

Exploring Ways to Justify Paternalism

By Leela Koenig

**Submitted to
Central European University
Department of Political Science**

In partial fulfillment of the requirements for the degree of Master of Arts.

Supervisor: Professor János Kis

**Budapest, Hungary
(2012)**

Abstract

This thesis argues for a distinction between soft and hard paternalism based on a version of paternalism which has as its main characteristic that it is motivated by the opinion that the relevant individual is not able to make the right decisions on her own. Given that this judgment and the subsequent intervention violate the autonomy of the individual, and equate her with the status of a child, I argue that the only way in which the intervention is justified is if it takes a certain type of soft approach. In order for an approach to be soft, it must a) operate within the frame of options the paternalizee is likely to consent to and b) aim to restore the mental capacity, which caused the intervention in the first place, to a level in which the paternalizee can express a valid form of ex-post consent. A hard approach is only possible if the paternalizer has ruled out the possibility for a soft approach. I differentiate between four ways in which a paternalizer can consider the paternalizee as unable to judge for herself and show how this differentiation is consistent with the soft/hard distinction that I am proposing.

Acknowledgements

I would first of all like to express my gratitude to my supervisor professor János Kis for his great help in writing this thesis. Our conversations, his patience and encouraging words were crucial to the completion of this work. I am very honored to have had a chance to learn from him. I also want to express my gratitude and respect for the CEU faculty who have been nothing but supportive during my time here. I have learned a lot from them, both in and outside the classroom, in ways they may not even realize.

Secondly, I want to thank my family, especially my sister Vanessa, for their support and never-ceasing sense of humor and ability to put things in perspective. I want to thank Yoni Cohen-Idov for listening to late night ramblings, for sending me flowers and for being as authentic and exciting as he is. Lastly, my love and friendship go to my dearest friends Amy Rodgers and Maja Nenadovic without whom this year would have not turned out the way it has. I hope they know how much their friendship has meant to me, and this seems a pretty great place to put that in print.

Table of Contents

Abstract	i
Acknowledgements.....	ii
Introduction.....	1
Chapter 1 Definitions of paternalism and the distinction between hard and soft paternalism.....	2
I. Definitions of paternalism	4
II. Quong’s judgmental definition of paternalism	7
III. What’s wrong with paternalism?	10
IV. Distinctions between soft and hard paternalism.....	13
V. What’s wrong with judgmental paternalism?	15
VI. A soft/hard distinction for judgmental paternalism.....	17
Chapter 2 The role of consent in paternalism.....	18
I. Roles of consent	18
II. Paternalism after consent	21
III. Inevitable Paternalism.....	24
IV. Subsequent Consent.....	25
Chapter 3 A soft/hard distinction based on ex-post consent.....	30
I. Ex-post consent as a restriction on paternalistic interventions	31
II. The duty to restore the mental capacity to express valid ex-post consent.....	32
III. Objections to the possibility and validity of ex-post consent.....	34
Chapter 4 The mental capacity to consent and its relation to the soft/hard distinction in judgmental paternalism	37
I. The second part of the judgmental definition	37
II. Four ways in which we can consider someone ‘unable to judge’	41
III. The duty to restore the paternalizee’s mental capacity	44
IV. Re-classifying cases as example of soft and hard paternalism	46
V. Scope of the duty to restore mental capacity	48
Bibliography	50

Introduction

This thesis argues for a distinction between soft and hard paternalism based on a version of paternalism which has as its main characteristic that it is motivated by the opinion that the relevant individual is not able to make the right decisions on her own. Given that this judgment and the subsequent intervention violate the autonomy of the individual, and equate her with the status of a child, I argue that the only way in which the intervention is justified is if it takes a certain type of soft approach. In order for an approach to be soft, it must a) operate within the frame of options the paternalizee is likely to consent to and b) aim to restore the mental capacity, which caused the intervention in the first place, to a level in which the paternalizee can express a valid form of ex-post consent. A hard approach is only possible if the paternalizer has ruled out the possibility for a soft approach. I differentiate between four ways in which a paternalizer can consider the paternalizee as unable to judge for herself and show how this differentiation is consistent with the soft/hard distinction that I am proposing.

Chapter 1 provides the conceptual tools for this thesis. I present a number of definitions of paternalism and argue why I take Quong's judgmental definition of paternalism to be the best definition of paternalism available to us. I discuss a number of the main objections against paternalism and show that the objections against paternalism inform the various distinctions that have been made between soft and hard paternalism. I will pay specific attention to discussing the wrongness of judgmental paternalism, because it lies at the basis of the distinction that of soft and hard paternalism I will propose in chapter 3.

Chapter 2 discusses the several ways in which consent affects paternalistic interventions. Although some scholars argue that consent plays no role in the justification of paternalism I will discuss a distinct situations in which consent does have a significant role.

Chapter 3 presents a way to distinguish soft from hard paternalism by introducing the requirement of ex-post consent. I will discuss a few objections to the idea of ex-post consent, in order to strengthen the case that this requirement serves as a restriction on the set of options that are available to the paternalizer.

Chapter 4 goes further by asking what it means to judge a person unable to judge for herself. I will present four different ways in which that judgment can be made by the paternalizer. These four in turn play a role in both distinction between soft and hard paternalism as well as the justification of both these types of paternalistic intervention. As a result of the paternalistic judgment, the decision to intervene in an individual's life comes with the duty to restore the individual's autonomy as soon, and as well, as possible. Not adhering to that duty affects the extent in which the paternalistic intervention is justified. I close this chapter with a discussion on how far the scope of this duty reaches.

Chapter 1 Definitions of paternalism and the distinction between hard and soft paternalism

A significant part of the work on paternalism is the construction of a definition which correctly identifies whether an act or intervention is paternalistic or not. Although the definition has a core idea – the paternalistic intervention has to lead to the improvement of at least one condition of the paternalizee's life – how that should be done and who is allowed to do it to whom are questions which affect how paternalism itself is defined. The specifics of a definition of paternalism matter since the way in which paternalism is defined in turn affects how it can be justified.

This chapter will provide the conceptual background of paternalism. I first discuss some definitions of paternalism and show why I take Quong's definition of paternalism as the definition of paternalism in this thesis. I then provide an overview of the main arguments

against paternalism and show how these objections have informed distinctions between soft and hard paternalism. I close this chapter with a description of the arguments against Quong's paternalism.

Before I start, I wish to make one preliminary remark. The relationship between the paternalizer and the paternalizee matters greatly to the character of a paternalistic intervention. There is a difference between a paternalistic intervention of a government to its citizens and a paternalistic intervention of a parent to a child, or a friend to a friend. The difference expresses itself in two ways. The first difference is that a government is never able to know its citizens in the same way a parent knows her child, or the way a friend knows his best friend.¹ Knowledge of the paternalizee ensures that the paternalizer knows much better what the paternalizee wants, what she does not want, and which methods will work best. It is therefore much more likely that the paternalizee will put her trust in the paternalizer. The government cannot obtain the same relationship, and therefore must exercise more caution in designing its policies; not in the least because these policies are normally intended to affect a large number of individuals, in contrast with more personal levels of paternalism which only intend to affect one person, or a very small number (for example, all of the parents' children).

The second difference in relationships exists in how much coercion is permissible in the intervention. A government is entitled to forbid certain acts, and enforce the prohibition through the law. It can prescribe fines, and incarcerate people for a long time. An ordinary citizen is excluded from having this level of power. She cannot prescribe laws with similar force as a government. As much as a mother might want to commit her adult son in a rehabilitation clinic, she cannot do so without the consent of the son or without the approval

¹ Rizzo and Whitman (2008) and (2009) argue that this 'knowledge' problem is an argument against any type of paternalism. Paternalism cannot generalize what might be good for one individual to general blanket policies. What is good for one, does not have to be good for another.

of a judge after a trial. Or, if my friend has reached a level of drunkenness which prompts me to take away her car keys, I will have to give them back when she is sober. When a government catches a drunk driver, it can suspend the license to drive indefinitely, and even take possession of the car.

Although there are significant differences in relationships between the paternalizer and the paternalizee, these differences are not relevant in this thesis. I will therefore make use of examples in which the paternalizer as the government or as a citizen will be used interchangeably.

I. Definitions of paternalism

In *On Liberty*, Mill writes that an individual “cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right”. Ever since Mill’s famous defense of individual liberty, paternalism and paternalistic motivations for policies have been challenged to justify themselves, and, in some cases, categorically ruled out as a legitimate motivation for an intervention in the lives of a rational individual. The charge against paternalism uncovered a necessity to be more specific about what it means to be paternalistic. In order to understand whether a paternalistic intervention is permissible, it is important to understand what kind of intervention is being imposed and what the underlying reasons for the interventions are.

Dworkin defines paternalism as “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”.² Dworkin’s definition itself raises a number of important questions which on their turn challenge the definition itself. The first question is

² Gerald Dworkin. “Paternalism,” in *Morality and the Law*, ed. Richard A. Wasserstrom (Wadsworth Publishing Company, 1971), p271

whether only those acts which interfere with liberty are paternalistic. There are cases in which someone acts paternalistically without actually limiting someone's liberty. If John is supposed to study for an exam and his mother carefully scans all his incoming phone calls to make sure not one of his friends gets through to tempt him to go out, then his mother is acting paternalistically towards John. However, John is not limited in his liberty, because he has no intention to go out in the first place. He intends to study for his exam. Nonetheless, we would still say that John's mother is being paternalistic towards him, because she does not want John to even be tempted to go out, and she worries enough about his ability to resist temptation to prevent it from occurring altogether.

A strict understanding of interference with liberty would imply that only if you intend to do something, but are prevented from doing so, then your liberty is limited. However, if the idea of interference would be understood broader than merely referring to John's actual intentions, this might allow Dworkin's definition to still identify John's mother as being paternalistic towards John. If it is also an interference of liberty to be deprived of a choice, - even if you would not have known about this option had you not been informed - then Dworkin's definition identifies John's mother as paternalistic. She deprives John of the choice to go out, or to stay in and study. This broader understanding of interference with liberty risks identifying too many cases as paternalistic. To deprive someone of making a choice does not make the deprivation paternalistic in and of itself. The law prevents me from making a great number of choices, as do ordinary social conventions, and even if these examples show that there are limitations of my liberty, they do not make these restrictions paternalistic. After all, there are very persuasive reasons to not allow people to do whatever they feel like in traffic, or at the office, which do not refer exclusively to the coerced individual. Not every restriction on my liberty is a paternalistic restriction, and the removal of an option in my set of options is not necessarily a problematic limitation for my liberty (if it is

one in the first place). In conclusion, Dworkin's definition fails to identify all cases of paternalism. A change in the conceptual understanding of how liberty ought to be impeded in order to be considered paternalistic does not save this definition of paternalism.

Several attempts have been made to improve on Dworkin's definition. De Marneffe provides a simpler account of a 'motivational' type of paternalism. He writes that "a policy that limits a person's choices is paternalistic toward that person if and only if the government adopts this policy because those in the relevant political process count the fact that it will benefit this person as a reason in its favor."³ When an individual is deprived of choice, precisely because it is for her own good, then the intervention is paternalistic. However, this definition seems to identify too many policies as paternalistic. If a government closes down a casino, because it believes that the population will benefit from it, then this definition would identify this limitation of citizen's choice as paternalistic. But, what if - much to the government's surprise - citizens completely agree with this decision, and in fact, never really understood why the casinos were allowed in the first place and were not very interested in going either. It is hard to see what is so paternalistic about the policy, even if the government counted the fact that it benefitted everyone in its favor. De Marneffe's definition for paternalism is therefore also not satisfactory.

Gert and Culver list a number of characteristics which an act has to possess in order to be paternalistic.⁴ These characteristics refer both to the intentions of the paternalizer, as well as to the state of the paternalizee. They argue that "A only acts paternalistically toward S if and only if A's behavior (correctly) indicates that A believes that:

- 1) his action is for S's good
- 2) he is qualified to act on S's behalf

³ Peter de Marneffe. "Avoiding Paternalism," *Philosophy and Public Affairs* 34, no1 (2006): 70

⁴ Gert and Culver, Paternalistic Behavior, *Philosophy and Public Affairs* 6 (1976):45-57, 49

- 3) his action involves violating a moral rule (or doing that which will require him to do so with regard to S)
- 4) he is justified in acting on S's behalf independently of S's past, present or immediately forthcoming (free, informed) consent
- 5) S believes (perhaps falsely) that he (S) generally knows what is for his own good."

With regards to (3) violating a moral rule, they write that:

"In our opinion, violating a moral rule involves doing something that would be morally wrong unless one has an adequate justification for doing it. Thus, killing, causing pain (mental or physical), disabling, and depriving of freedom, opportunity, or pleasure are all violations of moral rules. The same is true of deceiving, breaking a promise or cheating."⁵

Gert and Culver argue that cases in which no moral rule is violated cannot count as paternalistic. However, let's consider the case of John's mother again. When she scans John's phone calls, she is not violating a moral rule – John might have left it outside his room on purpose, and generally does not mind when his mother looks at who is calling. She is therefore not deceiving, or cheating John either. She simply withholds some information because she believes that is better for John. Withholding information from your son does not constitute a violation of a moral rule. We could feel some unease about John's mother not telling her son he is getting some calls, but she is certainly not violating any moral rules. Whatever is wrong with what John's mother did, it is not identified by Gert and Culver's third condition. Although the idea that paternalism violates some moral rule could in itself be a sufficient condition to identify a paternalistic act, this definition still fails to include all acts of paternalism.

II. Quong's judgmental definition of paternalism

In "Paternalism and Perfectionism" Quong points out that what seems to be missing in the previous definitions of paternalism is an account of what the paternalizer has to believe about

⁵ Gert and Culver, *Paternalistic Behavior*, p51

the paternalizee's own capacity to make decisions.⁶ The casino-example showed that when citizens were glad about the removal of the casinos, it was hard to see how this limitation of freedom was paternalistic. However, what if the government thought that citizens had to be protected against the lure of the casinos and saw no other way but to order all casinos to close down? In that case, independent from the *actual* opinion of the citizens, the government assumed that citizens were unable to resist temptation and would gamble away their money. Therefore, they considered it necessary to intervene. This would show why their intervention was paternalistic, because it was paternalistic in its intent.

In similar fashion, John's mother may not have violated any moral rules, or acted against John's explicit wishes, she assumed that John was better off not being tempted to go out, because it was very likely he would succumb to the pressure. She judged John as unable to judge for himself in a situation in which he was confronted with luring invitations from his friends. It is precisely this element of her action which suggests that her act is paternalistic.

Quong provides a definition which comprises this element of paternalism, and it is his definition of paternalism which I will adopt in this paper. He proposes the 'judgmental definition' which defines paternalism as any act where:

1. Agent A attempts to improve welfare, good, happiness, needs, interests or values of agent B with regard to a particular decision or situation that B faces;
2. A's act is motivated by a *negative judgment* of B's ability (assuming B has relevant information) to make the right decision or manage the particular situation in a way that will effectively advance B's welfare, good, happiness, needs, interests or values.⁷

⁶ Jonathan Quong. "Paternalism and Perfectionism" in *Liberalism without Perfection*, Oxford University Press (2007):73-107, 80. In that chapter, Quong also gives an excellent discussion of why a number of other definitions of paternalism (which I do not discuss in this thesis) are unsatisfactory.

⁷ Quong, 80

Quong makes two remarks about his definition which I include here because they clarify the scope and nature of judgmental paternalism. The first remark regards part (1) in which an act is also paternalistic if the agent prevents someone else from doing something which would harm B (this is what Dworkin calls ‘impure’ paternalism). So, if I pay C to stop offering and/or selling drugs to B then I am not changing the actual decision-making process of B, but I do influence the set of options B has to his disposal. The reasons that this is still paternalistic, is because I am motivated by a judgment that B is, and will be, unable to refrain from buying drugs from C.

The second remark states that many policies can have different motivations for their implementation. For example, a government can decide to implement a default organ donor system in which citizens are automatically registered as donors, but citizens can opt-out if they so wish. The same government can also count the fact that it shortens the waiting lists for organ transplantations in favor of implementing the scheme. This motivation can exist alongside the idea that this default system is the best way to address the inertia of citizens who do wish to register, but simply do not. Therefore, even if it is clear that a policy can have other, sometimes even stronger nonpaternalistic motivations, the policy remains paternalistic in some extent.

There nevertheless remains some disagreement about what it is that makes a policy or an act paternalistic. For example, De Marneffe would not count a policy as paternalistic if the justification of paternalism in that policy is not necessary for the justification of the policy itself. That is, the policy of a default organ donor system could – theoretically – also be completely justified by the necessity of shortening the waiting lists. In that case, the policy simply is not paternalistic and does not require any ‘extra’ justification. However, although this might seem like a strategy for policy makers, it still remains important to determine if

and how a default organ donor system can be justified on paternalistic grounds. As Grill correctly points out “the mere presence of another reason such as one referring to harms to others, should not erase the paternalistic content of a situation”.⁸

The judgmental definition succeeds in identifying policies as paternalistic, because it comprises one of the most distinctive motivations behind paternalism. The judgmental definition, as Quong argues, is extensionally accurate, because it is intensionally correct.⁹ Paternalism is not just the idea that a government, or any other person wants to improve someone else’s life. Acts of benevolence also do that. Paternalism is different, because it is motivated by the idea that, unless the paternalizer does it, the paternalizee will remain in her suboptimal position, because they are simply not competent enough to improve on their own accord.

III. What’s wrong with paternalism?

Grill writes that “the most common attitude towards paternalism is to reject it, absolutely or conditionally”.¹⁰ In fact, Feinberg spares no negative judgment when he states that paternalism normally inspires some level of repugnance in us. Not everyone agrees on what exactly it is that makes paternalism repugnant, and it deserves attention to discuss this. Grill argues that the clearer we are about what we understand as paternalism, the clearer we can be about the content of antipaternalism.¹¹ Given the variety of definitions of paternalism, every version has its own antipaternalist objections. In order to be justified, the paternalizer needs an argument that shows why that which she is violating is not a reason not to intervene.

⁸ Kalle Grill. “The Normative Core of Paternalism” *Res Publica* (2007) 13:441-458, 445”

⁹ Quong, 82

¹⁰ Grill, 442

¹¹ Grill provides a thorough discussion about the different ways in which a policy can be paternalistic. Policies can be paternalistic either because of the underlying reasons or motivations behind the policy, or because the policy which is merely paternalistic as an act (for example, it restricts choices, but perhaps for non-paternalistic reasons). He advocates that we ought to start thinking about paternalism as always a compound of reason and act. His paper is a great proposal, but due to its meta-theoretical nature I will not discuss it any further in this thesis.

When paternalism is understood as liberty or choice- limiting, the antipaternalist rejection of paternalism is founded on the importance of autonomy in an individual's life. Feinberg writes "respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him".¹² The only acceptable form of paternalism is when it interferes with a 'sufficiently involuntary choice'. For example, if someone engages in behavior that harms herself, and she is clearly suffering from anxiety or a mental impairment, then it is justified to intervene. Feinberg's stance also commits him to defending very harmful behavior if the behavior is the result of a sufficiently voluntary choice. If a perfectly sane individual engages in harmful conduct, such as auto-mutilation, or extremely dangerous sports, the free choice of entering that behavior bars any paternalistic intervention.

Others disagree with Feinberg's firm stance against paternalistic intervention. Arneson for example, argues that Feinberg attaches too much importance to the fact that a choice has been made voluntarily. The fact that a choice was voluntary should not have the role of 'make-or-break significance'. He states that "it is a mistake to make a fetish of voluntary choice."¹³ Arneson reduces the importance of the fact that a choice has been made in a voluntary manner. This means that if there are good reasons to intervene in someone's free choices, Arneson is likely to consider the intervention justified.

A similar response to Feinberg's position comes from De Marneffe who states that "not every liberty that paternalism violates is very important to us."¹⁴ For example, it is a much less significant violation of our liberty if we cannot choose whether to wear seatbelts in traffic than when we are harmed in our liberty to choose our life-partners, or in which neighborhood to live. For those liberties that hardly matter to us, the fact that a paternalistic

¹² Joel Feinberg, "Harm to Self" *The Moral Limits of Criminal Law: Volume III* (1989), 68

¹³ Richard Arneson. "Joel Feinberg and the Justification of Hard Paternalism" in *Legal Theory* (2005) vol.11 p259-284

¹⁴ Peter De Marneffe. "Avoiding Paternalism". *Philosophy & Public Affairs*, (2006, vol 34), 68-94, 68

intervention violates them is not a reason to argue that the intervention is wrong. These paternalistic interventions are rather harmless ways to improve the life of an individual, and are easier to justify.

On the other hand, it seems quite unlikely that every liberty matters to everyone in the same extent. It could very well be that for one person, it matters greatly that they get to choose where to live, but for others, the location of their house is simply not a big deal. If they are assigned to live in one neighborhood or the other, it matters very little to their sense of well-being. This example suggests that ‘free choice’ is not always a goal in itself. Whether a choice was our own, matters in relation to what is chosen for.

Scanlon differentiates between three values we can attach to a choice: an instrumental, demonstrative, or symbolic value.¹⁵ The instrumental value of choice is the value of choice as a means of obtaining something. But the demonstrative or symbolic value of choice exists for choices which matter to a person because they show that, regardless of the quality of the outcome, the outcome is the result of their own choices. Many choices in life matter to us, precisely because they reflect what we value. With regards to the outcome of such choices, Scanlon writes “for better or worse, I want these things to be produced by and reflect my own taste, imagination and powers of discrimination and analysis”.¹⁶

If these choices were inhibited, or manipulated by others, these choices no longer reflect our own values. It is this decrease of authenticity of an outcome which reflects what is wrong with paternalism. If the paternalizer thinks the choice of the paternalizee is a foolish choice, this might well be a correct observation. But, if it matters greatly to the paternalizee to make this choice on her own - even if it is a foolish choice- then intervening in her life causes more damage than it may attempt to prevent. Or, as Scanlon writes “the pejorative ring of ‘paternalism’ and the particular bitterness attaching to it stem from cases in which

¹⁵ Thomas Scanlon. “The Significance of Choice”, in *Equal Freedom* edited by S. Darwall. Ann Arbor: University of Michigan Press (1995) 39-104, 67

¹⁶ Scanlon, 68

either the seriousness of the loss in question or the foolishness of the choice leading to it is a matter of controversy”.¹⁷ Paternalistic interventions in choices that have great symbolic or demonstrative value for the paternalizee are much more harmful, and therefore problematic, than interventions in choices which do not possess this value.

IV. *Distinctions between soft and hard paternalism*

An important distinction in the paternalism debate is the distinction between soft and hard paternalism. This distinction differentiates between methods of and reasons for paternalistic interventions. Soft paternalistic interventions are often less invasive to an individual's life than hard paternalistic interventions. Because they are less invasive, they are comparatively easier to justify. If an antipaternalist objects to paternalism because it violates autonomy, the paternalistic interventions which do not violate autonomy would be classified as soft interventions. In some cases, the fact that an intervention qualifies as hard paternalism is a reason to never find such an intervention justifiable.

Soft paternalism tends to accommodate an antipaternalist sentiment. For example, Feinberg's emphasis on the importance of voluntary choice provides a basis to differentiate soft from hard paternalism. To intervene in behavior which is not the result of a sufficiently voluntary choice is soft paternalistic. To intervene in behavior which someone voluntarily engages in, is hard paternalistic.

Another basis for the distinction between soft and hard paternalism is the extent in which the intervention coerces an individual into doing something. Scoccia defines hard paternalism as the type of paternalism that violates autonomy. Soft paternalistic interventions are interventions that do not violate autonomy.¹⁸ Coercion, deception, and the like violate autonomy. Yet, according to Scoccia, merely influencing someone's behavior via incentives

¹⁷ Scanlon, 181

¹⁸ Danny Scoccia. "In Defense of Hard Paternalism" *Law and Philosophy*, vol27, no 4 (July 2008), 351-381, 358

does not. Therefore, influencing an individual to doing something is an example of soft paternalism, whereas coercion through threats or laws are cases of hard paternalism.

Thaler and Sunstein defend a similar type of soft/hard distinction in their introduction of libertarian paternalism. Libertarian paternalism classifies as a type of soft paternalism in two ways. First, libertarian paternalism does not prescribe how people ought to live. Even though it is concerned with welfare improvement, it seeks its indicators for welfare amongst people themselves. It does not seek to independently determine what is good for a person but, as Thaler and Sunstein writes “the libertarian paternalist would seek indirect proxies for welfare: methods that test whether one or another approach is welfare-promoting without relying on unreliable guesswork about that question”.¹⁹ This is opposed to, for example, moral paternalism, which seeks to make people better off in the moral sense of the word, regardless of whether that person would ever agree that they are indeed better off. In so far as moral paternalism does not care about the personal goals of the individual, moral paternalism is an example of hard paternalism.

Second, libertarian paternalism is not coercive in its methods. It merely influences or ‘nudges’ an individual into the direction of realizing their own preferences. In some instances, this method is to fiddle with the way in which choices are presented to that individual (making a good pension scheme the default, or putting fruit at the entrance of a shop to incentive buying healthy food). In other instances, the influence is to offer a scheme which an individual can opt-in to in order to maximize their own welfare (anti-procrastination schemes, quitting smoking programs etc). One might think that libertarian paternalism is so soft that it hardly qualifies as any form of paternalism, but Thaler and Sunstein write that “in our understanding, a policy counts as “paternalistic” if it is selected with the goal of influencing the choices of affected parties in a way that will make those parties better off.”²⁰

¹⁹ Thaler and Sunstein (2009), 18

²⁰ Thaler and Sunstein (2005), 175

Thaler and Sunstein provide justifications for their soft paternalistic interventions which are quite similar to judgmental paternalism. In their research, they have shown that individuals suffer from all sorts of cognitive biases. Due to these biases, individuals tend to make irrational decisions.²¹ These decisions are irrational, because they show a lack of instrumental rationality (which is the understanding of the (most) efficient way to realize preferences). Thaler and Sunstein do not enter the discussion of whether it is irrational to have certain preferences. In chapter 4, I discuss the extent in which some of the policies they endorse are indeed soft paternalistic. First, I want to turn to a discussion of the wrongness of judgmental paternalism.

V. *What's wrong with judgmental paternalism?*

Judgmental paternalism is motivated not only by the desire to improve the life of the paternalizee, but also by the idea that the paternalizee is incapable of making the right decisions and advance her own needs and interests. The subsequent intervention could violate either the autonomy, or the liberty, or an important moral rule or neither of those three. If judgmental paternalism is mainly defined by what the paternalizer thinks of the paternalizee, how would an antipaternalist argue against judgmental paternalism?

What does it mean to say of someone that you think they cannot look after themselves? When this judgment refers to children, mentally handicapped or any other individual with serious psychological impairments, the observation is correct. Judgmental paternalism is not wrong just because it considers a person unable to judge for herself. In fact, judgmental paternalism is silent about whether it must actually be true that the paternalizee is unable to judge for herself, because what makes an act paternalistic under this definition

²¹ Dan Ariely considers these inhibitions to be so structural, that he finds them 'predictable'. See "Predictably Irrational" by Dan Ariely (2008) for more studies of irrational behavior.

depends entirely on the motives of the paternalizee, and not on the subsequent acts which may or may not violate a liberty.

The wrongness of judgmental paternalism is rather difficult to grasp, but it seems to be something like this: regardless of whether it is true that the paternalizee is unable to make the right decision, and manage a situation in a good way, we could say that being considered to not being able to sort out your own life harms your dignity. It is a state of being which no self-respecting adult wishes to be in, and even if they truly find themselves in such a state, the most natural response is the wish that it be for the shortest amount of time possible. As long as the judgment stands, it classifies the paternalizee as, at least in one way, not able to live life in the same way as 'normal' individuals. To consider an adult as unable to judge for herself is an unwelcome judgment for many, because it equates an adult with the status of a child. We value that adults are able to direct their own lives, and are able to create goals in their life which they are able to achieve through their own freely chosen actions. There is no denying that in some instances, adults fail to make the right decisions, because they are influenced by external factors, or have cognitive inhibitions. Despite that fact, the value of autonomy which is assigned to all in equal measure is greater than the concern that not all choices are as effective as others.

The wrongness of judgmental paternalism consists of two parts. First, for any self-respecting adult, to be considered incapable to make the right decision by your government or by your peers is undesirable, even if there is a point to their judgment. If their judgment is false, and you are subjected to a paternalistic intervention, it is not only undesirable, but also humiliating. Either way, it is a judgment anyone would want to end to pertain to you as soon as possible. The unease of being judged as not able to lead an autonomous life supervenes on the great importance we attach to the ability and freedom to do so.

Furthermore, given that the paternalizer considers you unable to adequately handle a situation, she would naturally deprive you from exercising any influence. Judgmental paternalism excludes you from having authority over that situation, and that part of your life. The decisions made by the paternalizer might include methods you would never have implemented on your own. If Tom wants to lose weight, and he is too addicted to food to do it himself, he still might object to being sent to a Spartan weight loss camp. It might be true that his own decisions about how to lose weight are problematic, but this does not mean he has no preferences for things he does *not* want. In its strongest form, judgmental paternalism completely silences the opinion of the paternalizee. The negative connotations of the act of taking over decision-making and ruling out the possibility of influence of the paternalizee, because she is considered mentally incapable to do so, show what is wrong with judgmental paternalism.

VI. *A soft/hard distinction for judgmental paternalism*

If antipaternalist sentiment can inform a soft/hard distinction in paternalism, it is worth looking whether there is a way in which judgmental paternalism can be divided in soft and hard paternalistic types. The soft paternalistic version of judgmental paternalism should then be easier to justify than the hard paternalistic way. I will propose such a distinction in chapter 3, and I will use the possibility in which the paternalizee's mental capacity is restored to a level which enables her to make her own decisions again as the main distinguishing criterion. I will consider the indicator of restoration of this mental capacity to be the ability to express ex-post consent to the paternalistic intervention. In order to do so, I first want to discuss the role of consent in the paternalism debate in the following chapter.

Chapter 2 The role of consent in paternalism

This chapter provides an overview of the role of consent in the paternalism debate. Consent can take up different roles with regards to the character of a paternalistic policy as well as to its justification, and I start with briefly discussing those different roles. I will conclude with discussing cases in which consent could only come after the policy has already been implemented, and the extent in which subsequent consent can retroactively justify a paternalistic intervention.

I. Roles of consent

Douglas Husak argues that neither the presence nor the absence of consent affects the justification of the paternalistic policy. He states that what justifies a paternalist policy is dependent on the policy itself and on the mental state of the paternalizee. Whether the paternalizee consents to a policy is irrelevant to its justification. If the mental state of the paternalizee is such that she is “not in a favorable position to make the right decision” then the paternalizee can take over decision-making.²²

Paternalism can be justified if the policy has five specific characteristics: 1) the policy is minimally intrusive to the liberty of the individual; 2) the objective sought after is obviously valuable; 3) the means chosen are likely to promote this objective; 4) the individual is not in a mental state to make the decision on their own and 5) the paternalizee stands in an ideal relationship with the paternalizer. Not one of these five refers to the role of consent of the individual. If it is permissible to treat someone paternalistically, then “ongoing validity of prior consent is not what does the justificatory work”.²³

Husak makes a persuasive, yet ideal case for what can justify paternalism. I am not convinced that these five criteria justify the disregard of consent entirely. Firstly, what it

²² Douglas Husak. “Paternalism and Consent” in *The Ethics of Consent* ed. Franklin Miller and Alan Wertheimer, Oxford Scholarship Online (2009) 107-130, 109

²³ Husak, 11

means to stand in an ideal relationship is not entirely clear. If it would include the government-citizen relationship – which it should- then there is always a risk that the policy is more harmful to an individual than the government is able to estimate. The expression of consent would prevent this risk, because whatever potential harm can come from the policy is accounted for through the consent of the individuals themselves.

Secondly, whichever intervention is imposed upon an individual, it is bound to change their lives to some extent, and there are cases in which consent is crucial to the success of that change. Consider the misanthrope who is forced by his wife to join a poker club and socialize with other players. He enjoys playing poker, and he has no other plans in the evenings anyway. Being sent to the poker club is minimally intrusive, and having friends is a nice thing. His wife stands in an ideal relationship with him, and she thinks her husband should get out more. Yet, the misanthrope really does not want friends, and resents having to go to the club. If asked, he would not give his consent to this policy, nor is he very likely to consent to having been sent to the club upon his return. So, in what way is this paternalistic intervention justified? The referral to the increased benefits of the intervention would be pointless. The means chosen by his wife are indeed likely to promote the objective; going to the poker club is a good way to make some friends. Had we included the requirement for consent then we could see that the criteria together do not reach the alleged benefits which justify the intervention. Husak is too quick to dismiss the importance of some level of influence of the paternalizee to the chances of success in paternalistic interventions.²⁴

Joseph Raz does not ascribe an important role to consent to policies either. In fact he argues that, contrary to what is deeply embedded in Western thought; consent plays a marginal role in the establishment and legitimacy of authority. He writes that “consent represents merely

²⁴ In “Moral Paternalism” G. Dworkin discusses the legitimacy of improving an individual in moral terms, and he shows that whether the paternalizee endorses the policy or not is not important. This, however, is not what Husak is getting at, since he focuses on welfare improving paternalism.

one end of the spectrum in the myriad of processes and actions that lead to the formation of and that express this attitude in one's government".²⁵ Potential consent to a policy informs the government in what types of directives people are likely to accept and follow. As such, consent plays an informative role for what 'authoritative directives' the government can give to its subjects. These directives are not all paternalistic, but they are not unlike paternalistic policies either in so far as they are imposed by a government motivated by the wish to improve the life of its citizens. The coercive nature of the policy is justified, because their imposition makes it more likely that a subject will conform to reasons that already count in favor of the directive. Raz writes that "the issuing of directives which, if followed, will enable their subjects to conform to reasons that apply to them better than they otherwise can" and therefore "authorities typically engage in trying to establish what those reasons are."²⁶

The imposition of such authoritative directives is motivated by reasons similar to judgmental paternalism. The natural opponent of government directives is the anarchist, who as Raz writes "regards an authoritative directive not as a consideration to be added to the balance of reasons, but as a decision by another that displaces his right to act on his own judgment on the merits of the case. In this he finds the disturbing and problematic aspect of authority. And in this he is right."²⁷ The extra push to perform this act is not welcomed by the anarchist, but according to Raz the anarchist overemphasizes the role of consent in the first place. Raz admits there is some role to consent, but not for the legitimacy of authoritative interventions. If there is a role at all, it is in the determination of the appropriate content of the policy, and the sense of connection that this creates between the authority and its subjects. But, it plays no role in the justification of policies themselves.

²⁵ Raz, 369

²⁶ Joseph Raz. "Government by consent" in *Ethics in the Public Domain: Essays in The Morality of Law and Politics*, Clarendon Paperbacks (1994), 355-369, 359

²⁷ Raz, 360

In chapter 4, I will elaborate on why judgmental paternalism cannot demand prior consent to a policy for its justification, precisely because it considers the judgment of the paternalizee about the relevant situation to be unfit. But first, I wish to discuss whether it is even possible to be treated paternalistically after having expressed prior consent.

II. Paternalism after consent

Consent can have different influences on a paternalistic intervention. Some would argue that consent to a paternalistic policy stops the intervention from being paternalistic. If I voluntarily enter a program that makes me quit smoking, and I accept the terms and conditions of the program, then the program is no longer paternalistic. After all, any limitations or potential punishments are self-imposed. What consent does on this reading is remove that element of paternalism which is objectionable because it is imposed by someone else.

For example, when Ulysses asked his men to tie him to a pole and not obey his commands for the time they were in reach of the calling of the Sirens, one could argue that his men were not treating Ulysses paternalistically. His men were merely following the explicit orders from their superior not to obey him for a limited period of time. Ulysses orchestrated every single act his men were supposed to perform in response to his own acts. He explicitly instructed them to ignore any future orders in a specific time period and indicated at which point the temporal disobedience had to end (when he could no longer hear the Sirens). It is indeed hard to see any paternalistic action from Ulysses men towards Ulysses.

However, some, such as the hardcore libertarians, could identify a level of paternalism in the example above. The prioritization of the ‘rational’ Ulysses before he heard the call of the Sirens and the ‘irrational’ Ulysses who ordered his men to release him and sail into the

direction of the call is considered an act of paternalism by a libertarian who believes that only the individual should be allowed to direct her own life. A libertarian would say that to ignore Ulysses when he revokes his earlier commands on the grounds that the earlier Ulysses is the one whose orders were rational is paternalistic. To truly respect Ulysses autonomy is to take whatever he says about how he wants to direct his life as representative for what he actually wants. Even if preferences held now contradict the preferences that are held earlier, the outsider is not entitled to judge which of the two expresses one's actual preferences. The best way is to go with what the individual tells you. To prioritize past-Ulysses over present-Ulysses, even if it is at his own specific request, is paternalist, and therefore illegitimate.

But, the problem with the hardcore libertarian response is twofold. Firstly, it is not clear why it is a better expression of respect for the autonomy of an individual to insist on following the latest expression of preferences. Surely, if a temporary limitation is self-invoked after careful thought, the heavily influenced change of mind is not necessarily an expression of autonomy. Rather, it is an expression of a mind under heavy influence, and as such, not representative of one's actual preferences. Furthermore, it seems absurd to deny people the possibility to temporarily prevent themselves from a certain act. To do so would make sense in many ways; postponing the indulgence into some treat after a certain important chore is performed does not strike me as an example of violation my own autonomy. One does not have to be a hedonist in order to be autonomous. The hardcore libertarian position ignores the common desire of people to be protected against themselves or against strong influences from outside.

Nevertheless, it is of course possible to truly change one's mind. Someone can genuinely regret consenting to a policy which eliminates the possibility for self-direction. Think of 18-year olds who consent to serving in the army for many years on end. If it is

reasonable to assume that a self-imposed restriction is truly regretted, then in order to respect the autonomy of an individual, the restriction should be uplifted.

It is worth asking whether there perhaps is a non-libertarian way in which can find paternalistic actions in how Ulysses's men treated him. What if, for example, Ulysses had not orchestrated the event with complete precision, but he told his men to do 'whatever it takes to sail past the Sirens'? Such an order leaves a number of options for his men. They could, for example, choose not to tie Ulysses to a post, but knock him unconscious for several hours. Or, they could agree that their commander should not suffer through this ordeal at all and decide to fill his ears with wax, and designate another person to listen to the Sirens until the calling was out of reach. Not one of these policies is very controversial, but what they all have in common is that they do not have the explicit consent of Ulysses in so far as Ulysses did not order the specific policies. Furthermore, the men would not ask for the consent of Ulysses, because if they would ask Ulysses whether he would approve of the policy, they risk that Ulysses disapproves for the wrong reasons (namely that he wants the ship to sail to the Sirens).

It seems that in this case, we can identify room for paternalistic motivations in the actions of Ulysses's men. Even though Ulysses consented to a temporary suspension of his own command, there remains room for his men to choose what exactly they can do during the temporary anarchy on their ship. They could deliberately ignore Ulysses's opinion, because they consider him unfit to self-direct. Moreover, they can ignore Ulysses's expression of changed preferences to sail to the Sirens after all, and assume that this is not the 'real' Ulysses. As such, consent to being treated paternalistically is possible, because often the paternalizer continues to have several options to her disposal.

III. *Inevitable Paternalism*

A final set of cases in this discussion of consent is whether consent can play a role in cases in which paternalistic intervention is inevitable. That parents act paternalistically towards their children is inevitable; the obligation to enter an education system which educates and shapes a child is inevitably paternalistic; when your relative suddenly finds herself in the hospital, you might be appointed to make decisions on her behalf. There are many cases in which one actor stands in a relationship of dependence with another individual without an explicit act of consent which precedes this relationship. A child, for example, has not consented to standing in a relationship of dependence with her parents. Nor has the child consented to being obliged to enter an education system. Asking for their consent seems, due to their minor age, pointless, but the subsequent denial of this dependency would be a terrible idea.

We can see a similar relationship with the state and its citizens. It is not a very controversial to say that citizens, especially minor ones, do not express explicit consent to the state's authority. This is not a thesis however about what exactly generates the authority of the state. What matters for this thesis is the following: a state is expected to regulate a significant part of an individual's life. Think of health-care systems, education policies, environmental policies, the job market, retirement and so on.²⁸ As such, Thaler and Sunstein are right when they claim that it is inevitable that in a state, some policies will be paternalistic.²⁹

When states see that citizens cannot be left to their own devices to reverse or end harmful behavior, then the state should step in. I am not referring to those cases which Dworkin (1972) adequately excludes from paternalism, namely those cases in which law enforcement is the only way to prevent collective action problems. In such cases, the law serves to ensure

²⁹ Richard Thaler and Cass Sunstein Thaler, "Libertarian Paternalism" *The American Economic Review*, (2005, Vol. 93, No. 2): 175-179, 175 and Richard Thaler and Cass Sunstein. *Nudge: Improving Decisions about Health, Wealth and Happiness*, Penguin Books (2008), 237

that everyone participates in a scheme. Such schemes promote the greater good of society, or of a number of individuals in that scheme, but it is not a necessary requirement of these laws to do so (precisely because in some cases a number individuals will, by some measure, be worse off because of the scheme). Even if in most of the policies it is possible to find motives that are not paternalistic, I want to focus in that part of the motivation which is paternalistic to the individuals. For example, of course we can say that a having a well-educated society has all sorts of economic or cultural benefits, but this argument exists alongside the belief that is better for an individual if they receive education. That this is a motive of most governments can easily be shown by reference to the great number of subjects, extra-curricular activities and exchange programs that schools are encouraged to offer in order to contribute to the self-development of the student.

Given that some paternalistic policies are inevitable, whether the policies are preceded by consent or not in order to assess their justification is a moot question. Moreover, it is sometimes simply not possible to ask for consent if for example, the paternalizee does not have the mental ability to do so. Therefore, we should look cases of paternalism in which there is no prior consent, and assess whether and how the notion of subsequent consent plays a meaningful role.

IV. Subsequent Consent

Several scholars have explored the possibility of justifying a paternalistic intervention through the expression of consent after the intervention. This approach circumvents the problems with the expression of consent before the intervention. When the paternalizee realizes the benefits of the policy, she might retroactively consent to its imposition. The paternalizer then has to work within the limits of that which the paternalizee is likely to consent to. When there are good reasons to think that no rational individual would ever

consent to a particular policy, the paternalizer is not justified in imposing it on the paternalizee.

Carter argues that the only way in which a paternalistic intervention is justified is if it does not violate an actual right instead of a prima facie right.³⁰ Everyone has a prima facie right to non-interference, and only when we can be sure that this prima facie right is not applicable, a paternalizer can intervene. For example, those with severe mental disabilities do not have a right to non-interference, and therefore paternalistic interventions are justified. In other cases, prior or subsequent consent to the intervention ensure that the actual right to non-interference is not violated. According to Carter, the only way in which a paternalistic intervention can be justified is if either:

- 1) Prior to the interference the subject explicitly consents to the paternalistic intervention; or
- 2) Subsequent to the interference the subject
 - a. Explicitly consents to the actions; or
 - b. Is disposed to consent either upon request, or upon the receipt of a relevant piece of information.³¹

Carter acknowledges the risk of invalid subsequent consent resulting from indoctrination. However, in such cases, it seems that the initiative to intervene in the first place was illegitimate. No-one would consent to being indoctrinated, and therefore such a paternalistic intervention would violate an actual right and cannot be justified. It nevertheless remains difficult to assess the likelihood of subsequent consent, and Carter proposes six criteria which

³⁰ Rosemary Carter. "Justifying Paternalism" *Canadian Journal of Philosophy*, (1977):1, 133-145, 133

³¹ Carter, 136

can be used to determine this likelihood.³² Especially in parent-child relationships, the only possibility of consent is ex-post. Children cannot express any type of valid consent, but, Carter writes “paternalism toward a child has a good chance of meeting with subsequent approval of the adult self, since with the development of this abilities and judgment he will probably see the wisdom of our interferences”.³³

Van de Veer objects to Carter’s methods of justifying paternalistic interventions.³⁴ He argues that the justification of a paternalistic policy “cannot reduce to the question of whether it is proper to bet on subsequent consent”.³⁵ It seems that to bet on subsequent consent in the future is as ‘risky’ as it is to bet on future benefits accrued from the intervention. The fact the justification of the policy relies on a certain event in the future should not be understood as causing risky behavior but rather the opposite. When the paternalizer accepts that future consent is the only way in which their paternalistic interventions can be justified, this seems to be a very effective constraint on the set of options they consider to be available. Van de Veer is right in his warning that Carter risks too much by assuming that the child will see the wisdom of the intervention when she is older. Therefore, it seems there is a need to another requirement of the paternalistic intervention itself in order for it to be justifiable. I will return to this notion in the next chapter.

In line with this requirement, Haley Richmond presents similar reservations regarding the role of consent in the justification for paternalism. She states that consent “is held to vindicate the paternalist from any moral blame that might be attached to the interference in

³² In order to judge the probability of subsequent consent the paternalizer should check: 1) whether the paternalistic action is in accordance with the permanent aims and preferences of the subjects; 2) whether the proposed subject is in a temporary state of relative incompetence; 3) whether the subject lacks relevant information which he will, in the normal course of events, come to possess; 4) the size of the utilities promoted or the disutilities prevented; 5) whether the action has harmful consequences which are irreversible; 6) whether certain conventions obtain.

³³ Carter, 141

³⁴ Donald van de Veer. “Paternalism and Subsequent Consent”, *Canadian Journal of Philosophy* (1979): 631-642, 640

³⁵ Van de Veer, 640

the liberty of action of another person”.³⁶ Yet, in order to look at the rightness of the policy, she writes that “a claim that the decision-making of parents with regard to the upbringing of their child was morally justifiable must depend on a critical evaluation of the child’s educational background. Consent, therefore, becomes redundant”.³⁷ In a critique on Carter she rightfully remarks that “rather than attempting to decide in advance what our children’s good should consist in, we should instead direct our efforts to bringing them up to reason well and choose well”.³⁸

Finally, Dworkin also recognizes the importance of future consent in the relationship between parents and children. The desirability of future consent functions as a restriction on what parents are entitled to do to their children. He writes

“there is however an important moral limitation on the exercise of such paternal power which is provided by the notion of the child eventually coming to see the correctness of his parent’s interventions. Parental paternalism may be thought of as a wager by the parent on the child’s subsequent recognition of the wisdom of the restrictions. There is an emphasis on what would be called future-oriented consent – on what the child will come to welcome, rather than on what he does welcome.”³⁹

In response, Husak calls Dworkin’s future-oriented consent ‘unhelpful’. He questions the representativeness of the moment in which we measure whether or not there is consent. Is the appropriate time right after the policy, or years after the policy and how would we deal with a change of opinion over time? Many teenagers may not appreciate their parents’ policy of rationing candy during primary school, yet when those teenagers are adults with children of their own they might wholeheartedly approve.

Moreover, Husak warns that neither the prospect of ex-post approval, nor the ex-post approval itself are necessarily the same as an act of consent. Understanding why a paternalizer chose to intervene and subject someone to a certain policy is not the same as

³⁶ Haley Richmond. “Paternalism and Consent: Some Educational Problems” *Journal of Philosophy of Education* (1998) vol. 32 no 2, p239-251, 240

³⁷ Richmond, 246

³⁸ Richmond, 248

³⁹ Dworkin, 277

actual consent. Husak writes “often I am in a better position to assess how events affect my welfare long after they occur, but this superior perspective should not be mistaken for consent”.⁴⁰ Husak is right in questioning the conditions under which the expression of ex-post consent actually justifies the policy. On the one hand, there is a risk of indoctrination, or distortion of the paternalizee’s actual preferences. If there is an expression of consent, this cannot be understood as representative for her actual preferences. On the other hand, if paternalism is inevitable, a complete disregard for the subsequent consent of the paternalizee deprives her from any way to exercise her autonomy. She will just have to accept whichever method and whichever outcome of that method. Again, it seems there is a need for a better way to distinguish ways in which paternalism relates itself to the notion of subsequent consent.

⁴⁰ Husak, 114

Chapter 3 A soft/hard distinction based on ex-post consent

In this chapter, I want to propose a way in which the requirement of ex-post consent can do two meaningful things for the justification of judgmental paternalism. In chapter 1, I stated that the wrongness of judgmental paternalism exists in the idea that it goes against the ideal of allowing an individual to lead an autonomous life in which their choices, unless they harm others, deserve the same level of respect and liberty as any other individual. Judgmental paternalism places the paternalizee outside that realm. I also stated in chapter 1, that the distinction between soft and hard paternalism accommodates main objections against paternalism. I will therefore argue that it is possible to distinguish between soft and hard paternalistic interventions by looking at the extent in which the policy aims to do two things: First, the distinction is predicated on the extent in which the paternalizer cares about the ex-post consent of the paternalizee to the extent that she accepts this is a possibility that restricts the things she can do to the paternalizee. If the paternalizer does not allow herself to be restricted by what it is that the paternalizee may or may not consent to, then her interventions are hard. If she does allow her interventions to be restricted by the set of things she believes the paternalizee would consent to, then her interventions are soft.

The second necessary element that determines the distinction is the extent in which the paternalizer aims to restore the paternalizee's mental ability to a level in which she could no longer judge the paternalizee as unable to judge for herself. If nothing in the paternalizer's policy aims to restore that mental capacity while she does have the ability to do so, then her intervention is hard. If the paternalizer does all she can to restore that mental capacity, then the intervention is soft. Finally, if either of these two conditions for soft paternalism are not fulfilled, then the intervention is hard paternalism.

Although I will address this at greater length in chapter, this classification of soft and hard interventions will re-classify a great number of paternalistic interventions as hard

interventions. I therefore also hope to show why I believe that many interventions that are currently deemed soft and therefore just, are in fact hard and require more from the paternalizer in order for the intervention to be soft paternalistic.

I. Ex-post consent as a restriction on paternalistic interventions

Consider this example: John is a very religious person, and he inherits a huge library from his atheist grandfather. John knows that in this library there are some books which might upset his faith after reading them. He therefore gives the key to his library to his best friend Lisa. She is endowed with the right to replace John's judgment. Therefore, she gets to decide whether or not to read the books, or whether to keep them in the library at all to avoid temptation. John entrusts Lisa to make a call, and he has good reasons to think that he would agree with whatever Lisa would decide.

Lisa, however, is not at constrained in her options by John's expectations. Even though John assumes that Lisa knows best because they are friends, and he consents to her authority over what will happen with the books, these expectations are just expectations, and do not automatically function as limits or caveats for what Lisa can decide.

Let's say that Lisa knows that John is very sensitive about his grandfather's possessions. She also firmly believes that John should never read these books. Not only would it upset him, it would also distort the relationship he has with his grandfather, which can never be resolved due to the grandfather's passing away. She figures that what is actually best for John is to remove the books and burn them. John can therefore not be tempted to go online and buy the books back in the honor of his grandfather. She knows John is likely to do this (for example out of nostalgia) on a whim, and she wants to protect him at all cost. Lisa knows John will never agree with her burning the books, but she knows that, all things considered, this is what is best for him.

Lisa is now faced with an important choice. John has endowed her with the right to judge what should be done with the blasphemous books. He placed no restrictions on her whatsoever, so Lisa has a number of options. To burn the books would objectively be the best thing. It would prevent John from going through great turmoil. But Lisa also knows that, although John consented to giving Lisa *carte blanche*, he would never consent to *that*. It seems that Lisa is now capable of being paternalistic in two ways. She either takes the possibility for John's future consent after she has implemented her decision about what to do with the books into account, or, she doesn't.

It is in the way in which Lisa will make her choice that we can recognize another way to distinguish soft from hard paternalism in so far as it tracks the extent in which the paternalizer desires the ex-post consent of the paternalizee. If Lisa chooses to burn the books, she is a hard paternalist, because she cares not for John's ex-post consent (or at least not enough). She chooses for what she considers to be the objectively best thing to do for John.

However, if Lisa would care enough about John's ex post consent, she might still think that burning the books is best, but she will not do it. She would simply lock the books away and might only consider giving the key after John expresses regret about his deferral of judgment. If Lisa would allow herself to be constrained by what she thinks John would consent to even if John gave her a *carte blanche* to do whatever she thought was best, then this is a case of soft paternalism.

II. The duty to restore the mental capacity to express valid ex-post consent

A second, equally important part of the character of soft paternalistic interventions that I am proposing is that the intervention must include an attempt to restore the mental capacity of the paternalizee. If the intervention fails to do this, whereas the paternalizer did have the possibility to do so, then the intervention is hard. Lisa, in the example above, did not have the

ability to restore John's mental capacity to make the right decision in situations that involve his grandfather's library, her intervention can therefore still be soft.

When such an intervention is hard can be shown by the following example. I stated earlier that organizing an education system is an important role of the government. It is also a system that is inevitably paternalistic. It does not rely on the consent of the students, it aims to improve the lives of students, it determines what students have to do for the majority of the day and with whom, and through such processes of socialization and through subjects which teach about society and religion and culture, it installs a number of beliefs about the world.

If a government considers certain beliefs about the world as the correct beliefs, it can demand that these beliefs are presented in the school's curriculum as the only, and therefore as the only correct way of thinking about the world. Think of a government who refuses to allow certain versions of history to be taught in school. The government probably knows that some interpretations of history differ, but it chooses to not include these in the history books. On a smaller level, think of schools who do not allow the teaching of evolution in school, because it firmly believes that all things are created by a higher being.

The above is an example of a government that has a hard paternalistic way of subjecting students to the school's curriculum. It does not consider it important that the students, after they reach a certain age, could express ex-post consent to what and how they were taught. The purpose of the curriculum is to install an umber of beliefs as the correct ones, and the validity these beliefs are neither questioned in the curriculum itself, nor are teachers supposed to encourage assessment on the part of the students. The government wants the students to exit the education system with the beliefs it wants it to have.

If a student who exits the education system would express something like consent, it is not a type of consent which actually validates the previously taught beliefs. If someone expresses consent to something they were taught to belief, then it does not really qualify as

actual consent. We do not know whether someone would have also consented after an act of comparison between two or more sets of beliefs. If all I have ever known is one set of beliefs, I cannot be sure that this is indeed the best set of beliefs based on which I want to decide how I want to direct my own life. When a government, or a school, precludes the possibility to compare between sets of beliefs, they preclude the possibility of ex-post consent of the paternalizee. Therefore, the government is hard paternalistic.

A soft paternalistic education system does aspire to obtain ex-post consent after students exit the system. Instead of eliminating alternative systems of belief, such an education system would teach a number of belief-systems. More importantly, it would encourage students to assess what it is that they are being taught. Alongside courses on world religion or various political systems, it teaches critical thinking skills, analytical skills and it encourages the practice of debate. An education system that is soft paternalistic ensures the possibility for ex-post consent through its methods. The education system is an example of a case in which some paternalism is inevitable. Yet, this does not exempt the government in its role as paternalizing agent of the obligation to be soft in its interventions, where possible.

III. Objections to the possibility and validity of ex-post consent

In this section I wish to respond to two objections to the possibility and validity of ex-post consent. The first objection comes in the form of a warning from Van de Veer. He warns for the risk that

“an aggressive paternalistically minded person (e.g. a legislator) might claim justification for his interference on the ground that many or most chronological adults are immature, still growing, and subsequent consent is probable by the *mature self* when the latter comes to be”.⁴¹

⁴¹ Van de Veer, 642

This warning points at the risk that occurs when we think that as long as an adult is unable to judge for herself, we are justified in intervening in her affairs. If the adult does not agree what the paternalizer thinks is the right approach, or right decision, then this is an indicator of her inability and a confirmation of the necessity to (continue) to intervene. The intervention will receive approval of the adult who will see the wisdom of the intervention when she has reaped the benefits.

My response to this objection is that this indeed a risk that should be taken seriously. It is one of the reasons why the only way in which an intervention is soft, and justifiable, is when part of the intervention is the restoration of the mental ability whenever possible. This requirement is an answer to precisely this objection, and it is meant to restrict the room that the judgmental definition of paternalism allows for prolonged intervention.

The second objection comes from Tziporah Kassachkoff who questions the extent in which we can take an expression of consent as reflecting consent to the policy itself. Kassachkoff does agree that consent can play an important role in the justification of paternalism. She writes that “consent is morally relevant to the justification of paternalistic action only if it shows that the insult to autonomy which a paternalistic action is held to constitute did not take place”⁴². However, Kassachkoff raises two concerns which put the representativeness of an expressed act of consent, or of gratitude into question.⁴³

Her concern is that the paternalizer cannot be sure that her efforts to improve the life of the paternalizer have led to the decrease or increase of the paternalizee’s autonomy.⁴⁴ If it is hard to determine this, then the retroactively justification of the intervention is put into

⁴² Tziporah Kassachkoff. “Paternalism: Does Gratitude Make it Okay?” in *Social Theory and Practice*, (1994 vol. 20 no 1), 1-17, 15

⁴³ I do not think gratitude and consent can be used as interchangeably as Kassachkoff does in her paper (for the simple reasons it is perfectly possible for me to be grateful for things I never asked for nor never would have asked for), but a more charitable reading of this use provides relevant objections to the importance I assign to ex-post consent.

⁴⁴ Kassachkoff, 20

question. It is also unsure whether, if the paternalizee says she consents, and is grateful for the results of the intervention, she is expressing consent to the intervention itself, and not just to the end results. There is no denying that it is impossible to obtain complete certainty about the representativeness of the expressed consent. Yet, if the paternalizer aspires to restore the mental capacity in the best way possible, then there really is not much more that would be reasonable to ask. Moreover, Kassachkoff's objection to this expression of consent would suggest we have reasons to doubt any other expression of consent (or disapproval for that matter) as well. If we cannot be sure that the expressed consent pertains to the situation after the paternalistic intervention, how can we be sure the paternalizee did consent to her situation before the intervention? It seems a bit absurd to question the validity of the expression of consent this far. We have no option but to assume that settling for the best case scenario is sufficient.

Secondly, Kassachkoff raises the issue that the requirement for ex-post consent itself is completely morally neutral, because "any paternalistic act at all is, on this theory, justifiable as long as the subject is glad that it was done and the consent was not "engineered".⁴⁵ My response would be that this description of the requirement for ex-post consent is incorrect. It is not morally neutral itself, because it serves as a restriction on what paternalizers can impose upon the paternalizee. The fact that the requirement exists is a result of how much value is attached to an individual's ability to lead an autonomous life. Secondly, given that the requirement of ex-post consent is an expression of respect to the autonomy of the individual, I see no reason to be concerned about the set of actions that a government could impose within that framework.

⁴⁵ Kassachkoff, 19

Chapter 4 The mental capacity to consent and its relation to the soft/hard distinction in judgmental paternalism

This final chapter elaborates on the second part of the judgmental definition of paternalism I have adopted in chapter 1. The second part of that definition is the idea that in order for an intervention to be paternalistic, the paternalizer has to be motivated by a negative judgment about the mental ability of the paternalizee to make the right decision. Chapter 3 provided a description of soft and hard paternalistic interventions, and although I have made references to what would justify a soft paternalistic intervention, there is much more to be said about the combination of the judgmental definition and the soft/hard distinction I am proposing.

In this chapter, I discuss how the judgmental definition of paternalism and soft/hard distinction I propose in chapter three affect each other. Mainly, I discuss how the judgmental definition provides a basis to differentiate soft and hard paternalistic interventions. I will present four distinct ways in which the paternalizer can judge a person unable to make the right decision about advancing her well-being. Each of these ways has different implications for the paternalistic intervention itself. Therefore, the paternalizer is obliged determine what she understand as ‘considering someone unable to judge’, and she is obliged to design her intervention accordingly.

I. The second part of the judgmental definition

The second part of the judgmental definition states that A is acting paternalistically is “A’s act is motivated by a negative judgment of B’s ability (assuming B has relevant information) to make the right decision or manage the particular situation in a way that will effectively advance B’s welfare, good, happiness, needs, interests or values. Following this definition, Quong identifies three different capacities which, independent from each other, can be the capacity which the paternalizee is considered to not be able to use appropriately. The three

relevant capacities are 1) practical reasoning, 2) willpower, and 3) emotion management.⁴⁶

Quong admits that there could be more capacities which affect decision-making than these three, but he makes a persuasive case how each of these three capacities can, on their own, malfunction to the extent that it is not possible that the paternalizee will make the right decision, or manage the situation in a way that will best advance the paternalizee's welfare.

This part of the judgmental definition directs us to a number of problems I would like to bring to the surface. First, to say of someone that she is not able to make the right decision is to make a normative statement about the decision she would otherwise have made. It probably is the case that the paternalizee can make *a* decision about a particular situation, but this decision is not considered to be the 'right' one. Quong adds that even if the paternalizee has all the right information, she might nevertheless fail to appreciate a particular piece of information in the 'right' way. For example, someone might know that skiing alone is very hazardous, but they think this danger does not apply to them or, in fact, get a kick out of the dangers ahead.

Despite the normative judgment that underlies the statement that someone's decision is not the right one, Quong does not demand that the paternalizer has to be able to discern whatever the 'right' decision is. This is somewhat puzzling at first sight, especially since it could be the case that whatever is the right decision is not a matter of fact, but of opinion. What counts as 'advancing one's welfare' can be understood in two different ways. We can either say that someone's welfare is advanced when it is measured by some external standard (the paternalizee has more money than before, more options than before etc). Or, we can say that someone's welfare is advanced because the paternalizee herself believes it has advanced.

⁴⁶ Quong, 81

It can even be the case that the paternalizee deeply desires something which most would consider rather unimportant.

Ronald Dworkin differentiates between the *additive* view on what advances someone's well-being and the *substantive* view. The additive view on what advances the paternalizee's well-being holds "that we can judge his life a good or bad one without consulting his opinions about its value".⁴⁷ Under the judgmental definition of paternalism, the paternalizer believes that the paternalizee is unable to realize a certain 'objective' measure of well-being, regardless of whether she cares about that type of thing. The constitutive view of what adds to a person's well-being holds "that no component may even so much as contribute to the value of a person's life without his endorsement".⁴⁸ In this case, the paternalizee can only consider those situations in which the paternalizee is failing to advance their own stated preferences as cases in which paternalistic interventions could actually improve the paternalizee's life. The judgmental definition is silent about which of the two views the paternalizer must adopt. Quong writes that "is it best to simply say that the paternalizer believes the paternalizee *lacks the necessary level* of rationality, or willpower, or emotion management to effectively advance his or her own welfare, values, needs or interests in the particular context".⁴⁹ Judgmental paternalism refers to what it is that the paternalizee is capable of doing, irrespective of the paternalizer's view on what advances welfare.

Gert and Culver suggested that the paternalizer must also believe that the paternalizee herself thinks she is doing the right thing, but I fail to see the necessity of that addition. They write "we can act paternalistically toward those who, we believe, do not, in fact, know what is for their own good, but we cannot act paternalistically toward someone whom we do not regard as believing that he knows what is for his own good".⁵⁰ What this suggests is that Gert

⁴⁷ Ronald Dworkin. "Foundations of Liberal Equality" Tanner Lectures (1990), 51

⁴⁸ Ronald Dworkin, 51

⁴⁹ Quong, 83

⁵⁰ Gert and Culver, 54

and Culver could defend that when someone does not believe that they are not acting in a way that is for their own good, an intervention would not be an act of paternalism, but of beneficence. In that case, we would be doing someone a favor. Yet this ignores the invasive nature of a paternalistic intervention. Judgmental paternalism states that in order to be paternalistic it is simply enough to consider someone unable to advance their own interests, and whether the paternalizee agrees with that or not, the defining feature of the intervention is to *take over* decision-making. To experience paternalistic intervention is precisely the humiliating feature of paternalism I referred to in chapter 1. Even if the paternalizee agrees she has made a mess of her life, she might value it tremendously that she sorts it out by her own accord in due course. Therefore, it is not necessary for an act to be paternalistic to believe that the paternalizee herself believes she is doing the right thing.

A final consideration regarding requirements of the paternalizer is that even if the paternalizer does not necessarily claim to know what the ‘right’ decision is, at least she is not impeded by the same problems as the paternalizee. If the paternalizer’s abilities to judge are indeed better than those of the paternalizee, then there is much better chance that the right decision will be made. In fact, it seems that for the *definition* of judgmental paternalism it is not important that we specify *who* makes the paternalistic intervention.

For the *justification* of a paternalistic intervention however, this matters much more. As a rule of thumb to determine whether an intervention is justified, I would argue that only those who can plausibly claim their mental capacities are indeed better than those of the paternalizee are justified in their intervention. In this thesis however, I chose not to develop the necessary requirements of the paternalizer, even though this is a very important part of the paternalism debate. I will simply assume that the paternalizer is an agent whose capacities are such that she can make the right decision, while fully realizing that in most cases, this is a matter of controversy. In any case, we can grant this part of the judgmental definition as

satisfactory for the time being, because the judgmental definition requires further discussion in other areas as well.

II. Four ways in which we can consider someone 'unable to judge'

The second part of the judgmental definition is unclear about the following: what does it mean to consider someone unable to make the right decision, or to efficiently manage a situation to advance one's own welfare? To determine the various ways in which someone can be unable to judge, the first question we should ask focuses on the *duration* of the inability to make the right decision and effectively advance one's own welfare. The second question focuses on the *scope* of the inability to not be able to manage a situation well. The answers to these questions show that there are four different judgments which a judgmental paternalizer can make about someone's inability to make the right decision:

The paternalizee can be considered to be:

- i) unable to judge about a particular thing for a limited duration of time.
- ii) unable to judge about everything for a limited duration of time.
- iii) unable to judge about a particular thing for an unlimited duration of time.
- iv) unable to judge about everything for an unlimited duration of time.

It is not always clear which of these four judgments underlies a paternalistic policy. Yet which of these four judgments motivates the paternalizer is important for the soft/hard distinction I am proposing and its subsequent justification. The motive for the paternalistic intervention is (1) to improve the well-being of the paternalizee, and (2) that the paternalizer believes that the paternalizee is unable to judge the inability to judge appropriately what should be done in a particular situation. This means that at the moment before and during the

intervention, the paternalizee is not able to properly assess the situation. She is not able to appreciate information in the right way; she is not able to weigh costs and benefits; she is not able to imagine which action will yield the best results and so on. If her mental state is such that she is not able to comprehend the situation she finds herself in, then leaving her in that situation prolongs her inability and therewith extends the motive for paternalistic intervention beyond the moment at which one could say that the intervention has yielded the result the paternalizer aimed for.

To state this in more general terms, this is how these distinct judgments affect the ex-post consent distinction, and most notably, the justification for the soft or hard paternalistic intervention:

1) If a paternalistic intervention is at hand due to a special relationship between the paternalizer and the paternalizee, or due to the inevitability of some level of paternalism between the government and its citizens then the distinction I propose commits the paternalizer to the following: a hard paternalistic approach is only justifiable if a soft paternalistic approach is not possible. It is therefore the duty of the paternalizer to uncover, to the best of their knowledge whether a soft paternalistic approach is possible. A soft paternalistic approach is only justifiable if it aims to restore the mental capacity of the paternalizee to regain the ability to judge her own situation.

2) If the paternalizer's judgment is either (i) or (ii) then the ex-post consent requirement of soft paternalism commits the paternalizer to only being justified in her intervention if she, where possible, aims to restore the malfunctioning capacity in order to create the possibility to express ex-post consent to the paternalistic intervention.

3) If the paternalizer considers the paternalizee to be (iii) unable to judge about one particular thing, or (iv) about everything, for an unlimited period of time then a paternalistic intervention based on that judgment will qualify as hard paternalistic. This classification of such interventions is only justified if, at least to the best of the paternalizer's knowledge, it is indeed the case that the paternalizee is not able to regain the capacity to judge. But, if it is not true that the paternalizee cannot regain the capacity to judge, then the paternalizer is unjustified in any hard paternalistic treatment.

There are, however, some special cases to consider. These are cases in which it is not clear whether a person will ever be restored to a mental capacity. Think of long-term drug addicts, convicted criminals who need psychological treatment and other people with specific mental problems which only form a problem in certain, but not all, areas of life. In such cases a soft paternalistic approach which aims to restore mental ability could prove to be impossible, but there could also be a chance that the restoration is possible, in which case the paternalizer should choose the soft paternalistic approach.

To be sure, a hard paternalist intervention is justified if a soft approach is ruled out, but how to rule out such an approach with people about whom we cannot be sure? It seems that the motivation of the paternalistic intervention tells us what the approach should look like. The basis for the intervention is the concern about the paternalizee's decision-making process, and the desire to improve upon that capacity. The purpose of putting criminals through rehabilitative programs is to restore their inability to handle certain social situations with the purpose of eventually re-introducing them into society. The underlying purpose of the paternalistic intervention should be represented in the approach itself. However, if after careful, regular consideration the paternalizer continues to consider the paternalizee unable, this prolonged judgment does *not* make the intervention hard paternalistic.

III. The duty to restore the paternalizee's mental capacity

There are several ways in which the inability to judge can be caused, and in some cases it is sufficient to restore the inability to judge by removing the thing that caused it.

Take Jim who has a serious drinking problem. He is simply unable to resist the temptation of a glass of liquor, and it is harming his life in a serious way. Lisa wants him to get his normal life back, and she is convinced Jim is not able to do this on his own accord. She thinks Jim can make trivial decisions, but he is not capable of making decisions about his life that are good for him. She also thinks that is caused by the fact that he drinks so much. So, Lisa intervenes in Jim's situation. If she wants to be soft paternalistic and justified in her intervention, she is bound by what she thinks Jim would consent to. But, she also knows that as long as Jim remains drunk most of the time, whatever he expresses about her actions is not valid. After all, what Jim says and does while intoxicated is precisely what Lisa considers illustrative for Jim's inability to manage a situation. Lisa removes all alcohol from Jim's house, and she negotiates with shopkeepers and bartenders that they should no longer serve Jim. After a few weeks, Jim recovers. His constant desire to drink is gone. Jim just needed to stop drinking to regain control over his own life. With her intervention, Lisa has restored Jim's ability to make the right decisions over his life. In this instance, what improved Jim's life, and what restored his mental ability to control his own life were one and the same act.

However, there are cases in which what improves someone's life, and what improves someone's mental abilities do not coincide. Consider the following well-known case from libertarian paternalists about organ donor registration: It is believed that the main reason why people - most of whom explicitly express the wish to register as a donor - refrain from doing so, is because they are impaired by cognitive processes which prevent them from acting on what they prefer (for example, they are very prone to procrastinate). The government

therefore decides to accommodate this desire by designing a system that makes everyone a default organ donor. If anyone so wishes, they can opt out of this system.

In this example, the government is acting paternalistically. Its aim is to improve the well-being of its citizens by realizing their preferences. The government does this because they are, rightfully, of the opinion that citizens are not able to do this on their own accord - they are unable to realize their own preferences. Both parts of the judgmental definition are satisfied. Yet what still has to be determined is which of the four judgments underlies the government's motivation to intervene. If we look at how this policy has been implemented, it seems the government assumes i) that citizens are unable of making the right decision for an unlimited period of time based on the following observations: the default program does not put an end to the inability of citizens to judge the situation accordingly. What the program does is to create an end-state which is consistent with what the government considers to be the preference of its citizens. But these citizens remain as lazy as before. Nothing in the act of the government targets the initial reason for intervention – the inability to make the right decision. If this mental ability remains unaltered, then the fact that these citizens remain in the program rules out the possibility of them expressing ex-post consent. If their inability to act before the intervention served as justified motive to intervene, because their inability did not reflect their preferences, then the ex post inability to act equally does not reflect their preferences. If the cause for the intervention is not altered, then fact that individuals find themselves in a new situation and do not try to get out of that situation should not be confused with their consent to that situation.

Consider the following: a criticism to this requirement could be to refer to the assumed initial preference of the citizens. This preference is now realized, so why is there still a need for ex-post consent? The ex-post consent is redundant, especially if we consider

the initial preference as something very much akin to consenting to the intervention. But, this objection overlooks a number of relevant considerations.

First, the default program is a blanket policy – it applies to every citizen in the country. Surely, a number of these citizens do not want to become organ donors. However, again, the logic of the government’s judgment about their citizen’s incapacity to act on their preferences in this respect works in two directions. If it is true that there are citizens who want to become donors but do not act on it, then it is equally plausible that there are citizens who do not want to be donors and do not act on it. If procrastination and laziness prevent someone from registering, it seems equally likely that it prevents someone from de-registering from the program. Therefore, they remain in the program and are considered as potential donors.

Secondly, someone can change their mind about their preference to become an organ donor. It is quite normal that people will re-evaluate such values from time to time. One’s ideas about organ donation might radically change after certain events. After a close person suffered from an incurable illness, you might decide to donate your body to science after your death so it can be used for research.⁵¹ When children strongly object to the idea of their parent being used as an organ donor, someone might reconsider what they value more. In all these instances they could change their preferences, but remain stuck with the procrastinating brain which fails to make the right decision about this situation. They will therefore remain donors, against their wishes.

IV. Re-classifying cases as example of soft and hard paternalism

Based on my distinction between soft and hard paternalism, some policies that are normally identified as soft will be classified as hard under my distinction. Nevertheless, the re-classification of these cases corresponds better to some of our intuitions about these cases. I

⁵¹ To clarify this example, The Netherlands has the default-option of being registered as an organ donor, but you are only expected to donate organs for medical purposes. It is optional to also donate your body to science in case there is demand (after any medical demand has been met).

will discuss a number of examples of paternalistic interventions which qualify as hard paternalism under this distinction.

- 1) The default organ donor scheme I referred to earlier in thesis is an example of a policy which does not impose values, yet recognizes that people requires an extra nudge in order to realize their own preferences. Therefore, libertarian paternalists such as Thaler and Sunstein classify this default scheme as soft paternalistic. Under the ex-post consent distinction, this case will classify as hard paternalistic. The government does not ensure that citizens are enabled to assess and handle this particular situation any better than before its paternalistic intervention. In fact, some of those who are now considered organ donors are there against their own will.
- 2) Education programs which do not include alternative belief systems, and which do not teach students the skills necessary to asses a situation and weigh up cost and benefits risk being classified as hard paternalists. Given that it is perfectly possible to teach children alternative belief systems and critical thinking skills, the hard paternalistic approach cannot be justified.
- 3) The default pension scheme is another example of soft paternalism from the view of the libertarian paternalist. It is paternalistic because the default is based on the idea that it is in the interest of workers to be subscribed to a pension scheme, but the process of selecting one has proven too complicated or tedious for many. Given that it is in everyone's interest, the government is entitled to set a system as the default in which everyone is automatically subscribed to one scheme, but they are free to chose another one if they so wish. Under the ex-post distinction, the pension scheme classifies as hard paternalistic. The paternalistic motivation for creating the scheme is the inability of workers to decide which pension to take based on the jungle of

information, the complexity of retirement schemes and the sheer effort it takes to properly investigate the options. The default scheme does nothing to change this inability. Even though the intention to provide all workers with a comfortable pension is very laudable, the intervention is hard, and not soft. How will a worker - who is presumed to not understand the complexity of pension schemes – express approval of his current scheme?

The examples above show that what some have argued were justifiable interventions because they were soft interventions now qualify as hard paternalistic interventions under the distinction I am proposing. Despite their aspired goal of improving well-being, they treat paternalizees as children, as individuals who are not, and will not be capable of making these decisions on their own. Unless the intervention is paired with an attempt to enable capable individuals to starting making these decisions, then these interventions are hard.

V. *Scope of the duty to restore mental capacity*

A final question regarding the requirement to restore mental capacity pertains to the scope of the requirement. This concern the question of the extent in which a paternalizer who intervenes motivated by the belief that the paternalizee is incapable of judging for herself should restore the mental capacity. I argued before that, in order for that intervention to be soft, the intervention must aim to restore that capacity. But the following question presents itself: is it part of the duty that the restoration of the mental capacity also enables the paternalizee to regain the ability to judge in similar situations, either similar in kind, or similar because the situation is likely to repeat itself in the future? If John knows that Lisa is bound to get drunk again on Thursday night after he took away her car keys on Wednesday, should he act in such a way that Lisa might not get drunk again on Thursday, or is his duty

strictly related to restoring Lisa's ability to judge on Wednesday night? In this example, John does not have the option to forever keep Lisa's keys, so he might just not be able to do more than intervene in the way he has been doing so far.

But, what if there was a relatively easy way for John to prevent Lisa from continuing her drinking habit to enable her to make the right call in future situations? If he could do so in a nonpaternalistic way, then it seems to me that John would be doing Lisa a favor. Yet, I currently do not see a way to argue that John is *obliged* to do this. His duty ends where the paternalistic intervention ends. This is also the best way to ensure that the ex-post consent refers only to the set of actions and reasons specific to the paternalistic intervention.

Bibliography

- Arneson, R “Joel Feinberg and the Justification of Hard Paternalism” in *Legal Theory* 11, (2005) 259-284
- Carter, R “Justifying Paternalism” *Canadian Journal of Philosophy* 1 (1977), 133-145
- De Marneffe P, ‘Avoiding Paternalism’ *Philosophy & Public Affairs*, 34 (2006), 68-94
- Dworkin, G “Paternalism” *The Monist* (1972)
 - Moral Paternalism *Law and Philosophy* 24 (2005) 305–319
- Dworkin. R “Foundations of Liberal Equality” *Tanner Lectures* (1990)
- Feinberg J *Harm to Self: The moral limits of the criminal law*, Oxford University Press (1975)
- Gert and Culver “Paternalistic Behavior” *Philosophy and Public Affairs* 6 (1976) 45-57
- Grill, K “The Normative Core of Paternalism” *Res Publica* 13 (2007) 441-458
- Husak, D “Paternalism and Consent” in *The Ethics of Consent* ed. Franklin Miller and Alan Wertheimer, Oxford Scholarship Online (2009) 107-130
- Kassachkoff, T “Paternalism: Does Gratitude Make it Okay?” in *Social Theory and Practice*, vol. 20 no 1, (1994) 1-17
- Quong, J ‘Paternalism and Perfectionism’ in *Liberalism without Perfection*, Oxford University Press (2010)
- Raz, J “Government by consent” in *Ethics in the Public Domain: Essays in The Morality of Law and Politics*, Clarendon Paperbacks (1994)), 355-369
- Richmond H “Paternalism and Consent: Some Educational Problems” *Journal of Philosophy of Education* (1998) vol. 32 no 2, p239-251
- Rizzo, MJ and D.G. Whitman “Little Brother Is Watching You: New Paternalism on the Slippery Slopes,” *Rizzo Arizona Law Review* (2008)
- Rizzo and D.G. Whitman “The Knowledge Problem of New Paternalism,” *BYU Law Review* (2009)
- Scanlon, T ‘The Significance of Choice’, in Darwall, S. *Equal Freedom* Ann Arbor: University of Michigan Press, (1995) 39-104
- Scoccia. D “In Defense of Hard Paternalism” *Law and Philosophy*, vol27, no 4 (July 2008), 351-381
- Thaler, R. and C. Sunstein "Libertarian Paternalism" *The American Economic Review*, (2005, Vol. 93, No. 2) 175-179
- Thaler, R. and C. Sunstein *Nudge: Improving Decisions about Health, Wealth and Happiness*, Penguin Books (2008)
- Veer, D van de “Paternalism and Subsequent Consent” *Canadian Journal of Philosophy* vol 9. No4 (1979) p631-642