as expressing the multi-layered meaning of one’s existence.”); Nuyen (1983) at 27 (“[I]t is unreasonable to object to a law enforcing the wearing of seatbelts when driving, given the enormous benefits and the minor irritation of having to conform.”); Moore (1999) at 96 (“recreational drug use, like oral sex, is not typically motivated by some loftier goal that commands much respect.”); Perri 6 (2000) at 141 (“[W]e have come to accept laws requiring the use of seatbelts in cars and helmets for motorcyclists . . .”); Van Wyk (1996) at 77-78 (“It is doubtful whether the desire to drive without a safety-belt plays a central role in anyone’s life plan.”); Wikler (1978) at 236 (“Intuitions are fairly firm on cases in which a minor restriction of liberty produces enormous increases in utility This suggests that we will not err if we give priority to utility over liberty where the benefit is high, the loss of liberty small, and the practice affected relatively unimportant.”); Zamir (1998) at 264.

221. Arneson (1985) at 957; Zamir (1998) at 243.

values, goals, and preferences.²²² Joel Feinberg, for example, concedes to Gerald Dworkin that *most* motorcyclists prefer not to wear helmets “simply as a matter of comfort and convenience” and, therefore, hard paternalistic helmet laws would only be trivial liberty limitation.²²³ Feinberg admits that there are some people for whom helmets cramp their romantic hair blowing lifestyle. So, while helmet laws would be high harm, low intrusion for most; they might be high harm, *high* intrusion for some. Nevertheless, *most* motorcyclists find the regulation trivial, and laws must be general.

222. Kleinig (1983) at 89-90. *See also* Bayles (1988) at 110; Beauchamp & McCullough (1984) at 87-88; Goldman (1991) at 129; Faden & Beauchamp (1986) at 343, 361 (arguing that in policy contexts the state can use an objective standard based on the reasonable, ordinary or *average person*) (emphasis added); *id.* at 260 (suggesting the plausibility of objectivity tied to *average persons*) (emphasis added); *id.* at 46 n.28 (explaining the objective standard of reasonable person as "*common behavioral assumptions*" that are "prescriptive as well as descriptive") (emphasis added); Feinberg (1984) at 175 (relying on "empirical data bearing on the voluntariness of consent in the typical cases"); *id.* at 181 (using "actuarial tables"); *id.* at 203 (making presumptions reflecting what constitutes coercion to *most* persons); *id.* at 219-28 (norms of expectability); *id.* at 324 (providing examples where would want to be pushed out of way of bus -- "*indirect statistical evidence* when overwhelming" or even best interest standard when no subjective evidence) (emphasis added); Feinberg (1985) at 103 (aptness words); Fox (1993) at 588 (discussing the "privileged epistemological position"); Hardin (1988) at 141 ("I am nearly certain that food has great utility to the undernourished . . ."); Hodson (1983) at 50 ("relevance of judgments as to what *most competent persons* would decide to do in similar circumstances") (emphasis added); Kleinig (1983) at 29, 119, 130; Kultgen (1995) at 161, 171-72, 190-91, 234; Nikku (1997) at 93-94, 272 ("What often counts as a risk seems, at least partially, to be a matter of subjective aims; hence, second partly determinative of the existence or degree of risk may be no unproblematic task." "Of course, given a *certain stability [normalcy]* about what *people want or what they need* in order to pursue their aims, it is *not* ordinarily unreasonable to *presume* [certain risks]") (first emphasis added) (comparing data and belief in PHIC); Nikku (1997) at 97-102, 244, 261 (offering as alternatives to PHIC the HC of a "minimally rational person" or of the majority); Rubin (1998) at 127-28 (placing reliance on social consensus); Schneider (1998) at ch.4; Smiley (1989) at 305-08; Thompson (1980) at 255 (arguing that even if an individual does not accept the good of intervention, the state's theory of primary goods might be such that it excludes relatively few lifeplans); VanDeVeer (1986) at 81, 116 (arguing that it is most compelling to presume consent regarding matters of "low level, readily resolvable empirical claims."); VanDeVeer (1986) at 99 n.3, 190-91, 221, 305, 444-45; Weale (1987) at 368 (avoiding value judgment); R. West (1990); White (2000) ("expert impartiality"); Wikler (1978) at 229-30; Woodward (1982) at 85, 87-88; Wilkinson (1996) at 493 (best such view f– is what claims are about); Zamir (1998) at 236; Zwitter (1999) (providing statistics for normalcy inferences).

223. Feinberg (1986) at 93.

The impact on others is just an effect of law.²²⁴

9. Table of Four Categories of Hard Paternalism Cases. It is helpful, for the reader's easy reference and summary, to collect the hard paternalism cases discussed in each of the four categories into a single table. Cases of *justified* hard paternalism must fit within one of the two highlighted cells.

224. Bentham (1781) at ch. XVII, sec. XV; Feinberg (1984) at 128 "[T]he law must often be couched in general terms . . ."; Feinberg (1984) at 210 (law uses objective standards); *id.* at 228; *id.* at 258 ("In human legislatures and courts of law . . . for practical reasons they are forced to formulate rules based on the presumptive preferences of *standard persons*, thus discouraging subsequent judicial inquiry into actual preferences of real individuals.") (emphasis added); *id.* at 259-60; *id.* at 274-75 ("[T]he law must create order and predictability by using some notion of a '*standard individual*' . . . [P]ublic rules take both the arbitrariness and the vulnerability out of voluntary transactions . . .") (emphasis added); *id.* at 290 (determining intent); *id.* at 300 (making presumptions when conduct "exceedingly rare"); *id.* at 326 ("[T]he law cannot do without rigid lines . . . [D]irect tests . . . would be cumbersome to administer, or unreliable, or both."); Hardin (1988) at 142 ("The defense of apparently paternalistic actions by a state or other collective body is therefore not that a particular instance of the action affecting a particular individual is necessarily in that individual's interest (perhaps contrary to the individual's assertions) but that the institutionalization of that action in general in relevant circumstances is best overall."); Husak (1992) at 132 ("[T]he law, necessarily expressed in general terms, should be responsive to the most *common, typical* reason why persons assume risks.") (emphasis added); Kleinig (1983) at 89 (arguing that if it's severely intrusive, then that's a cost of the law and not paternalism but an administrative justification as to them. Moreover, exemptions can be made if they are feasible); VanDeVeer (1986) at 107 ("Legislatures, of course, typically promulgate laws for entire classes of persons."); *id.* at 359. *But see* Carter (1977) at 145 (arguing that self-paternalistic legislation by the majority that restricts the minority only *because* it is required for the satisfactory operation of the scheme is not paternalistic).

<p>High Harm, Low Intrusion</p> <ul style="list-style-type: none"> ▶ Seatbelt and helmet laws ▶ FDA bans on therapeutic drugs ▶ Preventing blowing life savings ▶ Stopping Clinton's romantic activities ▶ Compel Social Security savings ▶ Ban recreational drugs ▶ Ban commerce in human organs ▶ Therapeutic privilege 	<p>High Harm, High Intrusion (Irrational)</p> <ul style="list-style-type: none"> ▶ Refuse disclosure to the eye plucker ▶ Refuse to enroll healthy research volunteer ▶ Stopping Joe Starrett from going to the showdown 	<p>High Harm, High Intrusion (Rational)</p> <ul style="list-style-type: none"> ▶ Ban mountain climbing, rafting, or BASE jumping ▶ Transfuse Jehovah's Witness ▶ Ban PAS ▶ Ban silicone breast implants
<p>Low Harm, Low Intrusion</p> <ul style="list-style-type: none"> ▶ Ban tongue splitting or other body art ▶ Invoking therapeutic privilege without particular risks ▶ Ban fried food ▶ Release parties from bad bargains 	<p>Low Harm, High Intrusion</p> <ul style="list-style-type: none"> ▶ Religiously motivated body art 	

* * *

In sum, the third necessary condition for justified hard paternalism requires that the subject either have a low autonomy interest in the restricted conduct or, if she has a high autonomy interest in the restricted conduct, that it be irrational. We can state this condition:

It is a necessary condition for justified hard paternalism that:

3. Hard paternalistic liberty limitation must restrict only conduct in which the subject has a low autonomy interest or an irrational high autonomy interest.

Unless this condition were satisfied, the autonomy interests at stake would be too high

to be outweighed by beneficence.

E. Condition Four: Hard Paternalistic Liberty Limitation Must Be Imposed Only Where No Morally Preferable, Less Autonomy Restrictive Alternatives Are Available.

The fourth necessary condition for justified hard paternalism requires that the agent intervene for hard paternalistic reasons only where no morally preferable, less autonomy restrictive alternatives are available. Hard paternalism must be, in other words, a form of liberty limitation of “last resort.” It “must be subject to the tightest controls utilizing the narrowest grounds of ethical justification.”²²⁵ The agent may limit a subject’s liberty for hard paternalistic reasons only where no morally preferable form of liberty limitation can be substituted.²²⁶

1. Why Hard Paternalism Must Be a Last Resort. As discussed in Chapter

One, there is a presumption against any limitation of individual liberty.²²⁷ Therefore,

225. Gaylin & Jennings (1996) at 199.

226. Beauchamp & Childress (2001) at 20; Beauchamp & Childress (1994) at 34, 266, 283. In a dramatic espousal of this condition, John Kultgen employs the term “soft antipaternalism” instead of “hard paternalism” or even “hard parentalism.” Kultgen (1995) at 132, 199. Kultgen explains that hard paternalism and soft antipaternalism, while “sorting out cases the same way, cause reflection to come to rest at different points.” Although Kultgen’s concept sanctions the same intervention as hard paternalism, it places *emphasis* on the opposition to the practice. Kultgen (1995) at 132, 136. Kultgen’s emphasis is appropriate.

227. Chan (2000) at 85 & n.9 (“[T]here is a strong presumption against [autonomy’s] violation, so that paternalism requires weighty reasons to be justified.”); Childress (1997) at 66; Feinberg (1984) at 9 (“Liberty should be the norm; coercion always needs some special justification . . . the ‘presumptive case for liberty’”); *id.* at 108; Feinberg (1986) at 57 (“[W]e must reject legal paternalism or at least hold it under grave suspicion (‘presumptively false’).”); Feinberg (1988) at 67, 321; Fox (1993) at 578; Gaus (1990) at 396; Gostin (2000) at 3118; Harris (1967) at 581; Kasachkoff (1991) at 412 (“[S]ince we value the right of individuals to lead their own lives . . . any interference with another’s life . . . demands some

intervention with liberty always requires some special justification. Before an agent limits a subject's liberty not only must the agent have weighty reasons (conditions one and two) for the limitation but also the limitation must be necessary or at least morally superior to alternative ways of achieving the objective of the intervention. Childress et al. argue that "[t]he fact that a policy will infringe a general moral consideration provides a strong moral reason to seek an alternative strategy that is less morally troubling. This is the logic of a prima facie or presumptive general moral consideration."²²⁸

If the desired ends can be accomplished in a way that avoids conflict with individual liberty or that interferes with liberty pursuant to a less controversial liberty

justification."); Kekes (1997) at 8 ("[T]he claims of freedom may be legitimately restricted – the disagreements are over the question of how far and under what circumstances and for what reasons its restriction may be legitimate."); Kleinig (1983) at xi, 4-5 (comparing paternalism to "killing," where "although no moral judgment is embodied, there is accorded sufficient importance to the life/death distinction to warrant our marking the circumstance" and "raises a moral question about it"); Kultgen (1995) at 38 ("Until all exceptive clauses are spelled out, rules [like autonomy] assert prima facie rights and may be overruled."); *id.* at 112; *id.* at 176 ("Since liberty is a central good, there is a moral presumption against all liberty-limiting principles."); Moffat (1998) at 586; National Bioethics Advisory Commission (1997) at 75, 80, 91-92; Moore (1999) at 69-70; Nikku (1997) at 19, 65 ("Self determination . . . is not an absolute value but a prima facie value . . ."); Perri 6 (2000) at 140; Shapiro (1988) at 570 (explaining that the presumption "operate[s] as a screen at the legislative level"); *id.* at 544 ("[A]ntipaternalism is the presumption, at least when it comes to action on behalf of the state, and that the paternalist therefore always has the burden of persuasion."); VanDeVeer (1986) at 92-94 (arguing that "there is a moral presumption against the legitimacy of invasive interference"); *id.* at 306, 335; Weale (1983) at 802-03.

228. Childress et al. (2002) at 173 & n.9 (also noting that "[t]his justificatory condition is probably the most controversial. Some of the authors of this paper believe that the language of 'necessity' is too strong.").

limiting principle, then that alternative must be adopted.²²⁹ Accordingly, in specifying when the principle of beneficence outweighs the principle of autonomy, Beauchamp and Childress require, among other conditions, that the autonomy-intruding agent's action "is needed."²³⁰ And Tom Beauchamp requires that "no acceptable alternative to the paternalistic action exists."²³¹

In comparison to the harm principle, offense principle, and non-liberty-limiting interventions; hard paternalism is, as discussed above, the most morally troubling strategy.²³² It is, therefore, imperative to seek alternatives. The analysis is similar to

229. Bayer (1994) at 153 ("Proposals . . . meeting the threat of tuberculosis with a carrot than a stick . . . are laudatory because they . . . appear to *obviate* the need to choose between liberty and the public health. They are, for the most part, uncontroversial.") (emphasis added); Beauchamp (2001) at 381; Beauchamp & Childress (2001) at 310; Callahan (1998) at 199 (explaining that it would be better to improve public health in ways that "*avoid conflict*" with personal liberty) (emphasis added); Childress (1982) at 115, 201; Childress (1997) at 66; Daniels (1985) at 158; Dworkin (1971) at 126 ("If there is an *alternative way* of accomplishing the desired ends without restricting liberty although it may involve great expense, inconvenience, etc., the society must adopt it.") (emphasis added); Feinberg (1986) at 89; *id.* at 134; *id.* at 136-38 (if can raise voluntariness, then there's *no need* to restrict liberty) (emphasis added); *id.* at 174 (in dispositional consent there's no time to warn or do this raising of voluntariness -- that impossibility is what makes it justifiable); *id.* at 374; Fried (1970) at 179-82; Gostin et al. (1999) at 120-24; Gutmann & Thompson (1996) at 266 (favoring "regulation over prohibition"); Kleinig (1983) at 70, 74; Kultgen (1995) at 167 ("Interference with her liberty in self-affecting matters should be a measure of *last resort*.") (emphasis added); *id.* at 77 (corollary I); *id.* at 115, 127, 135, 143, 167, 172; Mill (1859) at Book V (arguing that "regulations in general be no material impediment to obtaining the article, but a very considerable one to making an improper use of it." He illustrates this in writing that "*labeling* may be enforced without violation of liberty.") (emphasis added); Moffat (1998) at 605 ("Criminalizing conduct . . . should always be our last resort in responding to social problems."); Rainbolt (1989) at 58; Shapiro (1988) at 550.

230. Beauchamp & Childress (1994) at 266.

231. Beauchamp (1996) at 1917.

232. Feinberg (1986) at 134 ("As a principle of public policy [hard paternalism] has an acrid moral flavor and creates serious risks of government tyranny."). *See also id.* at 23 ("[L]egal paternalism is . . . arrogant and demeaning . . . patronizing . . ."); *id.* at 60-61,70; Bayles (1978) at 119, 128-32; Dworkin (1983) at 124 (describing paternalism as "imposing a good on someone in that given his current approach of the facts, he doesn't wish to be restricted"); Feinberg (1996) at 391 ("Those who are strongly opposed to

that used for criminal law defenses such as necessity and self-defense. These defenses are successful only if the defendant had available no other reasonable choice such as the ability to flee. Similarly, hard paternalism is something that we do not like, so we want to be sure that we really need it before we use it.

As I discussed in Chapter Three, it was a key part of Feinberg's methodology in *Harm to Self*, to show that hard paternalism was not justified because it was not "needed."²³³ Feinberg put forth the soft paternalistic strategy to obviate the need for

paternalism find it not only mistaken but arrogant and demeaning."); Gostin (2000) at 3119; Häyry (1998) at 449; Husak (1992) at 138-41; Kekes (1997) at 7, 22 (noting the intertwined and interdependent nature of liberty and value pluralism); Kultgen (1983) at 16 ("[B]eing treated paternalistically inclines us to condemn it. We resent incursions on our autonomy."); *id.* at 211 ("[P]aternalism' is firmly entrenched as a tag of disapproval."); Lavin (1996) at 2426 ("Despite the attractiveness of policies aimed at the prevention of tobacco use . . . the moral defensibility of policies that go beyond education and the protection of nonsmokers is suspect. It is difficult to discern what moral grounds could support such policies, if the grounds are neither weakly paternalistic nor rooted in the harm principle."); Rakowski (1993) at 1123; Rubin (1998) at 84 ("In hard paternalism the *values* that are used to assess harm and benefit are alien to, and therefore imposed upon, the patient. . . . [T]his kind of intervention is much harder to justify than limited or weak paternalism.") (emphasis added); *id.* at 85 ("It is much harder to justify interference with an individual's freedom when the motivation is to protect the individual from harming *himself*, even harder when the *values* used to justify the intervention are alien to the individual . . .") (emphasis added); Shapiro (1988) at 530; Trebilcock (1993) at 150 ("The problems posed by hard paternalism are obvious once one abandons as the principal *reference point* an individual's own preferences, the dangers of an authoritarian imposition of others' preferences . . . are relatively unconstrained.") (emphasis added); Viscusi (1998) at 1101-02 ("The mere existence of a risk is not a legitimate rationale for government regulation In a world of rational choice, with full information, there would be no rationale . . . for interfering with those decisions."); Zamir (1998) at 231 (recognizing "hostility toward paternalism characterizes the prevailing liberal discourse").

233. Feinberg (1986) at 138; *id.* at 264 ("practice is effectively discouraged *without resorting* to the criminal law") (emphasis added). *See also* Bayles (1978) at 109 ("The soft paternalist's argument against hard paternalism is to show that hard paternalism is implausible and *not needed* to handle any plausible legislation.") (emphasis added); Childress (1997) at 194 ("Critics of Mill's principle have tried to take the sting out of it largely by contending that voluntary self-regarding conduct is practically a null class because our risky actions are other-regarding and/or nonvoluntary."); Goldman & Goldman (1990) at 72 ("One strategy for sidestepping the limitation that prohibits paternalistic laws is to try to provide non-paternalistic justification for such laws."); Gutmann & Thompson (1996) at 262; Kennedy (1982) at 643 ("The

hard paternalism, through showing that seemingly hard paternalistic measures could be justified on other more liberal grounds. And as I discussed in Chapter Four, even apart from Feinberg, one of the main ways in which hard paternalism has been attacked is by showing that seemingly hard paternalistic measures can be “covered,” “explained,” or “handled” by other liberty limiting principles, thereby making hard paternalism superfluous.²³⁴

If an agent can achieve the objective of the intervention (*i.e.* protection of the subject from significant harm) through other than hard paternalistic means, then hard paternalistic measures are not justifiable. For example, if the state can eliminate a public health risk through educational measures, through providing incentives, or through re-designing the activity, then the state is not justified in regulating or prohibiting that activity on hard paternalistic grounds.

plausibility of principled anti-paternalism is therefore linked to the ability to *dismiss or to explain away* cases in which one wants to act paternalistically but can't rationalize the action in terms of incapacity.") (emphasis added); Kultgen (1995) at 60 ("Authors categorize cases in ways that anticipate the normative judgments they make."); Suber (1999) at 635 ("There are many other ways to do what the paternalist does but without paternalism: notably, to widen the definition of harm, and to narrow that of valid consent."); VanDeVeer (1986) at 213 ("[I]t is sometimes thought, and argued, that there is little reason to worry over whether or not this or that paternalistically based defense of interference is justified, since such fastidiousness about paternalistic strategies of justification can be set aside -- *set aside* because there is a legitimate, familiar, and nonpaternalistic ground . . .") (emphasis added); Zamir (1998) at 281 ("[P]olicymakers in Western liberal democracies rarely *resort to* paternalistic justifications for their regulations in present times.") (emphasis added).

234. Feinberg (1988) at 285-86 ("But if either reason alone is thought to be sufficient, why not abandon the reason that impugns autonomy?"); *id.* at 287 (calling nonliberal principles "epiphenomena"); *id.* at 323 (arguing that only the *best* available reasons for liberty limitation should ever be used).

Joel Feinberg observes that a “last resort” condition also operates in constitutional analysis.²³⁵ Indeed, under “strict scrutiny,” which is employed where certain constitutionally protected rights are infringed by legislation, the state must show that the law is “necessary” to the law’s objective. The “fit” between the means and the end must be very tight.

For example, the United States Supreme Court struck a Wisconsin statute requiring any parent under a court order to pay court-ordered child support before remarrying. Justice Marshall concluded that the statute unnecessarily interfered with the right to marry. Rather than using the denial of a marriage license as a kind of “collection device,” Wisconsin could have used less drastic compliance measures (that would not interfere with protected liberty) such as wage assignments.²³⁶ Similarly, hard paternalism is not justified where its objective can be achieved through means that do not limit liberty or that limit it pursuant to a morally preferable liberty limiting principle.

235. Feinberg (1986) at 91-92. *See also* Childress et al. (2002) at 173 n.10 (“We observe that some of these justificatory conditions are quite similar to the justificatory conditions that must be met in U.S. constitutional law when there is strict scrutiny In such cases, the government must show that it has a ‘compelling interest,’ that its methods are strictly necessary to achieve its objectives, and that it has adopted the ‘least restrictive alternative.’”).

236. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

2. What Constitutes a Last Resort: Non-Substantially Autonomous Conduct.

The analysis of whether, in any particular circumstances, hard paternalism is a last resort and whether there are morally preferable alternatives can proceed in two ways. One way in which hard paternalism would not be a last resort is where there is a morally preferable alternative liberty limiting principle: soft paternalism. The other way in which hard paternalism would not be a last resort is where the objective of the hard paternalism could be achieved through non-liberty limiting means. I discuss the former (soft paternalism) situation here, and the latter (non-liberty limiting) situation in the next subsection.

Recall from Chapter Two that there are two distinct forms of hard paternalism. First, there is the case where the subject is *not* substantially autonomous, but the agent does not intervene for that reason. Second, there is the standard case in which the subject is substantially autonomous. Just as soft paternalism is justified only so long as and to the extent that the subject's choice is not substantially autonomous (or substantial autonomy can be ascertained),²³⁷ hard paternalism is justified only so long as and to the

237. Armsden (1989) at 93; Bayles (1988) at 115 (the agent's motive for interfering must be to counteract the subject's lack of understanding); Berger (1985) at 47; Callahan (1984) at 286; Childress (1997) at 125 (denying that soft paternalism automatically justified intervention and requiring that soft paternalism employ the least restrictive means, prevent serious harm, and be proportional to its negative effects); Douglas (1983) at 174-75 (contrasting "cooperative paternalism" in which the agent helps the subject become more competent and "conflictual paternalism" in which the agent does not have that aim); Gert, Culver & Clouser (1997) at 226 (arguing that "just because people are not competent to make a rational decision does not mean that it is justified to violate any moral rule with regard to them"); Häyry (1991) at 70; Hospers (1980) at 265 (arguing that the agent must not impose his values onto the subject --

extent it is necessary. And hard paternalism is not necessary where soft paternalistic measures are available.

For example, Beauchamp and Childress criticize the FDA's 1992 decision to restrict the use of silicone breast implants to specially qualified candidates. They argue that the FDA should have instead focused on informing patients of the risks of breast implants rather than banning them outright.²³⁸ "A more defensible policy would permit the continued use of silicone breast implants . . . while requiring adequate disclosure of information about risks (known and unknown)."

Indeed, more recent FDA regulatory action is consistent with Beauchamp and Childress' recommendation. Take the recent initiative to switch some drugs from prescription status to over-the-counter status.²³⁹ The rationale for requiring a prescription is that no label could be written for these drugs that would enable the

even when the subject acts without substantial voluntariness. Under such circumstances, the agent must act to help the subject); Jorgensen (2000) at 48; Kleinig (1983) at 141 ("The fact that a paternalistic imposition is weak does not mean that it is therefore morally unproblematic."); *id.* At 31, 214 ("Weak paternalistic impositions are not justified merely because their beneficiaries lack autarchy. As Mill makes clear, such impositions must be directed to the 'improvement' of those on whom they are laid In other words, the end of weak paternalism must be autarchy."); Kultgen (1983) at 8 ("This solicitude is constructive."); *id.* at 20; *id.* at 53 ("The kinds and extent of control which they legitimately exert, however, are strictly limited by the ultimate objective – to prepare their children for autonomy"); *id.* at 54, 59, 78; Lavin (1996) at 2423; Locke (1688) at 57 ("[T]he end of Law is not to abolish or restrain but to preserve and encourage freedom"); VanDeVeer (1986) at 354-55 (arguing that the mere presence of some lack of voluntariness does not imply a forfeiture of ascriptive autonomy).

238. Beauchamp & Childress (2001) at 205.

239. FDA Transcript of the Joint Meeting of the Nonprescription Drugs Advisory Committee and the Pulmonary-Allergy Drugs Advisory Committee (May 11, 2001).

consumer to make a substantially autonomous decision to take that drug. Expert medical supervision is required to make the consumer's decision substantially autonomous. Therefore, prescription drug laws have a soft paternalistic rationale.²⁴⁰

However, to require a prescription for those drugs which consumers *could* safely and effectively self-medicate on the basis of the drug labels would be hard paternalism. And it would not be justified hard paternalism because a morally preferable therapeutic drug policy with respect to those drugs is available: allow the drugs to be marketed over-the-counter with adequate labeling.

In sum, the first way in which hard paternalism would not be a last resort is where soft paternalism is a morally preferable alternative to achieve the objective.

3. What Constitutes a Last Resort: Non-Liberty Limiting Means. The second way in which hard paternalism would not be a last resort is where non-liberty limiting means (such as rational persuasion) can be used to achieve the objective. For example, Beauchamp and Childress recommend that chemical plants protect susceptible workers not by banning them from employment but rather by devising protective equipment or by altering the work environment.²⁴¹

240. Hutt (1982); Temin (1980).

241. Beauchamp & Childress (1994) at 316(emphasis added).

Similarly, Childress et al. explain that “a policy that provides incentives for persons with tuberculosis to complete their treatment until cured will have priority over a policy that forcibly detains such persons in order to ensure the completion of the treatment.”²⁴² Proponents of the forcible strategy, Childress et al. argue, will “have the burden of moral proof.” These (non-liberty-limiting) measures are sufficient to protect the subjects from harm. So, there is no justification for resorting to hard paternalistic measures.

* * *

In sum, the fourth necessary condition for justified hard paternalism requires that it be the only available liberty limiting principle which the agent can use to protect the subject from significant harm. We can state this condition:

It is a necessary condition for the justifiability of hard paternalism that:

4. *Hard paternalistic liberty limitation must be imposed only if no morally preferable, less autonomy-restrictive alternatives are available.*

If the objective of the liberty limitation could be achieved through soft paternalism or through non-liberty limiting means, then those alternatives, and not hard paternalism, must be employed.²⁴³

242. Childress et al. (2002) at 173.

243. The analysis will sometimes be more complicated where there are morally preferable options but it is unclear whether they are really “alternatives.” Perhaps the options do not achieve the same level of effectiveness as hard paternalism. Are we willing to sacrifice some level of effectiveness in order to use a morally preferable alternative? How much? We can probably glean some insight from how effectiveness is

F. Condition Five: Hard Paternalistic Liberty Limitation Must Very Probably Be an Effective Means for Achieving Its Objective.

The foregoing four conditions demand both that the end or objective of the hard paternalism is legitimate and that it cannot be achieved through morally preferable (non-hard paternalistic) alternatives. The fifth necessary condition for justified hard paternalism focuses on the particular methods or means of liberty limitation used. The fifth condition requires that the hard paternalistic intervention very probably be an *effective* means for achieving the objective (*i.e.* protecting the subject from significant harm). Hard paternalism must, as Beauchamp and Childress put it, “have a reasonable prospect of achievement.”²⁴⁴

1. Why Hard Paternalism Must Very Probably Be Effective. In Chapter Two, I argued that an agent’s intervention need not be successful in order for the intervention to be defined as hard paternalistic.²⁴⁵ What *defines* an intervention as hard paternalism is the agent’s reason or rationale for intervening. It is a necessary condition for the definition of hard paternalism that the agent *intends* to protect or benefit the subject.

However, while ultimate success is not essential to the *definition* of hard

used in the risk assessment context. Beauchamp & Childress (2001) at 198. These questions are not unique to hard paternalism, and I will not explore them here.

244. Beauchamp & Childress (2001) at 19-20.

245. Chan (2000) at 85 (“[T]he intention to benefit the subject, and not the success in doing so, defines paternalism.”); Childress (1982) at 21; Hershey (1985) at 172; Kleinig (1983) at 76.

paternalism, the probability of success is a necessary condition for the *justifiability* of hard paternalism. In other words, liberty limitation need not be effective in order to qualify as hard paternalism, but it must probably be effective in order to be justified hard paternalism.²⁴⁶

The effectiveness requirement is needed to give teeth to the significant harm condition. The second necessary condition for justified hard paternalism (significant harm) requires that the agent determine that but for the liberty limitation the subject will come to significant harm. The fifth necessary condition for justified hard paternalism (effectiveness) requires the agent to determine that his liberty limitation will really probably prevent this harm. Unless there is a tight causal connection between the objective of the hard paternalistic intervention and the intervention itself, the hard paternalism will be pointless. Moreover, as I discuss in the next subsection in

246. Beauchamp & Childress (1994) at 34, 266, 283; Beauchamp & Childress (2001) at 19-20, 133, 186 (requiring that the paternalistic act “has a reasonable prospect of achievement,” that it “will probably prevent the harm,” and that it “has a high probability of preventing it”); Childress (1982) at 202; Childress (1997) at 66; Feinberg (1984) at 26 (explaining that all liberty limiting principles include the clause “is probably an *effective* means for producing Y”) (emphasis added); Childress et al. (2002) at 173 (“It is essential to show that infringing one or more general moral considerations will probably protect public health. For instance, a policy that . . . has little chance of realizing its goal is ethically unjustified.”); Feinberg (1986) at xvii (x is necessary and an *effective* means for producing y) (emphasis added); Feinberg (1988) at xix; *id.* at 234 (“Both liberalism and the United States Constitution require that prohibitory legislation be aimed at the proper kind of evil, that there be a *reasonable relation* between an existing evil and the remedy proposed . . .”) (emphasis added); Glover (1979) at 181; Gostin (2001) at 69 (“The methods used . . . must be designed to prevent or ameliorate the threat . . . [and] have a ‘reasonable or substantial’ relation to the protection of the public health . . .”); *id.* at 92, 99-100, 152, 161, 214; Kasachkoff (1997) at 413; Kleinig (1983) at 76; Kultgen (1995) at 167; Pellegrino (1981) at 374; Rainbolt (1989) at 58; Young (1986) at 78 (“The intervention must clearly be linked to the harm-threatening behavior.”).

connection with condition six, it may also mean that hard paternalism is disproportional and causes more harm than it prevents.

The agent may be misguided or inept. He may mean well and may even have a legitimate objective. But not only must he intend and design his intervention to succeed but also he must make sure that his intervention will probably achieve that objective. Limitation of liberty is a serious matter. It cannot be sanctioned on any but a very high chance that it really will be helpful to the subject (and protect her from significant harm). A similar intuition underlies much of the debate over capital punishment. Many do not want to take such a serious step (destroying as opposed to merely infringing upon autonomy) unless we can be sure such a measure will actually or very probably achieve its objectives (*e.g.* deter crime).²⁴⁷

Some hard paternalistic measures, such as seatbelt laws, have been proven as effective.²⁴⁸ Others have not been so proven. For example, we learned a few years ago that imposing criminal penalties for the possession of sterile drug injection equipment (in violation of drug paraphernalia and syringe prescription laws) fails to achieve the objective of such laws: reduction of the transmission of HIV and hepatitis C.²⁴⁹ These

247. Beauchamp (2001) at 39.

248. Fredenburg (1984) at 787-88; NHTSA (1997).

249. *Health Matrix* Symposium (2001).

laws did not deter or prevent injection drug users from injecting drugs. Instead, they were barriers to access to sterile syringes, which reduce the need for the needle sharing that promotes disease transmission. Today, in the United States, at least, most of those prescription and possession laws have been amended, and syringe exchange programs have been established.²⁵⁰ This is an appropriate response. Why interfere with individual liberty when doing so won't even achieve the benevolent objective?

Similarly, scientific and medical research suggests that silicone breast implants are not responsible for the harm that they once were thought to cause. Subsequently, the FDA relaxed its ban on silicone breast implants.²⁵¹ This is an appropriate response. Why interfere with individual liberty when doing so won't even achieve the benevolent objective?²⁵²

2. What Level of Effectiveness Is Required: Probable Success or Actual

Success. The “effectiveness” condition, like the last resort condition, resonates with constitutional legal analysis. Even under the minimal level of scrutiny, the state must

250. National Center for HIV, STD, and TB Prevention, www.cdc.gov/idu.

251. Clinical trials are being conducted by Santa Barbara, California based McGhan Medical Corporation and Mentor Corporation.

252. Prostitution laws, to the extent that they have a hard paternalistic rationale (as opposed to harm to others or moralism rationales) are also widely criticized for not achieving certain objectives of criminalization such as protection of the health and welfare of the woman herself. Law (2000); Meier & Geis (1998). Criminalization, for example, deters women from seeking help when they have been abused, and a criminal record hinders them from getting employment outside prostitution.

show that a law restricting individual liberty is “rationally related” to and reasonably directed toward achieving the law’s objective.²⁵³ For example the United States Supreme Court rejected a constitutional challenge to a regulation concerning the length and style of policemen’s hair. Justice Marshall dissented. He conceded that the objectives of the regulation were legitimate (making policemen readily recognizable to the public and creating a sense of *esprit de corps* from being similar). However, Justice Marshall, noting that the regulation impinged on policemen’s means of expressing attitude and values, found no connection between the objective and the regulation.²⁵⁴

Here, for the reasons provided in the last subsection, effectiveness (as a condition for the moral justifiability of hard paternalism) requires more than a mere plausible relationship or a rational relationship between hard paternalistic intervention and its objective. The burden on the hard paternalist must be more demanding. The effectiveness condition is better analogized to higher standards of constitutional review. Under the middle level of constitutional scrutiny, the restriction (of certain protected liberties) must be “substantially related” to the objective. Under strict scrutiny, the relationship between the means and end must be even tighter: the restriction must be strictly necessary to achieve the objective.

253. Gostin (2001) at 77-78 (noting that the rational basis test under the U.S. Constitution requires laws to have both a legitimate purpose and a means that are reasonably related to attaining the objective).

254. Kelley v. Johnson, 425 U.S. 238 (1976).

Even these stricter standards of constitutional review do not require *actual* success. Neither should the effectiveness condition for justified hard paternalism. In determining the justifiability of hard paternalism, we are not assessing the overall justification of the intervention, but only the moral justifiability. As I discussed in Chapter One, hard paternalism is only a *rationale* for liberty limitation. Therefore, the proper focus of the moral analysis is on the agent's reasons and evidence. Requiring the moral justifiability of hard paternalism to rest on the *outcome* of the intervention would not permit *ex ante* moral evaluation of the justifiability of the intervention. Moreover, it would make the justifiability possibly contingent on arbitrary and/or unforeseeable events.

* * *

In sum, the fifth necessary condition for justified hard paternalism requires that the liberty limitation will very probably be effective in achieving the objective. We can state this condition:

It is a necessary condition for the justifiability of hard paternalism that:

5. *The agent employ hard paternalistic liberty limitation only where it will very probably be effective in obtaining the objective.*

Unless hard paternalistic liberty limitation is likely to be effective and successful, it cannot draw moral warrant from the first necessary condition. Beneficence cannot outweigh autonomy unless that beneficence will very probably actually be achieved.

G. Condition Six: Hard Paternalistic Liberty Limitation Must Protect the Subject from Harm that Outweighs Any Harm Caused by the Intervention Itself.

Even if the foregoing five conditions are satisfied -- and we have established that the end or objective of the hard paternalism is legitimate, that it cannot be achieved through morally preferable (non-hard paternalistic) alternatives, and that the means chosen would be effective in achieving the objective -- we must still ensure that hard paternalism will not cause more harm than it prevents.

The sixth necessary condition for justified hard paternalism requires that the significant harm that the agent intends to reduce or prevent through limiting the subject's liberty be greater than the harm caused by the liberty limitation itself. That is, not only must agents intervene for hard paternalistic reasons only in order to save the subject from significant harm but also agents must intervene for hard paternalistic reasons only where they can probably prevent more harm than they themselves cause.²⁵⁵

255. Armsden (1989) at 129; *id.* at 152 (defending “*mild and transient* intervention”) (emphasis added); Beauchamp (2001) at 381; *id.* at 129 (“Proportionality between the good and the bad effect. The good effect must outweigh the bad effect.”); Beauchamp & Childress (1994) at 283 (requiring that “the projected benefits to the [subject] of the paternalistic action outweigh its risks to the [subject].”); Callahan (1998) at 194-95 (requiring serious and demonstrable harm and only slight and transitory interventions); Culver & Gert (1990) at 632 (considering not just risks but also the “harm of forced treatment” in determining the justifiability of paternalistic intervention); Dworkin (1983) at 127 (supporting intervention when it poses only a “minimal risk of harm to them at the cost of a trivial interference with their freedom”); Gostin (2001) at 20 (“Health regulation that overreaches, in that it achieves a minimal health benefit with disproportionate human burdens, is not tolerated in a society based on the rule of law.”); *id.* at 69, 92; Kultgen (1995) at 68 (“[J]ustifiability is a function of the strength of the subject's desires which they frustrate, the severity of the measures, and the magnitude of the goods and harms produced.”); *id.* at 182 (“In a significant concession to common sense, Feinberg asserts that the line will differ according to the kind of intervention.”); Raz (1986) at 122; Young (1986) at 78 (considering the “character of the

Beauchamp and Childress, for example, require that “the projected benefits to the [subject] of the paternalistic action outweigh its risks to the subject” and that “the beneficence that [the subject] can be expected to gain outweigh any harms, costs, or burdens that [the subject] is likely to incur.”²⁵⁶ There must be, as James Childress puts it, some “proportionality.”²⁵⁷ “All of the positive features and benefits must be balanced against the negative features and effects.”²⁵⁸

1. Why Proportionality Is Necessary. The core reason for a requirement of proportionality is captured in the pithy truth of Aesop’s fable of the Kite and the Pigeons:

Some pigeons, terrified by the appearance of a kite, called upon the hawk to defend them. He agreed at once. When they had admitted the hawk into their coop, they found that he had killed a larger number of them in one day than the kite could injure in a whole year.

The moral of the fable is to avoid solutions that are worse than the problem.

The proportionality condition is necessary for reasons similar to those for the necessity of the effectiveness condition. Just as the agent cannot intervene with the

intervention to be countenanced”). Of course, any interference with a subject’s substantially autonomous self-regarding conduct “is an invasion of a person’s interest in *liberty*, and is thus harmful to him to that extent.” Feinberg (1984) at 78.

256. Beauchamp & Childress (2001) at 186; Beauchamp & Childress (1994) at 266.

257. Childress (1982) at 109. *See also* Childress (1997) at 66; *id.* at 125 (requiring that paternalism be proportional to its negative effects).

258. Childress et al. (2002) at 173.

subject's liberty where doing so will not probably protect the subject from harm, neither can the agent intervene with the subject's liberty where the agent will probably cause *more* harm than he prevents. In either case, the agent would defeat the very basis for his intervention.

Feinberg applied a *de minimus* mediating maxim to the harm principle because "interference with trivia will cause more harm than it prevents."²⁵⁹ Like the harm principle, the spirit of hard paternalism is to minimize harms. It too ought not cause more harm than it prevents.

The agent cannot justify his hard paternalism by appealing to the prevention of significant harm either (1) where he probably will not prevent that harm or (2) where he causes more harm than he aims to prevent. The effectiveness condition (condition five) ensures that the agent probably will avert the harm caused by the subject's conduct. The proportionality condition ensures that the agent will not himself cause greater harm by intervening. Both conditions are necessary to ensure that there is sufficient weight on the beneficence side of the balancing scale.

Suppose the subject were about to raft down a wild and dangerous river. Surely,

259. Feinberg (1984) at 189.

the park ranger cannot justifiably pull out his service revolver and shoot the rafter in order to stop her. Although the ranger might intend to protect the rafter (from getting severely cut and bashed on the rocks), and although preventing that harm might be a legitimate objective for hard paternalism, the ranger's means of intervention (shooting) leaves the subject even worse off – than had the ranger not intervened at all. By shooting the subject, the agent would thereby, negate the very (beneficent) purpose of the liberty limitation.²⁶⁰

Similarly, employing physical restraints and bed siderails in nursing homes fails to reduce residents' fall-related injuries, but significantly increases the risk of entrapment and asphyxiation. If the rationale for using these restraints on nursing home residents is for their own protection, then the practice is misguided. It causes more harm than it prevents.²⁶¹

2. *What Degree of Proportionality Is Required?* Often, the harm caused by hard paternalistic liberty limitation is easily outweighed (or designed to be outweighed) by the harm it prevents. For example, where a physician sticks a patient with a needle, the pinch and the minor swelling cause the patient some harm. Yet, this minor harm is

260. Husak (2002) at 36 (noting that “a severe beating or lengthy term of incarceration in her closet would cause [a stubborn daughter] greater harm than the lack of vegetables in her diet”).

261. Braun et al. (2000). *See also* Beauchamp & Childress (2001) at 186.

outweighed where the needle prick is required to inoculate the patient against a life-threatening virus.²⁶²

However, in other cases, determining an acceptable *level* of proportionality is more difficult. For example, while artificially adding fluoride to a municipal water supply decreases the incidence of dental cavities, it also increases the risk of other health problems. Various medical and epidemiological studies, which I cannot describe in any detail here, have linked fluoridation with statistically increased incidence of skeletal fluorosis, bone fractures, and cancer. Related studies have even questioned the effectiveness of fluoridation in achieving its intended objective. But even if fluoridation were effective (the CDC listed it as one of the ten most significant public health advances in the 20th century), it is unclear whether preventing cavities outweighs the harms caused by the measure (fluoridation) implemented to achieve that end.

The strong evidence condition (condition one) helps here. Where the tradeoffs become closer and murkier, then hard paternalism is not justified because the first condition is not satisfied. But the real work (and it will not always be easy work) of applying the proportionality condition (and balancing beneficence against beneficence)

262. Beauchamp & Childress (2001) at 114.

can be handled by well-established models such as risk-benefit analysis.²⁶³

* * *

In sum, the sixth necessary condition for justified hard paternalism requires that the harm from which the subject is protected be greater than harm caused by the liberty limitation itself. We can state this condition:

It is a necessary condition for the justifiability of hard paternalism that:

6. *The agent employ hard paternalism only where it will very probably protect the subject from more harm than it causes.*

Were the agent able to cause a greater harm to the subject in order to protect her from a lesser harm, that would eviscerate the bite of the first necessary condition for justified hard paternalism.

H. Condition Seven: Hard Paternalistic Liberty Limitation Must Be as Least Restrictive as Necessary.

Not only should hard paternalism should be the operative liberty limiting principle only when no other alternative is available (per the fourth condition) but also - - even when hard paternalism is justified on the other six conditions defended in this chapter -- the scope of the hard paternalistic intervention must be as narrow as possible commensurate with achieving the primary objective of the liberty limitation.

263. Beauchamo & Childress (2001) at 202-06. One limitation of the condition, as stated, is that it would permit hard paternalistic intervention to cause 99% as much harm as it prevents. In that case, the harm prevented would be greater than the harm caused. But although not wholly negated, the very basis for the intervention (prevent significant harm – condition one) would be largely eviscerated.

The seventh necessary condition for justified hard paternalism requires that the agent interfere with the subject's liberty no more than is required to achieve the objective. There are various methods of implementing hard paternalism, including through force, coercive threat, and deception; and there are various degrees to which these methods can be brought to bear on the subject. The principle of the least restrictive alternative demands that scope of liberty limitation be no broader or more intrusive than necessary. There are two separate aspects in which hard paternalism must be least restrictive: (1) it must cause as little harm as necessary, and (2) it must restrict as little liberty as necessary.

1. *Why Must Hard Paternalism Be as Least Restrictive as Necessary: The Amount of Harm Caused.* The least restrictiveness condition and the proportionality condition are related, but each performs a unique role. The least restrictiveness condition without the proportionality condition would permit a hard paternalistic measure that caused more harm than it prevented – so long as it were the least restrictive alternative available. The proportionality condition without the least restrictiveness condition would permit harm-causing intervention (though less harm than averted) even where less harm-causing interventions were available. The proportionality condition ensures that the intervention does not cause more harm than it averts. But that is really just an outside limit. In no case should the paternalistic agent cause more harm than is

necessary.

Suppose there were two hard paternalistic measures that could effectively achieve a legitimate objective for hard paternalism. Each might be proportional and satisfy condition six. But one measure might cause less harm than the other. That less-harm-producing alternative must be chosen. This is demanded by the presumption against liberty limitation. Hard paternalistic measures are not desirable, and should be employed reluctantly. Once they are employed, they should (like any undesirable thing, such as a tetanus shot) be made as quick and painless as possible.

2. Why Must Hard Paternalism Be as Least Restrictive as Necessary: The Scope of Liberty Restricted. Minimizing the restrictiveness of liberty limitation is widely endorsed.²⁶⁴ As one commentator explains, “it is essential to think about the

264. Arrigo (1992-93) 151-54; Beauchamp (2001) at 381; Beauchamp & Childress (1994) at 34, 283 (arguing intervention can be justified if it is “[t]he *least restrictive* alternative that will secure the benefits and reduce the risk is adopted”) (emphasis added); Beauchamp & Childress (2001) at 301 (arguing that universal screening for HIV is not justified where it is sufficiently effective to screen just high-risk groups); Calcott (2000) at 318-19; Childress (1982) at 113; Childress (1997) at 66; *id.* at 125 (denying that soft paternalism automatically justified intervention and requiring that soft paternalism employ the *least restrictive* means, prevent serious harm, and be proportional to its negative effects) (emphasis added); Dixon (2001) at 323 (proposing to preserve boxing but to eliminate blows to the head); Dworkin (1971) at 123-24 (proposing institutional arrangement of waiting period rather than absolute prohibition); Feinberg (1984) at 22-25, 194-98, 217; Feinberg (1986) at 138; *id.* at 264 (“practice is effectively discouraged *without resorting* to the criminal law”) (emphasis added); Feinberg (1988) at 115-16 (urging controls on license, location, and manner instead of banning); *id.* at 143 (urging use of tax and regulation before prohibition); *id.* at 186, 233; Goldman & Goldman (1990) at 75; Gostin (1997) at 332 (“The intervention must also be *no more restrictive* than necessary to achieve the public health objective.”) (emphasis added); *id.* at 352 (“[T]obacco use can be dramatically reduced without an inordinate cost to our political principles.”); Gostin, et al. (1999) at 124 (“[S]tatutes should require health officials to choose the *least restrictive* alternative that will accomplish the public health goal.”) (emphasis added); Gostin (2001) at 103,

‘fit’ between any given set of policy proposals and the underlying scientific and moral bases for regulatory action.”²⁶⁵ The fit must be as tight as possible. Beauchamp and Childress demand that “the least autonomy-restrictive alternative that will secure the benefit and reduce the risk is adopted” and that “the infringement selected must be the least possible commensurate with achieving the primary goal of the action.”²⁶⁶

As I discussed in Chapter One and in connection with condition four (the last resort condition) in this chapter, there is a presumption against the limitation of individual liberty. But even when there is strong evidence that a hard paternalistic intervention has an appropriate objective and is necessary, effective, and proportional (conditions one through six are satisfied) in achieving that objective; the presumption still operates.

162, 215; Gutmann & Thompson (1996) at 266 (“[T]he paternalistic measure should employ the *least restrictive* measure for preventing the harm or promoting the good in question.”) (emphasis added); Husak (1992) at 99 (“Whenever possible, the objects of social policy should be achieved by means less drastic than a total prohibition.”); Husak (1998) at 604 (“[A] statute that is *underinclusive* is to be preferred to a statute that is overinclusive.”) (emphasis added); Jorgensen (2000) at 56; Kasachkoff (1997) at 413; Kleinig (1983) at 70, 93, 135-37, 185, 216; Kultgen (1995) at 77, 167; Lavin (1996) at 2425; Mill (1859) at Book V; Pellegrino (1981) at 376 (supporting a “principle of self-determination”); Rainbolt (1989) at 58; Regan (1974) at 191; Riley (1998) at 141; Shapiro (1988) at 570 (1988); Sunstein (1997) at 56 (“A good government should have a presumption in favor of the *least intrusive* means”) (emphasis added); Thompson (1980) at 251-53; Trebilcock (1993) at 75-76; VanDeVeer (1986) at 312, 356 (“[L]egislatures rationally could make fine-textured sets of laws Indeed, there is a presumption in favor of so doing -- subject to constraints of workability.”); Wikler (1983) at 35, 39, 45; Wikler & Beauchamp (1996) at 1367; Young (1986) at 78. For an illustration of the different types of measures for reducing health damage, see Hadden (1980) at 411; Viscusi (1998) at 1098-99. The restrictiveness can pertain to the activity itself or the impact on a population.

265. Rabin (1991) at 495.

266. Beauchamp & Childress (2001) at 19-20, 186.

As James Childress puts it, “even if a person’s liberty is justifiably restricted, [the presumption] leaves ‘moral traces’ in that it requires use of the least restrictive alternative.”²⁶⁷ The presumption against interference with individual liberty demands not only strong moral reasons for hard paternalism but also demands that the particular means or methods of hard paternalism be necessary – that no morally preferable means are available. There are several dimensions on which the scope of interference can be measured. I cannot review all these dimensions here. But some of the more salient are captured by distinctions between (1) temporary and permanent paternalism, and (2) partial and total paternalism.

One distinction that philosophers commonly draw in order to describe the restrictiveness of paternalistic interventions is that between “temporary” and “permanent” paternalism.²⁶⁸ This distinction is, of course, central in soft paternalism, where liberty limitation is only presumptively justified. In soft paternalism, liberty limitation is justified only temporarily – either until the subject begins to act substantially voluntarily or until the subject’s conduct is ascertained to (already) be

267. Childress (1982) at 202.

268. Bok (1978) at 204 (“Paternalistic restraints may be brief . . . or of much longer duration . . .”); Gert & Culver (1997) at 238-40 (length of time); Gostin (2000) at 3121 (“[I]t is important to measure the intervention’s duration . . .”); Gostin (2001) at 103; Gutmann & Thompson (1996) at 265 (“Another salient feature of Mill’s case of bridge crossing is that the intervention is *limited*.”); Häyry (1991) at 70; Linzer (1999) at 138. This distinction parallels determinations of offense seriousness – factors of intensity, duration, and character. Feinberg (1985) at 35.

substantially voluntary.²⁶⁹

In hard paternalism, on the other hand, the distinction between temporary and permanent paternalism describes the scope or degree of liberty limitation. For example, the state might ban rafting (temporarily) on the Rapid River, for example, until the storm subsides. Or, the state might ban rafting on the Rapid River (permanently) because it's often (though not always) just too fast and rocky.²⁷⁰

Closely related to the distinction between temporary and permanent paternalism is the distinction between "partial" and "total" paternalism. Total paternalism is not justified where partial paternalism can achieve the same objective. For example, a (total) law prohibiting the use of motorcycles might be overly broad where the serious

269. Beauchamp & Childress (1994) at 277, 285-86; Feinberg (1986) at 12, 61, 125-26, 143, 157, 175. *See also* Armsden (1989) at 93; Bayles (1988) at 115 (the agent's motive for interfering must be to counteract the subject's lack of understanding); Berger (1985) at 47; Callahan (1984) at 286; Childress (1997) at 125 (denying that soft paternalism automatically justified intervention and requiring that soft paternalism employ the least restrictive means, prevent serious harm, and be proportional to its negative effects); Douglas (1983) at 174-75 (contrasting "cooperative paternalism" in which the agent helps the subject become more competent and "conflictual paternalism" in which the agent does not have that aim); Gert, Culver & Clouser (1997) at 226 (arguing that "just because people are not competent to make a rational decision does not mean that it is justified to violate any moral rule with regard to them"); Häyry (1991) at 70; Hospers (1980) at 265 (arguing that the agent must not impose his values onto the subject -- even when the subject acts without substantial voluntariness. Under such circumstances, the agent must act to help the subject); Jorgensen (2000) at 48; Kleinig (1983) at 31, 214; *id.* at 141 ("The fact that a paternalistic imposition is weak does not mean that it is therefore morally unproblematic."); Kultgen (1983) at 8 ("This solicitude is constructive."); *id.* at 20; *id.* at 53 ("The kinds and extent of control which they legitimately exert, however, are strictly limited by the ultimate objective -- to prepare their children for autonomy . . ."); *id.* at 54, 59, 78; Lavin (1996) at 2423; Locke (1688) at 57 ("[T]he end of Law is not to abolish or restrain but to preserve and encourage freedom . . ."); VanDeVeer (1986) at 354-55 (arguing that the mere presence of some lack of voluntariness does not imply a forfeiture of ascriptive autonomy).

270. Feinberg (1984) at 194-98 (on licensing as an alternative).

risks (of concern) of motorcycle riding can be controlled by a (partial) law requiring riders to wear helmets.

Gerald Dworkin observes, “a good deal depends on the *nature* of the deprivation — *e.g.* does it prevent the person from engaging in the activity completely or merely limit his participation.”²⁷¹ The extent to which a subject's liberty is limited often varies significantly depending upon whether the restriction is addressed to the *manner* in which actions are performed or instead addressed to their outright and complete prohibition.²⁷² Whenever possible, hard paternalistic objectives should be achieved through means less drastic than total prohibition.

For example, although millions are killed in automobile accidents, (substantially autonomous) driving itself is not prohibited. However, various laws do regulate *how*

271. Dworkin (1971) at 125. *See also* Burrows (1995) at 501 (“The easy cases, from a paternalistic point of view, are those in which safety-enhancing restrictions leave the main attraction of participation in the activity in-tact.”); Gostin (2000) at 3121 (“[I]t is important to measure the intervention’s *invasiveness*: to what extent does the public health intervention intrude on the right in question?”) (emphasis added); Gostin (2001) at 103; Thompson (1987) at 174.

272. Armsden (1989) at 31; Berlin (1969) at 130 (arguing that the extent of freedom is determined by “how far they are opened and closed by deliberate human acts”); Kleinig (1983) at 108; Kultgen (1995) at 167; Mill (1859) at Book V (arguing that “regulations in general be no material impediment to obtaining the article, but a very considerable one to making an improper use of it.” He illustrates this in writing that “labeling may be enforced without violation of liberty.”); Murdach (1996) at 28 (“limited beneficence”); Sunstein (1997) at 179; Umezo (1999) at 6; VanDeVeer (1986) at 361, 438-39. In some circumstances, the intervention itself is not paternalistic but the manner of intervention makes it paternalistic. For example, food stamps and other forms of welfare are provided for the good of subjects but with their consent. So, the programs themselves do not have a hard paternalistic rationale. However, there are often hard paternalistic strings attached in the ways in which the programs are implemented. Kleinig (1983) at 173; Mead (1997); Mead (1998).

one drives, for example: within the posted speed limits, with a seatbelt, and without more than 0.08% blood alcohol content. Similarly, other risky activities are permitted but only with the use of safety equipment such as goggles, life jackets, or other protective gear. And many opponents of boxing do not demand its complete prohibition (as the AMA House of Delegates proposed in 1984) but only a modification sufficient to prevent the significant harm: “I propose a single legal restriction – a complete ban on blows to the head – which would allow boxing to continue, while eliminating its single most harmful aspect.”²⁷³

Requiring hard paternalism to employ the least restrictive alternative is demanded by the presumption against liberty limitation. The presumption is an inference both in favor of not limiting liberty *and*, if liberty is to be limited, limiting as little as possible. So, the presumption imposes on the proponent of hard paternalism the burden of showing that there are good reasons for limiting individual liberty *and* that there are good reasons for limiting as much liberty as he proposes to limit.

Hard paternalistic measures are not desirable, but they are sometimes necessary. They should be as quick and painless as possible. Moreover, as discussed below, unless hard paternalism were as least restrictive as necessary, hard paternalism

273. Dixon (2001) at 323.

might not be sufficiently contained to limit a potential slippery slope of overly invasive hard paternalistic measures.

3. *First Objection to the Necessity of Least Restrictiveness: Usefulness.* It

might be objected that the usefulness of the distinctions between partial and total paternalism and between temporary and permanent paternalism are limited because of the high number of possible relevant act descriptions.²⁷⁴ For example, prohibiting motorcycle riding without a helmet could be characterized as partial paternalism because it only regulates one aspect of the activity, motorcycle riding. Alternatively, the same law could be characterized as total paternalism if a plausible case could be made that there is separate discrete activity, “helmetless motorcycle riding.”²⁷⁵

Nevertheless, this condition is workable. Like several others, as discussed

274. Gordon (1980) at 268 (“[A]n action can be referred to by different descriptions”); Hayry (1991) at 24 (noting the distinction represents “matters of degree rather than the matters of clear-cut classes. So, although the variety of possible reasons for paternalistic intervention ought to be registered and recognized, it seems probable that finer details of the divisions will not be able to carry much weight in justificatory considerations”); Sunstein (1997) at 179; VanDeVeer (1986) at 30; Weale (1983) at 788 (“[T]here is a certain indefiniteness about the identification of actions”). Also, determining what is a least restrictive alternative is often complicated. For example, laws serve not only a functional but also a symbolic function. Gusfield (1968) at 57-58.

275. These sorts of distinctions and recategorizations are *not* uncommon. In tort law, for example, plaintiffs are barred from recovering for injuries due to risks intrinsic to sports, because they are presumed to know these risks and consent to them (and thereby waive any claims) by participating in the sport. In order to get around this “assumption of risk: defense, plaintiffs, with some success, argue, for example, that they were not participating in, for example, skiing but “ski-racing.” *Petiet v. Kirkwood Mtn. Resort*, 2002 WL 31002996 (Cal. App. 2002). So, there has been a good deal of briefing and judicial opinions addressing when altering some aspects of an activity makes that activity into an altogether different activity.

above, it resonates with constitutional legal analysis.²⁷⁶ In light of the presumption against limiting individual liberty, laws which are overinclusive (restricting more protected liberty than necessary to achieve the law's objective) cannot be justified. Courts regularly apply the requirement that liberty limitation be "narrowly tailored."

For example, the United States Supreme Court struck down an Arkansas statute that required public school teachers to list annually every organization to which they belonged or contributed. The Court held that the state could achieve its legitimate interest in ascertaining teachers' competence by asking only about those affiliations which could be relevant to teacher fitness.²⁷⁷

In another case, the Court struck down a municipal regulation banning the leafletting and the distribution of printed materials. The Court held that while such laws served the legitimate government interest of keeping streets and sidewalks free from litter, there were less restrictive means to ensure cleanliness and prevent littering, than totally prohibiting a means of expressing First Amendment-protected speech.²⁷⁸ While there may be cases where it is unclear whether hard paternalism is total or partial, in

276. This "*least restrictive alternative*" analysis parallels that used in constitutional law when analyzing government interference with "fundamental rights." Chemerinsky (1997) at 532, 643; Feinberg (1986) at 87-94; Kelso (1994) at 1298-1305; NBAC (1997) at 91.

277. Shelton v. Tucker, 364 U.S. 479 (1960).

278. Schneider v. State, 308 U.S. 147 (1939).

many cases it will be clear enough.

4. *Second Objection to the Necessity of Least Restrictiveness:*

Superfluosity. It might be objected that this condition is superfluous, and that my theory lacks simplicity and elegance because this condition and the last resort condition get at the same thing: minimize the extent of limitation of liberty. Indeed, a single condition could probably be crafted that could do the work of my two conditions. Childress et al., for example, observe that “[t]he justificatory condition of least infringement could plausibly be interpreted as a corollary of necessity – for instance, a proposed coercive measure must be necessary in *degree* as well as in *kind*.”²⁷⁹

But that approach would elevate simplicity at the cost of (the arguably more important attribute of) clarity. The “last resort” and “least restrictive” conditions serve distinct roles. The last resort condition is a threshold condition, requiring that there be no hard paternalism where other (preferred) alternatives such as persuasion or soft paternalism could achieve the objective. The least restrictiveness condition, on the other hand, is applied at the (later) stage of determining the justifiability of particular means of implementing hard paternalism. The roles of the last resort and least restrictiveness conditions is sufficiently distinct to warrant the use of separate

279. Childress et al. (2002) at 173 (emphasis added).

conditions.

* * *

In sum, the seventh necessary condition for justified hard paternalism requires that the agent not limit more liberty or cause more harm than is necessary to achieve the objective. We can state this condition:

It is a necessary condition for the justifiability of hard paternalism that:

7. *The agent must restrict only as much liberty and cause as much harm as is necessary to achieve the objective.*

Just as a hard paternalistic reason for liberty limitation is acceptable only if no other liberty limiting principles are available (per Condition Four), any particular *means* of hard paternalistic liberty limitation is acceptable only if there are no narrower, more tailored means of achieving that same objective.²⁸⁰

I. Summary of the Argument for the Individual Necessity of Each of the Seven Conditions for Justified Hard Paternalism.

In the last seven subsections I have argued why each condition is necessary for

280. The analysis will sometimes be more complicated where there are less restrictive hard paternalistic measures but which do not achieve the same level of effectiveness as hard paternalism. Are we willing to sacrifice some (small) level of effectiveness in order to use a less restrictive alternative? How much? Ought we employ a measure that is 10% less effective if it is 50% less restrictive? How can we quantify effectiveness and restrictiveness to even frame such issues? These questions are not unique to hard paternalism, and I will not explore them here. The condition, as stated, includes the easy cases where less restrictive measures can achieve equal or more effectiveness than more restrictive measures. How tradeoffs should be made in the hard cases is better examined in the context of specific examples in greater depth than can be done here.

justified hard paternalism. If there were a measure of justified hard paternalistic liberty limitation that did not satisfy those seven conditions, then that would be a counterexample to the argument that those seven conditions are necessary to justify hard paternalism.

I showed both through plain language argument and through grappling with purported counterexamples that cases of hard paternalistic liberty limitation that fail to satisfy all these conditions cannot be justified. I showed that my theory of justified hard paternalism can account for all the cases of hard paternalism typically thought to be justified.

J. Argument for the Joint Sufficiency of the Seven Conditions for Justified Hard Paternalism.

I turn now to argue for the joint sufficiency of my seven conditions. Even if there is no case of justified paternalism that fails to satisfy my seven conditions, I must still establish that there is no case where all seven conditions are satisfied that is not a case of justified hard paternalism. That is, even if my theory of justified hard paternalism is not too narrow, I must still establish that it is not too broad.

1. Introduction to the Method of Establishing the Joint Sufficiency of the

Seven Conditions. In order to establish sufficiency, I must show that if a case of hard paternalism satisfies my seven conditions, then it must be justified. Appropriate counterexamples are cases of unjustified hard paternalism that satisfy all seven conditions. If sufficiency is expressed as a conditional (If a case of hard paternalism satisfies the seven conditions \rightarrow then it is justified hard paternalism), then responding to a counterexample requires a modus tollens argument: negating the consequent and thereby permitting the negation of the antecedent of the conditional to be drawn as a conclusion.

2. Counterexamples to the Joint Sufficiency of the Seven Conditions. I have already discussed many cases of unjustified hard paternalism (*e.g.* banning tattooing). But these have all failed to satisfy at least one of the seven conditions. This was, of course, the whole point of these examples: to show that the conditions were necessary to exclude these cases from the theory of justified hard paternalism.

Two notable cases, which I have not yet discussed, and which might satisfy the seven conditions are (1) the banning of laetrile, and (2) the banning of cigarette smoking. These limitations of liberty are generally considered to be unjustified hard paternalism. If they satisfy all seven conditions, then I may have a valid counterexample to sufficiency with which to contend.

Laetrile was introduced as a cancer-fighting drug around the 1970s. But as no study proved that it offered any clinical benefit, the FDA banned the drug.²⁸¹ However, despite being aware of the shabby scientific basis for laetrile, many patients sought access to the drug despite the FDA's ban. Many philosophers concluded that the FDA's ban was unjustified hard paternalism.²⁸² The laetrile case, however does not qualify as a counterexample to the sufficiency of my seven conditions. It does not even get past the first two conditions. It is unclear that permitting patients to take a drug that had no benefit (nor any serious side effects) would cause them significant harm.

The case of cigarette smoking may prove more difficult. While cigarette smoking is widely restricted on harm to others grounds, few have even proposed hard paternalistic restriction of smoking. One of the few cases of hard paternalistic regulation of smoking (in Friendship Heights, Maryland) was quickly defeated.²⁸³ Hard paternalistic restriction of cigarette smoking is not generally considered justified.

However, hard paternalistic restriction of cigarette smoking does seem to satisfy my seven conditions. First, there is overwhelming scientific evidence that smoking

281. Rutherford v. United States, 442 U.S. 544 (1979).

282. Caplan (1980) at 145; Thompson (1980) at 267; VanDeVeer (1986) at 323.

283. Pope (2000) at 480.

causes serious health problems that set back people's welfare interests (conditions one and two). Second, people do not have a high autonomy interest in smoking. So, this would be high harm, low intrusion hard paternalism (condition three). Third, other measures (*e.g.* education) have been attempted and have failed. So, hard paternalism would be a last resort (condition four). Fourth, if people do not have access to cigarettes, then the harm from smoking will stop. So, the ban would be effective at preventing the harm (condition five). Fifth, any harm caused by the intervention (*e.g.* withdrawal symptoms) are less serious than the harm prevented, and can be handled with measures such as nicotine patches. So, the ban would be proportional (condition six). Finally, since cigarette smoking is intrinsically harmful, there is no less restrictive manner of preventing the harm from smoking. Attempted measures such as special filters and low tar cigarettes have been proven to cause even more harm.

The case of banning cigarette smoking seems to be a counterexample to the sufficiency of my seven conditions. It satisfies all seven conditions, but is not a case of *justified* hard paternalism. There are two ways in which I can respond to the counterexample. I can either revise (strengthen) my conditions to exclude this case or I can argue that the judgment regarding the justifiability of banning smoking should be revised. I shall do the latter.

My theory indicates that the hard paternalistic restriction of cigarette smoking is justified even though that it not now a considered judgment in our culture. However, this is not necessarily a reason to revise the theory. Indeed, it is a virtue of normative theories that they generate judgments that were not in our original database of judgments. As VanDeVeer explains, “If its implications require revision of our intuitions . . . that will not be surprising and need not be seriously damaging, for that is a familiar byproduct of acceptable theories.”²⁸⁴ Only if the theory “has radically counterintuitive implications in a wide array of cases, that provides reason to pause and to revise, or even to reject the theory.”²⁸⁵ Cultural attitudes toward smoking are shifting, and, while not congruent with our considered judgments, my theory’s implications for smoking are hardly radically counterintuitive.

IV. OBJECTIONS TO THE SEVEN NECESSARY AND JOINTLY SUFFICIENT CONDITIONS FOR JUSTIFIED HARD PATERNALISM.

In this section, I identify, evaluate, and respond to the four strongest arguments that philosophers have typically made against the justifiability of hard paternalism. There are three important *consequentialist* objections to hard paternalism: (1) the Slippery Slope Argument, (2) the Argument from Paternalistic Distance, and (3) the Argument from the Developmental Value of Choice. In addition, there is one important

284. VanDeVeer (1986) at 180.

285. VanDeVeer (1986) at 180.

non-consequentialist objection to hard paternalism: (4) the Argument from the Oppression of Individuality.

I state each of these four objections in its strongest form. Then, I defeat each objection largely: (1) by showing that the objection is not supported by sufficient evidence, and/or (2) by demonstrating that my theory of justified hard paternalism is constrained enough to avoid causing the bad consequences that motivate the objection.

A. Objection One: The Slippery Slope Argument²⁴³

Tom Beauchamp argues that “the dominant reason” paternalism ought to be judged an unacceptable justifying principle is that “paternalistic principles are intrinsically too broad and hence serve to justify too much.”²⁴⁴ While many philosophers don’t identify the *scope* of hard paternalism as its *principal* objection, almost all philosophers conclude that hard paternalism has a slippery slope problem.²⁴⁵

243. The slippery slope argument, unlike the other three objections to hard paternalism, is widely employed outside the context of hard paternalism, to attack all sorts of moral, policy, and legal arguments and positions. The analysis has become rather sophisticated and extensive. (*e.g.* Volokh 2003), and cannot be dealt with comprehensively, here. Accordingly, I focus on motivating and responding to the key features of the argument.

244. Beauchamp (1976) at 373. *See also* Beauchamp (1977) at 77-78; Beauchamp (1978) at 245; Beauchamp (1981) at 139-40; Beauchamp (1983) at 131; Beauchamp & Childress (1994) at 278 (“Antipaternalism also argues that paternalistic standards are too broad and therefore would authorize and institutionalize too much intervention if made the basis of policy.”); Beauchamp & Childress (2001) at 182.

245. Archard (1994) at 286; Husak (1992) at 141; Kleinig (1983) at 74, 159, 191; VanDeVeer (1986) at 234-36.

George Rainbolt, for example, worries that “once the absolute prohibition of hard paternalism is abandoned, there will be no way to check state intrusions into our liberty.”²⁴⁶ Joel Feinberg concludes that “[t]he trick is stopping short . . . legal (hard) paternalism justifies too much.”²⁴⁷ Gerald Dworkin also recognizes the “difficulty of drawing a line so that it is not the case that *all* ultra-hazardous activities are ruled out.”²⁴⁸ And Douglas Husak worries that “a hard paternalistic rationale . . . would prove far too much and would justify a wider range of paternalistic interferences over individual liberty than should be tolerated.”²⁴⁹

The slippery slope argument, also known as the “thin edge of the wedge,” “the snowball effect,” “the domino theory,” “the tip of the iceberg,” “the foot in the door,” or the “camel’s nose in the tent,” has perhaps as many variations as it does names. Still, each form of the argument is basically a variation on *reductio ad absurdum*. The two forms of the slippery slope argument most relevant here are the logical form and the empirical form.²⁵⁰

246. Rainbolt (1989) at 56.

247. Feinberg (1986) at 24. *See also id.* at 77, 346-47.

248. Dworkin (1971) at 125.

249. Husak (1992) at 141.

250. Opponents to hard paternalism also sometimes make an argument distinct from the slippery slope: the argument “from added authority.” Schauer (1985) at 367-68; van der Burg (1998) at 131. Here, the concern is “jurisdictional,” because the merely allowing the government or another paternalistic agent to regulate substantially autonomous self-regarding behavior at all increases the risk that it will come to regulate other such behavior. This argument has also been described as “statism.” *See* Salgado (1997) at 944. Of course, hard paternalism, like any liberty limiting principle, provides only a morally relevant reason, and not necessarily a decisive reason in support of state intervention. But, in any case, because this

1. *The Logical Form of the Slippery Slope.* The logical form of the slippery slope argument holds that the concepts used to justify *some* paternalism, actually justify far too much paternalism. “[T]he slope is slippery,” states the objection, “because the concepts and distinctions used in moral and legal rules are vague and may lead to unanticipated outcomes.”²⁵¹ What distinguishes the logical form of the slippery slope argument is that the slide is not due to psychological, political, or social forces acting on (and perhaps stretching) the principle. Rather, the slide is due to the vague conceptual scope of the hard paternalism liberty limiting principle itself.

Writers have long contended that hard paternalism’s justificatory scope is theoretically infinitely expandable. Rousseau warned:

The more I reflect, the more I find that the question may be reduced to this fundamental proposition: to seek happiness and avoid misery in that which does not affect another is a natural right If there is a self-evident and absolute maxim in the world, I think it is this one, and if anyone succeeded in subverting it, there is no human action which might not be made a crime.²⁵²

Later, the Whig historian Thomas Babington Macaulay similarly warned:

Why should they not take away the child from the mother, select the nurse, regulate the school, overlook the playground, fix the hours of

argument requires detailed attention to the mechanics of institutional and/or personal behavior, I shall not pursue it here.

251. Beauchamp & Childress (1994) at 229; Childress (1982) at 118; Van der Burg (1998) at 133 (“The gray zone in the second slippery slope argument is usually the result of both semantic indeterminacy and epistemic indeterminacy.”).

252. J.J. Rousseau (1968) (1761) at 264.

labor, of recreation, prescribe what ballads shall be sung, what tunes shall be played, what books shall be read, what physic shall be swallowed? Why should they not choose our wives, limit our expenses, and stint us to a certain number of dishes of meat, of glasses of wine, and cups of tea?²⁵³

Contemporary anti-hard paternalists similarly argue that regulation based on hard paternalism leads to “an ominous growth in big government”²⁵⁴ and the “enforcement of prudence.”²⁵⁵ These writers suggest that “if extended to its *logical limits*, [hard] paternalism would support the regulation of almost any activity. . . . laws limiting consumption of unhealthful foods and laws requiring regular medical exams are just a few examples of laws that [hard] paternalism could justify.”²⁵⁶

The essence of the logical slippery slope objection to hard paternalism is that it “[*fails to*] draw a line so that it is not the case that all ultrahazardous activities are ruled out.”²⁵⁷ Michael Trebilcock contends that “[t]he problems posed by hard paternalism are obvious once one abandons as the *principal reference point* an individual's own preferences, the dangers of an authoritarian imposition of others' preferences . . . are

253. Macaulay (1972) (1853) at 165.

254. Beauchamp (1989) at 46.

255. Feinberg (1986) at 25.

256. Ezra (1990) at 1071-72 (emphasis added). *See also* Boughton, (1984) at 186; Cunningham (1998) at 52 (“Beware, ye other merchants of premature politically incorrect death -- ye distillers, fatty food distributors, gun makers, auto makers.”); Feinberg (1986) at 77; Gilbert (1980) at 5 (“Some aspects of the current vogue to alter unacceptable lifestyles are pernicious and verge on the totalitarian.”); Kadow (1998) at 74; Kultgen (1995) at 15 (“More globally, we should be repelled by the prospect of a world of do-gooders and busybodies prying into the affairs of their neighbors and badgering them for their own good.”); Leichter (1991) at 133-34; Malthby & Dushman (1994) at 646; Schauer (1985) at 368-69; Stewart (1996) at 1401-02; Sullum (1998) at 269; Szobonya (1996) at 545-46.

257. Dworkin (1971) at 125 (emphasis added).

relatively unconstrained."²⁵⁸ Milton Friedman suggests that once one accepts the principle that some shall decide for others "[t]here is *no formula* that can tell us where to stop."²⁵⁹

2. *Initial Response to the Logical Slippery Slope Objection.* My initial response to the logical form of the slippery slope argument is that it has little or no force against my theory of hard paternalism. My theory is not too vague.

Take, for example, Enrique Salgado's argument:

If the state intends to protect citizens' health from themselves, shouldn't it also regulate other health-related activities Policemen could go about making sure people do their obligatory pushups and situps. People who harm their health by eating high cholesterol foods or by hurting their ankles by playing soccer . . . could be arrested and charged for 'crimes against health.'²⁶⁰

Obviously, Salgado is correct. A theory of hard paternalism that legitimized intervention in individuals' "*unhealthful*" or "*non-optimal* decisions" would legitimize far too much. Paternalistic agents could, according to some scale or other, interpret far too wide a range of subjects' choices as unhealthful or non-optimal.

But that's hardly the argument I've made for hard paternalism. My argument for

258. Trebilcock (1993) at 150.

259. Friedman (1962) at 33-34.

260. Salgado (1997) at 945.

hard paternalism does not rely so heavily on an single vague term like “non-optimal,” but rather on seven individually necessary conditions. The argument that I’ve constructed leaves agents far less discretion. It is more narrow, richer in detail, and more resistant to modulation.²⁶¹ Like any other liberty limiting principle, my theory of justified hard paternalism is qualified by mediating maxims.²⁶²

The conduct in Salgado’s scenario, for example, would fail to satisfy several of

261. Schauer (1985) at 371.

262. Beauchamp (2001) at 381 (“[C]onditions can be specified by a hard paternalist that will severely restrict the range of justifiable interventions.”) (emphasis added); Beauchamp & Childress (2001) at 182 (“Careful defenders of paternalism would disallow these extreme interventions”); Blokland (1997) at 170 (observing that Kleinig, Dworkin, Feinberg, and Gert all propose “a number of *limiting guidelines*”) (emphasis added); Bronaugh (1986) at 801; Dahl (1988) at 78 (“[I]f one doesn’t make the distinctions that Feinberg draws, one will be apt to be led astray.”); Feinberg (1984) at 13 (calling for “careful analysis of the concept of harm, and the formulation of relatively *precise maxims* to mediate the application of the harm principle”) (emphasis added); *id.* at 26, 36, 187-217; *id.* at 187 (arguing that the harm principle requires “*supplementary principles*”: “I shall use the term ‘*mediating maxim*’ as an umbrella term for further specifications of meaning . . . , for guides to the application of a liberty limiting principle.”) (emphasis added); *id.* at 214; *id.* at 245 (arguing that the harm principle must be “supplemented by additional principles” and “refined and shaped by conceptual analysis” and “*mediating maxims* [must be] prescribed to guide its application”) (emphasis added); Feinberg (1985) at x (“[I]nterpretations and qualifications of the literal liberty limiting principles . . . are necessary of those . . . principles are to warrant our endorsement”) (emphasis added); *id.* at 10, 26, 49; Feinberg (1986) at x, xii-xiii, xvi; *id.* at 3 (arguing that liberty limiting principles, “until they are *interpreted, qualified, and mediated* by various standards, are largely vacuous. Accordingly, we have concentrated thus far on *fleshing them out* with normative substance.”) (emphasis added); Feinberg (1988) at x (explaining that even core liberal liberty limiting principles must be interpreted and qualified if they are to warrant our endorsement); *id.* at xii (offering “*supplementary criteria*” to guide application) (emphasis added); *id.* at xvi (offering “*mediating maxims*” to guide application of the offense principle); *id.* at 11, 58, 179; *id.* at 206 (explaining that classifying exploitative acts is a useful prerequisite to understanding what the law should do about it); *id.* at 319; Gutman & Thompson (1996) at 263; Häyry (1991) at 70; *id.* at 77 (“The gravity of a given violation of autonomy, the seriousness of an instance of self-inflicted harm, and the degree of voluntariness of a decision are all factors that must be assessed and compared separately in each particular class of cases.”); Kultgen (1995) at 15, 81, 210 (offering “*corollaries*”); Mackie (1977) at 181; Perri 6 (2000) at 151 “[T]here must also be some *limitations* upon the scope of [the harm principle.]” (emphasis added); Sankowski (1985) at 11; Schwartz (1990) at 73-74 (“[P]aternalistic authority . . . is useful is properly limited”); Thompson (1980) at 260; Young (1986) at 65 (endorsing a “policy of (selective) strong paternalism”); *id.* at 77-78 (describing “*criteria for limiting the scope of paternalism*”).

my necessary conditions. The second condition is not satisfied because no significant harm is at stake. Failure to do one's situps will not setback below a tolerable minimum one's critical or welfare interests. The third condition is not satisfied because this conduct falls in the low harm, low intrusion category. The fifth condition is not satisfied because it is hard to believe that the interventions that Salgado describes would ever be effective. And the seventh condition is not satisfied because even if these aspects of personal health were legitimate subjects of hard paternalism, they could be achieved in less restrictive ways than through criminal sanctions.

Admittedly, several of my conditions do not have an altogether determinate application. But even Beauchamp and Childress' less specified conditions, discussed as the beginning of this chapter, are sufficient to restrict the paternalistic agent's discretion and to "reduce the amount of intuition involved."²⁶³ The "strong evidence" condition additionally ensures that hard paternalism is justified only when it is *clear* that the other six conditions are satisfied. Furthermore, conditions for the application of other liberty limiting principles (like the harm principle) are equally (even notoriously) vague, but these liberty limiting principles are still considered to be determinate enough to be useful and workable.

263. Beauchamp & Childress (2001) at 19. *See also* Lode (1999) at 1511 ("The terms "tall" and "bald" are vague, but they have not been expanded beyond a relatively fixed understanding of their relative scopes.").

3. Further Response to the Logical Slippery Slope Objection: More Examples.

Tom Beauchamp illustrates a logical slippery slope objection by suggesting that “[hard] paternalism could *in principle* prohibit hazardous recreational activities such as hang-gliding, mountain-climbing, and whitewater rafting.”²⁶⁴ Beauchamp further suggests, and I agree, that hard paternalistic restriction of this conduct does not seem justifiable.

However, my theory would not justify intervention into any of this conduct. Distinctions can be drawn. There are relevant and discernable differences between this conduct and the conduct my theory would permit to be restricted. This conduct falls in the high harm-high intrusiveness category. Therefore, it can be restricted only if the participants lack a rational basis for engaging in the activity. With respect to this conduct, the participants clearly do have a rational basis. It provides an appreciable (even if not, for me, desirable) thrill and excitement. The hazardous recreational activities that Beauchamp mentions provide an understandable sense of adventure. They may be high harm, high intrusion activities, but the motivation for engaging in them is not irrational.²⁶⁵ Therefore, hard paternalistic restriction of these recreational activities would fail to satisfy my third condition.

264. Beauchamp (1996) at 1918.

265. More could be said about the *reasons* for engaging in these activities, but there is not space here. Like Feinberg, I appeal to the reader’s intuitions on this point. Feinberg (1988) at 126 (drawing “probative impact” from “spontaneous reactions”: “[S]uch arguments, while technically ad hominem in form have as much force as can be expected in ethical discourse.”).

Joel Feinberg argues that “[hard] paternalism justifies too much, the flat-out prohibition, for example, of whiskey [and] fried foods.”²⁶⁶ My theory would not justify intervention with any of this conduct. Hard paternalistic liberty limitation of this conduct fails to satisfy the second necessary condition. Consumption of whiskey and fried foods is not significantly harmful.²⁶⁷ Of course, they could be consumed with sufficient regularity and volume to be significantly harmful. But so could toothpaste and caffeine. These products are typically used in moderation and do not pose health risks of sufficient magnitude and probability to create significant harm.

Moreover, even if strong evidence developed that these products do cause significant harm, hard paternalism still would not be justified unless: (1) morally preferable alternatives (*e.g.* persuasion, education) were not available, (2) less restrictive alternatives (*e.g.* regulating alcohol content or serving hours), and (3) prohibition (in contrast to experience under the Volstead Act) would be effective. In short, while some theories of hard paternalism might be subject to a logical slippery

266. Feinberg (1996) at 319. *See also* Feinberg (1988) at xvii (“[A] consistent application of (hard) legal paternalism would lead to the creation of new crimes that call for the general punishment of risk-takers, the enforcement of prudence, and interference with selfless saints and heroes.”).

267. Consumption for a particular individual might be sufficiently harmful. Accordingly, hard paternalistic liberty limitation may be justified in that individual’s case. It is not justified as a rule of law. However, statistical and epidemiological research may reveal that the deleterious impact on a population of consuming whiskey and fried foods is as great as or greater than, for example, that caused by failure to wear seatbelts. It is important, though beyond the scope of this dissertation, to analyze the measurement, distribution, and form of risks.

slope objection, my theory imposes hurdles that retard this slide.

4. *The Empirical-Psychological Form of the Slippery Slope.* The empirical version of the slippery slope argument focuses not on the conceptual scope of the principles themselves but on the scope and manner of their probable real-life application. The slope is slippery because various psychological and social forces would likely make it difficult to maintain the relevant distinctions *in practice*.²⁶⁸ The objection charges that while a relevant distinction *can* be drawn, it is unlikely that decisionmakers *will* abide by the distinction. As Bernard Williams put it, there might be an argument for a “reasonable” distinction, but such a distinction might not be “effective.”²⁶⁹

Those making an empirical slippery slope objection ask “what’s next . . . a ban on alcohol? Butter? Bungee jumping? How about mandatory jogging, yoga, or weight lifting?”²⁷⁰ “The next victims of such rulemaking may be whistlers, gum chewers, bone

268. Beauchamp & Childress (1994) at 229 (emphasis added); Beauchamp & Childress (2001) at 144-45; Childress (1982) at 118.

269. Williams (1985) at 128. *See also* Beauchamp & Childress (1994) at 317 (“We defend a version of paternalism that justifies strong paternalistic interventions under some conditions. However, we acknowledged that a policy or rule permitting strong paternalism . . . is often not worth the *risk of abuse* that it invites.”) (emphasis added);

270. Ezra (1993) at 936.

crackers, dandruff scratchers, lint pickers, and popcorn eaters."²⁷¹ A poem submitted to the *Philip Morris Magazine* colorfully captures their concern:

Smoking is a civil right,
Those who don't should join the fight.
For if one right does disappear,
The loss of others may be near....
Too many calories can cause you to die,
So let's have a ban on apple pie.
Once a government restricts a right,
The end will never be near in sight.
There's a lesson here . . . this is no joke,
I once had a right to smoke!²⁷²

Indeed, there has been some "slippage" to what some have dubbed the "daddy state."²⁷³ One economist has remarked that "[i]t is somewhat ironic that the government discourages smoking and drinking . . . , yet when it comes to the major cause of death - heart disease . . . politicians let us eat with impunity."²⁷⁴ In response to this seemingly ironic situation, a Yale psychologist has proposed a junk-food tax.²⁷⁵ Others have

271. Goodin (1989) at 124. *See also* Caplan (1994) at 23 ("The problem with personal responsibility at the *policy level* is that it may prove hard to draw a clear line between encouragement and coercion.") (emphasis added); Leclere & Herrera (1999) at 426; Richards (1982) at 242; Tollison & Wagner (1991) at 301 ("If government has the power to protect people from making choices that include relatively high risks, why stop at tobacco consumption?"); Young (1998) at A9 ("The war on smoking may set an especially dangerous *precedent* in allowing the government to regulate unhealthy behavior. What next: Sugar? High-fat foods? Red meat? Coffee?") (emphasis added).

272. Mroz (1987) at 29.

273. Brownstein (1998) at 30.

274. Chambers & McAlister (1996) at G1.

275. Brownell (1994) at A29. *See also* Reel (1994) at A43; Rippel (1999) at 34.

proposed even more direct regulation of fatty foods.²⁷⁶

5. Initial Response to the Empirical Slippery Slope Objection. Surely, we must be cautious in using hard paternalism as a liberty-limiting principle. "Opponents of paternalism rightly worry about a steadily increasing use of paternalistic measures."²⁷⁷ Justice Brandeis was right when he warned that "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."²⁷⁸ We ought to heed the warning to beware of hard paternalistic regulation.

Nevertheless, the empirical slippery slope is *not* unavoidable. "A broadside

276. DHEW (1975) at 104 (proposing controls on high sugar and low nutrition foods); Doyle (1998) at 42; Price (1999) at 40 (reporting that Michael F. Jacobson, the executive director of the Center for Science in the Public Interest "argues that people can't be trusted to make wise and healthful decisions on their own" and describing CSPI's attacks on Chinese food, movie popcorn, Mexican food, and soft drinks); Vanchieri (1998) at 420.

277. Kleinig (1983) at 74.

278. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("The greatest dangers to liberty lurk in individual encroachment by men of zeal, well-meaning but without understanding."). See also Douglas (1983) at 179-80; Feingold (1998) at 334 ("[I]s public health's claim of benevolence suspect - a *cloak* for the imposition of the claimant's values on the supposed beneficiary?") (emphasis added); Kultgen (1995) at 56 ("Whenever anyone professes to act altruistically, we must *suspect* a desire to dominate.") (emphasis added); Lerner (1956) ("They're always throwing goodness at you. But with a little bit of luck, a man can duck."); Neff (1967) at 557 ("[T]he benevolent have a tendency to *colonize* whether geographically or legally.") (emphasis added); Pellegrino (1981) at 375 ("Involuntary measures also assume a benign, wise, and responsive government -- something history finds singularly rare."); Szasz (1992) at 73 ("The preventive function of government is far more likely to be *abused*, to the prejudice of liberty, than the punitory function, for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency.") (emphasis added); Thoreau (1854) at 118 ("If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life."); VanDeVeer (1986) at 443 ("The otherwise commendable aim of liberalism . . . has sometimes led to a kind of *aggressive benevolence* and related disregard for the conception of the good possessed by those whom liberals have been bent on helping.") (emphasis added); Zamir (1998) at 281 ("A common argument against paternalism is that the paternalist's benevolent *rhetoric may disguise* other, less legitimate motivations History provides numerous examples of false paternalism, where whole sectors of society (women, minority groups) were oppressed 'for their own good.'") (emphasis added).

directed against paternalistic acts . . . ignores morally relevant differences."²⁷⁹ "Careful defenses of paternalism would disallow these extreme interventions, and at best [the empirical slippery slope] argument establish[es] only a rebuttable *presumption* against paternalistic intervention."²⁸⁰ "[C]onditions can be specified that restrict the range of interventions and that justify only a narrow range of acts."²⁸¹ If the paternalistic principle is sufficiently narrow, then (as I explained above with regard to the logical slippery slope) it can be consistently and plausibly applied to a small class of conduct.

The empirical slippery slope argument "depends for its persuasiveness upon temporally and spatially contingent empirical facts."²⁸² As Wibren Van der Burg explains, "it is . . . only a probabilistic argument."²⁸³ "The ultimate success or failure of slippery slope arguments . . . depends on speculative predictions . . . how good is the evidence . . .?"²⁸⁴ Such an argument "needs to be justified and not merely intoned."²⁸⁵

279. Hoffmaster (1980) at 201.

280. Beauchamp (1996) at 1918 (emphasis added).

281. Beauchamp & Childress (1994) at 282. *See also id.* at 317-18 (worrying about abuse); Beauchamp (1990) at 154 ("[P]aternalism . . . is acceptable when properly qualified."); Curran (1998) at 747 ("Rather than all-powerful paternalistic tyrants, we are simply 'redefining the unacceptable' and working to protect the health of individuals and society."); Feinberg (1986) at 379 n.32 (expressing optimism in containing).

282. Schauer (1985) at 381. *See also* Beauchamp & Childress (1994) at 231; Beauchamp & Childress (2001) at 145; Enoch (2001) at 633.

283. Van der Burg (1998) at 135.

284. Beauchamp & Childress (2001) at 146.

285. Kleinig (1983) at 94. *See also* Enoch (2001); Feinberg (1984) at 346-47; van der Burg (1998) at 137-38; *id.* at 141 ("Slippery slope arguments are often not so much rational arguments as expressions of an underlying feeling of concern about general trends in society [T]hey are rarely valid and plausible . . .").

Hard paternalism does not necessarily “endorse a sweeping condemnation of every dangerous recreational pastime.” Rather, as Douglas Husak argues, “distinctions would have to be drawn on the basis of [the strength and plausibility of the] empirical evidence.”²⁸⁶

For example, Dan Beauchamp’s response to the empirical slippery slope objection is that it ignores political and social reality. He argues that because legislatures and state judges are politically accountable to the voters, they cannot become totalitarian institutions without at least the consent of those whom they rule. He writes:

Beyond limits on alcohol, and tobacco through increased taxes and controls on availability, handgun controls, helmets for motorcyclists, and seatbelts and airbags for cars, there are few remaining measures on the horizon available to democratic government. Imaginative philosophers might still envision a time when American legislatures would dictate that American citizens run three miles every day (or at least take long walks), eat more bran, eschew bacon, and so forth, but I see no prospect that we are slouching, even slowly, toward a vast paternal power exercised by our elected officials.²⁸⁷

Democracy itself, argues Beauchamp, is sufficient to stem the slide of the empirical slippery slope.

286. Husak (1992) at 87.

287. Beauchamp (1988) at 97. *See also* Kleinig (1983) at 191 (“The slippery slope looks slippery only because we consider one factor in isolation from others that are also important if government interference is to be justified.”); Manuel-Rivas (1996) (reporting that the hard paternalistic ordinance in Friendship Heights, Maryland was killed due to opposition based in large part on the issue of personal liberty); Teret & Gaare (1986) at 46 (“[I]t is questionable whether any measure so extreme would be enacted by a legislature because of our strong political and moral bias toward personal liberty and autonomy . . .”).

Beauchamp's response is properly addressed to challenge the empirical evidence. It is, however, substantively unsatisfactory. First, it is unclear that political officials really are very accountable to their constituents.²⁸⁸ Second, and more importantly, Beauchamp's response begs the question. Philosophers examine hard paternalism in order to determine what sorts of liberty limitation are morally justifiable.²⁸⁹ Dan Beauchamp's democratic accountability argument proposes that the political process is a sufficient check on the scope of hard paternalism. But this gets things backwards. Liberty limiting principles are supposed to be a check on the political process. As Mill argued in *On Liberty*: "The limit, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community The 'tyranny of the majority' is now generally included among the evils against which society must be on its guard."²⁹⁰

6. *Further Response to the Empirical Slippery Slope Objection: Its*

Relationship to the Status Quo. I have a more forceful response to the empirical slippery slope objection. The proponent of the empirical slippery slope argument has

288. Chemerinsky (1989) at 79-80 (observing that "social choice theorists have demonstrated reasons why multi-membered bodies cannot accurately respect majority wishes"); Pildes & Anderson (1990) at 2124; Wikler (1978) at 226.

289. VanDeVeer (1986) at 337 ("[T]he claim that whatever policies are decided by elected representatives in a majoritarian constitutional democracy are all right fails to address our basic questions.").

290. Mill (1859) at Book I.

not met her prima facie argumentation burden. The proponent must show more than that my theory *might* lead to bad consequences. Indeed, the proponent must show more than that my theory probably *will* lead to bad consequences. The proponent must also show that these bad consequences are *worse* than the status quo, that where we will slide *to* is less desirable than where we slide *from*.²⁹¹

But the empirical slippery slope proponent cannot make this showing. As I argued at length in Chapter Three, the status quo sanctions hard paternalistic liberty limitation, but masks it as soft paternalism.²⁹² My theory of justified hard paternalism

291. Enoch (2001) at 636; Rachels (1986) at 175 (“The present ethics has its evils too”); Van der Burg (1998) at 129; Walton (1992) at 260-61; Whitman (1994) at 91-93.

292. Arneson (1990) at 371 n.7 (“We should put aside unpersuasive arguments to the effect that harms to nonconsenting third parties could justify a ban”); Beauchamp & Childress (1994) at 130 (“Although writers in biomedical ethics often resort to fictions such as deemed consent, it is more defensible to argue *straightforwardly* that a patient’s autonomy, liberty, privacy, or confidentiality can be justifiably overridden”); Caplan (1997) at 70; Childress (1997) at 67 (“It is more defensible to *face directly the conflict* between [autonomy] and other principles rather than reinterpret [autonomy] by extending it to circumstances where it does not apply. Then we can determine more clearly whether [autonomy] can be outweighed by competing principles in the circumstances.”) (emphasis added); Dershowitz (1993) at xi (arguing against Lawrence Tribe: “I, too, favor mandatory seat belt laws, but I recognize that support for such paternalistic legislation requires a compromise with Mill’s principle. And it is a compromise I am prepared to make *explicitly* rather than uncomfortably try to *squeeze* seat belt laws into Mill’s principle by invoking flying people and convoluted logic.”) (emphasis added); *see also id.* at xv-xvi (“[I]t is far better to argue about the limits of the principle itself rather than to accept it as an almost biblical (or constitutional) rule of action and then try to find ways to *squeeze* what are really exceptions into the parameters of the principle.”) (emphasis added); Epstein (1995) at 417 (calling for “revitalizing the harm principle”); Epstein (1995) at 416 (“The modern theories presuppose as alternative theory of harm that is indefensible: the exercise of individual choice is now regarded as an act of pure negative externality.”); Feinberg (1984) at 214 (“[W]e can preserve that illusion of harm as a single determinate even purely empirical notion. The analysis . . . however, reveals that harm is a very complex concept with hidden normative dimensions . . . [and requires] supplementary criteria (or ‘mediating maxims’)”); Feinberg (1988) at 170; Flew (1998) at 79-81 (criticizing Orwell’s Newspeak); Gostin (2000) at 3119 (criticizing “*strained* conceptions of social harms” and recommending “recognizing certain public health interventions as justified paternalism”) (emphasis added); Gutmann & Thompson (1996) at 250 (arguing that rather than making a “strained” argument to find some other-regarding harm, that “[t]he more straightforward approach is to

gives determinacy to the concepts that *frame* intuitions about when hard paternalism is justified. Making the relevant appeals explicit will surely better check an expansion of the scope of hard paternalism than the current hidden, confused, and dishonest stretching of soft paternalism.²⁹³

concede that some moralist [or paternalist] claims may count, and to try to develop criteria for separating those that should count from those that should not.”); Harris (1967) at 592 (“The test for consent should not mask circularity of reasoning or irrationality. If Y is capable of contracting, he should be able to consent. If there is a good reason that consent should be negated in the X-Y situation, that reason needs articulation and justification.”); Holmes (1897) at 457; Kleinig (1990) at 44 (“[L]iberal values . . . are in need of regular attention and rearticulation.”); Kopelman (1997) at 316 (“When unexamined or unjustifiable values are seeded into policy and decisions, the result may be a harvest of bias, injustice, and prejudice.”); Kultgen (1995) at 166-67 (“Some authors who have saddled themselves with a categorical condemnation of paternalism attempt to define their paternalism away by *tortured appeals* to the interests of third parties The magnitude and probability of bystander harms are [often] too slight to justify curtailment of [individual] liberty.”) (emphasis added); Macintyre (1983) at 139; Macklin (1993) at 175 (“My only argument here is that it is not acceptable to *fudge* the solution to this ethical dilemma by broadening the meaning of ‘futility.’ That maneuver may appear to settle the ethical dilemma, but only at the price of *linguistic dishonesty*.”) (emphasis added); *id.* at 175 (“[I]t is *confused and dishonest* to cloak decisions to withhold [scarce medical resources] under the mantle of futility.”) (emphasis added); *id.* at 182 (“For reasons of *conceptual clarity* and *linguistic honesty*, among others, I have been urging that the concept of futility be understood in a narrow sense.”) (emphasis added); *id.* at 184 (“It is important not to misuse the language of futility to *mask* quality-of-life judgments. *Honesty* demands that the issue of quality be confronted squarely.”) (emphasis added); Mill (1859) at IV (“If grown persons are to be punished for not taking proper care of themselves, I would rather it for their own sake than under *pretence* of preventing them from impairing their capacity or imparting society benefits.”) (emphasis added); Rainbolt (1989) at 56 (“In defending the soft paternalist line, authors have been driven to positions which seem very *ad hoc*.”) (“Acknowledging that paternalism is sometimes permissible would allow us to give the most obvious and natural explanation of these laws”); Sankowski (1985) at 10; Winick (1991) at 26.

293. Dershowitz (1993) at xi (arguing against Lawrence Tribe: “I, too, favor mandatory seat belt laws, but I recognize that support for such paternalistic legislation requires a compromise with Mill’s principle. And it is a compromise I am prepared to make *explicitly* rather than uncomfortably try to *squeeze* seat belt laws into Mill’s principle by invoking flying people and convoluted logic.”) (emphasis added); Gostin (2000) at 3119 (criticizing “strained conceptions of social harms” and recommending “recognizing certain public health interventions as justified paternalism”); Gutmann & Thompson (1996) at 250 (arguing that rather than making a “strained” argument to find some other-regarding harm, that “[t]he more straightforward approach is to concede that some moralist [or paternalist] claims may count, and to try to develop criteria for separating those that should count from those that should not.”); Harris (1967) at 592 (“The test for consent should not mask circularity of reasoning or irrationality. If Y is capable of contracting, he should be able to consent. If there is a good reason that consent should be negated in the X-Y situation, that reason needs articulation and justification.”); Macklin (1993) at 184 (“It is important not to misuse the language of futility to *mask* quality-of-life judgments. *Honesty* demands that the issue of quality be confronted squarely.”) (emphasis added); Mill (1859) at IV (“If grown persons are to be

7. Further Response to the Empirical Slippery Slope Objection: Its

Relationship to Moral Justifiability. Furthermore, it is unclear whether the empirical slippery slope argument is an appropriate objection to the *moral* justifiability of hard paternalism. While the logical slippery slope argument fronts a relevant attack because it questions the liberty limiting scope that the theory legitimizes, the empirical slippery slope argument, on the other hand, focuses on the effects on implementation. The possibility of a slippery slope resulting from a policy does not necessarily indicate a need to revise the *moral* constraints.

Liberty limiting principles, as I explained in Chapter One and at the beginning of this chapter, provide only necessary, not sufficient, reasons for intervention. Public policy issues also require answers to practical and empirical questions. The empirical slippery slope, as it focuses on possible (not necessary) effects of implementation, is more properly addressed to this stage of the analysis than to the moral justifiability stage.

* * *

Admittedly, my seven conditions still retain a degree of vagueness that fans the

punished for not taking proper care of themselves, I would rather it for their own sake than under *pretence* of preventing them from impairing their capacity or imparting society benefits.”) (emphasis added); Rainbolt (1989) at 56 (“Acknowledging that paternalism is sometimes permissible would allow us to give the most obvious and natural explanation of these laws”); Sankowski (1985) at 10; Winick (1991) at 26.

flames of the slippery slope objections. But that residual vagueness cannot itself be a dispositive objection. All rules – indeed all statutes, regulations, and judicial opinions – have a degree of vagueness. The harm principle, for example, as I argued in Chapter Three, has notorious vagueness problems. But that has not impeded the harm principle from being widely employed as a liberty limiting principle in philosophy, political theory, law, and bioethics. It is still workable. Vagueness alone does not threaten to undermine the very legitimacy of the liberty limiting principle itself, and my conditions for justified hard paternalism ought not be held to a higher standard.

B. Objection Two: The Argument from Paternalistic Distance.

1. *Statement of the Objection.* Mill argued that “the strongest of all the arguments against the interference . . . with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place.”²⁹⁴

The subject of paternalistic intervention, according to Mill, is both epistemologically privileged and more interested in her own welfare than anyone else. Mill explains:

294. Mill (1859) at Book IV. *See also* Arneson (1980) at 474 (“Rationality in the sense of economic prudence . . . is a *value* which we have no more reason to impose on an adult against his will for his own good than we have reason to impose any other value on paternalistic grounds.”); Anne Bradstreet, *Meditation 12 Divine and Moral* (1624) (“Authority without wisdom is like a heavy axe without an edge, fitter to bruise than polish.”); R.M. Dworkin (1993) at 222-23 (“[W]hy we should ever respect the decisions people make when we believe that these are not in their interests. One popular answer might be called the *evidentiary view*: it holds that we should respect the decisions people make for themselves, even when we regard these decisions as imprudent, because each person generally knows what is in his own best interests better than anyone else.”); Faden & Beauchamp (1986) at 309 (“extra subjective component”); Feinberg (1988) at 308; Ryan (1964) at 259 (“[N]o one knows better than I what I want. It is a distrust of expertise about ends that is common to Liberal Thought.”); Zamir (1998) at 237 n.22.

If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is best, not because it is the best in itself, but because it is his own mode. Human beings are not like sheep; and even sheep are not indistinguishably alike. A man cannot get a coat or a pair of boots to fit him unless they are . . . made to his measure²⁹⁵

* * *

He is the person most interested in his own well being . . . the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else. The interference of society must be grounded on general presumptions which may be altogether wrong.²⁹⁶

W.H. Auden similarly explained:

Men are not equal in their capacities and virtues. . . . No individual or class, therefore, no matter how superior . . . can claim an absolute right to impose its views of the good upon them. . . . [T]he people must have a right to make their own mistakes and to suffer for them.²⁹⁷

More recently, Daniel Wikler questioned the decisions made “by a paternalistic bureaucracy endowed with broad powers, questionable wisdom, and inconsistent motivation.”²⁹⁸

John Kleinig succinctly captures the essence of the Objection from Paternalistic Distance: “There is nothing to suggest that the state has a superior capability . . . or that its ability to make the right choices about the risks people take in their lives is

295. Mill (1859) at Book III. *See also* Mill (1859) at Book V (“likely to be better done by individuals”).

296. Mill (1859) at Book IV.

297. Auden (1944).

298. Wikler (1979) at 378.

necessarily better."²⁹⁹ The objection charges: (1) that the hard paternalistic agent must show that he can decide *better* than the subjects on whose behalf he chooses, and (2) paternalistic agents cannot make that showing because they are epistemically disadvantaged relative to the substantially autonomous subject when it comes to that subject's welfare.³⁰⁰

There is no objective correct view, no external answer to questions regarding what is good for persons. Indeed, many philosophers take this as the very foundation for personal sovereignty, justificatory neutrality, and the liberal tolerance of different values. Nevertheless, hard paternalism involves the claim by the agent to know better

299. Kleinig (1983) at 49

300. Arneson (1998) at 251 ("[H]umans, including the humans who would administer any paternalistic rule, are imperfectly rational, imperfectly well-informed, and not always disposed to be moral."); Blackburn (2001) at 100 ("The elite are human too . . . who shall guard the guardians?"); Dworkin (1983) at 125 ("[R]ational men knowing something about the resources of ignorance, ill-will, and stupidity available to the lawmakers of a society . . . will be concerned to limit such intervention to a minimum."); R.M. Dworkin (1993) at 223; Goodin (1993) at 237 (arguing that even if people are poor judges, paternalism is justified only if there is a *better* judge); Goodin (1995) at 128 ("Whether anyone else is a better judge of his interests is, of course, a separate issue."); Gostin, et al. 43-44; Hayry (1991) at 91; Klein (1994) at 238 ("One good reason to reject paternalism is that public officials, acting in some remote government office, do not in fact know better whether an activity is detrimental to our enduring self."); Kleinig (1983) at 29-30 ("Argument from Paternalistic Distance"); Kleinig (1983) at 29-30 ("Argument from Paternalistic Distance"); Leonard et al (2000) at 324 ("[A] paternalist is logically required to believe that the intervenor is *better* placed than the paternalized person to judge the latter's welfare."); New (1999) at 70-71 ("Justifications of state paternalism, if they are to be made successfully, must be made in relation to the ability of the state and its officials to *reason* better than the individual."); *id.* at 71-75 (reviewing different reasoning failures which might justify intervention if the state can do better); *id.* at 81 (arguing that individuals are subject to various reasoning failures, paternalism is justified only if the state can "make these decisions *better* than individuals"); Reich (1979) at 13; Riley (1998) at 127 ("Given that all are fallible . . . the individual ought to decide for himself . . ."); Rippel (1999) at 34 ("People do not always make the right choices for their health or their well-being, but the question is whether others can better decide for them."). Smiley (1989) at 314; Trebilcock (1993) at 158 (calling state paternalism "a quintessential case of the socially constructed blind leading the blind") (paraphrasing Matthew 15:14); Wikler (1978) at 227-28.

what is good for the subject than the subject herself does.³⁰¹ That claim, charges the Argument from Paternalistic Distance, cannot be substantiated.

2. Restatement of the Objection. The Argument from Paternalistic Distance highlights that the balancing model is really not so much about “autonomy yielding to or being overridden by beneficence.” Rather, the model is really all about values.³⁰² “Respect for autonomy means that [value] will be defined by the recipient of the action [the subject] rather than by the agent.”³⁰³ With hard paternalism, on the other hand, “the beneficent actor [the agent] overrides or ignores the recipient’s [the subject’s] ideas of

301. Brock (1988) at 559; Feinberg (1986) at 23, 55.

302. Childress (1997) at 122 (“[J]udgments about patient benefit necessarily presuppose values It is an oversimplification to pose the conflict as one between beneficence and autonomy, because it is also in part a conflict about *whose interpretation of beneficence will triumph.*”) (emphasis added); Childress (1982) at 33 (“At the center of the controversy about paternalism, this question is raised by the application of beneficence in its various senses.”); Culver & Gert (1990) at 631 (“[T]here is no single preferred ranking of evils”); Dworkin (1983) at 124 (describing paternalism as “imposing a good on someone in that given his current approach of the facts, he doesn’t wish to be restricted”); Feinberg (1986) at 111 (“[I]f none of the voluntariness-reducing factors is present, his odd choice must be explained as due to his judgment that the goal he seeks is worth the extreme risk he voluntarily takes.”); Feinberg (1988) at 60 (arguing that the paternalistic agent does not have a vicarious interest but an external interest in the subject’s well-being: “What A wants for B and has an interest in bringing about in that case is quite *independent* of what B wants for himself”) (emphasis added); Rubin (1998) at 84 (“In hard paternalism the *values* that are used to assess harm and benefit are alien to, and therefore imposed upon, the patient. . . . [T]his kind of intervention is much harder to justify than limited or weak paternalism.”) (emphasis added); *id.* at 85 (“It is much harder to justify interference with an individual’s freedom when the motivation is to protect the individual from harming *himself*, even harder when the *values* used to justify the intervention are alien to the individual”) (emphasis added); Spinoza (1677) *Ethics* at preface to pt IV (“One and the same thing can at the same time be good, bad, and indifferent.”). Perhaps Devlin is right that “it is a distinction without a difference to say that society is acting for a man’s own good and not for the enforcement of the [moral] law.” Devlin (1965) at 136.

303. Churchill (1996) at 244 (emphasis added).

[value] and imposes his or her own.”³⁰⁴

While soft paternalism preserves the *subject's* values, hard paternalism imposes the *agent's* values.³⁰⁵ John Hospers accurately describes hard paternalism as interference with a subject's liberty “to promote *my* [*i.e.* the agent's] ends” and noting that “what *we* [*the agents*] want for him is not the same as what *he* [*the subject*] wants for himself.”³⁰⁶

“But,” one man may say, “surely laws or action that thwart the person's own goals can't be paternalistic at all, because part of the definition of paternalistic action is that it's for the person's *own good*. Yes, but there's the rub: what is *for the person's own good* may not be the same as *what he wants* ([especially in the short run, and] even in the long run).³⁰⁷

The agent acts to benefit the subject – but only in the way in which the *agent* thinks that the subject ought to be benefitted. Therefore, we can re-characterize hard paternalism as follows. The true conflict is not between the subject's autonomy and the subject's good. The true conflict is between the subject's own conception of her good, on the one hand, and the agent's conception of the subject's good, on the other.

304. Churchill (1996) at 244. *See also* Beauchamp & Childress (1994) at 293 (“Values determine *what* will count as costs, harms, and benefits as well as *how much* particular costs, harms, and benefits will count — that is how much weight they will have in our calculations.”); Ten (1980) at 116 (“[W]here we disapprove of an activity, or cannot appreciate it, we tend to think that the [subject] herself derives little benefit from it.”); Wikler (1978) at 309 (“A second reason for doubting the justifiability of paternalistic interference concerns the subjectivity of the notion of harm.”); Wikler (1978) at 228-29.

305. These may be the same for the agent aiming to help the subject achieve her own ends

306. Hospers (1980) at 265.

307. Hospers (1980) at 265.

Once hard paternalism framed in this way, the Argument from Paternalistic Distance becomes even clearer. *Who is better situated to ascertain the subject's good?* Clearly, states the objection, the subject is better situated. To suppose that anyone else is better situated would commit what Niclas Berggren describes as the “cardinal error of paternalism.”³⁰⁸ Jeremy Bentham colorfully warned of this “error,” warning that “the legislator should never lose sight of the well-known story of the oculist and the sot.”

A countryman who had hurt his eyes by drinking, went to a celebrated oculist for advice. He found him at his table, with a glass of wine before him. “You must leave off drinking,” said the oculist. “How so?” says the countryman. “*You* don’t, and methinks your own eyes of none of the best.” – “That’s very true, friend,” replied the oculist: “but you are to know, I love my bottle better than my eyes.”³⁰⁹

Even if the agent could identify “costs” to the subject’s conduct, the agent (like the countryman) has no solid basis for assessing that these costs outweigh possible “benefits” that the subject derives from that conduct.³¹⁰

308. <http://hem.passagen.se/nicb/framez.htm/>

309. Bentham (1781) at ch. XVII, sec. XV.

310. Bentham (1781) at ch. XVII, sec. XV (“It is a standing topic of complaint, that a man knows too little of himself. Be it so: But is it so certain that the legislature must know more. It is plain, that of individuals the legislature can know nothing: concerning those parts of conduct which depend upon the particular circumstances of each individual, it is plain, therefore, that he can determine nothing to advantage. It is only with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may he in a way to engage, that he can have any pretence for interfering”); R.M. Dworkin (1993) at 213; Fox (1993) at 588 (discussing the “privileged epistemological position”); Greenawalt (1974) at 85 (“[G]overnmental action may be inappropriate even when parallel private action would be justified. At least when the government acts through generalized rule of policy . . . it must be less closely involved . . . , less able to consider individual factors and to tailor attempted influence accordingly The state should, therefore, be much more cautious”); Jorgensen (2000) at 55 (“[I]ntimates are in a much better position to interfere in the right way. Primarily, this is because they often are better able to acquire knowledge of the [subject] . . . such knowledge is essential to the decision of whether to interfere paternalistically.”); Kultgen (1995) at 171-72, 234; White (2000) (“expert impartiality”); Woodward (1982) at 87-88; Zamir (1998) at 236.

3. Response to the Objection. My response to the objection is, basically, that it is stated too strongly. Surely, there are some situations in which a paternalistic agent can have more concern for a subject and/or more knowledge of the subject's good.³¹¹ After all, individuals simply do not possess "tolerable common sense and experience" regarding some of the conduct in which they engage. Furthermore, as Armsden argues, Mill "fail[s] to see that rules permitting paternalism could be defined so as to check the dangers portended by him."³¹² Legislators who promulgate the occasional hard paternalistic law need not be Platonic Guardians who usurp *all* self-determination from the people.

The Argument from Paternalistic Distance is a statistical and probabilistic argument. Note the language in Mill's objection itself: "the *odds* are that it interferes wrongly."³¹³ Hard paternalistic intervention "*may be* altogether wrong."³¹⁴ Even the casual observer of television game shows, like *Jeopardy*, appreciates that even epistemically privileged best judges are sometimes outperformed. As Robert Goodin

311. Armsden (1989) at 45; Caney (1991) at 463-65; Dworkin (1971) at 114-15; Goldman & Goldman (1990) at 66, 68; Jorgensen (2000) at 47; Kleinig (1983) at 26, 28-30; Kultgen (1995) at 137 (only *prima facie*); Mill (1848) at 947, 951; Sankowski (1985) at 3; Weiss (1985) at 185; Wilkinson (1996) at 493.

312. Armsden (1989) at 46.

313. Mill (1859) at Book IV.

314. Mill (1859) at Book IV (emphasis added).

describes the objection: “[T]he most that can plausibly be made out along these lines is a baldly empirical claim. Usually (not always) each individual is probably (not necessarily) the best judge of his own best interests.”³¹⁵

Because the Argument from Paternalistic Distance is empirically based, it can be defeated by empirical evidence.³¹⁶ Accordingly, the main response to the Argument from Paternalistic Distance is that it is just too strong. At best, the objection establishes that individuals are *usually* the most concerned with their own well-being, that individuals are *usually* the best judge of their own well-being.

Onora O’Neil finds the Argument from Paternalistic Distance “empirically dubious.”³¹⁷ She argues that probably many people would be happier under beneficent policies because they cannot make some decisions as well as paternalistic agents. John Kleinig admits that “[w]ere the choices people make always the best choices, the product of settled preferences and cool reflection on alternatives, it would be difficult to justify the intrusions of others.”³¹⁸ “But,” Kleinig observes, “they are often stupid and ill-considered, the outcome of temporary concerns or a lackadaisical attitude.”³¹⁹

315. Goodin (1995) at 127.

316. Goodin (1995) at 127; Zamir (1998) at 238.

317. O’Neil (1984) at 173.

318. Kleinig (1983) at 45.

319. Kleinig (1983) at 45.

Despite the interest that people have in their well-being, there is ample evidence that people are often *poor judges* of it. Some of the reasons stem from a lack of motivation – the failure to keep long-term goals and remote effects consistently before their eyes; some stem from defects in knowledge or rationality – an inadequate appreciation of subtleties, hasty and ill-considered inferences, culpable ignorance, and so forth.³²⁰

* * *

[W]e ought to be no less astonished at the *carelessness, thoughtlessness, and stupidity* of people with respect to the unelevating character or self-destructive potential of their self-regarding behavior. For rational beings, we do some pretty irrational things.³²¹

Decision science literature is filled with a plethora of evidence of human irrationality.³²²

It is important to stress that despite these various defects, subjects still often act with substantial autonomy. Otherwise, any liberty limitation would not be hard paternalism. Yet, even above the threshold of substantial autonomy, there is still a wide range of degrees to which conduct can be more or less autonomous.³²³ Even

320. Kleinig (1983) at 48 (emphasis added).

321. Kleinig (1983) at 29 (emphasis added).

322. Hunreuther & Slovik (1996); Slovik (2000); Sunstein (2000); Zamir (1998) at 251-54, 268-71.

323. Beauchamp & Childress (1994) at 123 (“Actions therefore can be autonomous by degrees . . . a broad continuum exists.”); Beauchamp & McCullough (1984) at 97 (“[T]he typical ‘strong paternalist’ refers to factors that influence or fail to influence . . . [T]here is rarely a naked appeal to a . . . *paternalistic* interest.”); *id.* at 98 (“[T]he justifying reasons used by an alleged strong paternalist may turn out to be similar in kind to those used by weak paternalists That is, the appeal may in the end be to inordinately powerful psychological or situational factors”) (true even for what Beauchamp and McCollough call “cases of strong paternalism” in “pure form”); Feinberg (1986) at 115 (providing examples of temporarily distorting circumstances that do not vitiate substantial voluntariness: fatigued, nervous, agitated, excited); *id.* at 132 (“[F]actual errors persisted in against clear evidence . . . cancel voluntariness in cases in which there is an approximation to certain knowledge of the danger.”). *id.* at 137 (“laziness, indifference, inertial habit, or short term indulgence”); Feinberg (1988) at 183 (headstrongness); *id.* at 201 (moral deficiencies); *id.* at 201 (manipulation short of coercion); Feinberg (1986) at 115-16; *id.* at 278 (“[H]is less than fully voluntary conduct will be ‘voluntary enough’ for a valid and irrevocable

substantially autonomous choices may be made out of: impetuosity; laziness; inertial habit; and other transitory impulses, encumbrances, and deficiencies.

4. *Counterobjection from Paternalistic Distance.* “But,” a proponent of the Argument from Paternalistic Distance might ask, “is this response coherent?”³²⁴ How can the paternalistic agent use evidence of a subject’s “bad” choices to show that the subject is not the best judge? Denominating the subject’s choice as “bad” (in the first place) seems to beg the question of how the agent can really know what is in the subject’s best interest.³²⁵ This response still seems to commit the cardinal error of paternalism, and seems to fail to address the heart of the objection.

contract.”) (It is hard paternalism when A, B, C, and D are satisfied. The conditions in E represent properties that can range within hard paternalism.); Glick (2000) at 394 (giving less weight to the preferences of “an acutely ill frightened, although technically competent patient”); Gostin (2000) at 3119 (“A person may understand that high-fat foods cause adverse health effects . . . but [due to limited willpower] may not refrain from these activities.”); Gostin (2001) at 91; Hart (1965) at 33 (defending paternalism where choices are made “when the judgment is likely to be clouded” or under “pressure by others of a kind too subtle to be susceptible of proof in a court of law”); Harris (1977) at 88 (“There seems to be a middle way between these two extremes which I shall refer to as ‘irresponsible action.’”); Husak (1980) at 40 (“Paternalistic treatment, by definition, seems to imply a shortcoming or deficiency on the part of the subject of the interference.”) (citing White (1974) at 73); Kleinig (1983) at 85-86 (arguing that not all encumbrances take the individual below the substantial autonomy threshold); *id.* at 165 (arguing that what others offer as weak paternalism is substantially autonomous — social security; *id.* at 85-86 (arguing that not all encumbrances take the individual below the substantial autonomy threshold); *id.* at 66 (arguing that because there is a “hiatus between judgments that are one’s own and judgments that are one’s best . . . there is some room here for strong paternalism.”); Weale (1983) at 800-01 (noting that the effects of: consequences remote in time, transitory impulses, underestimating probability).

324. In fact, the response has not yet been fully stated. Showing that people are often poor judges of their own interests is only half the battle, only the first step of a two-step argument. The response must also establish that the paternalistic agent can make a *better* decision. The counterobjection is to the first stage of the response. I lay out the second stage of the response after responding to the counterobjection.

325. Beauchamp & Childress (2001) at 195 (what counts as a harm is value-dependent); Young (1986) at 79 (even death can be a benefit for some).

5. *Initial Response to the Counterobjection.* The counterobjection is based on a false assumption: that a subject's choices can be evaluatively assessed only according to the agent's own value scale. This assumption is false. As explained in connection with conditions two and three, hard paternalistic intervention can be in accord with the subject's own critical interests.

Beneficence-based arguments need not raise deep epistemological and/or axiological problems. For example, beneficence-based justification is quite plausible where, for example, the subject (incontinently) acknowledges that her choice (*e.g.* smoking) is a bad one, but, for lack of self-discipline or responsibility, chooses it anyway.³²⁶ In Book II of *Utilitarianism*, Mill observes that “under influence or temptation” men choose a lower pleasure over a higher one, “from infirmity of character, [they] make their election for the nearer good, though they *know* it to be less valuable.”³²⁷ Under such circumstances, the good imposed on the individual through hard paternalistic liberty limitation is not alien but is her own.

Many theorists have struggled to demonstrate that hard paternalistic liberty limitation is justified on the basis that the subject's liberty is restricted in order to promote a subject-dependent good -- the “real” values of the subject. Desire-dependent

326. Nikku (1997) at 63, 85; Ten (1980) at 120; VanDeVeer (1986) at 230.

327. Mill (1861) at II (emphasis added).

conceptions are often framed in terms of a Platonic or Hobbesian organic metaphor.³²⁸

Irving Berlin explains,

[T]he dominant self is then variously identified with my 'higher nature,' with the self that calculates and aims at what will satisfy it in the long run, with my 'real,' or 'ideal,' or 'autonomous' self, or with my self 'at its best'; which is then contrasted with my irrational impulses, uncontrolled desires, my 'lower nature,' the pursuit of immediate pleasures, my 'empirical' or 'heteronomous' self³²⁹

But beneficence-based arguments need not rely upon suspicious empirically unverifiable distinctions either between interests and preferences or between a false self and a true self. Instead, the paternalistic agent can use the subject's own desire-dependent conception of the good.³³⁰

328. Beauchamp (2001) at 223 (discussing the metaphor depicting the passions as irrational, as an alien force, and as needing discipline and control by reason); Leonard et al (2000) (analogizing to Robert Louis Stevenson's Dr. Jeckyl and Mr. Hyde).

329. Berlin (1969) at 132.

330. Armsden (1989) at 10-11; *id.* at 65-66 (distinguishing: SP2 -- subjective good, SP1 -- objective good independent of the subject's values, SP1A -- override for greater value, and SP1B -- override for extra-majority value); Baergen & Baergen (1996) at 482 ("Paternalism is easier to justify when one intervenes to prevent something that the *patient would view as a harm . . .*") (emphasis added); Frohock (1989) at 239; Hospers (1980) at 258 (defending paternalism "in accordance with [a subject's] long-term goals for himself" -- "counter his present desires . . . to fulfill his long-term desire"); *id.* at 264 (defending "paternalistic action . . . taken in order to help a person achieve *his own goals*."); Husak (1980) at 43 (not all cases impose an agent's conception of the good, the agent can use the *subject's conception* as in self-paternalism) (emphasis added); Kekes (1997) at 17; Kleinig (1983) at 9, 13 (arguing that the justificatory burden is less in part because in such cases the subject at least *acknowledges* the rejected good as a good); *id.* 30, 53, 68-69, 73; *id.* at 75 ("There is a presumption in favor of those paternalistic impositions that accord with the recipient's own conception of good."); Kronman (1983) at 774-86; Kultgen (1995) at 217; Meisel (1995) at § 7.3 (continuum of standards focused on wants rather than needs); Scoccia (1990) at 320-23 (defending interference as a "purely formal requirement" -- only when inconsistent with stable values. In other words, it is okay for the subject to make an impetuous choice if she is an impetuous person but not if she is an efficient maximizer); *id.* at 325 (arguing that the paternalistic agent should be neutral about content, and rejecting objectivist, perfectionist accounts and substitution of values, prudence foreign only if imprudent,); *id.* at 326 (arguing that a desire-dependent conception of the good still tolerates some autonomy violations); *id.* at 333 (arguing that a desire-dependent conception of the good is "thicker" than a

Subjective good consequentialism, like objective good consequentialism, sanctions intervention with subjects' liberty in order to achieve goods "which [the subjects] *would*, if they were more enlightened, themselves pursue, but do not, because they are blind, or ignorant, or corrupt."³³¹ However, with subjective good consequentialism, the subjunctive is narrowly construed to what *this* particular subject *would* choose. The good is objective relative to the subject, not relative to human beings in general. Thus, one writer has described subjective good consequentialism as the "individual-personalistic theory of paternalism."³³²

The difference between objective and subjective conceptions of the good tracks the difference between, respectively, the "best interest standard" and the "substituted judgment standard" for making decisions for incompetent patients. It is fruitful to explicate the distinction through drawing out the analogy.

purely want-regarding account; offering the example of taking the farmer to the city (against his desires) before acceding to his 'want' to stay in the county); Thompson (1980) at 255 ("To justify paternalism, we cannot appeal to what *rational* persons in general would desire if we can determine what a *particular* person would want in the circumstances.") (emphasis added); Thompson (1980) at 255; Weale (1978) at 170 (requiring joint conditions that "interference with a person's own freely chosen plan of life must be severe" and "interference should be justified by reference to some element in the subject's own life plan"); Woodward (1982) at 72 (offering a similar argument in terms of consent: "reason to suppose that because of his most *deeply held projects* and values he will come to consent") (emphasis added); *id.* at 86; Zamir (1998) at 264, 273; Zembaty (1986) at 65 (defending physicians' hard paternalism "on the basis of all the knowledge they can gather about their patients' values and emotional makeup").

331. Berlin (1969) at 132-33.

332. Umezo (1999) at 37.

The best interest standard, like the objective conception of the good, focuses on a patient's welfare, on her needs and interests. This is the standard that the Massachusetts Supreme Court employed when it affirmed the decision of a lower court permitting a state institution not to treat Joseph Saikewicz.³³³ Saikewicz was a profoundly retarded 67-year-old man, who was diagnosed with acute leukemia. In order to determine whether Saikewicz should be treated, the court could not be guided by his preferences. Having been incompetent for his entire life, Saikewicz had never expressed any preferences. Therefore, the court had to (and did) rely on more objectively quantifiable measures. The court concluded that because Saikewicz exhibited an adverse response to treatment and because he had a relatively small chance of brief survival, it was not in his best interest to treat him.

In contrast to the best interests standard, the substituted judgment standard, like the subjective conception of the good, on the other hand, focuses on the patient's wants and preferences.³³⁴ The physician employing substituted judgment, like the paternalistic agent employing a subjective conception of the good, uses the subject's wants and preferences as the *best* evidence of what is "good" for her.

333. *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977). *See also* *In re Storar*, 434 N.Y.S.2d 46 (App. Div. 1980).

334. Meisel (1995) at 341-81. *See also* VanDeVeer (1986) at 95-163 (examining different conceptions of the good); *id.* at 317;

This is the standard that the Missouri Supreme Court employed when it refused to issue a court order to the parents of Nancy Cruzan, directing the state hospital – where Nancy was a PVS patient following a car accident – to discontinue Nancy’s tube feedings.³³⁵ The court did not, like the Massachusetts *Saikewicz* court, consider what it thought, what Nancy’s doctors thought, or even what Nancy’s parents thought would be best for Nancy. Rather, the court demanded clear and convincing evidence of what Nancy *herself* would have wanted.

My theory of hard paternalism is not vulnerable to the counterobjection. It is not circular. It does not conclude that the subject is not the best judge regarding some decisions because the subject makes “bad” decisions, where those decisions are assessed as bad in the first place because the subject is not the best judge. Instead, as I explained in defending condition two, the subject’s decisions are assessed as “bad” on the basis of their tendency to set back the subject’s own critical and welfare interests.

6. *Further Response to the Counterobjection.* In *On Liberty*, Mill rejected the suggestion that the state’s collective experience justified interference in self-regarding matters universally condemned by experience.³³⁶ He based this rejection on the empirically probabilistic argument that the state will be more right than individuals only

335. Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

336. Arneson (1989) at 416; Kleinig (1983) at 30.

with regard to other-regarding acts.

However, in his *Principles of Political Economy*, Mill allowed paternalism for subjects who are poor judges.³³⁷ Mill recognized human failing in *Principles of Political Economy* more explicitly than he did in *On Liberty*.³³⁸ And in *Utilitarianism*, Mill allows even more room for paternalistic intervention by the state. He writes:

The presumption in favor of individual judgment is only legitimate, where the judgment is grounded on actual, and especially on present, personal experience, not where it is formed antecedently to experience, and not suffered to be reversed even after experience has condemned it.

In Book II, Mill explains that if a “competent judge” has the experience of two pleasures, then the preference of that person shows which pleasure is more desirable. In explaining why each individual would not have a heavy burden of evaluating the utility of each action, Mill explains:

[T]here is not time previous to action, for calculating and weighing the effects of any line of conduct on the general happiness The answer to the objection is that there has been ample time, namely the whole past duration of the human species. During all that time mankind have been learning by experience the tendency of actions, on which the experience of all the prudence as well as all the morality of life are dependent.

In Book IV of *Utilitarianism*, Mill similarly explains:

The only things it is sought to prevent are things which have been tried

337. Mill (1848) at 803, 938

338. Mill (1848) at 947, 953.

and condemned from the beginning of the world until now – things which experience has shown not to be useful or suitable to any personal individuality. There must be some length of time and amount of experience after which a moral or prudential truth may be regarded as established; and it is merely desired to prevent generation after generation from falling over the same precipice which has been fatal to their predecessors.

While my project here is not to do an exegesis of Mill's classic books, this cursory review indicates that Mill firmly believes that paternalistic agents do sometimes *have* an epistemological advantage over substantially autonomous subjects.³³⁹

[I]t would be absurd to pretend that people ought to live as if nothing whatever had been known in the world before they came into it; as if experience had as yet done nothing towards showing that one mode of existence, or of conduct, is preferable to another.³⁴⁰

No individual has the opportunity, in the span of a single lifetime, to have personal experience in many things. But the benefit of the experience of millions of people can be embodied by paternalistic institutions like the modern regulatory state.

There are reasons to think that the paternalistic agents can make a *better* decision

339. Berger (1985) at 46 ("Now the exception that Mill made for cases where the consumer cannot judge the possible dangers (e.g. dangerous drugs), does only carry the risk of harm in some cases. But, he held, where the product is one 'of which [] has much at stake,' and where individuals cannot be well-informed, the 'presumption' in favor of the individual judging his or her interests best is overridden."). See also Mill (1862) at Book V ("What the state can usefully do is make itself a central depository and active circulator and diffuser of the experience resulting from many trials."); Mill (1859) at Book II ("[T]here are many truths of which the full meaning *cannot* be realized until personal experience has brought it home."); Mill (1848) at 802.

340. Mill (1859) at Book III (arguing that we should presume that individuals know what they are doing but "their experience may be too narrow or they may not have interpreted it rightly"). See also Armsden (1989) at 145 (can specify circumstances); *id.* at 152 ("universally recognized repugnant circumstances").

in some circumstances. First, the state, for example, is more impartial and not subject to failures of reasoning. It is not swayed by weakness of will, emotional decision making, and temptations of immediate gratification. An individual, on the other hand, might fail to buckle up out of laziness rather than out of a rational assessment of the costs and benefits of doing so. The eye plucker, Joe Starrett, and the healthy high-risk research volunteer might miscalculate the extent to which their conduct promotes and sets back their own critical interests. The state is less likely to do so.

The second reason that the paternalistic agent (*e.g.* the state) can make a *better* decision is that it has a wider perspective. It has the experience to which Mill referred – experience with highway traffic injury statistics, for example. Finally, a third reason that the state can make a *better* decision is that it has dedicated people to consider risks (from therapeutic drugs or from cigarette smoking, for example) over time who can not only collect relevant information but also assess its implications.³⁴¹

341. New (1999) at 82. *See also* Baier (1972) at 715 (“Governments should be and are often better informed than individuals about what is needed and what would be morally desirable for everyone to do, say, in economic, military, or populations matters.”); Buchanan & Brock (1989) at 50; Marcus Tullius Cicero, *De Oratore* II, 36 (“History . . . provides guidance in daily life . . .”); Feinberg (1986) at 160 (explaining that one might know conduct is risky but not how risky: “scope and limits of his first level knowledge”), 160-62 (comparing unavoidable ignorance to avoidable ignorance — expertise can help in the latter case) (in the example of the icy lake, interference is justified by someone who knew more); Gaus (1990) at 401-03 (arguing that an epistemological dispute is not resolved by choosing an umpire but it solves the practical problem – if the umpire can choose in range R); Knowles (1977) at 80; Kultgen (1995) at 100 (holding the presumption of autonomy to be less forceful when individual choice is not based on experience); New (1999) at 82 (“Individual citizens are fallible. On occasion, and in particular circumstances, the state may be less so.”); VanDeVeer (1986) at 109; Zamir (1998) at 275.

For these reasons, the state (and similar paternalistic agents) will sometimes have strong evidence (even when the subject does not) that the subject's conduct will set back her critical or welfare interests – while not furthering any other critical interests. The objection from paternalistic distance reminds is that this evidence is required. But it does not establish that this evidence is unobtainable.

C. Objection Three: The Argument from the Developmental Value of Choice.

1. *Statement of the Objection.* Those who make the argument from the developmental value of choice hold that restricting people's foolish conduct prevents them from fully experimenting with various life experiences, and consequently prevents both the individual and society from learning from the individual's mistakes.³⁴² Trial and error is, after all, an important element in any educational process.³⁴³ The subject loses something valuable by not making her own decisions without unsolicited assistance.³⁴⁴

Mill explains, “though individuals may not do the particular thing so well, on

342. Armsden (1989) at 70; Burrows (1995) at 496; Caney (1991) at 465-67; Feinberg (1988) at 54; Goldman & Goldman (1990) at 66; Jorgensen (2000) at 47-48; Klein (1994) (“[L]iberty breeds responsibility”); Kleinig (1983) at 26-27, 30-32; Kultgen (1995) at 107, 137-38; Mill (1848) at 942-44; Nuyen (1983) at 30 (“[T]here is value in failures . . . learning from one's mistakes.”); Richards (1982) at 58 (“[A]llowing people to make and learn from their own mistakes is a crucial part of the development of mature autonomy.”); *id.* at 61 (experiments in living); *id.* at 113; Sankowski (1985) at 4, 9; Young (1986) at 5; Zamir (1998) at 276.

343. Plato's *Meno* 82-85D.

344. Wright (1995) at 1433-34 n.121.

average, as the officers of government, it is nevertheless desirable that it should be done by them . . . as a means to their own mental education.”³⁴⁵ Feinberg reflects: “If adults are treated as children, they will come in time to be like children.”³⁴⁶ Bailey Kuklin calls this Mill’s “moral muscles argument.”³⁴⁷ It is echoed by Mill’s contemporary, Herbert Spencer, who argued that “[t]he ultimate result of shielding men from the effects of their folly is to fill the world with fools.”³⁴⁸

2. *Response to the Objection.* The Argument from the Developmental Value of Choice, like the other consequentialist objections to hard paternalism, is limited by empirical facts. And there just is not enough evidence to make the objection sufficiently compelling.

Admittedly, “[e]xtreme, comprehensive state paternalism may lead to undesirable results in terms of people’s development.”³⁴⁹ For example, Richard Arneson describes a mechanical robot that would “guide” us to do that which would optimize our utility.³⁵⁰ Similar auto-corrective mechanisms are described in the

345. Mill (1859) at Book V.

346. Feinberg (1983) at 3.

347. Kuklin (1992) at 666 n.36 (citing numerous sources).

348. Spencer (1981) (1884).

349. Zamir (1998) at 277.

350. Arneson (1980) at 477-78. *See also* Regan (1983) at 114 (idealized paternalist).

dystopian literature.³⁵¹ *Player Piano*'s EPICAC XIV, for example, solves everyone's problems, makes all the decisions, and gives everyone what they "need." Arneson's robot and EPICAC XIV would shield people from, and would stunt their full appreciation of, realms of experience. That kind of hard paternalism would protect subjects at the cost of their educational and social development.

However, the force of the Argument from the Developmental Value of Choice drastically diminishes when the scope and conditions for justified hard paternalism are more limited. Pursuing the "moral muscles" metaphor, John Kleinig argues that even exercise, although generally healthful, can be overdone.³⁵² Overtraining, for example, adversely impacts an athlete's immune system due to the release of excess stress hormones; it causes the suppression of white blood cells; and it decreases performance and coordination. It's good for athletes to train – but not too much.

Similarly, it's good for people to exercise making decisions for themselves – but not too much. It is not clear that individuals always learn or that they always learn at an acceptable cost. Kleinig argues that "we do not learn from all our mistakes, or not without excessive costs being exacted."³⁵³

351. Vonnegut (1952).

352. Kleinig (1983) at 31; Stephens (1873) at xxii.

353. Kleinig (1983) at 189. *See also id.* at 54 ("We are much more likely to learn from our mistakes if their deleterious consequences are relatively immediate or not catastrophic . . .").

The Argument from the Developmental Value of Choice is, in short, vulnerable to a form of the logical fallacy *post hoc ergo propter hoc*, the causal error of extrapolating beyond a given range of cases.³⁵⁴ Just because there is a positive relationship between making one's own decisions and mental education, that relationship may only obtain within a certain range of cases. It may not be purely linear. Just as rain is good for crops within a certain range of conditions (generally, the more rain, the better for the crops) if there is too much rain, it can have a negative (drowning) effect on the crops.³⁵⁵

Mark Twain famously argues that “a man who carries a cat by the tail is getting experience that will always be helpful. He isn't likely to grow dim or doubtful. Chances are, he isn't going to carry that cat that way again, either. But if he wants to, I say let him.” So do I. Hard paternalistic intervention would prevent the subject from learning about the feline character, only to protect the subject from the trivial costs of some claw scratches.

The cat carrier case is but an appetizer in the Las Vegas-style buffet of both low harm and high harm self-regarding experiences available to individuals, permitted under my seven conditions. The social and educational development of children is not

354. Walton (1989) at 222.

355. Walton (1989) at 222.

hampered by cutting them off (through soft paternalism) from some things (like playing with matches or playing on the roof). Similarly, on my theory of justified hard paternalism, the individual can learn from a very wide range of self-regarding mistakes. Only a small subset is precluded as an option.³⁵⁶

First (per condition two), only the restriction of high harm conduct (that significantly sets back a critical or welfare interest of the subject) is permitted. Indeed, except for very rare cases where a subject has irrational high autonomy interests, only the that high harm conduct in which the subject has a low autonomy interest may be restricted. And even that is permitted only where it is a last resort, proportional, effective, and as least restrictive as possible.

It is, in short, implausible that a limited number of discrete interventions – those legitimized by my seven conditions – would stunt development. It is implausible that forcing people to wear helmets or preventing them from blowing their life savings, for example, would have a detrimental effect on their development as autonomous persons. The comatose motorcyclist does not learn from his “mistake” in riding helmetless. And his opportunities for mental education more generally are drastically limited. Limiting

356. Neither is society itself deprived of the subject’s experiments in living. As discussed in my response to the objection from paternalistic distance, my conditions limit hard paternalism to situations where the state (or other agent) has an epistemic advantage such that additional experimentation is unnecessary.

the number and severity of significant harms, within the constraints of my seven conditions, would not only *not* meaningfully reduce but also would even preserve a far wider range of opportunities for moral and educational development.³⁵⁷

D. Objection Four: Non-Consequentialist Objection: The Oppression of Individuality.

1. *Statement of the Objection.* Those who make the Argument from Oppression of Individuality contend that hard paternalism undermines the subject's status as a person, her status as a human being. Kleinig writes that this is the most difficult objection.³⁵⁸ Douglas Husak concurs, arguing that "[s]urely the essence of the *best general objection to paternalism* is that such interferences treat persons as less than full autonomous agents . . . an objection to paternalism qua paternalism."³⁵⁹

The Objection from Oppression of Individuality charges hard paternalism with violating not only the subject's autonomy (as a right) but also the subject's autonomy

357. Husak (2002) at 30. *See also* Young (1986) at 65 (arguing that "[t]hose who seriously value autonomy cannot remain content with weak paternalism"); *id.* at 65-70 (arguing in a manner similar to Kleinig that paternalism is justified to protect "dispositional autonomy" by infringing "occurrent autonomy"); Kultgen (1995) at 138 (arguing that: "Intervention to prevent [only] the more egregious mistakes may contribute to development rather than militate against it."); Zamir (1998) at 276 (suggesting that by being paternalistically protected, people do learn – through the internalization of social norms to appreciate their true worth).

358. Kleinig (1983) at 28.

359. Husak (1980) at 28 (emphasis added).

(as an ideal of character).³⁶⁰ Some writers characterize the objection as a problem of human “dignity.”³⁶¹ Isaiah Berlin explains:

Paternalism is despotic, not because it is more oppressive than naked, brutal, unenlightened tyranny, nor merely because it ignores the transcendental reason embodied in me, but because it is an *insult* to my conception of myself as a human being, determined to make my own life in accordance with my own (not necessarily rational or benevolent)

360. Beauchamp & Childress (1994) at 278 (“Strong paternalistic interventions display *disrespect* toward autonomous agents and fail to treat them as moral equals, treating them as less than independent determiners of their own good.”); Beauchamp & Childress (2001) at 63, 182; Berlin (1969) at 118; *id.* at 136-37 (“[N]othing is worse than to treat them as if they were not autonomous . . . whose choices are manipulated by their rulers . . .”); Brody (1983) at 175 (“The frustration of desire that occurs when we overrule his decision and act paternalistically toward him will often outweigh any benefits that he might gain from the decisions we make for him.”); Feinberg (1984) at 116-17; Feinberg (1986) at 23 (“[L]egal paternalism is . . . arrogant and demeaning . . . patronizing . . .”); *id.* at 307 (“If he is an autonomous being, he has the right to decide foolishly in self-regarding matters.”); *id.* at 27 (describing paternalism as “arrogant,” “demeaning,” “patronizing,” “belittling,” and “degrading”); *id.* at 61 (“He has a sovereign right to choose in a manner we think, plausibly enough, to be foolish, provided only that the choices are truly voluntary.”); *id.* at 67 (“An autonomous being has the right to make even unreasonable decisions determining his own lot in life, provided that his decisions are genuinely voluntary (hence truly his own), and do not injure or limit the freedom of others.”); *id.* at 69-70; *id.* at 98 (“We *undermine his status as a person* . . . if we force our better conception of his own good upon him.”) (emphasis added); *id.* at 109; *id.* at 134 (“As a principle of public policy [hard paternalism] has an acrid moral flavor and creates serious risks of government tyranny.”); Feinberg (1988) at 61 (“To the believer in *de jure* personal autonomy . . . he is the ‘right owner’ of his own life, and even the genuine interests of other persons in how he lives it in private, though more respectable than that of ‘thieves,’ is of comparatively little importance.”); Feinberg (1996) at 391 (“Those who are strongly opposed to paternalism find it not only mistaken but arrogant and *demeaning*.”); Frohock (1989) at 235 (“The offensiveness of paternalism is also clear on liberal concepts. Paternalism insults individual integrity by overriding or avoiding consent. It determines an individual’s interests from a point of view outside the individual’s moral and intellectual powers.”); Kant (1793) at 58-59 (“Human freedom as a principle for the constitution of a community I express in this formula: No man can compel me to be happy after his fashion, according to his conception of the well-being of someone else. Instead, everybody may pursue his happiness in the manner that seems best to him provided he does not infringe on other people’s freedom to pursue similar ends, i.e. on another’s right to do whatever can coexist with every man’s freedom under a possible universal law. If a government were . . . a paternal government (*imperium paternale*) . . . such a government would be the worst conceivable despotism.”); Klein (1994) (“[A]ny old story won’t give our lives meaning. It must be one’s own story.”); Kleinig (1983) at 4, 38; *id.* at 183 (describing paternalism as “distasteful,” “insulting,” “demeaning,” and “degrading”) (“Substitution of the choices of bureaucracy for those of consumers carries with it a not so subtle implication that consumers are powerless, if not incompetent . . .”); Mead (1998) at 111-12 (“Paternalism . . . is *demeaning*, for it implies that these individuals cannot manage their own lives.”); Royster (1986) (arguing paternalism is self-righteousness); Starobin (1999) (calling paternalism “undeniably elitist”).

361. Wright (1995).

purposes.³⁶²

The problem with hard paternalism, charges the Objection from Oppression of Individuality, is that it insults, degrades, and demeans the subject, by failing to treat her as someone who can manage her own affairs.

Donald VanDeVeer provides some useful metaphors that illustrate the Objection from Oppression of Individuality. VanDeVeer argues:

We cannot invasively intervene in his choices on the basis of a myopic focus on what constitutes his own good even if we happen to possess superior insight on that score To do otherwise is to treat [the subject] as a '*good receptacle*' or a 'utility location,' but persons are not just that. They are *arbiters* of their own well-being, and not merely sentient, computing devices to be kept in good repair.³⁶³

On VanDeVeer's account, the proponent of the Argument from the Oppression of Individuality charges that hard paternalism treats individuals as mere "clay to be sculpted."³⁶⁴

Goethe, among other literary figures, captures the essence of the objection in a dialogue in his 1788 play *Egmont*:

Duke of Alba: Freedom? A fine word, if only one could understand it!

362. Berlin (1969) at 157 (emphasis added). *See also id.* at 157-62 (discussing the importance of being and having recognition for being somebody in the world).

363. VanDeVeer (1986) at 112 (emphasis added). *See also* Beauchamp (2001) at 132; Childress (1982) at 57.

364. VanDeVeer (1986) at 113.

What kind of freedom do they want? What is the freedom of the most free? To do what is right! And in this the King will not hinder them It is the King's intention to restrict them for their own good, if need be to thrust their own welfare upon them, to sacrifice the harmful citizens so that the best may live in peace and enjoy the blessing of wise government.

Egmont: He has decided what a prince has the right to decide. His will is to weaken, oppress, destroy the strength of his people – their self confidence, their own conception of themselves His will is to corrupt *the very core of their individuality*; doubtless with the intention to make them happier. But his will *annihilates them*.³⁶⁵

Indeed, The Objection from Oppression of Individuality seems to be the point of many classic Twentieth Century dystopian novels and films. In the societies depicted in *Brave New World*, *Nineteen Eight-Four*, *Fahrenheit 481*, *We*, *Rollerball*, *A Boy and His Dog*, *THX 1138*, and *Pleasantville*, there was adequate security but little liberty or freedom. The inhabitants of these fictional societies are perceived to be (and Huxley, Orwell, Bradbury, and the other authors intend them to be perceived as) robbed of their very humanity.

Learned Hand declared that he would find it “most irksome to be ruled by a Bevy of Platonic Guardians *even if I knew how to choose them*, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.”³⁶⁶ People want

365. Goethe (1788) at Act IV (emphasis added).

366. Bickel (1986) at 20.

to be in control – even when it makes no difference to the outcome.³⁶⁷ There is, in short, a value in choosing – apart from either the wisdom or consequences of the choice.³⁶⁸ As Robert Young put it: “To be content or happy is desirable, but autonomously to have

367. Armsden (1989) at 47, 64; Arneson (1989) at 437; Bayles (1978) at 119, 128-32; Brock (1993) at 32; Buchanan & Brock (1989) at 38-39, 41; Childress (1982) at 69, 73; Childress (1997) at 78, 123; R.M. Dworkin (1978) at 263; Fox (1993) at 578 (“More importantly, it is enraging to think of our life decisions being made for us in this way *even if* the deciding person or committee is sensible and competent.”); Freeman (1999) at 113 (“[P]aternalism is a charge that individuals are treated as *mere subjects* benignly perhaps, but not as free citizens who are capable of taking responsibility for their lives.”) (emphasis added); Gostin (2000) at 3119; Gostin (2001) at 90; Häyry (1998) at 449; Husak (1992) at 138-41; Jorgensen (2000) at 47; Kekes (1997) at 7, 22 (noting the intertwined and interdependent nature of liberty and value pluralism); Kultgen (1995) at 103-04; Lavin (1996) at 2426 (“Despite the attractiveness of policies aimed at the prevention of tobacco use . . . the moral defensibility of policies that go beyond education and the protection of nonsmokers is suspect. It is difficult to discern what moral grounds could support such policies, if the grounds are neither weakly paternalistic nor rooted in the harm principle.”); Kultgen (1995) at 16 (“We resent incursions on our autonomy.”); Linzer (1999) at 137; O’Neil (1984) at 173; Rakowski (1993) at 1123; Shapiro (1988) at 530; VanDeVeer (1986) at 112 (“[W]e cannot invasively intervene in his choices on the basis of a myopic focus on what constitutes his own good even if we happen to possess superior insight on that score To do otherwise is to treat [the subject] as a ‘good receptacle’ or a ‘utility location,’ but persons are not just that. They are arbiters of their own well-being, and not merely sentient, computing devices to be kept in good repair.”); Viscusi (1998) at 1101-02 (“The mere existence of a risk is not a legitimate rationale for government regulation In a world of rational choice, with full information, there would be no rationale . . . for interfering with those decisions.”); Weale (1978) at 169; Zamir (1998) at 231 (recognizing “hostility toward paternalism characterizes the prevailing liberal discourse”).

368. Bovard (1999) at 222 (“Paternalism perceives happiness as deriving solely from a final result . . . [b]ut happiness is also the result of an *active pursuit of one’s own values*.”) (emphasis added); Burrows (1995) at 496 (“[H]aving the freedom to make a choice is intrinsically valuable *even if* the outcome of the choice is harmful to the chooser; that is, the freedom to choose has a value that is an end in itself.”); Glover (1977) at 80-81 (“[P]eople can mind more about *expressing themselves* than about the standard of result.”) (emphasis added); Kleinig (1983) at 16 (“[B]eing treated paternalistically inclines us to condemn it. We resent incursions on our autonomy.”); *id.* at 211 (“[P]aternalism’ is firmly entrenched as a tag of disapproval.”); *id.* at 30-32 (“[E]ven if they do not make the best choices, there is a *value in choosing*”) (emphasis added); *id.* at 25, 28, 54; Rippel (1997) at 34 (“[P]eople still *prefer to choose* . . . rather than have somebody else making those decisions for them.”) (emphasis added); Stephens (1873) at 19 (“[T]hough there is a wiser part, and though the wise part may wish well to the less wise, yet even the disadvantages of having a wise course forced upon the members of civilized societies exceed the disadvantages of following an unwise course freely) (quoting Morley); Young (1986) at 25-26 (“Just as the contentment of those in the Brave New World had its attractions . . . what each lacks is the *working through of a life plan* which expresses the will of the individual in question. To be content or happy is desirable, but freely to have been the architect and builder of one’s contentment is better.”) (emphasis added).

been its *architect and builder* is better”³⁶⁹

While the objections from paternalistic distance and the developmental value of choice focus on autonomy as an instrumental value, the objection from the oppression of individuality focuses on autonomy as an intrinsic value. In its boldest form, the objection from Oppression of Individuality could even (though it need not) concede the Argument from Paternalistic Distance to the hard paternalist. It could concede that the paternalistic agent might be a better judge than the subject in some circumstances, yet “provide a ground *nonetheless* for resenting Big Brother’s intrusion, *even when* he really does know best.”³⁷⁰ Stanley Benn explains:

To protect against paternalism is not therefore necessarily to claim that the subjects are being treated contrary to their own best interests, but that they are deprived of their *right to decide for themselves* what their interests are, and how best they would be served.³⁷¹

* * *

“What has it to do with you? What right have you, or anyone else, to make my life better – or safer – than I choose to make it for myself? I have projects of my own, and mine is the prime responsibility for judging their advisability, and for assessing what I make of them and of myself. I’ll thank you not to interfere.”³⁷²

Later, Benn writes, “persons are entitled to make the mistakes if they choose, if they themselves are the only losers.”

369. Young (1982) at 39 (emphasis added).

370. Benn (1988) at 14 (emphasis added).

371. Benn (1988) at 11 (emphasis added).

372. Benn (1988) at 12.

In sum, rather than (primarily) defending the *substance* of an individual's judgment, the Objection from Oppression of Individuality (primarily) defends an individual's *right* to make that judgment.³⁷³

2. Initial Response to the Objection: Its Target Is Objective Good

Consequentialism. The problem with the Objection from Oppression of Individuality is that it has force only against an extreme form of hard paternalism such as that described in Plato's *Republic* or in the dystopian literature.³⁷⁴

All forms of consequentialist arguments for hard paternalism balance the subject's autonomy against the subject's good. The more familiar form of this argument employs an *objective* conception of the good. When the paternalistic agent imposes an objective conception of the good, he doesn't even consider the subject's preferences. The subject's preferences, the agent concludes, are not probative (and hardly conclusive) evidence of what is good for the subject. Instead, the agent determines what is good for the subject by reference to standards which are external to the subject.

Donald VanDeVeer, for example, offers his "Unreasonable Harm Prevention

373. Benn (1988) at 14. *See also* Feinberg (1986) at 62 ("There must be a right to err, to be mistaken, to decide falsely, to take big risks, if there is to be any meaningful self rule."); *id.* at 61, 67, 69, 109, 307.

374. Richards (1982) at 60 ("Plato's idea that there are no limits to legitimate state paternalism . . . [is] a form of deep paternalism inconsistent with basic respect for the person and human rights.").

Principle (UPP)" as a justification of hard paternalism where five conditions are satisfied:

1. S's choice to do Y is *unreasonable*.
2. S's doing Y is likely to make S significantly worse off than if S refrains.
3. A's doing X will prevent S from doing Y (in the least restrictive but effective manner).
4. S is likely to be significantly better off if A does X than if S did Y.
5. A's Xing involves no wrong to others.

VanDeVeer ultimately rejects UPP, concluding that the "door would be opened to a broad array of quite invasive paternalistic interventions."³⁷⁵ The scope of paternalism legitimized by UPP could be virtually unlimited, depending on how the key term "unreasonable" is construed.³⁷⁶

John Kultgen offers a consequentialist defense of paternalism similar to UPP.

Kultgen's "Principle of Paternalism" ("PP") justifies intervention where two conditions are satisfied:

1. The agent believes the expected value for the subject is greater than any alternative³⁷⁷
and
2. The agent has reason to trust her judgment more than the subject.³⁷⁸

375. VanDeVeer (1986) at 126. *See also id.* at 354-55 (proposing similar conditions for soft paternalism).

376. Gert & Culver (1997) at 229-32.

377. Kultgen (1995) at 76, 83, 143-44, 200.

378. Kultgen (1995) at 83, 143.

Kultgen forthrightly admits that PP “sanctions a good deal of parentalism.”³⁷⁹ Kultgen’s PP is an aggressive paternalism that explicitly purports to justify an agent placing a subject’s “true or objective well-being” over the subject’s wants or even over the subject’s considered decisions.³⁸⁰ Kultgen’s PP, in short, sanctions more active and more extensive interference with individual liberty than most other alternatives.³⁸¹

Kultgen is cognizant of the dangers. He recognizes the need to be critical and to draw boundaries.³⁸² For example, like most writers of paternalism, Kultgen offers several “corollaries” of PP to limit the scope of its application.³⁸³ Kultgen recognizes that “the fact that a person is rational, informed, balanced in his judgments, and in control of his feelings is clear evidence that what he wants is objectively good for

379. Kultgen (1995) at 15. As discussed in Chapter One, John Kultgen argues that the term “parentalism” is preferable to “paternalism” because it does “not incorporate a negative evaluation in its very definition . . . as to bias judgment.” Kultgen (1995) at 61; *see also id.* at x, 48; Gutmann & Thompson (1996) at 400 n.69 (“As John Locke long ago pointed out, the more appropriate term is ‘parentalism’”); Locke (1698) at §§ 52-53. But Kultgen’s proposed usage has been generally rejected. Beauchamp & Childress (1994) at 319 n.25; G. Brock (1996) at 539 (rejecting the use of the term “parentalism” because it has “connotations which are just as negative as the term ‘paternalism’”); Childress (1982) at 8 (“I will use ‘paternalism’ more frequently because it has a sharper and clearer ‘system of associated commonplaces.’ It is also hallowed by numerous practical and theoretical discussions.”); Kleinig (1983) at xiii (admitting the attractiveness of the alternate vocabulary but choosing, nevertheless, to “bow to convention”); Nikku (1997) at 18 n.2 (choosing the “notion paternalism” because “it has a sharper and clearer association”); Zamir (1998) at 229 n.1 (using “paternalism” because “it is the term almost invariably used in the relevant philosophical, economic, and legal literature”).

380. Kultgen (1995) at 80, 142, 155, 201, 215.

381. Kultgen (1995) at 85.

382. Kultgen (1995) at 15 (“But the danger that the parentalist will succumb to the kind of solicitude that dominates its recipient demands that we draw boundaries around the forms of justified parentalism carefully and erect strong barriers of conviction to prevent these boundaries from being overstepped.”); *id.* at 81.

383. Kultgen (1995) at 210.

him.”³⁸⁴

Nevertheless, for Kultgen, a person’s substantially voluntary expressed desires and choices are no more than mere “clues” of what is objectively good for that person.³⁸⁵ He writes: “My theory is an example of . . . ‘ideal theory,’ which says that components of a person’s good exist *independently* of whether he desires them.”³⁸⁶ Kultgen is clear that the paternalistic agent must make objective judgments and that “there are occasions where the parentalist has sufficient evidence to think that something is better for the subject than the achievement of the goals of even her stable projects and the good of pursuing goals her own way.”³⁸⁷

As this quick glimpse at VanDeVeer’s UPP and Kultgen’s PP demonstrates, objective good consequentialism justifies a great deal of paternalism.³⁸⁸ Offering little

384. Kultgen (1995) at 9. *See also id.* at 80 (“The most accessible evidence about what is good for a person is his expressed desires.”).

385. Kultgen (1995) at 10.

386. Kultgen (1995) at 215 (emphasis added).

387. Kultgen (1995) at 142. *See also id.* at 152 (The agent intervenes to prevent serious harm “as this is determined by the *intervener’s understanding* of that person’s interests.”); *id.* at 155-56.

388. Objective good consequentialism presumes “an *a priori* notion of what things are good in life.” Soble (1982) at 352. The true liberal cannot judge that “some self-regarding acts ought not to be open to anyone to perform, because these acts are too dangerous [or] not worthwhile. . . . These judgments . . . are judgments the liberal wants to reserve for the individual to make.” Soble (1982) at 347. Objective good consequentialism offers an unsatisfactory answer to the question: Why ought we not allow the subject choose for herself? To simply answer this question by concluding that the subject’s choice is “wrong” assumes: (1) that there is an objective good, (2) that the agent knows this objective good, and/or (3) that the agent ought to limit the subject’s liberty in order to correct aberrations from this objective good. All three of these assumptions are questionable. Indeed, if they weren’t, hard paternalism – and perhaps much of ethics itself – would cease to be of philosophical interest.

or no respect for the subject and her wishes, plans, goals, and values, these arguments, much like the hypothetical rational consent arguments examined in the Chapter Four, are too unconstrained.³⁸⁹ I take objective good consequentialism to be the paradigm target of the objection from oppression of individuality, and turn now to contrast it with my own theory of justified hard paternalism.

3. Further Response to the Objection. The theory of hard paternalism that I defend leaves subjects with a significant degree of self-expression and self-guidance. Rather than destroying autonomy, the interventions that are legitimized under my seven conditions “affect only a *fraction* of the subject's stream of life . . . some aspects of her action of the moment.”³⁹⁰ Restriction of a subject’s liberty with regard to some conduct does not wholly negate autonomy. The protection of autonomy in most areas of life does not preclude paternalistic intervention in a few.³⁹¹

389. Woodward (1982) at 77-82. *See also* Goodin (1993) at 236 (“The upshot is that paternalism is always going to be more or less justifiable . . .”); Hardin (1988) at 139-40 (noting that the strength of paternalism falls on a continuum); Kleinig (1983) at 157; Kultgen (1995) at 90; Rubin (1998) at 84 (“In hard paternalism the values that are used to assess harm and benefit are *alien* to, and therefore imposed upon, the patient. . . . [T]his kind of intervention is much harder to justify than limited or weak paternalism.”) (emphasis added); Schonsheck (1994) at 181-82; Trebilcock (1993) at 150 (“The problems posed by hard paternalism are obvious once one abandons as the principal *reference point* an individual's own preferences, the dangers of an authoritarian imposition of others' preferences . . . are relatively unconstrained.”) (emphasis added).

390. Kultgen (1995) at 93.; Young (1986) at 35 (“Mostly such coercion is occurrent and hence will affect only the autonomy of the moment . . .”). The “ardent chooser” whose life plan is to fully experience everything life has to offer would seem to be resistant to hard paternalism. Arneson (1989) at 435 (arguing that the liberal principle itself can be alien).

391. Armsden (1989) at 47.

My theory does not sanction government intervention to correct all the non-optimal choices that individuals make. It sanctions only correction of people's high harm, low autonomy interest choices (and, rarely, of high harm, irrational high autonomy interest choices), and only then in limited and strictly defined circumstances.³⁹² As Sin Yee Chan observes: "[W]e [can] maintain the status of self governing agents, while relinquishing *some* direct control over matters concerning ourselves."³⁹³ We can do with fewer options than we have without being substantially affected, particularly where the restricted options relate to only non-critical interests. The motorcycle rider forced to don a helmet is still the controller of his life. "*Partial or temporary* loss of control over her body hardly terminates her status as a moral agent."³⁹⁴

If individuals should not be treated as utility containers (*i.e.* restricting their

392. Hospers (1980) at 260 (if wager that intervention fits in the subject's life plan, these conditions make the wager much more likely); Nikku (1997) at 99 (the minimally rational person); VanDeVeer (1986) at 134-40 (intervention is not just benefit but also autonomy promoting);

393. Chan (2000) at 85 & n35 (emphasis added).

394. Kultgen (1995) at 192 (emphasis added). *See also* Archard (1994) at 287, 291; Blackburn (2001) at 100 ("It would often be good and no signal of disrespect to ourselves, if those who know better could resolve us from our worst follies."); Buchanan & Brock (1989) at 39 ("The importance of our interest in deciding for ourselves will vary substantially depending on the nature of the particular decision being made."); R.M. Dworkin (1998) at 1152 (conceding that state has a legitimate role in determining the "reasonableness" of suicide decisions); Kleinig (1983) at 50-51, 73, 86; Kuklin (1992) at 661 n.25; Kultgen (1995) at 106, 108, 110, 136-37, 157, 196; *id.* at 156 "Ordinary acts of parentalism alter *limited parts* of the subject's life . . . they do not affect his system of values." (emphasis added); Loeben (1999) at 106 ("[N]ot all decisions are of equal importance."); May (1994) at 140 (arguing that appeals to authority can *broaden* not threaten autonomy. Using the *helmsman metaphor*, the subject determines the path of the voyage. The state only alters the path to avoid icebergs. Can look at each individual choice or on a macro level); May (1998).

liberty for hard paternalistic reasons to ensure optimal decisions), neither should they be treated as autonomy containers (*i.e.* never restricting liberty for hard paternalistic reasons even where the conduct is of marginal importance to the subject and she engages in it with little or not deliberation).³⁹⁵ As Cohen explains, “not all restrictions of conduct ‘for one’s own good’ are *ipso facto* individuality compromising since not all conduct is necessarily an expression of one’s individuality.”³⁹⁶

4. Counterobjection from Oppression of Individuality. The proponent of the objection from individuality has a rejoinder: the *cumulative* effect of the liberty limitation justified on my seven conditions might be more than trivial. Charles Fried argues:

Any one of these acts could be forgone on a particular occasion without changing the picture of the life the [subject] leads, so that nothing significant might appear to be at stake. Yet, if a person were to give up all trivial ends involving even a slight risk of death, his life would be very different. Although a particular trivial end is just that, trivial, the *capacity for engaging in trivial ends in general* – entertainment, comforts, quirks – is an important aspect of human personality.³⁹⁷

While the subject might not care much about the restriction of one activity, she might care a great deal were an agent to restrict entire categories of conduct. This would take

395. Kleinig (1983) at 72.

396. Cohen (1986) at 312. Furthermore, if we valued individual’s choice itself just because it was the individual’s choice, the whole concept of paternalism would vanish. If we must respect an individual’s choice just because she made it, there is no room to intervene with individuals’ decisions.

397. Fried (1970) at 179. *See also* Weale (1978) at 171 (noting Fried’s cumulative interference problem in *An Anatomy of Values* 179-82);

away a range of discretion from the subject. It would take away not only the subject's ability to engage in one (or several) particular specific trivial end(s) but also her ability to engage in trivial ends *at all*.

5. *Response to the Counterobjection.* Fried raises an important caution flag. However, my theory of hard paternalism does not pose this danger. While a very wide range of conduct might fall in the low intrusion categories and while removal of all this conduct as an available option might, taken together, be highly intrusive; the low intrusiveness condition (or irrational high intrusiveness) is but one of seven necessary conditions for justifiable hard paternalism. The conduct to which Fried refers would not satisfy the other six conditions (such as the significant harm condition). Therefore, under my theory of justified hard paternalism, individuals would retain a vigorous capacity to engage in trivial ends.

V. CONCLUSION

In this chapter, I defended a simple, clear, and coherent theory of justified hard paternalism. I defended seven conditions as necessary and jointly sufficient to justify hard paternalistic liberty limitation. I then tested my seven conditions against the four most cogent objections to hard paternalism.

Additional specification of the seven conditions is required, particularly as new

situations arise and our considered judgments evolve. Furthermore, additional modulation of the conditions may be required where the conditions are applied in different agent-subject contexts. And some more attention to balancing conditions against one another (*e.g.* tradeoff effectiveness for restrictiveness) is needed.

While I have not provided an “algorithm” for determining when hard paternalism is justified, I have provided substantial guidance for making such determinations. And I have framed the issues so to facilitate the dialog that will provide further guidance.