

A JUSTIFICATION OF PATERNALISM

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### Abstract

I attempt in this paper to develop a theory of paternalism which indicates when and why a paternalistic action is justified. In the first two chapters I consider the extant theories on this subject: in the first chapter I develop a utilitarian theory of the justification of paternalistic interference, and in the second chapter I consider various non-utilitarian theories that have been offered. Although I do not agree with the utilitarian analysis of rights, and so with their rationale for paternalistic intervention, I argue that such a theory does provide a strong presumption against such interference. Nor do I find any of the non-utilitarian theories satisfactory, although they each contain certain important insights. In the third chapter I develop my own theory. I claim that there is really only a problem in justifying paternalism when the subject has the prima facie right to do what he proposes to do. It is therefore necessary to determine under what conditions any prima facie right can be interfered with. From results of this investigation I conclude that consent, either tacit or explicit, prior or subsequent to interference, is the key to the justification of paternalistic interference. More specifically, I argue that consent, or the disposition to consent upon receipt of factual information or correction of a logical error, is a necessary condition for justification, and that it is also sufficient except where it is gained by "warping" the subject's preferences, or where it is due to lack of relevant information, or a logical error.

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## Introduction

I make the assumption in this paper, one which I believe is shared by most people in our culture, that there is a standing presumption in favor of freedom of action and beliefs, and that if one is to interfere with either of these, one must be prepared to offer a rationale for doing so. The reasons given for such interference can be divided into two classes on the basis of who is supposed to benefit from the interference -- whether it is the subject himself or someone else. In the former case the reason for interference could be either that we are preventing him from harming himself or that we are ensuring that he is in a position to realize certain benefits. In the latter, the reason that would usually be offered is that we are protecting others from the harmful consequences of the subject's actions or beliefs. My concern in this paper is with the first kind of rationale -- when the interference is for the good of the subject, or, in other words, when the grounds for interference are paternalistic. There is a recognized problem in determining when and why such interference is justified, and it is to this problem that I direct my attention.

I shall define paternalism as coercive interference with someone's actions or beliefs for reasons to do primarily with the subject's own good. This means that the major consideration must be the subject's welfare, but interference need not be for this reason exclusively in order to be considered paternalistic. So, if parents want their child

to take piano lessons mainly because they think she will benefit from doing so, but also because it will make them happy if she learns to play the piano, this would still count as paternalistic interference with her actions. When we interfere with someone's action we either force that person to do something he does not want to do, or we prevent him from doing something he does want to do. Interfering with someone's beliefs would involve changing them in some way. Brainwashing would be an extreme example of this kind of interference, along with any other psychological processes that radically modify the beliefs of the person subjected to them. Such processes would of course have to be seen by the instigators as being in the subject's interest in order to be paternalistic, but given the fervor of some religious fanatics, it is not difficult to imagine the appropriate circumstances.

David Donaldson<sup>1</sup> has offered a broader definition which stipulates as paternalistic acts, not only those in which the subject is forced to do something he doesn't want to do (or prevented from doing something he does want to do) but also those in which there is an alternative act which affects the donor equally and which the beneficiary prefers; for example, giving people food vouchers instead of money when the latter would be preferred. But since the definition I have offered captures the central cases of paternalism, and since Donaldson's raises further problems with which I don't wish to deal in this paper (although I think they will have to be dealt with

eventually) I shall set it aside.

In the first two chapters I examine the extant theories on the justification of paternalism, and offer in the third my own alternative theory. The first chapter is an application of utilitarian theory to the problem of when one ought to interfere with someone's actions or beliefs on paternalistic grounds. It is interesting to see how strong a presumption against such interference can be made out on the basis of utility. Mill thought that, as a matter of contingent fact, paternalism would never be justified towards sane adults:

"... the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant."<sup>2</sup>

And that this is so because everyone will always be better off if each individual is left to pursue his own good as he sees fit. I believe, and argue implicitly, that this is a false empirical claim, but that there are nonetheless fairly strong utilitarian arguments against such interference. I think it is useful to illustrate how probable it is that paternalism will result in over-all disutilities, since this constitutes a fairly strong argument for non-interference, one with which many of us will be sympathetic whether or not we are utilitarians. But I do not think that utility provides the necessary moral justification for interference. That is, I don't think that



whether or not one should be permitted to do as he wants when it concerns only himself ought to rest entirely on a calculation of utilities. This is really a basic conflict on the question of the role of rights, and although I can't argue here for the truth of my assumption -- such an argument belongs in a theory of rights -- I do assume that the utilitarian account of rights is not correct. For those who do not share this assumption I would like to point out that for a utilitarian if the over-all disutilities and the over-all utilities seem to balance out, so that there is neither an obligation to interfere nor an obligation not to interfere, then whether one does so is quite arbitrary. But surely you will agree that whether one ought to interfere with another's freedom of action should not rest on an arbitrary decision. I do not think that there being such a balance is an empirically implausible situation although it might be fairly unusual.

At any rate, I do not accept utilitarianism as the solution to moral problems, a position that is shared by many people for a number of different reasons. Because of this and because utilitarianism, it seems to me, allows unjustified paternalism, I think it is important to attempt a non-utilitarian rationale for paternalistic interference.

Rawls,<sup>3</sup> Dworkin,<sup>4</sup> Brown,<sup>5</sup> and Donaldson<sup>6</sup> each attempt to provide such a rationale. In the second chapter I examine these theories in some detail, pointing out what I think the various problems are with

each of them. I don't think any of these theories provide the correct rationale for interference, but each of them has important insights which I incorporate in one way or another into my own theory.

The third chapter is devoted to the development and defense of my solution to the problem of when paternalistic interference is justified. Because the question of whether or not to interfere is really only a problem when the subject of the proposed paternalism has a prima facie right to do what he is being prevented from doing (or not do what is being required of him), I first consider under what circumstances any right can be interfered with. From my results I conclude that consent, either tacit or explicit, prior or subsequent to interference, is the key to justification of paternalistic interference. I argue that consent, or the disposition to consent under certain circumstances, is a necessary condition of justification, and that it is also sufficient except under some specified conditions. Tooley's<sup>7</sup> analysis of rights is important in showing when consent is not sufficient. Another problem which arises in the area of rights which is of central concern in my theory is 'who has rights'. But because I am not offering a theory of rights in this paper I can only make a brief gesture at the solution to this difficult problem.

## Footnotes for Introduction

1. David Donaldson, "Fathers and Sons", unpublished paper.
2. John Stuart Mill, Utilitarianism, Liberty and Representative Government, Everyman's Library (New York: Dutton, 1910), pp. 72 - 73.
3. John Rawls, A Theory of Justice (Cambridge, Massachusetts: Harvard University Press, 1971), see especially pp. 249 - 250.
4. Gerald Dworkin, "Paternalism", The Monist, Vol. 56 (1972), pp. 64 - 84.
5. D. G. Brown, "The Rights of Children", The Journal of Education, No. 17 (April 1971), pp. 8 - 20.
6. David Donaldson, "Fathers and Sons", unpublished paper.
7. Michael Tooley, in the Correspondence, Philosophy & Public Affairs, Vol. 2, No. 4 (Summer 1973), pp. 419 - 432.

## Chapter 1

### Utilitarian Justification of Paternalism

In this chapter I apply the theory of act utilitarianism to the problem of determining when paternalistic interference will be justified. It is natural to suppose that on grounds of utility a great deal of paternalism will be condoned. This, I shall argue, is a mistake; rather, on these grounds there will be a fairly strong presumption against paternalistic interference when the proposed subjects are sane adults. In the first section I develop a number of arguments to show why this should be the case. In the second, I show why it is that there is not this presumption when the subjects are children, the insane, or mentally deficient. And finally in the last section, I consider two cases where the question of whether or not to interfere arises; the first is one in which on grounds of utility one ought not to interfere, and the second, one in which on those same grounds, interference ought to be forthcoming.

#### Section 1.

In order to show that there is a presumption against interference, and how strong it is, I shall present what I believe to be the central considerations in determining what the balance of utility is likely to be in any given case. On the positive side there is of course the supposed benefit to the person whose action is being interfered with. The problem is in determining what the possible

disutilities are and what kinds of considerations would lead one to expect disutilities where these can't be accurately assessed in advance. In On Liberty Mill either suggests or states explicitly a number of the relevant considerations, many of which I have incorporated in the following. Since this is not a critique of Mill I shall not be considering his text, but where a consideration is one of those Mill has suggested I shall acknowledge it to be such with a footnote giving the relevant page in On Liberty.

Before discussing the various utilitarian reasons for non-interference I should point out that on grounds of utility a stronger case can be made against interference when the paternalism takes the form of coercive legislation than when it is merely private intervention of a single person. I shall attempt to make clear why this is so in the following discussion.

The possible disutilities which arise from personal and/or legislative paternalism divide into those from which the subject of the paternalism might himself suffer and those from which the society as a whole might suffer. I shall consider the former first.

One of the considerations against interference which presents itself most immediately to many people is the objectionable nature of being forced to do something that one does not want to do (or being prevented from doing something one does want to do).<sup>1</sup> The very fact that it is objectionable is itself a disutility which must be weighed against the supposed benefits of the interference. How great the

disutility is will depend both on the length of time the coercion must be used and how offensive it is in itself. Obviously if the force must be used over a long period of time, the total disutilities will be much greater than if the same amount of force were used only momentarily. Because of this, long term paternalistic intervention will be more likely to result in over-all disutilities than short term intervention, although it will of course depend on the precise circumstances of the case.

The second most obvious consideration is that each person has more knowledge of his own circumstances, feelings, preferences, desires, etc. than anyone else, and that for these reasons he is in a better position to assess his interests than any other person.<sup>2</sup> This means that he has a much better chance of being accurate in his judgments with respect to his own good, and that others are likely to make mistakes. So although someone might think that his interference is for his subject's good, it will probably turn out that this is not the case. If this is so then we will have the disutility of someone being forced to do something against his will without the utility of his being better off as a result, and perhaps even the disutility of his being worse off than he was before. This is even more likely to be the case when the interference takes the form of legislation since such legislation must be made on general presumptions about what is good for people.<sup>3</sup> Such presumptions may be altogether wrong, or if right, misapplied in individual cases. I think

there is strong empirical evidence to support this claim. We cannot of course condemn all paternalistic legislation on these grounds -- there may well be some which do not suffer from such faults -- but these are strong arguments for considerable caution in adopting such legislative measures.

Not only is a person more likely to be more accurate in his assessment of what is good for himself because of his favored position with respect to the relevant information, but also because he is probably more concerned than anyone else with own well being.<sup>4</sup> This means that he will (probably) take the necessary time and energy to accurately determine what really is in his interest, and thus will have a better chance of being correct than a well-meaning, but ill-informed outsider. There will be exceptions to this, particularly where there is a strong personal bond, as between lovers, parents and children, siblings, and others. But it still provides a good reason for using caution in dealing with people paternalistically. Again I think the danger of paternalistic intervention in fact resulting in greater disutility for the subject is greater when it takes the form of legislation than when a private individual is proposing to interfere. The reason for this is quite obvious: the body of people responsible for the legislation cannot possibly take the interest in each person necessary to assess accurately his position, and thus determine whether it really is better for him that his action be interfered with or not, whereas this is at least possible in

interpersonal interference, and as pointed out above, probable when there is a certain kind of personal relationship.

Finally, disutilities for the subject of paternalism might arise from a policy of interfering with him on every or even most of those occasions when it can be seen that he is about to do something counter to his interest. This would deny him the opportunity of learning from his mistakes, and this might result in his deliberative capacities remaining underdeveloped. The disutilities of such a state will arise from two sources. The first from the fact that, when there is no longer someone to intervene whenever it is deemed necessary, it is likely he will often do foolish, personally harmful things. He would have been better off if he had been permitted to learn how best to serve his own interest by making a few mistakes on some minor matters. The second source of disutility arises from the fact (if it is a fact) that an individual who has underdeveloped deliberative capacities will be a less happy individual than one whose capacities are well-developed. This will be true not only because of the consequences of being unable to make wise decisions, but also because being a competent decision maker is fulfilling in itself; anyone who hasn't this capacity then, will be less happy than someone who does have it, other things being equal. I should emphasize that these disutilities only provide a good reason for not making a policy of interfering with someone's action when it can be seen that that person is going to do something counter to his



interests; in any particular instance the likelihood of inhibiting a subject's deliberative capacities will have to be balanced against the gains from doing so, along with a number of other considerations, such as the ones already cited and those that follow.

I turn my attention now to the disutilities which might be experienced by a society as a whole as a result of paternalistic intervention. As it is more convenient to talk of the advantages of non-interference than the disadvantages of interference I shall cast the following discussion in those terms. And because the strongest case can be made against legislative measures, I shall consider the arguments in that field first.

The gains to mankind resulting from individuals being left to do whatever they wish, providing it harms no one else, come from two different sources: the first are the cultural benefits which arise from people being permitted to pursue their own good, since innovation often results;<sup>5</sup> the second from the benefits to society that result from the money, time, and energy that might be used to enforce paternalistic legislation being directed instead into other areas where the benefits to the society or mankind are considerable, e.g. using these resources to increase social benefits, or improve the environment. The argument is that the gains to mankind or society, resulting from non-interference will probably outweigh any harm that might befall the individuals as a result of their actions being uninhibited by outside coercion. It is fairly clear why this should be the case

as far as the second source of benefits is concerned: it is just so tremendously difficult to effectively enforce paternalistic legislation, with the cost to the society in resources being directly correlated to this difficulty. The prohibition against alcohol is a case in point. And it has recently been argued that the cost of enforcing anti-drug legislation far outweighs the supposed benefits. It seems to me that there is little doubt that in these and similar cases the money, time, and energy consumed could be much more profitably directed elsewhere.

The first suggested benefit of the practice of non-paternalism has considerable plausibility when one considers the possible negative results of the state or church laying down strict rules that one is to follow in day to day life. Artistic and scientific endeavors will likely suffer, and the culture as a whole, stagnate.

So, when a piece of paternalistic legislation is being proposed the following questions must be asked: what are the costs to society of enforcing such legislation? could the energy be more profitably directed elsewhere? are we in our narrow minded way inhibiting cultural progress? The answers to these questions will play a large part in determining whether or not a piece of legislation is justified on utilitarian grounds.

As far as the interpersonal sort of paternalism is concerned, I don't think the above considerations will play any significant role; from such paternalism there just won't be the possible harmful

consequences to the society as a whole.

Even if given the above considerations the utilities seem to be on the side of paternalistic interference, one has still to consider the possible negative results of setting a precedent for other paternalistic actions where the disutilities might outweigh the utilities. This is a particular problem when it is paternalistic legislation which is being considered, since the legal system is very precedent oriented. Such a measure might open the door to a large number of other measures for which the utilities have not been carefully calculated and which would in fact result in overall disutility.

There is some possibility that even when the paternalism is only being engaged in by a private individual precedent will be a danger. The source of the danger is that an observer will reason: "He interfered on paternalistic grounds so it must be okay for me to do so," where he hasn't made the other necessary calculations or hasn't realized that there is a relevant difference between the two cases. This is analogous to the case against lying: when one takes into account the possibility of others following one's example but not being as careful in their reasoning, and considers the negative results of not being able to believe what people say, then one may have a good case for not lying even though the circumstances of the particular case when considered on their own would justify it.

Finally, I think I should point out that paternalism will always be a last resort. It is only when argument, exhortation, or pleas

have failed to change someone's mind about what is in their interest that one will be justified in turning to coercion to prevent him from doing something which is against his interest. This is true because persuasion carries none of the disutilities that paternalism does; so the over-all utility will always be greater when someone has been successfully persuaded to do other than he planned, than when he has been forced to do so. Of course there will be times when one doesn't have the opportunity to engage in debate with a person about what he ought or ought not do. In such circumstances, assuming the utilities favour interference, paternalism would be the only choice.

We have, in summary, the following reasons based on utilitarian considerations for not engaging in paternalistic intervention:

1. the evil of being forced to do something one does not want to do will often outweigh the benefits;
2. other people will usually be mistaken about what is good for someone else for the following reasons:
  - a) a person is more careful in his assessment of his interests than others will be since he is more interested in his own well-being;
  - b) he has more knowledge of his feelings and circumstances than anyone else;
  - c) legislation, being based on general presumptions cannot take into consideration the circumstances of particular cases;

3. there is the possibility of inhibiting the development of deliberative capacities;
4. the cost to society will often outweigh the benefits of such intervention due to the difficulties involved in forcing people to do something against their will, and to the innovation that results from leaving each person to pursue his own good as he sees fit;
5. there are dangers in setting a precedent;
6. reasoned argument, if it is successful, will always have a greater net utility than force.

I think it will be agreed that these considerations work together to create a strong presumption against paternalistic interference (particularly when it is to take the form of legislative measures) when the subjects are sane adults. But what about children, the insane, and the mentally deficient? Surely paternalism will often be justified towards them. In the next section I shall examine the case for paternalism towards these classes of people in the light of the reasons which I have developed for non-intervention in general.

## Section 2.

What needs to be shown when interfering with the actions of a child on paternalistic grounds is that some of the reasons for non-interference are inapplicable given the nature of the case and/or that the utilities they refer to are slight and could be fairly

easily overridden by the utilities of interference. If this is usually true then we have on utilitarian grounds a reason for there not being a general presumption against paternalism towards children while there is this presumption when the subject is an adult.

I think one of the most important differences between children and adults which makes paternalism more often justified towards the former than the latter is that children are wrong considerably more often than adults in their judgments as to what is in their best interest. If left to their own devices they are likely to do things that will be of great harm, or neglect to do those things which would prove beneficial. The explanation of such phenomena could be in their lack of experience, their undeveloped cognitive abilities and their inability to perceive or appreciate the nature of the consequences of their actions (or inaction). And although it is usually true that adults take more interest in their own welfare than anyone else this is not true in the case of children. Their parents are typically as interested in their children's well-being as they are in their own. And if the instigators of paternalism are legislators their lack of direct concern with each child will probably be relatively unimportant in the light of their greater expertise. There might be a case for arguing that the adults directly responsible for the child are both more interested and have the necessary competence to protect the child from his own actions, and thus paternalistic interference in the form of legislation is not only unnecessary, but

is more likely to be in error than when it comes from concerned parents. However, there is a class of legislation that serves to protect the child from his parents some of which would be classified as paternalistic (e.g. removing a child from his home because of abuse even when he doesn't want to go) where such an objection could not be made. It might also be true that there are certain things which parents would be relatively powerless to prevent their children from doing if it were not for help from paternalistic legislation.

Another relevant fact is that paternalism is almost always engaged in by a child's parents or guardians. Because of this there will be no cost to the society in the great majority of instances of interference. And of those cases in which paternalistic legislation is directed towards children the cost is still likely to be relatively low as most of the enforcing of such legislation will be handled by the adults responsible for the children, either parents, older members of the family, teachers, or others; e.g. those laws requiring children to attend school, prohibiting their drinking alcohol, or having sexual relations. Where this is not the case, either because the responsible adults aren't in a position to interfere, or don't wish to, the cost to society will still be quite low due partly to the relative infrequency of such situations and partly to the relative weakness of those towards whom the legislation is directed.

Furthermore, setting a precedent is less dangerous when the subject is a child than when it is an adult, since for the reasons

outlined above, there is less danger of interfering with children when one ought not to do so. And it seems unlikely that paternalism towards children would be used as a precedent for paternalism towards adults since people are willing to recognize that there is a relevant difference between these two classes of people, even if they are not able to articulate precisely what it is.

Nonetheless, there are two reasons for non-interference which might play an important part in deciding whether or not to interfere with a child's action. The first is the possibility of inhibiting the development of deliberative skills if one follows a policy of interference. Obviously there will be a play-off between the severity of the results of the child being left to act in the manner he has decided upon and the benefits of having him learn by experience.

The other consideration is the objectionable nature of being forced to do something against one's will. This is a consideration which is I think often ignored when an adult is deciding whether or not to interfere with a child's actions on paternalistic grounds. Does the harm to the child which would result from non-interference really outweigh the annoyance of his being forced into doing something he doesn't want to do? It often will, but there will be times when it won't. Unless this is taken into consideration, one cannot be sure that one's interference is justified on utilitarian grounds.

It should be clear that although there will be times when paternalistic interference with a child will be unjustified on the



grounds of utility, there is not a strong presumption against interference because the possible disutilities of doing so are not nearly so great as when the proposed subject is an adult.

This is also true of some of the insane and mentally deficient, and for similar reasons. If someone has severely impaired cognitive or emotional capacities then utility will probably be on the side of interference. This is true because of the following. First, these people will often not know what is for their own good, while someone whose capacities are not impaired will often be correct in his judgment as to whether a person ought or ought not do something. And one does not usually have to worry about inhibiting deliberative capacities, although one should keep such a possibility in mind, particularly when the person falls on the borderline between those who are sane and those who aren't, or those who suffer from mental deficiencies and those who do not. It might be the case that allowing a borderline case to do some of the things which will cause him some personal harm will give him the necessary experience to control various areas of his life himself without outside interference. It will of course depend on the severity of the harm and the likelihood of his learning through the experience. Even the disutilities of the cost to society will be relatively small compared to the potential personal harm which would result from non-interference. Because of these considerations we don't really have to worry about setting a precedent; utility will usually be on the side of interference within

that class anyway; and it is unlikely that paternalism towards those with impaired capacities will be used as a precedent for paternalism towards people whose capacities are not impaired. We do of course still have to take into consideration the disutilities for the subject of being forced to do something against his will. But this disutility on its own will often not be great enough to override the utility of interference. For these reasons, as with children, there is not a presumption against interference on utilitarian grounds.

### Section 3

In this section I shall consider two circumstances in which the question as to whether or not to interfere paternalistically arises. In relation to the first I shall argue that on grounds of utility, although it might at first glance appear that interference would be justified, it would in fact probably be unjustified. In relation to the second I construct a case which I believe is empirically plausible, and in which on grounds of utility, paternalistic interference ought to be engaged in.

The question arises every so often as to whether or not it should be required of people by law that they fasten their seat belts while in a moving vehicle. I would like to suggest how a utilitarian calculation might go. Because various reasons for non-interference fail to have much weight in this case it might appear that utility would favor interference. For instance, it can clearly demonstrated that

fastening one's seat belt is in one's interest and thus the fact that the interference comes from legislators is irrelevant. In fact most people realize that they ought out of self-interest to fasten their seat belt but fail to act accordingly for any of a number of reasons: they can't come to grips emotionally with the possible consequences of not doing so; they suffer from weakness of the will; or perhaps they irrationally place a higher value on not having to bother with seat belts than on the good which might result. So one could argue that the legislation is simply forcing people to do what they already know is in their interest. Nor will the cost to society likely outweigh the benefits of such legislation, assuming, that is, that there will be no special effort to ensure that the legislation is obeyed but rather in the course of ticketing speeders, or routine checks, fastened or unfastened seat belts would be something of which note is taken, and fines or whatever passed out accordingly. Or perhaps it could be required that cars be designed in such a way that there would be an objectionable noise if the seat belts were left unfastened. Finally it does not seem likely that the annoyance of having to fasten one's seat belt would outweigh the benefits of doing so, given the fact that serious injuries and death can often be avoided as a result of having one's seat belt fastened. But in spite of the fact that the utilities seem to be balancing out in favor of interference, there is a consideration which could tip the balance the other way, viz: the danger of setting a precedent. As noted earlier this is a

a particular danger in the realm of legislation because the legal system is precedent oriented. Because of the high probability of undesirable results of a great deal of paternalistic legislation for the reasons already given in Section 1, I think the danger of setting a precedent is great enough to constitute a fairly conclusive reason against a law requiring the fastening of seat belts.

The following case is one in which on grounds of utility it would probably be concluded that one ought to engage in paternalistic interference. Say a woman's husband has had in the past a severe drinking problem. It damaged his health, jeopardized his job, and made him foul tempered and hard to live with. He went to Alcoholics Anonymous meetings and managed to stay off alcohol for a number of years, but due to a particularly stressful time, has decided that he really needs a drink in order to get through. His wife knows from past experience that if he has one drink he will again soon be suffering from alcoholism. So she decides to threaten to leave him if he takes even a single drink. Her husband believes she means what she says, and in spite of great reluctance decides not to indulge. Was such interference justified on utilitarian grounds or not? It seems to me that the only considerations that have any force are the benefits of the interference and the objectionable nature of his being forced to do something against his will. Surely it is obvious that in this case the benefits will far outweigh any disutilities arising from his being coerced into not doing something he wants to do. This

means that interference would be justified on utilitarian grounds.

In summary, I have argued that because of a number of considerations paternalism will usually result in greater disutilities than utilities, particularly when it is to take the form of legislation, and that this creates a general presumption against interference on utilitarian grounds, but that there will be some circumstances in which the reverse is true, when on utilitarian grounds interference would be justified.

## Footnotes for Chapter 1

1. John Stuart Mill, Utilitarianism, Liberty and Representative Government, Everyman's Library (New York: Dutton, 1910), p. 133.

2. Mill, p. 133.

3. Mill, p. 133.

4. Mill, p. 133.

5. Mill, p. 121.

## Chapter 2

### Some Non-utilitarian Theories

I am concerned in this chapter with the extant non-utilitarian theories on the justification of paternalism. I offer critique and criticism of the positions taken by Rawls,<sup>1</sup> Dworkin,<sup>2</sup> Donaldson,<sup>3</sup> and Brown.<sup>4</sup>

Rawls offers three principles of paternalism which he thinks are the ones that "parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society."<sup>5</sup> All three principles are necessary conditions for paternalistic interference, and are jointly sufficient, so only if all the principles are fulfilled will paternalism be justified. They read as follows:

1. paternalistic intervention must be justified by evidenced failure or absence of reason and will;
2. the intervention must be guided by what is known about the subject's more permanent aims and preferences. We may know about these through familiarity with the particular person in question. But if we lack any detailed kind of information we will know that he is probably interested in primary goods because these are things that most people would want no matter what else they want, e.g. health, happiness, nourishment, sufficient wealth, etc. Acting in accordance with the permanent aims and preferences or the primary goods gives the 3rd condition the best chance of being fulfilled.

3. the paternalistic act must be something of which the subject would approve upon the recovery or development of his rational powers.

These principles have, I think, intuitive plausibility, even if one doesn't accept the theoretical background of the original position. There are, however, certain difficulties which I wish to point out.

First, there is some ambiguity as to whether Rawls wants the non-existence of rational powers to be a necessary condition for interference, or whether simply not using the powers that one has would satisfy that first condition. It should be noted in this respect that to say someone acted irrationally is to acknowledge that he has the ability to act rationally, but has not done so. This is why we attribute irrational behavior to some people at certain times, while we never do so to animals -- we credit the human with rational powers, while denying that animals have such powers. Given this it seems, although it isn't entirely clear from the wording of the conditions above, that Rawls wants the non-existence of rational powers to be a necessary condition for paternalistic interference. But he also says, "Paternalistic principles are a protection against our own irrationality..."<sup>6</sup> which, given the distinction drawn above, means that simply not using one's existent powers could also satisfy the first condition. It is important to know which possible interpretation of his principle Rawls wants in order to determine how much paternalistic inter-



ference would be justified.

The second difficulty is that the principles don't seem to take account of those people who suffer from severe impairment of their rational capacities and who will never recover or develop them -- the permanently insane or mentally retarded. Because they won't ever have these abilities it seems reasonable to suppose that they will never consent to their paternalistic treatment, leaving the third condition unfulfilled. But since it is a necessary condition for justified paternalism, such interference won't be justified without its fulfillment. This leaves us in the absurd position of paternalism not being justified for those classes of people towards whom it seems intuitively to be most obviously justified. We might try to alleviate this problem by reading the third condition as a hypothetical -- perhaps it is even meant to be read as such: the interference must be something of which the subject of the paternalism would approve if he develops or recovers his rational powers. This certainly takes care of the permanently insane and mentally retarded, but such a reading seems to leave the way open for extending paternalism well beyond what most of us would be happy with. It is not possible for someone to argue that none of us ever develop our rational powers to the capacity of which they are capable, but if we ever did we would approve of all kinds of paternalistic treatment which we wouldn't in our present state. The danger is the same whether Rawls thinks irrationality and/or the non-existence of

rational powers fulfills the first condition. In the first case it could be argued that we would approve if the existence of our full rational powers were ever realized; in the second case, that we would approve if we ever came to view the relevant situation rationally, i.e. used the powers available. Of course it is possible to stipulate the level of development, or the severity of the irrationality and to make this level low enough that there seems little threat of too much paternalism. But this requires theoretical work which we don't find in Rawls.

Finally, there is a problem with the first condition -- there must be an evidenced absence or failure of reason or will. This seems intuitively to be a reasonable restriction, but I think we'll find that there are some situations in which it need not be fulfilled in order for paternalism to be justified. For instance, to use an example from Mill, if someone is about to walk across a bridge which is, unknown to him, on the verge of collapse, we should take whatever means necessary to stop him from doing so, provided we haven't the time to warn him of the danger. There need be no absence or failure of reason in this case to justify such intervention, but merely ignorance and insufficient time to remedy it. Mill denies that this is a case of paternalistic intervention on the grounds that "liberty consists in doing what one desires, and he does not desire to fall into the river."<sup>7</sup> So, the argument concludes, we have not interfered with his freedom. But this seems to ignore the fact that at the time of

intervention, the subject does want to cross the bridge, and we are stopping him from attempting to satisfy that want. Of course, one can point out that if we only had time to warn him of the danger, he would probably have decided not to cross the bridge; or that after explaining why we had grabbed him as he started across, he would probably thank us for saving his life. But these arguments don't show that our interference wasn't paternalistic; they are rather, possible justifications for such interference.

At any rate, if we deny that the interference in the crossing-the-bridge example is paternalistic on the grounds that the subject does not desire the consequences, we have to deny that all sorts of interference with people's actions would be paternalistic on the same grounds. For example, it could be argued that children don't really want to die of malnutrition so making them eat their vegetables is not paternalistic; or that people don't really want to become heroin addicts and so denying them access to heroin is not paternalistic; that people don't really want to die of lung cancer so making the sale of cigarettes illegal is not paternalistic, etc. And if these measures are not paternalistic, then of course they don't require the justification that they otherwise would. This is, I think a consequence none of us are willing to accept. But, of course, the important point is that people do want to smoke, take heroin, and not eat their vegetables; such desires might be irrational given that most people also do not want to get lung cancer, become addicts,

or be unhealthy. But that does not change the fact that they have the desires, and that the actions of parents or legislative measures are interfering with them.

I shall not commit myself at this point on whether or not paternalism in such cases as mentioned above is or would be justified, but it seems quite clear that stopping someone from attempting to walk across a bridge which is about to collapse is justifiable interference, and any theory with a hope of being correct must allow for such cases of paternalistic intervention. But this is just what Rawls' first condition denies, since it requires that there be an evidenced absence of reason or will. For this reason it cannot be a necessary condition for the justification of paternalistic intervention.

Dworkin delimits the area of justifiable paternalism basically by the notion of consent. This is a similar condition to the third one of Rawls but whereas Rawls requires the actual consent of the subject of paternalistic treatment, Dworkin rests his case on the hypothetical consent, not of any particular subject of paternalism, but of rational people. He attempts to produce "certain kinds of conditions which make it plausible to suppose that rational men could reach agreement to limit their liberty even when other men's interests are not affected."<sup>8</sup> The conditions, one or a combination of which Dworkin suggests as making it likely that rational people would agree to paternalistic measures, are as follows:

1. when there are certain 'goods' which could be promoted by certain measures, even if they are not recognized by the subjects of those measures as being 'goods' at the time. He suggests health and education as being such goods, and compulsory attendance at educational institutes as the paternalistic measure promoting the latter. He makes no suggestion as to how the former might be promoted.
2. where someone is making an irrational weighting of values. This might be the case where one continues to smoke cigarettes in the light of the dangers of doing so, or when one refuses to fasten his seat belt. Of course there may be other explanations of such behavior, such as #3 below. It is implied by Dworkin that laws banning the sale of cigarettes and requiring the fastening of seat belts would probably be acceptable to rational persons as paternalistic measures to prevent the harm one might experience from having such irrational values.
3. where someone fails to act in accordance with his actual preferences and desires. Dworkin thinks paternalistic measures in such circumstances would be even more clearly acceptable than in the above condition (2), since "we are really not -- by assumption -- imposing a good on another person."<sup>9</sup>
4. where the decision is irreversable, e.g. suicide, or where

the act will result in some changes which will make it impossible to make reasoned choices in the future, e.g. taking certain drugs. He thinks rational people would agree to a cooling off period with respect to suicide, and (it is implied) that they would agree to the ban of certain drugs.

5. where decisions are made under extreme psychological and sociological pressures. The example he gives is suicide.
6. where someone is suffering from a temporary state, such as great fear or depression, that is inimical to the making of well-informed and rational decisions.
7. where the dangers in doing or not doing something are either not sufficiently understood or fully appreciated by the persons involved, where there are severe and undesirable effects and where the activity being prevented or required is not one which affects one's conception of the person he is, nor plays a very important role in his life. Fastening one's seat belt, he suggests, could be a required activity of this kind.
8. where the measures preserve and enhance for the individual his ability to rationally consider and carry out his own decisions.

It does at least seem plausible that fully rational individuals

would agree that some of the conditions listed above are ones under which at least some paternalistic measures would be acceptable, but whether or not they would agree to all those Dworkin suggests, or whether he has neglected to list others which they would find more amenable, is certainly an open and debatable question, as Dworkin himself recognizes. ("Of course as in any kind of agreement schema there are great difficulties in deciding what rational individuals would or would not accept.")<sup>10</sup> Nor is it clear whether the specific measures that Dworkin thinks might be agreed to would in fact be agreed to. For instance, would rational persons really think laws requiring the fastening of seat belts desirable? or those banning the sale of cigarettes or other drugs? But even if it were obvious to everyone what paternalistic measures fully rational people would agree to, why should that be considered relevant to what paternalism is actually justified? Why should I in my rather imperfect, fuzzy-headed, and at least sometimes irrational state, be concerned with what fully rational people might think acceptable? Why is their agreement morally relevant? I hope the answer to this doesn't appear to others to be so obvious that it doesn't warrant consideration, since it isn't obvious to me. Perhaps the answer is because that is what I would agree to if I were fully rational. But if that is the answer it would have saved time and energy if his principle had been stated in such terms in the first place, rather than bringing in the agreement schema. I think this principle looks as compelling as it

does because it is assumed that I will automatically want to do what I would do if I were fully rational. And for the most part I think that's true. But it is not true that I want to be forced by others to act in accordance with the paternalistic restrictions I would agree to if I were fully rational. And if I don't want to be so forced, what is the relevance of the hypothetical agreement of my rational self? The fact is that certain rights of liberty and freedom of action would be infringed; the supposition that I would agree to such intervention if I were fully rational is irrelevant. Of course if I agree or consent to suffer whatever paternalistic measures are seen to be in accordance with what I would agree to if I were fully rational, supposing someone could have such information, then we have a totally different situation, since it involves actual agreement of my actual self. I, for one, would not consent to such interference, but there are people who would.

Interestingly, with respect to children Dworkin does not appeal to what rational people would agree ought to be done to or for children, but rather to what the child will himself subsequently recognize to have been wise restrictions. He says, "There is, however, an important moral limitation on the exercise of such parental power which is provided by the notion of the child eventually coming to see the correctness of his parents' interventions."<sup>11</sup>

The requirement of actual consent, rather than hypothetical consent, seems to me to be a much more promising line in determining



when and why paternalism is justified, a principle which I develop in the third chapter of this paper. And I think many of the conditions that Dworkin submits as those which rational people would agree to are among those under which many people would in fact give their actual consent to interference, if not before some act (or proposed act) at least afterwards. It is for this reason that I find Dworkin's article of interest and importance.

Donaldson<sup>12</sup> argues that paternalism is prima facie wrong, but that there are three circumstances in which it would be at least morally permissible: (1) when there has been an informal (or, I assume, formal) contract to interfere paternalistically under certain specified conditions; (2) when there is an established social convention that paternalistic intervention will be forthcoming under certain conditions; and (3) when the subject is irrational. With respect to the first condition, Donaldson has in mind such things as someone asking a friend to intervene if he tries to kill himself while in a depressed state. He makes this 'informal contract' to protect himself against the undesirable consequences of contingent situations, such as depression. There is of course no reason why there couldn't be formal contracts for the same kind of protection. This condition is really very much like the notion of consent that we have already met in Rawls and Dworkin. However, Donaldson does not consider the possibility of someone consenting to paternalistic intervention after it has been engaged in. The third condition is supposed to cover such

people as children and the insane which makes me think that Donaldson really wants the concept of non-rational actions rather than irrational ones, since everyone acts irrationally at some time. If this is true then it really should read: when the subject is incapable of rational action. It is then, much like one of the two possible readings of Rawls' first condition, requiring evidenced absence of failure of reason or will, and suffers from some of the same difficulties. Donaldson's second condition -- that there are social conventions of paternalistic interference which lead people to expect and, we can assume, want such interference in the circumstances covered by the convention, thus making such interference acceptable -- is new and in my opinion important. The way in which it is important will be made explicit in Chapter 3.

Brown is concerned in his paper "The Rights of Children"<sup>13</sup> with determining why paternalism towards children is morally acceptable, while such interference with a sane adult is (he assumes) morally unacceptable. He suggests that the relevant difference is incompetence. But since there is no doubt that adults are often incompetent to make wise decisions about certain things which affect their well-being where such incompetence would not give anyone the right to interfere with that decision, it will have to be a special kind of incompetence which only children suffer from. Brown suggests that it is immaturity, and that this is something that children outgrow by some natural process. It is different from the mere acquisition

of skills through learning, and so in spite of educational opportunities (broadly speaking), or degree of intelligence (retardation being a special case) every child will reach the stage of maturity necessary to make paternalism inappropriate. If this is true then we can allow for some degree of incompetence in adults without that incompetence making it acceptable for others to interfere paternalistically, since it won't be the appropriate kind of incompetence, while still maintaining that it is incompetence -- the special kind arising from immaturity -- that makes our paternalistic interference with children acceptable. Similarly Brown thinks that we have the right to interfere with the actions and decisions of the insane for their own good because they are suffering from a special kind and degree of incompetence which arises from their insanity. He is careful to point out that immaturity does not affect all the decisions made by a child about his own good (or any other decision for that matter), and that where it does not affect his decision, i.e. where the child concerned actually has the competence to make the relevant decision, he also has the right to do so. And no doubt Brown would agree that this is true of the insane as well. The conclusion of this is that there is no problem justifying paternalistic interference with the decisions of a child or someone suffering from insanity where their respective incompetences would adversely affect their decision since in such cases they do not have the right to make the relevant decision. But where the decision of a child or an insane person would not be

adversely affected by his immaturity or insanity, respectively, he has the right to do as he sees fit without paternalistic interference; so such interference would be unjustified.

It is important to note that 'competence' is a dispositional term: abilities can be present without being employed. This is the case when the circumstances requiring them simply aren't present, or when, although a person has certain abilities, he doesn't call upon them, perhaps because he hasn't thought it necessary, doesn't want to be bothered, or is influenced by desire, passion, etc. This means that someone who is competent (i.e. has the necessary abilities) could do something incompetently (i.e., badly), or vice versa. Of course incompetence and incompetent decisions are related -- someone who is incompetent will generally make incompetent decisions. It is important for Brown's argument that it is a relatively enduring incompetence and not the incompetence (i.e. the inappropriateness, unwiseness, etc.) of decisions or actions that marks off those people liable to justifiable paternalistic intervention from those who are not liable to such intervention.

I have three objections to Brown's thesis. The first is as follows: according to Brown, the action of a child can be interfered with for his own good if his immaturity is responsible for it being ill advised. The child does not have the right to freedom of action in such a case. But if a child is about to do something counter to his interest not because of his immaturity, but simply because he

lacks certain relevant information, or because his value structure is different, or even inferior, or perhaps some other reason not arising from his immaturity, can we now interfere? And if so why? These are circumstances in which we might find an adult, but which would not give anyone the right to interfere with his freedom of action (at least according to Brown's assumptions). But since there is no difference in kind between the circumstances leading to an unwise action in the case of the adult and that of a child, what gives the right to interfere with the child's action? I think we would, at least at times, have the right to interfere, and I'm sure Brown would agree, but his theory offers no rationale for our doing so.

Secondly, Brown's theory makes paternalistic interference unjustified towards adults in some circumstances in which I think most of us would expect a theory to find it justified. I am thinking here of such a case as when a friend is depressed and is about to make a foolish decision which we feel sure he will regret when he gets over his bout of depression. Say he normally has the abilities to accurately assess the prospects of the future, and is particularly good at making plans which reflect his continuing interests and values. But while depressed he loses these abilities; he can no longer see the future with his usual perspecuity, and is about to make a decision which reflects his loss of this ability. Say he is going to quit his job and go to sea. I think that in such circumstances a friend using the appropriate coercion to stop him from carrying out such an idea

ought to be justified by a theory which purports to show where and when paternalistic interference is acceptable. I want to make it clear that the depressed person is not in such a state that he could be certified as insane, so he is not suffering from the kind and degree of incompetence that Brown thinks would justify interference with an adult. The fact that Brown's theory would not justify interference in the case cited does, I think, constitute a major objection to the theory, and a reason for looking for one which more accurately reflects and explains our intuitions in this respect.

My third objection has to do with the theory's empirical presuppositions and Brown's empirical speculations. It does seem right that at least certain kinds of insanity entail a special kind and degree of incompetence, different from the incompetences suffered by normal adults. But how plausible is the presupposition that there is some special kind of incompetence which children suffer from, which they grow out of by some natural process, which provides grounds for denying children rights that adults (even incompetent) ones have? Brown admits that he doesn't have the kinds of empirical knowledge that this presupposition depends upon, but he does think it makes sense of the distinctions we draw. Of course, neither do I have the empirical knowledge necessary to show the empirical presupposition either true or false. But I do find it implausible, and I don't think it is essential in providing a rationale for the distinctions we make. In fact I offer a theory in the third chapter

which does not need any such empirical presupposition. The reason I find the presupposition implausible is that I just don't see what kind of thing this 'immaturity' could be that is different in kind from simply learning how to get on in the world. I can think of no decision a child, at least one above some minimum age, would make, or act he would undertake, that an adult who had been sufficiently unexposed, reclusive, overly-protected, inexperienced, or whatever, might not also make or propose to do. In fact, I often see adults doing things that I did as a young teenager, where my immediate reaction is: My god, haven't they grown out of that yet? But they won't grow out of it; they will have to learn to behave differently, as they probably will when they have had the appropriate experiences.

Brown does speculate that it is something like the inability to make overall judgments -- the weighing of facts in a sensible way -- that is special about immaturity, and that it is an ability which one acquires naturally as one approaches adulthood. But I find the examples he gives which are supposed to illustrate the lack of this ability unconvincing. For instance, I don't think it is because we think a child is unable to exercise overall judgment in deciding whether or not to take drugs that we decline to allow him to make such a decision, as Brown maintains, but rather because we expect his values to be different, or even inferior, from ours. But, of course, this cannot be what justifies our interference with the child, since different, or inferior values for that matter, are something many

adults also suffer from, but which would not justify paternalism towards them. However, I do think that the fact that a child's values are likely to change, and that he will as a result regret some of the decisions made as a child, has something to do with why we feel justified in interfering with a child in circumstances where we feel inferior values are responsible for foolish decisions or actions. The precise role of these considerations in what I believe to be the justification of paternalism will be made clear in Chapter 3.

A natural suggestion at this point is that it is the propensity of children to be lured by present pleasure which justifies our interfering with such decisions as to whether or not to take drugs. This, it might be suggested, is what constitutes immaturity. The main problem here is that although it might be true that more children suffer from this fault than adults, it is still true that some adults never 'out grow' this attitude, and it is also true that some children don't suffer from it. I trust that these are fairly obvious empirical claims. This means that we don't have the difference in kind between adults and children that would justify paternalism towards the latter, but not the former. And it also means that for those children who demonstratively don't weigh present pleasures more heavily than future ones, we have to find some other rationale for not allowing them to take drugs if they decide to do so.

With respect to the other example Brown gives of a decision we would not permit a child to act upon -- deciding to quit school and



go to sea -- it seems to me that if it is an inability to make an over-all judgment that makes us unwilling to let a child make such a decision, that he has this inability because he has a narrow perception of the values involved, has a warped notion of what seamen do, and is in general not quite in touch with the reality of the situation. His inability to make an overall judgment then is grounded not in his inability to weigh the facts in a sensible way, but rather in his inability to correctly ascertain what the facts are. It seems likely that these are the kinds of things that are learned, rather than come about through some natural process of growth. And if they are learned some people will learn them sooner than others, and some will not learn them at all. Such disabilities cannot then be the grounds for justifying paternalism towards children, if one maintains at the same time that adults, even those lacking these abilities, ought not to be interfered with paternalistically.

Besides this I think the examples Brown gives which are supposed to illustrate the ability of a child to acquire particular skills or acuteness of judgment about particular things at an early age, in contrast to his supposed inability to exercise overall judgment, in fact tells against the view that he lacks such an ability. Taking Brown's example of a 10-year old child being trusted to babysit, I think such a responsibility at least at times -- certainly in emergency situations -- requires the ability to make overall judgments, and that we trust the child to make such judgments because we expect him or her

to arrive at decisions similar to those we would make. This is in contrast to the drug-taking example, where we expect the child to make a decision contrary to the one we think is wise.

It seems to me then that incompetence won't provide the necessary rationale and justification for paternalistic interference. But I do think that the concept has some important work to do in this area. What it is will become clear in the next chapter.

## Footnotes for Chapter 2

1. John Rawls, A Theory of Justice (Cambridge, Massachusetts: Harvard University Press, 1971), see especially pp. 249 - 250.

2. Gerald Dworkin, "Paternalism", The Monist, Vol. 56 (1972), pp. 64 - 84.

3. David Donaldson, "Fathers and Sons", unpublished paper.

4. D. G. Brown, "The Rights of Children", The Journal of Education, No. 17 (April 1971), pp. 8 - 20.

5. Rawls, p. 249.

6. Rawls, p. 250.

7. Mill, p. 152.

8. Dworkin, pp. 77 - 78.

9. Dworkin, p. 79.

10. Dworkin, p. 78.

11. Dworkin, p. 77.

12. Donaldson.

13. Brown.

### Chapter 3

#### Development of an Alternative Theory

Bearing in mind the suggested means of justifying paternalism which I have considered in Chapter 2, and the objections raised, I shall now attempt to develop an alternative theory which shows why and when paternalism is justified.

##### Section 1.

Two classes of action with which one may sometimes interfere on paternalistic grounds can be distinguished on the basis of whether the subject has or has not the prima facie right to perform that action. If the subject does not have the prima facie right to perform the action, there is no particular difficulty in justifying paternalistic interference -- the fact that it is paternalistic provides a prima facie justification and there is no reason to believe any further justification is required. It is for those actions which the subject has the prima facie right to perform that the problem of justifying paternalistic interference arises. I claim that the subject's welfare alone does not constitute a justification of interference, and therefore that any paternalistic act in such circumstances does itself require justification.

If we are to determine when paternalistic interference with someone's prima facie right is justified we must first determine when any kind of interference with a prima facie right is justified. I believe the following three conditions are the ones under which a

prima facie right can be interfered with, at least when the subject belongs to the central core of right-holders. (I leave for the moment the questions of what rights animals and mentally defectives have, if any, and under what conditions they can be overridden.) Though I offer no defense of these conditions, I conjecture that any theory of rights with the logical features we expect it to have will contain them.

1. when the interference with someone's prima facie right to do something is to protect someone else's overriding right;
2. when the possessor of the prima facie right alienates it;
3. when refraining from interference would result in sufficiently large total disutilities for other people.

The first condition is actually an analytic truth, but there are nevertheless theoretical problems with it: what makes a right an overriding right? How do we assess the relative importance of rights? There are similar difficulties with 3: how large must the disutilities be in order for interference with a right to be justifiable? There will probably be a significant number of cases in which it will be intuitively obvious when one right overrides another, or when the disutilities are sufficiently large to override a right, but there will be others in which it will be difficult to decide what one ought to do. But even where it is obvious that a prima facie right ought to be overridden by either another right or by the disutilities of

non-interference, there remains the problem of providing a rationale for the judgments made intuitively. The solutions to these problems belong to a theory of rights, and as such are too broad to be dealt with here.

It should be noted that I am assuming we are not being utilitarian about these problems. If we were, there would be no theoretical problems in either 1 or 3. And, I think 3 would be included in 1 since a utilitarian would argue that if the total disutilities of non-interference are greater than the disutility of interference, then that gives others the (overriding) right to interfere with another's prima facie right. I, for one, do not accept this analysis of rights, although I do think (as stated in 3) that (sufficiently) large disutilities will provide a justification for interfering with someone's prima facie right. I trust it is clear that I am not quibbling with the claim that people have a prima facie right to be protected from large disutilities, but rather with the claim that the assignment of rights is based solely on utilities.

Of the three conditions under which prima facie rights can be interfered with, 2, alienation of a right, is the only candidate for justifying paternalism and it is, I shall argue, a successful one. Neither 1, an overriding right, nor 2, large disutilities for others, are relevant in determining whether a paternalistic action is justified since we are by definition considering only interference for which the grounds are the subject's welfare.

The alienation of one's right to do a certain thing can be effected in either of the following ways (there might be other ways of alienating a right, but they will not be relevant to the question of paternalism):

1. one can give his previous consent for someone's interference with his freedom of action under certain specified circumstances;
2. one can give his subsequent approval of the interference, tacitly or explicitly; that is, one can subsequently consent to the interference.

Examples of 1 and 2 should make clear what I have in mind. Consider the following. A, knowing that once temptation presents itself he is likely to break his resolve not to buy cigarettes, asks B to prevent him from doing so before they enter a store. It would normally be impermissible for B to interfere with A's action, but because A has given prior permission for B to interfere in those circumstances, B is justified in doing so, regardless of B's protestations. A has alienated his right and thus relieved B from his obligation not to interfere; it is because he has done so that B is justified in his paternalistic action. This is a case of previous consent justifying paternalistic interference. As for subsequent consent, consider the following. A is going to commit suicide and B prevents him from doing so; some time afterwards A either explicitly thanks B for interfering, thus giving his consent for his doing so, or on the basis of

observation -- B doesn't again attempt suicide, is obviously happy to still be alive, etc. -- it is clear that B tacitly approves of the interference. He has in effect subsequently consented to the interference with his right to freedom of action, and thus alienated that right in the specific instance, after the act.

Consent, then is the important theoretical notion in determining whether a paternalistic action is justified, but there are some complications. Suppose someone (1) dies before he gets a certain piece of information which would have led him to give his consent; or (2) doesn't die too soon, but simply never gets a piece of relevant information which would lead him to give his consent; or (3) is making a logical blunder, which leads him to withhold consent, where he would otherwise give it. Are any of these situations morally relevant to the question of whether or not paternalistic interference is justified? Surely not; surely an untimely death, a logical error, or simply the lack of a piece of information are morally irrelevant to deciding whether such an act is justified. This being the case I offer the following condition as necessary for the justification of paternalism: the subject of a paternalistic act must give either his previous or subsequent consent to that action, explicitly or tacitly, or would give his consent if he had a relevant piece of information, (i.e. if he believed something that he does not now believe) or if he were not making a logical error. It is important though that the information be something which if the subject did have, given his



present dispositions, values, intellectual capacities, life style, etc. would lead him to give his consent. If this were not the case we would be invoking conditions which are morally relevant to determining the justifiability of a paternalistic action. For example, if the subject would consent upon receiving certain information only if his personality were changed in some way, then we no longer have simply the lack of information, but also the state of his personality. But this is a condition which is certainly not morally neutral.

(In the rest of this paper I shall often speak of simply consent being necessary for the justification of paternalism; this is to be understood as shorthand for the full necessary condition as given in this paragraph.)

The problem which now presents itself is similar to one I raised with respect to Rawls' position, viz: there is a special class of people towards whom paternalism is obviously justified, but with respect to which paternalistic acts would not fulfill the necessary condition for justification, i.e. where the subject will never give his consent. This, it seems to me, points to a natural division of the class of paternalistic actions into those in which it is reasonable to expect consent (under certain circumstances, yet to be made explicit) and those in which consent is unlikely to be forthcoming under any circumstances. These two classes are designed to be co-extensive with the division of subjects of paternalism on the grounds of competence, those people who are permanently incompetent being

co-extensive with the 'no-consent' class; those people who are not permanently incompetent being co-extensive with the 'consent' class.

It is difficult to be precise about who the incompetents are or what it is they are incompetent to do. The people I want included in this class are those whose grasp of reality is so weak that they are incapable of getting on in the world without direct and extensive outside help. They are those who are unable to understand or practice the most basic requirements of survival, and so whose lives would be in immediate danger if it were not for interference on the part of others. The mentally retarded -- at least those below a certain level -- and some types of permanently insane, e.g. those who suffer from delusions such as thinking they can fly, will undoubtedly fall into this class. Of course very young children will also be incompetent in this way, but only temporarily. Although this is all rather vague it should at least be clear what the distinction is that I wish to draw using the concept of incompetence.

The reason that the permanent incompetents will not likely come to approve of paternalistic actions towards them is that their state is unchanging -- their abilities and quality of judgment are not going to improve (by assumption) -- so there is no reason to believe that they will come to see the wisdom of someone's interference. On the other hand, with respect to those who do not fall into the class of permanent incompetents, we can obtain prior consent to paternalistic interference, or expect subsequent consent to be forthcoming under

certain conditions, e.g. if the situation is such that their assessment of it is likely to change, or if their state is such that it is likely to change in such a way as to alter their assessment of the relevant situation. Having made this distinction, I shall set aside the class of permanent incompetents for later consideration (Section 5) as they raise special difficulties, and direct my attention to the class of competents. Until such time as it is explicitly stated, my remarks are to be understood in what follows as being directed towards that class.

It will be remembered that I have argued that only consent, given before or after an act of paternalism, or the disposition to consent upon the receipt of certain relevant information, or the correction of a logical blunder, will justify that interference. Prior consent poses no problem for the person engaging in paternalistic interference; he knows that under the specified circumstances he can justifiably interfere because the consent of the subject has already been given. But what of someone who is faced with a situation in which paternalistic interference with another's action is an open option, but where prior consent has not been given? How is he to decide whether or not to interfere? The decision, I suggest, should be made on the grounds of the likelihood of subsequent consent. If the agent judges that it is at least reasonably likely that his interference will meet with the subsequent consent of his subject, then his act would be subjectively justified. Of course, whether it is

objectively justified depends entirely on whether or not the subsequent consent is actually given, or would be given upon the receipt of certain information, or the correction of a logical error. One might want to temper the requirement for subjective justification in the following way: how sure one should be that consent will be forthcoming will vary inversely with how severe the consequences of non-interference would be. That is, if the consequences would not be very harmful, then there must be a good chance of subsequent approval, but if the consequences would be very bad indeed, then it would be sufficient if there were a small but significant chance of subsequent consent. This modification seems reasonable, but I'm not sure what its moral rationale would be, or whether it needs one.

But how does one judge the likelihood of subsequent consent? Although there is no precise answer to this question, I think there are a number of conditions which will be relevant in making such a calculation. I can't, by the nature of the case, offer an exhaustive list of mutually exclusive conditions, but I think the list below contains most of those which are interesting, important, and central. Each condition will be commented on in some detail below.

1. whether the paternalistic action is in accordance with the permanent aims and preferences of the subject;
2. whether the proposed subject is in a temporary state of relative incompetence;
3. whether refraining from interference would result in large

disutilities for the person concerned, or whether engaging in interference would result in significant utilities;

4. whether the decision or action has harmful consequences which are irreversible;
5. whether the circumstances in which the paternalism is engaged in constitute an emergency;
6. whether certain social conventions obtain.

The first condition is of special importance, since if the paternalistic act were not in accordance with either his permanent aims and preferences (assuming someone could think they were doing something for his own good where this was true) it would be very unlikely to meet with the subject's subsequent consent. So, this condition is one which will always have to be fulfilled if there is to be a reasonable chance of justification of the interference; this is true whichever of the other conditions obtain. I conjecture that this is a logical truth. For although it is possible that consent be forthcoming even though the subject's permanent aims and preferences are neither maintained nor furthered, consent must usually be accompanied by their maintenance or furtherance, otherwise there is no sense in saying that the subject has permanent aims and preferences. There is no such logical relationship between consent and any of the other conditions. However, it will be true in general that with an increase in the number of the other conditions which are fulfilled follows an increase in the probability that the subject of a paternalistic action

will give his subsequent consent. For example, if 1, 2, and 3 are fulfilled there will generally be more chance of paternalism being justified than if only 1 and 2 are fulfilled, and less chance of paternalism being justified than if all of 1, 2, 3, and 4 were fulfilled. But this will not always be true, for if the disutilities are tremendously large, then there might be more chance of subsequent consent if only 1, 2, and 4 were fulfilled than if 1 through 4 were fulfilled and the disutilities were significantly less. Obviously it depends on the precise nature of the surrounding circumstances and exactly what the subject proposes to do and what must be done to prevent him.

The 'permanent aims and preferences' condition is both a negative one, indicating the kinds of things one ought to avoid if one wants his paternalistic action to be justified, as well as a positive one, indicating the kinds of things that, in the appropriate circumstances, it would be proper to promote. A person's permanent aims and preferences will include those things which he plans and strives for in the broad outline of his life plan, such as having a family, being a competent pianist, and a good professor. They will also usually (but not always) include the primary goods -- those things that most people want no matter what else they want, such as well-developed intellectual capacities, physical and mental health, sufficient wealth, and probably other things. Because this is true, if more specific permanent aims and preferences are unknown, the

primary goods are the safest things to promote, because they will probably be among the subject's permanent aims and preferences. It is possible of course for one of the primary goods to actually be contrary to one of someone's permanent aims and preferences. If this is the case then obviously if an agent wants his paternalistic act to be justified by subsequent consent, he should act in accordance with his subject's expressed permanent aims and preferences, and not the particular primary good; his subject would rightly consider it irrelevant what most people want, and give his consent only if the interference was in accordance with what he in fact wants. Because it is possible for a primary good to be contrary to one of a subject's permanent aims, there is a better chance of consent if one is able to act in accordance with known permanent aims and preferences than if these are unknown and one has only the primary goods as guidelines.

It is particularly important that this condition be fulfilled, not only because, as pointed out above, it is highly unlikely that consent will be forthcoming if the interference is not in accordance with his permanent aims and preferences or the primary goods, but also because if someone were to purposely act contrary to these guidelines the subject would rightly see the interference as simply an assault on the integrity of his person.

This condition is basically one of those offered by Rawls, but it can also be seen that Dworkin's condition #8 -- the measure preserves

and enhances for the individual his ability to rationally consider and carry out his own decisions -- would be included in it, since what is being preserved or enhanced is one's intellectual abilities -- one of the primary goods.

Condition 2 is about incompetence. I am concerned there not with the distinction between those who suffer from a severe permanent incompetence -- I am still concerned only with those who are not permanently incompetent -- but those who are suffering from a temporary incompetence relative to their usual state. Temporary insanity or emotionally crippling states are examples of states in which an adult would be less competent than usual. We know by empirical observation that such people don't have the abilities necessary to make decisions as wisely as they do and would make if they were not in such a state. Their perception, assessment or appreciation of relevant facts, weighing of values, and other intellectual abilities are inferior to what they usually are, and their emotional outlook will often be warped. Such inabilities are liable to result in decisions that are not only foolish or harmful, but ones which a person would not have made if he had not been in an incompetent state and which he would therefore have reason to regret. Because this is true there is a good chance that interfering with a decision of a relatively incompetent person when it would have bad consequences for him will meet with his approval once he has regained his competence.

Similarly, we know from empirical observation that a child's



ability to assess or appreciate relevant facts, weigh values, etc. are inferior to what they will be when he is an adult (although he may as a child be as competent as some other (competent) adult). And we can account for this simply by the fact that children haven't been around long enough to develop their potential abilities or had enough experience in getting on in the world. Of course the longer one lives the more experience and knowledge one gains, experience which is no doubt expressed to some extent in one's decisions. But children are going through an incredibly rapid period of learning, and thus change, which, if I may make an empirical speculation, levels out in our society somewhere around the age of 18. (My guess is that this is culturally determined to a rather great extent.) And because their abilities are inferior they are likely to do things which they (as adults) would think foolish. This means that paternalism towards the child has a good chance of meeting with the subsequent approval of his adult self, since with the development of his abilities and judgment he will, we hope, see the wisdom of our interference.

It is worth pointing out that Dworkin's conditions #5 and #6 are subsumed under my condition of incompetence. They are, respectively, where decisions are made under extreme psychological and sociological pressures; and where someone is suffering from a temporary state, such as great fear or depression, that is inimical to the making of well-informed and rational decisions. Such conditions are ones which affect the competence of the person suffering from them, and it is

for this reason, I believe, that they are important -- they come under one of the conditions which is relevant to determining the likelihood of the subject of a paternalistic act consenting to it.

The third condition will usually be relevant when the subject is temporarily incompetent relative to his usual state, so I shall consider such cases first. It is concerned with two different circumstances in which one might consider acting paternalistically:

- (1) when large disutilities would result from non-interference; and
- (2) when one's interference would result in large utilities. There will of course be times when one could do both -- prevent disutilities and at the same time promote certain utilities. The latter of the two will be of importance when the subject is a child, and the former will be of importance when the subject is either a child or a temporarily incompetent adult. This is because the opportunity for interfering with a temporarily incompetent adult on the grounds that he will benefit from your doing so, rather than because he will harm himself if you don't, will seldom arise, and even if it did and one took the opportunity to interfere, this would probably not meet with his approval upon recovering his competent state. For he can promote his own welfare in his own way when he is again competent, and doesn't need to be forced to do so while incompetent. This is often not true of children, since many of the things that parents do to promote their children's welfare are things which the children would not be able to do once they were adults; the opportunity would have passed.

And even where this is not the case, the advantages of having been forced as a child to do something which could be done as an adult are often obvious. For these reasons, promoting utilities when the subject is a child will often have a fairly good chance of meeting with subsequent consent.

On the other hand, if a temporarily incompetent adult or a child is prevented from doing something which would result in large disutilities then it seems likely that upon recovery of his competent state, or upon reaching adulthood, respectively, the subject will be happy that he didn't do what he proposed, and thus will approve of the interference which prevented him, provided of course, that the means used to prevent his action were not more undesirable than the results of his unhindered action would have been. But if the disutilities would have been small, then, (even if the interference constituted a smaller disutility) there would be much less chance of his being thankful for the intervention. There might of course be some other prevailing condition, such as irreversibility, which would give us independent reasons for believing consent would be forthcoming even though the disutilities of non-interference would not have been very great.

There will also be cases where, even when someone is in his usual competent state, if non-interference would result in large disutilities one could feel fairly sure that his interference would meet with subsequent consent. Such cases would be ones in which the

subject lacks a piece of relevant information which he will have at some point in the future. For instance, say it is true that there is a hell where one burns for eternity unless one says the appropriate words before death: "I accept Christ." And we know it, but many other people don't believe it, and what's more, refuse to say, "I accept Christ," before death, thereby guaranteeing their eternal burning. Now, in such circumstances, and assuming that after death each person will come to know the truth, we could count on gaining the consent of each person for the interference which prevented him from going to hell. But of course even if he never got the relevant information, the fact that he would consent if he did get it would render the paternalistic interference justified.

The fourth consideration actually combines two conditions: disutility and irreversibility; obviously if an act did not entail disutilities as well as being irreversible, there would be no reason to interfere with it. It might be thought that this condition doesn't really add anything to the previous condition of large disutilities because an act with irreversible harmful consequences will always result in greater disutility than that same act would if its consequences were not irreversible. But I don't think it is redundant, since interference with some irreversible acts will meet with the subsequent approval of the subject, even though the disutilities of the act would actually have been smaller than would usually be needed to gain the subsequent consent for interference. This will be true

simply because a person will often be grateful not to have done something which he realizes would have been irreversible, even if the disutilities of doing so would not have been very great. And if he would be grateful, and there are no other conditions which would lead him to withhold his consent, then it is reasonable to expect that his consent will be forthcoming. In this way the irreversibility of an action will play an important part in determining the probability of subsequent consent.

The fifth condition refers to emergency situations. There are of course a number of different kinds of emergency situations, but the one which is relevant to the question of paternalism is one in which the subject is about to do something, the dangerous nature of which he is unaware, and of which we haven't time to warn him. Stopping someone from crossing a bridge that is, unknown to him, about to collapse is a case in point. Once it is explained to our subject why we tackled him as he was about to step onto the bridge, it is highly likely that he will approve of our having done so. But if he is aware of the potential danger of walking on it, and while fully in possession of his senses still wishes to do so, then we have no reason to believe our interference would meet with his subsequent approval, and ought therefore to refrain.

The last condition is the one, of the three offered by Donaldson, which I thought to be of importance. The suggestion is that if there is a social convention of interfering with a particular kind of action

which is deemed harmful to the individual, then in the circumstances covered by that convention, people might expect, and in fact count on, such interference. A certain class of attempted suicides would, I think, be covered by such a convention. I am thinking of those cases of suicides which are really a cry for help and not those in which someone is either seriously interested in ending his life, or where he is in a state of relative incompetence in which it is impossible for him to assess his situation accurately. People do typically interfere in the latter two cases, not because of their recognition of a convention of doing so, but either because they think a person ought not to take his life under any circumstances, or because the person proposing to do so really isn't in a state in which he can make a reasoned decision about the matter. But for those people who are using a suicide attempt as a cry for help -- in effect saying, "Things are going terribly for me, please help," -- others might interfere because they recognize the convention of doing so. They understand the attempt to be what it is -- a cry for help -- and respond in the appropriate manner, i.e. with interference. We can assume that the potential suicidee is aware of the convention and is acting in accordance with it and expects others to do their part, i.e. stop him from taking his life. And if this is the case, if the subject is acting in accordance with the convention, then we can count on his subsequent approval.

There are I think certain special kinds of relationships in which

more paternalism is justified than we would normally expect, i.e. when the circumstances don't really have to fulfill any of the conditions under which we would normally expect approval. I am thinking here of such relations as between husband and wife, lovers, and perhaps siblings. These are very complex kinds of associations, and it isn't clear of what they consist, so I'm not able to say why they allow more paternalism than would normally be expected. But I think they quite clearly do. For example: say I have some complaint like aching knees. I ought to go to the doctor to see what the problem is, but because I hate going to doctors, don't go. They get bad enough that my lover becomes concerned. He decides I'm going to the doctor; he gets my coat and boots, insists I put them on, and that I get into the car so he can drive me to the doctor. I'm not going to have a fight about it, but do all these things grudgingly, wishing he'd just leave me alone. After seeing the doctor, I realize that it was a good thing that he interfered in that way, and so approve of his actions. I think it's true that if anyone else tried that, I should refuse to budge. But, if they succeeded in forcing me to a doctor, I should not give consent for that interference. I trust this isn't merely autobiographical but points to a real, though unexplained, difference between this kind of relationship and others not of this class.

## Section 2.

I have only argued so far that consent is a necessary condition

for the justification of paternalism, but have not considered the question of whether it is a sufficient condition. I shall be considering this problem in its negative form: when is consent not a sufficient condition for the justification of paternalism? In order to answer this question I have to introduce a new technical tool, namely, a more detailed analysis of rights. Doing so has the additional benefit of allowing me to show how what I have already said about the justification of paternalism fits under an analysis of rights which has independently much to recommend it.

A type of circumstance in which consent is not a sufficient condition is exemplified by a situation envisaged by Rawls, viz: "... imagine two persons in full possession of their reason and will, who affirm different religious or philosophical beliefs; and suppose that there is some psychological process that will convert each to the other's view, despite the fact that the process is imposed on them against their wishes. In due course, let us suppose, both will come to accept conscientiously their new beliefs";<sup>1</sup> and, we will assume, approve of the process responsible for their coming to have such beliefs. We must also assume, in order for the act to be paternalistic, that this was done because it was thought to be for the subject's good. Now we certainly don't want to say that such interference with one's beliefs was justified.

Tooley<sup>2</sup> has offered an analysis of rights and what constitutes a violation of a right which provides a rationale for holding that



under certain circumstances, consent, even though it is, as I have argued, a necessary condition for the justification of paternalism, is not a sufficient condition. Because his analysis plays an important part in what follows I quote it in full:

"Individual A has a right at time  $t$  that state of affairs  $S$  obtain at  $t^*$  if and only if it is the case that if A were to desire at time  $t$  that  $S$  obtain at time  $t^*$ , then, in virtue of that fact alone, other individuals would be under a prima facie obligation to refrain from preventing state of affairs  $S$  from obtaining at time  $t^*$ . ... An action can constitute a violation of A's right at time  $t$  that state of affairs  $S$  obtain at time  $t^*$  if and only if one of the following conditions obtains:

- (1) the action is performed at time  $t$ , it prevents state of affairs  $S$  from existing at time  $t^*$ , and individual A desires at time  $t$  that state of affairs  $S$  obtain at time  $t$ .
- (2) the action is performed at some time  $t'$ , it prevents state of affairs  $S$  from existing at time  $t^*$ , and although individual A is incapable of desiring at time  $t'$  either that  $S$  obtain or that  $S$  not obtain at time  $t^*$ , A did desire at time  $t$  that  $S$  obtain at time  $t^*$ , where  $t$  is the moment of time immediately preceding the time interval in which A is incapable of desiring either that  $S$  exist or that  $S$  not exist at time  $t^*$ .
- (3) the action is performed at time  $t'$  and prevents state of affairs  $S$  from obtaining at time  $t^*$ , and although individual A does not desire at time  $t'$  that  $S$  obtain at time  $t^*$ , either because A is incapable of having the desire at that time, or because there is some relevant information that A does not possess at that time, there is some later time  $t$  at which A will exist and at which he will desire that state of affairs  $S$  exist at time  $t^*$ .
- (4) the essential idea [of this condition] is simply that actions to which an individual does not object -- either because he is incapable of desiring at the time that they not occur, or because he lacks relevant information, or because his desires have been "warped" by psychological or physiological factors -- may nevertheless violate his

rights if there is some time at which he is or will be capable of wishing that the action had not been performed, and at which time he would so wish if he had all the relevant information and had not been subjected to influences that distorted his preferences."<sup>3</sup>

Although I'm not entirely satisfied with the details of these conditions they are, I think, basically correct. They show that an action can violate an individual's rights by frustrating a corresponding desire he has now, had some time in the past, or will have some time in the future, or would have if he had certain relevant information, or if it were not for psychological or physiological factors. I think we should also add that there is a violation of a right if an action violates a desire that the subject would have if he were not making certain logical errors.

The first condition will cover the most usual cases of paternalistic interferences: the subject desires to do something and is prevented at that time from doing so by someone else (or the subject desires not to do something and is coerced into doing it). But the fourth condition, or rather a modification of the fourth condition, is of utmost importance in arguing that a right has been violated in certain important cases of paternalism, such as the one quoted from Rawls on p. 67.

It will be remembered that the fourth condition states basically that those actions to which the subject does not object, but to which he would object later if it weren't for the fact that he lacks relevant information, or that his desires have been warped by psychological or

physiological factors, constitute a violation of the subject's right.

I modify this to make an additional condition which reads:

(4') If someone later approves of an action to which he objected at the time, but of which he would not have later approved if it were not for one of the following factors, then that action constitutes a violation of his right:

- a) his desires have been "warped" by psychological or physiological factors;
- b) he lacks certain relevant information;
- c) he is making logical blunders.

This means that in spite of the subsequent approval of the subject in the belief-changing example cited from Rawls, the interference would still constitute unjustified paternalism.

This condition (4') is also useful in showing that certain paternalistic measures which children are subjected to are unjustified even though they may come to approve of them. A problem arises because which paternalistic measures a child will come to approve when he is an adult will depend, in part, on how successful his parents or others were in inculcating their beliefs and attitudes. If they were very successful he may not dissent from certain kinds of treatment which in effect impaired his abilities to lead a full and happy human life or which were undesirable for other reasons. For instance, he might come to approve of the pressures used to force him into the mould of a narrow religious sect which forbids various kinds of artistic endea-

vors and inhibits the full development of various intellectual skills; he now accepts the tenets of the religion, and has been trained to be the kind of person who does not value these things. I appeal to what Rawls calls the Aristotelian Principle in arguing that in this case a right has been infringed: "... other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized or the greater the complexity."<sup>4</sup> It follows that people will generally prefer to do those things that require more highly developed abilities, and that if they do not prefer them they would do so if given the right opportunities. So we can assume in this case that the child would have preferred to have developed artistic and intellectual skills had he been allowed to develop them. The fact that he subsequently consents to the paternalistic measures used to inhibit these abilities does not count as an alienation of his right not to have been subjected to them, because he would not so approve if his preferences had not been "warped" by those measures, i.e. because of the 4' condition. (There will no doubt be times when it will be difficult to decide when someone's preferences have been "warped". Whether an individual approves of treatment which made him a less happy individual than he might have been, will often be a guide to whether his preferences have been warped, but this will not always be the case. Such judgments, at least sometimes, will involve substantive moral issues which I cannot possibly go into here.)

One may conclude that consent, or the disposition to consent either upon receipt of certain information, or upon the correction of logical errors, is a necessary condition for justified paternalism, and that it is also a sufficient condition, except in those circumstances covered by the condition 4'.

### Section 3.

There are two natural objections to this theory of paternalism which I would now like to consider. The first involves a case exemplified by the following. We have a very unkind individual as manager of a factory where his influence perpetuates various rules and regulations which cause considerable and unnecessary hardships for the workers. While he is on holidays, he becomes unusually big hearted and decides to give orders for the unpopular regulations to be withdrawn. He gives a companion, say a business associate, a letter containing the orders. But his companion, being fairly sure that once the manager goes back to work he will not only regret his decision, but will suffer considerable anguish because of it, decides not to mail the letter, thus preventing the manager from carrying out his wishes. We may suppose that, upon his return to the factory, the manager discovers what his companion has done and approves of his interference. We have here a case of justified paternalism, according to the thesis I have developed. But one might object, surely his companion should not have interfered, since it would have been better for

all the workers if he had not done so. To this I can only agree. I have maintained that this is a justified paternalistic action, not that it is a justified action, all things considered. Whether one ought morally to engage in paternalism will depend not only on whether the action is or will be consented to, but also on other moral considerations, such as how it will affect other people. Sometimes one will conclude that all things considered one ought not engage in an act that would be justified paternalism.

The second possible objection involves a case the basic form of which is as follows: if an action is interfered with, the subject will never have the experience necessary to see that it would have been a foolish thing to do and so would never consent to the interference, but if the action were not interfered with the subject would at some later time regret it, and would wish that someone had prevented him from doing it. For example, say a man wants to try heroin, but his wife, believing it is a very harmful thing to do, objects, and threatens to leave him if he takes it, hoping that her threat will stop him. Her threat works and her husband never takes heroin, but he also never approves of her interference. However, if she hadn't interfered, there would have been some later time when he would have regretted starting to take heroin, say while suffering withdrawal and would have wished that his wife had interfered. If we could stretch 'does not have certain factual information' to include 'not having a relevant experience' we could perhaps include this case as one of

those justified under my theory, by saying that her husband would consent if he had certain information. But I don't think we can (or should) stretch it in this way, which means that paternalism in this case (and similar ones) would be unjustified. This does perhaps run counter to some people's intuitions on the subject, but I am not attempting to present a theory which accords with everyone's intuitions, although if it clashed with certain central ones this might tell against it. With respect to this intuition, however, I stand by my theory and against the intuition. If one doesn't have the right to make mistakes, one doesn't really have the right to freedom of action. But I, and I assume most others, think that people do have the right to freedom of action, and so must admit that they have the right to do things which might prove personally harmful. Unless there exists one of the conditions under which a prima facie right can be overridden, interference with such actions would be unjustified.

#### Section 4.

I have been mainly concerned, in what has gone before, with interpersonal paternalistic action, and have not mentioned how the thesis I have developed applies to paternalistic legislation. The general form of the argument should be clear: paternalistic legislation is only justified if those towards whom it is directed consent to it. But because it is directed towards a body of people who may disagree on whether or not there should be such legislation, there are complications.

If the majority of the people want a piece of legislation, say making heroin illegal, because they think people shouldn't be allowed to take drugs which (they believe) are harmful, then we have a case of unjustified paternalism. They are interfering with the freedom of action of those who want to take heroin on paternalistic grounds, and they haven't the consent of those people to do so. But, if on the other hand, the majority of the people agree that they shouldn't be paternalistic towards others, but still do not want heroin readily available because of the danger of they themselves yielding to the temptation of taking it, then legislation which made it relatively difficult to get ahold of -- say requiring a doctor's prescription -- might well be morally justified. The majority of the people want the legislation as a safe-guard against weakness of the will, and are simply making others who do not want it, make a sacrifice for them -- the legislation would not actually be paternalistic for that minority. Of course it is paternalistic towards the majority who want it (justifiably so, because of their consent) because there will be times, such as when they are suffering from weakness of the will, when they would like heroin to be readily available, and it won't be because of the legislation. It isn't entirely clear under what conditions the minority can be asked to make such sacrifices for the majority -- I suppose it will depend partly on how great the sacrifice is and how important it is that it be made -- but it is conceivable that the kind of legislation I have suggested would be justified.



It is also important to distinguish between legislation that is paternalistic -- that is, requires at least some of the people to do something for their own good which they do not at some time want to do -- and that which may appear to be paternalistic but is in fact not so. For instance, if most people want something like medicare to be instituted, then it is non-paternalistic to comply with their wishes, since they are not, at any time, being forced to do something they do not want to do. And it is non-paternalistic towards those who do not want it, even if they are required to opt into the scheme, since they would be required to do so (we can assume), not because it is good for them that they do so, but because it is necessary that everyone join if the scheme is to work satisfactorily, or perhaps because it requires less complicated bureaucratic machinery, and thus less expenditure of funds, if everyone is included. There is, of course, still the question of whether it is morally acceptable that those who do not want medicare be required to sacrifice their freedom of choice in order that the majority may benefit. I conjecture that in such a case the sacrifice would be mild enough, and the benefits would be great enough, to warrant the sacrifice.

So, whenever one is deciding whether a piece of (apparently) paternalistic legislation is justified one must first determine whether the legislation is actually paternalistic; and if it is, then it is essential to determine towards whom it is directed, and whether they have consented to it, or are likely to do so in the future.

## Section 5.

This section is concerned with those people who I described earlier as permanent incompetents. It will be remembered that they are people whose grasp of reality is so weak that they are incapable of getting on in the world without direct and extensive outside help. They include the mentally retarded -- at least those below a certain level -- and some types of permanently insane. Because their state is unchanging it is highly unlikely that consent will ever be given for paternalistic interference. How then do I account for the fact that paternalism is so obviously justified towards this class of people?

Before considering the answer to this question I would like to make a distinction between rights to do -- action rights -- and rights to receive. The former will include such things as the right to walk down the street at night, buy liquor, drive a car, and even scratch, etc., while the latter will include such things as the right to a fair trial, medical care, education and food.

Now, although the situation is still unclear, I conjecture that action rights are in some way tied to certain abilities -- the ability to appreciate certain information, or the consequences of actions, the ability to form relevant concepts, and perhaps other intellectual abilities -- as well as the ability to distinguish between reality and fantasy, in a way that is not true for rights to receive. And if this is true then the permanent incompetents will either have a small

sub-set of action rights -- those for which they do not require any of the abilities they lack -- or they will have the full range of action rights, but those for which they require certain abilities will be of a weakened variety, watered down in such a way that they do not require the same conditions to override them as are required when they are held by people who are competent in the relevant ways. If the former of these suggestions is true then such people will have the prima facie right to scratch themselves whenever they feel the need, but they would not even have the prima facie right to jump out of a window if they desired to do so, or to not eat, or whatever. And if they don't have these rights then we do not have to worry about justifying paternalism in cases involving them. If, on the other hand, the latter suggestion is true, then permanent incompetents will have the prima facie right to jump out the window as well as other rights, but they will be such that they can be easily overridden by such considerations as doing so might result in a broken leg, or perhaps even that doing so would cause those who look after them considerable work and anxiety. At any rate, there need be no further justification of the interference with a permanent incompetent's action other than that it was for his own good; the paternalism will not itself need justification. Consent, then is simply unnecessary when an incompetent's action is being interfered with on paternalistic grounds, when the decision to do or not do the act requires abilities he doesn't possess.

These are mere conjectures -- I haven't at this stage philosophical arguments to back them up, nor do I have any clear intuitions as to which of them might be correct. However, I do have some inclination towards the latter, because it fits with my views on animals. Some animals (at least those above a certain evolutionary stage) do, I think, have action rights, but I don't think they are the full-fledged action rights possessed by competent people; rather theirs would be watered-down much as are those of the incompetents. And the reason could be the same: they lack certain essential abilities that would make them full-fledged. Perhaps there is some kind of sliding scale of the relevant abilities from competent people, to incompetent people, to the higher animals, to the lower animals, which matches a sliding scale of action rights from the full-fledged ones right down to none at all. This might result in worms having no action rights whatsoever, while horses have prima facie action rights which might be overridden fairly easily. So, for instance, if a horse does not want to go for a ride up the trails his prima facie right not to do so might be overridden simply by such facts as we take care of the horse, treating it in the best manner we know, we would like to go up the trails, and it won't hurt the horse to do so. But, on the other hand, if the horse wants to go outside and there is absolutely no reason why he should not do so, then we would be infringing on his right if we were to refuse to let him out.

It is also true, I think, that viewing the rights of incompetents

as watered-down versions of those that competents have, fits better with Tooley's analysis of rights, while the suggestion that they have a small sub-set of action rights would require some revision. This would probably take the form of adding another condition for the class of action rights (Tooley's analysis remaining basically the same for rights to receive) specifying that certain abilities are necessary for the possession of these rights. The form of the analysis would then be two necessary conditions which are jointly sufficient for a creature to have an action right.

#### Section 6.

In summary I have argued that paternalistic acts are in need of justification where the person who is being interfered with has the prima facie right to do the thing in question. If this is a full-fledged prima facie right, i.e. if it belongs to the central core of right-holders, then consent, either before or after the paternalistic act, given implicitly or explicitly, or the disposition to consent upon receipt of relevant information or recognition of a logical error, is a necessary condition for justification. It will also be sufficient except in those cases where consent is only forthcoming because the subject has been "warped" in certain relevant ways, lacks relevant information or is making a logical error. For those cases where previous consent has not been given I offer a number of conditions as guidelines for deciding the likelihood of subsequent consent. Finally I show how the theory I have developed applies to paternalistic legislation.

## Footnotes for Chapter 3

1. John Rawls, A Theory of Justice (Cambridge, Massachusetts: Harvard University Press, 1971), pp. 249 - 250.
2. Michael Tooley, in the Correspondence, Philosophy & Public Affairs, Vol. 2, No. 4 (Summer 1973), pp. 419 - 432.
3. Tooley, pp. 426 - 427.
4. Rawls, p. 426.

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