

1974

Justifications for Paternalism

Donald H. Regan

University of Michigan Law School, donregan@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/book_chapters



Part of the [Law and Philosophy Commons](#)

Publication Information & Recommended Citation

Regan, Donald H. "Justifications for Paternalism." In *Nomos XV: The Limits of Law*, edited by J. R. Pennock and J. W. Chapman, 189-210. New York: Lieber-Atherton, 1974.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

13

JUSTIFICATIONS FOR PATERNALISM

Donald H. Regan

One of the most troublesome problems concerning the appropriate extent of government interference with individuals' activity is the problem of paternalism—that is, the problem of when, if ever, the state may compel an individual to do or to refrain from some act or activity “for his own good.” One would hardly know this was a troublesome problem just from looking at the literature on political and legal philosophy. It is hard to think of an influential philosophical discussion of the matter more recent than John Stuart Mill's.¹ But paternalism is a problem which keeps coming up in discussions among philosophers as well as in discussions among people concerned with practical questions about the propriety of particular pieces of legislation, and it is a problem on which I think there is as yet no completely satisfactory view.

Possibly the reason there has been so little writing on the subject of paternalism is that the simplest and most natural approach to the problem—the straightforward hedonistic utilitarian approach—leads so quickly to what is apparently a dead end. My purpose in writing

this paper is to suggest two other possible justifications for paternalism, aside from pleasure-maximization, which are not, so far as I know, part of the standard lore associated with the problem. It may be that my suggestions are part of other people's standard lore and that no one has ever seen fit to write them down. That is a risk I shall have to take.

I

Before I present my "new" justifications of paternalism, I should like to rehearse very briefly the main points of what I take to be the standard dialectic of paternalism. In the context of a hedonistic-utilitarian (which we shall hereafter abbreviate as simply "utilitarian") approach to the problem of the justification of coercion by the state, there is one necessary and sufficient condition for paternalistic coercion—namely, that the coercion will result in more pleasure or happiness overall for the individual coerced.² If people will be happier overall if they abstain from cigarettes, or from heroin, or if they wear seat belts in cars or helmets when riding motorcycles, then we should coerce them to do all of those things. That is all there is to it.

The reason (perhaps I should say "one reason") why this single-minded pleasure-maximizing approach is unsatisfactory is clear enough. Anyone who suggests that we are always justified in compelling people to do that which will make them happiest is ignoring another value which is not the same as happiness, the value of freedom of choice. It seems that individuals have a right to make bad choices, or choices which sacrifice their own future happiness to their present whim, if that's what they want.

Already we see why paternalism is a problem. It is a problem precisely because in cases where paternalistic coercion would be justified on pleasure-maximizing grounds, two important values, pleasure or happiness on the one hand and freedom on the other, seem to be irreconcilably opposed. This is what I meant when I said that the simple straightforward approach leads quickly to an apparent dead end. We have reached a head-on conflict of very high-level values before we have fairly begun our investigation.

To be sure, there are a few more standard moves. One such move is to suggest that paternalism is justified when the individual coerced lacks relevant information about the consequences of his acts.³

Presumably this justification for paternalism gets its force from a feeling that ignorance is a sort of unfreedom. Since the person who lacks information is unfree even if we do not intervene to constrain his choice, we are not really decreasing his freedom by intervening, and the conflict between freedom and happiness never arises. Just why being uninformed seems to be a way of being unfree is an interesting question. Certainly it smacks more of a lack of "positive" freedom than of a lack of "negative" freedom, but as an excuse for paternalism ignorance is in reasonably good repute even with advocates of negative freedom. The reason is no doubt to be found in an intimate connection between human freedom and rationality, but to say just what that connection is is beyond my present powers.⁴

Now if our justification of paternalism is simply people's ignorance, it might seem that we have a warrant not for coercing people but only for educating them. If the reason we feel justified in forbidding drugs is because we don't think users realize the danger to themselves, should we not concentrate on informing them of the danger, and then let them do as they please? In fact, there are a variety of possible claims we might put forth to justify coercion in particular cases. Sometimes there simply will not be time to educate the party coerced, as where an individual threatens to act in a way which will do him irreparable damage before we can convince him of what the facts are. In other cases, the party to be coerced may lack the expertise to understand or use the information he should have. Stretching the concept of information a bit, we might suggest that even where expertise is not in question, an individual might have all the facts within his cognitive grasp and still not really appreciate them. For example, someone might know all the medical facts about cigarettes and lung cancer and still fail to appreciate just how horrible it would be to die of cancer. In a similar vein, we might suggest that most people are simply incapable of taking very small probabilities properly into account, and this could be regarded as a sort of ignorance about consequences. With these arguments, and no doubt others like them, we can defend a good deal of paternalism with some persuasiveness on the ground that we are interfering only where people lack information.

Another move we might make, similar to the appeal to ignorance, is to claim that paternalism is justified when the subject of coercion is acting under an internal psychological compulsion. In this case also we might claim not to interfere with freedom, since the subject

of coercion is already unfree, and we might nonetheless open up very considerable opportunities for benevolent intervention.

For some it may be that the arguments we have already sketched will suffice to construct a satisfying theory of when paternalism is appropriate and when it is not. For myself, I am not yet content. On the one hand, it is not clear that even after we limit utilitarian paternalism to cases of incomplete information or psychological compulsion (or only the first of these) we have given freedom of choice its due. We are so seldom fully informed of the consequences of our acts, and we are so seldom quite free of unconscious motivation, that our whole lives might be subject to paternalistic supervision if there were no other restrictions. It is always possible to make the rule-utilitarian move of saying that by and large government will do worse at arranging people's happiness than they would do themselves, but that seems to leave our claim to freedom too dependent on a contingency. A somewhat more appealing move, which can be made in either an act- or a rule-utilitarian framework, would be to claim that some considerable degree of freedom is a necessary condition of being happy. Unfortunately, this claim is not obviously true—witness the cases of nuns, soldiers, and others who manage to be happy inside total institutions—and even if it were true it would still seem to subordinate to happiness something which is in fact an independent value of equal stature.

I have just been suggesting that even a limited utilitarian paternalism may be too strong. I would also suggest that in other cases it may be too weak. I have a lingering feeling that it may be permissible to prevent cigarette smoking even by a smoker who has no family, who is clear-headed and as free of neuroses as a person can be, who is well informed about his chances of getting cancer and the general diminution of his life expectancy, and who just doesn't give a damn.⁵

My conclusion, after this rapid survey of the standard moves, is that there is still considerable room for new approaches to the problem of paternalism.

II

The first suggestion I would like to make is that we might regard paternalism as justified by a policy of coercing people in order to maximize human freedom. Whereas utility-maximizing paternalism coerces people "for their own good" in the sense of "for their own

happiness," freedom-maximizing paternalism would coerce people "for their own good" in the sense of "for their own freedom."

The notion of freedom-maximizing paternalism is suggested by Mill's example of a contract for slavery. Mill says that although we generally enforce contracts, because they are made in the exercise of that liberty which we must respect, we should not enforce contracts for slavery. The reason is that slavery is the negation of liberty, and it would be absurd to give significance, in the name of protecting liberty, to an act by which the contracting party purports to destroy his liberty absolutely. In Mill's words: "[B]y selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favor, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom."⁶

Now if Mill is right about this—if the principle of freedom does not require that a man should be free to destroy his freedom completely—it seems that the principle of freedom also does not require that a man should be free to destroy his freedom partially. In other words, if our general reason for letting people do as they please is that we value freedom, and if it is a countervailing reason in the slavery case that what the agent pleases will destroy his freedom, then it seems equally a countervailing reason in the cigarette-smoking case or the seat belt case that what the agent pleases will destroy his freedom to some extent.⁷ When I say cigarette smoking or not wearing a seat belt will destroy his freedom to some extent, I refer to the fact that these forms of conduct will, at least statistically, shorten his life span and may also lead to debilitating disease or crippling injury.

It might be objected that there is a difference between the case of a contract for slavery and the case of smoking cigarettes, in that the former is *essentially* an act destroying freedom while the latter is only *incidentally* such an act. Now if what is meant by this is that the act of selling oneself to be a slave has no other consequence than the destruction of one's freedom, while the act of smoking a cigarette, whatever it does to one's freedom, may also be productive of pleasure, then I think the argument is misguided. Presumably no one would sell himself into slavery unless he hoped thereby to accomplish something very important to him. If we were trying to

make up a plausible hypothetical case, we would posit a situation where selling himself into slavery was the only way some individual could secure the money for a very expensive operation which was necessary to save his child's life, or something similar. If this is the context in which the making of a contract for slavery is being considered, it is clear that the act of selling oneself into slavery does have consequences other than the mere extinction of one's freedom, and very important consequences at that.

Possibly what would be meant by saying that the act of selling oneself into slavery is essentially an act destroying freedom, while the act of cigarette smoking is only incidentally such an act, is not simply a matter of reckoning up the consequences, as the previous paragraph suggests. The claim may be rather that selling oneself into slavery is objectionable because the good consequences (saving the child) are obtained only through the mediation of the bad consequences (abdicating one's freedom), whereas in the cigarette-smoking case the good and bad consequences flow independently from the act, and the bad consequences are not a means to the good. If this is what is meant, we are dealing with something like the Doctrine of Double Effect, and a full discussion would take us far afield. Accordingly, I shall drop the matter, after observing that I see no convincing argument, at least along the lines so far considered, for treating the slavery case and the cigarette case differently.

A somewhat different objection might be raised. We were rather cavalier in the way we introduced the idea that cigarette smoking has as one of its consequences a diminution (statistically speaking, at least) of the smoker's freedom. It might be said that disease, injury, and death are not ordinarily regarded as causes of "unfreedom," but of disabilities or incapacities which are not strictly a matter of freedom at all. A long answer to this claim, involving a lengthy exposition of what we mean by "unfreedom," is possible. I shall content myself with a short answer, which seems adequate to this case. We are not trying to minimize unfreedom but to maximize freedom, and what we mean by "freedom" in this connection includes abilities, capacities, and in general whatever is a precondition for any human activity. What we desire is that the largest number of people should have the widest possible range of effective choice about what to do with themselves. From this point of view it is clear that death and injury and disease are all restrictions on freedom.⁸

An entirely different objection might be raised against the whole notion of freedom-maximizing paternalism, namely, that it is absurd to speak of coercing someone in order to promote his freedom. In fact, it is the objection which is, if not absurd, at least ill-considered. It would be self-contradictory in some sense to speak of coercing someone in order to increase his freedom at the point where he was being coerced, or in the act with respect to which he was being coerced.⁹ But we are not speaking of that. We are speaking of coercing someone in order to increase his freedom at other times and in respect of other acts. In this there is no contradiction at all, just as there is no contradiction in the utilitarian paternalist program of promoting people's happiness by making them do things which make them unhappy at the moment where the coercion is effective.

We have left until last the most telling criticism of the freedom-maximizing approach, which is that it assumes freedom can be quantified and summed up, at least intrapersonally, and interpersonally as well if our freedom-paternalism is to be connected with a broader principle of freedom-maximization.¹⁰ This criticism is plainly unanswerable, if in order to answer it we must provide anything like a full description of how freedom is measured and compared. But the parallel criticism of hedonistic utilitarianism is unanswerable in the same way, which has not prevented many people from being utilitarians and many more from believing that utility-maximization is *one* important moral consideration.

We can say a few things about how freedom is measured. First of all, it is clear that we do not determine the extent of a person's freedom just by counting up the actions available to him (or which will be available, at all relevant times) and saying that the greater the number of actions, the greater his freedom. For one thing, there is no obviously satisfactory criterion for individuating actions. More important, however, is the fact that freedom to do some things is much more important than freedom to do others, and any criterion based on mere counting would ignore such differences. In deciding how great a person's freedom is, we need to consider not merely how many different things he can do, but what the things he can do are. Freedom to do X will presumably count for more than freedom to do Y whenever X is more pleasurable to the particular individual than Y, or more highly valued by a rational individual than Y, or more essential to the individual's sense of

his personal identity than Y, and so on. The considerations just listed do not exhaust the possibilities, and each must be taken as including the qualification "other things being equal," if only because the considerations we have listed might conflict for particular values of X and Y.

Now it may seem that in the last paragraph we replaced a nearly hopeless problem (how to count up actions) with an utterly impossible one (how to evaluate bundles of freedom in terms of the relative importance, according to various criteria, of the available actions). I do not think that is the case. We may be no closer to a well-defined procedure for ranking bundles of freedom (in fact, we may be further away from such a procedure), but the new problem is one that may be more amenable to acceptable intuitive judgments than the old one. If the criterion for ranking bundles of freedom is simply the number of available actions, my intuition says that almost all the bundles that arise in practice are going to contain the same infinite number of actions, and therefore be equally valuable. My intuition also says, however, that the conclusion that almost all bundles of freedom which arise in practice are equally valuable is ludicrous. Once the criterion is expanded to include reference to the importance of the actions, I find that I can make some rough intuitive judgments, just as I can make rough intuitive judgments about the relative happiness of various possible lives. What I am suggesting, then, is, first, that freedom-maximization may be no more susceptible than utility-maximization to the criticism of vagueness, and, second, that if the notion of freedom-maximization, like the notion of utility-maximization, strikes a responsive chord from somewhere among our moral intuitions, then we should perhaps struggle along with this vague notion just as we do with others equally vague.¹¹

The most disconcerting part of any utilitarian argument is the part where the author waves his hands and produces out of nowhere conclusions about the morality of particular kinds of acts or particular practices. Still, having suggested freedom-maximization, and having suggested that I have some intuitions about when freedom is maximized, I feel obliged to apply the principle to a few examples of paternalism. Reluctantly, therefore, I shall now briefly assume the role of a moral clairvoyant.

Let us consider first the case of the man who wishes to sell himself into slavery in order to secure money for an operation for his otherwise doomed child. Although it was Mill's discussion of this case which suggested freedom-maximizing paternalism to us, it

is not at all clear that, even if we accept the freedom-maximizing principle, we should prevent the enforcement of the contract. The first question is what is the net effect on the father's freedom of disallowing the contract? This is not an easy question, since saving his child may be more important to the man we are talking about than anything else he will ever do. Depending on whether it is his only child, and on his views about posterity, it may be important not merely in the sense that he badly wants to do it, but in the sense that it touches his deepest feelings about his own worth and identity. We should also remember that as a slave the man may have a degree of freedom which is not insignificant. He will have absolutely no *legal* freedom, but it is the freedom he is actually accorded by his master which is of primary importance, and that could be quite considerable. In sum, I think we might construct a plausible case in which, even considering the father's freedom alone, we would allow the contract. In general, however, I would expect it to be the case that, considering the father's freedom alone, the contract should not be allowed. At this point we need to remember, though, that other considerations besides the father's freedom are relevant. Our final decision must surely take into account not merely the father's freedom but also the child's freedom, or the child's happiness, or both. When we weigh these things, the father's decision to sell himself probably ought to stand.

I think our reluctance to allow the father to sell himself into slavery is based on two feelings which are not directly related to our freedom-maximizing principle. First, we refuse to accept the conditions of the problem, in particular that becoming a slave is really the only way to save the child. We feel that if a father ever found himself in such a position—and more generally if anyone ever found himself in a position where he was denied something so important that he might reasonably decide to sell himself as a slave in order to get what he was denied—there would be something drastically wrong with the broader social context, and we ought to focus on changing the social context instead of coolly allowing the contract for slavery to be enforced. The second reason we are not disposed to allow the father to sell himself is that we are concerned with unfreedom, and not just with freedom (here I qualify a bit what I said earlier in connection with death, injury, and disease as causes of unfreedom), at least in the following sense: Assume that the child, if allowed to die, and the father, if allowed to become a slave, would be losing exactly the same quantity of

freedom. We would prefer the child to die than the father to become a slave because there is nothing positively offensive to our valuation of freedom in someone's being dead, whereas there is something very offensive in someone's being alive but totally unfree.

Consider now a related case, the case of suicide. Or rather, let us consider two cases of suicide. First, the man who is a terminal cancer patient, who is bed-ridden and in constant pain, but still sufficiently clear-headed so that we regard him as capable of rational choice, and who wants to end his life. Second, the man who is not suffering from any gross physical, psychological, or financial handicap, but who hasn't many friends or a job he likes, and who simply finds life a burden which he is convinced he would like to lay aside once and for all. I do not think either of these men should be prevented from committing suicide, but it might seem that freedom-maximizing paternalism would justify preventing the suicide in both cases, even though we assume that no one other than the described individuals is affected. After all, once either of them is dead, he has no freedom of any kind. So long as he is alive, he has some freedom, which we may maintain by coercion at the expense of a relatively minor limitation on the things he is allowed to do. The limitation looks very small if we describe the things the would-be suicide is not allowed to do as "shooting pistols into his head," "swallowing poison," and so on, by enumeration. The limitation may not look quite so small if we describe what the subject is not allowed to do more candidly as "committing suicide," since that is at least an act that is likely to be regarded by the person who wants to do it as fairly important. But we might still feel that the freedom to commit suicide is less than the freedom which is lost in being dead.

One counterargument is available which is peculiar to the case of the cancer patient. That is the argument that the cancer victim, once he reaches the agonizing final stages of that illness, will be incapable of rational activity and will be subhuman. He will be a positive offense to our value of freedom, like the man who becomes a slave, in a way in which the man who simply doesn't enjoy his life is not.

There is another argument, however, which applies equally to the cancer patient and the man who is merely tired of life and which sways me to believe we should allow the suicide even though we recognize the principle of freedom-maximization. When we prevent someone from committing suicide, we are not merely preventing

that act. We are coercing the would-be suicide into every other act that he does. We are coercing him into getting up in the morning, dressing, eating, watching television—whatever he fills his time with. None of this is really done by choice. None of this is done freely.¹² We are assuming, of course, that the desire for an end to one's life persists. If the wish to commit suicide is only a passing fancy, then we are probably justified in preventing suicide by one in whom the desire to commit suicide is transitory. But if the desire to commit suicide does not pass, then preventing someone from committing suicide poisons everything else he does in a way in which preventing him from smoking cigarettes or compelling him to wear a motorcycle helmet if he rides a motorcycle does not. This is the reason why the freedom-maximization principle does not entail that suicide should always be prevented.

Finally, let us look at the case of forbidding someone to smoke cigarettes, or compelling him to wear a seat belt or a motorcycle helmet. As my comments made in passing in the previous paragraph suggest, these are cases where I have some feeling that coercion is justified. I have this feeling even in the face of assumptions which rule out the possibility of defending coercion by reference to the coerced's lack of information. And my feeling seems stronger than whatever feeling I have that it might possibly be all right to coerce people just to make them happier. I think the feeling may be accounted for by appeal to the principle that we may coerce people in order to protect their freedom. The restrictions involved in forbidding cigarettes or requiring a motorcyclist to wear a helmet appear as relatively slight incursions into the realm of individual freedom. The diminution of the individual's freedom which might result from a shorter life, cancer, emphysema, or an accident in which serious head injury was sustained is considerable. As I observed previously, forbidding cigarettes or requiring a helmet would not poison other activities, or cause other apparently free activity to be really unfree. In short, freedom-maximizing paternalism is made to order for the purpose of justifying coercion in such matters as these.

Of course, when I say that "forbidding cigarettes or requiring a helmet would not poison other activities," I am making an observation which I believe to be true in most cases and true contingently, not one which I believe is true universally or necessarily. It might be that if some particular individual were denied cigarettes, he would be so wracked by nervous tension which he could not otherwise assuage that he would be incapable of any meaningful activity.

Such an individual should be allowed cigarettes, even on a freedom-maximizing ground. Similarly, there might be individuals who, if they were only allowed to ride motorcycles wearing helmets, would prefer not to ride at all. Whether these individuals ought to be allowed to ride without helmets would depend on just how important riding was to them, but such individuals are already sufficiently unusual, I think, so that they might turn out to qualify for an exception as well.

We should also take note of a distinction between a prohibition against cigarettes or a requirement of motorcycle helmets and prohibitions against dangerous activities such as mountain climbing. It is plausible to suppose that there are some people for whom it is very important to engage in particular high-risk activities, or even to engage in just any high-risk activity, so long as it is sufficiently risky. Such people ought not necessarily to be restrained. 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 life style around and which few people if any engage in because of the risk involved.

Before we leave the freedom-maximizing principle, one comment about the exact status of the principle is in order. I have written as if the freedom-maximizing principle might be taken as completely displacing the utility-maximizing principle. If we accepted freedom maximizing and ignored utility completely, we might find ourselves coercing individuals on paternalistic grounds when the result of coercion was to secure a small gain in freedom at the cost of a large loss of utility. Now there might be people to whom such a result would be acceptable, but I do not count myself among them. Perhaps we should coerce where a large gain in freedom can be secured at the cost of a small loss of utility, but freedom is not the only goal to be pursued any more than utility is. Where the freedom-maximization principle and the utility-maximization principle conflict, we may still have a difficult problem about how the conflict should be resolved. But we have not quite the same problem we started with—that is, we have not quite the same conflict between utility and freedom which we ran into at the beginning of the first section of this paper. Suggesting the freedom-maximizing principle, or, in other words, suggesting that our concern for freedom might be embodied in a teleological principle rather than a deontological one, reveals that there is a way of taking freedom into account while at the same reducing the number of cases in which utility

and freedom conflict. The traditional way of looking at the paternalism problem seems to assume that any interference with free choice in any particular case is *prima facie* unjustifiable, with the result that every decision in favor of coercion must come as the resolution of a conflict between principles. Under the freedom-maximizing approach, any coercion is presumptively unjustifiable, but may turn out to be completely innocent, if it is shown that the overall effect on freedom is positive.¹³ In such cases—and it is cases like cigarettes and heroin, seat belts and motorcycle helmets that I have in mind—there would then be no conflict of principles. The principle which reflects our concern for freedom and the principle which reflects our concern for utility would point in the same direction.¹⁴

III

So far we have looked at one “new” justification for paternalism. I should like now to make a second suggestion, which is considerably more radical, and to my mind considerably more interesting. That is the suggestion that we can bring much paternalistic legislation under the “harm principle,” so that it presents no special problem at all. By the “harm principle” I mean any formulation of that central tenet of Mill’s *On Liberty*: “That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹⁵ Plainly, the reason why paternalism is ordinarily thought to present a problem is that it appears to be a matter of exercising power over an individual, not to prevent harm to others, but to prevent harm to himself. If there were some good reason for regarding the harm done as done to a person other than the agent, the problem would disappear. I think there is a good reason for regarding the harm done by the agent as done to another, at least in many cases where paternalism seems justified. To bring out that reason, it will be useful to consider a specific case.

Let us consider statutes, of which there are a number, which make it an offense to ride a motorcycle without wearing a helmet. Such statutes are frequently attacked on the ground that they compel the cyclist to do something for nobody’s good but his own and that if he wants to run the risk of serious injury, that is his own business.¹⁶ From this point the defender of the helmet

statute might take the argument off into the question of completeness of information. That line we shall ignore. Another suggestion that the defender of the statute frequently makes goes as follows: "Anyone who rides a motorcycle without a helmet is risking serious injury. If he is seriously injured, then he is very likely at some stage to become a public charge. He will be cared for in a public hospital, or even if he can afford private care, he will end up unemployed and drawing public compensation. Even this may not happen in every case, but certainly in statistical terms the helmetless cyclist is imposing a burden on public assistance funds. Since public funds must be raised by taxation, the helmetless cyclist is in fact hurting someone besides himself."

The argument just stated is not very satisfying. For one thing, when we consider just what the statistical burden which the motorcyclist imposes on the public treasury comes to, it may well be that the "harm" done by the motorcyclist to others by this route is outweighed by the utility to him of riding without a helmet. Further, the tenuousness of the connection between the conduct and the "harm" gives the argument something of the false ring of rationalization. In any case, the opponent of the helmet statute, in order apparently to avoid the force of the argument, has only to steel himself and say something like the following: "You go too fast. You say that the cyclist will be a burden on public assistance funds, but the cyclist never asked for public assistance. The cyclist I have in mind values his freedom, and he realizes that the price of freedom is to suffer the consequences of his choices. If he suffers a serious injury, leave him to manage as best he can. Leave him to private charity, or let him die in the street. So long as you are prepared to do that, his riding without a helmet doesn't hurt anyone but himself."

At this stage the defender of the statute might say: "But we can't leave him in the street. That would be inhuman. It would cost us more in suffering to leave him in the street than it would cost to care for him properly. So you see, he has harmed us, either way." The obvious retort is: "If you value freedom at all, you must admit that one person's mere emotional distress at another's behavior is no justification for making that behavior a crime. If the cyclist insists on dying in a public thoroughfare, let us remove him, as we would any other offensive exhibitionist. But so long as he removes himself from the public eye, he is as entitled to die as to read a dirty book."

Now the defender of the statute, if he has not turned on his heel and stalked off, might say something like the following: "It's not simply a matter of squeamishness that makes me want to help the injured cyclist. I have a moral obligation to. Being denied assistance when one is injured is a punishment too great to visit on anyone's head just for making a foolish choice, even if the choice was precisely to risk that punishment. The cyclist may have made his original choice with full knowledge, but he must regret it now. I have a general duty to help people in need. My duty would be satisfied here only if the cyclist did not want help at the time he needed help. The fact that he decided he would do without help before he needed it is quite irrelevant." From here the defender of the statute would go on to say that being put in a position where one must undertake some burden or expense if one is to satisfy one's *moral* obligations (as opposed to reacting on the basis of one's feelings of pity or horror) is harm, so the cyclist has harmed someone after all.

At this point it seems the defender of the statute is in a strong position, and may have won the argument. What remains to be observed is that if he has won the argument, he has done so by hitting on a suggestion that makes most of the argument as we have described it superfluous. What the defender of the statute is really saying is that the cyclist at the time of deciding to ride without a helmet and the cyclist at the time of his turning up with a broken head are different people, and the choice of one doesn't bind the other. But if the cyclist is a different person at the later time from the person he was at the time of his original decision, then the cyclist at the time of his original decision has harmed another person, and the initial attack on the statute, to the effect that it violated the "harm principle," was mistaken.

Now it must be admitted that we would ordinarily speak of the cyclist as a single person throughout the events which befell him. And it must also be admitted that if we start regarding as separate persons what we would ordinarily regard as separate time-slices or time-segments of the same person, we will have opened a can of worms. Still, I think the suggestion that we should regard separate time-segments as separate persons, at least for some purposes, cannot be ignored. The argument we have just made about the cyclist hurting "another" may seem considerably more plausible if we think, say, about a man who smokes for twenty years, then quits for ten, and then

turns up with lung cancer, of which his smoking was a causal antecedent. Here, it seems, nature has been distinctly unfair.

A similar sort of case may be suggested in connection with moral responsibility and the infliction of punishment. Even supposing we hold a retributivist view of punishment, I think we would be reluctant to punish an embezzler whom we find out ten years after his crime and nine-and-a-half years after he has squandered all his ill-gotten gains and returned to a life which has since been absolutely blameless. The reason is that although the criminal was (and perhaps timelessly "is") deserving of punishment, the criminal is no longer accessible to us. Inhabiting the criminal's body and social role, we find a new man.

The suggestion that for purposes of apportioning blame and punishment our ordinary criteria of personal identity may be inadequate is at least as old as Locke.¹⁷ What I suggest in addition is that the problem of who should be allowed to suffer the natural (i.e., physical, psychological, and so on) consequences of a person's choices is much like the problem of who should be required to suffer the moral consequences of a person's choices. If different time-segments of one "person" may be distinguishable in the latter context, I think they may be in the former as well.¹⁸

The difficult question, of course, is still before us. If we adopt any such view as the one I have suggested, the crucial question is, just what makes different time-segments of what we would ordinarily regard as one person "different" people? Let us start with the case of punishment. I would say, roughly, that the embezzler is a different person when we discover him ten years later if he is no longer the sort of person who would embezzle, if placed in the same situation in which he did so originally (or a similar situation). What this means, of course, is far from clear. Many moralists, concerned about preserving freedom of the will, would probably want to hold that the question "Would Jones, if placed in the following situation, embezzle?" frequently does not have a well-defined answer. The theory of identity-of-persons-for-purposes-of-retribution which I have suggested seems to require, however, that the question "Is Jones the sort of person who, if placed in the following situation, would embezzle?" should have a well-defined answer. In that case, the second question, about what sort of person Jones is, cannot be just the same as the first question, about what Jones would do. Perhaps the second question is about what Jones would "probably" do, or what he would be strongly disposed to do, or what he might do without greatly sur-

prising those who knew him intimately, or something along these lines.

If we press on, assuming that further reflection would provide us with a satisfactory sense of "the sort of person who . . .," the first thing we notice is the following. Our embezzler may, after ten years, be the same person for some purposes and at the same time be a different person for others. Thus, suppose the embezzler committed, at the same time he committed embezzlement, an unrelated aggravated assault. It is at least conceivable that after ten years the embezzler has grown much more conscious of duties of trust without becoming any more disposed to control a volatile temper which produces occasional physical aggression. In such a case, I think we might hold it inappropriate to punish the embezzler now for his embezzlement, but still appropriate to punish him for the assault (for which we assume he has not been previously punished).¹⁹

Returning to our main topic of paternalism, what, if anything, makes the motorcyclist a different person after his accident? The answer, I think, is that the motorcyclist is a different person, in the relevant respect, if he is no longer the sort of person who would ignore his future well-being for the sake of small increments of present utility. Of course, it is not certain that having the accident will produce any such change in the motorcyclist. But it seems likely to. In many cases, I should think, the cyclist will not merely wish he had behaved differently in the past, but will have a new appreciation of the virtue of prudence, and will alter his attitude toward risk in the future. Suppose the cyclist is not chastened and suffers no change in his dispositions toward risky behavior as a result of his experience. Does that mean we should not help him? Possibly, but only if we think the cyclist will not change in the relevant respect further in the future. After all, the cyclist who has been injured without being educated no more has the right to harm, by refusing help, any of *his* future selves who will have learned prudence than the cyclist who has not been injured has the right to harm, by not wearing a helmet, future selves who would be educated by an accident. In short, we are entitled to refuse help, and we should decline to coerce in the first place, only if the cyclist is incorrigible.²⁰

It may occur to the reader to wonder why, if I am prepared to carry my unorthodox suggestion about personal identity as far as I have, I do not simply go the whole way and say that the cyclist is a different person at every moment in time. That would allow

us to avoid the difficult questions we have wrestled with in the last few paragraphs about when people are the same at different times and when they are not. The reason for my reluctance to take this drastic step is that it would seem to undermine our whole concept of freedom. Freedom is concerned with making choices, especially, we like to think, with making rational choices. But rational choice requires deliberation and essentially involves time. If no one is ever the same person at successive instants, how can anyone ever make a rational choice, or a choice for himself? We might, of course, redefine rationality as an attribute, not of persons, but of series of persons which correspond to what we used to think of as persons. But no such radical reconstruction is required, at least in the present context. In connection with the justification of paternalism, all we need to recognize is that persons may, despite bodily continuity, become different persons *for some purposes* as they change over time. If we concentrate on consequences which are drastic, or which are considerably removed in time from the choices from which they flow, or preferably both, then what I have suggested about the attenuation over time of personal-identity-for-moral-purposes seems to help in understanding our paternalistic impulses, and may help in justifying them.

REFERENCES

¹ There is a brief exchange on the subject of paternalism between Devlin (*The Enforcement of Morals*, pp. 6-7, 132-137) and H. L. A. Hart (*Law, Liberty and Morality*, pp. 30-34), and passing mention is made of the problem in standard works such as Benn and Peters, *The Principles of Political Thought*. No doubt I would be aware of some full-scale discussions of paternalism if I were better informed about the literature of political philosophy outside the tradition which has come down to us from Bentham and Mill.

The one recent full-length essay on the subject which has come to my attention is "Paternalism," by Gerald Dworkin, in *Morality and the Law*, edited by Richard Wasserstrom. I discovered Dworkin's essay only after I had essentially completed this paper, but I doubt that having read his paper sooner would have much altered my own. Although his essay makes interesting reading, the conclusion seems to be approximately that paternalism is justified in those cases where a fully informed and rational individual in the position of the coerced would accept the coercion as justified. The question of what a rational individual would regard as justified remains. Some of Dworkin's remarks suggest the sort of "freedom-maximizing" paternalism I discuss in section II of this paper. On the whole, though, that does not seem to be a sufficiently strong thread in Dworkin's argument so that I am merely repeating what he has said, and there is nothing in Dworkin's essay that bears any resemblance to the view I suggest in section III.

²It should be noted that throughout this paper I am adopting the viewpoint of an "ideal legislator," and even that in a very strong sense. I am considering when coercion would be justified from the point of view of an omniscient paternalist, who not only knows everything about the individual he is coercing and the consequences of various choices by that individual but who also has at his disposal means of coercion which can discriminate perfectly between different individuals and different acts. Thus, our paternalist need not frame general prohibitions and weigh the good consequences of such prohibitions as applied to some coercees against the bad consequences of the same prohibitions as applied to others. Nor need he take into account such problems, which may in practice be the most important connected with paternalism, as the effect of certain kinds of paternalistic legislation on the administration of the legal system generally. In other words, I am not speaking in this paper at a very practical level. It seems to me, however, that before we can decide what sorts of paternalistic prohibitions are justified in practice, we need to know, or at least to have an idea, what sort would be justified for my ideal paternalist. Hence my concern with what I recognize is a very abstract formulation of the problem.

³Similarly, it is widely accepted that certain statuses, such as infancy or imbecility, justify paternalism. My present concern is not with the question of what statuses justify paternalism, but with the question of when, if ever, we are justified in coercing an individual who has a good general claim not to be coerced, in other words, who is, to the same extent as the rest of us, a mature and responsible adult.

⁴I might have taken refuge in a more standard "beyond the scope of this essay," but if I knew what the connection between freedom and rationality was, I should be writing a different essay, and a more important one.

⁵I have the same lingering feeling about the justifiability of prohibiting heroin, requiring the wearing of seat belts in cars and helmets on motorcycles, and so on. Generally when I mention one of these cases, I shall intend it as a stand-in for all cases of the same type. What counts as the "same type" the reader is left to infer from the discussion below.

⁶*On Liberty* (Everyman ed., 1910), p. 158.

⁷Of course, almost any choice will "destroy the agent's freedom to some extent" in the sense of reducing or eliminating his freedom to do some particular acts at various times in the future. But it is only a much smaller class of choices which will "destroy the agent's freedom to some extent" in the stronger sense of leaving him, on the whole, significantly less free after the choice than he would have been had he made a different choice. Obviously, a principle which goes under the name "freedom-maximization" is concerned with preventing choices of the second kind, not the first.

⁸The inclusion of death along with injury and disease raises a question which proves troublesome for other "maximizing" theories as well. Are we really out to maximize human freedom to the extent that we might prohibit abortion or birth control so long as the totality of human freedom would be increased by increasing the number of people? I have no wish to undertake a discussion of that problem in this paper. I think we can distinguish between freedom, or happiness, or whatever, of people who actually exist, at some point in time, independently of our decision about coercion (or other moral decision), and of people who do not. If we can't make some such distinction, then the appeal of freedom-maximization is considerably lessened, along with the appeal of traditional utilitarianism.

⁹This sentence makes it clear that I have cast my lot generally with the "negative" rather than the "positive" sense of freedom. Even so, I have included the qualification "in some sense" to take care of peculiar cases, like the case of an individual who is under a psychological compulsion to do one particular act in some situation, but whom we can threaten with a sufficiently high sanction to override the compulsion, and who then finds himself free to choose among a wide variety of acts.

¹⁰Strictly, we would not need a cardinal measure of freedom if we were always concerned with only one person at a time. An ordinal scale ranking "bundles" of freedom for that person would suffice. If considerations of risk were introduced in the same way they may be introduced into utility theory, we might find ourselves with a cardinal measure, which was defined only up to a linear transformation. Even with more than one person, we might find ways of making decisions which took everyone's freedom into account without relying on interpersonal comparisons, such as a generalized Nash arbitration scheme. (See Luce & Raiffa, *Games and Decisions*, pp. 124-134, 349-350.) Such methods of making decisions affecting more than one person would fit uncomfortably, however, under the rubric of "freedom-maximization." What we say in the text is sufficiently fuzzy so that it probably doesn't matter much whether we regard ourselves as searching for ordinal or cardinal measures of freedom. The main object is to suggest that freedom-maximization may not be much vaguer in principle than utility-maximization, and utilitarian moral philosophers have, for the most part, managed to ignore the fascinating complications of modern decision theory.

¹¹For the reader who would still claim to have *absolutely* no sense of when one bundle of freedom is "greater" than another which neither includes it nor is included in it, I would suggest that he consider whether he does not have some intuitions about when one *interference* with freedom is "greater" than another which is logically unrelated. Thus, is it not clear that a prohibition against traveling in any self-propelled vehicle would, in general, be a greater interference with personal freedom than a prohibition against wearing purple ties? I admit that examples like this don't get us very far. But they may shake the utter skeptic, to whom this footnote is addressed.

¹²Instead of claiming that we coerce the would-be suicide into "whatever he fills his time with," it might be somewhat more accurate to say we coerce him into the disjunction of all the things he might fill his time with, but the point is the same. For a person who would really rather be dead, one way of filling his time is much like another.

¹³I use "*prima facie* unjustifiable" and "presumptively unjustifiable" in what I take to be well-accepted senses, or at least senses parallel to well-accepted senses of "*prima facie* wrong" and "presumptively wrong." Very roughly, an act is *prima facie* wrong if it possesses some feature which is always wrong-making, and by virtue of which it will be wrong *sans phrase* except when it has some other right-making feature. An act is presumptively wrong if it has some feature which is generally indicative of wrongness.

¹⁴In view of this last paragraph, we may have strained unnecessarily to try to make plausible the conclusion that preventing suicide is not required by freedom-maximization. Perhaps preventing suicide would maximize freedom, but only at too great a cost in utility. Even if we defend allowing suicide in this way, however, the case is stronger, the less freedom is being sacrificed when the suicide is allowed. Our argument was not wasted, then, even if we may have overreached ourselves by stating the conclusion as strongly as we did.

¹⁵*On Liberty* (Everyman ed., 1910), p. 73.

¹⁶It is worth noting that it is almost always possible to find some way in which an apparently paternalistic piece of legislation could be held to prevent harm to others, even without resort to the "burden on public funds" argument discussed further on in the text. Thus, it has been pointed out to me by my colleague Vince Blasi that the requirement of motorcycle helmets might decrease the chance of injury to others when a motorcyclist has an accident, by making it less likely that he will be stunned and lose control of his vehicle completely. In the case of cigarettes it could be argued, as another colleague, Doug Kahn, has suggested, that the smoker harms impressionable children by setting them a bad example.

¹⁷*An Essay Concerning Human Understanding*, Bk. II, ch. xxvii. This is not the place to argue about just what Locke's theory of personal identity is. In fact, I think that in the chapter cited he suggests at least two different theories, one of which is not unlike the theory I outline in the text below. Since I do not propose to indulge in exegesis, I will at least direct the doubtful reader's attention to the *Essay*, Bk. II, ch. xxvii, § § 16-26.

¹⁸Derek Parfit has argued convincingly that questions of personal identity are questions of degree, and Parfit, I am sure, would accept the general notion that the cyclist or the embezzler might be different persons at different times. See "Personal Identity," *Philosophical Review*, LXXX (1971), 3. Unfortunately, Parfit's discussion centers around hypothetical cases of fission and fusion of consciousness, and is aimed at establishing the possibility that what we ordinarily speak of as one person is a series of more or less closely connected ancestral and descendant selves. Parfit does not give any attention to the question of just where one self becomes another. He does point out that if we accept this view of personal identity, then the principle of prudence, rather than being at odds with the principle of concern for others, may be deducible from it—and may in fact have no other support! This observation of course exactly parallels our suggestion that paternalism may be justified by appeal to the "harm principle."

¹⁹One untoward consequence of the theory I am suggesting might be that it would place a great strain on our adherence to another principle, the prohibition against punishing innocents even when good consequences would result. When the standard case of securing good consequences by punishing someone who is innocent is that of the sheriff framing somebody for a crime he didn't commit in order to avoid a riot, we may be able to say firmly "No—that would be an outrage" in part because of our belief that such cases wouldn't come up often, so the good consequences lost would not be significant. Our new principle, if taken seriously, might require nonpunishment of many persons for crimes which earlier inhabitants of the bodies they are attached to unquestionable did commit. To let too many such persons go unpunished might completely undermine the use of punishment as a deterrent. Of course, we aren't certain punishment has much deterrent effect anyway, but so far we haven't given up. Even aside from deterrence, the new theory might require us to discard any judicial system of punishment, even as retribution. Under the present judicial system and the ordinary view of personal identity, we know that some innocent persons are convicted, but we console ourselves with the thought that the number is small and that no one who is innocent is convicted "intentionally" despite knowledge of his innocence which is attributable to the judicial system. If we adopt the suggested view of personal identity, we might have to conclude that any system of judicial punishment would convict so many innocent persons that it would be insupportable.

²⁰At this point a difficulty arises which is connected with the problem of "possible persons" (persons whose existence is prevented by abortion or birth control) which we encountered in section II. We have suggested that the cyclist may be coerced because of the possibility that he may develop into a person who is different in a relevant respect, such as attitude toward risk, or something of the sort. But we have also admitted that the cyclist may *not* develop into such a person. Are we not then interfering to protect merely *possible* future selves of the cyclist, and if we are prepared to protect these merely possible persons, why not the unborn? I think of two possible answers, or suggestions for answers, both of which have some plausibility. First, the possible persons we are protecting in the case of the cyclist might exist even without our intervention, even though they also might not (and might not ever exist even if we do intervene). Possible persons who are about to be prevented from existing by abortion or birth control quite certainly will not exist without our intervention. (Spelling this out might involve us in difficulties about the individuation of possible persons.) Second, it seems that we may be justified in treating differently possible persons who are not related by bodily or psychological continuity to any *actual* persons, and possible persons who are so related. (This requires a bit of spelling out too, to explain how a merely possible person could be related by bodily or psychological continuity to any actual person. I would suggest, however, that the reader who can't see approximately how this would go just isn't trying.)