

John Stuart Mill, Ronald Dworkin and Paternalism
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Introduction

In 'On Liberty' Mill famously wrote that '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. [Indeed] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, but not for compelling him, or visiting him with any evil in case he do otherwise.'¹

Several aspects of Mill's account call for preliminary comment. First, even though he railed against interfering with the liberty of persons both for their physical good *and* for their moral good, it is Mill's denunciation of interferences of the former kind, rather than of the latter, that has made him a famed opponent of *paternalistic* interferences.² Second, Mill's characterisation of paternalism as involving interference with the liberty of individuals by way of compulsion, suggests that he was presupposing the use of physical force. However, it is also possible to treat people paternalistically by way of deception (e.g. through the withholding of information). Though there can be little doubt that Mill's predominant concern was with forms of paternalism requiring physical interference with liberty, he could, without inconsistency, have widened his perspective to include instances of paternalism like those involving deception, which, strictly, do not require interference with liberty. Both perspectives incorporate the idea of an affront to individual liberty, and so capture the central complaint of opponents of paternalism. Third, his strictures about

¹ 'On Liberty' in *Essays on Politics and Society*, vol. XVIII of *Collected Works of John Stuart Mill*, ed. J.M. Robson (Toronto: University of Toronto Press, 1977) pp. 223-224 [Chapter I, Paragraph 9].

² Interferences of the latter kind are helpfully analysed by Gerald Dworkin, 'Moral Paternalism', *Law and Philosophy* 24 (2005) pp. 305-319.

paternalism only apply to interferences with the liberty of competent agents because he specifically exempted those in the care of others, viz., children, adolescents, those whose ‘reflective faculties’ are defective, and those in their ‘nonage’.³ A few contemporary writers have taken the view that the only form of paternalism worthy of the name is the sort that consists in overriding the wishes of competent agents for their own good (so-called ‘hard’ or ‘strong’ paternalism). But many consider, for example, that decisions made for the good of children, who have never been competent, or for those who once were competent but are no longer, also constitute paternalism (so-called ‘soft’ or ‘weak’ paternalism).⁴ Fourth, even though Mill focussed on paternalistic *actions*, paternalistic goals may also, on occasion, be achieved by *refraining from acting*. Wealthy parents sometimes deliberately refrain from bequeathing their wealth to their children because they think it will be better for them to make their own way in life. It is plausible to claim that if A refrains from helping B with the intention of helping B to become more self-reliant, A’s refraining ought to be counted as paternalistic.⁵ This fact leads directly to the fifth and final feature of Mill’s characterisation of paternalism on which I wish to offer a preliminary comment, namely that he emphasised both the motivation for, and the effects of, paternalism. Several reasons have already been given for modifying Mill’s characterisation of paternalism as involving actions that interfere with the liberty of individuals. There is reason, too, for thinking that Mill’s account of the motive for paternalism requires modification.⁶ In the famous

³ ‘On Liberty’, p. 224 [Chapter 1, Paragraph 10]. The last mentioned are from ‘those backward states of society in which the race itself may be considered in its nonage’ (i.e. in an immature stage of development).

⁴ Tom Beauchamp, ‘Paternalism and Bio-Behavioral Control’, *The Monist* 60 (1976) pp. 62-80 is one who contends that weak paternalism is ‘not paternalism in any interesting sense’. The same sentiment is evident in Richard Arneson, ‘Mill versus Paternalism’, *Ethics* 90 (1980) pp. 470-489, especially pp. 471ff (although it has to be added that he has recently outlined a markedly different view in ‘Joel Feinberg and the Justification of Hard Paternalism’, *Legal Theory* 11 (2005) pp. 259-284). Joel Feinberg, who first drew the distinction between weak and strong paternalism in ‘Legal Paternalism’, *Canadian Journal of Philosophy* 1 (1971) pp. 105-124, later came to concur with Beauchamp’s view but, because of the potential for confusion, was prepared to say so only in a whisper. See *Harm to Self*, vol. 3 of *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1986) pp. 12-16.

⁵ Seana Valentine Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, *Philosophy and Public Affairs* 29 (2000) pp. 205-250, especially p. 213.

⁶ *Ibid.*, p. 215f.

passage cited in my opening paragraph, Mill seems to believe that paternalism arises out of a disagreement between A and B about what would be best for A. However, in acting paternalistically toward B, A's motivation may be to promote what B wants, viz., to be made better off (or, alternatively, not to be made worse off). If A believes that B will act contrary to what they have agreed would be in B's best interests, and prevents B from so acting (say, because of B's weakness of will), A's behaviour will be paternalistic. Thus, for example, a woman acts paternalistically if she hides her partner's money to prevent him from gambling even if he agrees with her that gambling is contrary to his best interests.

Given these preliminary points, I shall take A to behave paternalistically if, irrespective of whether B has competently reached a contrary judgment about how to promote or protect his own interests, A seeks to justify an action or an omission which is intended to affect B by claiming that it will make B better off, or protect B from harm. This brief statement encapsulates a broad understanding of paternalism even though much of the essay will be concerned with the narrower notion of strong paternalism and with whether it may ever be justifiable. I will begin by briefly reviewing Mill's seminal discussion of the issue, before giving consideration to a prominent recent attempt by Ronald Dworkin to elaborate a similar opposition to strong paternalism,⁷ albeit in a manner he thinks less vulnerable to criticism. I will argue that neither Mill's position nor that of Dworkin precludes the justifiability of at least some instances of strong paternalism.

Mill's main arguments against paternalism and some critical comments on them

Mill's opposition to paternalism stemmed fundamentally from his commitment to liberty as the means by which we may best develop our capacities (consistent, of course, with others enjoying similar liberty). He put forward a number of arguments that have been given different taxonomies

⁷ *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2000). Dworkin distinguishes (p. 217) between 'volitional paternalism', which is aimed at helping an individual achieve what he already wants to achieve, and 'critical paternalism', which is aimed at forcing an individual to lead a life that is in accord with his critical interests rather than with what he now values. I believe that Dworkin's rejection of critical paternalism can be likened to the rejection by many liberals of 'strong paternalism'.

by commentators.⁸ I lay no claim to offering a definitive account of his arguments, merely an indicative one.

Mill argues against paternalism on, at least, the following four main grounds. First, because competent persons know their own interests better than do others (especially governments⁹) their liberty should not be interfered with on the ground that others know better how to protect or promote those interests.¹⁰ Second, paternalistic interferences with liberty are prone to error (especially when undertaken by governments) because they rely on general presumptions of no direct relevance to any particular person, and so are apt to be misapplied because of lack of acquaintance with the specific circumstances of affected persons.¹¹ Third, paternalistic interferences fail to show respect for individual liberty, which is vital to the treatment of individuals as equals.¹² Fourth, since the exercise of liberty is instrumental to the development of individual character, individuals ought to be allowed to make their own mistakes in order to develop their particular characters.¹³ I will review these arguments consecutively.

Mill's first line of reasoning relies on a questionable premise. Indeed, as I shall shortly point out, Mill himself raised doubts about it in one of his publications. However, this did not dissuade him from employing it to argue that paternalism should be prohibited.

It is true that competent individuals are, in general, better-placed than others to know what is in their own best interests if only because the good for individuals is, in significant part, determined by their subjective preferences. This has particular significance when it is the state that proposes to act

⁸ See, for example, Gerald Dworkin, 'Paternalism', *The Monist* 56 (1972) pp. 64-84, especially pp. 70-76; Arneson, 'Mill versus Paternalism', op. cit., especially pp. 476-481; and, John Kleinig, *Paternalism* (Totowa, N.J.: Rowman and Allanheld, 1984) pp. 28ff.

⁹ Douglas N. Husak, 'Legal Paternalism' in Hugh LaFollette, ed., *The Oxford Handbook of Practical Ethics* (New York: Oxford University Press, 2003) pp. 387-412, argues that the characterisation of certain laws as 'paternalistic' is highly problematic (pp. 390ff). Nonetheless, he goes on to argue that despite it being more difficult to justify state paternalism than (non-legal) paternalism by individuals (395ff), state paternalism may sometimes be justified on consequentialist grounds (401ff).

¹⁰ 'On Liberty', p. 277 [Chapter IV, Paragraph 4].

¹¹ 'On Liberty', p. 277 and p. 283 [Chapter IV, Paragraphs 4 and 12, respectively].

¹² 'On Liberty', p. 263 [Chapter III, Paragraph 4].

¹³ 'On Liberty', p. 283 [Chapter IV, Paragraph 12].

paternalistically. In fact, Mill thought his position at its strongest in relation to the paternalistic use of the law because:

The interference of society to overrule [a person's] judgment and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.¹⁴

These generalisations are supposed to bolster the claim that to compel competent individuals to behave in ways that they do not judge to be in their best interests will render them worse off, but they are open to challenge. Since competent individuals do not always know what is in their best interests, and, even when they do, they do not always act accordingly, it is obvious that Mill's claims about our knowledge of, and solicitude for, our own good ought to be rejected.¹⁵

Furthermore, as previously mentioned, Mill acknowledged in another publication that such generalizations have their limitations. In an earlier discussion of the proper limits of government intervention in the economy (which continued to be included without revision in later editions), he stated similar views about the sovereignty of the individual, but noted that the above generalisations could 'be admitted only with numerous abatements and exceptions'.¹⁶

His second argument also ought to be rejected. In addition to the points made in the passage just cited, he claimed that

. . . the strongest of all arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place.¹⁷

¹⁴ 'On Liberty', p. 277 [Chapter IV, Paragraph 4].

¹⁵ Cf., for example, H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) p. 32f.

¹⁶ *Principles of Political Economy with Some of Their Applications to Social Philosophy*, vol. III of *Collected Works of John Stuart Mill*, ed. J.M. Robson (Toronto: University of Toronto Press, 1977), p. 947 [Book V, Chapter 10, § 8].

¹⁷ 'On Liberty', p. 283 [Chapter IV, Paragraph 12].

This contention about the likely misapplication of paternalistic laws to individual cases lacks credibility, most particularly because Mill directed it against *all* (legal) paternalism. It fails to provide a convincing ground for opposing legislation, for example, for ‘cooling off’ periods to afford consumers protection against making unwise purchases, or for compelling the use of safety equipment in industrial settings. It is simply not credible to suggest that laws like these involve interferences that are so seriously misplaced as to constitute an affront to individual liberty. Undoubtedly, it is possible for laws to be objectionably paternalistic in virtue of aiming to offer protection that is quite unwelcome. Thus, for example, proposals to use the law to compel pregnant women who are contemplating having an abortion to delay making their decision until they have attended a counselling session, have met with this response. But this does not gainsay the point that legal paternalism is not always misguided in the way Mill nominated in his second argument. Furthermore, in relation to non-legal paternalism, his argument has little or no relevance. Hence, his second argument is no more compelling than his first.

The third ground for Mill’s opposition to paternalism was its disrespect for the equal standing of competent individuals within society. Because the interests of each individual matter equally, compulsion is permissible only as a means of securing the interests of individuals when they are endangered by the conduct of others. Thus, there is no place for compulsion in that sphere of action ‘in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person’s life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation’.¹⁸ If individuals are not to be robbed of their equal standing with others once they are ‘capable of being improved by free and equal discussion’,¹⁹ paternalism has to be prohibited. Without such a prohibition they would be at risk of having a conception of the good different from their own imposed upon them, which would signal that their self-determination had been usurped and that their equal standing was not respected.

There can be no doubt that this third argument captures what many critics of paternalism take to be the essence of why they find it offensive. Competent

¹⁸ ‘On Liberty’ p. 225 [Chapter I, Paragraph 12].

¹⁹ ‘On Liberty’ p. 224 [Chapter I, Paragraph 10].

individuals do bridle when others treat them as though they are still in their nonage. But must paternalism involve such demeaning treatment? Consider (to give just two examples) the legal requirement for passengers on ships to be given training to prepare them for the extremely unlikely eventuality of having to abandon ship, and the legal mandating of fire drills for occupants of certain kinds of building. Even if paternalism is not the only motive for legal requirements like these, it surely is among the more significant of the reasons for their promulgation. Despite having, on occasion, been mildly resentful myself about the inconvenience involved, it is hard to take seriously the idea of passengers or occupants of buildings being demeaned by having to undertake these forms of compulsory training. In particular, I think it hard to take seriously any claim that having to undertake the training is offensive because it causes a diminution in the standing of the one who is required to undertake the training as compared with that of the legislators or instructors. I say this with full awareness of how remote the prospect is that the training will help to save the lives of those being trained (and, hence, be in their interests). In short, I am no more persuaded by Mill's third main argument against paternalism than by his two previous arguments.

Mill's fourth (and, perhaps, most important) argument is built on the idea that because value inheres in individuals being able to decide things for themselves (as a means to the development of their individuality), the loss in value that must result from paternalistic interferences with decision-making is sufficient to warrant their prohibition.²⁰ Since he seems to have thought that the good for individuals consists in self-fulfilment, *and* that development of the capacities needed for decision-making is a key component of self-fulfilment, it is plain why, on his account, sovereignty in decision-making is instrumentally significant for the good of individuals.²¹ Coupled with his first argument, which was supposed to show that no improvement in well-being could ever result from preempting or overriding an individual's decision-making (such decision-making being causally necessary for the individual's own good), the foundations for Mill's anti-paternalism might seem to have been firmly laid. However, even supposing that a significant cost is imposed on individuals when their decisions are forcibly preempted or overridden, it still does not follow that that cost will

²⁰ He devotes Chapter III of 'On Liberty' almost entirely to furnishing a case for the instrumental value (or, utility) of individual self-determination. See pp. 260-275.

²¹ This argument is sometimes referred to as his 'moral muscles argument' because of the analogy he draws with the building up of the 'muscular powers'. See 'On Liberty', pp. 260-265 [Chapter III, Paragraphs 1-6]. Cf. Feinberg, *op. cit.*, p. 384 (note 5).

always exceed any benefit the individual obtains (e.g. the benefit obtained in being protected against harm). Mill's fourth argument is, therefore, indecisive regardless of whether it is harnessed together with his first argument.

Notwithstanding this, I will say a little more here (in order that I may draw upon it later) about the relationship Mill posited between self-fulfilment and the good for an individual. As mentioned, Mill seems to have thought that decision-making sovereignty is instrumental to the good for an individual. However, he recognised that it is possible, on occasion, to question whether an individual's decision is both free and informed, as in the following famous example:

If either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.²²

Because he acknowledged that there are such circumstances it has seemed to many that Mill's account of the relationship between decision-making sovereignty and individual good is not as inflexible as has hitherto been suggested and, instead, implies that only those who are both informed and free²³ are to be recognized as sovereign decision-makers. On this understanding, it is consistent with his position to employ weak paternalism when individuals are either inadequately informed or unfree.

However, Mill had more to say about the example so the remainder of the passage cannot be ignored. He continued:

Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore, (unless he is a child, or delirious, or in some

²² 'On Liberty' p. 294 [Chapter V, Paragraph 5].

²³ Mill's claim that 'liberty consists in doing what one desires' is open to obvious objections but a more plausible account could be substituted without significantly altering his stance.

state of excitement or absorption incompatible with the full use of the reflecting faculty) he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.²⁴

This suggests that Mill was prepared to modify his position on the sovereignty of the (competent) individual only when it was *certain* that an individual would behave in a manner contrary to his own good if not constrained. Accordingly, his concession to weak paternalism was quite limited. However, in the next section it will emerge that, in at least one circumstance, Mill was willing to break the nexus he claimed to exist between individual self-determination and the good, and, in consequence, to concede far more than weak paternalism.

Two criticisms of the internal consistency of Mill's position on the justifiability of paternalism

It has been contended that not only are Mill's specific arguments against paternalism open to criticism, but that in proposing a blanket prohibition on paternalism he left himself open to a charge of holding inconsistent positions. Two main reasons have been offered for thinking there is an internal inconsistency between Mill's anti-paternalism and his other published views.

First, his anti-paternalism appears to be at odds with his commitment to utilitarianism.²⁵ Elsewhere he regards 'utility as the ultimate appeal on all ethical questions',²⁶ albeit this is immediately qualified when he adds that he means 'utility in the largest sense, grounded on the permanent interests of man as a progressive being'.²⁷ Since it is conceivable that instances of paternalism may be justified on utilitarian grounds, various critics have contended that Mill's anti-paternalist standpoint makes the protection of individual liberty, rather than utility, his supreme value. Second, as I hinted at the end of the preceding section, Mill allows that there is one circumstance in which a competent adult's right to be a sovereign chooser should be challenged. He holds²⁸ that society should not permit the

²⁴ 'On Liberty' p. 294 [Chapter V, Paragraph 5].

²⁵ Cf. J.F. Stephen, *Liberty, Equality, Fraternity* [1874], ed. R.J. White (Cambridge: Cambridge University Press, 1967) p. 86.

²⁶ 'On Liberty', p. 224 [Chapter I, Paragraph 11].

²⁷ Ibid.

²⁸ 'On Liberty', p. 299 [Chapter V, Paragraph 11].

enforcement of a contract for perpetual servitude, even if it has been entered into voluntarily. As a result, he has been accused of inconsistency.²⁹

Various of Mill's supporters have sought to defend him against the first objection by drawing attention to the key role that the protection and fostering of individual liberty played in his understanding of the good for an individual. Thus, they believe that Mill could consistently hold, first, that a competent individual's good consisted in his free pursuit of his preferred way of living, and, second, that any society wishing to maximise well-being (in accordance with the dictates of utilitarianism) ought to prohibit paternalism in order to protect the liberty of each individual to choose his own way of life and to live accordingly.³⁰ Though it can readily be granted that being free is an element in the good for an individual, it need not be granted (and I do not grant) that it is exhaustive of the good. An individual can, for example, quite legitimately trade some of his liberty for other goods like health, or can do so with an eye to ensuring he has more and better options in the future. So, it would seem that Mill and these supporters ultimately have to fall back on their insistence that the overriding of an individual's competent judgment by others will undermine that individual's status as a sovereign chooser. Of course, in the event that there is any doubt about an individual's competence at the time that a particular choice is made, it will, without inconsistency, be permissible to endorse a weak paternalist response.

In order to be in a better position to assess the defensibility of this claim about the sovereignty of competent decision-makers I turn to the second of the criticisms concerning the internal consistency of Mill's anti-paternalism. In discussing exceptions to the legal requirement to honour agreements voluntarily entered into, Mill notoriously wrote:

... it is sometimes considered a sufficient reason for releasing [persons] from an engagement, that it is injurious to themselves. In

²⁹ Versions of these two arguments can be found in, for example, Gerald Dworkin, 'Paternalism', op. cit., pp. 70ff; Arneson, 'Mill versus Paternalism', op. cit., p. 473f; C.L. Ten, *Mill on Liberty* (Oxford: Clarendon Press, 1980) ch. 7; and, Feinberg, *Harm to Self*, op. cit., pp. 75ff, p. 384 (note 7).

³⁰ Cf., for example, Rolf E. Sartorius, *Individual Conduct and Social Norms* (Encino and Belmont, Calif.: Dickenson, 1975) pp. 155ff, and Alan E. Fuchs, 'Autonomy, Slavery, and Mill's Critique of Paternalism', *Ethical Theory and Moral Practice* 4 (2001) pp. 231-251, especially pp. 233ff.

this, and most other civilized countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion. The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at the very least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.³¹

Mill's comments about voluntary enslavement have ruffled his supporters and been seized upon by certain of his critics. The former seek to play down what seems to be inconsistency, while the latter think that the inconsistency between Mill's discussion of voluntary slavery contracts and his usual strictures on the paternalistic treatment of those intending voluntarily to endanger their interests (provided they have been warned of the danger) should simply be acknowledged, *and* that, no matter the explanation for the inconsistency, its existence exposes how difficult it is to maintain a rationally justifiable blanket prohibition on paternalism.³² So, even if, for the most part, the sovereignty of the individual rightfully holds sway, occasions will arise when protection or promotion of an individual's own good justifiably requires overruling his sovereignty (as, I believe, various examples have already illustrated). Hence, proposals for acting paternalistically, and instances of paternalism, including those involving

³¹ 'On Liberty', p. 299f [Chapter V, Paragraph 11].

³² Cf. Dworkin, 'Paternalism', op. cit.; Robert Young, 'Autonomy and Paternalism' in Steven C. Patten, ed., *New Essays in Ethics and Public Policy*, Supplementary Volume 8 of the *Canadian Journal of Philosophy* (1982) pp. 47-66; Kleinig, *Paternalism*, op. cit.; Dan Brock, 'Paternalism and Autonomy', *Ethics* 98 (1988) pp. 550-565; and Danny Scoccia, 'Paternalism and Respect for Autonomy', *Ethics* 100 (1990) pp. 318-334.

strong paternalism, should be considered one by one to determine which, if any, are rationally justifiable. I will seek below to make good on these assertions. But it will help if I first consider several of the ways in which Mill's supporters have responded to the charge that he is inconsistent.

Some responses to the charge that Mill is inconsistent

Some supporters point to the cautious way Mill expresses himself in the passage quoted above and conclude that his opposition to paternalism was reserved for all but extreme cases like that of a person selling himself into perpetual slavery. For them, the language of prohibition used elsewhere by Mill is simply a rhetorical device and any picture of Mill's position on paternalism will be incomplete if it ignores his remarks about voluntary slavery contracts.³³ The complete picture tells a story of restricted opposition to paternalism. The trouble with any interpretation along these lines is that it can hardly be thought accurate to regard Mill as indulging in mere rhetoric in the passage cited at the very beginning of this paper (or, indeed, in other

³³ In support of such a view, there is the consideration that in his earlier work, *Principles of Political Economy with Some of Their Applications to Social Philosophy*, op. cit., p. 935f [Book V, Chapter xi, § 9], in a section dealing with cases of contract in perpetuity, Mill wrote: 'A second exception to the doctrine that individuals are the best judges of their own best interest, is when an individual attempts to decide irrevocably now, what will be best for his interest at some future and distant time. The presumption in favour of individual judgment is only legitimate, where the judgment is grounded on actual, and especially on present, personal experience; not where it is formed antecedently to experience, and not suffered to be reversed even after experience has condemned it. When persons have bound themselves by a contract, not simply to do some one thing, but to continue doing something for ever or for a prolonged period, without any power of revoking the engagement, the presumption which their perseverance in that course of conduct would otherwise raise in favour of its being advantageous to them, does not exist; and any such presumption which can be grounded on their having voluntarily entered into the contract, perhaps at an early age, and without any real knowledge of what they undertook, is commonly next to null. The practical maxim of leaving contracts free, is not applicable without great limitations in case of engagements in perpetuity; and the law should be extremely jealous of such engagements; should refuse its sanction to them, when the obligations they impose are such as the contracting party cannot be a competent judge of; if it ever does sanction them, it should take every possible security for their being contracted with foresight and deliberation; and in compensation for not permitting the parties themselves to revoke their engagement, should grant them a release from it, on a sufficient case being made out before an impartial authority.' This passage remained unaltered through six further editions, including the final edition published in 1871.

passages with a similar drift that are to be found throughout the first chapter of ‘On Liberty’).

A second response has been to suggest that Mill should have re-affirmed his statements opposing paternalism and discarded his paternalistic objection to voluntary slavery contracts.³⁴ Arneson endeavours to back up this claim by suggesting that though Mill expressed warranted opposition to voluntary slavery contracts, he neglected to consider the possibility that there may be non-paternalistic rationales for outlawing them. At first glance this may seem a more reasonable way to account for Mill’s contentions. Alas, however, given that Mill repeated his claim about the importance of disallowing voluntary slavery contracts without modification over a period of three decades, it beggars belief to think that he misidentified why he thought they should be disallowed.

A third, and quite influential, response has come from those supporters who believe that Mill’s comments about perpetual slavery can be accommodated by construing him as making a weak paternalist claim.³⁵ On this reading, Mill’s opposition to perpetual slavery contracts is compatible with his opposition to paternalism because an individual who enters into such a contract deprives himself of the capacity to make revisions in the future concerning how he will live his life, and, since this is an essential element in Mill’s concept of liberty, such an individual shows thereby that his choice is not fully voluntary. But if Mill’s opposition to paternalism throughout the bulk of ‘On Liberty’ simply reflects his opposition to strong paternalism, it is difficult to reconcile this with his emphasis on the *voluntariness* of the decision by an individual to sell himself into perpetual slavery. If he wished only to oppose strong paternalism he surely would have made it clear that he

³⁴ Arneson, ‘Mill versus Paternalism’, op. cit., p. 473, p. 487.

³⁵ Cf., for example, Feinberg, ‘Legal Paternalism’, op. cit.; John D. Hodson, ‘The Principle of Paternalism’, *American Philosophical Quarterly* 14 (1977) pp. 61-69; Ten, *Mill on Liberty*, op. cit.; and Fuchs, ‘Autonomy, Slavery, and Mill’s Critique of Paternalism’, op. cit., especially pp. 241-250. In *Harm to Self*, op. cit., especially chs. 17-22, Feinberg subjected this strategy to searching criticism. By the time he wrote the later work his strong conviction was that the competent have a ‘sovereign right of self-determination’, and he no longer considered weak paternalism to be paternalism at all, but, as previously mentioned, was prepared only to whisper this for fear of causing confusion. However, he sought, in consequence, to identify implicit non-paternalistic rationales for apparently paternalistic interventions, including in relation to voluntary perpetual slavery. For a spirited defence of his approach see Heidi Malm, ‘Feinberg’s Anti-paternalism and the Balancing Strategy’, *Legal Theory* 11 (2005) pp. 193-212.

did not consider it possible for someone to enter into such a contract fully voluntarily. Still, it may be said, regardless of the consistency or otherwise of Mill's claims about paternalism, the justifiability of overriding the judgments of competent individuals about which goals are worthy of being pursued remains a key issue for those who value liberty.

With that in mind, I shall consider a significant recent attempt by Ronald Dworkin to reject the view that a person's life can be improved by forcing him to do something he does not value. Dworkin allows that what he labels 'volitional paternalism' may be morally justifiable if it is sufficiently short-term and limited in scope, but contends that 'critical paternalism' can never be morally justifiable from a liberal perspective.

Ronald Dworkin's critique of paternalism

For Dworkin, an individual's 'volitional well-being is improved whenever he has or achieves something he wants',³⁶ whereas 'his critical well-being is improved only by his having or achieving those things that he should want, that is, achievements or experiences that it would make his life a worse one not to want'.³⁷ Correspondingly, '[v]olitional paternalism supposes that coercion can sometimes help people achieve what they already want to achieve, and is for that reason in their volitional interests. Critical paternalism supposes that coercion can sometimes provide people with lives that are better than the lives they now think good and is therefore sometimes in their critical interests.'³⁸ Dworkin believes that it is a significant philosophical issue whether the former view is to be preferred to the latter, because an individual's life can be evaluated *either* by reference to whether it includes the components that make a life a good life *or* by whether the individual endorses the components that make up his life. Dworkin favours the latter (which he dubs 'the constitutive view')³⁹ on the ground that the

³⁶ Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, op. cit. p. 216.

³⁷ *Ibid.*, p. 216.

³⁸ *Ibid.*, p. 217.

³⁹ His view in this respect is similar to that of Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 1990) p. 203f, though Kymlicka is less concerned to oppose (state) paternalism than (state) *perfectionism*, namely, the idea that, in order to develop the qualities that will perfect our natures as human beings, the state should 'promote goods that are worthy of promotion but whose value is not adequately recognised by the persons for whom they are goods', as Colin Macleod expresses the view on p. 135 of 'Agency, Goodness, and Endorsement: Why We Can't Be Forced to

former ('the additive view') is incapable of explaining 'why a good life is distinctively valuable for or to the person whose life it is'.⁴⁰ On the additive view, whether a component is in someone's critical interests is separable from whether it is endorsed, albeit it is possible to hold that the stronger the degree of endorsement of a component the greater its value.⁴¹ On the constitutive view, by contrast, endorsement is a necessary condition of a component's having value, so unless and until an individual endorses a component it cannot contribute to making his life valuable for him.

Such a view accords well with Mill's conception of individuality in 'On Liberty'; indeed, it is just the kind of view that he seems to have had in mind on those occasions when he proposed a blanket prohibition on (strong) paternalism. For the present, though, I want to draw attention to the close fit between the constitutive view and Dworkin's preferred model of critical value, his so-called 'challenge model' (which he contrasts with an 'impact model'). The challenge model, whose focus is on meeting the challenge of living life well, is supposed to make more coherent sense of our ethical experience than the impact model, which holds that what matters is the difference a person's life makes to the world's objective value.

Dworkin believes that on the challenge model the connection between conviction and value is constitutive.⁴² Once the constitutive view is accepted, critical paternalism can be rejected out of hand -- an individual's life can only be improved with his endorsement. It cannot be improved by

Flourish', *Imprints* 7 (2003) pp. 131-160. For a statement of Dworkin's opposition to state perfectionism see 'Ronald Dworkin Replies' in Justine Burley (ed.), *Dworkin and His Critics* (Oxford: Blackwell, 2004) p. 357.

⁴⁰ *Ibid.*, p. 217.

⁴¹ T.M. Wilkinson, 'Dworkin on Paternalism and Well-Being', *Oxford Journal of Legal Studies* 16 (1996) pp. 433-444 distinguishes between a weak and a strong form of the additive view. The former is the view that the greater the degree of endorsement of an option the better it is *other things being equal*, whereas the latter is the view that the greater the degree of endorsement of an option the better it is *all things considered*. On the weak additive view, the less endorsed of two options can still be better provided it has a sufficiently greater critical value; whereas, according to the strong view, 'of equivalently endorsed options, the one with greater critical value contributes more to the success of a person's life' (p. 437). The difference, as he sees it, between the constitutive view and the strong additive view is that only on the former is endorsement a necessary condition for a component's having value.

⁴² *Sovereign Virtue: The Theory and Practice of Equality*, op. cit. p. 268 and 'Sovereign Virtue Revisited', *Ethics* 113 (2002) pp. 106-143, especially p. 141f.

treating him paternalistically, unless ‘the paternalism is sufficiently short-term and limited so that it does not significantly constrict choice if the endorsement never comes’.⁴³ (Dworkin thinks that, in contrast, critical paternalism, at the very least, makes sense on the impact model, even if its supporters are not required to approve of it.) Because he is aware of the possibility of an endorsement being produced through manipulation (e.g. through chemical or electrical brainwashing, or out of fear), he adds that an individual’s endorsement of a change in his life will be acceptable only if the mechanisms used to secure it do not weaken ‘his ability to consider the critical merits of the change in a reflective way’.⁴⁴

In order to see whether Dworkin’s approach represents an improvement on Mill’s arguments against the justifiability of strong paternalism it will be necessary to give close consideration to the key concept of ‘endorsement’ and to the supporting arguments he offers for its use as a bulwark against strong paternalism.

The way in which Dworkin (and Kymlicka) appear to understand the concept of endorsement makes it less straightforward than they imply and leaves Dworkin’s use of it open to objection. For them, endorsement seems to admit of no degrees -- it is all-or-nothing. But it is easy to imagine circumstances in which an individual endorses several options that cannot be simultaneously realised.⁴⁵ Given both this and Dworkin’s commitment to the constitutive view, wherein endorsement is a necessary condition for the realisation of value, it appears to follow, as Wilkinson has pointed out,⁴⁶ that an individual’s life could be improved by forcing him (paternalistically, if necessary) to take the critically most valuable among the various options he endorses. Furthermore, since Dworkin conceives of endorsement as all-or-nothing, he should consider that an option that is not taken up is one that is, strictly, no longer endorsed. If he does, then given that what is unendorsed is without value, it would appear that he must implausibly hold that an option that is initially endorsed but is deposed by another option that is more strongly endorsed, has no intrinsic value for the agent. It is surely more

⁴³ ‘Ronald Dworkin Replies’, op. cit., p. 355 (which corrects a misprint in the rendition of this claim in *Sovereign Virtue: The Theory and Practice of Equality*, op. cit., p. 269).

⁴⁴ *Ibid.*, p. 218.

⁴⁵ Cf. Wilkinson, ‘Dworkin on Paternalism and Well-Being’, op. cit., p. 435 and Macleod, ‘Agency, Goodness, and Endorsement: Why We Can’t Be Forced to Flourish’, op. cit., p. 143f.

⁴⁶ ‘Dworkin on Paternalism and Well-Being’, op. cit., p. 436.

plausible to believe that such an option is still regarded by the agent as having value, just not as great value as its replacement.⁴⁷

Given the confines of this paper I will say no more about Dworkin's construal of the concept of endorsement, but will, instead, concentrate on how he argues against critical paternalism. In particular, I will focus on the way he links endorsement with integrity. He offers two related arguments for the link. According to the first, in the absence of endorsement a person's life will lack integrity and so will feel false:

If we accept the challenge model we can insist on the priority of ethical integrity in any judgments we make about how good someone's life is. Someone has achieved ethical integrity, we may say, when he lives out of the conviction that his life, in its central features, is an appropriate one, that no other life he might live would be a plainly better response to the parameters of his ethical situation rightly judged.⁴⁸

He allows, of course, that an agent who lives in a manner that is faithful to his convictions can modify his convictions in light of advice from those well-placed to give it, or in light of his own continuing reflection. But, from the third person perspective, which he thinks is the crucial one for the issue of critical paternalism, we are precluded from requiring a competent individual to act contrary to his convictions once we give ethical integrity priority. It is permissible to debate with the individual about what would be in his best interests, but not to impose values that he does not endorse for that would require him to live a life in which he would not be at peace with himself.⁴⁹

The key point to notice about this argument is the contention that integrity is undermined by critical paternalism. As moral or ethical integrity is commonly understood, it involves holding steadfastly to a consistent set of moral values, standards, or principles that have been deliberately and

⁴⁷ Cf. Thomas Hurka, 'Indirect Perfectionism: Kymlicka on Liberal Neutrality', *Journal of Political Philosophy* 3 (1995) pp. 36-57, who distinguishes a strong interpretation of endorsement from a weak interpretation, which sees it as only a necessary condition of the realisation by an agent of the highest degree of value present in a valuable activity. This implies that an unendorsed activity may still have value for an agent.

⁴⁸ *Sovereign Virtue: The Theory and Practice of Equality*, op. cit., p. 270.

⁴⁹ *Ibid.*, p. 271f.

successfully integrated into a person's sense of self. So, when Dworkin writes that integrity 'fails conspicuously when people are made to live, by the fiat of other people, in a way they regret and never endorse',⁵⁰ what he says may, at first sight, seem undeniable. We do think that individuals suffer a loss of integrity when they fail to act in accordance with their convictions, including when third parties have induced them to act contrary to those convictions. But when a third party compels an individual to act in a way he does not endorse, we do not think that he has, as a result, failed to act with integrity. Even supposing that critical paternalism always gives rise to a moral problem, Dworkin has misidentified the problem in thinking it has to do with an individual suffering a loss of moral integrity.⁵¹

Integrity does require coherence but it is question-begging to claim that critical paternalism must destroy the coherence of an individual's life. Suppose that one of the key ingredients in a professional fire-fighter's sense of self is his readiness to put his life on the line to save others in an emergency. Suppose further that such a fire-fighter expresses the desire to enter an inferno to rescue a bed-ridden occupant who cannot escape without assistance. Suppose, finally, that his commanding officer orders that he not enter the building because the risk to his life would be too great and tells him that he will have him restrained if he makes an attempt. The commanding officer's behaviour is properly describable as critically paternalistic but it is not obvious that the fire-fighter must, in consequence, suffer a loss of personal (or, professional) integrity, or a loss of coherence in his response to the challenge to live his life well just because he has to follow such an order. Examples of the state engaging in critical paternalism are less common but they are to hand. Thus, for instance, ocean beaches may be closed to swimmers during shark alerts; professional fishing fleets can be prohibited from leaving port when extreme weather conditions are forecast; those wishing to engage in ocean racing of yachts cannot enter events without an EPIRB (an emergency position indicating radio beacon) on board; and in various countries employees are required to contribute to pension funds or superannuation schemes. In none of these cases, it seems to me, is there a loss of integrity or coherence for those who are compelled to conform.

⁵⁰ Ibid., p. 271.

⁵¹ Cf. Wilkinson, 'Against Dworkin's Endorsement Constraint', op. cit., p. 189 who registers a similar complaint.

Dworkin's second argument for a link between endorsement and integrity is that there is no good non-question-begging reason to think that people will lead better lives if they are made to choose between options others have decided would improve their lives. Critical paternalism 'assumes an independent, transcendent picture of ethical value, and the challenge model rejects any such picture'⁵² on the ground that it misrepresents the complex phenomenology of ethical judgment (which assigns a central constitutive role to reflective or intuitive conviction). It is a premise of this argument that others cannot know better than a competent individual what would be in his best interests (leaving aside interventions that are both temporary and non-invasive). This is a constitutive feature of the model of challenge and it is what is supposed to make critical paternalist attempts at restricting the options from among which individuals may choose (to prevent them making bad choices) self-defeating.

Is it not possible, however, for individuals to be seriously, even fatally, mistaken about the benefits to be had, or the harms to be suffered, as a result of the options they choose, despite others knowing about those benefits and harms? If an individual holds factually false beliefs about, for example, the suitability for consumption by him of a dose of the designer drug GBH (gammahydroxybutyrate),⁵³ but he endorses its consumption, should he still be permitted untrammelled access to the GBH?

Does Dworkin's model of challenge have anything helpful to say about such matters? Unfortunately, his own examples of how critical paternalism impacts on competent adults are highly contrived and, more significantly, are in a key respect very like Mill's example of contracts for perpetual servitude in that they concern decisions which impact on a life as a whole. One has to do with prohibiting an individual from pursuing his preferred vocation for life and the other with prohibiting expression of sexual orientation. He appears to think that other examples he canvasses can all be excluded from the category of critical paternalism on the ground that they would involve only temporary and non-invasive restrictions on people's behaviour and so would prove not to constrict choice in the event that endorsement is never given. By contrast, the everyday examples of

⁵² *Sovereign Virtue: The Theory and Practice of Equality*, op. cit., p. 274.

⁵³ The drug is sometimes known as 'liquid ecstasy' -- overdoses are common because the dosage needed to get a 'high' differs very little from dosages that can cause: severe irritability; hallucinations, blackouts and memory loss; seizures; comas; respiratory failures and deaths.

paternalism that I have given throughout this paper have been advanced as examples of strong (or, critical) paternalism. I do not deny that some individuals may willingly embrace the restrictions involved in the examples. But there will also be others for whom being required to conform involves a significant constraint. Dworkin's test for determining whether an instance of paternalism is to be regarded as objectionably critical is whether it involves overriding an individual's convictions rather than his will (and, as has already been indicated, he considers the connection between conviction and value to be constitutive).⁵⁴ Given the usual understanding of paternalism (viz., the one that I have been working with in this paper), this is mere stipulation.

Conclusion

Just as Mill sought in his more belligerent moments in chapter one of 'On Liberty' to champion the sovereignty of the competent individual, Dworkin seeks to champion such an individual's moral integrity. Neither has put forward a decisive case. Mill inconsistently claimed that a competent individual should be prevented from entering into a contract to be a perpetual slave. Dworkin is more resolute in his commitment to individual liberty but this comes at a cost, namely the cost of holding implausibly that an individual who is subject to critical paternalism is thereby stripped of his integrity (since the only options capable of promoting his well-being are those he endorses). This is so no matter how serious the bad consequences of an individual's actions may be for him, and no matter how mistaken he may be in his beliefs about those consequences, because to compel him to act against his convictions *necessarily* renders him even worse off.

Elsewhere I have argued that once an individual's occurrently autonomous choices (those choices made autonomously but which are in themselves of only momentary significance) are distinguished from his more important dispositionally autonomous choices (those choices made autonomously that have more global significance for his life), strong paternalism may sometimes justifiably be invoked to restrict the exercise of the former to protect future exercise of the latter.⁵⁵ My suggestion is that whether the autonomous behaviour of a competent individual in a particular instance will

⁵⁴ *Sovereign Virtue: The Theory and Practice of Equality*, op. cit., p. 268.

⁵⁵ *Personal Autonomy: Beyond Negative and Positive Liberty* (London: Croom Helm, 1986) ch. 6.

seriously undermine his capacity in future to make autonomous choices must be taken into account in deciding the justifiability of a paternalistic intervention. Hence, whether paternalism is justifiable is not an all-or-nothing matter. The onus is always on those, whether individuals or the state, who propose to act paternalistically to shoulder the burden of proof for its being necessary, but, even when that can satisfactorily be done, paternalism should be subject to strict limits. There is space here only to mention the sorts of consideration relevant to the determination of those limits.⁵⁶ They include the following: the seriousness of the harm that will be suffered, or the benefit that will be foregone; how extensive any intervention needs to be; and, whether it is possible to intervene without reducing those who are treated paternalistically to a condition of dependence.

On many issues to do with paternalism there will be no disagreement between what I want to say and what Mill and Ronald Dworkin have said. Thus, for example, I share Mill's opposition to perpetual slavery contracts, and believe that in opposing them he was expressing a point quite like the one I have made. I also endorse Dworkin's views that a competent adult Jehovah's Witness should be allowed to refuse life-saving blood transfusions even though his refusal is tantamount to accepting death and that a competent individual should be permitted access by law to medically assisted death⁵⁷ because strong paternalistic interference in these matters requires overriding the dispositional autonomy of the individuals concerned (and this in turn explains why it would be unjustified). However, I part company from Mill and Dworkin in believing that the same explanation serves to justify more interventions than they seem willing to countenance (e.g. the enforcement of occupational health and safety requirements despite the objections of employees and the issuing of orders by lifeguards requiring surfers to leave the surf when there is a shark in the near vicinity despite protests by the surfers). I think that anyone who values liberty in its more important dispositional guise should do the same.

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⁵⁶ Cf., for example, Gerald Dworkin, 'Paternalism', op. cit., pp. 82ff and Jeffrie Murphy, 'Incompetence and Paternalism', *Archiv für Rechts- und Sozialphilosophie* 60 (1974) pp. 465-486, especially pp. 483ff.

⁵⁷ See *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993) chs. 7 and 8.