

JUSTIFYING GOVERNMENT PATERNALISM, BEYOND J.S. MILL

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A thesis submitted to the faculty at the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Masters of Arts in the Department of Political Science.

Chapel Hill
2016

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ABSTRACT

Devin J. Christensen: Justifying Government Paternalism, Beyond J.S. Mill
(Under the direction of Jeff Spinner-Halev)

Recent scholarship on paternalism has rarely strayed from John Stuart Mill's *On Liberty*, in which the protection of liberty and respect for individual exercises of reason are offered as the only grounds for justifying paternalistic government interference in individuals' private affairs. However, Mill's restricted universe of moral discourse cannot exhaust the moral economy from which we draw when justifying government interference, including paternalistic interference, given pluralist commitments. If we are committed to pluralism, then we must accept 1) that normally competent, rational adults will inevitably disagree about what the good life entails, and these disagreements cannot be resolved on the basis of reason alone and 2) that citizens could consent to paternalistic interference for a plurality of reasons which are not reducible to liberty. I suggest that paternalistic mitigation of certain kinds of individual vulnerability offers an example of justified paternalism which cannot be explained in exclusively Millian terms.

To my wife, for your support, encouragement, critical discussion, and skepticism.

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I: INTRODUCTION

The past forty years of scholarship on paternalism have been dominated by John Stuart Mill. Work seeking to establish exactly why paternalism strikes us as *prima facie* objectionable, and whether and when government paternalism might be justified, rarely strays very far from *On Liberty*.¹ This scholarship has taught us much about the relationship between states and citizens and how thoroughly pervasive the questions of liberty and reason are in political thought. However, in this article I want to broaden the moral horizon, because neither liberty nor reason is able to capture all of the basic moral sensibilities which may convince us that paternalistic interference is justified. Without diminishing the value of earlier efforts, I want to suggest how and why we should move beyond Mill in our continued theorizing about paternalism.

The core of my argument is that pluralist commitments have implications for the project of public justification that blunt Mill's objection to paternalism.^a In particular, if we are committed to pluralism, then we must accept 1) that normally competent, rational adults will inevitably disagree about what the good life entails, and these disagreements cannot be resolved on the basis of reason alone; and 2) that citizens could consent to paternalistic interference for many reasons which are not reducible to liberty. Contrary to trends in the paternalistic literature, most of my analysis will focus on the process of public justification itself. This analysis shows that two famous qualifications to the prohibition of paternalism in *On Liberty* involve presuppositions about how laws are justified which run aground of pluralist commitments. For each instance of interference, public justification arguments for pluralists entertain a plurality of reasons for consenting to the interference and specify in context which relevant public must consent for the interference to be justified. The paternalism

¹ John Stuart Mill, *On Liberty and Other Essays*, ed. John Gray (Oxford, 2008).

literature shows how fruitful are considerations of liberty as a justifying reason and rational individuals as a relevant public, but my aim is to suggest that these topics do not (and cannot, if we are committed to pluralism) exhaust the moral economy from which we draw when consenting to government interference, including paternalistic interference.

The essay proceeds in three parts. In the first part I briefly sketch Mill's treatment of paternalism and show how it has shaped the paternalism literature since Joel Feinberg's 1971 essay "Legal Paternalism."² In the second part I analyze public justification of government interference in light of pluralist commitments. In the third part, I show how distancing ourselves from Mill enables justificatory arguments to better capture our basic moral sensibilities about paternalistic interference, using the example of the Federal Food, Drugs, and Cosmetic Act of 1938.

II. MILL AND PATERNALISM

The first three words of a 2013 edited volume on paternalism are "John Stuart Mill."³ The editors, Christian Coons and Michael Weber, situate the volume in terms of Mill's famous rejection of paternalism in *On Liberty*:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant (On Liberty, 14).

After mentioning only very briefly (in two sentences) the nature of some of the most common responses to Mill's absolute prohibition on paternalism, Coons and Weber suggest that "[t]his mere snippet from the historical debate is enough to show that paternalism is a topic that engages deep

² Joel Feinberg, "Legal Paternalism" *Journal of Philosophy* 1 (1971): 105-124.

³ Christian Coons and Michael Weber, eds., *Paternalism: Theory and Practice* (Cambridge, 2013).

philosophical issues in normative ethics and political philosophy, including the significance and nature of freedom and autonomy, and the relation between individuals and the state” (1).

Coons and Weber are right to characterize the great majority of all paternalism scholarship of the past four decades as a response to this statement of Mill’s. Nearly every chapter of the edited volume engages Mill in one way or another, and this tendency can be traced backward through the paternalism literature to two early essays from the 1970s: Joel Feinberg’s “Legal Paternalism” (1971), an essay-length introduction to his massively influential book *Harm to Self* (1986), and Gerald Dworkin’s “Paternalism” (1972).⁴ A full analysis of the extant literature and the various methods political theorists and philosophers have used to argue against Mill are beyond the scope of this paper. My goal is merely to mark out the conceptual territory in which these battles have been waged, and to do so I turn directly to Mill. Despite the absolution of the above-quoted prohibition on paternalism, Mill defines two different cases in which paternalistic interference would be justifiable: when interference doesn’t interrupt rationally chosen actions and when interference delivers greater net liberty to the person whose liberty is initially curtailed by the interference. I refer to these as the “broken bridge” and the “slave contract.” It is in the restricted context of these exceptions to Mill’s general proscription of paternalism that paternalist literature has more or less remained – a trend that I hope to interrupt in this essay.

II.1: Mill’s argument against government paternalism

Mill’s position against government interference, and paternalistic interference especially, has two primary components: liberty of opinion and liberty of action. He argues in Chapter 2 of *On Liberty* that we ought to protect individuals’ freedom to think and form beliefs, because the existence of uncustomary intellectual perspectives benefits the pursuit of truth in general.⁵ Freedom of thought accomplishes this in two ways. First, “even if the world is in the right, it is always probable that

⁴ Joel Feinberg, *Harm to Self* (Oxford, 1986); Gerald Dworkin, “Paternalism” *The Monist* 56 (1972): 64-84.

⁵ *On Liberty*, 20-61.

dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence” (54). As a general rule, we should assume all viewpoints contain a kernel of truth, and silencing dissenters throws the baby out with the bath water. But Mill presses the issue even further by suggesting that dissenting viewpoints are strictly required for the establishment of positive beliefs in the first place:

He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may be able to refute them. But if he is equally unable to refute the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgement (42).

Freedom of thought is beneficial in a second way because truth itself is only valuable to those who discover it themselves (often by following a path of frequent error):

No one can be a great thinker who does not recognize, that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think. [I]t is . . . indispensable, to enable average human beings to attain the mental stature which they are capable of (39).

Freedom of thought should thus be protected because it is only through the imperfect individual pursuit of knowledge that truth comes to have any value to the one who holds it, and because the existence of opposed viewpoints is required for the individual pursuit of knowledge to be possible.

In addition to freedom of thought, Mill argues that individuals’ due liberty extends to actions, at least in those cases in which individuals’ actions concern no one but the actors themselves (14, 83-84, 104). One reason we should respect individuals’ free agency, like their freedom of thought, is because the value of their lived decisions depends upon their having chosen them for themselves; “if a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode” (75).

Unlike in the case of truth (which Mill seems to treat as objective), people's good lives may genuinely differ:

Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies, that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable (75-76).

Independent of axiological considerations, Mill is attentive to practical institutional limitations to benevolent government interference; “the strongest of all the 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” (92). This worry is supported by a number of empirical generalizations. First, Mill thinks that individuals are epistemically advantaged with respect to their own goods; the government is simply not in a position to know what is in each individual's best interest (93). Second, the surest way to obtain a good is to put someone with a vested interest in obtaining the good in charge of its pursuit. Individuals – and not the government – have this kind of special interest in their own goods (121). Third, Mill argues that individuals benefit from making their own way, even if they make mistakes, because people learn from their negative experiences how better to live their lives (121). Finally, fourth, Mill is worried that enabling the government to interfere in the private lives of individuals – even when the state has the best intentions and is occasionally able to deliver good outcomes – will involve a dangerous inflation of state capacity (122) that is both inefficient (126) and attracts to government offices dangerously ambitious people with aspirations of domination (122).

Mill's argument against government paternalism thus has three freestanding components. First, he argues that the free exercise of reason generates the value of truth for individuals, so the state harms individuals when it interferes with their freedom of thought. Second, he argues that individuals' free agency generates (at least some of) the value their lives have to them, so the state

harms individuals when it interferes in their free actions. Third, even if the state theoretically could do more good than harm to individuals through interference with their private lives, Mill is convinced that the state is nevertheless practically incapable of doing so.

Mill's three complaints against paternalism generate two different categories of cases in which paternalism ought to be accepted, which he outlines in *On Liberty* and which paternalists have leveraged extensively. If the government is not to interfere with private exercises of reason, then there is no presumptive problem with the government interfering with the private lives of citizens where they are not exercising their reason (given that the state is able to overcome the practical dangers intervention presents). If the government is to protect individual liberty, then paternalistic interference which secures increased net liberty to the individual is acceptable (again, provided the state can do so without generating the kinds of practical problems Mill outlines). Mill thinks these kinds of situations do arise, and that they are the *only* cases in which paternalistic intervention is justifiable.

II.2: The broken bridge

[I]t is a proper office of public authority to guard against accidents. 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 (106-107).

The state is justified in interfering with individuals' uninformed or irrational decisions. For rational adults, such intervention is justified to the limited extent that it is undergone to warn individuals of the risky consequences of their actions, not to coercively prevent them from exposing themselves to risk (107). However, Mill adds an important caveat: the state oughtn't interfere "unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty" (107).

Mill moves quickly on from the bridge case to an example of drugs with potentially dangerous effects, in which he suggests that “labelling the drug with some word expressive of its dangerous character, may be enforced without violation of liberty: the buyer cannot wish not to know that the thing he possesses has poisonous qualities” (107). The broken bridge and dangerous drug examples, together with Mill’s qualified types of individuals with whom the state is apparently justified in interfering, suggest that Mill has in mind a special relationship among reason, knowledge, and liberty. The exercise of liberty requires knowledge of pertinent information, so the state is generally justified in interfering with individuals at least for the sake of educating them about the consequences of their private actions. But knowledge isn’t enough; the exercise of liberty requires one to have the capacity to make a rational decision in light of relevant information. Thus, when Mill says a buyer strictly “cannot” wish to remain ignorant of a drug’s toxicity, he is suggesting that a *rational* buyer, “with the full use of the reflecting faculty,” *would not* wish to remain so ignorant. On this line of reasoning, paternalistic intervention is justified in these special situations because such intervention doesn’t *really* interfere with the individual’s liberty, insofar as “liberty consists in doing what one *rationally* desires.”

Much has been made of the appeal to rational desires. Providing an account of what individuals *would* want, if only they were better informed or more rational, has been a dominant strategy for justifying paternalism. For example, the extent to which individuals’ interrupted behaviors are rational features centrally in Joel Feinberg’s “Legal Paternalism,” where he sketches his famous distinction between “strong” and “weak” paternalism:⁶

According to the strong version of legal paternalism, the state is justified in protecting a person, against his will, from the harmful consequences even of his fully voluntary⁷ choices and undertakings. . . . According to the weaker version of legal paternalism, a man can rightly be prevented from harming himself (when other

⁶ Feinberg, “Legal Paternalism,” 110-124.

⁷ Feinberg uses “voluntary” throughout his discussion, and by voluntary he means an action that follows from individuals’ deliberate choices or, alternatively, their exercises of reason. See “Legal Paternalism” 111.

interests are not directly involved) only if his intended action is substantially nonvoluntary. . . . The “harm to others” principle, after all, permits us to protect a man from the choices of other people; weak paternalism would permit us to protect him from “nonvoluntary choices,” which, being the choices of no one at all, are no less foreign to him (124).

Feinberg suggests that strong paternalism is (almost) never justifiable because people’s exercises of reason in matters that concern only themselves are too precious a thing to interfere with (111).^{8,b}

The rational agent line of reasoning in the broken bridge case has more recently become the topic of intense interest thanks to Richard Thaler and Cass Sunstein’s *Nudge* (2003).⁹ In *Nudge*, Thaler and Sunstein ask us to imagine ourselves as composite personalities. On the one hand, normal adult people are rational agents capable of making educated, calculated decisions about their desires and goals, and their decisions ought to be respected by the state and others (at least insofar as those decisions have the potential only to harm the individuals themselves). Call this part of our split personality the *homo economicus*, or Econ. On the other hand, normal adult people are quite bad at making decisions in certain contexts. What should be merely irrelevant features of a choice context to a rational agent tend to lead us into errors that prevent us from achieving our own goals. Call this part of our split personality the *homo sapien*, or Human (7).

Thaler and Sunstein mobilize social scientific research to show that Humans make repeated, predictable, and costly mistakes in their daily lives that, if they were thinking more rationally, they would agree are not aligned with their own life goals. *Nudge* asks whether the state might paternalistically intervene at the points when people tend to make such mistakes by modifying the architecture of the decision context itself, manipulating the Humans in us to (nonrationally) behave in

⁸ For the purposes of this paper, I roughly take paternalism to mean “delivering a good to people whether they want it or not.” “Government paternalism” refers to the state of affairs where the government attempts to deliver a good to citizens whether the citizens want it or not. See the endnote for more information on how my definition differs from Feinberg’s. My usage of paternalism is crudely derived from an analogy between the relationship between parents and children and the relationship between the state and its citizens. Refer to the appendix for this derivation.

⁹ Richard H. Thaler and Cass R. Sunstein, *Nudge* (Penguin, 2009).

a way that's better aligned with the way the Econs in us wish the Humans would behave (11-14). For Thaler and Sunstein, Feinberg, and Mill, interventions of this sort are justifiable because there's no moral problem with interfering with irrational behaviors.

One cannot overstate the importance of the broken bridge case to paternalism scholarship.¹⁰ Before moving on to a second massively influential Millian contribution to our thinking about paternalism, I want to point out an important implication the broken bridge has for the justification of paternalism. If we accept Mill's argument that it's individuals' behaving rationally that protects them from government interference (and the paternalism literature from Feinberg to *Nudge* for the most part *has* accepted this argument), then we reveal a crucial criticism against paternalistic interference: if a particular paternalistic intervention threatens to foreclose¹¹ on a life that a rational agent could affirm, then it is unjustifiable. In other words, the broken bridge case creates a thin category of justifiable paternalistic interference with behavior that cannot be affirmed by any rational agent. The forcefulness of this limitation of justified paternalism depends on our accepting Mill's moral evaluation of rationality, something paternalists have historically been too ready to do. As I argue below, it is not self-evident that relatively more rational agents ought to enjoy political protections unavailable to the rest of us, whose actions are as readily explained by emotion, habit, and non-reflection as by the exercise of Millian reason.

¹⁰ A few references which treat this issue directly are Coons and Weber, Introduction (1-24); Danny Scoccia, "The right to autonomy and the justification of hard paternalism" in *Paternalism: Theory and Practice* (78-81); Steven Wall, "Moral environmentalism" in *Paternalism: Theory and Practice* (101); Michael Cholbi, "Kantian paternalism and suicide intervention" in *Paternalism: Theory and Practice* (115); Jeremy A. Blumenthal, "A psychological defense of paternalism" in *Paternalism: Theory and Practice* (198-199); Julian Le Grand and Bill New, *Government Paternalism: Nanny State or Helpful Friend?* (Princeton, 2015), 79, 121, and Ch. 6; John Kleinig, *Paternalism* (Rowman & Allanheld, 1984), 25; Gerald Dworkin, "Paternalism" (73-78); Nicholas Dixon, "Boxing, Paternalism, and Legal Moralism" *Social Theory and Practice* 27 (2001): 324; Richard Arneson, "Mill versus Paternalism" *Ethics* 90 (1980): 482.

¹¹ By foreclose I vaguely mean an unacceptable degree to which the state can render a life difficult to pursue. This could include making it more expensive through taxation, making inputs to the life unavailable (as in outlawing the production of cigarettes would make smoking more difficult), or making the life itself illegal.

II.3: The slavery contract

According to Mill, the government is not to interfere with individuals' liberty in cases where their behavior affects no one but themselves. "Yet," he says, "this general rule has some exceptions."

In 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 reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. . . . But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free (113-114).¹²

Mill continues by admitting that the justification of paternalistic intervention for the sake of delivering greater net liberty is of "evidently far wider application" than just the case of the slave contract. As Gerald Dworkin has noted in "Paternalism" (1972), "This gives us a principle – a very narrow one – by which to justify some paternalistic interferences. Paternalism is justified only to preserve a wider range of freedom for the individual in question" (76).^c

Whether or not the slave contract principle is in fact "very narrow" remains an open question. We admit that certain kinds of goods are required for the exercise of liberty, so it may be the case that interference in order to protect these goods is justified on the grounds that it opens up a broader range of freedom to individuals. For example, we normally think that a certain level/kind of education is required for individuals to exercise freedom; public education requirements could perhaps be justified on this argument.^d Likewise, goods like health, perhaps some minimum level of material affluence, the guarantee of various positive political rights, and the enjoyment of social goods like acceptance

¹² Note that the basis of the argument here is protection of liberty, *not* respect for reason. One may reasonably wonder if the slavery contract is troublesome only because it involves nonrational behavior, but we should resist the urge to conclude outright that no one could rationally choose the life of a slave. See Dworkin, "Paternalism," 75-76.

and love may contribute to our capacity to exercise our liberty, if by liberty we have in mind the ability to actualize certain of our potentialities or capacities.¹³

Sarah Conly has recently taken up this line of argument in her book *Against Autonomy: Justifying Coercive Paternalism* (2013), in which she argues that if “liberty is . . . something that should be promoted, it would make more sense to admit that at times the best way to promote it overall is to curtail it in particular cases” (50).¹⁴ Conly has in mind particular coercive government interventions explicitly designed to improve individuals’ health like motorcycle helmet laws, smoking bans, bans on fatty foods and oversized sodas, on the argument that protecting health by limiting liberty in these particular cases yields increased net liberty to individuals.

I put off further analysis of Conly’s argument until the next section. For now, one should note that her approach is typical in the paternalism literature. If we accept Mill’s argument that paternalistic intervention is justified when it delivers individuals enhanced liberty, then an obvious way to justify paternalistic interference is to show that there are lots of ways beyond refusing to enforce slavery contracts that the state can enhance individuals’ liberty.¹⁵ Likewise, this line of reasoning suggests an important criticism to paternalism: if paternalistic intervention cannot be convincingly shown to enhance individuals’ liberty, then it is unjustifiable. But, as was true above with the broken bridge, the weight of this objection against paternalistic interference hinges on our acceptance of Mill’s claim that liberty is the *only* good the government can legitimately intervene to

¹³ This is the argument behind Martha Nussbaum and Amartya Sen’s human development approach; see Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap, 2011).

¹⁴ Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge, 2013).

¹⁵ For examples of paternalistic literature in this vein, see Coons and Weber, Introduction (7-8); Peter De Marneffe, “Self-sovereignty and paternalism” in *Paternalism: Theory and Practice* (58-59); Alexander, “Voluntary enslavement” (231); Thaler and Sunstein, 5; Feinberg, “Legal Paternalism,” 116; Richard Arneson, “Joel Feinberg and the Justification of Hard Paternalism” *Legal Theory* 11 (2005): 265; David Archard, “Freedom Not to be Free: The Case of the Slavery Contract in J. S. Mill’s On Liberty” *The Philosophical Quarterly* (1950-) 40 (1990): 453; Martin Binder and Leonhard K. Lades, “Autonomy-Enhancing Paternalism” *KYKLOS* 68 (2015): 3-27.

protect. I argue that we should not accept this claim because it runs aground of pluralist commitments.

III. PLURALISTIC PUBLIC JUSTIFICATION AND MILL

Nearly all scholarship about paternalism investigates whether, when, and how paternalistic interferences might be justified. Despite this interest, little to no attention has been paid by paternalists to what it means to “justify” a law. Based on my analysis above, Mill suggests that, whatever else it might mean, justification must have to do with respecting rational autonomy and protecting liberty. But is Mill correct? Briefly, my answer is a qualified negative. Mill is certainly right that justification *can* involve appeals to reason and liberty, but reason and liberty do not exhaust the realm of things on the basis of which justificatory appeals can be made. In fact, in some cases, reason and liberty will be quite distant from our first impressions of what justifies state interference. In making this argument against Mill, I aim to show that the paternalism literature of the past forty years has been mistakenly narrow in focus; in effect, paternalists have been misguidedly attempting to reduce what should be a rich and variable conversation about paternalistic justification into the meager terms of only one kind of person (the rational agent) and only one kind of good (liberty).

III.1: Public justification

I begin exploring public justification by activating some of our basic intuitions about politics. I take for granted that laws which interfere with citizen’s liberty stand in need of justification, because liberty is a *prima facie* good. In other words, it is because citizens suffer (at least a presumptive) harm when their liberty is infringed that state interference requires justification.¹⁶ Thinking about justification in this way draws our attention to a link between ethics and politics: justifying interfering laws is like making a moral argument that some *prima facie* wrong actions are morally permissible

¹⁶ Whether the specific nature of the harm is in denying due respect to individuals, denying them opportunities to develop the capacity for self-direction, denying them the basic good of autonomy, or something else is not central to my analysis.

after all. In fact, thinking about how moral arguments are structured grants considerable leverage over the notion of public justification. We only need moral arguments when the permissibility of an action is in question (and permissibility is usually in question because the action involves at least a presumptive bad); when arguments are needed they often require both principled accounts of the moral values at stake and certain information about how those principles come to bear on the moral context at hand; and moral arguments succeed when they convince us to think the action under investigation is permissible. We should also be attentive to the fact that moral arguments, when they succeed, differently succeed in convincing different people about the permissibility of different actions in different contexts on the basis of different reasons. If the analogy between moral arguments and public justification is right, we should also expect context-specificity and variety from justificatory appeals.

A second of our political intuitions begins with the notion that state interference is a special kind of presumptive bad because the state is a special kind of moral agent *vis a vis* its citizens.^e The moral permissibility of state interference, unlike the permissibility of presumptively wrong actions performed by other moral agents, is taken to be bound up in some notion of consent. In other words, the second political intuition to which I want to appeal as is that the consent of the governed is the *only* acceptable grounds for claiming that state interference is morally permissible. Government interference may only be justified by showing that citizens consent to that interference.

I also assume that we have pluralist commitments: we recognize and accept that different people find moral value in different things and that we are not in a position to say with any authority which of those things are “really” valuable. What this means for public justification is that different people will have different reasons for consenting to government interference, and we are generally unable to claim that others’ reasons for consent are unacceptable merely because their reasons would not convince *us*.^f Because we will generally be unable to resolve disagreements about which reasons are sufficient to consent to government interference, irreconcilable disagreement will always be a feature

of pluralistic liberal democracy (John Rawls, *Political Liberalism*, 36, 58, 136).¹⁷ What we need is an overlapping consensus: it is enough that individuals consent to an interfering law on the basis of whatever reasons enable them to do so. If any laws are justified, justification given pluralism cannot require that everyone consents for the same reasons (38, 137).⁸

The acceptance of inevitable disagreement and call for overlapping consensus do not mean we are required to accept consent on the basis *any* candidate reason (or that we must respect one's refusal to consent on the basis of just *any* reason). We think that coerced reasons are not legitimate grounds for consent. We are suspicious of reasons founded on manipulation.¹⁸ Intuition suggests there's a serious problem with reasons derived from some hysterical or delusional mental states, and occasionally we reject reasons which are based on empirical claims which turn out to be wrong.¹⁹

All this said about unacceptable reasons, only an inhumane and naïve account of human action would fail to incorporate the fact that people make decisions on the basis of more than coldly calculated rationality. People order their lives according to affect, faith, duty, custom, whim, and many other things, and we should not dismiss these out of hand as categorically unacceptable reasons to consent to government interference. In the end, which reasons (and which states of reasoning) are unacceptable depends on the particular case of interference at hand. Deciding which reasons we might accept as grounds for consent to interference, then, is essentially part of the project of justifying interfering laws and should not be settled by some metaphysical prearrangement on philosophers' parts.

¹⁷ John Rawls, *Political Liberalism, Expanded Edition* (Columbia University Press, 2005).

¹⁸ Much of the hesitancy to embrace *Nudge's* libertarian paternalism derives from this feeling. We understandably feel unease at the prospect of the government enabling us to act better if its primary method of doing so is to capitalize on the nonrational, manipulable cognitive shortcomings we face in particular decision contexts. Conly expresses this dissatisfaction at 29-32.

¹⁹ We probably wouldn't accept an argument that vaccines should be outlawed on the basis of their having been linked to autism, for example, because (among other concerns) the reasons for consenting to such a law rely on false empirical claims.

This leads to the last political intuition to which I want to draw attention: some laws are justified. We've already committed to the view that justification has something to do with consent. We've also acknowledged that even if we accept diverse reasons for consenting, not everyone will consent to any law, and some of those who fail to consent will fail for unacceptable reasons. It seems like the only way to reconcile these apparently contradictory commitments is to admit that our demand for consent can be satisfied by something less than explicit consent of each and every citizen. This approach has led theorists to ask, hypothetically, what would need to be changed about the unconsenting agents to make them consent.^h If hypothetical consent is at least sometimes a satisfying alternative to explicit consent, then all of our political intuitions and commitments can be simultaneously incorporated into an account of public justification.

The most familiar form of hypothetical consent is secured from individuals who we imbue with idealized capacities for reason. The familiar sentiment is captured by comments like, "of course the murderer doesn't consent to laws against killing, but if only she affirmed the proper social reasons she would;" or "the starving beggar doesn't consent to laws against stealing bread, but if he more carefully examined the situation in light of reason, he would." Thus, hypothetical consent asks us to consider to what an agent would consent if the agent had access to greater deciding resources (information, rational capacity, time, etc). Other nonexplicit consent devices operate in the same way. Proxy consent asks us whether and when another's consent can be counted in place of the agent's own. Future consent asks whether we suspect the agent (such as the agent is) would consent after having experienced the interference for which the consent is not presently forthcoming. Tacit consent asks whether, regardless of whether the agent knows or acknowledges it, certain nonverbal behaviors (consuming public goods, following laws, paying taxes, etc) can satisfy our notion of consent for that individual.ⁱ

Just as with justificatory reasons, what level of idealization is required, and of which citizens, depends on the political context of a particular instance of interference. We may think that laws which affect the fundamental political rights of individuals would need to be justified to a large public

that was only at most minimally idealized. We wouldn't be convinced that a law depriving women of the vote, for example, could be justified if we only considered the consent of hypothetical women and not actual women's explicit nonconsent. In other cases, such as justifications of laws aimed at solving collective dilemmas, we may tolerate relatively extensive idealization. When justifying pollution abatement laws, for example, we may give considerable justificatory weight to the consent of hypothetical individuals with special knowledge of how energy markets tend to produce pollution externalities and almost no weight to the explicit nonconsent of energy company executives.

Another way of talking about whose consent is required to justify a law is in terms of "relevant publics." When we appeal to the consent of hypothetical people for government interference, we are specifying a relevant public whose consent or lack of consent determines the justification of government interference. Hypothetical, idealized citizens are members of the relevant public; the actual versions of those same citizens are not. Crucially, we should reject the view that the consent of some subgroup of the actual public will never count in the justification of any law (though we have acknowledged that the actual public will never constitute the relevant public of a justified law), which means we must also reject the claim that some particular level or kind of idealization is always appropriate for justifying every law. In general, we shouldn't think that all laws should be justified with respect to the same relevant public. Whose unique perspectives on a law matter for its justification and why is fundamentally part of the justificatory argument of each interfering law.^j

Given the various political intuitions and commitments I've assumed we have, we can now construct a Public Justification Principle (PJP). Public justification has to do with consent. People consent on the basis of reasons, and we can't be sure in advance what those reasons are or why they are acceptable. Because different people have different reasons and different capacities for consenting, we can never expect unanimous explicit consent from the actual public, so we instead rely on the explicit consent of a restricted, potentially idealized, hypothetical, relevant public. Which reasons are acceptable and who are members of the relevant public depends on the particularities of

the interference at hand, which means justification is about particular laws and not classes of laws.^k

These stipulations imply a general PJP formulation such that:

An interfering law λ is justified if and only if each member i of the relevant public P has sufficient reasons R_i to explicitly consent to λ .²⁰

III.2: Justificatory arguments

There exists a dual relationship between justified laws and their justificatory arguments. The most natural connection is a causal one: arguments can cause individuals in the relevant public to consent to the interference on the basis of acceptable reasons. Successful justificatory arguments in this sense can be understood as strictly contributing to the justification of law. The familiar notion of public discourse is relevant to public justification in this context; the idea is that laws can be *made* justified by the promulgation of convincing justificatory arguments. In other words, “justified” is a property of laws, and justificatory arguments, by convincing individuals to consent to interference, can cause a law to come to have the property of being justified.

While justificatory arguments might have the ability to causally contribute to a law’s justified status, causation is not the only purpose for making justificatory arguments. Notice that the PJP states that a law is justified as a matter of fact; if the proper individuals consent to the law, then the law is justified. However, there is no independent method for determining when a law is in fact justified; pluralists have a determinacy problem. Justificatory arguments serve as an attempt to overcome that indeterminacy. If authority only derives from consent and we can’t enumerate all

²⁰ Kevin Vallier and Fred D’Agostino, “Public Justification” *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition) ed., Edward N. Zalta; <http://plato.stanford.edu/archives/spr2014/entries/justification-public/>; accessed 18 April 2016. I have made a number of minor modifications to Vallier and D’Agostino’s formulation of the PJP. First, I use “interfering” where they use “coercive” because not all forms of government interference which require justification are coercive. I use “explicitly consent” where they use “endorse” because the greater generality offered by “endorse” will only complicate rather than enrich my analysis. I have also rendered their qualification “justified *in the public P*” as the qualifier “relevant” on “public”. I think these two renderings are conceptually equivalent, but my formulation draws more helpful attention to the relevance of a public. For more information on what makes reasons “sufficient,” see Vallier and D’Agostino, section 2.1, pages 8-9.

acceptable reasons for consenting in advance, then successful justificatory arguments serve as epistemic bases to think a law is justified. For each law then, successful justificatory arguments provide a convincing account of which public is relevant to the particular interference under examination (and why), and what reasons might be thought to convince members of that relevant public to consent to the interference (and why).

Given pluralism, the relevant public may be a composite of several distinct groups, each of which consents to interference on the basis of different reasons. If this is true, justificatory arguments are most likely to succeed in the epistemic sense when they are able to incorporate a more diverse set of acceptable reasons with respect to a more diverse relevant public. This should draw our attention immediately to the inadequacy of attempting to justify paternalism on the narrow moral terrain suggested by Mill: restricting our arguments to only liberty and reason simply leaves out too much moral data for us to have much confidence in our claims about a law's justificatory status.

III.3: Returning to the broken bridge

Recall that Mill's broken bridge case suggests that interference in the free action of individuals in self-regarding cases is justified if those individuals are not behaving rationally. This yields an important objection to paternalism: paternalistic interference that forecloses on rationally affirmable lives is unjustifiable because hypothetical, rationally-idealized agents are always members of the relevant public to which justificatory arguments must appeal for consent.

Paternalists have often accepted the spirit of the rational agent objection. The typical response is that the unconsenting idealized agent the objector has in mind simply isn't ideal enough. Once one traces the appropriate lines of thought and supplements certain pieces of information, goes the paternalist's argument, it turns out that the life featuring paternalistic interference *is* a life affirmable by all hypothetically rational agents.¹ However, these sorts of replies are routinely unconvincing, because the level of idealization that is required for a rationally idealized agent to consent to some interferences makes us wonder what their consent has to do with our intuitions about authority over

actual agents. Imagine saying to a Jehovah's Witness that a law requiring medical professionals to perform blood transfusions on her (which conflict with Witnesses' religious convictions) is justified on the grounds that, if only she had "better information" or was "more rational," she *would* consent. Such an argument promises not only to fail to convince, but also to treat the Witness patronizingly and her religious beliefs disrespectfully.

A more productive response to the rational agent objection to paternalism is to question the underlying assumption that rationally idealized versions of ourselves always wield veto power in the justification of government interference. After all, we've already given up on a more moderate version of this view by acknowledging the persistence of reasonable disagreement; people within a normal range of understanding and rational capacity are just going to disagree, and if we think any laws are justifiable, it has to be the case that some rational people will not be members of the relevant public in some cases. If we are willing to accept that some normal rational viewpoints will not be authoritative, why should we feel differently about idealized rational viewpoints?

Perhaps one reason we should always respect the consent of rationally idealized agents is because knowledgeability and reason are developmental capacities, and those who improve them enjoy certain epistemic authority over those who don't. While any particular actual agent may not appreciate the convincingness of an argument for government interference, a rationally ideal but actualizable version of that agent, namely, a version who spent more time cultivating the capacity for reason, would. This perspective links ideal agents to actual agents through the actual agents' capacity to develop into their ideal selves, a move which may alleviate our worries that ideal agents' consent has nothing to do with actual agents.

But now we should ask why an agent's *epistemic* authority on the grounds of capacity improvement entitles the agent to *moral* authority. Insofar as reason is a perfectible capacity, we would need some other argument to show why that particular capacity is the right one to make authoritative over moral questions, which themselves form the basis of political justification. Someone appealing to their superiorly developed rational capacity to justify their authority over moral

and political questions is like a strongman's appeal to brawn or a cheat's appeal to cunning. I needn't be (and I'm not) committed to the view that reason isn't in fact a right basis on which to claim some moral and political authority. Rather, I simply want to draw attention to the fact that to so claim is to impose a skill-based moral hierarchy on other normally-competent citizens which, if the foundational skill were strength or guile, we would otherwise find reprehensible. If reason is the right authority, we ought to be able to explain why, and that explanation ought to be convincing to a (very) imperfectly rational person. The claim to legitimate authority of greater brawn, for example, could be made quite clear both to the strong and to the weak, and we should demand the same broad appeal from any other justification of a skill-based hierarchical authority. It's quite unclear, I think, what genuine legitimacy an argument in support of reason as a moral and political authority could claim if it was only convincing to those whose authority it sought to legitimate.

Suppose we can make a broadly convincing defense of reason as an acceptable foundation for some moral and political claim. The difficulty for someone claiming special moral authority for rationally idealized agents doesn't end there; now we have to confront the fact that only certain perspectives are seen as appropriate from which to reason. What I do *not* mean by this is that only members of particular groups have access to reason. Rather, what I want to convey is something like what Virginia Woolf meant by "writing like a man:" attention must be paid to certain features of decision contexts while others ought to be ignored; reason ought to take place in the absence of emotion; we ought to adopt a particular attitude toward the evaluation of certain benefits and risks; etc.²¹ Clearly one's ability to do these things is not strictly a function of one's race or gender or affluence or whatever. But whether one thinks these are the *right* things to do while reasoning about

²¹ In referencing Woolf, I am trying to draw an analogy between what I might call the conclusions of "right reason" and Woolf's object of interest: the novel. "And since a novel has this correspondence to real life, its values are to some extent those of real life. But it is obvious that the values of women differ very often from the values which have been made by the other sex; naturally, this is so. Yet it is the masculine values that prevail. . . . This is an important book, the critic assumes, because it deals with war. This is an insignificant book because it deals with the feelings of women in a drawing-room. . . . *The whole structure, therefore, of the early nineteenth-century novel was raised, if one was a woman, by a mind which was slightly pulled from the straight, and made to alter its clear vision in deference to external authority,*" Virginia Woolf, *A Room of One's Own* (Harcourt, 2005), 72-73. Emphasis is mine.

morality and politics in fact may be. Note well that the issue here is not that our perspectives are making us better or worse informed. Given any arbitrary level of rational idealization, which of all the features of a decision context strike the agent as relevant or salient depends unavoidably on the perspective from which that agent approaches the choice, and each of us is inescapably constrained to our own (and perhaps a few other proximate) perspectives.^m

I am suggesting that paternalists have been mistaken to accept the broken bridge case's underlying assumption that paternalistic interference is never justified if it forecloses on lives rational agents can affirm, because we don't have a reason to think in advance that the relevant public contains all and only rational agents. To make the case that the relevant public was so composed in a particular case of interference, the objector would need to provide convincing answers to the following questions. Why is reason the best basis for moral and political authority in this case? Whose perspectives on the instance of interference under examination should we take as the correct ones from which to reason? How can we show, after those questions have been settled, what reason demands? But notice that these questions are themselves the very basis of a justificatory argument that the objection sought in the first place to undermine. Satisfying answers would convince us who the relevant public is in context and why, and how we could imagine the interference obtaining (or failing to obtain) unanimous consent within that public.

Mill's rational agent objection to paternalism thus begs the question. Rather than showing that a particular interference is unjustified, it asks us to re-justify with respect to a rationally idealized relevant public. But the sorts of arguments, reasons, and data that could be mobilized to convincingly justify the political authority of rationally idealized agents will vary along with the political context. More importantly, successful justificatory arguments in some contexts *won't refer to a rationally idealized relevant public at all*. Thus, by rejecting the broken bridge case as the only type of instance in which paternalism might be justified, we become capable of attending to the possibility that justificatory arguments according to the PJP may appeal to more than just reason. There are no grounds for assuming in advance that these kinds of arguments will fail in every case.

By moving away from Mill in this regard, paternalists may be better able to justify paternalistic interference on the grounds of affect, duty, or other moral values we as pluralists already affirm. Elizabeth Anderson has offered one such argument in favor of paternalistic market interventions that becomes available beyond Mill.²² She argues that as democratic citizens we have duties to one another that prevent us from tolerating excessive risk burdens on fellow citizens who face those risks as a consequence of performing socially important roles. This argument has nothing to do with reason and everything to do with the types of social commitments properly democratically-minded individuals (whatever their capacities for reason) are supposed to have.

III.4: Returning to the slavery contract

Mill's recognition that slavery contracts are "enforced neither by law nor by opinion" has prompted the principle that "paternalism is justified only to preserve a wider range of freedom for the individual in question" (Dworkin, "Paternalism," 76). The spirit of this claim, in the terms of public justification I have provided, is that – whoever the relevant public is in a given situation – the only reason members of the relevant public would consent to interference is if they enjoyed more liberty with the interference than without. Paternalists have often accepted the spirit of this argument: "[W]hile the paternalist concedes that all things considered, it is good to have more liberty rather than less, the paternalist would say that sometimes we need to take away someone's liberty so that in the end they can have more liberty" (Conly, 50). Sometimes this means refusing to honor slavery contracts. Other times it may mean using government authority to coerce motorcyclists into wearing helmets or drivers seatbelts. In still other contexts, this argument might be mobilized to justify the demand that children attend mandatory schooling.

Sarah Conly's strain of argument makes it clear to us how broadly liberty can reach as an important reason to accept government interference. However, arguing within the context of liberty

²² Elizabeth Anderson, "How Should Egalitarians Cope with Market Risks?" *Theoretical Inquiries in Law* 9 (2008): 238-270.

has also produced the effect of affirming liberty as the *only* good on the basis of which to argue for justified interference. As a result, paternalists face two dangers. First, attempting to reduce all other goods (life, wealth, happiness, etc) to instantiations or expressions of liberty stretches the notion of liberty past its elastic limits. Second, treating liberty as a uniquely intrinsically valuable political good wrongly suggests that all other goods are merely instrumental goods required for the expression or enjoyment of liberty.²³ Gerald Dworkin has expressed this latter concern about Conly,

*almost all the examples that Conly gives to illustrate justified paternalism are ones where the over-all satisfaction of the agent's desires is maximized by curtailing liberty. If we stop people from drinking sugared beverages it is their health, or longevity, that is promoted. Valuable things to be sure but not their liberty. If one accepted the view that liberty may only be interfered with by a paternalist to promote the greater liberty of the agent there would be far fewer justified interferences than Conly thinks justified.*²⁴

Paternalists should take seriously the failure of liberty to be a universally convincing basis for paternalistic government interference. To do so, they must reject the presumption built into Mill's slavery contract case that liberty is the only reason we ought to accept government interference.²⁵ This of course is not to suggest that liberty isn't one, and an important one, of the many reasons we should faithfully entertain in our justificatory arguments (indeed, it is the curtailing of liberty that cause interferences to require justification in the first place). But, if we are committed to pluralism, we also acknowledge that reasonable people may find many different reasons to consent to interference; claiming a special authority for liberty ignores the content of our lived social experience

²³ Conly argues that liberty in fact is not the only intrinsically valuable good we affirm and that other things, like health, are not valuable only insofar as they enable the expression or possession of more liberty. However, as these excerpts suggest, she becomes trapped by the slavery contract example in the same line of reasoning she denies.

²⁴ Gerald Dworkin, "Review of Sarah Conly, *Against Autonomy* (2012)," in *Notre Dame Philosophical Reviews* (2013); <https://ndpr.nd.edu/news/40382-against-autonomy-justifying-coercive-paternalism/>; accessed 3 April 2016.

²⁵ One might also note that we could disagree with Mill that refusing to honor slavery contracts are always liberty-enhancing interventions. See Dworkin, "Paternalism," 75-76.

and shared, complex moral sensitivities and creates artificial barriers to the project of justification that motivates the paternalism literature. If paternalists move away from Mill in this respect, new and potentially better justificatory arguments for paternalistic intervention might be motivated by appeals to goods that cannot be convincingly expressed as instantiations or requisites of liberty.

IV. ELIXIR SULFANILAMIDE AND PATERNALISTIC INTERVENTION

In this final section, I use the case of premarket drug regulation to motivate my criticism of taking too seriously Mill on paternalism. In 1938, the United States passed the Federal Food, Drug, and Cosmetic (FD&C) Act, partially in response to a nationwide poisoning event in 1937 by an untested drug called Elixir Sulfanilamide. Drug market regulations designed to prevent mass poisoning events seem to be uncontroversially justified, which makes the FD&C Act a useful calibration tool for justificatory arguments. I want to suggest that the most immediate and basic moral response many have toward the Elixir Sulfanilamide Disaster stems from our intolerance of certain kinds of vulnerability to preventable risk, which is irreducible either to protecting liberty or to exclusively rational beliefs/desires. If this is correct, then justificatory arguments which adopt liberty and rationality as exclusive foci fail to convincingly illuminate the law's status as justified. Therefore, by distancing ourselves from Mill with respect to paternalism, our justificatory arguments will be more likely to succeed in their epistemic aims, because they will be better able to capture the real moral motivations behind normal people's actual consent to paternalistic interference.

IV.1: The Elixir Sulfanilamide Disaster of 1937

In early September of 1937, the first shipments of Elixir Sulfanilamide, a new liquid form of the popular antibacterial chemical sulfanilamide, were delivered to pharmacists for sale around the United States.²⁶ In pill and powder form, sulfanilamide had been used to effectively treat

²⁶ Unless otherwise noted, information on the Elixir Sulfanilamide Disaster comes from the U.S. Food and Drug Administration. See Carol Ballentine, *Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident*, printed in *FDA Consumer Magazine* (1981). Full text available online at

streptococcal and yeast infections (the latter for which it remains in use today) for nearly thirty years, but the liquid form had only recently been developed in response to market demand from southern states. At the time, safety testing was not required before new drugs were released to the market; federal law required only that active ingredients, color additives, and preservatives already known to be dangerous be labeled.²⁷ Elixir Sulfanilamide was lab-tested for flavor, appearance, and fragrance prior to delivery, but, because no pharmacological testing was completed, chemists failed to note that the solvent used to create the solution, diethylene glycol, more commonly known as antifreeze, is toxic to humans.

Within a month, the American Medical Association had begun to receive reports of deaths due to Elixir Sulfanilamide. By the time FDA agents were able to seize the remaining drugs, more than 100 people across 15 states, mostly children, were dead.ⁿ The disaster prompted the passage of the new Federal Food, Drug, and Cosmetic Act of 1938, which granted the FDA new powers to regulate drug markets, including premarket efficacy and safety testing and informative labeling of dangerous drug effects. The FD&C Act remains the legal framework for FDA drug regulation today, and it's thanks to this legislation (and heroic implementation by an FDA inspector named Frances Kelsey) that the United States narrowly avoided another even larger untested drug disaster that affected thousands of newborns in forty-six countries during the late 1950s and early 1960s.²⁸

<http://www.fda.gov/aboutfda/whatwedo/history/productregulation/sulfanilamidedisaster/default.htm>; accessed 3 April 2016.

²⁷ Arthur Philip Greeley, *The Food and Drugs Act, June 30, 1906: A Study with Text of the Act, Annotated, the Rules and Regulations for the Enforcement of the Act, Food Inspection, Decisions and Official Food Standards* (Washington, D.C.: J. Byrne & Company, 1907). Preview available online at <https://books.google.com/books?id=ngQRAAAAYAAJ&hl=en>; accessed 3 April 2016.

²⁸ Bara Fintel, Athena T. Samaras, Edson Carias, "The Thalidomide Tragedy: Lessons for Drug Safety and Regulation," *Helix Magazine* (2009); <https://helix.northwestern.edu/article/thalidomidetragedylessonsdrugsafetyandregulation>; accessed 1 February 2016; Margaret Hamburg, *50 Years After Thalidomide: Why Regulation Matters*, FDA Voice blog post (7 February 2012); <http://blogs.fda.gov/fdavoices/index.php/2012/02/50-years-after-thalidomide-why-regulation-matters/>; accessed 13 July 2016; *All Americans Will Pull Together... The Federal Government's Evolving Role in Dealing with Disaster: Thalidomide Drug Crisis 1960s*, Emory University Library; <http://guides.main.library.emory.edu/c.php?g=50422&p=325039>; accessed 1 February 2016.

IV.2: Justifying FDA premarket regulation

I take for granted that the federal government's response to the Elixir Sulfanilamide Disaster is justified. While I don't want to make any rigid claims about who the relevant public for premarket drug regulation must be, I am comfortable with asserting that those who fail to consent either embrace unacceptable reasons or have unsatisfying consenting faculties (and are thus not members of the relevant public). If the FD&C Act is in fact justified, then our justificatory arguments will succeed when they illuminate the various reasons members of the relevant public consent to the law. The FD&C Act is a particularly helpful case for paternalistic justification, because it shows that arguments which remain in the context of Mill's broken bridge and slavery contract fail.

While I don't think that Millian arguments that the FD&C Act is justified succeed, that doesn't mean one couldn't make them. We could argue that premarket intervention is justified on the basis of protecting liberty. One minimal requirement for the free exercise of liberty is possession of information relevant to one's decisions, especially, perhaps, when withheld information could lead to one's inadvertent self-poisoning. Premarket interventions to at least test for possible dangerous side effects for drugs and label them accordingly thus restrict individuals' liberty to buy and sell drugs with unknown effects for the sake of protecting their liberty to make health-conscious decisions. (These decisions also endow individuals with additional future liberty, insofar as the exercise of liberty requires one to be alive.) Furthermore, like Mill, we could emphasize premarket intervention in terms of rational agents. No rational agent, Mill says, could possibly want to ignorantly purchase a drug that turns out to be poisonous (*On Liberty*, 107); premarket drug testing is thus justified with respect to the rationally idealized relevant public. Following the trend of accepting the broken bridge and slave contract cases in Mill allows us to justify paternalistic regulatory interferences on these grounds, but not on others.

This strategy is inadequate because it fails to capture what strikes many of us as most morally salient about the Elixir Sulfanilamide Disaster. For example, neither liberty nor rationality are able to

incorporate the spirit of political arguments by FDA Commissioner Walter Campbell in favor of passing the FD&C Act in 1938:

*[The Elixir Sulfanilamide Disaster] emphasizes how essential it is to public welfare that the distribution of highly potent drugs should be controlled by an adequate Federal Food and Drug law. . . . These unfortunate occurrences may be expected to continue because new and relatively untried drug preparations are being manufactured almost daily at the whim of the individual manufacturer, and the damage to public health cannot accurately be estimated. The only remedy for such a situation is the enactment by Congress of an . . . Act which will require that all medicines placed upon the market shall be safe to use under the directions for use.*²⁹

*The bill is not intended to restrict in any way the availability of drugs for self-medication. On the contrary, it is intended to make self-medication safer and more effective.*³⁰

The root problem with having no premarket drug safety and efficacy testing is that untested and deadly drugs present unacceptable risks to normally intelligent and cognizant people. It would require a supernormal level of medical awareness to overcome the vulnerability one faces when deadly drugs are hidden amongst safe drugs at the local pharmacy, and it's that vulnerability we find morally intolerable. The first way in which Millian arguments fail, then, is that they wrongly ask us to abstract away from the awfulness of the situation. Justification doesn't require us to suppress our simplest moral sensitivities, and if it's on the basis of those sensitivities that members of the relevant public are capable of consenting to paternalistic interference, then arguments that do suppress them fail to reach their epistemic goals. The horrifying fact is that normally intelligent citizens ended up killing themselves and their children with what was claimed by their hometown pharmacists to be a safe and effective drug. If that horror forms the basis of individuals' consent to FDA premarket

²⁹ Ballentine.

³⁰ Gregory W. Reilly, "The FDA and Plan B: The Legislative History of the Durham-Humphrey Amendments and the Consideration of Social Harms in the Rx-OTC Switch," Digital Access to Scholarship at Harvard (2006); <https://dash.harvard.edu/handle/1/8965550>; accessed 3 April 2016, page 11.

regulation, then rendering a successful justificatory argument requires us to distance ourselves from Mill's exclusive focus on liberty and reason.

To this one might insist, like Mill, that FDA drug regulations are simply a broken bridge case: no rational agent would voluntarily face such vulnerability. It might be true that there is something inherently irrational about self-exposure to some risks, but there's no good reason to restrict the discourse to what rational agents would accept as opposed to what, say, properly empathetic agents would accept. My guess is that our normal reaction to someone who rejects premarket drug regulation is one of confusion at their unfeelingness toward the vulnerability of real persons, not some relatively abstract failure in their capacity for reason. Vulnerability simply isn't about idealized rational agents; it's about "normal" or "average" agents. Deciding which drug dangers are tolerated and which are not is simply part of how "[n]ormal persons make the world safe for normality,"³¹ like expiration dates, building codes, workplace safety standards, and innumerable other familiar regulations.

Neither will it do to express vulnerability as a slave contract case about liberty. Undoubtedly some of the harms that individuals risk in the absence of regulation – sickness, disability, death – are also tied up in their enjoyment of liberty, but as I argued above, justificatory arguments that attempt to reduce these other important goods to liberty are not only unconvincing but also run aground of pluralist commitments. Moreover, Millian arguments fail in a second way insofar as they fail to recognize that justifying intervention on the basis of vulnerability may be necessarily prior to the possibility of justifications on the grounds of liberty. As Daniel Wikler (1979) has suggested,

Human beings of average intellect, living in their own society, can insist on autonomy not because they are "persons" in [a rationally idealized] sense, but because, with respect to the challenges they have fashioned for themselves, they are nearly on par with [ideal] persons. . . . The notion that a right to self-direction

³¹ Daniel Wikler, "Paternalism and the Mildly Retarded," *Philosophy & Public Affairs* 8 (1979). Reprinted in *Paternalism*, ed., Rolf Sartorius. The quotation can be found in Sartorius, 90.

*attaches to those of a given level of intelligence, simply because of that mental ability and regardless of environmental circumstances, seems impossible to defend.*³²

It may only make sense to insist on respect for individual liberty if individuals' capacities are suited for navigating the risk structures of their environments. What we take to be tolerable exposures to accidental harm by everyday actual agents is determined endogenously according to the environmental factors which determine actual agents' abilities to successfully manage risk themselves and the state's ability to manage risk for them.

V: CONCLUSION

Much of the paternalist literature of the past forty years has attempted to specify which paternalistic interferences by governments in the lives of citizens can be justified. Many of these attempts have been unconvincing both to paternalists and to antipaternalists. I have argued in this essay that part of the reason paternalistic justificatory arguments have been unsuccessful is because paternalists have mistakenly restricted themselves to the narrow moral terrain marked out for paternalism by Mill in *On Liberty*. Mill is certainly correct that liberty is a valuable political good and that rational agents' consent matters when determining if laws are justified, but these two concepts cannot account for the breadth of values we as pluralists are committed to embracing. Mill's restricted universe of moral discourse not only fails to equip arguments with satisfactory force to convince us that controversial interferences may be justified; liberty and reason together are not even sufficient to explain why normal people consent to uncontroversially justified interferences. Drawing on the example of FDA premarket drug regulation, I argued that paternalistic justificatory arguments will continue to fail to convince if they follow Mill in suppressing our most basic moral sensitivities, which themselves serve as the basis for consent to interference.

³² Wikler, in Sartorius, 91.

APPENDIX: DEFINING PATERNALISM

It is beyond the scope of this article to provide a full defense of a definition of paternalism, especially when there is no shortage of definitions already available on the shelf.³³ I will be satisfied by offering a conceptual framework that captures our normal intuitions about how paternalistic behaviors differ from nonpaternalistic ones, and I hope to formulate a definition that doesn't predetermine justificatory questions.

As the term paternalism suggests, an individual acting paternalistically toward another is related somehow to a parent acting paternally toward their child.³⁴ One part of this relation has to do with capturing the motivation behind parents' behaviors toward their children. The foundation of the parent-child relationship is the special obligation parents have to their children, namely, to consider the child's best interests in any relevant circumstances when the parent's behavior affects the child. Genuinely paternal behavior consists in genuinely altruistic motivation; parents don't behave exclusively paternally toward their children, but we might distinguish those times that they do by the motivation behind their actions.

To motivate this line of reasoning, consider whether the same given action may at some times seem genuinely paternal and in others genuinely nonpaternal. If a mother slaps an ice cream cone out of her daughter's hand onto the ground because she realized at the last second that the cone had peanut ingredients (to which her daughter is deathly allergic) she behaves paternally. If she slaps the same cone onto the ground purely maliciously, she behaves nonpaternally. I want to draw attention to the motivation behind the action here and not what may strike one as the moral reprehensibility of the

³³ Especially helpful in surveying the definition literature is Gerald Dworkin, "Defining Paternalism," in *Paternalism: Theory and Practice*. See also Gerald Dworkin, "Paternalism: Some Second Thoughts" in *Paternalism*, ed., Rolf Sartorius (University of Minnesota Press, 1983).

³⁴ Here perhaps more than elsewhere I am trapped by the traditional language. The word "paternal" may carry negative connotations of patronization and patriarchy that I don't intend. The right kind of connotation, nurturing and care, is more closely associated with "maternal," but that isn't the word adopted by tradition.

action, as even benignly altruistically-motivated actions can nevertheless turn out to be morally reprehensible.

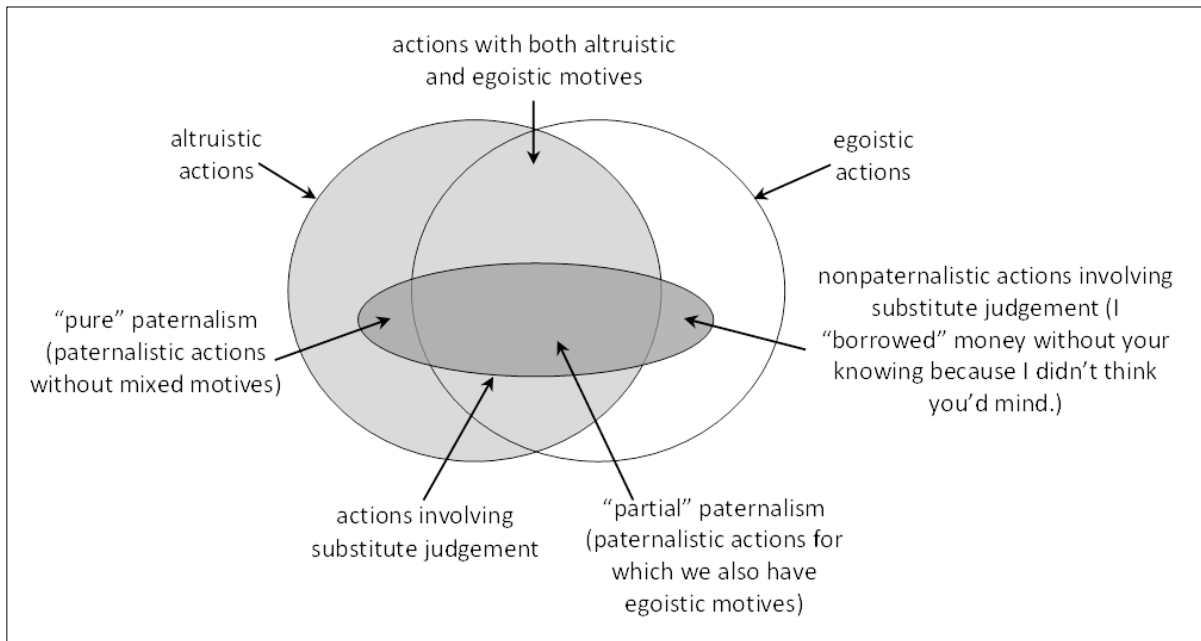
A second way we think paternalism is related to parenting concerns authority. While I think parents do (and should) incorporate their children's perspectives when deciding things for them, parents are not typically morally constrained by the mere fact that a child may not appreciate paternal treatment. Deciding whether or not the treatment is appropriate belongs entirely to the parent: while a parent may hope the child understands – or, better yet, appreciates – the paternal treatment, whether or not a treatment is in fact in the best interests of the child is (at the moment of action) up to the parent. The parent is assumed to be in an epistemic position to know better the needs of the child, and it is on the basis of this epistemic authority that the parent's judgement of how the child ought to be treated is morally defended. Of course parents can be wrong and children can be right, but I assume we normally acknowledge that parents are the better judges of what's good for their children than the children themselves, and that without this acknowledgement, normal paternal authority would be much more morally dubious.

I define paternalism in general as the coincidence of these two features of action between any two moral agents, because that definition captures our intuitions about paternalism without presupposing anything about the goods or publics one might reference when justifying it. The mere fact that someone acts on the basis of a good does not imply that the action is justified. Substitute judgement may strike us as a *prima facie* wrong, but this merely prompts us to demand justificatory arguments for paternalistic actions. What reasons and what publics are mobilized as components to those arguments (and the arguments' successes) are not presupposed by the definition of paternalism:

*A's behavior X toward S is paternalistic if A performs X out of an altruistic motivation to secure some good to S, and A substitutes A's own judgement about S's preferences for X for S's.*³⁵

³⁵ My definition is roughly a combination of Seana Shiffrin's recent influential formulation with a definition suggested by Donald VanDeVeer. See Seana Shiffrin, "Paternalism, Unconscionability Doctrine, and

Figure 1: Diagram of paternalism definition



Let government paternalism be a special kind of paternalistic behavior where X is a law enacted by a government A toward a citizen (or group of citizens) S. On this specification of government paternalism, I assume the state has the capacities a) to act, b) to be motivated in action by its citizens' well-being, and c) to substitute its judgement about the consequences of its actions for the stated preferences of at least some affected citizens. It may be dubious to assume that states have capacities a) and b), but notice that capacity c) is uncontroversial. Given the assumption of reasonable disagreement, the capacity for substitute judgement is a necessary condition for the pluralist state.

This definition of paternalism in terms of altruism draws our attention helpfully to the fact that we often have multiple motivations behind our actions. It might be that some actions are purely altruistic, and many may turn out to be purely egoistic. I assume, however, that some of our actions have mixed motivations: among the reasons we perform a given action are reasons related to our own private good as well as reasons genuinely related to the goods of others. While this understanding of

Accommodation” *Philosophy & Public Affairs* 29 (2000): 205-250; and Donald VanDeVeer, *Paternalistic Intervention: The Moral Bounds of Benevolence* (Princeton, 1986), 22.

paternalism does not preemptively decide the justificatory question in the case of any paternalistic behavior, it does draw attention to the fact that a given paternalistic behavior may be justified on the basis of *either* egoistic *or* altruistic reasons, *or both*. My formulation leaves us helpfully attentive to the possibility that paternalistic laws, which are *motivated* by at least some altruistic concerns, might be publically *justified* on the basis of egoistic reasons.^o

ENDNOTES

^a Whether or not Mill was committed to pluralism is itself a matter of some debate, an issue I hope to sidestep here. See Graham Finlay, “John Stuart Mill on the Uses of Diversity” *Utilitas* 14 (2002): 189-218; Alex Zakaras, “A Liberal Pluralism: Isaiah Berlin and John Stuart Mill” *The Review of Politics* 75 (2013): 69-96; Katherine Smits, “John Stuart Mill and the Social Construction of Identity” *History of Political Thought* 25 (2004): 298-324; Jason Tyndal, “Culture and Diversity in John Stuart Mill’s Civic Nation” *Utilitas* 25 (2013): 96-120.

^b Feinberg acknowledges that, insofar as our nonvoluntary (read: nonrational) actions are “foreign to us,” weak paternalism may not even be paternalism. If paternalism is minimally defined as having something to do with protecting people from themselves, and if we protect a person from their nonrational self – who’s a genuine moral “other” – then we don’t seem to be treating them paternalistically after all (*Harm to Self*, 12). Likewise, Thaler and Sunstein’s split personality psychology suggests not only that their “libertarian paternalism” is rather benign – it seems like it might not even be paternalism.

^c As with respect for rational agents above, the argument that liberty is a good worth protecting is not uniquely Millian. See John Locke, *Two Treatises of Government*, ed., Peter Laslett (Cambridge, 2013), Book II, Chapter iv, paragraphs 22-23, page 283-284; Lawrence Alexander, “Voluntary enslavement” in *Paternalism: Theory and Practice* (231).

^d One might note that Mill expressly argued against public education in *On Liberty*, but this argument was an economic one against public provision of goods, not an argument that education is not required for the exercise of liberty (118).

^e I cannot explore the various and important difficulties involved in attributing agency to states. When does a state act? Do states have motivations? Do states have reasons? While it is typical in the paternalism literature to treat states as moral agents without addressing these foundational difficulties, the difficulties nevertheless still loom in the background.

^f Many of our reasons for consenting or not consenting to interference are dictated to us by our adherence to particular life plans by which we order our moral lives, and arguments on the basis of one’s own life plan that another’s reasons for consenting are misguided fail to convince precisely because such arguments only derive their force from the preexisting acceptance of one’s own plan. These disagreements cannot be resolved through appeals to reason, because “a person’s interests and aims are rational if, and only if, they are to be encouraged and provided for by the plan that is rational for him,” John Rawls, *Theory of Justice, Revised Edition* (Belknap, 1999), VIII.63, page 359. “[A] conception of the good normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations. These attachments and loyalties give rise to devotions and affections, and so the flourishing of the persons and associations who are the objects of these sentiments is also part of our conception of the good,” Rawls, *Political Liberalism, Expanded Edition* (Columbia University Press, 2005), 1:I, §3.3, page 19. See also Rawls’s definition of a reasonable comprehensive doctrine, *Political Liberalism*, 1:II, §3.1-3.3, page 58-60.

^g While I have clearly been drawing from Rawls on the topic of pluralistic public justification, this comment is not a strictly correct representation of Rawls. Rawls thought that only “reasonable” comprehensive doctrines could form the basis of a democratic overlapping consensus. Rawls recommends we recognize as reasonable reasons for consenting only those which it is rational for a person to have given that person’s rational life plan, even if those reasons are not authoritative for us given our plan (*Political Liberalism*, 482-483). However, this view of which reasons for consent are acceptable is not the most general formulation. See Vallier and D’Agostino, “Public Justification,” section 3.2, pages 10-17.

^h For Rawls, a law is justified when “all citizens as free and equal *may reasonably be expected* to endorse [it] in the light of principles and ideals acceptable to their common human reason”, *Political Liberalism*, 2:IV, §1.3, page 137. The emphasis is mine, and it is intended to draw attention to the interpretation of Rawls as asking how hypothetical people – who were was similar in all relevant ways to the citizens as they are *except* with respect to their access to reason and the principles and ideals revealed thereby – could be expected to react to the law. See also Vallier and D’Agostino, section 2.4, page 17.

ⁱ The various methods of dealing with disagreement are traditionally referred to as different kinds of consent, but hypothetical consent among actual agents is conceptually equivalent to explicit consent among idealized agents. Indeed, important objections to hypothetical consent as a method of justification point to the fear that excessive idealization leads to a consenting agent who is so much different from the actual agent that the idealized agent’s consent to interference no longer satisfies our intuitive demand for consent by *actual* people. After all, it would be hard for me to convince you that you’ve consented to a law when you haven’t, simply by telling you that you *would* consent, if only you were better informed or were a more careful thinker (though philosophers say this about abstract people all the time). See Vallier and D’Agostino, section 2.4, pages 19-23. I choose to express various notions of consent in terms of idealized versus actual agents, because doing so draws attention to problems with the Millian objection to paternalism I examine in this section.

I also want to mention briefly that tacit consent may strike the reader as not readily expressed in terms of agent idealization. I cannot adequately respond to that concern without going some distance afield. All I will say is that where tacit consent seems like a satisfying alternative to explicit consent (which is not always the case), one can conceptually frame it as the explicit consent of a hypothetical agent who was more attentive to the relationship between the agent’s livelihood (consumption of public goods, obedience to laws, enjoyment of rights) than is the actual agent.

^j The relevant versus actual public distinction is also amenable to domination terminology. That one’s own consent is irrelevant to the justification of another’s interference with one’s own life must be a basic feature of domination broadly construed. If any law is to be justified, then some members of the actual public will not be members of the relevant public: they will be dominated. At the end of the day, not all forms of life are acceptable to us, and this kind of restriction of our freedom is simply a fact of shared social existence. Thus, the question of political justification is always partly a question of which people a particular law can tolerably dominate. By rejecting the view that some kind or level of idealization is always appropriate in all cases, I am also rejecting the view that some

members of the actual public (in particular those who don't reason well or with the best information or with as much practice or from the "right" perspective) are always tolerably dominated.

^k To show that classes of laws are justified, one must show that every member of the class is justified. Thus, the only way to show that all laws of a type P are unjustified without enumerating P's elements is to define the P-type as a type whose instantiations always entail an unjustifiable feature. This amounts to "defining away" the justificatory question with respect to P-type laws; saying that a law of type P is unjustified is nothing more than appealing to the definition of the type. If we are motivated by the question of justifying a law λ , then, we should take care not to define λ such that its justification is determined ahead of time, because doing so prevents, rather than enlightens, justificatory argumentation about λ . I mention this here, because many scholars who are *not* interested in justificatory arguments about paternalism have opted to simply define them away by including a law's (un)justified status as part of the definition of paternalism. See for examples Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, 2012), 6: n2; Simon Caney, *Justice Beyond Borders* (Oxford, 2005), 75; Elizabeth Anderson, "What Is the Point of Equality?" *Ethics* 109 (1999): 287-337, 301.

^l These arguments are also characterized by a tendency to slip into the language of "perfect" reason or "perfect" information (Vallier and D'Agostino, section 2.4.1, pages 19-20). The appeal of the consent of a perfectly rational person probably derives from Kant, who argued that moral principles are determined by reason and that, insofar as humans are rational, moral principles are available to them to the extent that they exercise their capacity for reason correctly. On this view, moral principles are made objectively determinant by reason, which suggests that agents who exercise their capacities for reason perfectly (so-called perfectly rational and perfectly informed agents) would grasp the truth of moral principles perfectly. But of course, humans are not perfectly rational agents, and our imperfect exercise of reason is simply a feature of human life and not something we will ever overcome. What a being who did not suffer from our cognitive hurdles would do or think or believe is strictly beyond our imaginative capacities. To what a "perfectly" rational or "perfectly" informed agent might consent cannot be the basis of political justification, because it is perfectly noumenal.

^m In epistemology, this recalls Sir Francis Bacon and Edmund Husserl. To continue my reference to Woolf, consider, "It would be a thousand pities if women wrote like men, or lived like men, or looked like men, for if two sexes are quite inadequate, considering the vastness and variety of the world, how should we manage with one only?" (86). For more contemporary scholarship on this idea, see especially recent work in behavioral economics by John List. Ori Heffetz and John A. List, "Is the Endowment Effect an Expectations Effect?" *Journal of the European Economic Association* 12 (2014): 1396-1422; John A. List, "Does Market Experience Eliminate Market Anomalies? The Case of Exogenous Market Experience," *American Economic Review* 101 (2011): 313- 317; Glenn W. Harrison, John A. List, and Charles Towe, "Naturally Occurring Preferences and Exogenous Laboratory Experiments: A Case Study of Risk Aversion," *Econometrica* 75 (2007): 433-458.

ⁿ The fact that most victims were children should not become the object of exclusive moral concern. More children died than adults for two reasons. First, children in 1937, as today, probably consumed

a disproportionate quantity of liquid medicines relative to adults, putting them at higher risk of ingesting Elixir Sulfanilamide in the first place. Second, the lethal dose of diethylene glycol is 38g for children and 71g in adults, making children relatively more vulnerable to a given exposure than adults. Leslie M. Shaw, ed., *The Clinical Toxicology Laboratory: Contemporary Practice of Poisoning Evaluation* (Washington, D.C.: AACCC Press, 2001), 197.

^o Many writers define paternalism either as justified in a certain way or as involving justificatory appeals to particular kinds of goods or reasons. These same writers typically express intentions of showing that some (not all and not no) paternalistic laws are justified, but by defining paternalism as a law justified in a particular way they immediately undermine their own aim of explicating the justification of such laws. See especially Kleinig, *Paternalism*, 18; Feinberg, *Harm to Self*, 54; Bernard Gert and Charles Culver, "The Justification of Paternalism," *Ethics* 89 (1979): 199.

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