

Should the law ever prevent people from freely making self-harming decisions? If so, what should and shouldn't be forbidden—and according to which principles?

In 2012, Michael Bloomberg, then mayor of New York, proposed a ban on sugary beverages larger than sixteen ounces to “curb the consumption of drinks and foods linked to obesity.” [1] It was quickly repealed in court, much to public approval, on the grounds that it overstepped state authority. [2] Most saw it as a poor application of legal paternalism, which Gerald Dworkin defines as an “interference with a person’s liberty of action justified by reasons referring exclusively to [his welfare].” [3]

People sometimes tolerate paternalist laws, such as the requirement to wear seatbelts in cars and helmets on motorcycles.[4] [5] But Bloomberg’s large drinks law crossed a line by taking paternalism a step too far, and the people pushed back. But what constitutes this line? Exactly when, in other words, is legal paternalism legitimate?

A now-conventional view, most famously articulated by John Stuart Mill, is that the state should restrict our liberty only to prevent us from harming *others*. [6] This is his harm principle. His principle is compelling because we often value the ability to choose for ourselves, even when the outcome is not in what the state perceives to be our best interest. It answers much of the question at hand. But there are exceptions to his blanket prohibition on paternalism. Broadly, paternalism is legitimate when an individual’s self-harming choice is the product of coercion, or an unsound or underdeveloped mind. In these instances, which are relatively rare, the action does not realize the value of choice, and the state can intervene in a paternalistic capacity.

Mill and Self-Harm

Mill’s harm principle posits that the law should prohibit only that which harms another. [7] Inversely, the law must pay allow actions that solely affect oneself, including self-harm, since “over his own body and mind, the individual is sovereign.” [8] [9] He offers two distinct arguments that uphold this proposition. First, he observes that even misguided choices, which paternalists believe the state has an obligation to prevent, have value for the individual. Life is worth living because I get to decide how I live it, not some stranger in the government. [10] It is choice, our ability to act for ourselves, that allows us to pursue our own good by our own means. After all, I am the most reliable judge of what is good for me because I am the most familiar with my life and my preferences. [11] The problem of enabling the law to make our choices by proxy is that “when it does interfere, the odds are

that it interferes wrongly, and in the wrong place.” [12] Even those who mean well will fall victim to the simple ignorance—no one knows myself better than I do.

Second, Mill claims that this freedom also benefits society as it does the individual.[14] Society is imperfect. The way of living we deem acceptable today may seem untenable tomorrow. The unwarranted restriction of autonomy, he holds, is essentially “an assumption of infallibility.”[15] As long as I do not cause harm to others, then, the law should empower me to pursue “different experiments of living,” in case my approach proves superior.[16]

Unfortunately, there is a deficiency in Mill’s defense of autonomy: there are instances where his blanket prohibition on legal paternalism has suboptimal consequences, some of which he hardly addresses, and most of which he does not address at all. Hence, with the foundations of his argument constructed, I will now explore when the law should intervene in a paternalistic capacity, and why.

Choice and Legal Paternalism

Mill’s key objection to legal paternalism is that choice, even when it seems erroneous and even when it harms oneself, has value for the individual.[17] Thus, the law should give people freedom when possible – specifically, when it is not used to cause harm to others.[18] In certain cases, however, an individual’s choices do not hold value for him, and it is then that the state is justified in prohibiting them.

To understand this argument, an explanation of the value of choice must come first. I want what happens to me to reflect the decisions that I make – but why? T. M. Scanlon posits that it has to do with the significance that decision has for me.[19] He separates this significance into three components, two of which are relevant to the topic at hand: instrumental and symbolic.

Instrumental value is the most straightforward. Choice is useful to an individual because since he is the best judge of what he wants; choice means outcomes are likely to coincide with and his preferences.[20] When I dine at a restaurant, I want to be able to pick food that appeals to me because I alone know how hungry I am, how hot or cold I feel, and what dishes I have grown tired of.

Symbolic value suggests that outcomes should be determined by oneself if only to appear competent in decision-making.[21] When I want to buy a house or select a suitable career, I want to do those things myself. I could ask a professional to choose for me, and he might do a better job, but it would be demeaning to waive my autonomy in such situations.

If an action does not realize at least one of these two values of choice, it has no worth for an individual. If the action is self-harming the law should intervene, especially when its consequences are likely to be severe and, in some cases, permanent. The value of a self-harming choice, and thereby its legitimacy, depend on two conditions: first, the individual must not be acting under coercion and, second, he must have a sound and fully developed mind. These two conditions are imposed because the parties they concern—the coerced,

the mentally incapacitated, the intoxicated, the young—are ill-suited, by the criteria discussed, to make self-harming decisions. Since choice has no real significance for them, they have no reason to object to paternalism.

By definition, the coerced exercise little autonomy when they heed the coercer. [22] [23] For example, an individual who is forced at gunpoint to give up his kidney does not want to; his preferences are just wrested from him and twisted around. This undermines instrumental value completely. Likewise, it would not be insulting for the state to intervene and prevent the extortion. On the contrary, he would likely be ecstatic about keeping hold of a major organ. Hence, symbolic value is void.

This line of reasoning also applies to the mentally ill and the intoxicated, both of whom are deprived of real control over their actions. Schizophrenic patients, for example, are not subject to coercion, but they are greatly influenced by imaginary entities that do not reflect the realities of their environment. Similarly, the cognitive processes of the inebriated are largely devoid of coherence. This withdraws the significance of instrumental value entirely; the preferences they might have in a proper state of mind do not reliably coincide with the choices they make. Neither group, too, has use for symbolic value; the restriction of their autonomy is a common practice, and is certainly not considered a demeaning one.

Paternalistic treatment of children is also acceptable. The difference here is that they seem to be in control, to know exactly what they want. But their right to self-harm must be strictly regulated nonetheless. Though they operate autonomously, they are largely ignorant of the consequences of their actions. For example, many a tearful child has refused the restraining hold of a seatbelt. If they could comprehend the probability of an accident and the pain – or worse – that would follow, they certainly would put their physical ease second. It is not useful in their case, then, for preferences to coincide with outcomes, so instrumental value is inapplicable. Symbolic value is also ineffectual. It is not belittling to regulate the choices that children make, as they are expected to be incompetent in the first place.

For these reasons, the law can extend a paternalistic claim to protect from self-harm those whose actions do not realize the value of choice – specifically, the coerced, the mentally ill, the intoxicated, and the young. While Mill's other arguments remain convincing, his blanket prohibition on paternalism is far too inflexible.

Applications

Modifying Mill's harm principle in this way helps us navigate when legal paternalism is legitimate and when it is not. To illustrate, I will apply my contentions to three controversial cases.

The first is Michael Bloomberg's 2012 soda ban, which I started with. While goal of making Americans healthier is admirable, the court was correct that the mayor had "exceeded the scope of [his] regulatory authority." [24] By the harm principle, an individual's diet is his own business because it does not affect anyone else. The choice of what size soda to drink also reflects both instrumental and symbolic values. If I want to consume a twenty-ounce cup of

soda as opposed to a sixteen-ounce one, I should be able to. It is insulting for a bureaucrat, whose knowledge of my own good is essentially self-proclaimed, to tell me otherwise. His soda ban for all ages is unjust.

The second case concerns assisted suicide in Germany. The country's highest court recently overturned a ban on medically assisted suicide for terminally ill patients. [25] Here, the court's ruling is valid. Suicide is a purely self-harming act, and it realizes both instrumental and symbolic values as well. I want to enlist a professional in the process, and it would be useful if I could – and it is degrading that the law should dictate the terms of my own death.

The third and final case is of Arkansas's new anti-transgender legislation, which is intended to prohibit gender-confirming surgery for transgender youths.[26] Proponents of the bill argue that it shields the underage from irreversible medical treatments, and here, their opinion is sound.[27] The law has a paternalistic obligation to protect minors from self-harm. That is not to say, of course, that gender-confirming surgeries in themselves are a type of self-harm at all. But in the future, those who regret their lasting decision might consider it as such. Minors can be hasty and underestimate the permanence of these treatments. Like the preferences of children in the example of uncomfortable seatbelts, their preferences, too, may be misguided. The law is simply safeguarding against this risk. Once they come of age, their actions realize both values of choice and they can undergo any surgery they wish, irreversible or otherwise.

So this is what defines the line that the law should not cross when restricting liberty. If the action affects none but the individual, and if it realizes the value of choice, it must go uninhibited. If it does not, it can be restrained.

Endnotes

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2 Ibid.

3 "Philosophy of Law: Freedom and the Limits of Legitimate Law," *Internet Encyclopedia of Philosophy*, accessed June 1, 2021, <https://iep.utm.edu/law-phil/#SH2a>

4 Ibid.

5 Michael Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2009) p. 60

6 John Stuart Mill, *On Liberty* (London: Dover Publications, 2002), p. 64

7 Ibid.

8 Ibid.

9 Ibid. p. 8

10 Barbara Hands, "Paternalism and the Law," *Philosophy Now*, 2009,
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11 Mill, *On Liberty*, p. 70

12 Ibid.

14 Ibid. p. 47

15 Ibid.

16 Ibid.

17 Hands, "Paternalism and the Law."

18 Mill, *On Liberty*, p. 64

19 T. M. Scanlon, "The Significance of Choice" (presentation, Brasenose College, Oxford University, May 1986)

20 Ibid.

21 Ibid.

22 Sandel, *Justice: What's the Right Thing to Do?*, p. 95

23 Scott Anderson, "Coercion," *Stanford Encyclopedia of Philosophy*, 2011,
<https://plato.stanford.edu/entries/coercion/>

24 Grynbaum, "New York's Ban on Big Sodas Is Rejected by Final Court."

25 Christopher F. Schuetze, "German Court Overturns Ban on Assisted Suicide," *New York Times*, February 26, 2021, <https://www.nytimes.com/2021/04/08/us/politics/asa-hutchinson-arkansas-transgender-law.html>.

26 Lisa Lerer, "Asa Hutchinson on Arkansas's Anti-Trans Law and the GOP Culture Wars," *New York Times*, April 8, 2021, <https://www.nytimes.com/2021/04/08/us/politics/asa-hutchinson-arkansas-transgender-law.html>.

27 Ibid.