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ANTIPATERNALISM AND JOHN STUART MILL

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A DISSERTATION

SUBMITTED TO THE GRADUATE FACULTY

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By

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Norman, Oklahoma

1985

ANTIPATERNALISM AND JOHN STUART MILL

A DISSERTATION

APPROVED FOR THE DEPARTMENT OF PHILOSOPHY

By

K. R. Merrill

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INTRODUCTION

Fyodor Dostoevski asserts, via the Grand Inquisitor, that the fundamental insight into human nature (what he describes as the secret of human nature) is to understand that humans crave uniformity in beliefs and actions. The Grand Inquisitor proclaims, "This craving for community of worship is the chief misery of every man individually and of all humanity from the beginning of time."[1]

John Stuart Mill evidently shared Dostoevski's fear of this flaw in human nature, this human weakness for uniformity and similarity, for he says in the "Introductory" to On Liberty, "The rules which obtain among themselves appear to them self-evident and self-justifying. This all but universal illusion is one of the examples of the magical influence of custom, which is not only, as the proverb says, a second nature but is continually mistaken for the first."[2] Later, in Chapter IV, he remarks concerning the public, "In its interferences with personal conduct it is seldom thinking of anything but the enormity of acting or feeling differently from itself; and this standard of judgment, thinly disguised, is held up to mankind as the dictate of religion and philosophy by nine-tenths of all moralists and speculative writers."[3]

In response to this despotic tendency in human nature, and other concerns as well, Mill proposes the following principle as the absolute limit to coercive control of individuals:

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[4]

This passage has from time to time been referred to as the harm principle, or the harm to others principle. Mill himself referred to it as the liberty principle. He recognized the fact that he was not advancing a single principle, but two related principles.[5] The first states that actions that are prejudicial to the interests of others may properly be subjected to the coercive power of the law or public opinion. This principle governs what is generally described as other-regarding actions, actions that may harm others. The second principle addresses what is usually regarded as self-regarding conduct; this principle maintains that society is absolutely forbidden from interfering with the actions that concern the interests of the individual alone; this position is referred to as antipaternalism.

Both principles have been the subject of much controversy. Mill has been criticized for not being sufficiently clear about what counts as harm to others. In other words, where do we sensibly draw the line between

other-regarding and self-regarding behavior? It is widely held that the first principle is subject to counter-examples such as the following:

> Consider then the man who walks down the main street of a town at mid-day. In the middle of a block in the central part of town, he stops, opens his briefcase, and pulls out a portable folding camp-toilet. In the prescribed manner, he attaches a plastic bag to its under side, sets it on the side-walk, and proceeds to defecate in it, to the utter amazement and disgust of the passers-by. While he is thus relieving himself, he unfolds a large banner which reads "This is what I think of the Puritanians" (substitute "niggers," "Kikes," "Spics," "Dagos," "Polacks," or "Hunkies"). Another placard placed prominently next to him invites ladies to join him in some of the more bizarre sexual-excretory perversions mentioned in Krafft-Ebbing and includes a large-scale graphic painting of the conduct he solicits. For those who avert their eyes too quickly, he plays an obscene phonograph record on a small portable machine, and accompanies its raunchier parts with grotesquely lewd bodily motions. He concludes his public performance by tasting some of his own excrement, and after savoring it slowly and thoroughly in the manner of a true epicure, he consumes it. He then dresses, ties the plastic bag containing the rest of the excrement, places it carefully in his briefcase, and continues on his way.[6]

I believe it is plausible enough that on a straight forward definition of harm the sort of behavior described above does not harm anyone, yet intuitively it strikes one as the sort of activity that a community ought to be permitted to prohibit on the grounds that it is an extreme nuisance. What is not clear is whether or not Mill meant to include or exclude this sort of behavior under the harm principle. In On Liberty Mill uses various terms to denote the proscribed actions, "harm," "damage," "interests" and "nuisance." So, Mill's exact meaning and application of this principle remains the subject of debate. This is an interesting and important issue in its own right, especially for the liberal view; but my interest in this paper is the other aspect of the liberty principle.

With the second part of the liberty principle, without ever using the word "paternalism" (although he does use the phrase "paternal government")

Mill sets out the problem of paternalism. The problem of paternalism is roughly the problem of justifying interference with autonomy, usually in the form of liberty, on the sole ground that the interference benefits the individual whose autonomy is restricted. Mill's position is that an autonomous person should never be coerced when only his own interests are at stake. I shall argue that Mill is right.

Since the writing of On Liberty the issues surrounding paternalism have become more complex and, while distinctions have multiplied, Mill himself recognized many of the most useful and important ones. Before proceeding, it will be useful to delineate some of these distinctions. One important distinction is between strong and weak paternalism. This distinction is important because it is argued by a number of philosophers, including myself, that weak paternalism is more easily justified than strong paternalism. This is also a distinction that Mill recognizes; clearly he intends the antipaternalism principle to apply to mature adults who reside in civilized nations. Strong paternalism is the interference in the life of someone who is believed to be competent, capable of making autonomous decisions. Common examples of strong paternalism are mandatory seat belt laws, mandatory helmet laws for motorcyclists, laws restricting dangerous hobbies or sports, e.g., laws requiring boxers to wear protective head gear. Of course there is some controversy over the proper criteria for competence. So cases of strong paternalism shade into cases of weak paternalism. Weak paternalism is interference in the life of an individual when it is thought that the individual is not competent, or at least not fully competent or not competent in the appropriate sense. Paternalism toward young children, the mentally retarded or mentally disturbed are examples of weak paternalism. A probable case of

weak paternalism is one like the following: A physician had been treating a sixty-nine-year-old man for a number of years and knew him to be neurotic. He had a history of depression and one attempted suicide. Additionally, the man had recently experienced the death of his wife. He was recovering from this tragedy when he got an opportunity to travel to Australia, an adventure he was happily looking forward to. During a physical examination in preparation for this trip, the physician discovered the man had cancer of the prostrate gland. It was untreatable in its present stage, but later, it could be treated. After extensive and conclusive tests, the man asked the physician, "Am I O.K.? I don't have cancer, do I?" The physician answered, "You're as good as you were ten years ago."[7] The physician believing it to be in the best interests of his patient, lied to him regarding his physical condition. This kind of paternalism is at least arguably weak; since the elderly man is neurotic, he is not fully competent.

Another important distinction to make is between direct and indirect paternalism. This, too, is a distinction thought relevant to the justification of paternalism, and, again, this is a distinction recognized in On Liberty. Direct paternalism is an action that restricts the autonomy of the intended recipient of the benefit; whereas indirect paternalism restricts one individual for the benefit of another. Examples of indirect paternalism are laws requiring automobile manufactures to install seat belts in cars, laws setting a maximum allowable interest rate for loans and so on. Most paternalism that is of philosophical interest to Mill is direct, some writers even restrict the use of the term to those cases which can be appropriately described as direct.

Mill's treatment of indirect paternalism is instructive. In order to properly understand Mill's position on paternalism it may even be essential to

grasp Mill's point here. Mill poses this question, "In cases of personal conduct supposed to be blamable, but which respect for liberty precludes society from preventing or punishing, because the evil directly resulting falls wholly on the agent; what the agent is free to do, ought other persons to be equally free to counsel or instigate?"[8] Mill has in mind cases of prostitution and gambling. He maintains that while fornication and gambling must be allowed, it is not clear that persons who induce others to engage in these practices should be unrestricted by the state. He further maintains that it is at least defensible to claim that if society in general believes that these activities are bad, then the question is disputable, and society ought to be permitted to at least punish the instigation in the interests of the 'victim.' This strategy might be extended to cases of exorbitant interest rates and the manufacture of cars without seat belts by arguing that while it may be required, out of respect for individuality and liberty, to allow persons to enter into unfavorable contracts and operate motor vehicles without seat belts, it is not required that society allow some persons to tempt others to do so. Hence, the instigators may be subject to legal punishment. Mill decides that these kinds of cases are too close to call, so he does not provide us with a conclusive position on indirect paternalism.

The value of making these distinctions, however, is that they help clarify Mill's main thesis. Employing the terms I have been defining, Mill's target in his antipaternalism is a limited range of behaviors; his view is that coercive strong direct paternalism is always wrong. Thus, paternalism that is appropriately described as coercive, strong and direct might aptly be characterized as employing an illicit triad. It is just this combination that Mill objects to in the strong or absolute way. Within this classification, his main

target is legal paternalism. My thesis is that Mill's position is correct. It is my purpose to develop an interpretation of Mill's arguments against paternalism and defend them against some common criticisms.

Mill's antipaternalism is sometimes referred to as radical.[9] But once it is understood that his arguments really focus on a narrow range of what tends to be designated as paternalism, his view seems somewhat less extreme. He makes several remarks to indicate that his real concern is with strong, not weak paternalism. First, there is the often cited case of the man approaching the unsafe bridge, he is a fair subject for coercive interference due to his ignorance (a form of incompetence). Also, in considering the question of whether or not the laboring class should be treated paternalistically with regard to the sale of stimulants, Mill replies that they should not, "unless after all efforts have been exhausted to educate them for freedom and govern them as freemen, and it has been definitely proved that they can only be governed as children."[10] If paternalism can be demonstrated to be properly described as weak rather than strong, Mill would allow even legal paternalism toward a large group. Indeed, his attitude toward the paternalistic treatment of children illustrates this point.

I shall proceed to develop my thesis along the following lines, in the first chapter I lay out what I take to be the most fruitful way of thinking about paternalism, i.e., as a violation of individual autonomy. I consider challenges to this view, especially those of Bernard Gert and Charles Culver. I argue that all cases appropriately described as paternalism should be understood as a denial of autonomy and, quite frequently, a denial of liberty. In the remainder of the chapter I consider a variety of issues that apparently conflict with the way that I characterize paternalism, e.g., that one can

behave paternalistically toward oneself. Then I argue that certain issues in paternalism would be more clearly understood and more easily resolved if we attend to the distinction between paternalism and fraternalism.

In chapter 2 I develop the notion of individuality that is found in On Liberty. I argue that individuality is a fundamental idea for Mill, not withstanding that this reading of Mill may not be consistent with the traditional understanding of utilitarianism. Individuality must be seen in light of Mill's unique utilitarianism where he maintains that utility is always to be understood in the largest sense for man as a progressive being. Once Mill's use of individuality is perspicuously understood, it is then possible to advance three arguments for antipaternalism. One based on rights; one based on the supreme value of individuality and one based on the lack of objective certainty with regard to certain preferences.

In the third chapter I develop a notion of autonomy as a concept that is captured by five dimensions. Consequently, a person can be autonomous along one dimension, in one sense, but not another. I argue that autonomy, at least for practical purposes, is individuality. This is at least true in the sense that whatever can be said to diminish or enhance autonomy also can be said to diminish or enhance individuality; likewise, whatever can be said to diminish or enhance individuality can be said to diminish or enhance autonomy. The result of this identity between autonomy and individuality is that the arguments developed in chapter 2 against coercive strong direct paternalism based on individuality have parallel arguments based on autonomy. In the final section of this chapter I defend my characterization of paternalism as a violation of autonomy against arguments that this is not a useful way to construe paternalism.

In the fourth chapter I explore Mill's arguments from chapter IV of On Liberty. There are four obvious arguments contained in that chapter and, I believe, a fifth rather obscure and undeveloped argument which I refer to as the dilemma of paternalistic punishment; and which I contend is fatal to the justification of legal paternalism toward autonomous persons. I further contend that the other four arguments, while not sufficiently persuasive to establish Mill's absolute prohibition against the illicit triad, are stronger arguments than most paternalists are willing to admit. Next I defend Mill against the allegation that he is inconsistent. The claim is made by a number of philosophers that Mill's position on slavery contracts, that a state should not recognize them, is inconsistent with his antipaternalism. In other words, the claim is that Mill has given in to paternalism after all. Then I respond to the claim that society's need for drug control laws and laws not allowing consent of the victim as a legal defense against assault or murder charges proves that Mill's antipaternalism is indefensible. I conclude that even without the arguments for antipaternalism based on individuality or autonomy Mill has a powerful case against paternalism, especially against legal paternalism.

In the final chapter I consider a variety of challenges to antipaternalism that are not specifically directed against Mill, but, if sustained, would tell against his position. Three of the strongest and most discussed issues are laws requiring motorists to wear seat belts, motorcyclists to use helmets and laws against dueling. I argue that there is no clear sense in which failing to wear a seat belt or use a helmet while riding a motorcycle are irrational, thus, there is no justification for coercion over these matters. Paternalistically motivated laws against dueling fall prey to the same arguments that I developed in chapter 4 with regard to slavery and drug usage laws. Then I

consider a case in which the state must decide whether or not to institutionalize an elderly woman or allow her to remain in society where she incurs some personal risk. In the second section to this chapter I appraise a strategy for defeating antipaternalism offered by John Kleinig which maintains that it is possible to treat persons in just the way that the antipaternalist objects to and still maintain that person's integrity.

My conclusion is that there are powerful and persuasive reasons to uphold Mill's antipaternalism and that there are no clear counter-examples nor counter-strategies that should persuade us to withdraw moral objections to all paternalism that is coercive, strong and direct.

NOTES

[1]Fyodor Dostoevski, The Grand Inquisitor on the Nature of Man, trans. Constance Garnett, with an Introduction by William Hubben (Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1976), p. 31.

[2]John Stuart Mill, On Liberty, ed. Elizabeth Rapaport (Indianapolis, Indiana: Hackett Publishing Company, 1978), p. 5.

[3]Ibid., p. 82.

[4]Ibid., p. 9.

[5]Ibid., p. 93.

[6]Tom L. Beauchamp, Philosophical Ethics (New York: McGraw-Hill Book Company, 1982), pp. 289-290.

[7]Tom L. Beauchamp and James F. Childress, Principles of Biomedical Ethics, 2d ed. (New York: Oxford University Press, 1983), pp. 289-290.

[8]Mill, On Liberty, p. 97.

[9]Mary B. Mahowald, "Against Paternalism: A Developmental View," Philosophy Research Archives 6 (1980): 342.

[10]Mill, On Liberty, p. 100.

ANTIPATERNALISM AND JOHN STUART MILL

CHAPTER I

HOW TO THINK ABOUT PATERNALISM

Gerald 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."[1] Jeffrie Murphy also identifies paternalism with actions that coerce persons for their own good.[2] This definition has been the subject of a great deal of criticism both for construing paternalism as an interference with liberty and for the description of paternalism as coercive. I shall argue that while focusing on the coercive element in paternalism does make the definition too narrow, it is substantially correct to construe paternalism as restriction of liberty. In fact, Dworkin states the definition more nearly exactly later in his article when he says "I said earlier that I meant by the term, roughly, interference with a person's liberty for his own good."[3]

The central moral issue in paternalism is justifying the restriction of liberty for reasons of beneficence. Although, as I shall argue, it probably creates less misunderstanding if we use the term "autonomy" in place of "liberty." My own view is that person P acts paternalistically toward individual I (by definition) when and only when, (i) P believes his action

(interference) benefits I, (ii) P does not have nor can he reasonably expect to obtain I's permission to interfere with I's liberty and autonomous control of I's own life, and (iii) P acts so as to interfere with I's autonomy. This interference may assume various forms, as we shall see: deception, physical restraint and so on; and, while liberty of action is typically the ultimate issue, liberty (broadly understood) is always violated in some form. It strikes me that the term that best captures the general character of this interference is interference with autonomy; so, in short, paternalism constitutes a violation of autonomy. Conditions (ii) and (iii) of course need clarification. This will be one of my aims in the remainder of this chapter. In section I of this chapter I elaborate on my characterization of paternalism. In the second section I consider challenges to my characterization of paternalism as restricting autonomy and consider an alternative characterization offered by Bernard Gert and Charles Culver. In the final section I consider a variety of issues, for example, the difference between fraternalism and paternalism, paternalistic behavior toward oneself and consent theories of justified paternalism. Consideration of these issues will, I conjecture, help clarify what paternalism is and make more plausible my characterization of paternalism.

I

The model of paternalism that I have suggested reads: B, who considers himself a benefactor, interferes, by any number of means, with the automomous decision process of A solely in the interests of A, but without concern as to whether or not A desires this interference. By "decision process" I have in mind a more or less organized and reflective process by

which an autonomous individual gathers and assesses facts, considers available opportunities in light of his desires, goals or plan of life, and selects actions and activities based on his assessment. This process can be interrupted at any point by a putative benefactor who distorts the facts, deceives, limits opportunities, penalizes the contemplated action or even physically restricts an individual or group of individuals. At the heart of paternalism is a lack of respect for the outcome of a particular decision process, or possibly only the expected or feared outcome. A paternalist may think that some individual has poorly assessed his opportunities, misunderstood his situation, has incoherent goals or is not competent to make a rational decision. For whatever reason, the paternalist thinks he is justified in taking at least some control of another's life.

There is, of course, a difference between interfering in someone's life in a paternalistic way and attempting to persuade him to pursue a different course of action. For example, if I, as a physical therapist, lie to a patient by exaggerating the consequences of not taking the physical therapy sessions seriously in order to get the patient to try to maximize the beneficial effects of the sessions, I treat him paternalistically by showing no respect for his own capacity to make a decision based on the actual facts. However, if I reason with him by providing an accurate account of the value of the physical therapy sessions, then I am appealing to him as a rational and autonomous person.

It may also be interesting to note the paternalist sometimes, rather than attempting to prevent a person from acting, attempts to require her to act. This point is illustrated in the following case:

> CASE 1: Mrs. B will undergo surgery in two or three days for a malignant tumor of her right breast. She has obviously understood her situation intellectually, but her mood has been rather blase and she appears to be rather inappropriately minimizing the emotional gravity of her situation. Dr. T's experience is that women in Mrs. B's situation who before mastectomy do not experience some grief and at least moderate concern about the physical and cosmetic implications of their operation often have a very severe and depressive post-operative course. Though Mrs. B has insisted that she does not wish to talk about the effects of the surgery, Dr. T talks with her about such effects prior to surgery in order to facilitate her emotional preparation for her impending loss.[4]

So, contrary to the common view of paternalism in general and medical paternalism in particular, it is not just the physician who withholds information against the wishes of the patient who behaves paternalistically, but also the one who forces the patient to face a situation, as in this case, for her own good. On my view, we find the essential elements of paternalism: the intention to benefit another and the refusal to respect the decision of the individual. It is interesting to note that this may also provide a clear case where the individual genuinely does not know her own interest.

II

Probably the most extensive and exhaustive attempt to develop a definition of paternalism is that of Bernard Gert and Charles M. Culver in their article "Paternalistic Behavior" and again in their book, Philosophy in Medicine.[5] In both of these works they argue that the liberty of action clause and the coercion requirement of Dworkin's definition make the definition of paternalism too narrow. Gert and Culver propose the following definition of "paternalism:"

A is acting paternalistically toward S if and only if (A's behavior correctly indicates that A believes that):

1. his action benefits S
2. his action involves violating a moral rule with regard to S
3. his action does not have S's past, present, or immediately forthcoming consent
4. S is competent to give consent (simple or valid)[6]

In this section I will respond to the challenge by Gert/Culver that paternalism is not in general an offense against autonomy but violates a variety of moral rules and, also, offer a general critique of their model of paternalism. In criticizing the Dworkin View, and in order to explicate their own definition, Gert/Culver detail a number of cases which they argue demonstrate the essential features of paternalism. I agree that the examples they provide are instructive; however, I will argue that different conclusions follow from them than the ones they draw.

There does not seem to be a great deal of disagreement among writers on the subject over which cases are paternalistic, although there is some, but the arguments center around the proper description or the most noteworthy features of a paternalistic act. While it may strike one as a bit tedious to review numerous cases, I do not see any better way to clarify the concept and arrive at an understanding of how to think about paternalism. The following cases are provided by Gert and Culver in their article "Paternalistic Behavior." Each case is meant to be a counter-example to the idea that paternalism restricts liberty or that paternalism is coercive.

CASE 2: Mr. N, a member of a religious sect that does not believe in blood transfusions, is involved in a serious automobile accident and loses a large amount of blood. On arriving at the hospital, he is still conscious and informs the doctor of his views on blood transfusion. Immediately thereafter he faints from loss of blood. The doctor believes that if Mr. N is not given a transfusion he will

> die. Thereupon, while Mr. N is still unconscious, the doctor arranges for and carries out the blood transfusion. (Similar cases may easily be constructed using antibiotic drugs or vaccines.)[7]

Gert and Culver argue that this case demonstrates that paternalism need not involve coercion, that it need not interfere with liberty of action, and that it need not involve an attempt to control behavior. While their first point, that coercion is not essential to paternalism, seems substantially correct, it should not be forgotten that most strong paternalism, especially paternalistic laws, will involve coercion, so that any justification of paternalism in law will need to justify the coercive actions necessary to enforce the paternalistic laws.

Their second argument, that Mr. N's liberty of action has not been impaired is not so clear, and is perhaps based on an unnecessarily restrictive understanding of liberty of action. Presumably the reason this act is paternalistic is that it meets the four criteria for paternalistic behavior. Condition 2 requires the violation of a moral rule. While Gert/Culver argue that no moral rule is violated by the physician at the time of the administration of the transfusion, condition 2 is still met because subsequently the physician will be required to violate a moral rule, either by lying to Mr. N about what has transpired, thereby violating the rule against deception, or by telling Mr. N the truth and causing him pain, thereby violating the rule against causing pain. But this ignores the fact that Mr. N's liberty to choose his own fate has already been violated. Mr. N has clearly stated his choice or desire (bizzare as it may seem to many of us) not to have a blood transfusion. A transfusion was administered in spite of his stated desire. If he was awake and physically resisting no one would be tempted to say that his liberty of action was not being violated. But what difference can it make that in these

particular circumstances he is unable to resist? His choice as to what sort of actions are and are not to be exercised with regard to his medical treatment have not been respected, and I cannot see what difference it makes whether or not at some later time the physician who acted paternalistically will either have to deceive or cause Mr. N pain.

Actually it is not clear to me that telling Mr. N the truth, which he is likely to find distressing, violates a moral rule. If it does, then we must violate a moral rule every time we break bad news to someone; for example, when a physician informs a patient he needs major surgery. This just seems wrong to me; that is, there are no grounds for such a rule. Surely no one thinks that a dentist breaks a moral rule with each tooth that he fills, but is justified in his action because restoring health to the tooth outweighs the pain he causes. The pain in this case would be incidental and unintended. There is a difference between knowingly and intentionally causing pain. In the case of the dentist, the fact that the pain is incidental and unintended means he is not violating a rule against causing pain; although there may be cases where knowingly causing pain violates a moral rule. The moral rule Gert/Culver mention must, if it is plausible, prohibit the intentional, not incidental, causing of pain. If this is so, then informing Mr. N. about his transfusion does not violate a moral rule and, on the Gert/Culver model of paternalism, the physician is not behaving paternalistically toward Mr. N.

Now consider a slightly modified version of this case. Suppose that later we discover Mr. N suffers from irreversible amnesia due to the accident and has no recollection of the blood transfusion discussion and that it never occurs to him that he may have had a blood tranfusion. On such an eventuality must we say that the physician is deceiving Mr. N? I cannot see

how. If anyone is tempted to think that the physician is deceiving Mr. N (by not informing him) this can only be because he acknowledges that Mr. N's decision has been ignored and it is precisely this action that requires justification. We do not normally expect physicians to go through the details of treatment unless asked. Even if it is insisted that the physician is deceiving Mr. N, this cannot be a morally objectionable kind of deception. Gert/Culver hold that there is a moral rule against all deception, but universal condemnation of deception is surely too strong. This is so because if there is such a moral rule, then things like wearing makeup to cover a blemish or lifts in shoes to make one appear taller would require justification. But that would be absurd; also, it would trivialize morality. Without a general moral rule condemming all deception (the rule should be against lying not deception) I see no basis for an objection to not bringing up the subject of blood transfusions to Mr. N if he does not bring it up himself. So now (assuming amnesia), on the Gert/Culver model, it again looks like this is not a case of paternalism at all, since no moral rule is subsequently violated.

Perhaps it could be argued that this would still be a case of paternalism because the physician must reasonably suppose that he will be required to either lie to Mr. N or cause him pain as a result of his giving Mr. N a blood transfusion and the amnesia is merely an unexpected and, in this case, fortuitous event. But this assumes that telling Mr. N. the truth, which will distress him, violates a moral rule, an assumption which I find implausible. This also assumes that prediction of future violation of moral rules is relevant to whether or not this is a case of paternalism, which I find equally implausible. The physician must realize at the time of the transfusion that he is violating Mr. N's expressed preference, his choice, as to how his

life is to proceed at this point, and it is precisely this element, plus his benevolent motive, that makes this a case of paternalism.

I am inclined to think that this is also a case of restricting action where action is broadly conceived to include the freedom to be left alone (not to have action taken on one's person without permission), or in other words the liberty to determine how others will act toward oneself where those actions have the kind of impact that medical treatment is apt to have. In most of our choices it is ultimately actions that concern us. So, I conclude, contrary to Gert/Culver, that this kind of example fails to show that paternalistic actions do not violate the liberty of an individual.

> **CASE 3:** Suppose a doctor lies to a mother on her deathbed when she asks about her son. The doctor tells her that her son is doing well, although he knows that the son has just been killed trying to escape from prison after having been indicted for multiple rape and murder.[8]

This case is offered to demonstrate, again, paternalism without coercion, attempts to control behavior, or interference with liberty of action. As Gert/Culver suggest, there is not any attempt to control behavior in the sense of restraint. Furthermore, the act is not coercive in any direct sense. Yet in this case, unlike case 2, the lie is the direct instrument of the paternalistic act; whereas, in case 2 a lie, if involved at all, was indirectly involved.

Sissela Bok, however, finds a striking parallel between certain kinds of deceit and coercion.[9] Both can be used to obtain illegitimate power. The person who deceives and the person who coerces both exercise a power over an individual that she does not willingly give up. Both deception and coercion

are often used to cover other kinds of wrongdoing; for example, lying to cover a theft or attempting to coerce someone into helping with a theft.

I do not wish to digress into a lengthy discussion of coercion, but perhaps a bit of exploration into "coercion" would be appropriate. Synonyms typically mentioned for "coercion" are "force" and "compulsion." A person may be physically coerced with regard to some action, as in an arrest, or psychologicaly forced as with threats. Sometimes the threat may even be with physical force or violence. What are the important features of psychological coercion? It may well be impossible to specify necessary and sufficient conditions for "coercion."[10] It will be sufficient for my purpose here to get the gist of what a typical coercive move involves. So, as a working description of psychological coercion I will say that one person coerces another when he threatens to inflict a harm or withhold a benefit in order to "persuade" the other person to undertake or refrain from some action. It is an attempt to exercise power without actual use of force. Coercive acts are unjustified where in ordinary circumstances the person being coerced should legitimately expect better treatment. The element of exploitation is often present. What is morally objectionable about unjustified use of threats is that the person being threatened deserves to be treated in a different, presumably better, way.

The parallel here between deceit and coercion is that both manipulate the decision process in some morally objectionable way. There is a prima facie case that everyone deserves the truth; also, everyone deserves not to be threatened. So, the manipulator, via the lie or the threat, seeks to exploit the advantage of his position; knowing the truth or having the power.

I would not want to push the analogy too far and claim that a lie is a kind of coercive force, but like coercion, it accomplishes the same effect and does exert influence, sometimes powerful, in the decision making process. In as much as information is required to make a decision and formulate attitudes, deliberate misinformation, if successfully deceitful, manipulates the decision making process, presumably in some way seen as suitable to the manipulator, or, as in the case of paternalism, in some way the manipulator thinks beneficial to another person. There does, then, seem to be some sense to the claim that misinformation forces certain decisions upon us in that we might say of some decision, "I was forced to make the decision the way that I did since I had no choice," and later I discover that the reason I thought I had no choice was that I had been deceived. This may not be coercive in a straight forward sense because it lacks the element of threat, but, to borrow a phrase from Wittgenstein, there is a certain "family resemblance". The resemblance focuses on manipulation and denial of autonomy. The morally objectonable features of both are a lack of respect for the individual, perhaps even to the point of being insulting or humiliating.[11]

Given the analogous kinds of objections that can be advanced against paternalism effected by coercion and paternalism effected by deception, one may ask, why not an absolute prohibition against deceptive strong direct paternalism as well as coercive strong direct paternalism? The answer lies, I believe, in a certain kind of dissimilarity that exists between deceptive manipulation and coercive manipulation. In coercive strong direct paternalism the paternalist directly confronts an autonomous individual who has been informed of the paternalist's concerns over the lack of wisdom, risk, foolishness, etc...and the possible consequences that the paternalist is

attempting to prevent. Given that the individual is genuinely autonomous, this raises a question about the truth of the paternalist's claim that the behavior at issue really is unwise, excessively risky or foolish. But in deceptive strong direct paternalism, as in case 3, there is no direct confrontation with the intended recipient of the paternalistic interference. Furthermore, often it is the case that deception is intimately connected to obtaining the benefit in a way that coercion is not. In these cases it is senseless to confront the individual with a choice, e.g., in case 3 it is not realistic to inform the dying woman of the ill fate of her son and then either attempt to persuade or corece her not to be depressed and saddened over this news. If the physician intends to spare this woman the anguish over her son, he can hardly ask her if she would like to be deceived or told the truth. In this kind of case the benefit cannot be obtained by persuasion or coercion. The critical differences between the coercive cases and at least some deceptive cases are: (1) In the deceptive cases the paternalist is not necessarily directly refusing to abide by the choice of an autonomous person and (2) in at least some deceptive cases the paternalist has no alternative method by which to obtain the benefit. In specific cases where these differences do not obtain, deceptive methods of paternalism may well be as objectionable as coercive methods. But the point is that in at least some deceptive cases of paternalism the relevant differences permit a line of justification for deception that is not available for coercion.

In case 3 it does not seem that the primary objective is to control behavior, although, no doubt, the physician would like to prevent a tearful outburst. It is primarily the emotion of sadness, depression and added psychological stress that the physician wishes to prevent. He has decided,

without consulting his patient, that it would be better for her not to know certain facts concerning important events relating to her life. In so acting he has seized control of an important aspect of her life, knowledge of a person for whom she cares a great deal. She may wish to change her will given that her son is dead, or to pray for him. Additionally, to whatever extent it makes sense to say that dealing with grief is an action, the patient here is prevented from dealing with her grief. If this strikes one as unlikely, I would simply point out that Fritz Perls complained at his death about being given pain relievers because they did not allow him to deal with his pain. Such examples are not unheard of. If this dying woman is a strong willed person and independent minded she may well prefer to know about such events, even under her present circumstances. I am not suggesting that it would be wrong to withhold this kind of information in all such cases, or even in this one; I am merely pointing out that interference with autonomous control of her life smacks of manipulation and coercion, which require strong justification..

The physician's aim, of course, is merely to relieve sorrow, but his method of doing so withholds information that is of some importance to the patient; and information is intimately connected to choice and action in that we usually base decisions to act on available information. In totalitarian countries (and on some occasions even in this country) one common method of restricting freedom, restricting choice, is by controlling information. Although all that I am arguing for in this case is that it involves a violation of autonomy by withholding information we would think should be provided, and because of this, interferes in the normal decision making process in matters concerning oneself. There need not be a direct restriction of action in a case for it to be paternalistic, nonetheless, controlling action does seem to be the

ultimate goal of the paternalist. So this case does illustrate a violation of liberty of action in a broad sense in that it restricts the options the patient is realistically likely to consider or the behavior she is likely to exhibit. Reflecting back on the Dworkin definition of paternalism, his "liberty of action" requirement doesn't seem so blatantly wrong as much as that it merely misleads us into expecting some more direct interference in an agent's action than we sometimes find in paternalistic actions.

> CASE 4: Mr. K is pacing back and forth on the roof of his five-story tenement and appears to be on the verge of jumping off. When questioned by the police he sounds confused. When interviewed by Dr. T in the emergency room, Mr. K admits to being afraid that he might jump off the roof and says that he fears he is losing his mind. However, he adamantly refuses hospitalization. Dr. T decides that for his own protection, Mr. K must be committed to the hospital for a period of forty-eight hours.[12]

This is intended as a straight forward case of deprivation of freedom. No doubt it is; specifically, this means that Dr. T deprives Mr. K of his liberty of choice by depriving him of his freedom. The more interesting aspect of this case is whether Mr. K meets the competency requirement (condition 4) of the Gert/Culver model. Even if Mr. K does meet the competency requirement, it would be easy to construct similar cases where he would not; and still I would argue that Mr. K is being treated paternalistically. Condition 4 requires that Mr. K be competent to give simple or valid consent in order for the action of Dr. T to be considered paternalistic. By "simple consent" Gert/Culver mean the ability to understand the nature of the decision that is to be made, to consent to medical treatment or whatever is appropriate for a given case and realize what one has consented to. For "valid consent" Mr. K, or any prospective recipient of paternalism, needs to be able to apprehend or

"appreciate" adequate information and not be coerced in his decision.[13] It appears that in the present case Mr. K is clearly unable to give valid consent. However, it does appear that he understands the nature of the request made of him, so he is competent to give or, in the present circumstances, refuse simple consent. But suppose that he was not; suppose that Mr. K could not even comprehend the nature of the questions put to him by Dr. T. In that eventuality, this would not be an instance of paternalism by virtue of failing condition 4 of the Gert/Culver model. Condition 4 of this model results in ruling out certain kinds of cases usually referred to as weak paternalism.

But this seems peculiar to me. If we take as the model of paternalism, as some writers have suggested, the broader notion of parentalism; that is, acting as a parent would act to include both the nurturing (maternal) function of parents and protection (paternal) function, then it just seems wrong not to include as paternalistic actions those that deny an individual autonomy on grounds of incompetence.[14] In this broad sense these kinds of actions are typical of the kind of thing a parent would do for a child, including an infant who is not capable of making or understanding the nature of decisions. In fact some philosophers (including myself) argue that it is just in these cases of incompetence that strong paternalism is justified. If condition 4 of the Gert/Culver model is allowed, then such justifications become irrelevant to paternalism. It seems wrong to arbitrarily define such views out of the game. In fact, intuitively, it seems that the paradigm cases of justified paternalism may just be those cases where someone is mentally childlike, in need of a parent. It seems that even Mill would give in to this kind of case.

> **CASE 5:** Professor B tells his wife that he has had a brief afair with her best friend. On hearing this, his wife becomes very depressed and says that she wants to kill herself. In fact, she once

> took an overdose of sleeping pills when she was depressed. Before leaving for a class that will be over in two hours he, without telling her, removes all the sleeping pills from the house.[15]

The Gert/Culver position is that this is more accurately described as a case of depriving of opportunity rather than freedom. No doubt, it is a case of depriving a person of opportunity, but it also restricts freedom. As I have previously argued, one way to manipulate, control or attempt to determine the attitudes someone will hold, choices she will make, or actions she will take is to control information; another way is to control opportunity. Controlling opportunity is instrumental in controlling actions. In this case the objective is to prevent suicide, the method or means by which this objective is accomplished is to limit opportunity.

I think that it should be clear from this case and the others offered by Gert/Culver that there is constant confusion in their analysis between the objective of the paternalist and the method used to obtain the objective. There are three elements in a paternalistic act which need to be distinguished. First, there is the motive, which is always the same for any paternalistic action, that is, to benefit the individual who is the recipient of the paternalism. Second, there is the specific objective that the paternalist adopts because he believes it will benefit someone, thus satisfying his motive or desire. These objectives include things like preventing suicide, sparing someone sorrow or distress, saving a life and so forth. The objective should be understood as whatever answers the question the putative benefactor may ask himself, "How can I benefit this person?" These actions only become paternalistic of course when the person receiving the help doesn't want it. The third element is the means or steps required to accomplish the objective.

These vary depending on the circumstances and the particular objectives, e.g., deception, coercion, or, as in the present case, deprivation of opportunity.

This explanation may look a little odd in the transfusion case. Normally, if the patient doesn't pass out, we would expect this person to continue his protest, perhaps even to resist physically. Then the steps required to administer the transfusion would include physical restraint, or at least, refusing to listen to his complaints. I have already explained why I don't think his passing out substantially changes the nature of that example. In any case, each paternalistic action requires some specific means or mechanism by which a putative benefactor seeks to achieve his objective. The means adopted are often violations of moral rules themselves, e.g., lying, coercion etc... and this is perhaps what has led Gert/Culver to identify this element as the moral element of the paternalistic act rather than, what I take to be the essential feature, unwelcomed interference in the decision process of an individual, i.e., a denial of autonomy. But case 2 shows that this is not so. In that case the means themselves did not constitute a violation of a moral rule, the only moral rule violated was one upholding individual autonomy.

In the present case, deprivation of opportunity is the mechanism by which liberty is restricted. It is a common complaint of minorities that they are not free (economically), not because they are physically restrained, but rather simply on account of limited opportunities. It is by ignoring these distinctions that Gert/Culver are led to consistently offer cases which supposedly do not involve interference with liberty. But in fact, as we have seen, these cases so far always have interfered with liberty in one sense or another; i.e., choice, autonomy and ultimately (in principle) action. The

description of these cases by Gert/Culver is correct (as far as it goes), but incomplete.

> CASE 6: A mother, convinced that her son will be killed if he joins the marines, breaks his arm in order to prevent him from doing so.[16]

The Gert/Culver argument here is that this is suitably described as a case of behavior control, but not behavior control obtained by depriving someone of freedom; it is they argue, properly described as disabling. But again we are confronted with a case where a person (the mother) thinks that someone else (the son) has made a bad decision, so bad that she thinks that she knows best and has a right to interfere with her son. It is a clear case of not respecting the decision and autonomy of one individual by another who claims to be acting in what she "knows" is that individual's best interests. Here again we find confusion between the instruments or means of paternalism and the objective of paternalism. The mother's objective is to benefit her son by preventing him from joining the marines. Rather than talk him out of his decision (as her means of controlling him) she physically disables him.

> CASE 7: Knocking someone out by a blow, as one might do to a friend who seemed about to attack an armed robber.[17]

The point argued here is that this can be a paternalistic act, but is, like case 6, really more accurately described as a temporary disabling rather than as deprivation of freedom. Clearly this is a case of disabling, but this merely illustrates again the confusion between the method or mechanism by which the paternalistic act is carried out and the objective. It is not my primary purpose to knock my friend out in such circumstances; my primary purpose is

to prevent what I take to be a foolhardy decision and the knockout blow is perhaps the only means I can think of on the spur of the moment.

> CASE 8: Mrs. P, on her first visit as an out-patient, is insistent during the last few minutes of her session that Dr. T give her some medicine for her nerves and for the vague, poorly localized pains which she describes. He feels there is no medical reason for her to have medication but judges that if he refuses her request outright, a useful and productive initial interview will end on a very sour note. However, he believes strongly in not administering active drugs when there is no medical reason for doing so; therefore, he writes a prescription for a week's supply of a placebo and makes a note on her chart to discuss the issue of medication with her in detail at their next week's appointment.[18]

This case is actually presented by Gert/Culver to illustrate a clear case of paternalism as determined by their four point criteria rather than as a counter-example to an account of paternalism as necessarily restricting liberty. But they do argue that this case neither restricts liberty nor controls behavior. On the surface the case of prescribing a placebo may not look like a case of paternalism at all because the patient insists on a prescription and the physician ostensibly concedes to this request by providing the patient with what she wants. If this is all there was to the case, it would not be a case of paternalism. But of course the patient isn't really getting what she thinks or has requested. Gert/Culver tacitly assume all placebos are inactive prescriptions, this is apparently not so. For Gert/Culver it is the deception that fulfills the moral element in the four point criteria of paternalism. But on the view I have proposed, whenever a person is deceived for his own good, the result of the deception is always, in some sense, to interfere with the normal informed and autonomous choice of the individual who is deceived. In this particular case it is not clear that the physician is providing the prescription for the patient's benefit; at least it is not clear to me how the

patient benefits in any important way from the session not ending on a "sour note." I can imagine circumstances in which a sour ending may benefit the patient, e.g., cause her to face reality.

It is clear how her choices, or opportunities, are restricted by the deception. If she was aware that she was not getting what she requested she might desire a second opinion. The deception denies her this choice. In addition, by prescribing a placebo the physician reinforces in this patient the notion that she does need an active prescription. In the usual manner of prescribing placebos, deception is inherent in the act of prescribing the placebo itself. But even if it were not, the act would require justification because one person has interfered with the autonomous choice of another.

As an interesting aside, recent studies indicate that there is an often successful procedure for prescribing placebos that does not require dishonesty. Historically it was believed that placebos worked only on the mind. More recently, however, it has been learned that placebos work on the body by stimulating an internal pain relief system that is capable of relieving even severe pain. Furthermore, the placebos can work even when patients know they might be getting a placebo. The non-deceptive procedure for prescribing placebos is as follows: (1) The patient is informed about placebo therapy and that some persons can achieve pain relief responses without pain relieving medicines. (2) The patient is then given a medication realizing that it may or may not be a placebo. (3) The patient is told to report the results to the physician and assured that she will not be left to suffer if the "prescription" is unsuccessful.[19]

Now I want to return to the four point definition of paternalism proposed by Gert/Culver. If I am right in my analysis, they have failed to

properly identify the essential moral element in a paternalistic act. The reason for this is their failure to distinguish the method or mechanism by which the act is accomplished from what I have been calling the objective (perhaps I should say immediate objective) of the paternalistic act, i.e., to prevent some harm from occurring and to ensure that some benefit does. Always implicit in such acts is the belief on the part of the paternalist that he, for some reason, is in a position to know the interests of another better than that other person.

Some writers argue that paternalism always implies a superior to inferior relationship such that the superior perceives in the inferior a lack of rationality, understanding, maturity, etc...The superior in this relationship, then, in some sense possesses a greater insight or perhaps even a more fully rational and autonomous grasp of life than the inferior.[20]

This seems a bit too strong an accusation to level against the paternalist since a putative benefactor may think that someone is making a serious (or perhaps even trivial) error, or is apt to if allowed to proceed as he apparently will if not prevented, and yet acknowledge that the individual about to err is typically brighter and more rational than himself; but in this particular instance this usually brighter and more rational person is making a serious blunder in his life which warrants paternalistic interference. So, even a child could behave paternalistically toward a parent. There is no reason to think that the paternalist assumes an attitude of general superiority, rather merely that he has superior insight in a particular circumstance.

Gert/Culver offer a final objection to a view of paternalism similar to the one I have been advocating, one held by James Childress.[21] The Childress account of paternalism emphasizes two aspects: first, the motivation for a

paternalistic act is always to benefit another individual, and second, a paternalistic act usurps the right of decision making in order to benefit the individual. Gert/Culver offer a counter-example to this account: "...suppose a hypochondriacal patient requests that a surgeon perform an operation on him which the surgeon feels is unnecessary and contraindicated."[22] Their point is that if the refusal of the surgeon is based on the interests of the patient, and presumably it is, then the surgeon has refused to accept the decision of the patient on grounds of benefit to the patient which, according to Gert/Culver, satisfies the Childress definition of paternalism. But, obviously, this is not a case of paternalism. I really do not understand this objection either directed at the Childress view or the view I have suggested. Childress emphasizes usurping control of an individual's life; I emphasize interference and restriction of liberty and autonomy. The surgeon has not attempted to usurp control of the patient's life, nor has he denied liberty nor interfered in the decision making process. He has merely refused to help the patient obtain what he considers unnecessary surgery. If the surgeon proceeded to attempt to restrict the patient's activities, or dissuade him by drugs or deception, then he would be behaving paternalistically toward the patient. As it stands, I cannot see how either Childress or I have difficulty with this example.

III

Now I want to focus on a variety of issues that I believe will further my argument that the best way to capture what takes place in a paternalistic act is to characterize paternalism as an interference with or denial of autonomy. The issues I will consider are first, the distinction between fraternalism and

paternalism; second, the question "Can someone behave paternalistically toward *himself*?" and, third, the useful boundaries of paternalism. On the Gert/Culver model condition three specifies that if the paternalist either has or expects he could get the consent of the recipient of the action, then the act is not paternalistic. This requirement is obviously bound up in the conception of paternalism that I am suggesting. So if I push some foolish person who is running beside the road in the direction of traffic and wearing a radio headset out of the way of a car, this is a beneficent action; but not a paternalistic one, because I am only doing what I believe he would want me to do. This was Mill's point with the bridge example. Even on Mill's strong opposition to infringement of liberty of action, where the interests of the individual are the only concern, it is permissible to interfere in such circumstances. It is allowable to perform such actions as illustrated in the runner and bridge cases because it is reasonable to assume that no one wants to be runover by a car or fall into a canyon; hence, their real desires are not interfered with. So if we act only in such a manner as we believe an individual would consent to, the action is better described as fraternalistic rather than paternalistic. In paternalistic actions we interfere in the free and autonomous decision making process of individuals. In fraternalistic actions we only do what we think the individual would ask us to do if he understood the situation; we behave as a brother, helping a person get what he wants. In paternalistic actions we behave as a parent, imposing our 'wisdom' on another person.

The implication of this distinction between fraternalism and paternalism is that consent arguments for justifying paternalistic interference with autonomy are wrongheaded. This is so because in fraternalism one is simply

doing what he believes a person would ask of him if the person realized what the fraternalist realizes. Thus, the fraternalist can legitimately argue that he has or will get, or should get the consent of the individual whose actions or decisions are being interfered with. But in strong paternalism the paternalist is willing to act in a more forceful fashion; he is willing to override an individual's judgments about his own good. It would seem, then, that all the hypothetical consent theorist is asking is whether or not he is reasonable and right in his judgment about the real interests of another; thus, it is not consent that is important, but merely who is right. But this alone cannot justify paternalistic interference. Again, if the paternalist is only asking, as the consent theorist seems to suggest, if it is morally permissible to act benevolently toward a person who wants to be the beneficiary of such benevolence, then he is asking a trivial question. If the paternalist is asking if a person should (in the sense of "a reasonable person would even though a given individual may not") welcome interference, then he needs to show the connection between a person's being unreasonable and justification for interfering with that person's autonomy. And more seriously, if violating autonomy is morally objectionable, then that person's consent to having his autonomy impaired does not, by itself, justify the impairment anymore than a person's consent to a beating justifies the beating. My suspicion is that at this point the consent theorist just becomes another version of the competency theorist, i.e., a person who holds that incompetency is the only grounds for justifying coercive strong direct paternalism. The idea of consent is probably meant to capture a form of incompetency, i.e., if a reasonable person would consent to coercion, deception etc..., but this particular person

does not, then this person is incompetent. The point is that consent is not important to the paternalist, but justification for violating autonomy is.

This may also indicate that there are moral problems with fraternalism as well. The consent of another to help or hinder his activities may make that help or hindrance welcome, but does not make it morally permissible. I suspect that fraternalistic actions are based on the assumption that the desired goal for which the aid is enlisted is itself morally permissible.

An interesting and related issue in paternalism is the question: "Can someone behave paternalistically toward himself?" Douglas Husak, and others, argue that some cases of paternalism are justified in spite of the fact that they violate autonomy because the agent consents to the interference. He further maintains that no conceptual problems are created by the notion that an agent can treat himself paternalistically. Obviously, if Husak is right then Gert/Culver, Mill and I are wrong in holding that consent of the agent who is the recipient of the "protective" action negates the paternalistic characteristics of the action.

Husak supports his position by pointing out that a person can make a decision now to intentionally restrict his liberty or autonomy at some later time. For example, Odysseus orders that he be physically restrained to prevent him from yielding to seduction, a taxpayer overpays his taxes so that he can be certain not to incur a tax debt that he cannot pay, and an individual refuses to accept credit cards to control temptation to overspend or create debt, a person asks friends to restrain him when tempted to smoke or drink alcoholic beverages. So, Husak concludes, "An agent who acts from this reason treats himself paternalistically in voluntarily consenting to

measures which subsequently interfere with his liberty to act according to his desires."[23]

But are such actions really paternalistic? Using the Gert/Culver model, even eliminating condition 3 as Husak suggests, how could condition 2 be met? In order that these kinds of actions actually be paternalistic, there would need to be moral rules prohibiting them. This means it would be immoral to refuse credit cards on grounds of fear of abuse, and there would need to be similar moral rules against the other actions. But what reasons could be given for such rules? On the view I have been advocating there is an analogous problem with the notion of paternalistic action against oneself. There is a sense in which an individual can restrict a future choice by making certain decisions and commitments now; and, of course, this is what tempts Husak to call these instances of paternalism. But individual autonomy is not really restricted. In cases where we attempt to control future moments of weakness by making arrangements to restrict our own liberty we are attempting to carry out our most reflective and serious desires by guarding against failure (in some future less rational moment) to adhere to our previous commitments or choices . It would be odd, as previously noted, to call any of these actions immoral. But there is nothing odd at all about raising moral questions when someone else interferes in our life in this way. The cases are not analogous, and it is not useful to say that I can behave paternalistically toward myself.

Up to now I have only considered cases suggested by Gert/Culver, which are mostly in the medical context. There are other kinds of cases that need to be considered that will, I believe, help to illuminate the precise nature of paternalism. There are a variety of cases which are sometimes offered as examples of paternalism which I think are not. For example, government

advertising the harmful effects of tobacco, providing food stamps in place of cash to welfare recipients and control of the use and sale of habit forming drugs. There are non-paternalistic reasons for each of these practices. It is part of the government's responsibility to advise its citizens of dangerous enterprises such as the use of tobacco. Food stamps are provided in lieu of cash, I suspect, to protect the taxpayer from the unscrupulous welfare recipient. And control of dangerous drugs is more likely to protect the general population from harm caused by the drug user/addict than to simply benefit the potential addict.[24]

Perhaps a more interesting possible counter-example to my account of paternalism is provided by certain kinds of incentive programs, for example, savings incentive programs offered by some large corporations. Such programs offer to match an employee's regular savings dollar for dollar up to some dollar limit, say $100.00 per month. In practice this may actually be a corporate device to recruit and retain good employees, but suppose that it is not. Suppose that a company adopts such a policy simply on grounds that it fears its employees will not provide for their own future, so that the offer is made on grounds of employee interests alone. I can not see anything morally objectionable about this kind of incentive program. On my view there needs to be some interference with autonomy. However, there does not seem to be any such interference.

But doesn't this kind of incentive, intuitively at least, seem paternalistic, or at least parentalistic (characteristic of parental actions)? We can easily imagine a parent offering monetary incentives for grades to her children in order to encourage good study habits. More specifically, we can even imagine an exact anaolog where a parent offers a savings incentive

program to her children to encourage good savings habits. What this kind of case may show is that what tends to get identified as paternalism outside the family context is what even inside the family context would often be considered poor parenting.

We may ask, what would be considered the proper model of a good parent? Well, a parent, among other things, is a teacher. So we may begin with this: whatever makes a good teacher will aid in good parenting. Some of these attributes are: patience, reflective listening, ability to articulate and persuade rather than coerce, order or warn. Parents, and teachers, who are able to manage children without threats of reward or punishment are to be admired; and, I suspect, are more effective than those who use threats. A parent has the responsibility for the moral education of the child, and so would do well to set an example of honesty. A good parent is perhaps better described as effective consultant rather than authority figure.[25] With this model in mind, it is easy to correlate what antipaternalists complain about most, coercive denial of autonomy, with poor parenting. Governments, physicians, and others who resort to deceit and coercion are open to criticism just as are parents who have neglected the model of a good parent.

In the case at issue, there are other options open to the parent; she, for example, can lie, threaten, or otherwise coerce her children. It is clear that the parent, or company, does enter into the decision process with incentives. What is not clear is that this is properly described as an interference with autonomy. In fact, my intuitions tell me that this is not interference. Furthermore, it is unlikely to be unwelcomed by the recipients of such incentives. If it is parenting at all, it looks like good parenting. So on my view, this is not paternalism. If anyone is inclined to argue that it is, then I

would simply point out that there is nothing morally objectionable about it and would further want to distinguish this kind of paternalism (perhaps it should be called benign paternalism) from the kind I have been identifying as interference with autonomy (I shall simply refer to this as paternalism). Clearly, it is not coercive paternalism. As long as individuals are given a legitimate choice, even if some are made more attractive via incentives, this does not constitute a violation of autonomy and is not, on my view paternalism. Not everything we might imagine parents doing for their children need be called paternalism. This characterization of paternalism sets it off as a class of cases that involve the special moral problem of justifying the denial of autonomy on grounds of beneficence.

In conclusion, it now appears that the Dworkin definition of paternalism, "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," while not quite correct does seem to capture most of what we regard as paternalism. It is ultimately action that we are concerned with, although paternalism actually interferes with autonomy or liberty in a broader sense than merely liberty of action. And coercion is not the only device by which the paternalist interferes with liberty, although coercion is of major concern, and I might note that the other paternalistic methods, lying, limiting opportunity and so forth belong in the same family of objectionable interferences with coercion. So the task of justifying paternalism is just the task of giving plausible and convincing arguments for denying individual liberty and autonomy on grounds of the interests of the person concerned. The outcome of these arguments will depend on the nature and value of liberty and autonomy weighed against the

interests and well being of the individual in a given context. To arrive at a defensible principle of justifiable paternalistic interference it will be necessary to give an adequate account of these concepts.

In the next chapter I examine Mill's use of the concept of individuality. I argue in chapter 3 that "individuality" is the word Mill uses for what has come to be called "autonomy." In order to fully appreciate and understand the strength of Mill's position, it is necessary to examine his treatment of individuality.

NOTES

[1]Gerald Dworkin, "Paternalism," in Philosophy of Law, 2d ed., edited by Joel Feinberg and Hyman Gross (Belmont, California: Wadsworth Publishing Company, 1980), p. 230.

[2]Jeffrie G. Murphy, "Incompetence and Paternalism," Retribution, Justice, and Therapy (Boston: D. Reidel Publishing Company, 1979), p. 165.

[3]Dworkin, "Paternalism," p. 231.

[4]Charles M. Culver and Bernard Gert, Philosophy in Medicine (New York: Oxford University Press, 1982), pp. 129-130.

[5]Ibid., pp. 126-142.

[6]Ibid., p. 130.

[7]Ibid., p. 127.

[8]Ibid., p. 128.

[9]Sissela Bok, Lying: Moral Choice in Public and Private Life (New York: Vintage Books, 1978), p. 22.

[10]Daniel Lyons, "The Last Word on Coercive Offers," Philosophy Research Archives 1480 (1983): 393-414.

[11]Ibid., p. 401.

[12]Culver and Gert, Philosophy in Medicine, p. 128.

[13]Ibid., pp. 42-63.

[14]Mary B. Mahowald, "Against Paternalism: A Developmental View," Philosophy Research Archives 6 (1980): 356-357.

[15]Culver and Gert, Philosophy in Medicine, p. 128.

[16]Ibid., p. 129.

[17]Ibid., p. 129.

[18]Ibid., p. 137.

[19]Martha S. Templin, Kathleen Krekeler, Jeanette A. Kowalski, "Placebos," Nursing Life (November/December, 1984), pp. 52-53.

[20]Arthur White, "Paternalism" (Ph.D. dissertation, University of Virginia, 1974), cited by Douglas Husak, "Paternalism and Autonomy," Philosophy and Public Affairs, 10 (winter 1981): 41.

[21]James F. Childress, "Paternalism and Health Care," Medical Responsibility, eds. Wade Robinson and Michael Pritchard (Clifton, New Jersey: The Humana Press, 1979), pp. 15-27.

[22]Culver and Gert, Philosophy in Medicine, p. 135.

[23]Douglas Husak, "Paternalism and Autonomy," Philosophy and Public Affairs 10 (winter, 1981): 44.

[24]I will argue this last point about control of dangerous drugs extensively in Chapter 5.

[25]Thomas Gordon, "Parent Effectiveness Training: A Preventative Program and its Effects on Families," Handbook on Parent Education, ed. Marvin J. Fine (New York: Academic Press, 1980), pp. 101-121.

CHAPTER II

INDIVIDUALITY

It will be useful to begin my discussion of individuality with a discussion of individualism. "Individualism" is a word with a curious history. In America it is probably safe to say that it is a popular word that elicits positive attitudes. I suspect that most associate individualism with independence, freedom, liberty, strength of character, self reliance, worth of the individual, individual rights and so forth. On this view the concept is an appealing one. However, such favorable ascriptions have not always been associated with this concept.

The word "individualism" first appeared in France as "individualisme" and the conservative response to it was quite critical. It was thought by Burke, and others, that individualism undermines the commonwealth. It is not difficult to follow this line of thinking. If individuals are, in an important sense, of supreme worth, and each the judge of what is right and wrong, then how can society impose social or civic duties on the individual who does not want them? Individualism in this sense suggests a withdrawal from public life, antisocial competition of each individual against other individuals, a subordination of the good of the group to the interests of the individual and was thought to be the harmful product of democracy. The fear was that individualism would lead to anarchy and egoism. In the words of one

Frenchman, all that remains under individualism is "a terrifying confusion of interests, passions and diverse opinions."[1] In France even today the word apparently still has a pejorative connotation, that of being an egoistic philosophy destructive of social unity.

One way to combat the negative aspects of individualism, while preserving something of the appealing aspects that attribute importance and value to each individual, is to distinguish individualism from individuality. Individualism, on this line of thinking, stresses the central value and importance of the individual to the extent that it does entail a certain amount of egoism, even to the detriment of society at large. Individuality, on the other hand, stresses the importance of each individual as an object of respect capable of independence and self-development, while insisting that each individual maintain a cooperative existence with other individuals. Perhaps something like the latter is the attitude taken in China. There individuals are encouraged to develop individual talents. Persons with natural ability in athletics or science are provided special training to enhance their gifts and are encouraged to develop themselves for the good of society. On this line of thought a form of individuality is maintained as a value, but egoistic individualism is not.[2]

It seems, then, that any account of morality that upholds individualism as an important value must deal with the dual reputation of this concept and attempt to separate the good aspects of individualism from the less desirable, e.g. egoism and anarchy. I believe that it would be possible to construe individuality as one form of individualism broadly understood, i.e., as a doctrine stressing the importance of the individual. Nevertheless, I shall use the term "individuality" as the term for the point of view I am defending.

One of the attractive features of the endorsement of a concept of individuality (as defined here) is that it implicitly recognizes individuals as the only moral entities that there are. Saul Kripke once observed in one of his lectures that the history of nations is not something in addition to the history of individuals. Thus, a complete account of individual actions in a nation would constitute a complete history of that nation. In a similar vein, when the claim is made that actions should primarily be judged by their impact on society as a whole, not solely the individual agent, this is nothing more than a claim that the interests or rights of other individuals must be considered as morally relevant to any act. There is no reason to think that this kind of claim is at odds with individuality.

In this chapter I shall address three topics. First, I will sketch what I take to be Mill's view of individuality. I will make some attempt to explicate the historical Mill because I think that the historical issue is interesting and important in its own right, but my main purpose shall be to develop an account of individuality that has its roots in Mill, is plausible, attractive and will help illuminate issues in paternalism. Second, I will propose an interpretation of the "progressive being," a conception of human nature that Mill seems to take as fundamental. Third, I will offer an evaluation of Mill's objective criterion of value, which is important for his concept of man as a progressive being, and make some suggestions for improving upon his line of argument.

I

There is general disagreement among philosophers as to what role individuality plays in Mill's thinking. Does individuality have intrinsic value as well as utility? This is an important question for my purposes since I have defined paternalism as a violation of individuality and autonomy. If individuality is valuable only for its consequences, then paternalistic acts will need a different sort of justification than if individuality is intrinsically valuable. For example, if individuality is not intrinsically valuable, but only valuable for its effects, then in circumstances where these effects are not present it would seem permissible to deny individuality. On the other hand, if individuality is intrinsically valuable, or has strong rights-generating characteristics, then every violation of individuality will require justification. I believe that Mill correctly considers individuality as valuable in itself apart from its usually beneficial consequences. Isaiah Berlin, and others as well, argue that Mill, much to his credit, abandons a purely utilitarian approach to morality in his defense of liberty and individuality by holding that individuality has intrinsic value. The following, taken from chapter 3 of On Liberty, are but some of the passages that seem to indicate something other than a purely utilitarian thinker at work.[3]

> Where not the person's own character but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.(p.54)

> But the evil is that individual spontaneity is hardly recognized by the common modes of thinking as having any intrinsic worth, or deserving any regard on its own account.(p. 54)

> But it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way.(p. 55)
>
> It really is of importance, not only what men do, but also what manner of men they are that do it.(p. 56)
>
> Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.(pps. 56-57)
>
> Having said that individuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce, well-developed human beings, I might here close the argument; for what more or better can be said of any condition of human affairs than that it brings human beings themselves nearer to the best thing they can be?(p. 61)
>
> If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.(p. 64)

Mill's argument seems to be that liberty is necessary for individuality, and that individuality is intrinsically valuable itself. His argument for this is quite complex, involving a complicated conception of happiness and human nature. Mill informs us early in his essay that when he speaks of utility he is thinking of "utility in the largest sense, grounded on the permanent interests of man as a progressive being." He is apparently arguing from some conception of an ideal of human excellence, and development toward this ideal is intimately connected to morality, or human well-being. Furthermore, Mill attacks what he takes to be the character ideal of his time, conformity to custom, as being like the Chinese lady's foot, simply molded by the environment. As Isaiah Berlin once observed, it is difficult to believe, when we look at Mill's activities, that it was not liberty and justice as such that he valued but utility.[4] In other words, there are a number of intrinsic values at

work in Mill's thought, not just one, pleasure. "Utility" seems to be used as the collective name for the group taken together.

I will spend some time in the remainder of this chapter attempting to explicate a reasonable interpretation of what Mill's arguments are, and then offer some suggestions that I believe will strengthen the general approach taken by Mill. My aim is to arrive at a defense of individuality as an intrinsic value that is Millian in spirit. I think that a profitable way to begin my inquiry into Mill's arguments for individuality is to consider the arguments of Robert Ladenson that Mill is a consistent utilitarian.[5] So I will begin with his arguments.

Ladenson defends Mill as a consistent utilitarian, that is, as advocating individuality for purely utilitarian reasons, on two grounds. First, everything that Mill says about individuality can be understood as a utilitarian appeal. And since Mill himself affirms that the ultimate standard of morality is utility, we ought to read him as always making utilitarian appeals. Second, if Mill is taken, as he often is and as I tend to read him, as holding a view of human excellence based on a natural end, then he must hold a teleological view of nature. But this would be inconsistent with Mill's philosophy of science.

I will concentrate on the first point and make only the following comment about the second. Mill's view of man may well be inconsistent with his philosophy of science. However, there is textual evidence that Mill does hold such a view of man. Also, Mill holds Wilhelm von Humboldt up as a man of keen insight into human nature and human affairs and takes it as a great loss to all of us that this man has had such little influence. Since it is clear that von Humboldt holds a teleological view of man, and given that Mill makes

no attempt to divorce himself from this aspect of von Humboldt's view, it is reasonable to believe that Mill agrees with it. But, of course, the best way to decide this issue is by appealing to what Mill says.

The main thrust of Ladenson's contention that Mill appeals to purely utilitarian grounds for individuality is that there is a series of utilitarian arguments in chapter 2 of On Liberty for freedom of expression, and Mill claims in chapter 3 that he intends to see if similar arguments do not also apply to liberty of action. So, on this reading of Mill, we should allow liberty for the sake of individuality and individuality is valuable for utilitarian reasons alone, it is most productive of happiness.

I want to begin my evaluation of Ladenson's arguments by first examining the context in which Mill says, in chapter 3, he will use the utilitarian arguments of chapter 2. He opens chapter 3 with this remark:

> Such being the reasons which make it imperative that human beings should be free to form opinions and to express their opinions without reserve; and such the baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty is either conceded or asserted in spite of prohibition; let us next examine whether the same reasons do not require that men should be free to act upon their opinions-to carry these out in their lives without hindrance, either physical or moral, from their fellow men, so long as it is their own risk and peril.[6]

First, it should be noted that the arguments Mill is referring to in chapter 3 that are parallel to chapter 2 are for liberty, not individuality. No one, I suspect, would not believe that many of the arguments for liberty of thought, expression and action are grounded on some further value. In chapter 3 this value is individuality. Further, if we take the title of this chapter seriously , "Of Individuality, as One of the Elements of Well-Being," and well-being or happiness being intrinsically valuable in Mill's view, so too is individuality. Second, it looks as though the arguments in chapter 2 are

deeper and less clearly purely utilitarian than one might suppose; for Mill says that the offense against free expression is an offense against the intellectual and moral nature of man. The intellectual and moral nature of man is part of Mill's notion of man as a progressive being, a concept I will attempt to develop shortly. Mill claims in chapter 2 as he summarizes his arguments for freedom of thought and expression, that such freedoms are required for the "mental well-being of mankind." Mill seems to have in mind by "mental well-being" roughly the same aspects of human nature that he attempts to capture by the phrase "intellectual nature." Both of these ideas are directly tied in with man as a progressive being and with individuality. So it appears that individuality is operating on Mill's thought even in chapter 2, though not explicitly. Finally, returning to Ladenson's point about the parallel arguments between chapter 2 and chapter 3, even if Mill meant to strike a parallel between pure utilitarian arguments, it wouldn't follow from this statement alone that there will not be other arguments as well. In fact it seems to me that Mill rather quickly runs through some arguments that look parallel to some of the arguments of chapter 2. For example he criticizes those who rely exclusively on custom and tradition for not realizing that traditions may be too narrow, unsuitable to another individual and that conformity to custom for custom's sake does not educate. From here Mill proceeds to argue in diverse ways for individuality, the developed individual. So liberty is justified because it is necessary to provide individuality. But what establishes the worth of individuality?

Ladenson maintains, correctly I believe, that to fully understand the arguments for individuality one must understand Mill's arguments in chapter 4 of Utilitarianism. Ladenson's understanding of Mill's explanation of happiness

is that various things lead to happiness, among them virtue. So, for example, virtue is originally regarded as a means to happiness, then by continual association of virtue with happiness, we come to value virtue itself. Thus, the claim that "Y regards X as having intrinsic worth" is to be understood as amounting to "Y desires X because he considers it a source of pleasure in its own right." Hence, Mill's contention that individuality has intrinsic value is compatible with pleasure as the only desirable end. However, what Mill actually says is that virtue is desired "not as a means to happiness but as part of their happiness." This tells us that happiness is not a simple thing, but has elements, and that it is a mistake to think of these elements as means to happiness. Then he says that virtue must be desired "disinterestedly, for itself." The picture Mill is portraying is apparently something like this. Originally, when we humans formulate a desire, it is either because we think that the thing or activity we desire leads to pleasure or avoids pain. But, through habit or proper training, or maybe both, we can come to intrinsically desire other things than pleasure. If we expect our children to love virtue we must connect it with pleasure and avoidance of pain. But, as they mature, if they do so rightly, they will come to love virtue for itself. Mill provides us with an example that illustrates this principle, that is, a desire exhibited, by some individuals at least, for money. Originally they desire it only for what it can buy, but subsequently they come to value the money itself regardless of its potential buying power. The same is true for power or fame. Likewise for virtues, living a principled life rather than a self-interested one and for individuality. Individuality and the principled life are not means to happiness, but the fundamental elements of happiness.

Perhaps the following analogy will help explain the difference between the way I read Mill and one traditional (and I take it, Ladenson's) reading of Mill. Suppose I needed to obtain one dollar and am able to devise a plan whereby I can earn a dollar. My plan requires that I earn the dollar in parts, 50 cents, 35 cents and 15 cents at a time. Once I have obtained each of these I have a dollar. But it would be misleading to say that obtaining the 50 cents, then the 35 cents and then the 15 cents led, or were means, to my obtaining the dollar. The work is a means to obtaining the dollar, and even a means to obtaining the parts, but the parts of the dollar themselves are not a means to obtaining the whole dollar. They, taken collectively are the dollar, and further, they are the same kind of entity that we call the dollar, i.e., money. In a similar fashion, obtaining the elements of happiness does not lead to obtaining a different entity called happiness. Each of the parts of happiness (and the dollar) are of the same kind as the whole. Happiness, for Mill, is not something separable and in addition to its parts. Mill even goes so far as to say that if we love virtue only for the pleasure it may bring, then we love it for the wrong reason, and worse, this instrumental love of virtue is actually counter-productive to the general happiness. Mill may be giving in to something like the hedonistic paradox here, that is, happiness is impossible to obtain if pursued directly. In order to get happiness we must more or less ignore happiness and pursue its elements as intrinsic values themselves. Mill further says in his essay on Bentham that happiness is:

> too complex or indefinite an end to be sought except through the medium of various secondary ends, concerning which there may be, and often is, agreement among persons who differ in the ultimate standard.[7]

So far, on Mill's view, almost anything can be viewed as an element of happiness: living a just life, virtue, individuality, love, fame, power, money and so on, but only some of these elements are correctly conceived as elements of happiness. Mill's criterion for distinguishing genuine happiness from some counterfeit is the pronouncement of the competent judges. This appeal to quality of pleasure indicates a standard at work other than pleasure. Clearly it is not simply pleasure Mill values. The much criticized argument at the opening of chapter 4 of Utilitarianism that argues from the fact that pleasure is the only thing desired to the claim that pleasure is the only desirable thing, must be understood in light of the later remarks of that chapter. Otherwise, we must hold that Mill, within a very few pages, is guilty of the most blatant contradiction. To say that Mill holds that pleasure is the only thing mankind is capable of desiring is true only in this limited sense, i.e., pleasure plays a key role in acquiring desires. Mill may or may not be right about this, it really does not matter for my purposes here. If one maintains that Mill is a hedonist, it is only so in an attenuated sense of the term. For Mill claims that man can, does and should desire other things besides pleasure.

II

To fully understand and appreciate Mill's value of individuality, and his comment at the opening of chapter 3 of On Liberty about the offense against man's intellectual and moral nature, the point of which is linked to the value of individuality, it is necessary to get a clearer picture of what Mill means by "progressive being." It should always be remembered that when Mill speaks of

utility it is utility "grounded on the permanent interests of man as a progressive being." Unfortunately, Mill provides no clear and comprehensive account of this notion which he evidently takes seriously, so we are left to try to piece together an account from his writings.[8] No doubt a number of different accounts could legitimately claim to rest on Mill's writings, but it is at least doubtful that each would be drastically different from the others. In what follows I shall attempt to articulate an account of the progressive being that connects to what Mill says about the nature of man. The "progressive being" is probably best understood as the phrase Mill uses to capture his views about human nature, especially the intellectual and moral aspects.

First, the progressive being is an intelligent creature capable of formulating an opinion based on evidence. Mill thinks that there is no such thing as absolute certainty or final truth in the important affairs of life, but there is sufficient certainty so that we can carry on our lives without constantly wondering if we know what we are doing. The progressive being is the person who, by critically reflecting on the data of experience and the views of other informed individuals, progressively increases his understanding of life and values. In fact, this process of critical reflection is the sole path to wisdom. The progressive being, then, has a certain amount of potential for developed rational capacity. It is intrinsically preferable that this capacity be developed rather than lay dormant. Persons without such developed capacities are apt to be those who conform to custom merely because they cannot think of any options; and neither do they understand the rationale behind the custom. Such persons lack a significant human aspect, a unique expression of themselves; they are in an important sense less than the best they can be. Recall that Mill quotes and praises this passage from Wilhelm von Humboldt:

> The true end of Man, or that which is prescribed by the eternal and immutable dictates of reason, and not suggested by vague and transient desires, is the highest and most harmonious development of his powers to a complete and consistent whole.[9]

This passage seems to capture at least one of the aspects that Mill has in mind for the progressive being. Development is the major ingredient in the personality of the progressive being. Later Mill will identify self-development with individuality. The claim is that this is the true end of man and it is prescribed by reason. Precisely why this is so is not yet clear.

The second distinguishing feature of the progressive being is that he has character. Mill says that:

> A person whose desires and impulses are his own-are the expression of his own nature, as it has been developed and modified by his own culture-is said to have a character. One whose desires and impulses are not his own has no character, no more than a steam engine has a character.[10]

So having our own desires is important on Mill's view. He draws an analogy between having our own understanding and having our own desires. We can easily see the advantage of having our own understanding. I take having our own understanding to mean roughly, being able to give an account of why a proposition is true (or false), the conditions that make it true and the conditions that make it false. The appeal here may be similar to the Aristotelian appeal that the man of wisdom knows causes, or reasons as well as facts. The same reasoning is to apply to desires. Mill correctly sees the importance of desires. What desires we acquire and cultivate determines to an enormous extent our personality and character. Mill argues that these should be our own. By this I take it he means that we should consciously adopt and cultivate our desires having reasons for cultivating some desires and not

others. Of course having our own desires does not mean that we choose whether or not we will have basic human desires; we do not choose, for example to be hungry. Nor do we choose to have a natural inclination to love the sea, or fear heights. But within the context of basic human desires, which sometimes can be willfully controlled, and natural inclinations and gifts, we can govern our lives quite extensively by consciously choosing to cultivate some desires or inclinations and suppress others. It is in this sense that we are able to choose our desires. And just as an informed and reflective opinion is valued over mere preference, consciously chosen desires are valued over those acquired in an unthinking fashion. Persons who reflectively choose their desires possess character, and are a benefit to society and themselves. Here Mill provides a metaphor. He compares human nature to a tree, as distinguished from a machine that is built, which needs space to grow and develop in accordance with its inward force. This is probably a further indication of the von Humboldt influence. For von Humboldt compares human nature to a flower, and adds that "the highest point of human existence is this flowering."[11]

The third feature of the progressive being is that he is a social creature. Mill thinks, like Hume, that humans have social feelings, but that these feelings need to be encouraged. The progressive being is a moral being who recognizes that the interests and desires of others count equally as do his. Actually, he does not merely recognize this, he feels it.

Mill addresses the issue of training, or encouraging the formation of certain tendencies, desires and impulses while discouraging others on two occasions in On Liberty: first, he says that youth should be taught the "ascertained results of human experience," and second, the desires and

impulses that are to be our own are modified and developed by culture. This raises two difficult problems. First, which desires and impulses are to be encouraged? And, why these and not others? The second problem arises from Mill's claim that our desires should be our own. How do we resolve the tension between having our own desires, which creates individuality, and the socialization and educational processes that are going to encourage, perhaps even inculcate, certain desires over others? I will postpone consideration of the latter question until chapter 3 of this work.

III

How might Mill answer the first question? I think that it is clear how Mill would respond: we inculcate desires and impulses consistent with and perhaps even a prerequisite for Mill's brand of utilitarianism. Since Mill has a healthy respect for virtues, justice and the higher or intellectual pleasures, socialization and education should encourage these kinds of things. The criteria by which we know that these are the right kinds of things to encourage are the pronouncements of the competent judges. The criterion works like this:

> Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure.[12]

Mill takes it as unquestionable that those who are competent to judge such matters prefer the higher pleasures, including virtues, justice and individuality. His explanation is that a being with higher faculties and talents (a progressive being) requires more to make him happy than a lower type of

creature. Such a being cannot be fully satisfied with the lower kind of pursuits. The decision of the competent judges is the sanction which justifies society's encouraging one kind of desire rather than another. The judges constitute the objective criterion for the most desirable or best kind of life. Furthermore, education is required in order to develop the right kind of desires because the natural tendency and capacity for such desires is a "tender plant" and needs constant nurturing to keep it alive.

Mill needs an objective criterion of desires and happiness in order to justify teaching certain kinds of experiences and endeavors as more valuable than others. In addition, he needs this criterion to make any sense at all of man as a progressive being. If there was no method or standard by which we can say one individual has lived well and another has not, then there would be no criterion for progress, and the notion of progressive being would be meaningless. Is his criterion adequate?

It seems to me that there is a problem with the way Mill has developed this criterion. The competent judges tell us which desires and impulses are preferable by comparing, from their own experience, the degree of satisfaction they obtained from satisfying the lower desires with the satisfaction obtained from pursuing the higher desires. One is a competent judge by virtue of having demonstrated the capacity to successfully engage in the higher human endeavors. Among these are, say, reading quality literature, appreciating the arts and almost certainly understanding the social sciences, since the progressive being must sift through the data of the social sciences in order to make well founded judgments about his life and about his participation in civic responsibilities. Individuals who are successful at such endeavors are likely to be just those who have the natural capacity and taste

for such things, and who perhaps are encouraged by parents and teachers to pursue such things. Those who are not gifted this way, or not properly encouraged, will probably fail to develop in certain ways and, therefore, not be counted among the competent judges. Thus the appeal to the competent judges seems to come to no more than this: those who are naturally talented and interested in the pursuit of higher learning prefer these kinds of pleasures over more mundane enterprises. It now appears that the outcome of the decision of the competent judges is built into the selection process for being a judge.

A similar attack on Mill's criterion is made by Michael McPherson. His criticism is that the fool and Socrates are in symmetrical positions.[13] For Socrates can say to the fool, "fool, you prefer the sensual pleasures to higher pursuits because you have failed to develop the capacity to enjoy the kinds of activities that I and my colleagues enjoy, hence your life style is inferior to mine." But the fool can reply, "Socrates, you have simply lost (or perhaps never had) the capacity to enjoy what I enjoy, hence all your effort and intellectual straining is wasted in that I can enjoy life just as much without so much effort."

While these arguments carry some force against Mill, neither, it seems to me, demonstrates conclusively that the judgment of experienced persons is irrelevant to value considerations. They do show that such judgments cannot be as conclusive as Mill thought, a decision from which there can be no appeal. Still, the judgment of experienced persons is a relevant consideration in determining whether or not certain pursuits are worthwhile. If those who engage in higher pursuits almost universally find such activities most satisfying, and other experiences quite shallow in comparison, then this should

be counted as some evidence for the higher pursuits. This is so since even if the judge's estimations have been colored by previous training, it does not follow from that fact that all of their preferences can be explained by education and training. It may well be that they have discovered something important for all humans. Those we are apt to describe as competent judges do have experiences others do not, hence, their preferences should be counted for something.

An interesting twist on this approach might be to appeal to those who perhaps could be described as 'incompetent judges.' Here the appeal is to those who lived a large part of their lives without any, or at least very much, experience with the higher pleasures; hence, they can be regarded as having failed to develop these capacities. We then ask, what is the judgment of these individuals? Do they express any regret for having failed to develop their capacities or feel as if they have missed out on valuable experiences? My suspicion is that at least some persons who would fall into this category would express regret.

Obviously it may be objected that since these individuals have not experienced both the lower and higher pleasures, that their judgments about preferences are irrelevant. But the point is that they have experienced life without the higher pursuits. So even if their testimony is only about where value does not reside, this at least gives credibility to the claim that value resides elsewhere; perhaps in the higher pleasures. This, combined with the fact that the competent judges do not experience regret at having developed themselves, provides a stronger consideration than an appeal to the competent judges alone.

McPherson makes an innovative suggestion for Mill to improve his argument, although the revised argument will not support as strong a conclusion as some would like. The revision involves shifting the perspective from the point of view of persons who have already formulated their primary desires and impulses establishing their plan of life (competent judges) to the perspective of persons who are just now deciding on which desires and impulses to cultivate. The argument then maintains that such persons exhibit a strong tendency to prefer to cultivate capacities for higher pleasures. This choice is referred to as a "metapreference," a preference for certain preferences. On this line of argument the metapreference is not based on expectation of more pleasure, but on the mere fact that people do in fact have desires for the higher pleasures.[14] I am not sure that this is an argument that Mill would be able to endorse in its present form. Mill evidently thinks that in order to instill desires in individuals the desires, at least in the early development, must be connected with pleasure or pain avoidance (although, as I have stated, this does not seem to be an important feature of Mill's view). However, even if the adjustment was made to make the metapreference on the basis of expected pleasure, the individuals at this stage of life, desire formation, must be quite young and, therefore, are either apt to be easily persuaded by their teachers, or if they ignore the advice of their teachers, they would appear to lack a solid basis for their rejection of such advice. It seems that persons in the 'metapreference stage' of development will either be unduly influenced by the socialization process, or their rejection of this process should be automatically suspect, since they lack broad-based knowledge and experience in life. What is still needed is a

justification for instilling certain preferences, and not others, via the socialization process.

There is another more forceful, and perhaps more promising, attempt to connect what is actually desired with what is desirable, thus providing an empirical and objective foundation, and justification, for inculcating some desires and not others. This argument is suggested by Kai Nielsen. Anthropologists, he observes, historically have been fond of noting the great differences that exist in the customs, beliefs and practices of the many societies that occupy this planet. More recently, however, some anthropologists have been more inclined to describe the similarities that exist between societies. So now we begin to find references to "universalities in human needs, potentialities and fulfillments" and sometimes reference to "common humanity," a universality of wants and desires. Apparently there is universal regulation in societies of such things as incest, property, lying and stealing. Also, there is universally a distinction between murder and homicide; human life and its preservation is seen as a good. Pain and frustration are universally viewed as bad. Moral codes exist to preserve the success of the society; and some anthropologists claim that values are based on universal human needs. But, Nielson asks, why should these needs be fulfilled? It is always possible to scrutinize a need, even if universal, and argue for its suppression rather than satisfaction. So cross cultural uniformity does not guarantee the success of objectivism any more than cross cultural differences entail relativism.[15]

Nielsen hedges a bit, and correctly I think, on the denial of a connection between the establishment of objectivism and uniformity in nature. He thinks that if all normal people desire X, it would be odd if X were not good or

desirable. It may actually be that Mill had something like this in mind in the opening argument of chapter 4 of Utilitarianism. I am somewhat sympathetic to this argument if supplemented with a qualification. As previously noted, it is a legitimate function of moral philosophy to question human nature, to ask if certain aspects of human nature should not be resisted. Hence, even if some desires are universal, it cannot be the bare fact of the desire alone that establishes a thing as desirable. For example, it may well be that there is a universal desire for revenge as a response to a felt injustice. But there are good reasons to forego revenge, suppress the desire, and submit instead to rule of law and impartial judgment. So here, a universal desire for revenge, if it exists, would not establish revenge as desirable. However, if there is a universal desire, as I suspect there is the desire to avoid pain, and reflection coupled with other relevant empirical considerations cannot produce any convincing reasons why the desire should be resisted or modified, there is a prima facie case that the thing desired is good or desirable. So, the relevant difference between establishing pain avoidance as desirable via the universal experience of mankind argument and establishing revenge (assuming it was a universal desire) by the universal experience of mankind argument is that, for the former, no reasons can be given for modifying the desire, while in the latter case, the desire for revenge, reasons for resisting can be given.

Mill himself recognizes the limits of the argument from desire or universal human experience. He advocates individuality as having intrinsic worth even though he acknowledges that this worth is not widely accepted. His claim is that those who fail to uphold individuality as valuable in its own right are mistaken.

This line of argument is, I think, made even more forceful by an account of value and rational action provided by Bernard Gert.[16] On this view reason is connected to actions in that irrational beliefs and desires are irrational because they are likely to lead to irrational actions, hence irrational action is primitive. Gert explains the view this way:

> I shall call a belief irrational if and only if (1) it is held by a person with sufficient knowledge and intelligence to know that it is false, (2) it is inconsistent with a great number of things he knows to be true, and (3) this inconsistency is apparent to almost all people with similar intelligence and knowledge. Thus an irrational belief must not merely be a false belief, not even an obviously false belief, but an obviously false belief held by a person who has sufficient intelligence and knowledge to know that it is false. I call such a belief irrational because holding it generally leads to what I call irrational actions.[17]

Based on this notion of rational belief, a useful distinction can be made between two kinds of rational beliefs, those required by reason and those allowed by reason. A belief is required by reason if it is irrational not to believe it. A belief is allowed by reason if it is neither required by reason nor irrational, so an intelligent and informed person could hold a belief that is allowed by reason to be either true or false and not be considered irrational. The sort of actions that Gert has in mind as being irrational are the following (these acts are irrational unless there is some unusual circumstance that justifies them): to take one's life, to subject oneself to pain or disability, to surrender liberty and opportunity. There are ,then, some beliefs about ourselves that are required by reason, they are: that we are mortal, we can suffer pain and disability, we can suffer loss of freedom and opportunity, and that we can be deprived of pleasure. It is also irrational to desire any of these without justification.

It may be argued that this is, in a sense, a weak view of rationality; that it will allow as rational many beliefs that really are not. But conceiving rational belief this way has the advantage of making a claim that a belief is irrational a very strong claim. It seems to me that this is the more important function of a concept of rationality, to lend a fair amount of certainty that those actions, beliefs and desires that are labeled irrational are really irrational. Further, if anyone thinks that any of the desires listed above as irrational are rational, or the corresponding actions that make the desires irrational are really rational, he need only consider what action he would take if someone he cared for a great deal began to express a desire for death, injury, slavery, pain, or loss of pleasures. One would, no doubt, fear for the sanity of anyone who engaged in attempts to carry out these kinds of acts. I think, therefore, that this view captures an intuition we all share about rational acts and desires.

Are there any values required by reason? As Gert points out, it is easier to define disvalue or evil than good. The previously listed irrational desires designate corresponding disvalue; so that "evil" is defined as the object of irrational desire. This means that the fundamental evils are death, pain, disability, loss of freedom and loss of opportunity. All rational men will want to avoid these evils. A rational desire is one that is allowed, not required, by reason. This conception of rational desire will allow quite a bit of divergence among positive values. While it is required by reason to pursue pleasure, opportunity and so forth, there is room for variance from individual to individual as to how much of these values is enough and exactly what form they should take. For example, knowledge, friendship, health, self development, artistic endeavors are all related to pleasure and opportunity,

but merely holding pleasure and opportunity as values does not commit one to an exact recipe for life. Neither does this view make value subjective; it merely allows choice within a limited range of rational values. Value then is the object of rational choice where intrinsic values are those required by reason in order to avoid intrinsic evil.

Let me now summarize my position. The most important aspect of individuality is that the person who is characterized as possessing this trait is a person with his own desires, views and ambitions. They are the ones he wants to have; his personality is his own. To promote individuality is to promote a vision of humanity as a being capable of choosing his own personality and character, who has a concept of himself as an intelligent creature. It seems to me that it is plausible and appealing to describe mankind as a progressive being, one capable of intellectual and moral progress, and as a being capable of defining for himself what that progress entails. Mill apparently uses the phrase "progressive being" to refer to potentialities for human growth and development. In Mill's usage, individuality refers to a developed individual, one who has realized, at least to some extent, his potential as a human being. The phrase "intellectual and moral nature" and the phrase "mental well-being," which are scattered throughout On Liberty, are apparently used to capture the idea of the progressive being who is progressing toward fulfillment and, thereby, excellence. The claim is that we know how humans should develop, we know what is good for us.

There is a connection between intellectual progress, moral progress, well-being or happiness and rational desires. It is fairly clear what intellectual progress is, movement toward a more knowledgeable and wiser race of persons. Moral progress is more difficult to define and to defend.

Moral progress is possible because there is an objective criterion for good and evil. As a progressive being mankind is capable of increasing the good aspects of his environment and decreasing the bad, hence increasing his well-being. But more importantly, he is capable of improving himself. The objective criterion that defines progress and improvement is established via three arguments. First, the argument from both the competent and incompetent judges. The appeal to the experience of these kinds of persons is at least a consideration indicating that the development of intellectual capacities and tastes is preferable to not developing such tastes. Second, the argument from the universal experience of mankind which suggests that such things as pain and frustration are undesirable, while rule of law and cooperation among individuals is preferable to anarchy. Third, the argument from irrational action which shows that certain kinds of desires just are irrational. This I take to be a fundamental datum of human experience, or what Mill might refer to as one of the "ascertained results of human experience." Man as a progressive being is capable of recognizing the difference between irrational, hence undesirable, actions and those that are rational. This being is capable of charting his own course in life, capable of working out his own view of a happy and satisfying life. Furthermore, a positive conception of happiness is person unique.

This last comment will be made clearer by a distinction between two kinds of factors, those that make us happy and those that make us unhappy. Perhaps it is commonly thought that happiness and unhappiness are mutually exhaustive, but this does not seem to me to be so. The factors that make a person happy are different factors from those that make one unhappy. There is, I think, a parallel here that will help clarify this point. Studies by

Frederick Herzberg indicate that the factors for job satisfaction and job dissatisfaction are different; that is, those things which prevent job dissatisfaction (for example, clean work and good pay) do not lead to job satisfaction (an example of a job satisfaction factor is thinking that the work one is doing is important). Hence, it makes sense for someone to say of his job that he is not dissatisfied with it, but neither is he satisfied with it, that is, he does not find it particularly satisfying.[18]

I maintain that an analogous condition holds for happiness. The factors that lead to unhappiness are those associated with irrational desires, death, pain, disability, loss of freedom and loss of opportunity. But merely avoiding these does not guarantee one a happy or meaningful life. Happiness is a condition that may result from satisfying those desires that fall into the class of rational desires. But there is no certainty here, for we are often disappointed with obtaining our goals. Further, it cannot be determined without consulting each individual what sort of life will make him happy. We are on firmer ground when making claims about those experiences that are likely to lead to unhappiness than when making claims about experiences that lead to happiness. In addition, the most troublesome kinds of moral arguments are those trying to show that one among competing goods is better, or one among competing evils is worse.

Individuality is important because each person must conduct his own experiments in living and decide for himself what course of action best suits him. It is not merely that individuality leads to or maximizes the chances for happiness, rather it is as Mill suggested, an essential part of happiness. Individuality is as much being something as doing something; it is being a person of a certain sort, the person I desire to be. An important part of life

is spent in determining, choosing, and planning. This is an intimate part of what it means to be a person and is, at least in part, happiness itself. It is basically satisfying for most persons to be the author of their own existence, and this is closely tied to a sense of worth and self-esteem.

It should now be evident that there are three lines of argument against paternalism based on individuality. First, one could claim that individuality is an integral part of being a person. Thus, it is axiomatic that we ought not interfere with the free expression of personhood which is purely self-regarding. The language of rights could be invoked here. Everyone has a fundamental right to act unrestricted in self-regarding conduct . All strong paternalism impairs individuality in some way, either by coercion, deceptive manipulation or physical restraint. The right of a developed individual is absolute in these matters. Consequently, the proper justification of strong paternalism is to establish that the recipient of the paternalistic interference is not really developed in the appropriate sense. In other words, the recipient is not competent either due to ignorance or mental impairment of one sort or another. Perhaps another way to capture this strategy for developing antipaternalism is to argue that the position is analytically true. Once the nature of individuality is understood, that a person properly described as developed is one who is fully competent, has charted her own course in life and does not welcome interference, then it is evident that one ought not coerce such an individual on purely self-regarding grounds. It is impossible to believe both of the following: that person P is properly characterized by the term "individuality" and person P should be coerced for her own good. However, this is not a useless analytic truth. Perhaps it belongs in the same category as claims like, "Always act in accordance with right reason" and "Do

good and avoid evil." These truths, while not immensely helpful, do point out a direction for proper action. The first one designates proper action as that which is based on reason; thus ruling out as illegitimate appeals to prejudice, false beliefs and so on. The second espouses what might be described as the moral point of view. Admittedly, neither claim is rich in content, but they give us a starting point for justifying our actions as rational or moral. In the case of paternalism the first step in justification is to show that the contemplated action does not fall within the boundaries of the illicit triad, i.e. paternalism that is coercive, strong and direct.

The second line of argument based on individuality maintains that individuality is an intrinsically desirable state for human beings. To mature to this state is to be a developed, rational and capable individual with regard to managing and directing one's own life. Further, the developed individual will have a sense of this development, a self-awareness, that is associated with a sense of worth and self-esteem. Strong paternalism conflicts with this state of individuality. The paternalist in effect says of an individual, in this situation you are not able to judge your own interests, someone else is. If this is true, and no doubt sometimes it will be, it needs convincing evidence. The evidence will be tantamount to showing that the paternalism is weak, not strong. In the case of strong paternalism the offense is especially severe, since a developed individual is treated as though he is not, which is an insult to that person's sense of worth or esteem. The argument further maintains that living a life free of paternalistic restrictions, that is, living as an independent operator in the world, is immensely desirable; perhaps even of supreme value. So, even if there are competing values, e.g., safety, when the disvalue of the coercion is factored into the moral equation, the balance is

always in favor of allowing unrestricted expression of individuality. Thus, coercive strong direct paternalism is always wrong.

The third line of argument against paternalism is that the paternalist often claims to know what she in fact does not know, i.e., what is best for the individual. If one interferes with a suicide, where the motive for the suicide is to avoid a brief continued existence ending in a painful death, one is interfering with a judgment between competing evils where one evil is accepted in order to avoid another. There is no clear best course of action here and, hence, no solid grounds for the interference. In other words, the paternalist often claims to know what, in a given set of circumstances, he cannot know; that, for example, it is better to live with severe pain than to die. It is in this kind of case that the paternalist forces his preferences on others in a particularly offensive way.

NOTES

[1]Steven Lukes, Individualism (New York: Harper and Row, 1973), p. 6.

[2]Victor W. Sidel and Ruth Sidel, "Medicine in China: Individual and Society," The Future of Individualism, The Hastings Center Studies 2 (September 1974): 23-24.

[3]All references in the following paragraph based on: John Stuart Mill, On Liberty, ed. Elizabeth Rapaport (Indianapolis: Hackett Publishing Company, Inc., 1978).

[4]Isaiah Berlin, "John Stuart Mill and the Ends of Life," in Four Essays on Liberty (New York: Oxford University Press, 1969), p. 179.

[5]Robert F. Ladenson, "Mill's Conception of Individuality," Social Theory and Practice 4 (1977): 167-182 passim.

[6]Mill, On Liberty, p. 53.

[7]Berlin, "Mill on the Ends of Life," p. 181.

[8]Adina Schwartz, John Stuart Mill (Ph.D. dissertation, The Rockefeller University, 1976), chap. 2 passim.

[9]Wilhelm von Humboldt, The Limits of State Action, ed. J. W. Burrow (New York: Cambridge University Press, 1969), p. 16.

[10]Mill, On Liberty, p. 57.

[11]von Humboldt, The Limits of State Action p. 16.

[12]John Stuart Mill, Utilitarianism and Other Writings, ed. Mary Warnock (New York: New American Library, 1962), p. 259.

[13]Michael S. McPherson, "Mill's Moral Theory and the Problem of Preference Change," Ethics (January 1982), p. 261.

[14]Ibid., p. 262.

[15]Kai Nielsen, "Ethical Relativism and the Fads of Cultural Relativity" Social Research (1966), pp. 531-51 passim.

[16]Bernard Gert, The Moral Rules (New York: Harper and Row Publishers, 1970), chap. 2-3 passim.

[17]Ibid., p. 165.

[18]Frederick Herzberg, Work and the Nature of Man (Cleveland, Ohio: The World Publishing Company, 1966), pp. 72-73.

CHAPTER III

AUTONOMY

Perhaps the clearest and most direct explanation of the meaning of "autonomy" is captured in its literal root meaning, self-rule or self-governing. The earliest usage of this term that I know of was to refer to a Greek city-state that made its own laws, i.e., was not under the dominance of a foreign power.[1] The advantages and desirability of being in an autonomous state are obvious; the citizens do not pay tribute to another government, can make laws and social arrangements to suit their own purposes and conception of well-being, citizens are not forced to participate in military alliances not in their own interests and the citizens gain a sense of nationality, security and independence. It is easy to see the attraction of attributing an analogous attribute to individuals who are self-directing, who determine their own fate free of certain restrictive influences. What is not so obvious is exactly what the appropriate description of the autonomous individual is.

My purpose in this chapter is fourfold: first, to provide what I take to be the appropriate description of the autonomous individual; second, to argue that Mill's concept of individuality as I developed that concept in chapter 2 of this paper is the same concept as autonomy; third, to address an issue raised in chapter 2, that is, to explain how individuality and autonomy are compatible with an education process that inculcates certain values; and

fourth, to explain further how it is useful and plausible to construe paternalism as a violation of autonomy.

I

Rather than define "autonomy," I think it is more useful to simply describe its relevant features. The intuitive notion I am attempting to cash out is the autonomous individual as self-governing or self-directing. It seems to me that this notion is captured by what might appropriately be described as the five dimensions of autonomy. The five dimensions are awareness, cognition, intentionality, independence and instrumentality. Hence, autonomy is not an all or none phenomenon, but is possessed in degrees depending on how one scores on the various dimensions. Also, an individual can be autonomous in one sense (dimension) while not in others. Further, one can, and often does, trade one dimension of autonomy for development in another. I shall now attempt an explanation of what I have in mind for each dimension.

The dimension I call awareness includes self-awareness or self-consciousness as well as awareness of the possibilities and realities that exist in the external environment. To be autonomous an individual must be aware of himself as an autonomous agent and also aware of the possible courses of action and opportunities available. Hence, a certain amount of imagination and creativity are required in order to see the possible kinds of interaction with one's environment that are open. Further, awareness incorporates the ability to integrate different courses of action and see how one course affects another, how some choices open new possibilities while closing off others. For example, the decision to enlist in the Army closes certain

opportunities until the period of enlistment terminates, while it opens other possibilities, perhaps travel and achievement of a sense of adventure. The less one is aware of herself and how the environment, social, political, family, physical and so on, influence her, the lower she scores on the awareness dimension.

The second dimension of autonomy is what I call the cognitive dimension. This dimension includes what might be described as intelligence and use of human reason. To be autonomous a person must be rational, able to connect ways of achieving goals and purposes with the means to these goals and purposes. This individual must understand what her interests are. The autonomous person must have at least some ability to gather information and evidence, determine if it is relevant to the issue or decision at hand and provide some logical evaluation of what conclusions follow from the gathered information. I understand this aspect of autonomy to include rational reflection, some ability to conceptualize; in short, autonomy requires a minimal degree of intellectual competence. There is, no doubt, overlap between this dimension and awareness. The overlap is indirect in that the more intelligent a person is the more apt she is to be creative in thinking about her choices in life.

By intentionality, the third dimension of autonomy, I have in mind purposive behavior, behavior directed toward a goal. Obviously this dimension overlaps a bit with the cognitive dimension, since part of what is included in the cognitive dimension relates directly to means-end relationships. However, intentionality emphasizes, not merely intelligent pursuit of ends, but formulation of ends themselves, to consciously aim at some goal. The autonomous individual must consciously intend her action, choice or decision.

Evidently this dimension also overlaps with awareness, for if the really important choices about our life, what education to pursue, what occupation to have, whether or not to marry and so on, are to be autonomous they must be intended and the individual must be aware of the likely consequences of such endeavors.

The fourth dimension of autonomy I call independence. By independence I understand a kind of psychological power to divorce oneself from certain internal (drives, instincts, desires) or external (societal or family) influences in order to assess one's beliefs and desires. Additionally, independence includes the capacity to adopt a different perspective from the one presently held. An individual who scores high on the independence dimension of autonomy is self-directive in a way that at least some animals are not. Consider, for example, the migratory habits of some birds. There is a sense in which the behavior pattern of these birds is self-directive; the sense is that there is no external person or force causing them to migrate. The fundamental cause of the migration is internal. I say fundamental cause here because there may be external cues which trigger the migratory response. But the urge to migrate is internal, self-initiated. Yet this is not a self-determined or autonomous decision on the part of the animals. The reason that instinctual behavior cannot be autonomous is that the animals, at least in these instances, lack what I call independence. They cannot, generally speaking, resist these urges or instincts; they lack that capacity. The autonomous individual is independent of this kind of force, internal or external in its origin, that is, free of neurotic obsessions and compulsions, and able to recognize that many of her basic desires are inculcated by formal education and parental guidance. The person who is independent is able to

develop new and different interests, goals and desires than the ones she has been taught.

Here, again, we encounter overlap between the dimensions. In order to be independent a person must be aware that other life-styles exist than the one she currently subscribes to, and be intelligent enough to pass some judgment on her own preferences. So the autonomous individual has the capacity to change her basic plan or philosophy of life as reason and intelligent evaluation recommend to her. This sometimes will require a certain amount of courage and fortitude, as in cases where a person advocates unpopular views; for example, withholding income tax for moral reasons, say, because tax revenues are used to finance abortions for welfare recipients. This indicates that lack of courage too can impair autonomy.

Perhaps another illustration will be helpful in clarifying what I have in mind by independence as a kind of psychological power or control over oneself. A standard move in a counseling situation goes as follows: a client complains to the counselor that other people cause her to be extremely angry, so much so that she frequently goes into a rage. The counselor may merely point out that the client has given, perhaps unintentionally and unknowingly, others this power over her, and since she has given them this power she can also take it away. The counselor may point out that it is the client who is responsible for the rages, not other people. Often this simple point frees individuals and allows them the power to control themselves in the way that they wish. Thus, the individual who scores high on the independence dimension is aware of certain forces that influence her attitudes, recognizes her responsibility for what and who she is and has the psychological power to be her own person.

The final dimension that seems to convey a significant dimension of autonomy I call instrumentality. By instrumentality I mean both the liberty and ability to act in our environment; so instrumentality is a kind of power or influence. To be autonomous an individual must have some influence over the external world, the physical power to cause things to happen in the world. The possibilities for the power I have in mind here range from simply being locomotive to possessing great influence over the world via political or military force. Completely powerless individuals are unable to carry out their simplest wishes on their own and, hence, have autonomy restricted. In addition, recognition of our powerless, or relatively powerless, condition will undoubtedly have an influence on our preferences and most desired life style. The amount of power we have will likely encourage us to modify our expectations and aspirations. Consequently, using this dimension as a measure, things like poverty and physical disability impair autonomy.

There is, I think, a difference between this dimension and the other four that should be noted. It is, in general, desirable to maximize the other four dimensions. That is, it is generally desirable to be as aware as possible, as independent as possible and so on. But clearly it is not desirable to be as powerful as possible. There is probably some truth to the saying, "power corrupts and absolute power corrupts absolutely." It may have been this sort of thing that Mill had in mind when he suggested that there could be too much individuality in society, i.e., that some individuals could be too powerful for both their own and society's good. Mill seemed to think that this is most likely in a society's early development; there some individuals may have too much influence, too much of their own way.

The way that I have developed autonomy, as having five dimensions, is, I think, useful. First, it shows that autonomy is not a simple thing that some persons have while others do not. Rather, nearly everyone is autonomous in some ways and to some degree, but not in other ways. Second, it allows us to make sense of the claim tnat we sacrifice autonomy for the sake of autonomy. The action of Odysseus in chapter 1 can now be explained as his decision to sacrifice some power, in the form of liberty, in order to achieve more independence. Perhaps it would be argued that he was not really getting independence, since he was using physical restraint he was not gaining in psychological capacity to control his unwanted desires. I think that it might be plausibly argued that physical restraint is one way of making a beginning in control of unwanted desires. Perhaps a clearer case is that of an alcoholic who commits herself to an institution in order to be cured. The alcoholic lacks independence, so she sacrifices some liberty, hopefully temporarily, to gain the independence she needs. The third advantage of construing autonomy this way is that it demonstrates the close connection between autonomy and personality, mental health and self-esteem.

One of the chief characteristics of mental health is self-esteem, and autonomy is clearly related to self-esteem, to an individual's self-concept and to the psychology of personal adjustment. Psychologists tell us that self-esteem is largely the product of the way we are treated, especially early in our development, by significant others, parents, peers and perhaps teachers. To be treated as an autonomous being fosters high self-esteem, to be deprived of autonomy conveys the idea that there is something defective about us. For example, one study involving two groups of parents, one with high-esteem children and the other with low-esteem children, revealed that

when asked if they agreed or disagreed with the statement "A child has a right to his own point of view and ought to be allowed to express it" that 93% of the parents of high-esteem boys agreed, whereas only 9.7% of the parents of low-esteem boys agreed.[2] The parents who agreed with the statement are those who, on my view of autonomy, encourage and extend independence, and possibly awareness, to their children.

There is reason to suppose an even more dramatic connection between autonomy and mental health. One psychologist puts the connection this way:

> We have seen that as the child develops, his behavior is continuously less passively and immediately reactive to the environment, progressively more actively directed according to his own plans. In a manner of speaking, he carries more weight in the determination of his behavior. It is, in my opinion, primarily this general development of the child's autonomy, in which activity will have played its part, rather than the direct experience of effective action, that is the basis of a developing sense of personal significance, of "being somebody," and ultimately of personal authority and self-respect. The child feels more significant because he has actually become so, not merely in the sense of being technically competent but in the deeper and more intrinsic sense of becoming an independent agent in the world....But if the development of autonomy has gone well, self-respect will not depend primarily on what one can do or how well one does it, will not require special justification, but will simply reflect what one is or is becoming-an autonomous human being.[3]

He then makes an even stronger connection between autonomy and mental health. He says, "In one form or another, a sense of insignificance or inferiority is probably a part of all neurosis. All neurosis involves some impairment of autonomy and, therefore, some impairment of self-respect."[4] Given that this attribution of value to autonomy is correct, and if the way I have explained autonomy is plausible and useful, as I think that it is, then it is evident that autonomy is necessary to be a wholesome and psychologically

healthy personality. Surely it is evident that some autonomy is necessary to have any personality at all.

II

In this section I shall explain how and in what sense individuality, as developed in chapter two, is the same thing as autonomy. We must keep in mind that the key notions in individuality are development and having one's own preferences, desires, tastes and so on. I intend to show here that whatever can be sensibly said of autonomy can be sensibly said of individuality and vice versa. There are a number of actions, conditions, interferences that will obviously impair either the development or the expression of autonomy; similarly, there are a number of actions, conditions, interferences that will foster the development or the expression of autonomy. My contention is that whatever fosters or inhibits autonomy also fosters or inhibits individuality.

First, conditions that impair reason and a person's capacity to critically reflect on choice diminishes autonomy. For instance, decisions made under the influence of drugs that reduce a person's capacity to think clearly render the decision, at the very least, not fully autonomous. Likewise, brainwashing robs a decision or choice of its autonomous characteristic. In a similar fashion, decisions made under the influence of drugs or brainwashing cannot legitimately be interpreted as an expression of a person's individuality. In order to count as an expression of individuality a decision should reflect one's own desires and wishes. Clearly brainwashing, if successful, causes individuals to reflect the desires and wishes of someone else. And whatever interferes

with the rational process of evidence gathering, weighing and deciding interferes with the formulation of one's own desires and opinions.

It may be argued, in fact Gerald Dworkin does so argue,[5] that if a drug addict wants her addiction, or if someone wants to become a drug addict, that this want would represent an autonomous choice. It seems to me that it would not, at least not in the full sense of the word. To desire to be enslaved, to another person or to an unquenchable craving, is prima facie irrational in the same sense in which the desire for death and pain are prima facie irrational; this is a crazy desire. A person may want the expected pleasure that may result from drug usage, but she cannot rationally want the pain and misery that is typically caused by drug addiction. This sort of desire indicates a low score in the cognitive and awareness dimensions of autonomy and, hence, the decision is not fully autonomous. Neither would such an irrational desire represent the expression of individuality, for one of the characteristics of the progressive being, the being who is appropriately described as having individuality, is an intelligent understanding of the world. The desire to be a drug addict indicates that intelligence is lacking.

Another kind of activity that inhibits autonomy is deception and manipulation. It is easily seen how these actions affect autonomy, since they interfere with the normal decision process. Specifically, deception and manipulation reduce the individual's awareness in certain respects as to how things really are in the world. Consequently, to put it in terms of possible worlds, the individual makes her choices for a different possible world than this one, for the close world that has been constructed for her by the deceiver or manipulator. Since the choice or decision made is for some other

possible world, such a decision represents an expression of autonomy and individuality in that world, but not in this world.

Other activities deracinate autonomy, things like hypnosis and subliminal advertising. Both of these kinds of activities disguise from an individual the real motive for her action, desire or belief, thus not allowing the individual fair opportunity to reflect on her wants and desires. Specifically, these interferences seem to affect three of the dimensions of autonomy, awareness, intentionality and independence. Likewise, if the source of the motive is external to the individual, as it is in post hypnotic suggestion and subliminal advertising, the motive for action cannot properly be said to be one's own, and, therefore, is not a genuine expression of individuality.

Obviously things like blind allegiance to authority or unconscious adherence to customs impair autonomy. The person who surrenders her will to an authority is not in control of her life, the authority is; similarly, unquestioning and unreflective acceptance of customs denies autonomous action. Individuality is likewise lost to authority and custom. Indeed, following custom for custom's sake was one of Mill's chief worries.

Finally, as described previously, a certain amount of power, the ability to influence the world around us, is required for autonomy. This of course captures an element of Mill's main argument for liberty of action: liberty is required to foster individuality. Persons who are at a stage in their life where they are making critical decisions about what long term goals to pursue, what plans to make for their life, need free access to information, but also need the liberty and ability to conduct some experiments in living, they need certain kinds of experience that can only be available in an environment that allows and encourages liberty of thought and action. It is

through open exchange of information and personal experience that individuals can properly decide what sort of life best suits them. So it seems clear that restrictions in what I have termed the instrumentality dimension of autonomy restricts individuality.

In general, increased awareness of the forces that influence our wants, desires and preferences, along with increased awareness of the options open to us, strengthens the sense in which a decision is autonomous. It should be clear by now that it also strengthens the sense in which the decision is one's own, which means the decision is in a strong sense an expression of individuality.

III

Now I want to focus attention on the third issue of this chapter, that is, to show how it is possible to have an educational system that attempts to instill values and not significantly diminish autonomy. This issue is closely related to the dispute between the liberal ideal of education and the progressive ideal of education. By the liberal ideal of education I understand the view that autonomy is taught and is the end product of education; and that this product is produced without much exercise of autonomy while under the control of the educational institution. The progressive ideal of education, as I understand it, entails teaching autonomy by allowing and encouraging the exercise of autonomy.[6] While it is not my intention to defend the liberal notion of education for autonomy in its full sense, I am in sympathy with the view that autonomy is the end product of education, and that certain values must be instilled. The age at which autonomy ought to be granted I suspect

should vary widely depending on the individual child. Further, on my conception of autonomy, it is possible to grant autonomy in degrees and in different ways, along different dimensions. The problem, then, is that if children are encouraged to form certain desires while avoiding others, are told some are virtues and some are vices; if they are taught a certain conception of rationality as the measure of the value of ideas; if, in other words, they are taught what Mill describes as the "ascertained results of human experience," then in what sense are the products of this education system really autonomous? In what sense are the desires of children educated in this fashion their own? It is tempting to say that such persons are merely expressing the intellectual and moral values they have been taught, and that, while they may use these values to formulate otherwise autonomous choices, they are not autonomously expressing these values and desires themselves.

It strikes me that Mill's claim that we ought to teach our children the ascertained results of human experience, is an interesting and fruitful claim. Just what are the ascertained results of human experience? I would argue that the conception of irrational action, as defined in the previous chapter, sets out at least some of these results, i.e., pain, death, loss of freedom and so on are recognized by all rational men as evils to be avoided, and that this is known via human experience. Anyone who desires such ends without special justification is irrational, really insane, in need of psychological therapy. The question I want to raise here is this: if a society teaches its children a notion of rationality, say the one I have advocated here, along with a corresponding moral system aimed at preventing the evils identified by the conception of rationality, and further instructs these children in the fundamentals of logic

and reasoning, does this violate or diminish the autonomy of those who are educated by this system?

There are those who think that it does, that there is some inconsistency in advocating autonomy and teaching what might be described as forms of knowledge, a particular conception of rationality. J.C. Walker seems to think that teaching a view of rationality creates a big problem, especially for the liberals, but really for anyone who advocates a view of rationality as fundamental and the acquisition of which is one goal of an educational system. His argument is that it is impossible to dissent from the view without automatically, by definition, being irrational. The problem presented by Walker is essentially this:

> This last point should loom as a serious worry for LRs (though apparently it doesn't) since, if once again we may take Peters as our guide, the "reconceptualization" of "reason" necessary to avoid Platonic elitism and dogmatism entails that certain LR tenets are not open to question since any "rational" person is committed to them and rejects them only on pain of becoming irrational. This act of theoretic authoritarianism is performed by that LR stalwart, FK. For to become a rational person it is necessary to be initiated into the LR forms under the authoritative guidance of educators. Rational persons autonomously submit themselves to these (and other) norms of reason, albeit after being heteronomously habituated into living according to them. We are back with the development/exercise dichotomy and the paradox of education.[7]

The "paradox of education" that Walker refers to is the notion that in order to develop autonomy our educational systems must deny autonomy during the educational process. But his criticism of the approach I have adopted in defense of autonomy and individuality runs deeper. He alleges that by incorporating a view of rationality into these concepts (autonomy and rationality), anyone who disagrees is, by definition, irrational.

In regard to this point, there are two questions that need to be answered; first, is this allegation true? And second, if it is true, is it necessarily a bad feature of a view of rationality?

In reply to the first question, it is not clear to me that the allegation is true. There are, of course, different conceptions of rationality. On the view I have advocated there is room for a number of disagreements among beliefs allowed by, but not required by, reason. So among rational persons it is allowable to have quite different philosophies of life, beliefs about God, beliefs about the good life and so on. It is true, however, that it is required by reason that all rational men view the desire for pain as irrational, hence all rational men must believe pain is evil. But it is not true that all rational men must accept this particular conception or approach to rationality. That is, it is not true that all rational persons must agree that the most plausible conception of rationality is to rest this concept on irrational action and make distinctions between beliefs required by reason and beliefs allowed by reason. I take it that the fact that pain is undesirable is a fundamental datum of human experience. Gert built his conception of rationality, the concept I am advocating and defending, on this idea that there are fundamental data of human experience. Mill too seems sympathetic to this idea. But it is not required by reason that all rational men accept this view of rationality, or reject it on pain of being ipso facto irrational. However, it is required by reason that all rational men accept that the desire for pain for pain's sake is irrational. It seems that there is a sense in which Walker's allegation is true, and a sense in which it is false. It is false that dissent from a particular conception of rationality makes one irrational by virtue of that dissent. But it

is true that any view of rationality must square with the facts of human existence, although it may provide a different account of those facts.

In regard to the second question raised by Walker's argument I would offer this reply. If the answer to the first question was a clear yes, then that would be a serious defect of the view of rationality. But the answer to the first question is a qualified yes, it is true that a conception of rationality must take account of the fundamental data of human experience. But I cannot see why this should not be so. This just means that some conceptions that dissent from this view of rationality are plausible and some are not. In other words, the intuition that pain is intrinsically undesirable (and other intuitions as well) act as a test for the plausibility of an account of rationality. If a particular account does not square with certain intuitions we all share, this counts as a prima facie case against the account. This approach, however, does not have the undesirable consequence that Walker alleges, i.e., either agree with my concept of rationality or disagree on pain of being irrational.

I think that it will be useful in arguing my case that one can instill autonomy in children without violating autonomy to recall a parallel Mill suggested between having our own understanding and having our own desires. To have my own understanding it is not required that the understanding I have be invented by me, discovered by me, or different from everyone else's. In fact, if my understanding is correct, it will be very much like all other correct understandings. For example, I have my own understanding of the Pythagorean Theorem if I can state it, know when and how it applies, can make correct calculations with it and, perhaps, am able to teach or explain it to others. It is not further required that this understanding not have been explained or taught to me. The same is true for my desires. Suppose a desire,

say, the desire to adopt a benevolent attitude towards others is taught to a child; then at the appropriate age, and this might be quite young, the rationale for this preference is explained to the child. As the child grows older and more mature, the explanations can get more complex, considering alternative points of view, and, therefore, more complete. As long as all the content of intellectual and moral instruction is open to question, the maturing child is free to reject the advocated view in favor of one of the alternatives, or one of her own design. It is in this sense that the acceptance or rejection of benevolence as a preference is her own, and, hence, autonomous.

It may, however, still be objected that as a psychological fact early training has a more forceful impact on preference formation than later reflection and criticism. This may well be so. There will no doubt be individual differences here; some individuals find it more difficult to rid themselves of unwanted early formulated prejudices than others. If this is so, perhaps the purely autonomous creature exists only in theory, since children must be taught something. But I do not think that this is a big problem for developing autonomous human beings. Recall the five dimensions of autonomy that I have suggested; education will potentially enhance awareness, intentionality, cognition, and to some extent the instrumentality dimension. The only dimension that might be impaired by education is independence, and this will vary among individuals and educational systems. As we know, some persons are naturally more independent than others. But in an educational system that encourages independence, even though some impairment may result in spite of the best efforts, whatever impairment results is likely to be minimal and not a serious threat to autonomy; or perhaps I should say, this is as close to autonomy as one can get.

IV

In this section I want to focus on clarifying how construing paternalism as a violation of autonomy is plausible and sheds light on attempts to justify paternalism. Once it is understood how autonomy is a broad and far reaching multi-dimensional concept, it is not difficult to comprehend how the various means or methods (coercion, deception, manipulation and so on) employed by the paternalist impair the autonomy or autonomous control of an individual's life. In the case of coercive strong direct paternalism the paternalist fails to show proper regard for the values, abilities, capacities, wants and desires of an autonomous individual. He fails to show proper respect for autonomy. This type of paternalism is never justified. The reasons why this is so are identical to the three reasons based on individuality that I outlined at the close of chapter 2. First, the existence of autonomous persons establishes rights; persons have a right to not have their autonomy restricted for purely self-regarding reasons. Second, living as an autonomous individual is an immensely satisfying existence; coercive strong direct paternalism acts as a countervalue to such an existence. And, finally, to engage in coercive strong direct paternalism is to enforce one person's preferences on another person in the absence of decisive evidence that either set of preferences is superior to the other.

"Coercive strong direct paternalism is always wrong" provides a starting point for justifying paternalism. If one employs coercive methods in paternalism, then the individual concerned is not a willing recipient of the 'benefit' being bestowed upon her. If the paternalism is strong, then the

individual is in the relevant sense competent, informed, aware, independent and so on. Hence, there is no justification for the interference. This would indicate that to legitimately treat a person paternalistically we must as a minimum believe that: (1) we are not coercing, or (2) the person is not really fully competent or aware of what she is doing, not fully autonomous, or (3) we are not directly interfering with the autonomy of the agent.

Thus there are three lines of justification for paternalism. First, show that the means employed to effect the benefit are not coercive; and then argue the merits of paternalistic interference by showing that the advantages of the benefit gained outweigh the disadvantages of not behaving paternalistically. This argument, to be successful, would need to consider the nature of the violation of autonomy. The reason some non-coercive methods of paternalism are exempt from the prohibition is that they are essential to the paternalistic act itself in a way that coercive methods are not. Persuasion, for example, is always an alternative to coercion. But in some instances, e.g. death bed deception, the intended benefit may not be achieved by any other means. The second line of justification for paternalism is to show that the paternalistic interference is weak, that the individual being coerced, manipulated, deceived and so on is not competent in the relevant sense. Perhaps we need a notion of moderate paternalism, for not all paternalistic acts will fall clearly into the category of strong or weak. In general, the less autonomous the recipient the stronger the case for paternalism. The presumption is that paternalism violates autonomy in a serious way. Justification on this line of defense consists in showing that the presumption is false. The third line of justification is to show that the paternalism is indirect. Many of the cases appropriately described as indirect,

e.g., minimum wage laws, laws establishing a maximum interest rate that may be charged for loans, laws requiring that safety equipment be used for certain kinds of jobs and so on, should be viewed as preventing one individual from harming another; preventing, at least in some cases, exploitation. However, none of these three lines of justification, by itself, is a sufficient condition for justifying paternalistic interference with autonomy. That is, it is not sufficient to say, "the paternalistic act is not coercive (direct/strong), therefore it is not morally objectionable.

In chapter 1 I reviewed a number of cases which are alleged to be paternalistic while not restricting liberty. There I argued that liberty, in the form of autonomy or individuality, is always impaired in strong paternalism. So now, rather than review a new batch of cases, I want to consider an accusation by Douglas Husak that it is not useful, or even defensible, to define paternalism in terms of violations of autonomy. Husak attacks the view that I am defending on three fronts. First, he claims that attempts to employ the concept of moral autonomy to set a limit on acceptable acts of paternalism have failed. Second, he argues that various formulations of autonomy are not useful to the antipaternalist. Third, he attempts to show that the explanation of paternalism as an affront to the dignity of persons as somehow captured by moral autonomy is not plausible. In general, Husak claims that the nature of the connection between autonomy and antipaternalism has not been made precise.[8] I am in some agreement with this last claim, however, there is, I believe, some confusion in Husak's analysis of this issue.

Husak concentrates his attack on the failure of past formulations of paternalism as violating autonomy on Dworkin's formulation. He takes Dworkin

to be advocating autonomy as a prima facie case against paternalism. Instances of justified paternalism are distinguished from unjustified instances by some kind of consent criterion. Husak finds this criterion paradoxical, for he asks, "How could one consent to an interference?"[9] I believe that Husak is right in criticizing actual consent theories this way. Consent may justify certain kinds of involvement in a person's life, involvement that under appropriate circumstances could aptly be characterized as interference with autonomy. But if Smith has Jones' consent to behave in restrictive ways towards Jones, Smith may well be justified in her action, but she is not acting paternalistically toward Jones. Rather, consistent with my explantion of paternalism from chapter 1, she is acting fraternalistically.

However, as Husak claims, it really appears that Dworkin is arguing from the position of hypothetical consent. Thus, the paradox Husak raises against consent theories is resolved, i.e., the interference with autonomy is prior to consent. This may solve the paradox, but it still seems to me that actual consent theories are wrongheaded for the reason I just stated, consent indicates a fraternal action not a paternal one. In addition, there are other problems for actual consent theories. If Smith claims to know better than Jones what is actually in Jones' own interest, what difference does consent make to the validity of this claim? Also, there will be cases where Jones does not know his own interest and is in no position now, and perhaps never will be (as in some coma cases), to give consent. The consent theory breaks down in these cases.

Husak offers the following kind of case as a further difficulty for the Dworkin line on justifiable paternalism. Suppose a physician is confronted with an unconscious patient in need of a transfusion. The law permits physicians to

treat patients and recover fees from them when it is reasonable to believe the patient, if conscious, would consent to the treatment. Further, suppose that the doctor believes the patient would consent to the transfusion, then administers the transfusion only to later discover that her patient is a member of a religious sect that forbids transfusions; hence she would not give her consent. Was the patient's autonomy violated? Husak says: "It seems likely that the moral autonomy of the patient has been violated, even though the physician was permitted (or perhaps even obligated) to render assistance."[10] Husak's point is that even reasonable belief that consent will be forthcoming does not prevent violations of autonomy.

Is Husak right in contending that this person's autonomy has been violated? I think not. It does not seem to me that this person's autonomy has been violated any more than if she was in a coma. If autonomy was violated then one of the dimensions of autonomy must have been impaired. But which one? Awareness was not reduced, since obviously the woman was not aware of anything. Neither was her independence, cognition or power reduced. This case is not like that of the Jehovah's Witness from chapter 1; there the desire of the patient was known prior to unconsciousness, so his liberty was violated. Autonomous control of life was lost by the patient in the present case when she became unconscious. So whatever caused her to become unconscious caused the loss of autonomy, not the action of the physician. The physician was not behaving paternalistically, but merely fulfilling her obligation as a physician. Again, this looks like a case of fraternalism, not paternalism.

Nonetheless, Husak contends that to modify Dworkin's criteria to allow interference with autonomy when it is reasonable to believe the individual

interfered with will come to appreciate the wisdom of the interference does not impart an important role to autonomy in distinguishing justifiable from unjustifiable paternalism. In fact, he argues, it makes consent quite unimportant. Husak states his case this way:

> That moral autonomy plays no important role in distinguishing instances of justified from unjustified paternalism according to Dworkin's modified criteria becomes apparent when one inquires: "When is it reasonable to believe that a person would consent to an interference?" The only sensible answer to this question, though one that may not be particularly illuminating, is that it is reasonable to believe that a person would consent to whatever interferences are reasonable. The proper focus, then, is on whether an interference is reasonable-not on whether a person would consent to it. The notion of consent is retained in the criteria to create the impression that a concern for moral autonomy is preserved. In reality, however, consent plays only a token role in the criteria.[11]

As previously stated, I agree with Husak that consent is irrelevant to justifying paternalism, and, further, that hypothetical consent theories, if they shed any light at all on paternalism, only provide insight into what is reasonable and what is not. Talk of consent is only a convenient way of saying what is reasonable. However, I am not even certain how far this talk of hypothetical consent will take us in determining what is reasonable. For example, Rawls apparently believes that a person is behaving autonomously when he acts "...from principles that we would consent to as free and equal rational beings, and that we are to understand in this way."[12] It is not clear to me what free and equal rational beings would consent to in the original position. As far as legal or coercive paternalism goes I would prefer to take my chances that I will err in calculating my interests rather than chance that others will not err in calculating those same interests.

But how are such decisions to be made without a clear understanding of autonomy? The real problem for Husak's position is that he fails to understand the importance of a deep insight into autonomy for resolving the conflict between paternalism and autonomy. Husak seems to think that because paternalism is sometimes compatible with autonomy, autonomy is irrelevant to the issue. He confuses the justifiable cases of paternalism based on promotion of autonomy (as with parental paternalism toward young children) with his contention that "autonomy plays no important role" in deciding issues of justifiable paternalism. These issues cannot be properly understood or resolved without understanding the value and importance of autonomy and weighing this against other benefits that might result from impairing autonomy, including promotion of autonomy itself over the long term. It is, I take it, this last attempt at justification (promotion of autonomy over the long term) that helps justify paternalism toward children.

By defining autonomy in terms of five dimensions, it is possible to make distinctions between different levels of paternalistic interference with autonomy. Some paternalism will interfere in more severe and far reaching ways than others, and other kinds of paternalism will interfere with more than one dimension. Under this conception it makes sense to restrict the liberty of children, require a certain amount of education and so forth for the sake of increases in the cognitive, awareness and through them the independence dimension.

Consider the case of the Jehovah's Witness from chapter 1. Could the case be made that forcing a Witness to have a transfusion would be an instance of weak rather than strong paternalism. I do not think that the case could be argued directly, i.e., his refusal to consent to a transfusion is not by

itself sufficient to demonstrate his incompetence. However, his level of independence might be questionable. If enough information is known about the background of this individual, and it turns out that he is the product of an oppressive religious upbringing where he was only subjected to a narrow range of ideas, where autonomy was discouraged in favor of allegiance to religious authorities, and he was not exposed to ideas outside of the limited ones held by his family and primary group, then his decision would lack significant independence. On this eventuality, his desire not to have a transfusion would not be, in a significant sense, his own. I am doubtful, however, that this line of argument by itself would justify paternalistic interference, although it may justify downgrading the proposed interference from strong to weak, or at least moderate. This is so because the damage done to this particular individual's autonomous personality during his formative years may be irreversible to such an extent that he could never live any meaningful life other than as a Jehovah's Witness. It may be that he could never come to accept his life if he had a transfusion. If, on the other hand, he made his decision to become a Jehovah's Witness as an autonomous adult, paternalistic interference would be both coercive and strong, hence unjustifiable. By conceiving autonomy the way that I have, the deep complexity of paternalistic issues emerges more clearly, and thereby, hopefully, more intelligent and defensible actions will result.

There are two other cases that I think cannot be adequately resolved without appeal to autonomy. One recent case in Oklahoma involved a three month old baby who died of bronchial pneumonia because his parents, members of the Church of the First Born (which forbids medical treatment) refused to call for medical help over a period of weeks while their child suffered and

died of pneumonia. This couple was recently convicted of second degree manslaughter. There were a number of issues involved in the trial: freedom of religion, parental obligations to children, and what actions a reasonable person would take in this situation. There is an underlying issue of paternalism too; not whether or not paternalism is justified, because obviously paternalism in some form is necessary with respect to infants. I am assuming here that the parents of this child thought, not only that they were carrying out their religious duty, but that they were acting in the best interests of their child. In other words, they thought that it was better for the child that he die than that he should receive medical treatment. The interesting aspect of this case is that the state made an attempt to block certain parental practices, to prevent a specific act of paternalism. We normally think of the state as the administrator of paternalistic practices, but in this case the state is attempting to prevent such practices as it believes are harmful. In this particular case the state's punishment of the parents is not paternalistic, since the child is deceased. But the state is attempting to block, or at least discourage, similar future practices. Further, the greater social question remains, under what circumstances is a state justified in interfering with parental paternalism. It seems to me that the interests of the child, the child's welfare that courts continually support, cannot be adequately assessed apart from the child's development as an autonomous agent. Certain kinds of religious child-rearing practices restrict autonomy by restricting the education and range of ideas to which a child is exposed.

This last issue is just the sort of issue raised by a 1971 Supreme Court decision in the case of Wisconsion vs Yoder.[13] In this case the respondents, members of the Amish religion, contrary to Wisconsion state law which

requires compulsory school attendance through age sixteen, refused to send Amish children to school after they had completed the eighth grade. The state court sustained the respondents claim that the state law violated their right under the First Amendment to the free exercise of religion. The fundamental reasoning of the court was that there was a minimal difference between the state requirements and Amish education. The claim was that the Amish child would not be unable to carry out the duties of citizenship because of this difference. The Supreme Court upheld this ruling, arguing that the parents have a right to keep their children out of public schools.

But Justice Douglas argued in his dissenting opinion that the court had ignored the future interests of the child. The court had, according to Douglas, erroneously assumed an identity of interests between parent and child. Douglas argues his point:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the students judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.[14]

It seems clear to me that Douglas is appealing to autonomy in this case. The child's autonomy is impaired on four of the five dimensions: awareness is reduced and the growth of the cognitive element is impaired; through these independence is reduced and the ability or power to influence one's environment is restricted. In shaping a child's education we, to a great degree, shape the person, especially by instilling certain basic prejudices,

wants and desires. It appears to me that it is instructive to cast cases of paternalism as cases of autonomy promoted or autonomy impaired. Husak has shown that some cases of paternalism are justified even though they impair autonomy. But he erroneously concludes from this that it is pointless and uninstructive to view issues in paternalism as issues over autonomy.

Another line of attack that Husak advances against the view that the objectionable attribute about paternalism is that it violates or somehow impairs autonomy, is that if this is true, then there is nothing distinctive about paternalism. He says "The conclusion that paternalistic interferences, qua interferences, are objectionable, is a good deal less interesting than the conclusion that paternalistic interferences, qua paternalism, are objectionable."[15] The problem, as Husak understands it, is that the autonomy impairment strategy places violations of the harm principle in the same category with legal paternalism. There are two replies that can be made here. First, what is interesting about paternalism is not that the paternalist interferes in the lives of persons in unique and imaginative ways, but that the interference is justified in the interests of the person interfered with. The morally intriguing aspect about this interference is that the motive for paternalism is benevolence, usually thought of as a virtue, but in certain kinds of benevolence, the paternalistic kind, there are moral objections to benevolence based on respect for autonomy. Second, what separates violations of the harm principle from paternalism is, again, not unique kinds of interference, but that violations of the harm principle are punished as acts of immorality, while victims of paternalism are coerced, deceived and manipulated, not because they have done something wrong, but for their own good.

One further argument offered by Husak deserves mention. He maintains that the most direct strategy for persuading those of us who persist in cashing out paternalism in terms of autonomy, is to provide a case of paternalism that does not involve loss or impairment of autonomy. The kind of case he has in mind is paternalism toward oneself. He says "No conceptual problems are raised by the claim that one can treat oneself paternalistically."[16] Of course this claim begs the question. Whether or not there are conceptual problems depends on how paternalism is defined. If one assumes that paternalism does not involve a violation of autonomy, then there are not conceptual problems. The case he cites is that of Odysseus. I have argued in chapter 1 why I don't think that this is a case of paternalism. But even if it were, it would only represent a special category, self administered paternalism, and would not be relevant to cases where A treats B paternalistically.

It would appear, then, that, contrary to Husak's claim, it is not only useful to discuss issues of paternalism by a detailed analysis of autonomy, but that it is imperative. Indeed, I cannot think of a more important or relevant concept for arguing cases of paternalism. Further, once a deep appreciation of autonomy and individuality is gained, it is not difficult to understand the force of the antipaternalist's position.

NOTES

[1]Gerald Dworkin, "Autonomy and Behavior Control," Hastings Center Report 6 (February 1976): 23.

[2]Paul H. Mussen, John J. Conger, and Jerome Kagan, Child Development and Personality, 5th ed. (New York: Harper and Row, 1979), p. 345.

[3]David Shapiro, Autonomy and Rigid Character (New York: Basic Books, Inc., 1981), p. 61.

[4]Ibid., p. 63.

[5]Dworkin, "Autonomy and Behavior Control," p. 25.

[6]J. C. Walker, "Two Competing Theories of Personal Autonomy: A Critique of the Liberal Rationalist Attack on Progressivism," Educational Theory 31 (summer/fall, 1981) passim. By "LR" Walker means "Liberal Rationalist; by "FK" he means "Forms of knowledge."

[7]Ibid., p. 305.

[8]Douglas n. Husak, "Paternalism and Autonomy," Philosophy and Public Affairs 10 (winter, 1981), pp. 28-29.

[9]Ibid., p. 30.

[10]Ibid., p. 32.

[11]Ibid., pp. 34-35.

[12]John Rawls, A Theory of Justice (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1976), p. 516.

[13]Wisconsin v. Yoder, Sup. Ct. 205 (1971).

[14]Ibid., p. 245.

[15]Husak, "Paternalism and Autonomy," p. 38.

[16]Ibid., p. 43.

CHAPTER IV

MILL'S ANTIPATERNALISM

When considering arguments against paternalism it is natural to turn to Mill. As previously stated, I believe that I am defending Mill's absolute prohibition against certain kinds of paternalism; what I have described as the illicit triad, coercive strong direct paternalism. Perhaps Mill's own target was not even that broad, his primary concern was with legal paternalism or the coercive use of law to restrict the liberty of an individual in his own interest.

There are, I believe, at least five distinct arguments in On Liberty against paternalism. One of them, the argument from individuality or autonomy and the main argument of chapter 3, I have already discussed at length in this paper, so I will not have much more to add at this time. The other four arguments are various utilitarian appeals. First there is Mill's claim that society prospers with genuine happiness only if extensive antipaternalistic liberty is available. Second, he claims that society has the power of education and persuasion in rearing its youth, and, therefore, does not need further coercive power. Third, the attempt to coerce individuals for their own good will, if they have any grit about them, encourage them to rebel against authority. Finally, what Mill calls the strongest of all the arguments against interference in personal conduct, society is apt to be mistaken about its interference.

There is probably even a sixth argument to be retrieved from chapter 4 of On Liberty. However, it is not developed by Mill. It might be described as the dilemma of paternalistic punishment. If the paternalist is forced to punish the recipient of his paternalism in order to secure the intended benefit, this punishment tends to undermine the benefit. The dilemma can briefly be stated this way. If the state does not use punishment to force compliance with its paternalistic laws, it will fail to secure the intended benefit by virtue of large scale violation of the laws. If the state does use punishment to coerce offenders into future compliance, it still fails to produce a net benefit by virtue of the negative utility of punishment. I will elaborate on this argument shortly.

I think that not enough attention has been paid to the first three of these arguments. In section one of this chapter I shall outline and comment on each of these arguments, plus the much discussed fourth argument, the one Mill calls the strongest argument. Then in section two I will attempt a defense of Mill's strong antipaternalism against what I take to be the most serious challenge to his philosophical position; that is, paternalistic arguments for disallowing slavery contracts, controlling dangerous drugs and disallowing consent of the victim as a defense against assault and murder charges. I will also introduce what I take to be the sixth argument against paternalism, the argument from paternalistic punishment.

I

One argument that Mill advances might be described as a general utilitarian appeal; that liberty, in the form of absence of coercive strong

direct paternalism, is necessary in order that society can prosper or flourish. In his essay, Utilitarianism, Mill identifies what he takes to be the chief causes of unhappiness. The primary cause, selfishness, caring only for oneself, prevents an individual from establishing meaningful attachments to others and to projects that affect others, thereby, preventing an enjoyable and meaningful life. Another source of misery and unhappiness is failure to develop one's mental capacities, failure to develop a healthy interest in our world, physical, social, aesthetic and so on. Mill argues that anyone with a "moderate amount of moral and intellectual requisites" can create a meaningful existence for himself. The third cause of unhappiness is positive evils; for example, disease, poverty, natural disasters etc... The first two sources of unhappiness have a direct bearing on the third; that is, lack of concern for the welfare of others and failure to develop oneself in such a way that one can make a contribution to social well-being contribute to the continuance and severity of the positive evils. Mill was optimistic about the future of the progressive being. Meaningful progress, he speculated, was possible through moral and intellectual development.[1]

In On Liberty Mill argues that real understanding and, ultimately, solutions to our difficult problems is only possible because of a select few. One in a hundred, he tells us, is able to correctly judge matters that are not self-evident. But the rest are able to learn from these few geniuses who provide moral and intellectual insight.[2] These few gifted, on whom the rest of us are dependent for significant progress and discovery, need lots of space, liberty, in order to flourish and produce the creative understanding by which the rest of us benefit. Hence, to curtail liberty, especially by legal

paternalism, frustrates the development and, therefore, the contribution of these special individuals.

While this line of argument has some force, especially for fostering a free and creative atmosphere of inquiry and experiment in the scientific and political arena, it is difficult to see how it supports an absolute ban on paternalism. For example, it is not readily evident how seat belt laws or a forced blood transfusion would stifle the kind of creative genius that is essential to a progressive society. This line of argument may support restraining certain kinds of paternalism, say, preventing an ingenious scientist from engaging in dangerous but potentially beneficial medical experiments on himself. If he recognizes the risks, but is willing to assume the risks and possible sacrifice for the benefit of mankind, then, following this kind of argument, such sacrifices should be allowed. But, if Mill is to produce an absolute prohibition, he needs a stronger kind of objection.

A second line of argument that Mill employs against those who would inflict punishment on the imprudent is that the power of education is sufficient power, no other power is needed. His argument seems to be that there are three influences at work here which negate any justification of further coercion. First, society has ample power and opportunity during an individual's formative years to instill a proper sense of conduct for both the other-regarding and self-regarding virtues. Second, custom is itself a forceful influence, especially on those who are "least fitted to judge for themselves." In other words, those whose life we might be most tempted to influence paternalistically are those most easily influenced by existing customs. Presumably the custom is exerting the correct, most prudent, sort of influence. Third, Mill claims that there are <u>natural</u> penalties associated with irrational

conduct. Those who experiment with drugs, or fail to wear seat belts, often experience unpleasant consequences. Thus, Mill concludes, these forces constitute enough coercion by themselves, no further penalty is justified.[3]

Is this argument convincing? One reply that is tempting to make is that education is not very effective, or at least it has not been. Seat belt campaigns and antismoking campaigns have failed to produce a significant reduction in the target behavior. Of course this reply may only tell against certain kinds of education, national television campaigns (and perhaps only certain kinds of those), and not against other forms of education or persuasion. My own senses lead me to believe that the American society, especially the public schools, could be more effective than they are. Mill argues in his essay Utilitarianism and in On Liberty that a society that fails to properly educate its citizens in moral and intellectual matters, to include, I suspect, self-regarding virtues (rational conduct), will pay a dear price. I think that the American society is paying that price now. The public education system has more or less failed to instill any sort of well thought out and coherent moral or intellectual outlook. The only moral education that I am aware of which takes place on a large scale is what is described as values clarification. The deleterious effect of this sort of approach is that it encourages students not only to refrain from reflecting critically on their own values, beliefs and practices, but to believe that such critical reflection leading to correct moral beliefs is not possible.

Consequently, to the objection that Mill has overestimated the value of education, a plausible counterclaim might be that no really ambitious and well researched program has ever been attempted. The further criticism of the paternalist here is, then, that he is applying his energy in the wrong place.

Rather than lobby for strong paternalistic laws to counter the effects of a haphazard upbringing, beneficent motives would more correctly be vented through funding of the discovery and implementation of efficient and successful education programs. I think Mill is right in his claim that societies that think they need paternalistic laws are those that have failed to properly educate their citizens. However, even this line of argument may not establish an absolute prohibition. In a society with an ideal education system the strict prohibiting of paternalistic laws makes some sense, but under current conditions, it may be argued, some paternalistic laws are necessary.

The other two claims that Mill groups under the rubric of unnecessary power, that custom and natural penalties are sufficient deterrence, are probably even less persuasive. The problem with relying on custom is that customs are not always present in any significant degree, or custom may work in the wrong direction. To whatever extent it makes sense to classify peer pressure as a kind of local custom, peer pressure in different groups encourages harmful practices. Some of America's youth face tremendous peer pressure in their schools to experiment with dangerous drugs. And, as for the wearing of seat belts, it is not clear that there are any customs at all operating. Natural penalties also are often ineffective in changing behavior or attitudes. The natural harmful effects of smoking and drug experimentation have failed to diminish their use in a large scale fashion.

There are cases where these last two arguments seem relevant and useful in the way that Mill had in mind. For example, sky-diving and handling poisonous snakes are not particularly popular hobbies. The explanation for this is likely to have something to do with the natural dangers involved. This sort of consideration may also be relevant to paternalistic laws against certain

vices, say, gambling. Most people recognize the dangers of accruing large gambling debts or losses and curb their activities accordingly. In addition, a person who loses the family fortune by gambling is thought ill of by most of society. This may be all the control that is needed for gambling. If so, then paternalistically motivated antigambling laws are unjustified.

A third rather interesting argument of Mill's is that there is a special segment of the population, those with "vigorous and independent characters," who will consider legal paternalism an insult and a violation of their rights. This strong willed group will consider it a "mark of spirit and courage to fly in the face of such usurped authority and do with ostentation the exact opposite of what it enjoins..."[4] The claim apparently is that there is a group, it is not clear how sizable, that will especially resent and be particularly insulted by paternalistic controls. In On Liberty Mill speaks of individuals with strong impulses or energy, these are potential heroes who are quite necessary to society.[5] Robert Pirsig describes what may well be the same group of persons in his book, Zen and the Art of Motorcycle Maintenance. There he refers to persons with a personality characteristic he calls gumption. A person with gumption is full of enthusiasm, which is connected, for Pirsig, to quality. In describing these individuals he says: "A person filled with gumption doesn't sit around dissipating and stewing about things. He's at the front of the train of his own awareness, watching to see what's up the track and meeting it when it comes."[6] Whatever else this kind of person may be, he has a significantly developed state of autonomy that will cause him to resent interference in his life when only his own good is at issue.

One line of argument that is possible from this claim, although Mill did not explicitly develop it, is that even if paternalism is justified for some,

paternalistic laws which cannot distinguish between those with gumption and those without gumption, are unjustified. This is so since the state is requiring those with gumption to tolerate restrictions which are both unnecessary and extremely offensive for the sake of those without this characteristic. The state, the argument maintains, has no justification for this demand. Those without gumption will simply have to bear the burden of their own stupidity and short sightedness.

It seems to me that if such a group of individuals exists, and I am sure it does, then their developed sense of autonomy and sensitivity to interference in their lives, at the very least, must be taken into consideration. Here lies one of the real difficulties with utilitarian calculations. Even if we had a rough estimate of how many gumption filled individuals there are, say even half the population, how do we compare the offense against them, the resentment and rebellion generated, with the harm that may result from failure to enforce some paternalistic laws? Perhaps it could successfully be argued that, given the high value of liberty and autonomy, we should tip the balance in favor of liberty. Furthermore, an issue of justice could be raised. How can we justify restricting the liberty of the individuals with gumption, if they have done nothing to deserve the restriction? Nevertheless, it is hard to believe that there could never be any exception to paternalism for the sake of those without gumption, on utilitarian grounds alone.

Finally, Mill develops what he calls the strongest argument against society's coercing influence in purely self-regarding conduct; that is, "the odds are that it interferes wrongly and in the wrong place."[7] A common reading of this argument is that Mill is claiming something like the following: while the general public may be able to discern its own interests, able to understand

situations and conditions that threaten them, this public is unable to discern, with any reliable accuracy, the interests of another. Thus, the harm principle is workable, but paternalistic practices are not. The standard rebuttal to this line of thinking is the claim that individuals do not really know their own interests. Hart, for example, says of Mill's extreme view:

> No doubt if we no longer sympathize with this criticism this is due, in part to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent.[8]

Hart seems to be advancing two objections to Mill here, one of which is that we no longer believe that people know their own interests best. It is tempting to argue that in matters like law, medicine and nuclear safety (both from bombs and with the use of nuclear power) that individuals do not know their own interests, only a few experts do. I am not convinced that, even in these matters, individuals do not by and large know their interests. It seems to me that experts are needed only as technical advisors on how to accomplish interests, not to determine interests. It is, I maintain, generally known that health is a benefit, that nuclear war or a nuclear accident is not. Experts serve, not to tell us our interests, but to help us decide what specific courses of action are likely to lead to a secure benefit or avoidance of harm. The difficulty, however, with trying to generate justification for paternalistic laws from this position is that to be forceful the argument must assume those who make law, the legislators, possess the relevant knowledge. But do they? Legislators are not medical doctors, nor are they nuclear physicists. They, like the general population, listen to expert testimony and then decide as best they

can what sort of laws support the general interests. In an analogous manner, I cannot see how they have special claim to knowing how to protect individuals against themselves.

Actually the point about knowing or not knowing interests is, I think, not of central importance as far as Mill's argument goes. For Mill it does not seem to be a matter of knowing or not knowing something, Mill is simply suspicious of the paternalist's motives. He fears abuse of paternalistic powers. He says:

> But the opinion of a similar majority, imposed as a law on the minority, on questions of self-regarding conduct is quite as likely to be wrong as right, for in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people, while very often it does not even mean that-the public, with the most perfect indifference, passing over the pleasure or convenience of those whose conduct they censure and considering only their own preference.[9]

Mill's fear apparently is that paternalistic laws invite legal moralism. By legal moralism I understand the doctrine that allows a state to enact laws when a majority of citizens favor such laws. It does not matter whether the desire for the law is based on mere tastes or even prejudice. Mill thinks that the public in general fails to pay enough attention to "universal experience" and will, if allowed, legislate mere preferences and prejudices into law. It may be recalled that in my Introduction I raised the possibility of inconsistency on Mill's part with regard to this argument which he calls the strongest of all the arguments. He appears to soften his hard antipaternalism with the remark that:

> It is easy for anyone to imagine an ideal public which leaves the freedom and choice of individuals in all uncertain matters undistrurbed and only requires them to abstain from modes of conduct which universal experience has condemned. But where has there been seen a public which set any such limit to its

> censorship.?, Or when does the public trouble itself about universal experience?[10]

This passage indicates more clearly, I believe, that Mill is not arguing from the claim that most of us enjoy special knowledge concerning our own interests, but rather he is arguing from a fear of abuse of power. He does apparently think, however, that when we compare values, e.g., competing goods or competing evils, each of us know our own preferences better than others. It would appear that this argument, according to Mill, is not indefeasible. If a world existed with an 'ideal public,' one that made public law soley on the firm basis of universal human experience, then this argument would lose its forcefulness. But here in the real world, the argument strikes me as quite forceful.

Mill offers what I take to be convincing evidence that abuse of power by a majority is common in human history by describing historical cases, e.g., Roman Catholics in Spain, Puritans in Great Britain and New England. The liberty principle, which disallows legal paternalism, is necessary to prevent this abuse of power. In contemporary America these same tendencies still exist. Moralistic arguments are offered to justify laws against consumption of alcoholic beverages, gambling and selling nonessential items on Sunday. Just consider what kind of laws would be forced upon us all if a group like The Moral Majority should come to power without Constitutional restraints.

Rolf Sartorius offers an interesting interpretation of this argument in Mill. He explains that a utilitarian can get an absolute prohibition in the following manner:

> Assume (a) that most acts of kind K are, on utilitarian grounds, wrong, although (b) some acts of kind K are, on utilitarian grounds, right, but that (c) most attempts to identify exceptions to

> the rule of thumb "Acts of kind K are wrong" are mistaken because there is no reliable criterion by means of which exceptions to the rule may be identified. When these conditions are all satisfied, the act-utilitarian has good reason, other things being equal, for acting so as to prevent anyone from ever performing an act of kind K.[11]

Does this argument provide the utilitarian with an exceptionless duty? Sartorius holds that first amendment freedoms in the Constitution allowing freedom of press can be justified this way. The argument is that in the long run an absolute ban on legal restrictions of the press is justified. It seems to me that even this argument will not work, i.e. mankind is not a greater gainer, when measured in purely utilitarian calculations, by allowing no interference with a free press, or in the parallel case of paternalism, no paternalistic interference by the law. There are justifiable exceptions to free press. Certain investigations are kept secret, national security is protected by classifying documents. During World War II when the Manhattan Project was in its full development extreme censorship was imposed on the press, even comic strips were censored; words like "atomic" and "nuclear" were forbidden. The government did not want the Axis Powers to get a hint that anyone in America was even thinking atomic. The argument was utilitarian, as Sartorius'; it is better in a few extreme cases to allow censorship than not, even though some mistakes may be made, i.e., some unjustified censorship may well occur. I do not see how a pure act utilitarian, as Sartorius interprets Mill, can object to a few cases of paternalism where the stakes are very high.

Sartorius attempts to bolster this argument by claiming that a 100% effective criterion is the only acceptable criterion for allowing exceptions to a utilitarian based rule.. He argues his case with this example:

> Modifying only slightly a hypothetical example found in the classic paper by Livermore, Malmquist, and Meehl, let us assume that there is a certain form of mental illness such that virtually all those who have it will commit suicide if left at liberty, and that the other conditions of our proposed criterion are satisfied as well. Again, assume that one person in a thousand suffers from the illness in question, and that our criterion is reliable, distinguishing with 95% effectiveness between those who will commit suicide in virtue of the illness in question from those who will not. In a population of 100,000, ninety-five of the 100 who would commit suicide would be identified and presumably benefited by being involuntarily committed. Five persons would go undetected and--unless they met a natural death first--commit suicide. But out of the 99,900 people who would not commit suicide, 4,995 would also be identified and committed as suicidal![12]

His claim is that even if we had a criterion for justifiable paternalistic interference in a person's life that was 95% effective, it would still yield too much error and so, on utilitarian grounds, be unacceptable. But the example involves a contorted use of statistics. I take it that there is an intended shock effect meant to overwhelm us by showing that even with a 95% effective criterion, we generate nearly 5000 bogus cases in an attempt to single out 100 legitimate cases of interference. But how can such a criterion be claimed 95% effective? Sartorius assumes a 5% error rate generates 5% of error in the population that it checks. But, as I understand statistics, a 5% error rate generates 5% of error out of those it identifies as having the characteristic. So, if a mechanism picks out 100 exceptions, it is mistaken in 5 of them. Sartorius reads the 5% error rate as "5 out of every 100 cases examined are erroneous." If out of a population of 100,000 a principle identified 5,090 as having a trait, where only 100 actually have it, it is an understatement to say that characterizing the principle as 95% accurate is misleading.

The point for Mill's argument is this, if we could rely on the general public to enforce paternalistic controls only in clear cases based on universal experience then, from the point of view of this fourth argument, even some

coercive strong direct paternalism may be permissible. But, of course, we cannot rely on the public and there are still other objections to paternalism.

Mill's argument seems not to be as Sartorius suggests, a prohibition based on difficulty in determining justifiable from unjustifiable cases, but prohibition based on gross abuse of power. Mill's claim is that it is human nature to want to meddle in the affairs of others, especially to enforce on others what we take to be in their interests. And this is as apt to be based on mere shallow and biased preference as reasoned argument.

The Sartorius argument seems to fall short of providing grounds for absolute prohibition. In order to prevent abuse of paternalistic powers we need only have a stringent criterion for interference, e.g., showing severe, long term harm is very likely to result from certain actions. This criteria would of course need to include a clear and tough standard for what counts as harm. This is a difficult problem itself, one which Mill fails to adequately treat. However, if an adequately stringent standard could be spelled out, then it would, I believe, rule out all of the petty interference Mill was concerned with, the sort the Puritans and others have historically been inclined to enforce.

It does, then, seem to me that the arguments in chapter 4 of On Liberty, as many critics have argued, are good arguments against widespread and severely restrictive paternalistic laws, but do not establish the extreme antipaternalism which Mill advocated. Whatever the historical Mill might have believed, at this point it appears that his absolute prohibition should be argued from autonomy and individuality. Perhaps it could be maintained that all the utilitarian arguments taken together constitute an absolute ban on legal paternalism. It does seem clear to me that at the very least Mill's arguments

from chapter 4 present a greater challenge to the paternalist than is commonly recognized.

There is, I believe, the possibility of getting what might be described as a provisional absolute prohibition on legal paternalism out of Mill's arguments in chapter 4. The argument maintains that paternalism is a dangerous power that is too easily abused. The argument further maintains that paternalistic arguments are not required for any important laws, e.g., laws against slavery, control of dangerous drugs, dueling or safety requirements for construction workers and so on. This argument is then strengthened by the claim that there are alternatives to coercion, education for instance. In other words, paternalistic laws are a dangerous precedent. As long as we can produce convincing non-paternalistic arguments against those activities that are most troubling to society, then we can maintain an absolute prohibition on legal paternalism. So the paternalist is required to seek other non-coercive avenues more diligently. The absolute ban is provisonal in that it is always subject to novel heretofore unthought of cases.

However, whether or not there can be a successful utilitarian appeal that establishes Mill's strong antipaternalism, as I have argued, it is in Mill's understanding of individuality and the nature of man that provide the absolute ban on coercive strong direct paternalism (especially legal paternalism) for developed or autonomous persons.

II

I will now turn my attention to what I take to be the strongest challenge against this view, the claim that there are good paternalistic arguments for

not legally recognizing slavery contracts, controlling drugs and not allowing consent to mistreatment to count as a legal defense against assault. Indeed, even Mill's supporters are critical of him on the issue of slavery and drug usage laws. Arneson thinks that the absolute prohibition of paternalism in chapter 1 of On Liberty is inconsistent with the exception he claims Mill makes for slavery contracts in chapter 5. Arneson's solution is simply to ignore the chapter 5 exception to the absolute antipaternalism position of chapter 1.[13] Dworkin takes the antislavery contract position of Mill to be espousing some kind of general principle that allows restriction of liberty for the sake of liberty.[14] This principle frequently is interpreted to justify any interference that lowers the risk of death or injury, since, it is argued, liberty is increased by prolonging life. Feinberg takes Mill's argument to be a claim that we know a priori that no one can benefit from a slavery contract; and further, that Mill has given in to paternalism after all.[15]

I think none of these interpretations of Mill are correct. Let us begin by examining what Mill actually says:

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

> to be free. It is not freedom to be allowed to alienate his freedom.[16]

Mill's argument here seems to me very simple. The state's failure to acknowledge slavery contracts is not the sort of paternalism to which he objects, it is not coercive and does not restrict liberty in a direct way. The argument seems only to claim that the individual who desires to become the slave of another is in no position to advance his cause in the name of liberty. There is something fundamentally incoherent about an argument that claims it is freedom to surrender freedom. The action of submitting oneself to slavery is inconsistent with the stated desire of the individual, to exercise liberty; it is like pulling the rug out from under one's own feet. The state may defend its refusal to sanction this contract with something like the following remark: "We see no reason to recognize slavery contracts and a number of reasons not to. The practice is inhuman and subject to great abuse. It is impossible to police. For example, an individual could be forcibly apprehended by a would be slaveowner, then tortured and threatened with future torture in order to elicit public statements on the part of the victim to the effect that he desires to be a slave. The state would then be forced to legally recognize and support this arrangement."

Mill's point is, then, a simple one: if an individual wishes to become a slave and petitions the state to legally recognize this institution, the grounds for recognition cannot be liberty. The prospective slave must find other arguments to persuade the state to establish the institution of slavery. Mill, in this contention, is consistent; he consistently defends liberty. As it turns out, in this case, liberty is not on the side of the would be slave.

Another attempted rebuttal to the claim that failure to enforce slavery contracts is a violation of liberty is provided by John Hodson. He claims that

justification for failure to enforce such contracts is only required if there is a prima facie obligation to allow them. Since there is no prima facie obligation for slavery contracts, the state is not obligated to justify its action, or failure to act. There is no interference with the would be slave's liberty. This follows for three reasons: first, a person may, without legal slavery, still live in de facto slavery; second, United States law does not recognize titles such as knight, baron and so forth, and this does not restrict liberty. In a similar way, failure to legally recognize a slave's status does not restrict liberty. Finally, in not recognizing the institution of slavery, the state merely fails to provide a nonessential service. There is no compelling reason to assert that there is a positive right to this service.[17]

The main force of this argument is, I believe, correct, but I am not convinced that a person can live in de facto slavery, at least not in a full sense. If a full-blown slavery institution is on going, as there once was in this country, the slave is at the mercy of the slave owner and the legal system that supports the institution. If a slave escapes he can be hunted down, punished and returned to his owner. Without a supporting legal system there cannot really be slavery. A 'slave' who can quit at any time is not really a slave. If an owner attempted to force his 'slave' back in servitude he, not the 'slave,' would be guilty of several crimes under the existing legal system, assault, kidnapping and so on. But the main force of Hodson's argument, I believe, is sustained. It is not an infringement of liberty by the state to refuse to get involved in a practice unless there is some obligation to support the practice. Hence, Mill is on firm grounds in his claim that the would be slave is in no position to establish an obligation grounded on liberty for the state to support slavery.

It may be instructive to examine some cases that perhaps are plausible candidates for permissible slavery. Here is the first case. Smith sells himself into slavery for one million dollars paid in advance, and is allowed one year before he must surrender himself to his master for perpetuity. In the second, Jones is paid ten million dollars in advance and allowed ten years before he surrenders himself to his master. And finally, a case of the beneficent slave. An eccentric multimillionaire wants to own a slave and offers to contribute ten million dollars to any cause in the name of any person who is willing to become his slave. Brown volunteers and has the ten million dollars given to the Save the Children Fund, reasoning that his sacrifice will save the lives of thousands of children and improve the lives of many others.

None of these cases are in any clear sense irrational. If Smith is a young man and intends to keep his bargain, actually turn himself over to be a slave, then he is at best very short-sighted. On the other hand it would not be at all irrational for Smith and Jones to believe that they could take their prepayments and 'disappear' somewhere in the world. While it may be true that the world is 'shrinking' in the twentieth century, I suspect one person with lots of money can still hide with just a little ingenuity. In Brown's case, it is not unreasonable to think of his sacrifice as noble. We think of a person who sacrifices his life for the sake of others as especially courageous and virtuous. Should we prevent or discourage Brown from making this sacrifice? If, during the Iranian hostage crisis, the Shah of Iran had volunteered to return to Iran to secure the release of the hostages, where he would certainly have been killed, should we have prevented him? Whatever the answer to these questions two points remain. First, there are good nonpaternalistic reasons for disallowing legal status to slavery. To the ones previously mentioned, it is

inhuman and impossible to police, I would add that, as Feinberg suggests, the legal mechanism by which we would review applications for a slavery contract would necessarily be complicated, expensive and stringent.[18] Probably one of two possibilities would take place. One, the only persons who apply would be persons who we think incompetent in one way or another, and, hence, not qualify for the contract. Or, two, perhaps a few persons like Brown would apply and we think they are being exploited, hence, deny their request. Either way we end up with an expensive piece of legal machinery that benefits no one.

The second point is this, none of these cases tell against Mill's argument or Mill's position on paternalism. There is an interesting swapping of arguments here. In the typical paternalism dispute we encounter a paternalist who is advocating some benefit at the expense of liberty. The antipaternalist argues from liberty and autonomy against imposing the benefit. But in the cases of Smith, Jones and Brown the arguments are reversed. The state is upholding liberty, at least in the sense that it refuses to take part in the restriction of liberty, by failing to recognize slavery contracts as binding; while the individual who wants a slavery contract is arguing from some benefit to himself, or others, at the expense of liberty. Feinberg thinks Mill's argument against slavery contracts commits him to the view that no slavery contracts are justifiable.[19] But, if my reading of Mill is correct, this is not so. Mill simply argues, correctly I believe, that slavery contracts cannot be justified on the basis of liberty. It is a mistake to read Mill otherwise. So Mill is not giving in to paternalism on this issue.

Another line of argument that is often used to subvert the strong antipaternalism of Mill is based on the need to control drug usage. Feinberg

maintains that Mill's strong position flies in the face of common sense and established custom. It is maintained that common sense and common practice requires the control of the purchase and distribution of dangerous drugs. Feinberg further claims that the justification for laws that control drugs is that drugs are always bad for the individual, thus generating a justified coercive paternalistic law against the use of drugs, contrary to Mill.[20] Hart accuses Mill of carrying his antipaternalism to lengths that now seem fantastic. Mill's reluctance to control drugs for paternalistic reasons is said to simply be untenably based on the false assumption that individuals know their own interests best.[21] I am not convinced that Mill's view is really subject to such criticism.

Part of the justification of drug laws, that part which pertains to the seller, is an attempt to prevent one person from harming another. So, even if the motive here is paternalistic, it is indirect paternalism, not the kind Mill was especially concerned with. In fact Mill was troubled by this kind of case and remained unsure as to whether or not he should include it in the class of absolutely proscribed paternalism. But what justifies punishment of the drug user? It is preposterous to claim that a drug user is sentenced to prison in his own interest. To believe this claim one must believe that, rather than use certain drugs, it is better for an individual to be stripped of most of his citizenship, nearly all of his physical liberties, placed in an environment often referred to as a "criminal college" where he is apt to be mistreated and raped by inmates and sadistic guards and where he will certainly not be in a drug free atmosphere. Perhaps it will be argued that we can justify a fine or mandatory counseling on paternalistic grounds. But even here there is difficulty. If the drug user refuses to pay the fine or attend the counseling

sessions, then do we send him to prison? If so, we are back to the original problem with paternalistic punishment. If not, we have an unenforceable law.

I really believe this problem with paternalistic punishment is fatal to legal paternalism. The supposed justification for paternalism is benevolence toward the individual coerced. But the punishment, to be effective at all, is worse than the behavior we try to prevent, especially in the drug cases. Mill understood this but did not develop the argument as far as I think it can be developed. He said:

> We shall reflect that he already bears, or will bear, the whole penalty of his error; if he spoils his life by mismanagement, we shall not, for that reason, desire to spoil it still further; instead of wishing to punish him, we shall rather endeavor to alleviate his punishment by showing him how he may avoid or cure the evils his conduct tends to bring upon him. He may be to us an object of pity, perhaps of dislike, but not of anger or resentment; we shall not treat him like an enemy of society; the worst we shall think ourselves justified in doing is leaving him to himself, if we do not interfere benevolently by showing interest or concern for him.[22]

There are two cases to be considered. First, those who actually suffer from their imprudence, whether drug usage or some other instance of poor judgment. Paternalism is supposed to be in the interests of the individual, but if in addition to the suffering he has already endured due to his own error, we punish him further by fine or prison, we make his life even more miserable. Mill's point seems to be that the only legitimate expression of benevolence, i.e., the only action that can honestly claim to be benevolent, is to express our sympathy to the injured individual and offer our advice and aid in reducing the likelihood of a future injury by the same error. The claim that the individual is ultimately benefited by punishment is not true in any clear sense. To a large degree whether or not punishment has a beneficial effect depends on the response of the person punished. If a short jail sentence for a drug user always

or nearly always prevented future use and addiction, then there may be some plausibility to the paternalist's claim that he is benefiting persons by sentencing them to jail. But even on this assumption whether or not a person is benefited by a prison or jail term depends on what happens to that individual while incarcerated. After all, sometimes people get acquainted with other criminals while in jail and turn to more serious crime. Also, sometimes people are murdered in prisons; or the prison term may even cost a person his career. But the assumption that a jail or prison term will lead to some good in a person's life is probably unfounded in the first place.

The second kind of case that must be considered is the case where the paternalist attempts to curb certain behavior by threatened punishment. But the threats will not work unless actually carried out. Here again the response of the intended beneficiary of paternalism is relevant to whether or not the paternalistic intervention actually accomplishes its objective. If everyone quietly and quickly gave in to the threat of punishment and modified his behavior in order to avoid the punishment, then the claim that coercive laws which threaten punishment actually do benefit individuals would be believable. And, I suppose, it must be admitted that those who yield to the threat of punishment without resistance are benefited by abstinence from drug use and experimentation. But, for those who violate the law, the threats must be carried out; or else the law will lose its coercive power. However, if actually carried out, then we end up harming the individual even more than if we did not administer the punishment. If we punish individuals, as is typical in drug use, it may have a beneficial effect on others by discouraging use of drugs. But then, if this is the justification for the law, the motive is not

paternalistic. The notion that we can benefit drug users by punishing them is, upon examination, implausible; and worse, as I shall argue, unjust.

I think that it will be instructive at this point to examine the value of paternalistic punishment in the family. The idea here is to extend the notion I developed in chapter 1, that unjustified paternalism in the law can be exposed for what it is by finding parallel examples in the family environment that are easily seen as bad parenting. The justification for parental punishment of children is, first of all, that they are incapable of managing their lives without parental intervention and that sometimes punishment is the only way a parent can accomplish a necessary benefit for the child. Second, possibly it can be argued that punishment teaches the child, beyond the immediate objective (for example, not running out from behind parked cars into the street), discipline and respect for authority. Justifiable punishment may take several forms: deprivation of privileges, confinement to a room or the house for short periods of time, reduction in allowance and (more controversially) mild spankings. The point here is that justifiable punishment of children is necessarily of relatively short duration and non-severe. The oversight of the legal paternalist is twofold. The paternalist fails to recognize that children are generally manageable in a way that mature adults are not. Children are apt to accept the parental punishment, especially in a family environment that is generally supportive, where the parents are seen by the child as loving parents. Whereas, the recipient of paternalistic punishment by the state is apt to see the state as an adversary, as intruding on private interests. And here Mill's argument based on the gumption of certain individuals is relevant. The second oversight is that there is only so much punishment that can be administered and covered by the rationale of benefit to the child. Analogously, there is only so much the

state can do and still make good its claim that it is acting in the interest of the individual being punished.

What should a parent do with a child who rebels against the punishment, the child who refuses to accept it? It is unlikely that harsh, severe or extreme punishment could be justified as being in the interest of the child. It is here that the loving, nurturing and motivating parent is likely to be more successful and beneficial to the child. There really is no parallel in the legal system to confining a child to a room or the house for a short period of time, since a jail or prison term, even a short one, is a much more severe form of punishment. The problem for the paternalistic state is that, for those adults who refuse to accept the state's restrictiions, the state loses its justification for punishment based on benefit. It appears that the state must be prepared to escalate punishment to a level of severity beyond which it can be maintained that it is benefiting the individuals who are punished.

The further the state is willing to go with escalating punishment the less plausible is its claim that it is acting paternalistically. Even if it can legitimately claim to benefit some individuals merely by the threat of punishment, how does the state justify worsening the lives of those who violate these paternalistic laws? The justification here cannot be paternalistic. It must be remembered that the victim of paternalistic punishment is not wicked, has done nothing to deserve punishment under a public interest proviso; in the words of Mill, this person is not the enemy of the state. The justification for the punishment is beneficence. But, as we have seen, often the punishment results in loss of benefit. If the state argues that it is justified in punishing this rebellious group for the sake of the non-rebellious, in order to maintain the coercive threat over them, then the state faces yet another allegation of

injustice. The state, under this justification, is punishing one group, the rebellious, who have done nothing to deserve punishment, for the sake of another group. Not only is this argument non paternalistic, I do not see how it can be sustained in any system that takes rights, liberty or individuality seriously.

What does justify punishment for drug users and sellers? Consider a world like ours except that drugs are not popular among the youth. Suppose that the only people who experiment with and abuse drugs are mature adults, and then only on a small scale. Further imagine that most give up the practice, some continue in a light and not very harmful way, and others become addicts. The later two groups, when questioned, prefer to take their chances thinking that the rest and relaxation they gain from drug usage is worth the risk and pain of addiction. In this world there would be little justification for drug control laws of any sort. But in the real world there is ample nonpaternalistic justification. The illegal drug business is a huge, malicious and ugly social problem. It constitutes a multibillion dollar industry that pays no taxes, it is a breeding ground for organized crime, it attacks young persons when they are most vulnerable to impulsive and short sighted actions and it presents a constant fear to parents that their children will fall prey to this institution. The punishment to individuals who take part in this practice, buyer or seller, is justified for their part in this insidious social problem. No paternalistic punishment is justified; none is needed.

The final argument against Mill's view that I want to consider is the argument that paternalistic laws against consent to beatings, mutilations and death are justified. Feinberg maintains these actions are always harmful and justified on paternalistic grounds alone. The trick, he believes, is to stop short

of outlawing whisky, cigarettes and fried foods.[23] But why stop short of these activities? If we think we are justified in interfering where self-harm is highly probable, I can hardly think of a better target than the use of tobacco. My own view is that we need not worry about stopping short of making these activities illegal, since there are no good reasons to ever let legal paternalism get off the ground.

Mill's arguments do not commit him to countenancing any of these paternalistic actions. First, consider the case of submitting to voluntary beatings or mutilations. Theoretically, Mill is committed to allowing any fully autonomous person do whatever he likes when the consequences are merely to himself. Mill's out on this problem is that the class of autonomous persons who wish to be beaten or mistreated is empty. Such desires, the desire for pain, disability or mutilation are prima facie irrational. The person who harbors these desires is most likely a candidate for institutionalization. Of course, one can easily imagine cases which defeat the prima facie irrationality; say a person wants to have his foot amputated to save his life. This person has a reason to become disabled, but his desire is not for the disability as such. Nor is it beneficial to prevent this person from having the amputation. To interfere with those who desire the disability for itself, is to act paternalistically in the weak sense, not the strong sense to which Mill objected.

Probably an analogous line of argument could be mounted regarding consent to beatings, mutilations and being killed as was for slavery contracts. That is, we could imagine cases like those of Smith, Jones and Brown who are willing to consent to abuse for large sums of money or as a self sacrifice for charity. However, analogous replies to those in the slavery cases can be made here. Consider a case where a person desires to be beaten in exchange for a

large sum of money either for himself or for some charity. This sacrifice is not clearly irrational. But, as with similar contracts involving slavery, there are good nonpaternalistic reasons for disallowing this practice. It degrades humanity, is easily abused and nearly impossible to police. Further, there is an indirect paternalistic argument against such a practice. The person who wishes to hire someone to mistreat, is giving vent to sadistic tendencies. These tendencies are morally objectionable and should be suppressed and resisted for that individual's own good as well as for society's. So the law is justified in disallowing Smith to submit to a beating or mutilation from Jones, strange as it may sound, for Jones' benefit. On this line of argument, the law restricting Jones is coercive strong indirect paternalism with regard to Smith but with regard to Jones it is coercive weak direct paternalism.

The case of a death wish or contracting to have oneself killed is more like a case of suicide or euthanasia. The desire for death, or taking steps to secure one's death is neither always wrong nor always irrational. For example, an individual may wish to die a painless and swift death now in order to prevent a slow and painful death. There is no clear sense in which this desire is irrational. If this individual asks for someone else's help in causing the death, then, of course, this raises the legal issue of murder. There may well be, as with slavery and consent to mistreatment, solid nonpaternalistic objections to legal euthanasia or suicide, but I see no convincing paternalistic ones. Since this issue will be discussed in chapter 6 at some length, I will not prolong the discussion here.

Mill's arguments against paternalistic laws are, it seems to me, persuasive and conclusive. The combined utilitarian appeals of chapter 4 of On Liberty with the appeals to individuality and liberty of chapter 3 make a formidable

challenge to the paternalist. If my investigation here has not badly erred, Mill's position against coercive strong direct paternalism is correct.

NOTES

[1]John Stuart Mill, Utilitarianism and Other Writings, ed. Mary Warnock (New York: New American Library, 1962), pp. 264-266.

[2]John Stuart Mill, On Liberty, ed. Elizabeth Rapaport (Indianapolis, Indiana: Hackett Publishing Company, Inc., 1978), p. 19.

[3]Ibid., pp. 80-81.

[4]Ibid., p. 81.

[5]Ibid., p. 57.

[6]Robert M. Pirsig, Zen and the Art of Motorcycle Maintenance (New York: William Morrow and Company, Inc., 1974), p. 303.

[7]Mill, On Liberty, p. 82.

[8]H. L. A. Hart, Law, Liberty, and Morality (Stanford, California: Stanford University Press, 1963), pp. 32-33.

[9]Mill, On Liberty, p. 81.

[10]Ibid., p. 82.

[11]Rolf Sartorius, "Involuntary Civil Commitment," Paternalism, ed. Rolf Satorius (Minneapolis: University of Minnesota Press, 1983), p. 100.

[12]Ibid., p. 101.

[13]Richard J. Arneson, "Mill versus Paternalism," Ethics 90 (July 1980): 473.

[14]Gerald Dworkin, "Paternalism," Philosophy of Law, 2d ed., edited by by Joel Feinberg and Hyman Gross (Belmont, California: Wadsworth Publishing Company, 1980), p. 235.

[15]Joel Feinberg, "Legal Paternalism," Canadian Journal of Philosophy 1 (September 1971): 117-118.

[16]Mill, On Liberty, p. 101.

[17]John D. Hodson, "Mill, Paternalism, and Slavery," Analysis (January 1981), pp. 61-62.

[18]Feinberg, "Legal Paternalism," p. 119.

[19]Ibid., p. 117.

[20]Ibid., pp. 105-106.

[21]Hart, Law, Liberty, and Morality, p. 32.

[22]Mill, On Liberty, p. 77.

[23]Feinberg, "Legal Paternalism," pp. 105-106.

CHAPTER V

CHALLENGES TO ANTIPATERNALISM

It is largely maintained that paternalism, even coercive strong direct paternalism, is justified when individuals engage in activities that place themselves beyond a certain threshold of risk. Some activities that are often included as fitting targets of paternalistic interference are, riding a motorcycle without a helmet, riding in or operating a car without a seat belt, jaywalking and dueling. Other activities that are thought to involve unusual risk but are less often the targets of paternalistic intervention are, smoking, drinking alcoholic beverages, eating fast foods or junk foods, handling dangerous animals such as tigers or poisonous snakes, dangerous hobbies such as skydiving, mountain climbing, SCUBA diving and boxing. If convincing reasons can be mounted for legal restriction of any of these activities based on individual welfare alone, then the strong antipaternalistic view I am advocating will be defeated. In section I of this chapter I will consider in some detail what are probably the strongest contenders among these two groups of activities for exceptions to antipaternalistic rules, that is, riding a motorcycle without a helmet and riding in a car without a seat belt. Then I will briefly consider dueling and a case of involuntary commitment based on risk of self harm. In section II I will consider a challenge to antipaternalism

from John Kleinig that is not based so much on counter-examples, but on a counter-strategy.

I

The problem with justifying motorcycle helmet and seat belt laws is set up for the paternalist by an argument that has its roots in individuality. It will be useful in introducing this argument to begin by examining a parallel argument used by Jeffrie Murphy against killing innocents in war. He makes use of the Kantian distinction between perfect and imperfect duties. This distinction emphasizes the difference between violating Jones' rights and doing something that would be bad for Jones. For example, if I make a contract with Jones, he has a right to expect the contract to be kept. On the other hand, if Jones is in financial distress, it will be bad for Jones if I fail to help, but he has no right, that is, I have no obligation, to come to his rescue.[1] A similar distinction is found in Mill between moral rules that forbid causing harm (on this point Mill explicitly includes denial of freedom as harm) and rules that require extending some benefit. The former are more vital than the latter.[2] So when the paternalist interferes with liberty in order to secure a benefit, she is, in the language of Kant, allowing an imperfect duty to outweigh a perfect duty; and in the language of Mill she is allowing a less vital interest to outweigh a more vital interest. In seeking to benefit us all via mandatory helmet and seat belt laws the paternalist is tampering with vital interests, held by some to be rights.

There are four basic strategies for defeating this argument that I will consider in this chapter. The first maintains that by requiring helmets and

seat belts the state is acting in a manner consistent with the desires of individuals. The second maintains that the interests of motorists that are denied are not vital; in other words, the interference with individuality is trivial. The third strategy argues that the paternalism is weak not strong paternalism. And finally, it is sometimes argued that the benefit from these restrictions is so great it justifies the offense against individuality. This last strategy is, I believe, a sound approach. For example, Murphy would not allow as justified waging any war in which innocents are intentionally killed. This argument leads to the unlikely conclusion that if the only way to defeat the Nazis in World War II was to wage war in such a way that innocents would be intentionally killed, then the war was unjustified. The strategy for defeating rights maintains that even powerful and important rights may be abandoned to prevent catastrophic and horrific consequences. While the strategy seems sound, I shall argue that it is not available to the paternalist.

Gerald Dworkin at one time thought that laws requiring motorcyclists to wear helmets and passengers in cars to wear seat belts was justified on paternalistic grounds.[3] More recently, however, he has come to realize the issue is more complicated and the justification for paternalistic laws less obvious.[4] It will, nevertheless, be instructive to examine his earlier reasons for favoring such laws. The justification offered was that by requiring motorcycle helmets and seat belts the state was promoting a good for the individual, safety, that is recognized as such by everyone. It is assumed, correctly I suspect, that most people do not want to be injured while riding on a motorcycle or while riding in a car. John Kleinig offers a similar argument, which I will comment on in some detail in section II of this chapter, that he refers to as the Argument from Personal Integrity. Dworkin

maintains that life plans are respected even in the face of helmet and seat belt legislation because the persons who fail to use them are not in accord with their own goals and purposes. The explanation offered as to why people so often fail to act in accord with their own interests, i.e., fail to wear helmets and seat belts, is that sometimes people just fail to exercise good judgment in that they miscalculate the weights of some of their values or they simply neglect to act in a manner consistent with their own values. So paternalistic laws, it is held, are justified to protect our future as rational choosers.[5]

I am not convinced that the description of why people do not use helmets and seat belts, that they miscalculate, are careless or thoughtless, is accurate. It seems to me that most people have two conflicting desires; they desire not to be injured and not to wear helmets or seat belts. But before I pursue this line, I first want to consider whether or not the intrusion into individuality is really trivial, as is often claimed.

There are some arguments over the issue of triviality that are available to the motorcyclists, but not to the motorist. My own experience as a long time motorcyclist informs me that persons who ride motorcycles, especially the larger ones, say 500cc's and larger, do so for the enjoyment of motorcycling and not simply as an economical means of transportation. In fact some of the larger motorcycles do not achieve as high a gas mileage as some of the high mileage automobiles. Kleinig acknowledges what might aptly be described as an aesthetic argument against helmet laws for motorcyclists. He says: "Motorcyclists, for example, have sometimes made a great deal of the sensations involved when the wind beats in the face and rushes through the hair-its almost sensual quality, the feeling and celebration of independence, a

sympathy with nature or a sense of striving against it."[6] There are two other arguments that sometimes are combined with this one in order to show that mandatory helmet laws are not trivial. One maintains that the danger or element of risk that comes from riding without a helmet is part of the basic enjoyment of the experience of motorcycle riding. The other maintains that the helmet itself creates new danger in several ways; it limits peripheral vision, fogs up, increases the likelihood of neck injury and sometimes traps bees or wasps which increases the likelihood of accident. Thus, mandatory helmet laws require the cyclists to accept one kind of risk in favor of another.

While Kleinig maintains that in spite of these considerations the balance still remains for mandatory helmet legislation, I think a more careful analysis is in order. Actually the fogging up problem can be easily dismissed. It is the face shield that fogs up, not the helmet. Face shields are generally sold separate from helmets. Also, face shield laws should be kept separate from helmet laws. Furthermore, there are applications available that will prevent fogging; and, should severe fogging occur while riding, the rider can easily remove the shield from most helmets.

However, the other considerations, the aesthetic experience argument and the argument from additional hazards are not so easily dismissed. From my own experience I can say that riding a motorcycle with a helmet is a different experience than riding without one. This is especially true if one is riding in the open roads or on back roads for the scenic or aesthetic experience. Mandatory helmet laws deny the cyclist the opportunity to choose when to take additional risk by riding without a helmet and when not to. Some riders will use a helmet while riding in heavy traffic or on interstate

highways, but not while riding in a neighborhood or on back roads, or, in general, when riding explicitly for the pleasure. A tangential argument to this one that is often overlooked is that in cold or inclement weather the helmet and face shield are welcomed friends, but on a hot August afternoon these welcomed friends become instruments of torture. Wearing a helmet during the summer months in a hot climate can be quite an unpleasant experience. Mandatory helmet laws again do not allow what I take to be a perfectly defensible choice by the individual rider as to when and under what conditions he will assume additional risk by riding without a helmet.

A possible counter to this reply is that, while it is true that a significant number of motorcycle riders will make defensible and discriminating decisions about when to use a helmet and when not to, a significant number are just lazy and undisciplined and will never ride with a helmet unless coerced to do so by the law. So, in order to protect this latter group against themselves, the former group will simply have to forego riding without a helmet. There are two difficulties with this reply as a defense of paternalism. First, it is not clear which group should be made to sacrifice. Should the discriminating helmet users lose their right of choice for the sake of the undisciplined, or should the undisciplined simply assume the risk and responsibility for their faults. One way to decide might be to simply determine (assuming this is possible) which group is larger and then decide in favor of the larger group. However, I am not convinced that this is the correct way to proceed. There are some relevant differences between the positions of the two groups. If we decide against the discriminating helmet users, then these individuals are forced to conform to a rigid rule they do not wish to always obey. Whereas, if we decide against the undisciplined group

for the sake of preserving the choice of the discriminating group, then the members of this group are not forced to take risks they do not wish to take. The risks they assume are of their own making and the consequences and responsibility should rest with them. If this argument is to succeed it must offer convincing reasons for restricting the liberty of one group for the sake of another when the former group has done nothing to deserve the restriction. The second problem with this argument as a justification of paternalism is that it is only partially paternalistic. The aim to restrict the liberty of the undisciplined group is paternalistic, but the willingness to restrict the liberty of the discriminating group is not. So to make this justification of coercion work the paternalist needs, in addition to his paternalistic argument, another argument showing that the state is justified in restricting the freedom of one group for the sake of another.

Do any of the arguments I have been advancing against mandatory helmet laws have parallels for mandatory seat belt laws? It is doubtful that an aesthetic argument can be mounted, most auto driving is not for the joy or even combined joy and transportation. Moreover, seat belts do not have an analogous effect on the experience of driving as does a helmet on motorcycle riding. Nor do seat belts create restrictions of vision or constitute a distraction. But seat belts, like helmets, may be thought by many to be a nuisance. Also, the seat belts, like helmets, force us to accept one kind of risk, being trapped in a burning or sinking car unable to undo a seat belt, in exchange for less risk of other kinds of injury. Likewise, mandatory seat belt laws deny the individual opportunity to use seat belts discriminatingly; for example, wear them in heavy traffic or during a high speed long trip, but not wear them on short trips or in a low traffic environment.

There are a number of other attempts to legitimize mandatory helmet and seat belt legislation, but, as I shall argue, none of them are successful paternalistic arguments. One such argument maintains that a large number of motorists recognize their laziness and lack of discipline with regard to helmets and seat belts and desire that the state help them by passing restrictive laws regarding these safety devices. This attempted justification suffers from defects similar to the last argument. If we make what I take to be a reasonable assumption, that there is a significant number of motorcycle and car drivers who will make responsible decisions about when to use helmets and seat belts, and further, that these drivers resent state coercion in this way, then by virtue of what line of reasoning does the state require these individuals to sacrifice their liberty for the sake of another group's foolishness, laziness or lack of discipline. The second problem with this approach to justification of paternalistic interference is that the argument is based on consent of that segment of the population that desires the state intervention and is, therefore, not paternalistic. This case is similar to that of Odysseus, lacking self control, he solicits the aid of his friends who justify their interference by virtue of his request. This sort of interference is fraternalistic, not paternalistic.

A further attempt to justify coercive laws requiring the use of helmets and seat belts is what Kleinig refers to as the Public Interest Argument. This argument maintains that individuals injured due to failure to take reasonable safety measures, e.g., wearing helmets while riding a motorcycle or seat belts while riding in a car, create a burden on the public in two ways. First, they are absent from their jobs and, thereby, contribute to loss of productivity.

Second, they often become a public charge for an extended period of time and consume medical resources that could have been saved for someone else.[7]

This attempt to justify helmet and seat belt laws, like the last argument, is no help to the paternalist, since it is an appeal to general harm not harmful self-regarding conduct. But aside from that difficulty, it is not so clear that it furthers the case for helmet and seat belt laws at all. Some of those who fail to use these safety devices die instantly and, had they lived, may have gone on to consume public resources via welfare or other prolonged illness. But even if the balance of public funds could be proven to be in favor of such legislation, I am not convinced that the additional funds expended on account of these risk takers justifies the denial of liberty. It costs more money to have a legal system that respects privacy and due process than one that does not, but that does not justify the denial of privacy or due process. It seems to me that the money spent to protect these liberties is money well spent.

However, this argument does raise the interesting question of who bears the cost of risk taking where it can be determined that failure to use a helmet or seat belt is a contributing factor in an injury. Higher insurance premiums may be justified for non helmet and seat belt users. Additionally, in a case of injury in a motorcycle or automobile accident, if it is determined that driver A was responsible for the accident causing injury to B, but B's injuries were partially caused by failure to wear a helmet or seat belt, then B may be justifiably held financially liable for a portion of his injuries.

One of the key questions in the debate over these mandatory safety regulations is whether or not the additional risk assumed by the vehicle operators who fail to use helmets or seat belts is an irrational risk. Does

taking additional risk indicate these individuals themselves are irrational? If so, this will help the paternalist take the first step in justifying coercive paternalism, showing that the paternalism is weak rather than strong.

How should we decide whether or not a risk is irrational? Joel Feinberg offers what I take to be a plausible and useful set of criteria that enables us to distinguish between reasonable and unreasonable risk. The relevant considerations for determining the reasonableness of any risk are: (1) the probability that the contemplated course of action will lead to harm, (2) the seriousness of the harm that may result from the action, (3) the probability that the desired value will be obtained by taking the risk, (4) the relative worth of the desired value itself, and (5) whether or not there are alternatives that will produce the value desired.[8]

If we apply these criteria to the motorcycle helmet and seat belt law issue, considering each point of the criteria in turn, we get the following results. (1) The probability that the action, riding a motorcycle without a helmet or riding in a car without a seat belt, will result in harm is really very low. After all, most people are never involved in a traffic accident involving injury. Perhaps it could be argued that there is a deficiency in this aspect of the criteria, that it should not measure raw probability, but increased probability of harm resulting in choosing one course of action over another. This is no doubt a relevant consideration, but what really counts is the probability of harm. If one course of action has a small probability of producing harm, and another course a greater but still small probability of leading to harm, the fact that the likelihood of harm is still small seems to tell against classifying as irrational anyone who prefers the second course of action over the first. It seems to me that this is what saves the non helmet

and non seat belt wearers from being irrational. They know that when they drive with or without these safety devices that the chance of their being in an injury producing accident is small. This fact combined with their desire not to use these devices induces them to abstain. There is no clear sense in which this choice is irrational. (2) The seriousness of the harm that may result is significant, since death may result. Furthermore, it is known that more deaths do result among non helmet and non seat belt users. It is this statistic that really drives the paternalistic motive. Yet it must be acknowledged that helmets and seat belts do not eliminate deaths. Death is a possibility both with and without these devices. The paternalist's case would be stronger if these devices eliminated the severest possible consequences of an accident. (3) The probability of the desired value being obtained, i.e., not wearing a helmet or seat belt, is a certainty. (4) The relative worth of being free of helmets and seat belts varies from individual to individual, but it seems reasonable to suppose that people who do not choose to use these devices attach at least some degree of importance to this choice. It is sometimes claimed (by Kleinig for example) that it is not a matter of importance but of laziness or lack of discipline. Dworkin too once thought this, but more recently has come to realize that "while it is possible to relate such cases to the soft paternalist thesis by claiming ignorance or weakness of will, the strategy seems too ad hoc to be convincing."[9] (5) There are no alternatives to the convenience of not wearing a helmet or seat belt. One achieves this goal by simply refraining from their use.

So of the five points in these criteria only the second favors the claim that failure to wear helmets and seat belts is unreasonable. Even if a partial concession is made on the first point, the balance is still in favor of

classifying non-use of helmets and seat belts as a rational choice. Furthermore, even if more weight is attached to the first two points in the criteria, we still do not obtain a clear decision in favor of the paternalist's view. Given that we need a justification for interfering with liberty and individuality, it is reasonable to demand a clear and convincing case for these paternalistic restrictions.

The case for mandatory helmet and seat belt laws on grounds of weak paternalism is made even more difficult if we take seriously the notion of essential relevance. According to this concept the only persons who are appropriately classified as irrational or incompetent are those who are incapable of grasping a fundamental or rudimentary relevance that makes ordinary communication possible. As long as a person understands what is "patently, rudimentarily, and fundamentally relevant" that person is rational.[10] The vast majority of people who fail to use helmets and seat belts are quite capable of grasping the essential relevance of their actions and are, on this model of rationality, both rational and competent. If this is so, paternalistic interference here will require a justification of strong paternalism, not weak paternalism.

I think that the implausibility of classifying the interference with liberty in these matters as weak paternalism due to unusual, abnormal or irrational risk becomes clearer still if we pay some attention to how much risk we accept in the normal course of our life. Consider how many activities we engage in that place us at risk. Millions of people smoke cigarettes and drink alcoholic beverages excessively. Both these activities increase significantly the likelihood of contracting serious life threatening disease. There are numerous dangerous hobbies that make physical injury and death more likely:

mountain climbing, skydiving, SCUBA diving, skiing, bicycling, skateboarding and so on. Also, there are dangerous occupations; among them are fireman, certain circus performers, high-rise construction worker, stunt man, policeman, soldier and so on. Many of us do not eat properly, knowing that we are jeopardizing our long term welfare by eating too much high fat and high cholesterol fast or junk food. Actually, it has been proposed that some of these activities should be the target of paternalistic interference.

One response is that in these activities, as opposed to failure to wear helmets and seat belts, the individual's actions are closely tied to important and meaningful events in her life. This may be true for some of these activities, fireman, mountain climber and circus performer. However, many people engage in SCUBA diving, skiing and bicycling only occasionally; therefore, these events are not of unusual significance in their life style. Although, I suspect the liberty to choose when and under what conditions to engage in risky sports or pastimes is of significance to most of us. Furthermore, if it is laziness and undiscipline that induces us not to use helmets and seat belts, why is it not the same laziness and undiscipline that allows us to smoke, drink too much and eat fast foods. I suspect that the probability of serious health problem is actually greater for these activities than the probability of serious injury by failure to wear helmets and seat belts. I am not trying to establish a slippery slope argument here. In general I do not believe that slippery slope arguments prove anything except that there are borderline cases. Nor am I accusing the paternalist who argues for helmet and seat belt laws, but not for smoking and fast food laws, of inconsistency, although there may well be inconsistency in such arguments. Indeed, it may be wondered, why not helmet laws for cars, especially convertibles; and

bicycles? Race car drivers wear helmets for extra protection which, no doubt, often saves injury and even life in a crash. Laws requiring helmets in cars would surely save additional lives each year and reduce the chance of injury. But my real point is simply that living is a risky business. We are all prepared to accept risks to live in a manner that suits us. Some individuals thrive on risk more than others. I recently witnessed an interview with a volcanologist who was asked if the dangers in her work were a concern to her. She replied that the danger of her work was part of the attractiveness of it. Given all the risks that we must accept, and additional risks that we seem willing to accept to live out our lives in our own style, it is difficult for me to believe the paternalist's claim that riding motorcycles without a helmet or riding in a car without using a seat belt warrants coercive restrictions on autonomous individuals because of the additional risk.

Perhaps the most difficult challenge to the justification of coercive interference requiring the use of helmets and seat belts is the difficulty based on a problem raised in chapter 4, the problem of paternalistic punishment. If a particular piece of paternalism is to have any chance whatsoever of being justified, it must actually benefit the individuals who are coerced. The problem in this case, as it was in the drug case considered in the previous chapter, is that it is doubtful that punishment for failure to use helmets and seat belts is beneficial. To some extent it depends on what lengths the state is willing to go to in order to ensure compliance with its coercive laws. In general the state is faced with the problem of escalating punishment to the point at which it no longer becomes plausible to claim that it is benefiting its citizens. If the state levies fines for failure to comply to helmet and seat belt laws, then it must be clear that it is better for

individuals to suffer loss of funds than not use these devices. Also, this assumes that fines will produce compliance. But we know that fines will not achieve universal compliance, so some of the population is harmed for no positive benefit to them. Further, from here the states justification gets even more difficult. What is the state justified in doing with those who refuse to pay the fines? The state could arrest and sentence to jail those who refuse to pay, or it could confiscate the motorcycle or car. If such drastic actions are implemented, can it seriously be maintained that the motive is still benefit of the individual being coerced? Is it plausible that a person is better off going to jail or losing her car rather than ride without a seat belt?

It may be replied that the law benefits the larger and less rebellious group and, hence, is justified. However, this raises new problems. The state has a number of options available to it. It could refrain from any rigorous and serious punishment, much as it does with the 55 mile per hour speed limit. If it selects this option, then helmet and seat belt compliance is apt to go the way of this speed limit, large scale violation. Hence, the law has little if any benefit. If the state vigorously pursues compliance with stiff fines, jail sentences or confiscation of property, then it is open to a charge of injustice by virtue of administering punishment way out of proportion with the offense. Remember, we are not dealing with an enemy of the state. If the state attempts to justify harsh punishment for violators in order to achieve general compliance, it is still open to the same charge of injustice plus an additional charge of injustice for harming one group, when they have done nothing to deserve it, for the sake of another. But even more damaging to the case for paternalism, if the state's argument rests on the general good, then the

state's argument is no longer paternalistic; hence, it can hardly be offered as a justification for paternalism.

There is one sort of law regarding helmets and seat belts that might be agreeable to paternalist and antipaternalist alike. A law was recently passed in Oklahoma requiring that young children be restrained by a car seat while riding in a car. However, there is no penalty for disobeying this law. A violator may be stopped and cited by a law enforcement official, but there is no fine assessed, no court appearance nor points levied against the violator's drivers license. The 'ticket' is advisory in nature. It is as if the state is saying to this driver, most likely a parent, "we think that you are behaving in an irresponsible and dangerous manner toward this child. If you really care for this child, you will take steps to secure her safety." A similar kind of law could perhaps appease the paternalist. The law is not coercive, but instructive. It levels no penalties. This would seem to avoid the main force of the objections I have raised against coercive interference. It is consistent with liberty and autonomy. The state, by issuing this sort of citation for violation of helmet and seat belt laws is simply appealing to the motorist as an autonomous being by saying in effect, "we believe that you are behaving in a dangerous and irresponsible manner toward yourself."

There are two other kinds of cases that deserve mention in connection with paternalism and risk. The first is the legal prohibition of dueling. Dueling is, like slavery and drug use, one of the kinds of cases that are often thought to challenge the strong antipaternalism I am defending. The belief is that we need paternalistic justifications to prohibit dueling, but, as I shall show, we do not. I think that not a great deal needs to be said about dueling. There may be cases where there is nothing morally objectionable about allowing two

individuals to fight a duel. But there may be difficulties properly policing this endeavor. The objection here is that, as with slavery, we would devise an intricate and expensive piece of legal machinery only to have few, if any, applications for a permit to fight a duel.

There are, of course, more substantial objections. The practice of settling disputes this way is uncivilized and barbaric. It sets the wrong sort of example for the rest of the population, especially children. Rather than resolve disagreements by fair rules with an impartial judge, the duelists resort to a strategy of survival of the strongest, or at least the most adept with the selected weapons for the duel. Hence, dueling undermines civilized rule of law.

My suspicion is that the great majority of people do not wish to be challenged to a duel any more than they wish to be mugged. Therefore, the state has the consent of those restricted. This not only helps justify the restriction, but also indicates that the restriction is not paternalistic.

The final case I will consider under the rubric of paternalism and risk is a case of involuntary commitment. The case is reported by Beauchamp and involves an elderly lady by the name of Mrs. Lake. Mrs. Lake suffered from arteriosclerosis which caused temporary periods of confusion and mild memory losses. It was agreed that she was no threat to anyone but herself. She testified at her hearing, while appearing fully rational and competent, that she understood the risks of living outside of an institution, but preferred to take the risk that she may injure herself during a period of disorientation rather than be institutionalized. The court denied her petition to remain free arguing that she was not competent to take care of herself, presented a danger to herself and was mentally ill. Beauchamp concludes his description

of this case with this remark: "Such reasoning is widespread today, despite forceful arguments by psychiatrists that the harmless 'mentally sick' are often competent to make rational judgments."[11]

Was Mrs. Lake's desire to live in freedom and accept the additional risk of injury due to her illness an irrational desire, or a sign of irrationality? Let me again appeal to the five point criteria of unreasonable risk outlined earlier in this chapter. (1) the probability that the contemplated course of action will lead to harm is not precisely determinable. If Mrs. Lake does not intend to drive a car, her chances of injury are reduced. It is fair to assume that she does not, since according to the description of the case there was no danger she might harm others; and, if she intended to drive there would be danger of harm to others. The probability of self-inflicted injury is also reduced if she has a close friend or relative who will check on her daily. The fact that her loss of memory was mild and periods of confusion short seems to indicate no significant danger to herself. (2) The seriousness of the harm that may result from her decision is potentially dangerous. She could absentmindedly wander into traffic. It is not clear from the information given if serious harm is a real possibility or not. To some extent it depends on where she lives and if someone is checking on her periodically. It is certainly easy to imagine situations where the potential for serious harm is not significantly increased by her choice to remain away from an institution. (3) The probability that the desired value (to remain free) by taking the risk is a certainty. (4) The worth of the desired value (liberty) is extremely high. (5) Are there alternatives? Again it is not clear from the description of this case if Mrs. Lake has alternatives; none are mentioned. If she has friends or

relatives with whom she could live, or who could check on her daily, this would surely be a preferable alternative to institutionalization.

How does Mrs. Lake score on this criteria? Given the high value of liberty and the seemingly low probability of significant self inflicted injury, I am inclined to think that Mrs. Lake was the victim of misguided paternalism. Patrick Henry said "Give me liberty, or give me death." For this we hold him up as noble and as embodying an important ideal. Why then, when Mrs. Lake makes a similar appeal, do our courts feel justified to label her crazy and institutionalize her? It appears to me that Mill's worst fears about the dangers of paternalism opening a wide door to abuse by which one group is able to enforce its own prejudiced view of the good on another group have been fulfilled in this and similar cases. Of course the judge may argue that this is a case of weak paternalism. This indicates that we need stringent criteria for weak paternalism in order to prevent cases of coercive strong direct paternalism from being passed off as cases of weak paternalism.

II

John Kleinig presents an interesting strategy which he believes defeats the strong antipaternalism of Mill, and others as well. He refers to his strategy as the "Argument from Personal Integrity."[12] What is interesting about this approach is that it begins by granting the liberal assumptions about human nature and rests more on principle rather than difficult cases for the antipaternalist.

Kleinig begins his explication with an account of the liberal description of human nature. Each human is born into the world with different capacities.

In order to achieve a meaningful and fulfilling existence each of us must develop these capacities. Distressingly, there is no single or uniform procedure for development, hence, each individual is required to deliberate and experiment in order to formulate her most promising plan of life. In our formative years we need lots of guidance and schooling. As we mature we come to realize that we have capacities that are intimately connected to our well-being and, consequently, we begin to take responsibility for our own development. We formulate a plan of life that shapes our personalities, our identity, and become mature autonomous creatures. We begin to approximate the liberal idea of individuality. Unfortunately, we do not always act consistently with our own designs for our life; we are sometimes shortsighted, impulsive and negligent with respect to our important lifetime ambitions and plans. In other words, we are infected with self-regarding vices. Some of our departures from dedication and commitment to our lifelong plans are trivial in that they merely divert our attention a bit or risk minor setbacks to our progress. But sometimes we err in our judgments in potentially life threatening or otherwise catastrophic ways. In these latter kinds of cases our risk *is* totally out of proportion to the possible gain.[13]

Kleinig argues that even coercive strong direct paternalism is consistent with this picture of human nature. He argues as follows: (1) Coercing competent persons under certain conditions does not violate their integrity. When individuals act on present desires that are inconsistent with their permanent desires and this action places them in jeopardy of catastrophic harm, then coercive intervention into their lives is justified. Since paternalistic intervention under these conditions is consistent with the individual's life plan, it is not moralistic. Further, the paternalism does not

introduce alien values, it merely reveals a tension between permanent and present wants. Where an individual places her self-identity at risk in a way that is inconsistent with her most serious commitments in life, denial of autonomy is permissible. (2) The antipaternalism based on oppression of individuality sees individuals too monochromatically; it views people in terms of immediate presentation.[14]

This approach is probably only a special version of what is sometimes referred to as the "real will" argument. The real will argument relies on a distinction between the real will, roughly equivalent to a previously expressed preference for a plan of life, and an empirical will, the desire of the moment. Kleinig himself is critical of the real will argument on grounds that it has totalitarian tendencies and that it has the potential to allow the overriding of any present desire. Nevertheless, he is willing to make an exception to this objection if the "real will" is cast in the guise of "well-established life-plans."[15] My own inclination is that Kleinig's first intuition, that this strategy is slightly totalitarian, is the correct one.

It might be tempting to present this kind of argument as an attempt to defeat what Mill referred to as the strongest argument of all, that the paternalist will interfere in the wrong place and in the wrong way. Mill, it may be recalled, conjectured that this argument might be defeated in a possible world where there existed an ideal public that confined its paternalistic intervention to what could properly be described as those interventions strictly based on the assertained results of human experience. On this approach it would be argued that the appeal to a well-established plan of life limits the abuse of paternalism in the same way that Mill's ideal public would, if one existed. One reply to this argument is that, like Mill, I

am skeptical that there is or will be an ideal public who would limit the use of paternalistic power in the appropriate way that the argument describes. I would fear creeping legal moralism.

This reply to the Personal Integrity Strategy may not be persuasive in a powerful way, however, I believe an even more convincing reply is possible. One claim that Kleinig makes in his attack on antipaternalism is that the antipaternalist portrays humans monochromatically, a creature with a single important desire, the present one, e.g., to climb a mountain, ride a motorcycle without a helmet or drive a car without wearing a seatbelt. First, I am not quite sure that this is true. If the antipaternalist attempts to warn of possible harmful consequences or persuade the person who is suspected of foolish shortsightedness, then this is evidence that other, perhaps more important, desires are recognized. Sometimes Kleinig talks as though the antipaternalist is callous, thinking to herself on the occasion of an auto accident where seat belts were not used, "they deserved their injuries." There is no reason to attribute such lack of empathy to the antipaternalist. The antipaternalist simply takes liberty and individuality more seriously than the paternalist. Second, is it not the case that the accusation of holding a monochromatic image of humanity is a two edged sword? It seems to me that it is the paternalist who subscribes to a monochromatic description of human nature in that the paternalist only allows a single, tight, consistent and fully developed plan of life. The paternalist does not allow for variation from a previous plan that may well have been expressed and adhered to by an individual. So, if a plan previously expressed does not allow for much risk, the paternalist stands ready to enforce consistency. But most of us are continually developing and experimenting and updating our interests and life

plans. The paternalist does not allow for excursions into new and possibly risky adventures; she does not allow for spontaneous and perhaps sometimes even capricious actions which an autonomous person may wish to indulge in.

The argument from Personal Integrity cries out for some crisp and telling examples. Unfortunately, the two provided by Kleinig are unconvincing. The first example he suggests in which the serious consequences of acting in a manner appropriately inconsistent with a plan of life is that of a student who wants to quit school just prior to final exams. It is in this kind of case, he argues, that something more than persuasion is justified.[16] However, it is not clear at all what more can be done in the way of coercion. It would seem pointless to physically force someone to sit at a desk, since this does not ensure that any learning will take place. I don't see what recourse friends, teachers or counsellors have other than to persuasion and reason. A parent could apply coercive pressure. Parents could threaten to disown, disinherit or refuse to financially support a return to college at a future time. For example, a parent could say to this student, "I have invested a great deal of money in your education. If you quit now, I will have wasted most of that past investment and all of my investment for the current semester. Unless you finish your final exams this semester, I will never again finance your education." Would a good parent make such a remark? Perhaps, in certain circumstances. But, generally speaking, I would say no. This kind of remark might be justified as a bluff to test the seriousness of the student's desire to quit. This student may be questioning her previous decision to attend college, deciding a college education is not worth the effort or merely expressing the desire for a break while she reevaluates her life. It is not clear that this person may not be benefited by working or traveling for a time until she

reaches more settled commitments for her life. If the parent is serious in the threat that I hypothesized, then I would argue that this 'parental beneficence' is misguided; more realistically inspired by anger and frustration than the interests of the student. This individual may simply need some time to reflect, experiment and grow.

The second case that Kleinig connects to this argument is mandatory seat belt and motorcycle helmet laws.[17] The argument is that these devices will not interfere with significant pursuits and will prevent risk taking where the stakes are high. Since I have discussed seat belt and helmet laws at length earlier, I will only summarize my reply here. It is not clear that the risk is unreasonable or irrational. This is especially so in light of the risks we accept on a routine basis in order to live our lives in our own way. There remains the problem of punishment based on paternalistic grounds. The paternalist continually forgets that there is only so much that he can do to a person and continue to plausibly claim that he is benefiting the recipient of his "beneficence." Kleinig admits that for persons who feel quite strongly over this issue, coercive measures may not be justified.[18] If this is admitted, then, as I previously argued, the state is not justified in coercing this group for the sake of those who do not feel strongly. Further, the argument justifying this latter coercion would not be a paternalistic one.

In this and the previous chapter I have evaluated a number of what are usually considered the strongest attempts to legitimize coercive strong direct paternalism. These attempts include arguments for the state's refusal to recognize slavery contracts, for laws forbidding the use of dangerous drugs and consent of the victim as a legal defense of assault or murder, laws against dueling, and laws requiring motorcyclists to wear helmets and

motorists to wear seat belts. I have attempted to show that there are powerful and persuasive arguments against a state's interference in the lives of its citizens for their own benefit. To begin with, respect for liberty, individuality and autonomy require a presumption against all paternalistic interference. In the case of coercive strong direct paternalism arguments based on autonomy or individuality provide conclusive reason for an exceptionless prohibition. But there are other grounds for prohibition as well. At the very least the paternalistic state, following the model of good parenting, should look for alternatives to coercion. When the state cannot find alternatives, or chooses not to seek them, and attempts to counter the presumption against coercive interference with overriding considerations of benefit to the individual, it is met with more difficulties. History teaches us that paternalistic powers are subject to abuse, so society is better off if the state is restrained from exercising these powers. Further, for those activities that the paternalist would most like to prohibit, slavery, drug abuse and so on, paternalistic arguments are, at best, superfluous. But perhaps the most troublesome problem for justifying state paternalism is the dilemma of paternalistic punishment; paternalistic laws are not enforcable on paternalistic grounds. It is a wise parent who knows the limit of her ability to coerce her children for their own good. There are as far as I can determine, no justifications for coercive paternalistic powers for the state.

NOTES

[1]Jeffrie G. Murphy, "The Killing of the Innocent," in War, Morality, and the Military Profession, ed. Malham M. Wakin (Boulder, Colorado: Westview Press, 1979), pp. 359-360.

[2]John Stuart Mill, Utilitarianism and Other Writings, ed. Mary Warnock (New York: New American Library, 1962), p. 316.

[3]Gerald Dworkin, "Paternalism," Philosophy of Law, 2d ed., edited by Joel Feinberg and Hyman Gross (Belmont, California: Wadsworth Publishing Company, 1890), p. 233.

[4]Gerald Dworkin, "Paternalism: Some Second Thoughts," Paternalism, ed. Rolf Sartorius (Minneapolis: University of Minnesota Press, 1983), p. 108.

[5]Ibid., pp. 30-31.

[6]John Kleinig, Paternalism (Totowa, New Jersey: Rowan & Allanheld, 1983), p. 89.

[7]Ibid., pp. 91-96.

[8]Joel Feinberg, "Legal Paternalism," Canadian Journal of Philosophy 1 (September 1971): 109-110.

[9]Dworkin, "Paternalism: Some Second Thoughts," p. 108.

[10]Jeffrie G. Murphy, Retribution, Justice and Therapy (Boston, D. Reidel Publishing Company, 1979), pp. 172-173.

[11]Tom L. Beauchamp, "Paternalism and Biobehavioral Control," The Monist 66 (January 1977): 63.

[12]Kleinig, Paternalism, pp. 67-73.

[13]Ibid., pp.67-69.

[14]Ibid., pp. 70-73.

[15]Ibid., p. 59.

[16]Ibid., p.70.

[17]Ibid., p. 73.

[18]Ibid., p. 73.

CONCLUSION

Having employed, as an opening gambit to this paper, a quotation from the Grand Inquisitor, perhaps it is no less appropriate to close by appealing to the wisdom of Dostoevski once again. In Dostoevski's charactery of the ultimate altruist, the Grand Inquisitor, we see the real ugliness of coercive paternalism run amuck. One of the interesting discoveries in the investigation of paternalism is that there are moral objections to certain expressions of altruism and beneficence.

As we have seen, the reasons why paternalism (the denial of autonomy on grounds of beneficence) is so objectionable have been well laid out by J. S. Mill. While his position has often been described as radical, fantastic and indefensible, it strikes one as much less radical, less fantastic and totally defensible once his position is placed in perspective. Mill's arguments focus on showing that paternalistic acts which are appropriately described as coercive, strong and direct constitute an illicit triad. This does not mean that state or individual actions that interfere with the autonomous control of a person's life are always wrong; it does mean, however, that autonomous individuals ought always be treated as such and that certain specific kinds of paternalistic acts are always wrong. While I have not tried to develop and defend an elaborate rights based argument, and notwithstanding the notorious difficulty with establishing rights, surely it must be the case that if we humans have rights at

all, the case can be made that autonomous persons have a right to be treated autonomously.

I think that the real power of Mill's antipaternalism resides in four arguments. The first maintains the supreme worth of individuality or autonomy. It is a basic and necessary human experience to live as an independent operator in the world. This innate capacity is intimately connected to our self concept and sense of esteem and worth. Thus, when individuality is violated on the grounds of beneficence toward the person whose individuality is denied, this constitutes a violation of what ought to be seen as a private sphere. Arguments which attempt to show that certain kinds of risk, e.g., failure to wear seat belts in cars or failure to wear helmets while riding a motorcycle, are excessively risky and irrational or irrational enough to warrant paternalistic restrictions, either fail in their attempts to demonstrate that the target behavior actually does involve an irrational risk, or subvert the attempt to justify coercive strong direct paternalism by virtue of the fact that the more powerful the demonstration that a particular act is irrational the more implausible the claim that the paternalism is strong. The second line of argument that supports Mill's antipaternalism is the line that Mill himself seemed to think was the strongest, i.e., the fear of legal moralism. Paternalistic power is too much power, especially for a state and especially when it is realized that paternalistic arguments are unnecessary for the most serious kinds of behavior that concern paternalists, e.g., the control of dangerous drugs. Third, The model of good parenting instructs us to act like good parents. It is a wise parent who knows how to control his or her children without the use of coercive power and who realizes that there are strict limits to the extent that coercion can be exercised over another and still claim,

credibly, that beneficence is the motive. The closest Mill comes to advancing this argument is probably in his claim that the state has the power of education and early training and this power is sufficient. The final argument that I find particularly persuasive is the dilemma of paternalistic punishment. In order for paternalistic laws to work they must be enforced. But any enforcement strong enough to allow the law to achieve the intended benefit founders on loss of benefit because the means of punishment undermine the intended benefit. Further, such paternalistic punishment is open to accusations of injustice; the person who is fined or imprisoned on paternalistic grounds is treated as though he is the enemy of the state when in fact he is not.

The usual objections advanced against Mill based on paternalistic arguments for such things as the denial of legal recognition to slavery contracts (including a charge on inconsistency on Mill's part) and the need to control dangerous drugs are unconvincing. We neither need nor is it desirable to restrict these activities for paternalistic reasons. Furthermore, it is difficult to substantiate the claim that, in these matters, we are coercing individuals for their own good.

As a final comment, I would urge the paternalist who feels an irresistible urge to deny my free expression of myself as an autonomous person to take a lesson from Thoreau when he observed that, "If a plant cannot live according to its nature it dies, and so a man."

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