

## Anti-paternalism and Public Health Policy: The Case of Product Safety Legislation<sup>1</sup>

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The UK General Product Safety Regulations 2005 states that products may not be brought to market if they present more than "the minimum risk compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons."<sup>2</sup> This recent regulation grants enforcement authorities the power to have products withdrawn from the market and recalled from buyers, and extended powers to halt the process of bringing a product to market.<sup>3</sup> In other words, decisions on acceptable risks from consumer products are to a considerable extent placed with government authorities, decisions that would otherwise be made by individual consumers. The UK regulation is based on a 2001 European Union directive; similar regulations apply throughout the Union, as well as in some other countries.

The risks involved in using consumer products are often risks to the user herself, rather than to third parties. Product safety regulation therefore typically involves paternalism. This article aims to distinguish the paternalistic content of product safety regulation, and in so doing, providing a more general framework for distinguishing the paternalistic content of any public health policy. Distinguishing the paternalistic content of policy is important if we want to evaluate the widespread resistance to paternalism codified in liberal anti-paternalist principles.

Most accounts of paternalism can be accommodated by the general definition *interference with a person, against her will, for her good*.<sup>4</sup> In the following, each of these three components will be discussed and applied to the case of product safety regulation, without commitment to a certain specification of any of the components. Concerning interference, I will consider five aspects of product safety regulation that make it an interfering policy, aspects that are relevant for public health policy more generally. Concerning will, I shall focus on the complexities arising from the fact that policies affect many persons and so can be welcomed or accepted for quite different reasons. Concerning good, I will consider the important and often misunderstood role of reasons in understanding paternalism, again with special attention to many person cases. This three-fold interpretation will then be used to discuss the normative status of paternalism

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<sup>2</sup> *The General Product Safety Regulations 2005*, Statutory Instruments 2005 no. 1803, p. 4.

<sup>3</sup> Peter Cartwright, 'Enforcement, risk and discretion: the case of dangerous consumer products', *Legal studies* 26(4) (2006): 524-43.

<sup>4</sup> Or an interference with several people against their will for their good.

and anti-paternalism in public health policy. Throughout, references to the philosophical debate are largely confined to the footnotes.

## INTERFERENCE

For there to be paternalism, there must be some kind of interference on the part of the paternalist. Involvement with a person, merely effecting her in some way, is not enough. Interference may generally be thought of in terms of restriction or limitation of liberty. It is, however, a matter of controversy how the line should be drawn between innocuous involvement and interference. Disagreement may arise both concerning which concrete actions qualify as interference and concerning how interference should be specified in general terms. There are (at least) five reasons for holding that product safety regulation amounts to interference.<sup>5</sup>

First, regulation restricts options.<sup>6</sup> Less safe products may quite possibly have more or other functions and designs. Prohibiting the market exchange of less safe products thus restricts the options of individual consumers in a non-trivial sense. Importantly, the restriction of options may matter also for a person who would not have taken advantage of those options had they been available. Freedom is arguably about having more options available than those you actually choose to realize.<sup>7</sup>

Second, as a special case of restriction of options, regulation imposes a cost on the individual consumer. It is in general more expensive to produce safer products. If nothing else, the process of ensuring that the product is safe and that it accords with relevant regulation entails a cost. Consumers are in effect forced to spend money on safety features. If they were allowed to choose from a wider range of products, they should be able to find less expensive products that would serve the same purpose as more expensive, safer products. In the long run, the aggregated cost of safety may be quite high.

Third, because of the above traits of product safety regulation, it may go against the preferences of individual consumers.<sup>8</sup> People may value the opportunity to buy less safe products because they are less expensive, or because they have more or other functions, or simply because of a preference for simple, old-fashioned, or 'raw' products.

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<sup>5</sup> I will assume throughout that those affected by the policy are sufficiently mature, informed, competent, and so on, to qualify as potential targets of illegitimate paternalism, according to liberal principles. The exact specification of these factors is an important and difficult matter for any anti-paternalist principle. The most ambitious attempt to accommodate this difficulty is arguably Joel Feinberg's in *Harm to Self*, Oxford University Press 1986, especially chapter 20.

<sup>6</sup> Restriction of options has been taken to constitute interference by e.g. David Archard ('Paternalism defined', *Analysis* 50(1) (1990): 36–42, p. 36), proposing as one condition of paternalism that a person 'P aims to bring it about that with respect to some state(s) of affairs which concerns [another person] Q's good Q's choice or opportunity to choose is denied or diminished.'

<sup>7</sup> Isaiah Berlin (Five essays on liberty: Introduction, in *Liberty*, Oxford University Press 2002 (1969), p. 41) remarked that '[t]he extent of a man's negative freedom is, as it were, a function of what doors, and how many, are open to him; upon what prospects they open; and how open they are'. It is, of course, not obvious that the net effect of regulation will be a loss of liberty so understood.

<sup>8</sup> Donald Van de Veer (*Paternalistic intervention*, Princeton University Press 1986, pp. 18–19) proposes that an action is an interference if the agent deliberately acts 'contrary to the operative preference, intention, or disposition of the subject' (or if she shapes or modifies these preferences in certain ways).

People may also prefer to have options available that they do not in fact want to take advantage of.

Fourth, the purchase and use of consumer products is a typically private affair. Whether individuals use safe or less safe products usually has no direct effects on other people, or on society at large. There are of course indirect effects of people having accidents and subsequently becoming a burden on their loved ones and more generally on the health care system, while contributing less to society. Such effects may ensue, however, from all kinds of actions, however private. If there is such a thing as an area of personal sovereignty or a region of liberty, as anti-paternalists typically claim, the purchase of consumer products seems a good candidate for inclusion under this domain.<sup>9</sup>

Fifth, product safety regulation is backed up by criminal sanctions. It thus qualifies as interference also on those narrow accounts of paternalism that are restricted to the criminal law.<sup>10</sup> That the law punishes the seller rather than the buyer might make this a case of ‘impure’ paternalism, or a ‘two party case’ – the direct interference is with one party and the concern is with the health of the other party. On the other hand, since the buyer is an active and willing party to a mutual agreement, she too may be interfered with by the threat of sanctions to the seller. Whether or not the interference is also with the buyer, these kinds of sanctions are typically and reasonably held to potentially involve paternalism.<sup>11</sup>

There are many ways to specify interference and every specification entails a different version of anti-paternalism. We may conclude, however, that there are several good reasons to count product safety regulation as interference. These reasons are quite general and may obviously apply also in other areas of public health policy. That product safety regulation is interfering does not of course mean that it is unjustified all things considered, nor that it necessarily involves paternalism.

## WILL

That the effects of a policy goes against the preferences of a person subject to that policy is one reason to count the policy as an interference with that person, as noted above. However, preferences, or will, may also be considered an independent component of paternalism. If a policy constitutes an interference with a person on other grounds than going against her preferences, she may welcome the policy, fully aware of its interfering properties. We may want the government to ensure that there are no unsafe products

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<sup>9</sup> Feinberg’s (chapter 19) account of paternalism rests heavily on the concept of personal sovereignty and the distinction between self-and other-regarding decisions; John Stuart Mill (*On Liberty*, in *On Liberty and Other Essays*, Oxford University Press 1991 (1859), p. 16) explains his anti-paternalist principle of liberty by pointing to ‘the appropriate region of human liberty’ as being ‘that portion of a person’s life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation.’

<sup>10</sup> Feinberg explicitly restricts the domain of his anti-paternalist principle to criminal prohibition. There is a discrepancy between this narrow occupation with the criminal law and the fact that Feinberg’s main argument against paternalism is based on the broad concept of personal sovereignty, see Richard Arneson, ‘Joel Feinberg and the Justification of Hard Anti-paternalism’, *Legal Theory* 11 (2005): 259–284, pp. 262–3.

<sup>11</sup> Gerald Dworkin, ‘Paternalism’, *Monist* 56 (1972): 64–84, p. 68; Feinberg, chapter 22, e.g. p. 172.

available on the market, even if this restricts our options, because we do not think the risk of buying an unsafe product worth the possible benefits. The risks may include harm to oneself as well as the risk of harming others with the product (with possible liability). A policy that is welcomed on these grounds arguably does not involve paternalism. Importantly, it does not involve something that is opposed by liberal anti-paternalist principles.<sup>12</sup>

There are several choices to be made concerning the specification of the will component of paternalism. We may say that an interfering policy is unwelcome either when it goes against a person's expressed opinion, or when it is against her will or judgement, whether expressed or not, or whenever it does not have her expressed approval. We may also add conditions demanding that the approval or disapproval be more or less informed and competent.<sup>13</sup> Acknowledging that different interpretations of will lead to different versions of anti-paternalism, we may for our present purposes assume that a policy is normally welcomed by a person if she either explicitly approves of it, or would approve of it if the matter was brought to her attention.

As is now and then pointed out, public health policy differs from medical health contexts in that it affects large numbers of people, often in a non-discriminatory way.<sup>14</sup> This means that a policy may be welcomed for a number of different reasons. We should distinguish between welcoming the interfering effects of a policy on oneself, and accepting these effects as a necessary evil that is outweighed by the greater good of having the policy apply to all. The former case involves no more paternalism than an interference with one person that is welcomed by that person. Concerning the latter case, we should further distinguish between welcoming a policy because of the good effects for ourselves from interference with everybody else, and welcoming it because of the good effects on others from interference with them. As an example of the former, we may accept out of *self-interest* that the government ensures that we, as well as our neighbours, drive safely or keep our lawns tidy. As an example of the latter, we may accept out of *benevolence* that the government prevents us, as well as those more prone to addiction, from using heroine or tobacco. Similarly, we may accept interfering product safety regulation either because we do not want others to use dangerous products that may harm *us*, or we may accept it out of concern that they may harm *themselves*. A policy that interferes with us but that we welcome as a means to ensure compliance with a scheme that promotes our self-interest does, arguably, not involve paternalism for us.<sup>15</sup> On the other hand, it is undoubtedly paternalism to support a policy because it prevents other people from harming themselves. The hard question is if a policy may subject *me* to paternalism, if I accept it because of the good it will do others. It seems we can go either way. On the one hand, the policy may count as involving paternalism for me because it

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<sup>12</sup> Mill (p. 14) typically opposes benevolent interference with a person only when it is 'against his will'.

<sup>13</sup> Again rising questions of what thresholds to accept, see footnote 5.

<sup>14</sup> This difference has been emphasised in recent calls for a public health ethics distinguished from traditional bioethics, see e.g. Ronald Bayer and Amy L. Fairchild, 'The Genesis of Public Health Ethics', *Bioethics* 18(6) (2004): 473–492.

<sup>15</sup> This is in line with Dworkin's (p. 69) argument that without paternalism, 'individuals [...] may need the use of compulsion to give effect to their collective judgement of their own interest by guaranteeing each individual compliance by the others.'

interferes with me and I do not find that the interference is made worthwhile by any benefit to me. On the other hand, the policy may count as involving no paternalism, because I do nevertheless welcome it.

It seems likely that on most specifications of the will component, most people would welcome product safety regulation on the level common in the European Union. For them, the regulation will not involve paternalism. However, there are certainly some people who do not welcome regulation, and with whom the regulation is an interference, for some or all of the reasons pointed out in the previous section. Product safety regulation, therefore, amounts to unwelcome interference with some people, but not with others.

## GOOD

If a policy amounts to unwelcome interference, it may involve paternalism. For there to be paternalism, however, the interference must be in some sense for the good of those interfered with.<sup>16</sup> We tend to think of paternalism as residing in actions, including complex state actions – policies. The good component then functions as a condition on which actions qualify as paternalistic. This is anyway how paternalism is defined in the philosophical literature. Unwelcome interferences are typically said to be paternalistic if they are *motivated* by the good of the person interfered with, or, less commonly, if they are *justified* by the good of this person.<sup>17</sup> However, actions are often motivated, as well as justified, by several different reasons. While this complexity is sometimes acknowledged, the solutions are unsatisfactory. Actions are typically counted as paternalistic when their rationale is solely<sup>18</sup>, or mainly<sup>19</sup>, the good of the person interfered with, or to the extent<sup>20</sup> that this is their rationale. These standard interpretations are ill suited for distinguishing those morally problematic aspects of paternalism that liberal anti-paternalists are concerned with. The essence of paternalism is the invocation (or acceptance) of the good of a person as a reason for unwelcome interference with her, regardless of the relative strength of this reason as compared to other reasons for the same interference.<sup>21</sup>

When we call a policy paternalistic, this should be interpreted merely as a convenient way to say that it *involves* paternalism, in the sense that the policy is interfering, unwelcome, and that the good of some people who are subject to this unwelcome interference is invoked as a reason for the policy. If we want to distinguish the paternalistic content of a situation more precisely, we must accept that policies are not

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<sup>16</sup> Seana Shiffrin ('Paternalism, Unconscionability Doctrine, and Accommodation', *Philosophy and Public Affairs* 29(3): 205–50, pp. 215–17) takes an uncommon stand on this issue and argues that acting out of disrespect for a person's judgement or agency is paternalistic regardless of whether or not it is for the good of the person.

<sup>17</sup> Or possibly both, as proposed by Peter De Marneffe, 'Avoiding Paternalism', *Philosophy and Public Affairs* 34(1) (2006): 68–94, pp. 73–74.

<sup>18</sup> E.g. Gerald Dworkin, 'Paternalism', *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Winter 2002 Edition), URL = <<http://plato.stanford.edu/archives/win2002/entries/paternalism/>>.

<sup>19</sup> E.g. Archard, pp. 38–39.

<sup>20</sup> E.g. John Kleinig, *Paternalism* (Manchester: Manchester University Press 1983), p. 12.

<sup>21</sup> For a more detailed argument for this interpretation of paternalism, see Kalle Grill, 'The Normative Core of Paternalism', *Res Publica* 13(4) (2007): 441–458.

paternalistic as such, but only in combination with certain reasons. The most obvious and sensible reason for introducing product safety regulation is to protect people from the risk of harm from unsafe products. However, there could be other reasons. A corrupt politician might push for regulations because they favour certain manufacturers. A more altruistic and far-sighted politician may propose regulations because they would stimulate technological innovation, spilling over into other areas. The invocation of these reasons for the policy may be more or less appropriate, but is not paternalistic, regardless of whether or not avoidance of harm reasons are invoked for the same policy. Similarly, what is paternalistic about involuntary psychiatric treatment is invoking the good of the patient as a reason for treatment, rather than the treatment as such; what is paternalistic about drug criminalization is the invocation of the good of (potential) drug users as a reason for criminalization and punishment, not the criminalization itself; and so on for other policies. We should insist on interpreting paternalism in terms of the invocation of reasons because this, unlike standard action-focused accounts, distinguishes precisely that aspect of policy-making and implementation that is resisted by anti-paternalism.

There is an important complication to be noted in many person cases. Even if a policy interferes with a person and is unwelcome, this may not be enough to make the invocation of her good as a reason for that policy paternalistic. This is because a policy that affects many may promote the good of each by interfering with the others. This is typically the case for policies that we do not think of as involving paternalism, such as laws against theft, assault and murder. These laws restrict the options available to all and may plausibly be unwelcome for some people. There are thus people that are protected by these laws but for whom these laws amount to an unwelcome interference. These people are not, however, protected through the unwelcome interference *with them*, but rather through interference with others, who are not allowed to harm them. Similarly, product safety regulation may to some extent protect people from risks of harm through the interference with other people, as noted above. I may oppose regulation and regulation may be interfering for me, yet when I benefit from the fact that my neighbour is not allowed to buy a dangerous lawnmower that could explode next to my garden table, this benefit occurs as a result of interference with her and not with me. Invoking this benefit to me as a reason for the policy is therefore not paternalism. As we saw in the previous section, restricting the options of others to harm me may in some cases be an interference also with me, as when others are prohibited from selling me dangerous or unhealthy products. The point is that regardless of how we specify interference, we must count as paternalistic only the invocation of a person's good for an action that achieves that good through interference *with her*.

## THE MORAL STATUS OF PATERNALISM

A great advantage of interpreting paternalism in terms of the invocation of reasons is that we may distinguish different kinds of reasons and consider for each kind whether its invocation is paternalistic or not. Based on such an analysis we may then approach the important normative question of how to evaluate different forms of paternalism. The

two main kinds of reasons to consider are arguably psychologically motivating reasons, or motives, and justificatory reasons. Motives cause and explain the actions they are motives for, while justificatory reasons justify, or contribute to the justification of, actions they are reasons for. We could also, however, focus our attention on officially stated reasons, or reasons invoked in some other context.

Resistance to paternalism may take somewhat different forms depending on what kind of reasons are invoked paternalistically. In terms of justification, anti-paternalism may most obviously be interpreted as a restriction on what reasons should count when we evaluate actions. The liberal anti-paternalist is not necessarily opposed to policies interfering with you. Whether an unwelcome interference is acceptable or right overall may depend on several considerations. What the anti-paternalist claims is that your good is not one of these considerations. We may say that this kind of reason is *invalid* as a reason for this kind of policy. In terms of motives, there may similarly be several reasons why a policy-maker may want to interfere with you against your will. According to anti-paternalism, your good should not be among those reasons. We may say that this motive is *inappropriate* for this kind of policy. As we have seen, having an inappropriate motive does not exclude the possibility of being motivated also by other reasons, which in themselves may be impeccable to the anti-paternalist and which may make the interference in one way commendable.<sup>22</sup>

Given that there are potentially many kinds of reasons, including different interpretations of what counts as a motive and a justification, there is room for a large number of mixed positions on the moral status of paternalism. However, the two end point strategies are perhaps the most coherent ones. These are general anti-paternalism and the full rejection of anti-paternalism. General anti-paternalism holds that paternalism is never acceptable, neither in motive nor in evaluation, nor in any other kind of reason. In evaluating the desirability of product safety regulation, to determine whether or not it should be introduced, or continued, anti-paternalism directs us to disregard good that will come about through unwelcome interference. The idea of disregarding the interests of some affected people is straightforward, and common in public policy evaluation. We commonly disregard the interests of non-citizens, non-residents and future generations. Similarly, we could disregard the interests in health and safety of those people for which regulation would be an unwelcome interference.

Anti-paternalism is a typically non-consequentialist position. Non-consequentialism holds that, when a moral right or duty is at stake, other considerations are excluded or become irrelevant. Only within the side constraints set by rights and duties may we consider a broader set of more or less worthy aims.<sup>23</sup> Some degree of anti-paternalism therefore forms a natural part of any system of rights or duties where there is no duty to

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<sup>22</sup> There could be moderate anti-paternalist positions that do not completely disregard certain reasons, but rather discount them in some fashion. This seems for example to be the position of Louis Groarke in 'Paternalism and Egregious Harm', *Public Affairs Quarterly* 16(3) (2002): 203–230. Discounting a reason can not be equivalent to simply attributing to the reason a lesser strength in relation to other reasons, since the moral status of paternalism does not tell us anything about the relative strength of different reasons.

<sup>23</sup> See e.g. Frances Kamm, 'Rights' in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro, Oxford University Press 2002.

protect or benefit people through unwelcome interference with them, and no right of people to be so protected or benefited. If people have a moral right to buy and sell unsafe products, and there is no conflicting right to be protected against the dangers of such products, that settles the matter against regulation. *No* other considerations than rights and duties are valid, and the avoidance of harm is simply one of these other considerations. This, however, is not a specifically anti-paternalist position. Anti-paternalism can be incorporated into a non-consequentialist theory in full through the right not to be interfered with against one's will for one's good, or in other words the right not to have one's good count as a reason for unwelcome interference. Such a right is general and holds for all unwelcome interference, regardless of whether or not there is a more substantial right to do or have something.

By telling us to disregard certain reasons in making all things considered judgements, anti-paternalism introduces a level of normative consideration that is prior to the common comparison and weighing of reasons. It may be argued that this framework makes moral judgement unnecessarily complicated, or that it unjustifiably attributes to some reasons a special trumping quality.<sup>24</sup> Moral rights and duties may be invoked as values, but their relative importance must always be measured against the importance of other considerations. To reject anti-paternalism is to hold that all reasons should be admitted into the process of comparing and weighing reasons. No commitment is thereby made concerning the relative importance of different kinds of reasons. The rejection of anti-paternalism is perfectly consistent with strong opposition to policies involving paternalism. Resistance to product safety regulation may take the form of insisting on the value of self-determination or autonomy, and on the greater importance of these considerations relative to the minimizing of risks and promotion of health. The five reasons for holding product safety regulation to be interfering, considered above, can count as reasons against regulation, without trumping or making invalid what reasons there are *for* regulation. If we reject anti-paternalism, liberal values can simply be assigned whatever relative importance we think they deserve, save perhaps infinite importance (which would in effect amount to anti-paternalism).

The rejection of anti-paternalism is furthermore consistent with the use of anti-paternalism-like rules of thumb. Rules of thumb that regulate what reasons to consider may for example arise through the expectations we attach to certain social roles. We should arguably put our private interests aside when we act as representatives for some organisation or agency, even if these interests are normally appropriate motives for action.<sup>25</sup> This moral demand is merely instrumental, however, and does not mean that our private interests lose their normative importance. Rather, the private interests of all are best promoted if we sometimes disregard our own interests. Perhaps, similarly, policy makers should sometimes put aside the interests of people facing unwelcome interference, because this is expedient. It may be that our interests in freedom from interference in some area is so great, and our other interests so small or difficult to

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<sup>24</sup> Feinberg (p. 26) explicitly calls autonomy a 'moral trump card'.

<sup>25</sup> This and other reasons for disregarding reasons are discussed by Thomas Scanlon in *What We Owe to Each Other*, Harvard University Press 1998, p. 51–52.



ascertain, that the risk of error would be too great to make the effort to consider all affected interests worthwhile, or that it would simply be a waste of resources. Anti-paternalist rules of thumb will only be motivated, however, in areas where it is both wasteful to even consider and estimate all affected interests, and where this is not obvious without a rule of thumb. In view of our great interest in health, and the vast resources available for making and implementing policy in modern welfare states, such areas may be hard to find in the public health context.

## CONCLUSION

Paternalism is the invocation of the good of a person as a reason for unwelcome interference with her. To the extent that product safety regulation amounts to unwelcome interference with some people, invoking the health of these people as a reason for such regulation is paternalism. Anti-paternalism requires that we disregard these reasons. Rejecting anti-paternalism means considering all relevant reasons for and against regulation, without first discarding some as invalid or inappropriate. While anti-paternalism is wide-spread and inherent in the liberal tradition, liberal values need not trump other values in order to be attributed great importance.

Is the General Product Safety Regulations 2005 a good or justified policy? This would seem to depend on its effects in terms of public health, the restriction and expansion of options, the frustration and satisfaction of preferences, and other relevant values. We should not accept the classification of a public health policy as 'paternalistic' to tell against it, without further argument. The paternalistic content of the situation must be distinguished and the moral status of paternalism must be decided in light of what this content is. Hopefully, this contribution has provided some analytical tools for making such distinctions and decisions.