

**This is the final draft of a paper now published in *The Routledge Handbook of the Philosophy of Paternalism*. Kalle Grill and Jason Hanna, eds. Routledge, 2018. There are minor differences between this version and the published version.**

Paternalism and Rights  
Daniel Groll  
Carleton College

Are there any deep or systematic connections between paternalism and people's rights?

Consider the following case:

**Fatima's Keys** Fatima loves listening to loud, live music. This has taken a toll on her hearing. Her doctors have told her that if she doesn't start wearing earplugs at shows, she may well lose her hearing altogether in the coming year. Fatima has ignored their warnings to this point. Tonight, pioneering grindcore band Napalm Death is in town and Fatima is keen to go. Her friend, Rob, is very concerned about Fatima's hearing. So he hides her car keys thereby preventing her from making it to the concert.

First, Rob's action is a paradigmatic case of paternalism. Second, in hiding Fatima's keys from her and so preventing Fatima from using her own car, Rob has violated one of Fatima's property rights (barring special circumstances). Finally, to the extent that Rob's action strikes us as in some way morally problematic, it seems natural to explain that by appeal to the fact that Rob has violated one of Fatima's rights (for her own good).

So here we have an example of paternalism that violates the paternalized subject's rights. We might think reflection on cases like **Fatima's Keys** shows us that there is some interesting connection between paternalism and people's rights. Perhaps the connection is definitional: part of what makes an action or policy paternalistic is that it violates a right. Or perhaps the connection is normative: paternalism is (always? often? only sometimes?) morally problematic because it violates people's rights (even if we don't define "paternalism" in terms of a rights violation).

My main goal in this paper is to argue for the normative connection. Part of the task will be to explain exactly what the normative connection is. That, of course, will involve answering the questions embedded in the claim as well as offering an account of the right(s) that is (are) connected to paternalism's normative status.

Before going further, I want to say something about how I understand the terms "rights" and "rights violation". I take rights-talk to be part of a family of concepts that form, to use Darwall's term, an "interdefinable circle" (Darwall 2006: 12). These concepts include: authority, legitimate claim or demand, obligation, sovereignty. So, if I say that Fatima and only Fatima has a right to her car keys, I take this to imply that, under normal circumstances, only she has authority with respect to how the keys are used; that, normally, only she can make valid claims or demands on others with respect to the keys; that she has sovereignty with respect to the use of the keys, etc.

## **1. Specifying the Normative Connection**

The claim we're considering is that there is a normative connection between paternalism and people's rights: paternalism is (always? often? only sometimes?) morally problematic because it violates people's rights. There is, obviously, a very big difference between the claims that paternalism is always morally problematic, often morally problematic, and only sometimes morally problematic. So, which version of the normative connection am I arguing for?

To help us answer this question, consider the following case:

**Permission Denied** Fatima is 10 years old and loves listening to really loud live music without earplugs. She really wants to see Napalm Death, but her father, Rob, won't let her go because he is concerned about the effect on her hearing.

Let's stipulate that Rob is entitled to decide whether Fatima can go to the concert and that he's making a good decision. If that's right, then it looks like there is nothing morally problematic with his decision. And that shows that some paternalistic actions are not morally problematic at all. So the "always" version of the normative connection claim can be ruled out...provided we think Rob is acting paternalistically.

Is he? Seanna Shiffrin would say "no". According to her, we act paternalistically only when we treat competent adults like children (Shiffrin 2000: 219 n.24).<sup>1</sup> Treating children (or incompetent adults) like children is not, according to Shiffrin, paternalistic.<sup>2</sup> If that's right, then **Permission Denied** does not give us reason to reject the claim that paternalism is always morally problematic.

Suppose, though, that we think Rob *does* act paternalistically in **Permission Denied**. An advocate of the view that paternalism is always morally problematic needn't be bothered. That is because he might insist that what **Permission Denied** really shows is that we need to distinguish between *soft* and *hard* paternalism. Soft paternalism is directed at individuals whose actions are "substantially nonvoluntary" or people who do not rise to some threshold level of competence for making the decision at hand.<sup>3</sup>

Hard paternalism, on the other hand, targets "human beings in the maturity of their faculties".<sup>4</sup> If the normative connection is meant to apply to all paternalism – soft and hard – then certainly the "always" version will be false: soft paternalism is usually not morally problematic at all. But we might invoke the soft/hard distinction as a way of setting aside cases like **Permission Denied** altogether so that we can focus on the more normatively interesting cases involving hard paternalism. If we do that, then we can

further specify the claim we're considering: *hard* paternalism is (always? often? only sometimes?) morally problematic because it violates people's rights.

Can we make a case for this claim? And which version: "always", "often", or "only sometimes"? To help us here, let's consider what it might mean to say that there is a systematic connection between hard paternalism's normative status and people's rights.

Here are three possibilities:

**Strong view:** Hard paternalism is *pro tanto* wrong inasmuch as it always involves a rights violation.

**Moderate view:** Hard paternalism is always *presumptively* wrong inasmuch as there is always the justified presumption of a rights violation.

**Weak view:** Hard paternalism is neither *pro tanto* nor *presumptively* wrong, but when it *is* wrong (either all things considered or *pro tanto*) that is because of a rights violation.<sup>5</sup>

If the Strong view is right, then hard paternalism is always morally problematic. If the Moderate view is right, then hard paternalism is often morally problematic, though in particular cases it will not be. If the Weak view is right, then paternalism is sometimes problematic, but there is no justified presumption of a rights violation in all instances of hard paternalism.

One might wonder whether the Weak view posits anything worthy of being called a "systematic connection" between paternalism and rights-violations. I think it does: even if paternalism is often morally *unproblematic*, it would be interesting to learn that *when* it is morally problematic it is because there is a rights violation. Even so, the Moderate and Strong views (and particularly the latter) posit a deeper, more interesting connection between paternalism and rights-violations, so I want to explore their prospects. More specifically, I want to show that the Strong view has more going for it than it might seem.

## 2. Defending the Strong view Part I: The Definitional Connection

One way to defend the Strong view would be to build the notion of a rights violation into our very understanding of what paternalism is. On this view, which I'll call **rv-Paternalism**, part of what makes an action is paternalistic is that it violates the rights of the paternalized subject (for the sake of that subject's welfare or good).<sup>6</sup> If this is a compelling understanding of what paternalism is, then the connection between paternalism's moral taint and people's rights will be very strong indeed: it will be baked into our very understanding of the nature of paternalism.

Seanna Shiffrin has provided an important contemporary version of something very close to **rv-Paternalism**. According to Shiffrin (2000: 218. Emphasis added):

Paternalism by A toward B may be characterized as behavior (whether through action or through omission):

- a) aimed to have (or to avoid) an effect on B or her *sphere of legitimate agency*
- b) that involves the substitution of A's judgment or agency for B's
- c) directed at B's own interests or *matters that legitimately lie within B's control*
- d) undertaken on the grounds that compared to B's judgment or agency with respect to those interests or other matters, A regards her judgment or agency to be (or as likely to be), in some respect, superior to B's.

There is a lot to say about Shiffrin's conception of paternalism.<sup>7</sup> What interests me here, however, is Shiffrin's idea that paternalism intrudes on the paternalized subject's "sphere of legitimate agency" and is directed at "matters that legitimately lie within B's control." She makes the connection between these ideas and people's rights clear when she notes that, "a full account of paternalism will depend upon a fleshed-out account of autonomy rights – over what an agent (B) generally has proper domain, just in virtue of being an

agent” (Shiffrin 2000: 218-19).<sup>8</sup> If Shiffrin is right about what paternalism *is*, then the Strong view will be vindicated since paternalism’s morally problematic nature will have been built into our very understanding of the phenomenon.

We’ve already seen one hurdle **rv-Paternalism** needs to clear: cases like **Permission Denied** appear to present us with instances of non-rights violating paternalism. But we’ve also seen how an advocate of **rv-Paternalism** can respond. First, like Shiffrin, they might deny that cases like **Permission Denied** evince paternalism. The other option is to reformulate **rv-Paternalism** as a claim about *hard* paternalism. This is the route preferred by Norbert Paolo (2015: 136) who says that, “An act is a case of hard paternalism when the carer infringes a right of the cared for and tries to justify this interference with an interest or right of the cared-for.”

But even if one thinks these responses are viable, **rv-Paternalism** faces another problem: there appear to be clear cases of (hard) paternalism that don’t involve any rights violation. For example:

**Rob’s Keys** Fatima loves listening to loud, live music. This has taken a toll on her hearing. Her doctors have told her that if she doesn’t start wearing earplugs at shows, she may well lose her hearing altogether in the coming year. Fatima has ignored their warnings to this point. Tonight, Napalm Death is in town and Fatima is keen to go. Her friend, Rob, is very concerned about Fatima’s hearing. The only way for Fatima to get to the concert is to borrow Rob’s car. Rob knows she’ll take the car whether he gives her permission to or not, so he hides his keys, thereby preventing her from making it to the concert.<sup>9</sup>

Fatima is not entitled (other things being equal) to use Rob’s car. He does not (it seems) wrong her at all by hiding *his* keys. They’re his! On the face of it, then, there is no rights violation here. Nonetheless, many people will count Rob’s action as paternalistic and obviously so.<sup>10</sup> But according to **rv-Paternalism**, Rob’s action is not paternalistic. And

advocates of **rv-Paternalism** cannot appeal to the soft/hard distinction here since if Rob's action is paternalistic it is an example of *hard* paternalism.

**rv-Paternalism** is forced to say that cases like **Rob's Keys** offer merely purported instances of non-rights violating paternalism: either the action is not paternalistic or there is some rights-violation involved. The first route is unacceptably question-begging. The second requires that the advocate of **rv-Paternalism** give an account of the right, or rights, that are violated. In the next section, I argue that, contrary to initial appearances, we actually can plausibly posit a rights violation in cases like **Rob's Keys**. If that argument is successful, then **rv-Paternalism** may be safe and it seems we'll have successfully defended the Strong view.

But **rv-Paternalism** faces another, in some ways more fundamental, challenge. This challenge is articulated by G. Dworkin (2016):

As a matter of methodology it is preferable to see if some concept can be defined in non-normative terms and only if that fails to capture the relevant phenomena to accept a normative definition.

One might reject the methodological assumption as applied to concept definition in general, but think that it nonetheless applies to defining "paternalism". Given widespread disagreement about when, if ever, paternalism is justified, it seems preferable to not build the presence of a moral taint *into* our understanding of what paternalism is. But this is precisely what **rv-Paternalism** does.<sup>11</sup> The methodological challenge, then, gives us reason to look for another way of defending the Strong view.<sup>12</sup>

### **3. Defending the Strong View Part II: The Normative Connection**

Let's take stock. We're trying to defend the Strong view that hard paternalism is *pro tanto* wrong in virtue of always involving a rights-violation. If we can do that, we'll have shown that there is a systematic connection between paternalism and people's rights that makes hard paternalism always morally problematic.

However, we're now looking for a way to establish the connection without *defining* (hard) paternalism partially in terms of a rights-violation. This leaves open the task of figuring out just what paternalism *is*, which I leave it to others in this volume to tackle. The idea we're after here is just this: whenever (hard) paternalism is on the scene, so too is a rights violation. To paternalize a competent adult involves violating one, or some, of their rights. Crucially, this is not now intended as a definitional move. Rather, it is a substantive claim about some right(s) that people have as competent adults and how hard paternalism always abrogates it (or them).

We've already confronted the biggest obstacle to making good on this substantive claim: cases like **Rob's Keys** appear to be involve paternalism with no rights violation. Really, there are two challenges to the Strong view one could extract from **Rob's Keys**. First, and most obviously, one might take **Rob's Keys** to provide a straightforward counterexample to the claim that hard paternalism always involves a rights violation (and so, to that extent, is always morally problematic).<sup>13</sup>

But you might take the case of **Rob's Keys** to show something else. Rather than seeing it as a case of unproblematic paternalism, you might see it as a case of *problematic, non-rights-violating* paternalism. That is, you might agree that cases like **Rob's Keys** exhibit morally problematic paternalism, but deny that the moral taint comes from a rights violation. More generally, you might think that identifying a rights

violation in every instance of (hard) paternalism seems like a very heavyhanded way of accounting for the moral taint of paternalism. Does it seem plausible, in advance of examining particular cases, that the wrong of paternalism always consists in the violation of the paternalized subject's rights? Some want to say "no",<sup>14</sup> that we can see the *pro tanto* wrongness of at least some instances of paternalism without having any thoughts about rights violations. So, according to this challenge, even if the Strong view is right in claiming that all instances of hard paternalism are morally problematic, it often (or at least sometimes) gets the *source* of the moral taint wrong.

Both challenges make clear what a defender of the Strong view needs to do. The Strong view is plausible only to the extent that it can identify find some right (or rights) that is (are) violated in cases like **Rob's Keys**. Can we do this?

To start, we might ask: is the claim that paternalism always involves the violation of a right the claim that it always violates *some right or other* or the claim that it always violates *some particular right*?

If we go the first route, the Strong view starts to look wildly implausible: if there is no one right that is violated by paternalism, why think that paternalism always involves a rights violation? It seems remarkable that it would!<sup>15</sup> Suppose, then, we go the second route and attempt to identify one particular right that is (presumptively) violated in every instance of paternalism. There are two questions. First, what could this right possibly be? And second, why think that we have it?

One answer to the first question comes from Mill (1978: 9):

In the part [of his conduct] which merely concerns himself, [a person's] independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Joel Feinberg (1989) defends a version of this claim in his articulation and defense of a “right to autonomy”. According to Feinberg, a person’s life:

Is after all *his* life; it *belongs* to him and to no one else. For that reason alone, he must be the one to decide – for better or worse – what is to be done with it in that private realm where the interests of others are not directly violated (59).<sup>16</sup>

Feinberg’s thought here is that my life is *properly* mine: I am the one rightly in charge of me, and so when matters involve only me, I am, by right, the one who gets to make decisions about those matters. If there is this kind of right, is it now plausible to think that Rob violates Fatima’s rights in keeping his keys from her?

Answering this question depends on resolving some well-known issues with the Mill/Feinberg approach. The most notable is figuring out which actions or domains of action “merely concern” the acting individual or figuring out the boundaries of “the private realm where the interests of others are not directly violated.” With respect to Mill’s formulation, Fatima’s desired course of action does not merely concern herself. It also concerns Rob. More generally, the worry is that the set of actions that only concern the acting individual is vanishingly small.<sup>17</sup> With respect to Feinberg’s formulation, clearly Fatima would directly violate Rob’s interests if she *stole* his keys. But that’s not what we’re wondering about here. The question is whether, in refusing to give Fatima his keys *for her own good*, Rob is interfering in Fatima’s “private realm” of interests.<sup>18</sup>

I think we can sidestep these questions, and in doing so isolate a right that is plausibly violated in both **Fatima’s Keys** and **Rob’s Keys**, by switching our focus slightly. Let’s call the potentially paternalized subject the “target agent” and the potential paternalist the “acting agent”. Instead of asking whether the target agent’s action is self-regarding or merely of concern to herself, we should ask, “Why is the *acting agent* doing

whatever it is he is doing?” My thought is that if the answer to this second question is, “Only (or overridingly) for the sake of the target agent’s good”, then the acting agent is not only acting paternalistically but violating a right (assuming that the target agent is competent). What is that right? It is the right of competent individuals to be the only ones to act *only* (or overridingly) for the sake of their own good.

This way of putting things takes the focus away from whether the action in question is “self-regarding”. The action might have all kinds of consequences for other people; it might be well outside the “private realm.” What matters is *why* the acting agent is stepping in. If he is stepping in only, or overridingly, for the sake of the target agent’s welfare, then the action violates a competent agent’s right to be the sole agent that is authorized to act *only* for her own good. Everyone else must, in acting for the good of that person, be authorized to so act.

The claim then is that competent agents are sovereign with respect to acting for their own good. This does not mean that others cannot act for our good without wronging us! That would be an absurd view. The claim, rather, is that others wrong us when they act only or overridingly for the sake of our good. In so acting, they are unconstrained by consideration of whether their attempt to help is authorized. Crucially, if the target agent is not competent, then the acting agent may still well be doing something paternalistic<sup>19</sup> – whether authorization is given is not relevant for whether the action *counts* as paternalistic (in this way my view is not a version of **rv-Paternalism**). It only matters for the moral assessment of the paternalistic act. Lack of authorization only counts against the act if the target agent is competent.

If competent agents are sovereign over their own good in the way I've claimed, then, contrary to initial appearances, **Rob's Keys** does involve a rights violation. Inasmuch as Rob is acting for Fatima's good without due concern for whether his intervention is welcome, he is wronging Fatima. It is true that the car is his. So he does not violate any of Fatima's property rights in refusing to loan her the car. He *does* violate Fatima's property rights in **Fatima's Keys**. But it turns out that the absence or presence of property rights is not what is most salient for explaining what is problematic about Rob's paternalism in the above cases. There is a more fundamental right of sovereignty over our good at play that explains the moral taint in *both* **Rob's Keys** and **Fatima's Keys**. As noted above, this story explains why there is no moral taint in **Permission Denied**: the right in question only attaches to competent agents. We do nothing wrong – either *pro tanto* or presumptively – in acting for the good of our children or incompetent patients in our charge.

But won't this conception of the right that is violated in acts of hard paternalism make all kinds of ordinary actions paternalistic and rights-violating? Surprise parties, gift giving, and charitable donations come immediately to mind. The general worry is that the account of the right that is violated in hard paternalism threatens to morally taint all kinds of actions that we tend to think have no moral taint at all.

The general answer to this concern is that in the kinds of cases just mentioned, and others like them, there is normally a presumption that our benevolent actions have been implicitly authorized. And to the extent that there is *not*, to the extent we believe or don't care that our benevolence is not authorized by the benefactee, then these actions *do* acquire a moral taint.

By way of illustration, consider charitable giving. Typically, we think that this action has no moral taint. And typically charitable giving is motivated by a desire to help other people, to improve their welfare, to make their lives better. In giving to Oxfam I am no doubt motivated, probably even primarily motivated, by the good of the people I aim to help. But my impulse to help is plausibly construed as constrained by the belief that the help is wanted. Were it not, I would be far less inclined to give. If nothing else, the fact that the help was not wanted (perhaps it is not perceived as help) would give me serious pause (Groll, 2014: 189). In general, when we aim to help other people – particularly competent adults – we are sensitive (however implicitly) to whether our help is welcome. If we act without concern for this question, or our concern for a person’s good overrides concerns for whether the help is wanted, then I think it is plausible that there is something morally problematic with our action. The same point holds for gift-giving and surprise parties: we typically take ourselves to have implicit authorization to do these things and if we really didn’t think that we did (or didn’t care), then the practices start to look morally problematic.

Even so, we might worry that this move only gets us so far. There seem to be all kinds of cases where I act for the good of others – particularly loved ones – without *any* thought of whether I have implicit authorization: think of the myriad actions, small or otherwise, that we do for romantic partners all the time without considering, first, whether some kind of authorization has been granted. Am I committed to saying that all such actions evince hard paternalism and involve a rights violation?

No. The reason is that being in this kind of relationship involves the parties granting each other a degree of leeway, a limited kind of authority, to look out for the

good of the other, to care for the other. Indeed, I think this is part of what it means to enter into this kind of relationship. This doesn't mean that one can do just anything for the good of one's partner. But being in this kind of relationship involves a kind of limited "authority swap" wherein each partner is given a very open-textured permission to act for the good of the other. So, when we act unthinkingly for the good of those we are most close to, it is (usually) against the backdrop of knowing that we are part of a relationship that effectively authorizes such actions. Our actions are, typically, neither paternalistic nor rights-violating (though they can certainly be both).

A version of this point applies to some non-intimate relationships. To take one example: a professor might make students hand in drafts of papers for their own good even though the students would really rather not write a draft. Is the professor acting paternalistically and violating the right I identified above?<sup>20</sup> On my view, the answer to both questions is "no": professors and students stand in a distinctive relationship which is defined, in part, by the student authorizing the professor to structure the class at least in part with an eye to the students' good. Again, that doesn't mean the professor can do just anything for the sake of the students' good. But actions that would clearly count as paternalistic outside the relationship are not paternalistic in the context of the relationship since the relationship is partly defined in terms of one party granting a limited authority to the other.

Some may be concerned that this way of defusing the initial concern (that my view of the right violated in hard paternalism will result in all kinds of ordinary behavior being morally problematic) comes too close to a "just so" story: in cases where people seemingly act only or overridingly out of concern for another's good but where we are

disinclined to say there is anything morally problematic, we simply invoke the idea that implicit authorization was (believed to be) given as part of being in a certain kind of relationship. But this isn't right. The proper lesson is that whether a particular action or policy is (hard) paternalistic, and so morally tainted, depends on the fine details of the case: on whether there was a prior relationship between the parties; on the nature of that relationship; on whether some form of consent or authorization was granted in the past. It will no doubt turn out that in looking at these fine details, some actions that take place within the context of the kinds of relationships that involve a transfer of authority will nonetheless turn out to be instances of hard paternalism and, on my view, rights violating.

So: we have identified a right that plausibly might be thought to be violated in every instance of (hard) paternalism and in doing we have so lent some credence to the Strong view.<sup>21</sup> Some will greet this idea – or the idea that there is any right of this sort (including those identified by Mill or Feinberg) – with unbridled skepticism (for example: Conly 2013: 36). Certainly, a full defense of the view would need to offer an account of *why* or *how* we have such a right. Is it basic? Or is the right itself an outcropping of more general concerns about promoting well-being or something else of value?<sup>22</sup>

First, we might follow Mill (and some contemporary followers of Mill, like R. Dworkin (1993)) by helping ourselves to an interest theory of rights and pointing to some important interest, or set of interests, that are protected or promoted by there being such a right. Broadly speaking, this would be to offer a *good-based* account of the origin and force of the right in question.

Second, we might try to show that the right in question is basic or fundamental, something we have in virtue of some feature possessed by mature adults. We might pursue this line of thought in a Kantian vein by arguing for the moral importance of our status as rational creatures with a capacity to set ends. Perhaps a story can be told according to which our rational end-setting capacities ground a kind of fundamental authority in each of us with respect to acting for our own good.

Far more needs to be said to flesh out either of these possibilities. What I want to emphasize now, however, is that adopting the Strong view needn't necessarily lend credence to an even *stronger* view, namely that (hard) paternalism is always and everywhere unjustified. This would only follow if we accept either the claim that all rights are absolute, i.e. "never permissibly infringed" (Shafer-Landau 2005: 189), or that the particular right I've identified is absolute.<sup>23</sup> The Strong view then does not, by itself, leave us with the Very Strong view that hard paternalism is always impermissible.

#### **4. Conclusion: The Challenge of Avoiding Rights-Talk**

I hope to have made somewhat compelling the idea that hard paternalism is always *pro tanto* wrong because it always involves a rights violation. But just how plausible it is will depend, in part, on the plausibility of competing accounts of when/why paternalism is morally problematic. By way of concluding, I want to very quickly examine some of those alternative accounts since, I will suggest, it is not clear that they are really alternatives at all.

How else might we account for the moral taint of paternalism? We need only consider some other common ways of conceiving of paternalism to see the possibilities.

Perhaps paternalism (always or presumptively) interferes with the paternalized subject's liberty (Feinberg 1984) *and it is pro tanto or presumptively wrong to interfere with the liberty of another person*. Or perhaps hard paternalism (always or presumptively) diminishes the paternalized subject's autonomy (Enoch 2016, Dworkin 1998 & 2016) and *it is pro tanto or presumptively wrong to diminish the autonomy of another person*. Or perhaps hard paternalism (always or presumptively) substitutes the paternalist's judgment for the paternalized subject's (Dworkin 1988, Shiffrin 2000)<sup>24</sup> *and it is pro tanto or presumptively wrong to do that*.<sup>25</sup>

Each of these suggestions comes with its own conception of paternalism which we could (and should) scrutinize independently. But I want to leave that aside and focus on the following question: do the above suggestions actually avoid appealing to the idea of a rights-violation in their account of paternalism's moral taint? The worry is that attempts to explain what it means to interfere with the liberty of another person; or to limit her autonomy; or to substitute one's judgment for another person's are implicitly appealing to the idea that the paternalist is acting in an *unauthorized* way.

Consider the idea that paternalism's moral taint stems from the fact that it, "constitutes an attempt to substitute one person's judgment for another's, to promote the latter's benefit" (Dworkin 1988: 123). The problem is that it's not clear that we can spell out the idea of A substituting his judgment for B's in the way required to explain why (hard) paternalism is so often morally problematic without implicitly helping ourselves to the idea that A is not *authorized* to substitute his judgment for B's. Indeed, the idea of A substituting his judgment for B's suggests that the judgment in question was *properly B's to make in the first place*.

I grant we need not hear it this way. Talk of substituting one thing for another can indicate a mere temporal ordering: Bob Gainey begins the game at left wing for the 1986 Montreal Canadiens and then is substituted out for Mats Naslund 45 seconds later. There's no implication here that Naslund is taking something from Gainey that is properly Gainey's. Rather, talking of "substituting Naslund for Gainey" indicates, merely, "First Gainey, now Naslund."

But that's not what's going on in G. Dworkin's talk of "substituting judgment." First, in many cases, the paternalized subject will not have first made a judgment which is then supplanted by a *later* judgment by the paternalist. The timing of the competing judgments is not relevant for understanding how A substituted his judgment for B's. The substitution is not temporal but, metaphorically speaking, geographical: A is inserting a judgment where it does not belong. The territory in question belongs (at least presumptively) to B. That is why when A's judgment carries the day we say that A has substituted his judgment for B's. But if B's judgment were to carry the day, we would not say that B's judgment substituted A's.

A similar point holds true for some of the other conceptions of paternalism that purport to explain paternalism's moral taint without appealing to the idea of a rights violation: can we make sense of the idea of interfering with liberty or limiting autonomy without helping ourselves to some notion of what decisions, or domains of decision-making, *properly* belong the paternalized subject?<sup>26</sup> Maybe we can. The point I'm after here is just that alternative routes to explaining what so often makes (hard) paternalism morally problematic might not be as distinct from my version of the rights route as they initially seem.

Having said that, the nature of the right that is violated might be very different from how I have construed it: perhaps, for example, it is a liberty right and not the broader right I have identified. This could have implications for whether the Strong view is correct since it might turn out that not all instances of hard paternalism violate the liberty right (indeed, this seems to be the case in **Rob's Keys**). But the key thought now is just that avoiding rights talk *altogether* when attempting to explain (hard) paternalism's moral taint (whether it always has it or not) is harder than it seems.

If all this is correct – if there is an independent account of the place of rights in paternalism that is somewhat compelling *and* if alternative accounts of paternalism's moral taint implicitly invoke the idea of a rights violation – then we have found a systematic connection between paternalism and rights without baking the idea of a rights violation into our understanding of paternalism.<sup>27</sup> And if my conception of the right in question is correct, we will have found that the moral taint of paternalism stems from the fact that paternalism toward competent adults involves violating the right of competent agents to be the only ones authorized to act solely for the sake of their own good.<sup>28</sup>

---

<sup>1</sup> Beauchamp 2009, 82 also goes this route.

<sup>2</sup> Although she admits that this will, “seem terribly counter-intuitive to those who regard our treatment of children and mentally disabled people as paradigm cases of justified paternalism” (Shiffrin 2000, 219 n.24).<sup>2</sup>

<sup>3</sup> More broadly, it is also directed at people where there is a *question* about whether their actions are voluntary or the result of minimally competent agency (Feinberg 1984: 12).

<sup>4</sup> Although attempting to draw a sharp distinction between soft and hard paternalism in terms of different kinds of agents (competent v incompetent) is none too easy. For criticisms of leaning too heavily on the distinction see Conly 2013; Arneson 2005; Levy 2012; and Begon 2016.

<sup>5</sup> There is also a fourth possibility, the Very Strong view, according to which Hard paternalism is always all things considered unjustified. I say a little more about this below (p.17) but I don't consider it a plausible view.

<sup>6</sup> The bit in parentheses is what I call the “welfare motive”. It is accepted by almost everyone to be part of what makes an action paternalistic. Shiffrin, however, rejects it.

<sup>7</sup> Including the fact that Shiffrin rejects the idea that paternalism must, by definition, be motivated by a concern for the paternalized subject's welfare.

<sup>8</sup> Having said that, however, Shiffrin immediately adds:

---

Although the characterization of paternalism that I am suggesting depends on an independent specification of an agent's rights, paternalist behavior cannot be reduced to some subset of behavior that violates these rights. For it is possible for A to act within her own rights, but be motivated purely by a disrespect for B's agency about matters that lie within B's purview and aim to maneuver around or manipulate B's agency. When this is A's sole motivation, she behaves paternalistically, I think, even if her behavior does not violate any distinct rights. (218)

This is what leads me to say that Shiffrin's view is *very close* to **rv-Paternalism**. I confess to being confused about why, given her account of paternalism, Shiffrin admits of the possibility of paternalism without a rights violation. It is true, as she notes, that there are examples of paternalism that do not violate "distinct" rights (like a particular property right for example). But it seems natural, given her view, for Shiffrin to posit that B has a claim against A attempting to substitute her judgment for B's with respect to spheres of interest that are legitimately within B's control. I discuss the possibility of there being such a right, and it playing a role in establishing a systematic connection between paternalism and rights violations, below (p. 15)

<sup>9</sup> Similar cases: Dworkin (1988, 122), Quong (2011, 79), Vallentyne in this volume.

<sup>10</sup> Although a lot will depend on how we understand Rob's motive. If he is centrally, or equally, concerned with not implicating *himself* in Fatima harming herself, then his action may not be (straightforwardly) paternalistic. Thanks to Micah Lott for pointing this out. This is a point pursued in-depth in Shiffrin 2000.

<sup>11</sup> More precisely, our fealty to **rv-Paternalism** falls afoul of the assumption absent attempts to formulate an adequate non-normative conception of paternalism.

<sup>12</sup> If you are not at all sympathetic to the methodological challenge, then my defense of the Strong view in the next section could serve as a defense of **rv-Paternalism** as well.

<sup>13</sup> Vallentyne, this volume. Notice that this is consistent with the Weak view, namely that when (hard) paternalism is morally problematic that is because it involves a rights-violation.

<sup>14</sup> Including an earlier time-slice of me. See Groll 2012.

<sup>15</sup> The Moderate view is immune to this worry, but susceptible to a weaker version of it: is it at all clear that there is even a presumption of a rights violation whenever paternalism occurs if there's no one right that is on the table as presumptively violated?

<sup>16</sup> I'm indebted to Arneson's discussion of Feinberg.

<sup>17</sup> For one account of how we should understand Mill on this point see Gray 1983.

<sup>18</sup> I think Feinberg would probably say that insofar as Rob is not limiting Fatima's liberty he is not *interfering* with her at all, and so Rob's action is neither problematic nor paternalistic. As I go on to argue, I think there is a sense in which Rob could be said to interfere with Fatima, not necessarily in virtue of limiting her liberty but by violating one of her rights.

<sup>19</sup> And indeed, I think they are simply in virtue of acting only or overridingly for the target agent's good. This is my current understanding of what paternalism *is*.

<sup>20</sup> Thanks to Jason Hanna for raising this example.

<sup>21</sup> Or the Moderate View if you think that the right I've identified is not in play in some circumstances.

<sup>22</sup> Feinberg (1989: 59) briefly surveys the options.

<sup>23</sup> As Shafer-Landau makes clear, there are parts in Feinberg that suggest that Feinberg believed that the rights constitutive of personal sovereignty are absolute and so that hard paternalism was always unjustified. But Shafer-Landau argues, convincingly in my view, that this view is neither consistent with some of Feinberg's other remarks on justified rights violations nor plausible on its own.

<sup>24</sup> Dworkin 1988 seems to treat talk of "substituting judgment" and "violating autonomy" interchangeably.

<sup>25</sup> Another option, suggested by Quong 2011, Groll 2012, and Shiffrin 2000 is that acting paternalistically involves acting with an insulting or disrespectful motive and that *this* is what accounts for paternalism's moral taint. This route avoids the problem I discuss below, but I am now (more or less) convinced by the criticisms of this view advanced by de Marneffe 2006 and Enoch 2016.

<sup>26</sup> Beauchamp 2009's purportedly "value neutral" (82) account is, I think, particularly susceptible to this challenge.

<sup>27</sup> We certainly haven't baked it into a conception of paternalism if we take paternalism to include both soft and hard paternalism. Have we baked it into a conception of *hard* paternalism? I don't think so. The idea that competent individuals are sovereign, in some way, with respect to their own good does not figure into

---

what *makes* an action paternalistic. Rather, it is a substantive, further commitment that explains *why* acting paternalistically toward competent adults is morally problematic.

<sup>28</sup> This paper has been much improved by very helpful feedback from Jennifer Lockhart, Micah Lott, Norbert Paulo, Michael Fuerstein and the two editors of this volume Kalle Grill and Jason Hanna.

### Related Topics

Peter Vallentyne's chapter for sure. No doubt there are others.

### Works Cited

Arneson, Richard J. "Joel Feinberg and the justification of hard paternalism." *Legal Theory* 11.03 (2005): 259-284.

Beauchamp, Tom L. "The concept of paternalism in biomedical ethics." *Jahrbuch für Wissenschaft und Ethik* 14 (2009): 77-92.

Begon, Jessica. "Paternalism." *Analysis* (2016): anw040.

Conly, Sarah. *Against Autonomy: Justifying Coercive Paternalism*. Cambridge University Press, 2013.

Darwall, Stephen L. *The second-person standpoint: Morality, respect, and accountability*. Harvard University Press, 2006.

De Marneffe, Peter. "Avoiding paternalism." *Philosophy & Public Affairs* 34.1 (2006): 68-94.

Dworkin, Gerald, "Paternalism", *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2016/entries/paternalism/>

Dworkin, Gerald. *The theory and practice of autonomy*. Cambridge University Press, 1988.

---

Dworkin, Ronald M. *Life's dominion: An argument about abortion, euthanasia, and individual freedom*. Vintage, 1993.

Enoch, David. "II—What's Wrong with Paternalism: Autonomy, Belief, and Action." *Proceedings of the Aristotelian Society*. Vol. 116. No. 1. The Oxford University Press, 2016.

Feinberg, Joel. *Moral Limits of the Criminal Law (Book 3)*, Oxford University Press; Reprint edition (March 9, 1989)

Gert, Bernard, and Charles M. Culver. "Paternalistic behavior." *Philosophy & Public Affairs* (1976): 45-57.

Gray, John. *Mill on liberty: a defence*. Routledge, 1983.

Grill, Kalle. "The normative core of paternalism." *Res Publica* 13.4 (2007): 441-458.

Groll, Daniel. "Medical paternalism—part 1." *Philosophy Compass* 9.3 (2014): 186-193.

Groll, Daniel. "Paternalism, respect, and the will." *Ethics* 122.4 (2012): 692-720.

Levy, Neil. "Forced to be free? Increasing patient autonomy by constraining it." *Journal of medical ethics* (2012): medethics-2011.

Mill, John Stuart. "On liberty (E. Rapaport, Ed.)." *Indianapolis, IN: Hackett*(1978).

Paulo, Norbert. "The bite of rights in paternalism." *New perspectives on paternalism and health care*. Springer International Publishing, 2015. 127-141.

Quong, Jonathan. *Liberalism without perfection*. oxford university Press, 2011.

Shafer-Landau, Russ. "Liberalism and paternalism." *Legal Theory* 11.03 (2005): 169-191.

Shiffrin, Seana Valentine. "Paternalism, unconscionability doctrine, and accommodation." *Philosophy & Public Affairs* 29.3 (2000): 205-250.

Vallentyne, Peter. "Libertarian Perspective" *Routledge Handbook on Paternalism*, 2017

### Further Reading

The *locus classicus* for discussions of paternalism (although the term never appears) is Mill's *On Liberty*. After that, J. Feinberg's, *Moral Limits of the Criminal Law (Book 3)*,

---

Oxford University Press; Reprint edition (March 9, 1989) is the first place to go for discussions of paternalism, followed by R. Arenson's super helpful "Joel Feinberg and the Justification of Hard Paternalism." *Legal Theory* 11.03 (2005): 259-284. Shiffrin's "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy & Public Affairs* 29.3 (2000): 205-250 is characteristically brilliant. For a recent, excellent overview of work on paternalism, see Jessica Begon's "Paternalism." *Analysis* (2016): anw040.

### Biographical Note

Daniel Groll is an associate professor of philosophy at Carleton College in Northfield, MN. His main area of research is paternalism, although he also does work on moral disagreement, moral testimony, and issues in clinical medical ethics. His work has been published in *Ethics*, *Analytic Philosophy*, *Hastings Center Report*, *Pediatrics*, and *Oxford Studies in Metaethics*. Outside of philosophy he enjoys Zamfir and Zamfir fan-fiction.