RECENT WORK

PATERNALISM, PART I

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I. Definitional Difficulties

Shaw famously said of England and America that they are divided by a common language. So too, I would suggest, is the recent literature on paternalism. For although the authors writing on paternalism are in the main all speaking the same language, that is, they generally employ the concept of paternalism, and do so with an eye to determining when, if ever, it is morally justifiable, they are divided as to its meaning and therefore divided as to what, precisely, stands in need of moral justification.¹

Of course there is really nothing new in all of this as philosophers have been debating the moral justification of paternalism for quite some time, and that debate has always been underwritten largely, if not entirely, by what philosophers have taken ‘paternalism’ to mean. Indeed, the roots of the current debate extend back more than thirty years to the publication of Gerald Dworkin’s landmark article ‘Paternalism’.² There, in arguing against an absolute ban on paternalism, Dworkin said, “By paternalism I shall understand roughly the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced.”³ In the subsequent and equally important ‘Paternalistic Behavior’, however, Bernard Gert and Charles Culver challenged

1. I say authors generally employ the concept of paternalism because some authors have taken to substituting ‘parentalism’ in place of what they perceive to be the overly patriarchal paternalism. See for example John Kultgen, Autonomy and Intervention: Parentalism in the Caring Life (Oxford University Press, 1995) and Daniel B. Klein ‘Go Ahead and Let Him Try: A Plea for Egonomic Laissez-faire’, Inquiry, 35 (1991), pp. 3–20.
Dworkin's understanding arguing that paternalism can occur in the absence of an interference with a person’s liberty of action and in the absence of coercion. In fact, they argued that paternalism can occur in the absence of an interference with any of a person’s liberties, so long as a moral rule has been or will be violated or transgressed with respect to that person (this is meant to address cases where, for example, a doctor lies or is going to have to lie to a patient for the patient’s own good without an apparent interference with the patient’s liberty). In response, Dworkin later emended his definition arguing that paternalism should not be understood as an interference with the individual’s liberty of action, but more broadly as an interference (ranging from rational argument to brute force) with his autonomy, in this way accounting for the sorts of cases envisioned by Gert and Culver.

Today, authors continue not only to debate which effect is dispositive when defining paternalism; they also debate whether it is dispositive. For some authors the aim, intent or attitude motivating the agent’s behaviour is sufficient to characterize it as paternalistic, regardless of whether that aim, intent or attitude has any particular effect upon the individual to whom it is directed. So it is that one author tells us, for example:

If I believe you are doing the wrong thing I should try to get you to do what I think is right. Now there are good reasons why I should not coerce you, or lie to you. My belief that you are doing wrong should be reasonable and sincere, and my paternalism will also probably need to preserve the basic pattern of your chosen existence. Nevertheless, if I can, within these limits, be paternalistic, I should.

Perhaps, but for many authors that sort of behaviour would be unobjectionable precisely because it is not genuinely paternalistic. Attempting (and perhaps failing) to persuade someone, in a non-coercive manner, to do what you think is right, while acknowledging and preserving the basic pattern of his chosen existence, is a far cry from limiting his liberty or autonomy, or violating a moral rule, for what is taken to be his own good.

Consequently, one finds a growing divide in the current literature between those authors who understand paternalism primarily as a matter of effect and those who understand it primarily as a matter of intent. But the divide is not a neat one. Just as there is little to no agreement among those authors who understand paternalism primarily as a matter of effect, as to what specifically the effect(s) must be nor the means or method by which that effect(s) must be

achieved,\textsuperscript{7} so too there is little to no agreement among those authors who understand paternalism primarily as a matter of aim, intent or attitude (putting aside the question as to whether such terms are equivalent), as to what specifically the aim, intent or attitude must be nor whether the individual engaging in paternalism must be motivated solely, mainly or only partially by, or on behalf of, that aim, intent or attitude.\textsuperscript{8}


Further complicating matters is the fact that even where there is agreement as to paternalism’s intension, there is disagreement as to its extension. For example, where there is agreement, say that paternalism should be understood primarily as a matter of effect, the effect primarily as a matter of interfering with the individual’s liberty and/or autonomy and the interference as one that is aimed at but not necessarily successful in preserving or promoting the individual’s own good, there is no agreement that paternalism understood in this way extends to cases involving interferences that are indirect as opposed to direct, weak as opposed to strong or consensual as opposed to non-consensual. Nor, finally, is there any agreement that the concept of paternalism, understood in this way, extends to cases where the individual interfered with is incompetent or immature as opposed to competent and mature.

Some authors, for example, maintain that the concept of paternalism extends to cases of both indirect (impure) and direct (pure) interferences. That is, interferences may properly be considered paternalistic, according to this view, when they interfere directly with the individual (seatbelt laws, for example), and when they do so indirectly (professional licensing requirements, for example). Other authors, however, maintain that alleged cases of indirect or impure paternalism are in fact cases of preventing harm to others not self and therefore not genuinely paternalistic.

In similar fashion, some authors have argued that the concept of paternalism should not be extended to cases where the interference is weak or soft. That is, where the interference is partial and temporary rather than complete and permanent, and aimed not at prohibiting the individual’s choice but rather ensuring that it is voluntary and knowing. Their argument, like the argument regarding indirect and impure interferences, is that weak or soft interferences do not in actuality prevent the individual from harming himself but rather prevent another from harming the individual. In short, on this view preventing the individual from acting, once it is determined that he is acting non-voluntarily or unknowingly, is not an instance of preventing the individual from harming himself. Rather, it is an instance of preventing another from harming the individual, and as such is not a genuine instance of paternalism.

Questions concerning the concept’s extension do not end there, however. Questions also arise as to whether the concept of paternalism extends to cases where the interference is consensual as opposed to non-consensual. For some authors, the presence of consent justifies paternalism (in some cases prior actual consent is required, in some cases subsequent or hypothetical consent


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is enough). For other authors, however, the presence of consent, whether actual, subsequent or hypothetical, does not justify paternalism so much as obviate it.

For example, if an individual consents, or would consent, given the opportunity, to a law requiring that a seatbelt be worn while riding in a car or a law requiring that a helmet be worn while riding on a motorcycle, those are not, on this view, genuine instances of paternalism. Although such laws aim at, and in many cases actually do, restrict the individual’s liberty and autonomy, and although such laws aim at, and in many cases actually do, prevent the individual from harming himself, they are not, on this view, genuine instances of paternalism because such restrictions are in accord with and not in opposition to the individual’s wishes. Rather, such restrictions are, on this view, instances of self-limitation and self-commitment, i.e., deliberate transfers of power for the purpose of preventing harm to self. This is the case whether


it is one individual or a group of individuals, as sometimes occurs in liberal democracies where the majority imposes through legislative enactment a restriction upon its own collective liberty and autonomy.15

Finally, there is some disagreement in the literature as to whether the concept of paternalism extends to cases involving any and all individuals or only to those cases involving individuals who are considered competent adults.16 Some authors argue, for example, that incompetence, incapacity and immaturity like consent provide grounds, justificatory grounds, for paternalism thereby making it morally permissible. As one recently suggested, “Even the liberal view . . . allows for paternalistic restrictions in the case of people whose decisions lack autonomy, for example, children, the mentally ill, and people acting under duress or in predicaments.”17 Other authors argue, however, that interferences either with an incompetent adult or a child are morally permissible precisely because they are not paternalistic.18 In fact, some


authors have observed that it is strange to describe such behaviour as paternalistic: “Paternalism is of philosophic interest not because of the way parents legitimately relate to their children—indeed there is oddity in describing this conduct as ‘paternalistic’—but rather because something like this practice is introduced into relations among adults. If our responses to adults mirror intrusive and solicitous parental responses to children we behave paternalistically.”

A review of the contemporary literature, therefore, reveals a clamorous cacophony in which there are as many competing conceptions of paternalism as there are authors, and in which every alleged example of genuine paternalism is drowned out by an equal and opposing counter-example. Indeed, the terminological inexactitude surrounding the concept and the attendant lack of consensus it has occasioned, has led one author to surmise that, “the word is sometimes more trouble than it is worth and that we would be better off philosophically doing without ‘paternalism’ in discussing some genuine problems now often formulated by using the word,” and another to conclude that, “In the final analysis the label of [paternalism or paternalistic act] seems of secondary importance. Rather, what is crucial is that we are clear about the range of acts whose moral assessment is in question.”

Unfortunately, it is precisely the range of acts whose moral assessment is in question that contemporary authors are unclear about. When one considers the fact that even allegedly perspicuous cases of paternalism (mandatory seat-belt laws, for example) are contested as being pseudo-paternalistic, perhaps it


is best to say, in the final analysis, that there is no such thing as paternalism. Rather, there are only paternalisms.

Paradoxically, while there is little to no agreement among contemporary authors as to paternalism’s intension or extension, and therefore little to no agreement as to what, precisely, stands in need of moral justification, there is widespread agreement that paternalism however defined—intent or effect, attempted or successful, coercive or non-coercive, consensual or non-consensual, criminal or civil, state or personal, public or private, hard or soft, strong or weak, extended or restricted, direct or indirect, pure or impure, negative or positive, preservative or promotive, active or passive, physical or moral and so on, ad infinitum—does give rise to a question of moral justification. What is more, contemporary responses to this question overwhelmingly proceed along the lines first limned by Mill in his essay *On Liberty*, well over a century ago.