

# How Not to Argue Against Paternalism

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## 1. Introduction

Paternalism “is the theory or principle that recognizes the need to prevent self-inflicted harm as a legitimizing reason for coercive legislation.”<sup>1</sup> Many liberal theorists have strongly antipaternalistic intuitions, some to the point where they believe the state should play no role in protecting people for their own good, that is, the state should play no role in protecting persons from their voluntarily assumed self-harmful actions. This is not to say intuitions are all liberal opponents have to offer—this essay will examine three (unsuccessful) strategies for delivering a principled argument against paternalism. The aim of this essay is primarily negative. I will not attempt to canvass why liberalism might require principled opposition by way of outlining a more promising set of arguments against paternalism.

I must emphasize the view these strategies argue against is hard, not soft, paternalism. Soft paternalism holds that, in the absence of competing moral factors (such as the paternalized agent’s obligations to others) interference is proper only with those: (1) whom we know to lack sufficient ability to make informed and voluntary decisions vis-à-vis the harmful action or omission, or (2) for whom we do not have sufficient evidence of their ability to do such.<sup>2</sup> A famous example of soft paternalism figures in John Stuart Mill’s “bad bridge” case.<sup>3</sup> In this case, we are permitted to restrain a person set to cross a dangerous bridge in order first to ascertain whether he is aware that the bridge is dangerous, and to ensure that he is not in some delusional or distressed state that negates his ability to make a voluntary decision to cross it. Either way, we are not permitted to continue restraining the person if we obtain sufficient evidence of his voluntariness. Soft paternalism claims we would be wrong to continue restraining an informed person, all else being equal, should he voluntarily decide nonetheless to risk a

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<sup>1</sup> Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), p. 8.

<sup>2</sup> *Ibid.*, pp. 12-16.

<sup>3</sup> J. S. Mill, *On Liberty* (New York: Penguin, 1986), p. 111.

## Reason Papers Vol. 30

foolish crossing. This is because soft paternalism holds “that the law’s concern should not be with the wisdom, prudence, or dangerousness of [a person’s] choice, but rather with whether or not the choice is truly his.”<sup>4</sup> A significantly less than voluntary act may not even proceed from a person’s own free and informed choice, so it cannot be said to be *his* choice. Acts that proceed from unforeseen ignorance, delusion, or psychological compulsion may be considered as foreign to a person’s will as would acts that proceed from external coercion or threats. By contrast, hard paternalism holds that, in the absence of competing moral factors, interference is still sometimes proper even with those persons whom we know are making voluntary and informed yet self-harmful decisions. Hard paternalism thus takes a position on what would be worthwhile or best for a person to do, sometimes against what that very person judges to be worthwhile or best for himself. Unlike the soft paternalist, a hard paternalist may restrain Jones from crossing a dangerous bridge *despite* the fact that he knows Jones is well-informed of its danger, and voluntarily intends to proceed anyway. He may restrain Jones for a variety of rationales: foolishly risking one’s life is a crime against nature, one has a legally enforceable duty to preserve one’s life, Jones’s reckless decision to cross irrationally undermines his own settled ends and values, etc. Some of these rationales may not fit well in a liberal polity—for instance, religious or natural law justifications. But other rationales such as certain self-regarding duties—or the appeal to one’s own good reason(s)—to promote one’s good provide significant challenges that any argument against hard paternalism must counter, since these rationales are shared by a significant number of liberals.

Some arguments against hard paternalism<sup>5</sup> fail to be persuasive. These defenses attempt to show that paternalism is generally self-defeating, autonomy-diminishing, productive of more harm than good, etc, and that is why we should not have paternalistic laws or policies. In what follows I reject three commonly used arguments as inadequately meeting the paternalist’s challenge. Particularly, they fail to show on their own terms that (allegedly) paternalistic interference is always wrong. These arguments face, moreover, what I call the “conceptual space problem.” This problem stems from the argumentative strategy of trying to show that allegedly paternalistic interferences normally defeat the purpose of protecting an agent’s good. If one successfully deploys this strategy, the very success reveals that his intended target is not a truly *paternalistic* interference. For if one can show

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<sup>4</sup> Feinberg, *Harm to Self*, p. 12.

<sup>5</sup> I will henceforth use “paternalism” as shorthand for “hard paternalism.”

## Reason Papers Vol. 30

the interference fails (directly or indirectly) to promote an agent's good better than does absence of the interference, then its failure to promote the agent's good also fails to render it a genuinely paternalistic interference. I must emphasize, however, that the conceptual space problem pertains only to an internalist account of practical reasons, which I will explain (very briefly) below.

The three failed antipaternalistic strategies I will now canvass are: (1) the Argument from Relative Paternalistic Ignorance, (2) the Arguments from the Instrumental and Non-Instrumental Value of Choice or Personal Autonomy, and (3) the Argument from Defending Vice as Value.

### **2. Argument from Relative Paternalistic Ignorance (ARPI)**

One argument against paternalistic coercion makes two related claims: (1) The paternalist, as an external party, lacks sufficient knowledge of a potential recipient's own chosen structure of values and preferences to make an informed decision to coerce the recipient; (2) the person herself, as the creator of her own structure of values and preferences, is in the best position to know her good. As Mill writes: "[W]ith respect to his own feelings or circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else."<sup>6</sup>

I will address these claims in turn, as each is mistaken if construed as generally able to give a persuasive case against paternalistic laws or policies. Two matters tell against (1). First, privileged access to subjective experience is often neither necessary nor sufficient for knowledge of an agent's own personal good. If it were, good advice or cognitive therapy would not be possible. Privileged access is not necessary for knowing an agent's good because we on the outside often can infer what an agent needs or wants from her own reasons, values, and actions. Privileged access is not sufficient for knowing an agent's good because while she may have such access to all of her inner beliefs and reasons, it does not follow that she has direct and immediate access. Agents cannot always hold all of their relevant beliefs and reasons in conscious awareness at the same time. We often need to be reminded of what we ourselves are already committed to believing. Privileged access also does not guarantee that an agent will make the appropriate logical connections between her reasons and beliefs. Second, an astute observer may more clearly see issues that pertain to the agent's good than does that very agent. Sometimes we can know another's good better than she knows it. Jones may lament his lack of motivation and sense of writer's block, mistakenly attributing them to the lack of an inspiring environment, while we have good

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<sup>6</sup> Mill, *On Liberty*, p. 143.

## Reason Papers Vol. 30

reason to believe Jones's slump is due to his increased alcohol consumption, which he does not clearly sense as detrimental.

Similar considerations count against (2). Even if we grant Mill's premise, and surely it is true in *some* cases, this argument's chief difficulty is that the move from a claim that some agent generally has broader and more accurate self-knowledge to the claim that he generally knows better than the paternalist in most cases does not work. The mind is not wholly transparent as Descartes believed, and this lack of transparency manifests itself in various ways. One way is through distractions brought on by impetuosity. If Jones is gripped by an occurrent desire to go partying, he may let this desire distract him from deliberating about why partying is not a good idea the night before an important medical exam for which he needs to study. It strains credulity to say that Jones has temporarily redefined his good to mean satisfying his thirst for drink and revelry—this is true especially if Jones has not really abandoned his disposition to seek a medical career. His greater good *as he is disposed to conceive of it* is still to perform well on the exam and get his degree; Jones has simply not given his greater good much thought since he (presumably) has voluntarily let his mind grow occupied by a thirst for instant gratification. A person who acts foolishly or rashly may be aware of his own dispositions and his long-term good but push such considerations to the margins of his conscious awareness. He may vaguely sense that he should study but instead places the thought “out of sight, out of mind.” Perhaps he does not even ask himself the questions (Should I really go out tonight? How much work do I have left?) that motivate a process of deliberation and often lead a person to reconsider his hasty and foolish decisions.

A defender of ARPI might counter that we should construe self-knowledge as occurrent expressions of preference or revealed choice and not count dispositions in our characterization of a person's character or identity. A person defines what his good will be at each moment. This reply is not very powerful, however. Why should we accept episodic preference expressions rather than settled dispositions, especially since the latter usually reflect both how we conceive of the person and how he conceives of himself? These traits give him a settled rather than schizophrenic personality and accord with the narrative stability of his life. Moreover, this reply rules out by definition the possibility of hard paternalistic interventions. If a person's good is defined by whatever he happens to choose freely at a time slice, then it is impossible for him ever freely to act *against* his good so defined. He attains his good through fulfilling whatever random whims he happens to indulge, no matter how irrational they may be given his other, more settled beliefs and reasons. (And surely a person cannot instantaneously alter his entire belief system to incorporate such whims.) If Jones makes a poorly thought-out choice to play Russian roulette, even though he is not suicidal and even though this foolish risk may destroy his otherwise rational life, a rejecter

## Reason Papers Vol. 30

of the “dispositional view” of agency holds that the whim better expresses Jones’s good than do the settled preferences and values he has developed over time. This stance is obviously not defensible. In addition to its other problems, an anti-dispositional view, one which asks us to conceive of agency as a series of disconnected occurrent preferences, makes the phenomenon of rational regret impossible. Returning to the party example, the view would have us regard Jones’s decision to live it up the night before the exam as his all-things-considered good in that moment. The next morning, when Jones is hung over and unable to focus on the exam, he would not have rational recourse to experience regret because his hedonistic preferences the night before had no connection to his newly occurrent preference to perform well on the exam. This view cannot be right, as it makes perfect sense for Jones to wish he had not thrown away months of work and succumbed to the temptation of fun distractions. Regret signals the fact that Jones conceives of himself as having enough stable identity to wish he had not made some decisions which, on reflection and in hindsight, undermine his deeper and more settled commitments.

Another way in which a person may not best know his own good is through miscalculation. Jones mistakenly believes that the risk of motorcycling without a helmet is, all told, outweighed by the pleasures of riding that way. This may be true of some thrill-seekers, but let us stipulate that in fact Jones is a risk-averse person who values what he risks losing in an accident, coupled with the sufficiently high probability of an accident, much more highly than any benefits of riding without a helmet. However, Jones has not done his homework as to assessing *his own* preference orderings and the relative importance he assigns to his various activities. Had he deliberated properly on these factors, he would rationally have chosen to wear a helmet. This point underscores the fact that people often fail to detect inconsistencies among their own beliefs and values, which is no surprise given two facts: the human mind is limited, and so persons cannot inspect all their beliefs at the same time, and people often succumb to inertia by not putting forth the requisite effort to think about or act to promote their good. Contrary to the antipaternalistic defender of ARPI, paternalistic laws could serve as safeguards against people’s naïveté or shortsightedness.<sup>7</sup>

Furthermore, a person may not best know his good even if he has not evaded or miscalculated; he may consciously hold beliefs and values that

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<sup>7</sup> The antipaternalist might note that these same concerns about inertia and shortsightedness could just as well apply to paternalistic agents. This is certainly a valid worry, and one that requires more attention than can be given here. Needless to say, if the paternalist could devise institutional safeguards to minimize abuse or misuse of otherwise justifiable paternalistic laws or policies, then the antipaternalist needs a more fundamental argument for why these laws or policies are, in fact, not justifiable.

## Reason Papers Vol. 30

contradict what he subconsciously believes and values. Charlie is fairly satisfied with his career as a banker, but unbeknownst to himself he has the temperament and skill to develop a much more fulfilling career as a doctor. Perhaps he has memories of enjoying science that have since faded, but their return would spark a renewed passion in him. For instance, Drew remembers Charlie's interest in science and sets out to rekindle Charlie's memories. Now, it would be difficult to recommend that we paternalistically remove Charlie from his current situation and thrust him into medical school. The rude transition may breed resentment and a crippling sense of loss that backfires, that prevents Charlie from developing a passion for medicine. But we might legitimately be able to take smaller steps to protect Charlie in other ways, such as keeping him from good-undermining distractions like alcohol abuse, based on our more intimate knowledge of his good.

The antipaternalist might respond in two ways. First, he could observe that political philosophy only provides general arguments, not ones without exceptions. There will always be outliers and counterexamples at the margins, so it is unfounded to demand that ARPI be able to immunize an agent from every conceivable paternalistic interference.<sup>8</sup> This observation is well-taken, but it merely shifts the argument to what should count as sufficient scope for an argument against legal paternalism. If ARPI is vulnerable to counterexamples (like the Charlie case) which many reasonably believe are not marginal, then we are stuck with a morass of conflicting intuitions and still hope for an argument that can help us resolve these conflicting views.

Second, more assertively, the defender of ARPI could claim that there is no reliable principle in the law that can be used for determining where exceptions to ARPI apply. This would, in fact, deliver a principled antipaternalism that does not admit of exceptions. This strategy is promising but for the observation that there seem to be fairly clear cases where an exception to ARPI obtains. Consider what I shall call Neutral Paternalism (NP): *If some action A performed by person P goes against P's own beliefs and values, then it might be legitimate to interfere with A in order to bring P's actions back into alignment with his beliefs and values.* I will employ NP as our paternalist argument for the remainder of the essay, as NP seems to pose the greatest challenge for antipaternalism in taking the person's own good to be as he defines it. Here we can understand rationality in subjective terms—a person whose actions contravene his own normative commitments is doing what he has no good reason to do given his commitments. If, out of deliberate ignorance, P ignores signs warning him not to swim in stormy waters—and P is not suicidal or a daredevil—then there is at least a strong *prima facie* case that P is acting out of voluntary ignorance of his own beliefs and values. If

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<sup>8</sup> I am grateful here and elsewhere for comments by an anonymous referee pressing me to address this issue.

## Reason Papers Vol. 30

so, a level-headed paternalist might be said in this instance to have a better grip on P's good than P currently does. Perhaps there are still worries that there is no practical way to implement laws or policies which deal with this level of specificity. But the antipaternalist should not put all of his eggs in this basket, for if certain paternalistic policies are enforceable because they prevent actions which (almost) every reasonable or rational person would not perform, then it seems feasible to enact some policies (like a swimming ban or seat belt requirements) which coerce people not to act on their more foolish motivations.

None of the above considerations is meant to imply that we *generally* know less about ourselves than other agents gather. That would be quite an unusual circumstance. We likely know more than anyone else simply because we have constant introspective access to many of our beliefs and intentions. But unless we are masters of introspection and experts about all that pertains to our own good, it does not follow that we *always* know *every* aspect of ourselves better than any other person. ARPI is vulnerable to too many empirical contingencies to serve as a powerful argument against paternalism.

### **3. Arguments from the Instrumental and Non-Instrumental Value of Choice or Personal Autonomy**

The first argument, from choice's instrumental value, maintains that paternalistic coercion is incompatible with the agency needed for a person to build his character and identity. (Call this the "argument from the developmental value of choice."<sup>9</sup>) It is certainly true that an agent can only develop his character and responsibility through making his own decisions and putting forth his own effort concerning the activities and pursuits that will come to define his identity. Character-building is like exercise; one atrophies psychologically if one does not work at the skills that define one's career or other life pursuits, the social skills and subtleties of mature and meaningful personal relationships, and moral virtues. Nobody can do these activities for another person—he must do them himself. Moreover, atrophied development raises a vicious cycle. Failure to build character keeps one from having a perspective on the fulfillment that comes through cultivating these features of a good life, which often leaves one without motivation to take the steps requisite for character-building and the chance for its attendant fulfillment. We could make a strong case against paternalism if we could show that it necessarily stifles motivation to build one's character. The same considerations apply when matters are writ large. As Mill argues eloquently,

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<sup>9</sup> John Kleinig, *Paternalism* (Totowa, NJ: Rowman & Allanheld, 1983), pp. 30-32.

## Reason Papers Vol. 30

conformity on a large scale cripples a society, robs it of the initiative to seek progress, and saps its creative energies.<sup>10</sup>

However, like exercise, there can be such a thing as too much choice or too much license, since agents can abuse their freedom. The above argument has the same shortcoming as ARPI in that we cannot infer from its usual validity that some measure of hard paternalism is not legitimately called for in many instances. For instance, John Kleinig writes that this argument's force "diminishes when the paternalism is strictly limited, designed to curb only self-destructive or severely damaging behavior, and then only by means that are not excessively intrusive."<sup>11</sup> On many occasions, free choices are instrumentally valuable as a means for building a mature and responsible character, especially from gaining prudence by learning from one's mistakes. But surely not *all* instances or types of voluntarily chosen self-harm qualify as valuable by this standard. For instance, Jones chooses to be a couch potato who never does anything valuable with his life, never meets any interesting people, and wastes away his life in a vapid torpor. His choices are not active; they do not contribute to his development. He is not autonomous in the sense of exercising choice from among a large and complex set of incompatible options. Limited paternalistic interferences—most likely in the form of prohibiting certain self-harmful activities—may in fact be more conducive than noninterference to putting Jones in an environment, or triggering in him a motivation, whereby he avoids the vices that erode his character and distract him from his good.

We do not constantly hold a child's hand and try to protect her from every single misfortune; part of building character is of course to learn from one's mistakes. Neither do we step aside and let a child act however she wants in the name of "development." This laissez-faire approach would likely be disastrous for children, and it is not clear why matters are different when it comes to interfering with adults who should know better. The argument from the developmental value of choice is vulnerable to counterexamples which can use it to support some paternalistic measures, even as it rightly rejects other forms of paternalism. Choice's instrumental value in enabling a person to pursue substantive goods is not realized if her choices are not instrumentally good.

Perhaps focusing on choice's putative *non-instrumental* value will show that paternalistic coercion is wrong by oppressing individuality. Part of living is to become one's own person, and many people value being unique and (at least partially) independent because they understand these qualities as valuable in and of themselves. Paternalism threatens to undermine living by

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<sup>10</sup> Mill, *On Liberty*, chap. 2.

<sup>11</sup> Kleinig, *Paternalism*, p. 30.



## Reason Papers Vol. 30

one's own initiative and judgment as something valuable for its own sake. Indeed, many oppose paternalism not on the grounds that it fails to be the optimal policy for bringing about the best consequences in one's life; rather, they argue that, apart from any consequentialist aims, paternalism infringes on a person's living *his* life. The realization of freely chosen activities instantiates itself in many ways, depending on the background, values, and temperament of a given individual. The "pursuit of happiness" manifests itself in various ways, from the relatively minor (e.g., freely motorcycling on the open road), to the sweeping (e.g., excitement at anticipating and participating in a series of artistic projects). Freely undertaken activities are intrinsically valuable as constitutive of a person's free choices and actions. One is not merely flailing one's limbs or acting under thrall to exogenous forces but doing what one believes in or cherishes for its own sake.

Nonetheless, an argument from the non-instrumental value of individuality faces three difficulties. First, individuality is a term of art, and defenders do not always have the same concept in mind. If we construe it in terms of absolute license or trivial habits of nonconformity, such an ideal fails to draw much support. It may not be difficult for epicures to comprehend how a person might value a licentious life full of whimsical pursuits. However, defenders of objective flourishing could object that such a life fails to be meaningful or to realize the human flourishing that a life of rationality, purpose, and virtue constitutes. A paternalist could even add that the superficiality of the former kind of life constitutes part of his motivation for advocating paternalism. Contrast the heroin-addicted couch potato who has never been interfered with, and the initially coerced but now free former heroin addict, who is now a successful writer and who would probably never have picked up a pen if not for the initial paternalistic prohibition of her drug use. Surely in many cases we could give lots of good reasons why the latter person has more individuality than the former.

A second problem is that the attractiveness of this ideal brings its own difficulty for antipaternalism. As the argument from the developmental value of choice makes evident, sometimes personal freedom is saved in the long run through temporary and short-term diminutions of freedom. A serious notion of individuality that stresses the value of independent thought and action can still invite hard paternalism if that is necessary to maximize, intrapersonally, one's exercise of independent thought and action. Moreover, constraining options undermine antipaternalistic appeals to the value of freedom, specifically freedom construed as the number or quality of options a person has available. A constraining option is "one that, if chosen and acted upon, is likely to impair [a person's] future autonomy ...."<sup>12</sup> A person who

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<sup>12</sup> James S. Taylor, *Stakes and Kidneys: Why Markets in Human Body Parts Are Morally Imperative* (Burlington, VT: Ashgate, 2005), p. 73.

## Reason Papers Vol. 30

decides frequently to use methamphetamine and heroin risks compromising his ability to perform autonomous actions in the future, either through incurring serious physical and mental injury, or even death.<sup>13</sup> One with allegiance to freedom's intrinsic value should abhor options which, if chosen, restrict in turn the number of long-term options one has. Surely there are some expressions of "individuality" which are anathema to a life of sincere and long-term devotion to the values of autonomy and freedom.

Some will no doubt argue that these two objections do not capture the whole story of what we can mean by the intrinsic value of freely chosen activities. They will counter that a freely chosen life is not one that admits of paternalistic cost-benefit trade-offs, at least not trade-offs which are forced on the person. The very fact that one's life is *one's* life makes paternalistic impositions defeat the purpose of a person's *living her life well*. On this view, one's life is "complete at each moment," a tapestry of ventures successful or failed, a self-contained narrative where the person strives to approach asymptotically—that is, never attain as completed end-states—the various excellences or virtues which constitute a well-lived life. Freedom of choice is a *sine qua non* of flourishing, as it constitutes the process or activity of living well. I will not pause to assess the merits *per se* of this attractive notion of human flourishing.<sup>14</sup> Even given the very brief sketch I have made of it, the ideal seems reasonable *and* reasonably contestable. This is the third objection. The ideal's reasonable contestability I also cannot discuss here in much detail, other than to indicate that some people might reasonably choose different ways of life—for example, hedonistic indulgence, religious self-denial—which do not require allegiance to the value of non-instrumental free choice. Although the non-instrumental aspect of freedom's value with regard to living well bears more emphasis, it remains far from clear that every person is rationally required to adopt this account of freedom's value. So long as these competing, incompatible accounts of the good stand as reasonable contenders to freedom's non-instrumental value, it is not clear we can use the latter conception to ground an antipaternalistic argument relevant to significant numbers of agents, including those who do not accept (or are not

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<sup>13</sup> But see note 19 on the issue of relative drug safety given prohibition versus legalization.

<sup>14</sup> Kleinig's example of how agents may non-instrumentally value the exercise of freedom refers to the story of Jonathan Livingston Seagull; see Kleinig, *Paternalism*, p. 51.

## Reason Papers Vol. 30

rationally required to accept) freedom's non-instrumental value.<sup>15</sup> Since the ideal is contestable, those who reasonably do not accept it might still be vulnerable to paternalistic suppression on grounds separate from appeal to the non-instrumental value of free self-determination.

### 4. Argument from Defending Vice as Value

A final misguided strategy for arguing against paternalism is to take putatively vicious or self-harmful activities and attempt to recast them in a more appealing light. This mistake is made especially obvious in some of David Richards's writings critical of morals legislation. Though I share Richards's antipathy toward legal moralism, I consider his strategy to be ineffective and easy for paternalists to attack.

Far from maintaining that drug use or prostitution are vices that the state nevertheless has no business forbidding, Richards defends the liberty to perform each of these activities based on their value to the participants.<sup>16</sup> He holds that "even psychological devotion to drugs may express not a physiological bondage, but critical interests of the person." Of the world's oldest profession he writes: "[T]he moral condemnation of the prostitute rests on and expresses such isolation and denial [of the prostitute's common humanity], disfiguring the reasonable perception of the forms sex takes in our lives, drawing sharp moralistic distinctions between the decent and the indecent when, in fact, there is a continuum of varying personal modes of sexual expression and fulfillment ...."<sup>17</sup> This moralism, according to Richards, is itself a reflection of secularized Puritanism.

Aside from the controversial claim that all condemnation of prostitution stems from a Puritan disapproval of sex *per se*—rather than an *affirmation* of its value as something not appropriate for market exchanges—Richards's general strategy itself will not deliver principled antipaternalism. It may work in showing the eligibility of certain unorthodox but not unhealthy ways of life that are wrongly condemned by entrenched social prejudices or natural law moralities. It may explain to a sometimes ossified majority opinion that homosexual marriage or occasional marijuana use in the privacy of one's home does not bring significant harm to anyone. But it is hardly clear that Richards's strategy can work for behavior with *obviously* little or no

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<sup>15</sup> Moreover, we will see below that the non-instrumental account of freedom is vulnerable to the charge of leaving no conceptual space for paternalism.

<sup>16</sup> See Richards, *Sex, Drugs, Death, and the Law* (Totowa, NJ: Rowman and Littlefield, 1982), pp. 126-27 for critiques of drug laws, and pp. 176-77 for critiques of prostitution laws.

<sup>17</sup> *Ibid.*, pp. 176-77.

## Reason Papers Vol. 30

redeeming value. Consider George Sher's reference to a news feature on female teenage crack addicts:

At the crack houses, which are usually decrepit rooms in abandoned buildings, they go on binges that typically last for two or three days.... The girls often perform oral sex in exchange for a smoke. Between binges they sleep in alleyways or abandoned buildings. Adults at the crack houses become the only family the girls have. They often call the older women Ma and the older men Poppy.<sup>18</sup>

As Sher notes, there are many reasons to be appalled by this phenomenon. It is doubtful that these young women are happy or fulfilled in the least. They spend their mindless days in squalor rather than productive activity. They run grave risks of illness and disease, and their ties to the older adults are likely rooted in exploitation rather than genuine human affection. I cannot see how Richards's claims about the psychological value of drug use, or the value of prostitution, apply to persons who sell themselves for crack cocaine. Our culture's use of the epithet "crack whore" does not elicit the slightest tinge of positive valuation, nor should it. Now, even the most degrading behavior *might* have potential value in, say, providing a basis for artistic expression that can only come from actually experiencing debasement. But most self-harmers are not countercultural icons like Hubert Selby or Lou Reed; they do not aim at or obtain aesthetic inspiration or edification from walking on the wild side. One need not accept paternalism to agree with Sher that such a life as the one described in the crack houses could never offer the fulfillment, self-respect, or joy that a life of commitment to positive goals can offer.<sup>19</sup> Even if Richardsian arguments could accommodate harmful behavior that at least *seems* valuable to self-harmers, moreover, it cannot account for those who indifferently or self-consciously destroy their lives for no rational purpose, out of self-loathing, depression, or desperation. Strategies that attempt to wring value out of these kinds of harmful behavior are strained and unconvincing. Moreover, they seem to accept the paternalist's premise that *truly* self-harmful

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<sup>18</sup> *The New York Times*, August 11, 1989, p. A13; quoted in George Sher, *Beyond Neutrality* (Cambridge: Cambridge University Press, 1997), p. 179.

<sup>19</sup> I cannot resist mentioning at this point that the squalor and sense of hopelessness surrounding these young women is partly a result of the (mixed) paternalistic War on Drugs. The illegality of certain drugs drives up their price, leading many users to resort to crime or prostitution. This is not to say that crack use is perfectly natural. But laws which marginalize or make criminals out of persons who are already sick or despondent about their lives do not help them; they usually only drive them underground and away from avenues of genuine recovery.

## Reason Papers Vol. 30

behavior is rightfully subject to coercive restraint, which leaves antipaternalists in the unenviable position of having to explain why no behavior is truly self-harmful. This concession to the dominance of a strategy more conducive to paternalism is unwarranted. We seek an argument showing that paternalism is *wrong*, not merely impractical or purpose-defeating in most cases. A better strategy for the antipaternalist is not to flinch at bad behavior or pretend that it is anything other than it is, but nonetheless to explain why persons should be left free to partake in such behavior if they so choose. Of course, the admission that certain self-harmful activities are so destructive that they have no compensating value will press an opponent of paternalism to identify what is the wrong-making feature of interferences which would save persons from themselves in ways that, quite possibly, they will come to be grateful for. Say what one will about some of the negative unintended consequences of paternalistic policies—it is plausible, I think, that a great many lives have been saved due to legal prohibitions of activities which would be much easier to partake in absent such prohibitions. This claim would require important empirical research that is beyond the scope of this article. Informational constraints aside, a purely cost-benefit analysis on the number of lives saved (or the quality of life saved) might tilt the balance in favor of paternalism.

Defending the freedom of persons to perform patently irrational actions is not easy, especially when rotten behavior's ugly aspects stare us in the face. Supporters of (some measure of) legal paternalism properly raise questions about why antipaternalists are so doggedly committed to letting persons be free to act foolishly or in a self-degrading manner. One might worry that the antipaternalist is not so much defending an oft-unappreciated aspect of personal freedom as he is fetishizing freedom beyond any recognizable purpose. It is one thing to defend the freedom of persons to think, to pursue a business, or to associate with whom they like; it seems another matter entirely to defend their freedom to destroy themselves for often the most frivolous and irresponsible reasons. Why in the world would any rational person want *that* kind of freedom? Dan Brock asks: "Why should our basic moral principles prevent others from interfering with our doing what we want when their interfering would be for our own good, while our doing what we want would be contrary to our own good?"<sup>20</sup> Brock's question is a good one and ultimately needs to be addressed by opponents of legal paternalism.

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<sup>20</sup> Dan Brock, "Paternalism and Promoting the Good," in *Paternalism*, ed. Rolf Sartorius (Minneapolis: University of Minnesota Press, 1983), p. 247.

### 5. The Conceptual Space Problem

Ironically, a *successful* move to defend vice as value may render paternalism an empty notion. This “conceptual space problem” lurks in the background even assuming the strategies discussed above could avoid the other concerns I raise. For instance, if all (putatively) vicious or harmful activities could really be recast in terms of their value, this would undermine the case against paternalism, since paternalism involves coercing people for their own *good*, and interference that suppresses seemingly vicious but actually valuable activities would not be a *paternalistic* interference. If, in fact, it is genuinely part of a person’s all-things-considered good to be a crack whore, then preventing *him* from pursuing that way of life is an infringement on *his* well-being so defined. This seems bizarre. What makes opposition to paternalism interesting is the fact that it requires us to bracket concern for well-being in light of, say, the competing moral demand of respect.<sup>21</sup> Redefining putative vices or self-harms as really comprising a person’s good undermines such opposition, for then interferences that block a person’s liberty to act for these revisionist goods would in fact be impositions on (his own view of) his good. Richards need not find this implication bothersome, but it spells trouble for an antipaternalist motivated by the crucial presumption that paternalistic theories are not empty sets.

This may puzzle a reader who believes legal paternalism is best defined in terms of the intentions or rationales of the laws. Regardless of whether, in fact, a putatively paternalistic law actually prevents a person from harming himself or advances his good, the primary issue is that the law is crafted with the *intention* of advancing what the lawmaker takes to be that person’s good, even if the lawmaker is mistaken. My hesitation in describing such a law as paternalistic comes primarily from acceptance of internalism about practical reasons. Such internalism maintains that R is a justifying reason for person P if P, acting from his subjective motivational set and with all relevant factual information and a sound deliberative route, would endorse R.<sup>22</sup> If, given P’s reasonable commitments, factual information and a sound deliberative route would not lead P to endorse R as a reason for him to act on its basis, then R is not a reason for P. Since R is not a reason for P, R cannot be said to be for P’s good. Coercion on R’s basis would not be justified to P, nor would it be for P’s good. So I believe it mistaken to label such coercion paternalistic regardless of what the interferer’s intentions might be. Of

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<sup>21</sup> For a discussion of the distinction between concern and respect, see Stanley Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), pp. 6-11.

<sup>22</sup> This (admittedly rough) characterization of internalism receives its classic formulation in Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985).

## Reason Papers Vol. 30

course, discussion of the debate between rival internalist and externalist views—and arguments for the superiority of practical reason internalism—goes well beyond the space available here. So I must beg the reader to take this section as a conditional argument. *If* one rejects practical reason externalism and accepts some version of internalism, then one should also accept the relevance of the conceptual space problem.

I now indicate how the conceptual space problem also applies to ARPI and varieties of arguments from the value of choice or autonomy. With regard to ARPI, in cases where the subject of interference knows her good better than does the interferer, the interference at least risks bringing about worse states of affairs for the subject. Mistaken “paternalists” who act from a distance toward the subject—who incorrectly presume to understand the subject’s good better than she does in a given instance—turn out to do more harm than good, all things considered. But if they do more harm than good, then whatever the so-called paternalists’ intentions, the wrong-making feature of their interferences is that these interferers *harm* their subjects, not that they wrong their subjects despite benefiting them. An antipaternalistic argument cannot identify the wrong-making feature as the harmfulness of an interference; rather, the wrong-maker must have to do with the impropriety of an interference that, in fact, *benefits* the subject. Otherwise, paternalism has no distinct territory and we can instead just evaluate all interferences in terms of, say, Mill’s Harm Principle. With regard to arguments from choice or autonomy’s *non-instrumental* value, building free choice into a person’s good does not defeat a paternalist argument either. Instead, it rules out the very possibility of there being a paternalist argument. Again, if freedom partially constitutes a person’s good, then by definition interferences with that person’s freedom *prima facie* go against his good.

These considerations might lead one to wonder whether there is any conceptual space for paternalism at all, or whether it is a bogeyman that disappears in the very attempt to formulate arguments against it. No doubt, arguments favoring paternalism are often cast in terms of what the paternalist *alleges* to be for the subject’s good, quite apart from whether the subject agrees about his alleged good. The three arguments I discuss each, in their own way, attempt to undermine this “objective” notion of paternalism in which subjects may suffer suppression on the basis of values or considerations which the paternalist claims apply to everyone, regardless of their own systems of beliefs and values. Arguments against this “objective paternalism,” like the three above which show the paternalist mistakenly or without warrant attributes goods to his subjects which they are not rationally required to share, risk inviting the conceptual space problem. In showing he is mistaken about his subjects’ good, the arguments also show the “paternalist’s” interferences are not genuinely for his subjects’ good, and hence not genuinely paternalistic.

## Reason Papers Vol. 30

Fortunately, neutral paternalism does not befall the conceptual space problem. One might consider NP to be a sort of “endogenous” view which, unlike objective paternalism, defines the subject’s good in terms of his own internal commitments. One advantage of NP from the paternalist’s standpoint is that it does not obviously seem unduly intrusive. We are taking the agent’s own commitments and then seeing whether those commitments make it unreasonable for him to reject interferences with actions that go against his own good *as he defines it*. Whether there is a viable argument against NP, and whether this argument can avoid the conceptual space problem, are matters which must occupy us another time.

### 6. Conclusion

I hope to have drawn attention to two matters which debates over paternalism often fail to address. First, if we are to have a powerful enough argument against paternalism, we need to search for our case outside of appeals to its potential harmfulness or unreliability, especially if we seek a liberal argument showing how such interferences are *wrong*. Of course, I lack the space even to outline what such a philosophically adequate strategy needs. Suffice it to say we would need to explore deeper issues such as practical reason internalism versus externalism, whether reasons internalism can yield a principle or principles that defeat neutral paternalism, whether any viable liberal theory has the equipment to levy a justificatory burden that neutral paternalists cannot meet—without having troublesome implications in other areas of political morality, etc. Second, in order to have a distinctively paternalistic position to argue against, we must frame the issue in such a way that interferences with a person are genuinely for his own good however construed, not defined away in every case by reducing the paternalist’s efforts to promotion of an ersatz understanding of the subject’s good. The interesting project is to see whether we can find convincing arguments for why it is (almost always, if not always) wrong to interfere with persons even when they benefit, all things considered, from such interferences.<sup>23</sup>

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<sup>23</sup> In fact, I believe such a project can successfully argue against liberal paternalism. I argue for such in my Ph.D. dissertation “Liberalism’s Case against Legal Paternalism” (Tulane University 2008). I would like to thank Chris Freiman, Gerald Gaus, Eric Mack, Kevin Vallier, and an anonymous referee for many helpful comments and suggestions on earlier versions of this article.