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FATHER KNOWS BEST: A CRITIQUE OF JOEL FEINBERG'S SOFT PATERNALISM

by

JAMES CULLEN SACHA

Under the Direction of Andrew Altman

ABSTRACT

This thesis focuses on the issue of whether or not the government is ever justified in prohibiting the actions of an individual who is harming herself but not others. I first analyze some of the key historical figures in the paternalism debate and argue that these accounts fail to adequately meet the needs of a modern, pluralistic society. Then, I analyze and critique the nuanced, soft-paternalist strategy put forth by Joel Feinberg. Finally, I defend a version of hard paternalism, arguing that a balancing strategy that examines each action on a case-by-case basis shows all citizens equal, and adequate concern and respect.

INDEX WORDS: Paternalism, Hard Paternalism, Soft paternalism, Joel Feinberg, John Stuart Mill, Aquinas, Aristotle

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by

JAMES CULLEN SACHA

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Master of Arts

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Georgia State University

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2007

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May 2007

DEDICATION

To my parents,

for their patience and payment in all my academic endeavors.

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LIST OF ABBREVIATIONS

Children of God (C.O.G.)

Female Genital Mutilation (FGM)

I. Introduction

The issue of whether or not, and to what degree, the government is justified in preventing an individual from harming himself is the source of much disagreement among judges, policymakers, and philosophers. Classical thinkers[1] had defended a strong form of paternalism that one could label "legal moralism." Legal moralism is the idea that the state is morally permitted to prohibit certain actions if the actions are inherently immoral. In modern times, John Stuart Mill broke from the paternalist tradition with his anti-paternalist argument that the only legitimate use of coercion by government is to stop actions that do harm to persons other than the agent. The paternalist views of the classical thinkers had endorsed the idea that the government is responsible for creating virtuous citizens, and that this responsibility allowed the government to prohibit individuals from harming themselves. In contrast, Mill's anti-paternalism can be described as allowing people to "live and let live." According to Mill, human beings will flourish best in an environment where the government does not interfere with actions that do not harm others.

Contemporary philosophers have continued to analyze the paternalist and anti-paternalist positions while drawing new distinctions. In the third volume of his series *The Moral Limits of the Criminal Law*, titled *Harm to Self*, Joel Feinberg specifically addresses problems that surround paternalism. In the tradition of Mill, Feinberg argues

[1] When I use the term "classical" in this thesis, I am referring specifically to the ideas of Aristotle and Aquinas. I will only use the term when I am referring to ideas that I believe both Aristotle and Aquinas

for a qualified form of anti-paternalism that he calls soft-paternalism. He claims the state should only interfere with harmful actions that do not affect others when the actions are non-voluntary. Feinberg's position is paternalistic because it allows the state to intervene to prevent a person from harming himself; his version of paternalism is "soft" because government interference is only warranted when the individual's conduct is not sufficiently voluntary. In other words, if an action is sufficiently voluntary and causes no harm to others, the state has no business legally prohibiting the action due to the potential harm to the individual. In contrast with the soft paternalist, the hard paternalist concludes that in some cases the government is justified in preventing individuals from committing harmful, self-regarding acts that are voluntary. Although hard paternalists consider the autonomy of an individual committing a harmful self-regarding action, the hard paternalists also factor in an individual's safety and well-being when deciding whether or not government intervention is permissible. The hard paternalist concludes that in some cases the fact that a person is harming herself provides a relevant (yet not necessarily sufficient) reason for the government to interfere, whereas the soft paternalist never views voluntary, self-regarding harm as a reason justifying government intervention.

In the first section of this thesis, I examine the legal moralism of Aristotle and Aquinas. Although their form of paternalism may have been defensible in pre-modern societies, it fails to be an acceptable theory due to the conditions of modern pluralism. I review several anti-paternalist arguments put forth by Mill in the second section. Mill

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share. I also recognize that some ancient and medieval thinkers differ from Aristotle and Aquinas greatly, and I am not referring to such thinkers when I use the term in this thesis.

does not adequately clarify key terms in the debate such as harm and voluntariness, and I argue that he fails to explain how a society based on the harm principle would maximize social utility. In the third section, I outline Feinberg's nuanced soft-paternalist strategy, in which he uses personal autonomy and notions of consent to ground his position that the state should not interfere with self-regarding actions. In the final section, I further examine Feinberg's standard of voluntariness. I provide both real and hypothetical examples to help illustrate the difficulties in applying the voluntariness standard. Although I argue that the indeterminate voluntariness standard is difficult to apply, I will not attempt to formulate an alternate standard. With the help of ideas from Ronald Dworkin, I argue instead that the weakness in the soft-paternalist strategy is not the formulation of the voluntariness standard, but the claim that the only good and relevant reasons for government intervention into self-regarding actions are reasons pertaining to whether or not an action is sufficiently voluntary. I conclude with a defense of hard paternalism, arguing that in some cases it is permissible for the government to intervene in the life of an individual for the sake of his personal safety and well-being.

II. Paternalistic Views of Aristotle and Aquinas

Aristotle argues that just as every person performs actions that aim at particular goods, a community or state also aims at some collective good. The best community will aim at the highest of all goods, and Aristotle argues that the "highest" good that any state should aim at is happiness. He writes,

> We see that every city-state is a community of some sort, and that every community is established for the sake of some good (for everyone performs an action for the sake of what he takes to be good). Clearly, then, while every community aims at some good, the community that has the most authority of all and encompasses all the other aims highest, that is to say, at the good that has the most authority of all.[2]

The good that has the most authority, or happiness, is not a hedonistic celebration of sensual pleasure. Instead, Aristotle argues that happiness is an "activity of the soul."[3] The activity of happiness can only be achieved through living in accordance with virtue or *areté*. An example will help to elucidate this point. A knife's essential attribute is the activity of cutting, and the virtue, or *areté*, of a knife is that it is able to cut well. A "virtuous" knife would be a knife that can easily cut many different objects.

The essential attribute of man for Aristotle is man's unique ability to reason, and the virtuous man leads the good life by using his reason effectively to determine which acts avoid excess and deficiency, hitting the mean. While the individual aims at her own happiness, the state must attempt to promote the intellectual and moral development of its citizens. The state accomplishes this goal by creating an environment that fosters moral growth, and this for Aristotle is "living well," or happiness. Aristotle explains:

> [I]t is not enough if they [the citizens] get the correct upbringing and attention when they are young; rather, they must continue the same practices and be habituated to them when they become men. Hence we need laws concerned with these things…For the many yield to compulsion more than to argument, and to sanctions more than to the fine.[4]

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[2] Aristotle, *Politics*, tr. C.D.C. Reeve (Indianapolis: Hackett Publishing Company, 1998), 1.
[3] Aristotle, *Nicomachean Ethics*, tr. Terence Irwin (Indianapolis: Hackett Publishing Company, 1999), 9.
[4] Ibid., 168.

So, in contrast with many contemporary liberals, Aristotle argues that not only does the state have a right to act paternalistically when it is in the best interest of the individual, but at times the state has a duty to do so. The state must not only protect its citizens, but also help them to be happy.

Just as Aristotle argues that the government of a state should aim to promote virtue in its citizens, Aquinas (relying on many of Aristotle's arguments) argues that a state is only truly a state when serving the common good:

> The end of the good life that we live on earth is the happiness of heaven, it is the duty of the king to promote the good life of the community so that it leads to the happiness in heaven—so that he could command the things that lead to heavenly bliss and as far as possible forbid their opposite.[5]

For Aquinas, the most important "good" is to serve God. The state should aim at creating virtuous subjects in order to serve God, and so that the subjects can ultimately gain true happiness in heaven. One way a state helps to create virtuous subjects is by enacting just laws that forbid immoral acts. Aquinas argues that human laws are just if they help to promote the law of God, and human laws must forbid acts which violate the law of God. .

In order to better understand why Aquinas argues that a state should aim at serving God and creating virtuous citizens, it is important to include a brief analysis of certain aspects of Aquinas' metaphysics. For Aquinas, metaphysics, morality, and law are all intimately connected, and it will prove useful to review some general aspects of his theory before moving to the more specific topic of this investigation.

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[5] Thomas Aquinas, *On Kingship*, in *St. Thomas Aquinas on Politics and Ethics*, tr. and ed. Paul E. Sigmund (New York: Norton Company, 1988), 28.

Aquinas states that generally speaking "[l]aw is a rule and measure of acts, whereby man is induced to act or is restrained from acting; for *lex* is derived from *ligare*, because it binds one to act."[6] Since a law is binding, it creates an obligation, and Aquinas argues that a law must aim at the common good to be a law.[7] Therefore, a law obligates a person to aim at the common good, which for Aquinas can be none other than God.

Aquinas distinguishes between three types of law: eternal law, natural law, and human law. Eternal law is divine reason, and although one knows eternal law exists, one can never fully understand or grasp the complexity of eternal law. However, natural law derives from eternal law, and one can grasp natural law through the faculty of the intellect.[8] Aquinas argues that the intellect allows man to intuitively grasp fundamental first principles, and the fact that man should seek the good and God is such a principle. From this principle, one must then use reason to determine that a state should seek the common good, and how one can establish a state to best meet this end. Man intuitively grasps general moral precepts from natural law, and one proceeds to apply these general maxims to specific situations with human reasoning.[9] The sovereign power creates "human laws" by using reasoning to decide the best way in which the laws can help to serve the common good and create virtuous citizens who aim at beatitude.

In *On Princely Government*, Aquinas shows the way in which human laws can be derived from natural laws. Aquinas argues that a "diversity of human interests" exists,

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[6]Thomas Aquinas, *Introduction to St. Thomas Aquinas*, ed. Anton C. Pegis (New York: Modern Library, 1948), 610.
[7] Ibid., 612.
[8] Ibid., 618.

and that since there are many ways in which man could pursue his goals, man "needs guidance for attaining his ends."[10] One can derive from the intellect and natural law that unity and order are beneficial. In particular, if a multitude of people with differing desires all reside in a community, the community must have some controlling principle that unites all of the citizens. So, Aquinas argues that part of the essence of a state is that it aims at common, unified good.[11]

The sovereign should aim at establishing a state that best assists people in finding true happiness, and happiness is achieved through fulfilling our nature and following divine law. Like Aristotle, Aquinas believes that man should foster his unique ability to reason and live in accordance with virtue. The virtuous man leads the good life by using his reason effectively to determine which acts are just, and then performing those acts in order to best serve God. Through the grace of God, individuals will be able to lead a life worthy of gaining them admission into heaven, and therefore the sovereign should promote acts that could lead to their "happiness in heaven" and forbid those acts that might frustrate this end.[12]

Much like a knife must be frequently sharpened in order to be fit to cut well, a man must habituate himself to get closer to perfect virtue. A man must remove himself from "undue pleasures," and Aquinas argues, "a man must receive this training from

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[9] Ibid., 620.
[10] Aquinas, *On Kingship*, tr. Sigmund, 14.
[11] Ibid., 15.
[12] Ibid., 28.

another, whereby to arrive at the perfection of virtue."[13] Furthermore, Aquinas argues that this "training" can be implemented by creating laws that forbid certain immoral acts. A person will refuse to perform these immoral acts first out of fear of punishment, but then the person may willingly become virtuous after behaving in the correct manner becomes habitual. A person can misuse his reason in order to rationalize satisfying his passion, and this needs to be prohibited.[14] Human laws can help an individual to achieve the discipline needed to live virtuously, and this should be the goal of any state.

For Aquinas, the goal of the individual subject and the goal of the state should not be distinguished: both should aim to live in accordance with virtue and serve God. However, it is important to note that Aquinas does not argue that all moral matters should be legislated. Due to the limited nature of human laws, practical concerns sometimes outweigh the benefits of legislating morality. Aquinas writes:

> [H]uman law does not prohibit every vice from which virtuous men abstain, but only the more serious ones from which the majority can abstain, especially those that harm others and which must be prohibited for human society to survive, such as homicide, theft and the like.[15]

Although Aquinas takes harm to others as the principal grounds for legally prohibiting an activity, he indicates that it is not the sole ground. Even though Aquinas recognizes that it is more important to legislate against some vices than others for the sake of a peaceful society, the type of tension that emerges in a modern, liberal society between the public

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[13] Aquinas, *Introduction to St. Thomas Aquinas*, 647.
[14] Ibid.
[15] Aquinas, *St. Thomas Aquinas on Politics and Ethics*, 55.

and private sphere is absent. Both the subject and the sovereign should recognize the importance of serving the interest of the common good, God.

A just state allows the individual to grow and progress morally *through* the state, a state that assists the individual in her goal of virtuous living. Although Aquinas argues that the state should not always intervene through legislation for the sake of the individual, the state is often justified in paternalistic interference. The model state for Aquinas would be a state that operates as an organic unity, with both the sovereign and the subjects all working as one toward the same singular goal of serving God. Civil and criminal laws aimed specifically at promoting moral acts and prohibiting immoral acts are not necessarily restrictive and an imposition on an individual's freedoms; instead laws that prohibit immoral acts can help the individual follow God's law and attain her ultimate end of entering the Kingdom of Heaven.

Both Aristotle and Aquinas consider politics to be teleological; the state should aim at a unified end. The end, or *telos*, for both thinkers is happiness, although for Aristotle happiness is living in accordance with virtue, and for Aquinas virtuous living must be directed towards God and Heaven. The assumption for both Aristotle and Aquinas is that subjects or citizens adhere to a single, comprehensive doctrine of what is "good" or divine because all individuals share a basic nature. However, even though moral disputes certainly occurred in pre-modern societies, it is much more difficult to agree upon an accepted moral doctrine in a modern democracy due to the number of people playing a role in government decision making and the extreme diversity of opinions. Difficulties could emerge if a modern nation like the United States tried to unite

all of its citizens with a single religious doctrine because a multitude of different religious beliefs exist, and many people do not adhere to any religion at all.

John Rawls refers to the existence of many different and competing moral doctrines as the fact of reasonable pluralism. Rawls states:

> The fact of reasonable pluralism limits what is practicably possible under the conditions of our social world, as opposed to conditions in other historical ages when people are often said to have been united (though perhaps they never have been) in affirming one comprehensive conception.[16]

The paternalism of Aristotle and Aquinas aims to create an environment where the state and the laws promote virtue, and restrict or discourage vice. In a modern, liberal society, few politicians and citizens can agree which behaviors are virtuous. Furthermore, the aim of many modern citizens is not admission into heaven or the type of "happiness" for which Aristotle argues. The legal moralism of the classical thinkers allows the state to prohibit immoral actions, even if the actions only harm the individual. For example, Aquinas might argue that laws prohibiting consensual homosexual acts or consensual adultery are just, even though these acts only "harm" the consenting adults.[17] But, reasonable pluralism leads not only to a diversity of opinions on what actions are "right" or beneficial, but also which actions are deemed wrong or harmful. Aquinas recognized that it was not always practical to legislate every human vice, and that the government should be most concerned with maintaining order and keeping individuals from harming

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[16] John Rawls, *Justice as Fairness: A Restatement*, (Cambridge: Belknap Press, 2001), 4-5.

[17] Aquinas does not explicitly state that homosexual or adulterous acts would warrant government intervention. However, it is plausible that he would defend such laws due to his views on the function of the law and on the immoral nature of homosexuality and adultery.

each other. Still, he concluded that the ruler should unify his subjects and direct them towards a particular notion of God. In a modern society, it is not only impractical to systematically direct citizens toward a single goal; it is also unreasonable. The competing doctrines of a diverse group of people leave contemporary society with no single, clear aim. Actions cannot be prohibited strictly on the grounds that they are wrong or immoral if society cannot reach any agreement over what should be deemed immoral. For this reason, the paternalism of Aristotle and Aquinas fails to meet the needs of a modern society. Any theory that emerges to address the role of government in limiting the liberty of individuals must address the diversity of interests, desires, and moral doctrines.

III. Mill's Anti-Paternalism

Recognizing the diversity of human interests in a modern society, John Stuart Mill contends that concrete criteria are needed to determine where the line should be drawn between tyranny and legitimate government interference. In what later theorists refer to as the "harm principle," Mill writes:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is prevent harm to others. His own good, either physical or moral is not a sufficient warrant.[18]

According to the harm principle, the government can only legitimately restrict liberty of a competent adult when the government is preventing the person from directly harming another unwilling individual. It is important to clearly understand the way in which Mill

[18] John Stuart Mill, *On liberty*, ed. Elizabeth Rapaport (Indianapolis: Hackett, 1978), 9.

uses key terms in defining the harm principle. Competent adults are of sound mind, and Mill explains that they are "human beings in the maturity of their faculties."[19] Furthermore, the principle only applies within "civilized" society.[20]

Mill adds that legitimately restricted harm must be committed "directly and in the first instance; for whatever affects himself may affect others through himself."[21] Direct harm refers to when one person, without an intermediary, harms another. So, although an individual may commit an act that is harmful to herself, the act cannot be prohibited on the grounds that it indirectly harms others. For example, an individual would not be prohibited from drinking alcohol on the grounds that drinking harmed her nephew because it meant that she had less money to give the nephew for a birthday present.

The government may only legitimately restrict one person from harming another when the victim is unwilling, or has not consented to the harm. Mill would not advocate legally prohibiting "X" from harming "Y", if "Y" freely consented to the harm committed by "X". In other words, a case where two people both freely consent to harm (or one person freely consents to having the other harm him), Mill argues that the harmful action should be legally allowed.

The harm principle provides Mill with an answer to the question of when the government is justified in limiting the liberty of individuals. Some actions only directly affect the person committing the action, and this conduct is "self-regarding". Other actions not only affect the individual, but also other agents. The harmful actions that are

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[19] Ibid.
[20] Ibid., 10.

"other regarding" may be justifiably prohibited by the state. However, the state may not legitimately restrict the conduct of an individual who is only harming himself.

The conception of the good for both Aristotle and Aquinas is that a single, uniform mode of life for all adult males constitutes a life of happiness. In contrast, Mill explains:

> The same things which are helps to one person toward the cultivation of his higher nature are hindrances to another. The same mode of life is healthy excitement to one…while to another it is a distracting burden…Such are the differences among human beings in their sources of pleasure [and] their susceptibilities of pain…unless there is a corresponding diversity in their modes of life, they neither obtain their fare share of happiness, nor grow up to the mental, moral, and aesthetic stature which their nature is capable.[22]

No single mode of life constitutes the life of happiness and this idea is at the heart of modern liberal pluralism. Mill concludes that the harm principle guarantees a sufficiently broad scope of individual liberty that allows for many different modes of life.

The best method for a state to promote happiness and to help citizens develop their faculties is by allowing them a wide range of personal liberty. If a state were to pass paternalistic laws, it would then hinder the individual from truly developing her highest human faculties. If the government attempts to create virtuous, happy citizens, it will diminish the opportunity for each individual to deliberate and decide on what choices to make in life. Through the process of deliberation, individuals strengthen their reason and imagination. It is better to allow individuals to foster their intellectual skills than for the government to select what is good or right for every individual.

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[21] Ibid., 11.
[22] Ibid., 65.

People must be allowed to make mistakes in order to learn from those mistakes and develop their minds and character. Laws aimed at improving morality do not foster this kind of development, and a government that can legislate morality will often do so in the wrong way.[23] For example, if a government prohibits certain acts that the government views as immoral, the government will be likely to prohibit the development of many great minds.[24] Geniuses often break the traditional mold of acceptable behavior, and a government may prohibit certain actions without fully understanding the value of the actions. Mill argues that it seems foolish to allow "average minds" to dictate right and wrong to a genius who may be thought to be immoral, but is not actually harming anyone. If this potential genius is not allowed to fully explore the truth in the ways he sees fit, then society at large suffers from him not developing his faculties. Finally, whether the person is a genius or someone far more average, the individual has the most knowledge and the strongest interest to pursue what is best for him. For this reason, one should not allow the state to attempt to build virtuous citizens through paternalistic laws. Mill concludes that the liberty that is lost will far outweigh any potential benefits of such legislation.

Although Mill contends that the harm principle is a useful criterion for determining when government intervention is permissible, he ultimately defends anti-paternalism on the basis of the principle of utility. Mill derives the principle of utility,

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[23] Ibid., 81.
[24] Ibid., 32.

"the greatest happiness principle," from the work of Jeremy Bentham.[25] Bentham argues that individuals and society should always act to bring about the greatest happiness for the greatest number of people. Happiness for Bentham is a function of pleasure and pain, and the happy person obtains pleasure and avoids pain. Society should create laws that maximize the potential for the most pleasure and minimizes the opportunity for pain, without elevating some pleasures to a superior status.

Although Mill utilizes the principle of utility, he rejects Bentham's notion that all pleasures are inherently equal. Mill writes: "[I]t is unquestionable fact that those who are equally acquainted with and equally capable of appreciating and enjoying both [the "higher" and "lower" [pleasures] do give a most marked preference to the manner of existence which employs their higher faculties."[26] The happiness for human beings must be distinguished from the happiness of beasts, and therefore happiness is much more than sensual pleasure. Similar to Aristotle and Aquinas, Mill argues that happiness requires the development of the higher human faculties. However, the three thinkers diverge with respect to the means of achieving happiness. Aristotle believes that happiness is linked to living in accordance with virtue and for Aquinas the glorification of God is entailed in his notion of happiness. On the other hand, Mill argues that individual liberty is crucial for achieving the happiness of which humans are capable as "progressive beings."[27] Contrasting with Bentham's conception, Mill's principle of utility can best be described in the following terms: individuals and society should always act to bring about the

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[25] John Stuart Mill, *Utilitarianism*, ed. George Sher, (Hackett Publishing: 1979), 3.
[26] Ibid., 9.

greatest development and exercise of the higher human capabilities for the greatest number of people.

According to Mill, the harm principle is ultimately justified because it best promotes social utility. However, in many cases it appears that liberty in self-regarding conduct does not promote more happiness. Many people freely choose self-regarding actions that lead to misery, instead of happiness. For example, let us assume that "Susan" chooses freely not to wear a seatbelt while driving a car. The harm principle allows Susan to make this choice, since her decision to not wear a seatbelt poses no direct harm to others. Susan gets into a terrible accident and can no longer walk, although it is likely that had she been wearing a seatbelt, she would not have been severely harmed. Although the harm principle allowed Susan to not wear a seatbelt, it certainly did not promote her happiness. Moreover, if many others had experiences similar to Susan, the "happiness" of society would be greatly diminished. Although it is possible that the seatbelt law would diminish social utility, it would be difficult (if not impossible) to prove this empirically. Protecting individual liberty with a strict rule mandating the use of seatbelts might produce, overall, more happiness than unhappiness in society. However, Mill provides no reason to think that implementing the harm principle will produce more overall happiness in society in all cases, and there seems to be nothing that would guarantee the harmony of the harm and utility principles across the many varied circumstances of human life. It is possible to imagine an array of cases where

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[27] Mill, *On Liberty*, 10.

government intervention in the lives of individuals might actually cause more happiness for more people.

Although Mill argues that the state is not justified in preventing self-regarding actions that may cause harm only to the individual, he does make an important exception. Mill introduces an example where a person is attempting to a cross an unsafe bridge and another individual or government agent sees this action. If the individual who was witnessing the potential accident did not have time to warn the bridge crosser, then he "might seize him and turn him back without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river."[28] Mill argues that no loss of liberty emerges because the bridge crosser would never want to cross the bridge if he had the knowledge that the bridge was actually unsafe. Once the person was informed about the dangerous bridge, he would then be allowed to do as he wished as long as he was not delirious or insane. Through this example, Mill concludes that paternalistic interference is only justified when a person does not have adequate information or has limited mental faculties. Even in these situations, Mill argues that a person without adequate information should make her own choices once she the appropriate information becomes available to her.

One can infer from the example of the bridge crosser that implicit in Mill's understanding of the harm principle is a notion of voluntariness. For example, paternalistic interference is permissible in cases where an individual is misinformed or mentally deficient. However, Mill does not adequately elaborate on the concept of

voluntariness. Using just the arguments of Mill, it would be difficult to determine in many cases whether or not an individual's actions were voluntary, involuntary, or a third option that lies somewhere between the two extremes. Similarly, Mill frequently uses the term "harm," without elaborating on what constitutes harm. With both harm and voluntariness, the meanings of these terms can only be inferred from Mill's writings. Neither concept is clearly defined or even clarified by Mill. Since harm and voluntariness are terms crucial to the paternalism debate, it is necessary to adequately address the meaning of these terms.

Fortunately, the debate over paternalism did not end with the arguments of Mill. Contemporary philosophers have added distinctions and nuanced arguments in an attempt to defend various paternalist and anti-paternalist positions. In the next section, I explain how Joel Feinberg carefully clarifies the concepts of harm and voluntariness. In contrast with Mill, Feinberg explicitly discusses the ideas of voluntariness and harm, thereby offering a more comprehensive and defensible version of anti-paternalism.

IV. Feinberg's Soft Paternalism

A. Defining Harm and Distinguishing Hard and Soft Paternalism

In this section, I explain how Feinberg defines harm and the distinction he draws between hard and soft paternalism. In contrast with Mill, Feinberg provides a detailed explanation of the meaning of harm. He describes three different senses of the term

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[28] Ibid., 95.

"harm."[29] The first sense of harm is used to describe harm to objects, and is similar to the terms "damaged" or "broken." Feinberg uses the example of a vandal who breaks a window. Although this sense of harm is commonly used, it is really only harm in a "derivative" or "extended" sense.[30] If people say that the window is harmed, they really mean that the interests of the owner of the window have been harmed. The "harm" caused to objects that have been damaged, broken, spoiled, et cetera, is only a metaphorical harm, and therefore is not essential to the discussion in this thesis.

The second sense of harm is the most essential to the current discussion. Feinberg defines harm as "the thwarting, setting back, or defeating of an interest."[31] The term "interest" can be best described as a "stake" or claim in the well-being of someone or something. If someone has a stake in a company, then her well-being is linked to the company's success. In other words, if the condition of the company improves, so does the condition of the individual who has an interest in that company. A person's "interests" are a collection of all things in which one has a stake.[32] The interests of an individual (or what she is interested *in*) are what Feinberg refers to as "components" of a person's well-being. So an individual is "harmed" if some component of her well-being is set back or defeated. For example, I may have an interest in attending a very important job interview at two o'clock. If another person prevented me from attending the interview, that person would be thwarting my attempt to further my own well-being,

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[29] Joel Feinberg, *Harm to Others*, *The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1984), 31-35.
[30] Ibid., 32.
[31] Ibid., 33.

namely preventing me from an opportunity for future employment. Since attending this interview is in my interest, the individual who prevented me from attending would cause "harm" to me.

Feinberg defines a third sense of harm, which is a normative variation of the second sense.[33] If X harms Y, then X has "wronged" Y. In this sense, a person wrongs another by committing an unjust act, or violating another person's rights. However, since Feinberg endorses the idea that consent nullifies wrong, he argues that a person cannot harm (in this third sense) himself. He writes: "One class of harms (in the sense of set-back to interests) must certainly be excluded from those that are properly called wrongs, namely those to which the victim has consented."[34] If a person consents to the harm, Feinberg concludes that it is not a wrongful harm. This third sense of harm is therefore not applicable to a discussion about self-regarding harm. The hard paternalist or legal moralist would likely disagree that all self-regarding harm is not "wrong." For the sake of clarity, I will use the term "harm" in the second sense, unless I explicitly state otherwise. In the debate over whether or not the government is ever justified in paternalistic interference when an individual is harming himself, defining harm in the third sense only begs the question.

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[32] Ibid., 34.
[33] Ibid.
[34] Ibid., 35.

The theories of hard and soft paternalism are differentiated from each other through the weight each attaches to voluntariness and consent.[35] In the next section, I discuss the voluntariness standard in detail, but it is important to first get some preliminary definitions of each theory. Feinberg defines hard paternalism in the following terms:

> Hard paternalism will accept as a reason for criminal legislation that it is necessary to protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices and undertakings.[36]

Feinberg asserts that hard paternalism is "paternalism" in the truest sense, that is, the government can coercively interfere in the lives of an individual for her own sake, even if she poses no threat to others.

In contrast to hard paternalism, Feinberg defines and ultimately defends soft paternalism. The soft paternalist is not clearly defending "paternalism" at all. Feinberg often comments that the name "soft paternalism" is a bit of a misnomer, and the position more clearly resembles anti-paternalism. He states:

> Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct…*when but only when* that conduct is substantially non-voluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.[37]

Feinberg's position is similar to the one held by Mill. The government can only interfere with self-regarding actions but only when the person's conduct is not voluntary. Also, as in Mill's example of the uninformed man crossing the bridge, the state may be allowed

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[35] Joel Feinberg, *Harm to Self, The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1986), 12.
[36] Ibid.

temporary intervention in order to determine whether the person is truly acting voluntarily. Of course, the important distinction between hard and soft paternalism rests on defining what constitutes a "voluntary" choice. I shall discuss this further in the next section.

B. Autonomy and a Voluntariness Standard

The arguments defending hard and soft paternalism often hinge on how one defines the terms "autonomy" and "voluntary,"[38] as well as the weight that is attached to these concepts in determining when it is permissible for the state to coercively intervene in an individual's conduct. Feinberg argues that personal autonomy is extremely important, and that fully competent adults have the right to make their own choices, as long as such choices do not harm other people. The autonomous individual can make choices that harm her, and the government should not interfere and prevent her from doing what may be harmful to her if she wishes to perform the harmful action. For example, the government should not be able to prevent an individual from smoking if the smoker is fully aware of the health risks and is not exposing other people to second-hand smoke.[39] Feinberg argues that one's autonomy, or the voluntariness of one's actions, is connected to her consent. If a person has the capacity to consent as a fully competent adult, and actually consents to harmful self-regarding actions, then the individual's

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[37] Ibid.
[38] Feinberg uses the term "voluntary" to describe actions, and "autonomous" to describe individuals (or states). However, the meaning of both terms is essentially the same.

autonomy should trump the potential harm. Therefore, the government should not coercively interfere by prohibiting such actions. Feinberg's view is clearly expressed when he states that an individual's good and her right to self-determination (personal autonomy) "usually correspond, but in those rare cases when they do not, a person's right of self-determination, being sovereign, takes precedence even over his own good."[40] So, an individual's right to self-determination must be respected even if the individual will certainly cause harm to himself. The only government interference that is justified in order to prevent self-regarding acts is the interference necessary to determine whether or not a person's conduct is voluntary.

The soft paternalist also must carefully distinguish what makes an individual's actions voluntary, or "voluntary enough." So a person may engage in activities which are risky, and which most people find to be completely ridiculous. However, Feinberg argues that an individual with strange and unreasonable beliefs can still be sufficiently autonomous to perform voluntary actions. Actions fall on a spectrum, and an individual act can be either perfectly voluntary, non-voluntary, or, as most actions lie, somewhere between these two extreme ends of the spectrum. A person who makes perfectly voluntary choices must be completely informed, have no distractions, and be free from coercion, and emotional problems or internal distractions. Feinberg admits that most, "and perhaps even all choices," are not perfectly voluntary.[41]

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[39] Ibid., 106.
[40] Ibid., 61.
[41] Ibid., 104.

Entirely non-voluntary choices are also rare; non-voluntary actions are the result of being coerced, completely ignorant, or lacking certain mental or physical capabilities due to some disability. For example, imagine a scenario where X grabs Y, and throws Y into Z causing harm to Z. Y is not making a voluntary choice to harm Z because X is coercing Y. Alternatively, a person could act in a nonvoluntary manner due to ignorance: Feinberg gives the example of an individual mistakenly putting arsenic on his eggs, supposing that the arsenic is table salt.[42] In the first example, the person is not voluntarily choosing to harm another agent, and in the second example the person is not voluntarily choosing to harm himself. Feinberg labels choices that come close to being perfectly voluntary as "fully voluntary," and those choices that are close to being entirely non-voluntary as "relatively non-voluntary." The majority of actions that fall somewhere between fully voluntary and relatively non-voluntary are often the actions that give rise to the dispute between hard and soft paternalists.

People often perform acts that put themselves at great risk, but Feinberg explains that only some of these risky actions are truly "irrational."[43] If a person is deranged, insane, or mentally challenged he may frequently behave irrationally. The irrational person is not truly himself and is therefore not autonomous. Since the irrational person is incompetent, he is also not responsible (or at least not fully responsible) for his actions. In addition to people who often act irrationally due to a mental defect, some people lack rationality for a short time due to some form of cognitive impairment. For example, a

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[42] Ibid.
[43] Ibid., 106.

person might experience temporary delusions or depart wildly from his own goals and ideals. These types of severe, temporary departures from a person's usually rational actions can be explained using the legal language of "temporary insanity."[44] The temporary and permanent irrational actions of individuals are close to perfect cases of non-voluntary actions. At the bare minimum, irrational actions are not sufficiently voluntary, nor do these actions give rise to much controversy for the hard or soft paternalist. If a person is acting irrationally, the government is warranted in preventing her from harming herself. The person is not choosing to cause self-harm, because such a person is not making a voluntary choice. Yet, the government should only interfere with irrational choices if the choices are harmful or potentially harmful. For example, even if a person is acting entirely irrationally, the government should not interfere in the person's decision to choose chocolate over vanilla ice cream. Both the hard and soft paternalist agree that the government should not interfere with actions that cause no risk to others or the individual.

In order to help make this difficult distinction between voluntary (or voluntary enough) and non-voluntary, Feinberg describes some "rules of thumb."[45] Feinberg asserts that one should establish variable criteria for voluntariness, and each criterion should have a different cut off point. Still, two rules will be important:

1. As the risk increases, so should the standard required for voluntariness for the action to be permitted.

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[44] Ibid.
[45] Ibid., 117.

2. The more irrevocable the harm that could be potentially caused by the action, the higher the standard of voluntariness that is required for the action to be permitted.[46]

Feinberg argues that a person who exhibits extremely risky and seemingly unreasonable behavior must exhibit a high degree of voluntariness in his behavior. So, for example, if a person wished to take a canoe over a waterfall, the government would be justified in questioning whether or not this individual is sane. Furthermore, one might investigate if the risk taker is being coerced or is perhaps under the influence of drugs. However, if an individual could prove that she was just a thrill seeking person who otherwise exhibited full mental competence, then, and only then, Feinberg would say that the government should not interfere in her canoeing adventure. However, it is important to note that Feinberg argues that this canoeing risk taker must meet a higher standard of voluntariness than the person making choices that are far less risky and must prove that he meets it to the government.

V. Criticisms of Feinberg and the Case for Hard Paternalism

A. The Voluntariness Standard Examined

In the previous section, I outlined Feinberg's distinctions that lead him to his soft-paternalist position. Although I use many of the same distinctions, I reach a very different conclusion than does Feinberg. In this section, I first examine the voluntariness

[46] Ibid., 117-119

standard and then begin to establish an argument in favor of hard paternalism. Before attempting the argument, I try to illustrate some of the weaknesses of Feinberg's voluntariness standard through an analysis of both hypothetical and actual examples. The purpose of the examples is not to provide a substitute for Feinberg's particular notion of voluntariness, but instead to build an intuitively attractive case that additional information must be considered when examining whether or not the government may legitimately interfere with someone's self-regarding, harmful actions. The soft paternalist will only prevent an individual from harming himself if the person's conduct is not sufficiently voluntary. I suggest that one reason to prefer hard paternalism is that the hard paternalist may consider the individual's safety and health.

Let us assume that the hypothetical "Jenny" is a twenty-three-year-old woman who has been raised since childbirth by an extreme religious cult known as the Children of God (C.O.G.). She has always lived under the strict rules and guidelines established by the cult, and as she became an adult, she maintained these beliefs. The C.O.G. believe that it is a sin to wear seatbelts or motorcycle helmets because these items hinder God's will. If you wear these protective devices, you are not fully trusting in God to protect you. Jenny would never wear a seatbelt or a motorcycle helmet because doing so would be evil. Furthermore, Jenny practices various acts of self-mutilation every night as a way to repent for her many sinful thoughts. Some of these acts of self-mutilation are quite severe and could lead to serious medical problems. Other than these "strange" religious beliefs, Jenny is a fully competent intelligent adult. She has attended college, and she is currently enrolled in her first year of medical school. She is aware of the dangers of her risky

actions, and doctors have even advised her that her self-mutilation could cause long-term medical problems. Her upbringing has shaped her beliefs, but she is in no way coerced to perform any of her unconventional actions. For Jenny, it would be irrational to wear seatbelts or to not practice self-mutilation, because doing these things would hinder her from getting into heaven. She has weighed and considered the medical risks, but she believes that her entry into heaven is far more important than her safety. So, she will continue to not wear seatbelts, and worse yet, will engage in nightly acts of self-mutilation.

An autonomous individual is a person who is self-governing, or freely makes her own choices. However, just as one's actions may never be fully voluntary, one may never be completely autonomous. Environment, family, friends, and other factors often shape a person's beliefs. Still, like Feinberg, I agree that a spectrum exists, and that one's judgments and actions may not come entirely from his "self," yet one can still be sufficiently autonomous to have a right against government intervention in much of one's conduct. However, if a person can hardly be said to have her own beliefs, then it seems difficult to say that she acts autonomously. Jenny's beliefs seem dangerous and unreasonable, but she was given these beliefs as a child. She is twenty-three, and she still holds the same dangerous beliefs that she has had since childhood.

Feinberg would most likely state that the government should not interfere in preventing Jenny from harming herself. Jenny's beliefs would most likely be viewed by Feinberg as eccentric and perhaps even unreasonable, but he states that "eccentric and even unreasonable judgments of the relative worthwhileness of that which is risked and

that which is gained do not count against voluntariness at all."[47] No matter how unreasonable Jenny's actions appear, I believe Feinberg would conclude that her conduct is indeed voluntary. However, Feinberg would not likely make such a decision without careful reflection, and without first applying his rules of thumb. Jenny's actions would necessitate a high voluntariness standard because her actions are both very risky, and the harm to her is quite possibly irrevocable. Therefore, Jenny could be questioned, and detained to check on whether or not her actions are voluntary. Feinberg writes the following about investigating the voluntariness of an individual's conduct:

> Reasonableness is one thing, and voluntariness is another. Yet one way of persuading a panel of voluntariness or a presumptively nonvoluntary self-damaging act is to offer some reason for it, even a bad reason, so long as it is relevant reason that renders the mysterious more intelligible. If the presumption of psychosis is correct, however, no such reason will be forthcoming.[48]

Jenny is an excellent candidate for being "presumptively" non-voluntary, but she could certainly respond to why she is committing the damaging acts: she wishes to enter heaven. Her choices may seem odd to many, but they are certainly consistent with her system of values and beliefs. Although she could be questioned and temporarily detained she would likely meet Feinberg's voluntariness standard and could certainly give a "relevant reason." Thus, she would be permitted to self-mutilate on his criteria.

The example of Jenny is hypothetical, but numerous people engage in acts of self-mutilation. I will briefly examine the case of young women in Kenya who practice

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[47] Ibid, 159.
[48] Ibid., 126.

female genital mutilation (FGM).[49] Unlike hypothetical examples, one cannot isolate the variables for the sake of argument when dealing with real life practices. The example of FGM is no exception. Throughout the world, different groups of people practice FGM, and the operation varies from the removal of the tip of the clitoris to the complete removal of the clitoris, parts of the labia minora and majora, and in some cases the sewing together of the remaining tissue.[50] In addition to the variations in the operation, the procedure is performed on girls as young as four years of age to women well into their adulthood. I shall look more closely at the practices of the Saboat people in Kikhome, Kenya.

Cultural anthropologist Christine Walley lived with the Saboat in the 1980's, and she taught high-school-age students. The Saboat practiced FGM, and the procedure was usually performed on girls between the ages of fourteen and sixteen. When the girls believed that they were ready for the procedure and ceremony signifying their passage into womanhood, they would approach elders about beginning the process. In 1982, FGM was officially outlawed in Kenya, yet the practice continued in many places. Among the Saboat people, many (but not all) young women continued having the procedure performed on them. Walley observed that the young women disagreed about the practice; while some of the Saboat denounced the procedure, others supported it.[51] The practice of FGM not only often has the effect of reducing or eliminating sexual pleasure, but also can

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[49]Christine Walley, "Searching for 'Voices': Feminism, Antrhopology, and the Global Debate over Female Genital Operations," *Cultural Anthropolog*y 12 (Aug. 1997), 405-437. All the information pertaining to women who practice FGM will be taken from anthropologist Christine Walley. FGM is also sometimes called female genital cutting, female circumcision, or female genital operations.

lead to a host of medical problems, including the possibility of hemorrhage, infections, urination difficulties, and the formation of cysts. Walley spoke often and frankly with her teenage students, and to her initial surprise "there was no delusion among the adolescent girls, some of whose married and unmarried peers were already pregnant, about how it would affect their sexual pleasure."[52] Furthermore, many of the teens would have likely known of the potential health risks through schooling, the government opposition, or due to witnessing problems in older women in the community. Still, some young women chose to continue with the procedure, and even claimed that they would certainly want their future daughters to do the same.

Much like the earlier hypothetical example, one cannot easily discern if these young women are acting voluntarily. By American standards, the teens have not yet reached the age of consent. However, in Kikhome, Kenya, women between the age of fourteen and sixteen are often married and participate as adults in the community in which they reside. Furthermore, the young women choose the time at which they have the procedure, and many are aware of the potential health and risks to their future pleasure. On the other hand, the teens no doubt feel the societal pressure of becoming a "woman." Like Jenny, most people today (particularly Americans) would view this practice as abhorrent, and certainly as an unreasonable choice. But among the Saboat, the choice is far from unreasonable and is often "freely" chosen. Feinberg expressly notes that in cases

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[50] Walley, 407.
[51] Ibid., 412
[52] Ibid.

of genital mutilation, the initial presumption should be that the action is not voluntary.[53] The voluntariness standard would also be set quite high due to the risk and irrevocable damage caused by the operation. Still, it is unclear that, after questioning and reasoning with a young woman in Kikhome, she would change her mind about the procedure. Certainly, even after being told of the consequences, Walley observed that some young women did not change their mind. I am not certain what conclusion Feinberg would reach on this specific case, but it seems as if the soft paternalist would respect the choice and allow the procedure. Both in the case of Jenny and with the practice of FGM in Kenya, the standard of voluntariness is difficult to apply. Russ Shafer-Landau comments that on the subject of voluntariness "Feinberg wisely declines to do anything other than give general guidelines."[54] The general guidelines Feinberg proposes are sound guidelines. However, even with sound guidelines for judging voluntariness, Feinberg's anti-paternalism fails because it ignores the importance of the principle that government should show equal concern and respect to all citizens. In the next section, I will argue that the hard paternalist strategy better meets the principle of equal concern and respect by allowing the government to restrict liberty in order to protect the agent's own safety and well-being.

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[53] *Harm to Self*, 126.
[54] Russ Shafer-Landau, "Liberalism and Paternalism," *Legal Theory* 11 (2005), 171.

B. Case for Hard Paternalism

It is interesting to note that just as Feinberg believes that soft-paternalism is a bit of a misnomer for his seemingly anti-paternalist argument, I believe that hard paternalism is also a misnomer. I shall use the term "hard paternalism," as Feinberg does, because it is commonly used in the literature to describe the position held by those who argue that the government is sometimes justified in interfering with the individual in acts which are harmful and self-regarding. Or, at the bare minimum, the government is right to consider the good of the individual as a relevant reason for prohibiting an act. However, the case for hard paternalism is not actually a very "hard" stance. The hard paternalist should be carefully distinguished from the legal moralist; the hard paternalist needs only to show that there are some (albeit rare) situations when the government is justified in interfering with voluntary, self-regarding actions that are harmful to the individual. The legal moralist argues that the government may legitimately criminalize immoral actions, even if the actions cause no direct harm to the individual or other people. Just as Aristotle and Aquinas argue that the state should create laws that promote virtuous citizens, the contemporary legal moralist concludes that the state may prohibit certain "harmless" immoral actions because these actions corrupt the environment necessary for promoting virtuous citizens.[55] The hard paternalist, or at least the version of hard paternalism which I defend, only limits an individual's actions in certain cases-- namely, when the actions put the person at risk of direct and severe harm. In other words, the aim of the hard

[55] See authors such as Robert George and John Finnis

paternalist is not to create virtuous citizens through government intervention, but instead to prevent certain individuals from harming themselves while still respecting the individual's autonomy.

Feinberg does not make a straw man of the hard paternalist in the aforementioned regard. In fact, he characterizes the "softer" hard paternalist as one who argues that one's self-determination and personal autonomy usually corresponds with the person's own good, "but in those rare cases when they do not, we must balance the person's right against his good and weigh them intuitively."[56] I shall defend this version of hard paternalism by arguing that such a balancing strategy is necessary to determine whether or not government interference is permissible. In particular cases, working out this balancing strategy could be extremely difficult. However, the fact that such a strategy is difficult offers no reason to reject it outright. Feinberg argues that this balancing strategy does not genuinely respect one's personal sovereignty. I shall argue that this view can indeed respect personal autonomy and that, more importantly, personal autonomy should not always trump an individual's well being or safety.

In *Taking Rights Seriously*, Ronald Dworkin argues that fairness requires that the laws show equal concern and respect for all citizens.[57] Building on concepts put forth by John Rawls, Dworkin argues that the laws should not favor any particular group, and in fact, that fair laws might be laws chosen behind the "veil of ignorance." I argue that the laws should in fact show equal concern and respect for all citizens, and that sometimes

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[56] Ibid., 61.
[57] Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard UP), 1977, 272-278.

the government can show equal concern and respect by implementing paternalistic laws.[58] However, let me be clear that I shall define more specifically what I mean by equal concern and respect, since I will not be using Dworkin's definition. I will be using these terms to defend an argument that Dworkin does not and would not defend. Still, the expression should serve as a starting point for my hard paternalist argument, and the principle of equal concern and respect seems to be an intuitively attractive idea.

I make another small addendum to the idea of equal concern and respect. The government should create laws that show equal and *adequate* concern and respect for all citizens. So, a government could potentially show equal concern and respect by showing no respect or concern for any citizen. For this reason, it is useful to add that the respect and concern should be adequate or appropriate, in addition to being equal. I shall take the word "concern" here to mean the concern for an individual's well-being, safety, and personal good. So, a government that shows equal and adequate concern tries to promote the well-being, safety, and "good" of every individual, and tries to do so as much as it can and equally for all. However, the government must show respect in addition to concern. It is here that autonomy becomes important. A government shows equal and adequate respect for its citizens by respecting the personal sovereignty, individual choices, and autonomy of every individual equally, and allowing each individual as much autonomy as possible. Therefore, a government that creates laws that attempt to show equal and adequate concern and respect for its citizens is faced with the difficult challenge of

[58] The principle of equal concern and respect might entail that, at least in some situations, government be not only permitted but required to be paternalistic. However, I will not address this issue because

balancing concern and respect, two concepts that can come into conflict. It is here that Feinberg and I, or the hard and soft paternalist, will diverge. As I have defined these terms, Feinberg would give far more weight to respect than concern. I will argue that particularly in certain cases that both respect and concern must be considered seriously.

In the previous examples, I have attempted to illustrate the difficulties in utilizing the voluntariness standard. I shall provide one more hypothetical example, but this time I will intentionally choose an example where few people will question whether or not the individual's conduct is voluntary. The following example is a case in which I will argue that even though the conduct is fully voluntary, government interference is permissible to prevent the individual from causing self-harm. In order to show equal concern and respect for the individual, paternalistic interference is warranted.

Let us assume that James is a twenty-five-year-old philosophy graduate student. James is well versed in analytic reasoning, and he generally exhibits both rational and reasonable behaviors. For the past year, James has participated in karate classes after his Tuesday and Thursday philosophy classes. He is not the best student in his karate class, but he loves participating in the sport. James has recently decided to enter a No-Holds-Barred Fighting Championship, where he will compete with far more experienced fighters. Since James does not want to encourage children to fight or glorify violence, he has chosen a tournament that is funded by wealthy spectators. The contest will be held in the mountains of North Carolina, and only a select group of adults will watch the fights. The wealthy spectators are offering a one-million-dollar cash prize, and the fight has been

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permissibility is all that is needed to establish a defense of hard paternalism.

legally sanctioned by the state. Since the cash prize is large, some of the world's best fighters will participate. Due to the rules of the contest, a team of psychiatrists evaluates each participant, particularly those who have never participated in such a competition. James must acknowledge that he is aware of the risks and sign a waiver to participate. In previous, similar competitions, several people have been severely injured, and a few have actually been killed, but James still signs the waiver.

Although James would need to meet a high standard of voluntariness due to the health risks, his choice to participate in the contest would no doubt be considered by Feinberg at the bare minimum "voluntary enough." Feinberg endorses the *volenti* maxim, and he argues that two party cases where both people consent operate like cases of self-regarding harm. In other words, since both parties are acting voluntarily, the harm principle would not be applicable in this case. Furthermore, if any harm is caused to society at large through this contest, the harm is minimal and indirect. James has not been coerced, and he is not deranged or insane. He is simply an individual who very much wants to participate in No-Holds-Barred fighting despite the risks. The problem with James's choice is that it has a high probability to lead to severe injury or even death. James is a novice, competing against experts. James is participating in an extremely risky activity that could lead to irrevocable harm. The best he can hope to gain is an enjoyable experience and more pride in his ability. However, this outcome is unlikely.

The example of James is meant to elicit the intuition that it is permissible for the government to prohibit James and all other similarly inexperienced fighters from this competition. If this particular example does not elicit such an intuition, perhaps the

example of people who wish to receive unnecessary amputations, lobotomies, or dangerous surgery for minor cosmetic purposes might give rise to the intuition.[59] Admittedly, this is not an argument in favor of general paternalistic interference; it is only a series of examples that hopefully give a reason for people to begin considering personal health and safety as relevant (but not necessarily sufficient) reasons for potentially legitimate government prohibitions against certain self-regarding harms.

The government is not usually justified in paternalistic interference; still, society should show equal and adequate concern and respect for its citizens. A person cannot make any choices or perform any actions if they are dead and could be severely limited in their choices if severely injured. Furthermore, a person can harm herself in a way that makes her extremely “unfree” through a free choice. It is in these cases that the government must show concern as well as respect. In cases such as Jenny or with the Kenyans practicing FGM, voluntariness is difficult to determine. However, the risk and potential harm can be fairly easily assessed in these situations. The government has many tools to determine (studies, etc.), for example, that self-mutilation is usually extremely harmful to one's physical and emotional stability. In addition to the physical harm, self-mutilation could potentially hinder one from making later voluntary choices. So, in order to show both concern and respect, the government is justified in taking account the interest of the individual in avoiding such harmful self-regarding acts. Even in the case of James, where one can determine that his conduct is voluntary, a permissible way to

[59] Both the lobotomy and amputation examples were provided in Russ-Shafer Landau's article "Liberalism and Paternalism."

show both concern and respect is to prohibit his participation the No-Holds-Barred competition. In such a case, a balancing strategy should be preferred, weighing the risk to his safety with his autonomy. Although James may have his autonomy "violated" in this one case, he could in the future be able to make many more choices that he may not be able to make if he is physically confined due to paralysis as a result of the competition.

Just as the soft paternalist struggles to determine whether or not an individual's conduct is voluntary, the hard-paternalist strategy is not without problems. Utilizing some of Feinberg's criteria for the voluntariness standard, I provide a few rules of thumb for a hard-paternalist balancing strategy. In most cases, if a person's conduct is sufficiently voluntary, she should be allowed to participate in whatever activities she chooses. The following guidelines can simply be used as a starting point for when, and the manner in which, the government may legitimately exercise paternalistic intervention:

1) It is difficult to determine whether or not someone's conduct is voluntary even after the person is questioned.

2) The activities being performed are generally regarded as highly unreasonable.

3) The risk of self-regarding harm (or two-party consensual harm) is extremely high.

4) The harm that could occur is likely to be severe.

5) The harm that could occur is likely to be irrevocable.

6) The potential severe harm is likely to occur in the near future, although it may also have lasting effects. (The harm should be differentiated from actions that cause slight harm that could eventually accumulate into a larger health risk)

7) The infringement on the individual's liberty is appropriately executed, and is in no way excessive relative to the act of self-harm.

The strength of the hard-paternalist balancing strategy rests in part on the fact that it allows each act to be examined on a case-by-case basis. I am not creating a formulaic procedure for applying guidelines that I expect will yield a determinate answer in all cases, and I believe it would be foolish to suggest as a general meta-rule, for example, that if three of the five guidelines are met, that paternalistic interference is warranted. Instead, these guidelines can be used as a framework for the balancing strategy to structure our thinking about particular cases. Finally, this list of guidelines is not exhaustive, and the aim of my strategy is to best both respect and protect the individual. As I have already mentioned, the government need not step in to prevent most actions, even when the actions are harmful to the individual.

Both the hard and soft paternalists would agree that a case that met the first guideline might warrant government intervention. I argued earlier that Feinberg and I would likely disagree on whether or not certain actions are voluntary enough. However, the soft paternalist would simply argue that paternalism would be allowed until the person can sufficiently show that she is acting voluntarily. The second guideline can serve as a relevant but never sufficient reason for paternalistic interference. In other words, if an action is incredibly unreasonable, a closer look at the motives of the individual might be in order. However, many actions may seem unreasonable, and if the individual is not putting himself at risk of severe harm, then the action should be allowed. Again, this guideline is not something that the soft paternalist would necessarily dispute.

Guidelines 3 through 6 all pertain to the harm or risk of harm to the individual, and it is here where the hard and soft paternalist will disagree. The soft paternalist argues that all of the aforementioned guidelines might warrant a closer look at whether or not someone's conduct is voluntary, but it is the voluntariness alone that ultimately determines the permissibility of paternalism. In contrast, my hard paternalist view holds that voluntariness does not necessarily dictate whether paternalism is permissible. The cases of Jenny, women practicing FGM, and James all meet guidelines 3 through 6 even if we assume adequate voluntariness. The harm is either certain, or at least a very high risk, and the damage is likely to be severe and irrevocable. My claim is that the state should show concern as well as respect for the individuals and therefore may prevent them from committing the actions they propose to take because these actions have a high probability of leading to grave danger to the agents themselves.

It is difficult in any of these cases to state that by allowing people to harm themselves that the government is protecting their autonomy. The likelihood that the individuals will limit their future liberty by committing these acts far outweighs the possibility they will somehow be freer in the present. When attempting to respect an individual's autonomy, one must consider that the self exists over time. Even if a person commits certain acts freely, the result of the actions might be less overall autonomy in her complete life. Odysseus was acting wisely when he asked his fellow sailors to limit his present autonomy by tying him to the mast, in order to gain more overall autonomy when he avoided the deadly calls of the Sirens. However, many do not act with the foresight of

Odysseus, and in some situations, the government may justifiably limit their harmful, self-regarding actions to preserve the risk takers overall autonomy.

Aristotle argued that happiness was acting in accordance with virtue over the course of a lifetime. He wrote: “One swallow does not make a spring, nor does one day; nor similarly does one day or a short time make us blessed and happy.”[60] Just as a single action or activity does not constitute happiness, a single action does not make an individual free or autonomous, and, in contrast to the anti-paternalist, I contend that autonomy-over-a-lifetime is a relevant consideration in determining whether government is permitted to intervene in a person’s voluntary conduct. Voluntariness is a matter of autonomy at a moment, not autonomy over a life.

The sixth guideline is to safeguard against the government attempting to intervene in more "minor" risky actions. In other words, the hard paternalism that I am defending does not prohibit people from smoking, drinking, or eating fatty foods because it is in their best interest. Although these actions might put people at risk, the harm is gradual and not immediately severe. These behaviors should certainly be discouraged, but I am not making a case that such actions warrant paternalism.

Finally, the seventh guideline addresses the issue of punishment. The punishment in these hard cases needs to fit the crime. Perhaps, for example, the individuals in the examples would be prohibited from such acts and required to go through counseling. Most people who commit self-regarding harms would not be best served by lengthy imprisonment or harsh punishments. The purpose of the balancing strategy is to show the

citizens concern and provide them with what would usually amount to temporary protection from their harmful activities. Some may argue that counseling is not punishment, and I would concur. However, one aim of punishment is rehabilitation, and if the courts mandate the counseling, it certainly is a form of paternalistic intervention. The hard paternalist needs only to argue that in some cases the government is justified in *preventing* (not punishing) people from self-regarding harms. It is not my intent in this essay to determine the legal punishment for particular acts of self-regarding harm; I wish to assert only that the government is sometimes justified in utilizing the hard-paternalist strategy to prevent severe cases of harm to self.

VI. Conclusion

After carefully examining both the hard and soft-paternalist strategies, I have argued that a version of hard paternalism that examines actions on a case-by-case basis and considers factors beyond voluntariness will show equal concern and respect for all people. The fear in allowing any form of paternalism is that the end result will be a government that legislates morality, and that people will no longer be truly free. Freedom is not always simply doing whatever one wants, and the end result of allowing paternalistic interference in some cases need not lead to a government which makes personal choices for people. Still, autonomy needs to be respected, and any body of citizens should safeguard themselves against overzealous government intervention.

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[60] Aristotle, *Nicomachean Ethics*, 9.

The hard-paternalist balancing strategy is often not easy to implement, but no strategy will be exempt from difficult cases and exceptions to any rules of thumb. I have provided a few general guidelines that can serve as a jumping off point for how to implement the balancing strategy. Difficult cases require the government to utilize as much information as possible, and factors other than the individual's informed consent should be considered. In certain cases where an individual puts himself at an extremely high risk of irrevocable harm, I have argued that only the hard-paternalist strategy can adequately show the individual both concern and respect.

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