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IS PUBLIC HEALTH PATERNALISM REALLY NEVER JUSTIFIED? A RESPONSE TO JOEL FEINBERG

THADDEUS MASON POPE*

ABSTRACT

In the preeminent scholarly legal treatise on paternalism, *The Moral Limits of the Criminal Law: Harm to Self*, Joel Feinberg argues that hard paternalism is never justified because it is superfluous; all reasonable restriction of self-regarding conduct can be justified on (more palatable) soft paternalistic grounds. In this article, I argue that Feinberg's strategy seems to work only because he "stretches" soft paternalism to justify liberty limitation that is properly described as hard paternalism. I expose Feinberg's strained appeals, and argue for honesty and transparency regarding the bases for paternalistic liberty limitation. If the rationale for public health restrictions on liberty is hard paternalism, then that normative appeal should not be masked. Rather it should be made explicit so that it can be subjected to constructive criticism and debate.

I. INTRODUCTION

The public health epidemics of today and tomorrow (such as obesity and tobacco) are increasingly recognized as behavioral in nature. And, increasingly, policymakers are proposing and implementing coercive

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measures to combat these epidemics, thereby restricting the often voluntary, informed, and deliberate choices of individuals. So, perhaps more than ever before, we are confronted with the task of determining *when* hard paternalism is justified.¹

But first, we must establish *whether* hard paternalism can ever be justified. In his preeminent scholarly treatise on paternalism, Joel Feinberg argues that hard paternalism is never justified because all reasonable limitation of self-regarding conduct can be justified on soft paternalistic grounds.² In this article, I argue that Feinberg's strategy seems to work only because he "stretches" soft paternalism to justify liberty limitation that is properly described as hard paternalism. Feinberg's categorical condemnation of hard paternalism fails, leaving room for scholars to determine the conditions under which hard paternalistic restrictions of individual liberty are justified.

A. *Hard Paternalism and Soft Paternalism*

Soft paternalism is the rationale for restricting an individual's self-regarding conduct where it is not substantially voluntary. Soft paternalism legitimizes intervention with an individual's conduct where the individual's decision to engage in that conduct is not factually informed, not adequately understood, coerced, or otherwise substantially cognitively or volitionally impaired. Soft paternalism is both justifiable and consistent with Millian liberalism.³

1. See generally Ronald L. Bayer & Amy L. Fairchild, *The Genesis of Public Health Ethics*, 18 *BIOETHICS* 473, 488, 492 (2004); James F. Childress & Ruth Gaare Bernheim, *Beyond the Liberal and Communitarian Impasse: A Framework and Vision for Public Health*, 55 *FLA. L. REV.* 1191, 1201-06 (2003). Some public health law scholars avoid confronting the justifiability of hard paternalism by balancing individual liberty and public health within a communitarian rather than within a Millian liberal framework. See, e.g., Daniel Callahan, *Individual Good and Common Good*, 46 *PERSPECTIVES IN BIOLOGY & MED.* 496 (2003); Daniel Callahan & Bruce Jennings, *Ethics and Public Health: Forging a Strong Relationship*, 92 *AM. J. PUB. HEALTH* 169 (2002); Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?*, 55 *FLA. L. REV.* 1105 (2003). But even these scholars recognize that public health resting on a communitarian foundation must still be related to our liberal culture.

2. JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* (1986) [hereinafter *HARM TO SELF*].

3. See Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 *GA. ST. U. L. REV.* 659, 667-79 (2004) [hereinafter

The core idea of the soft paternalism liberty limiting principle is that only substantially autonomous decisions, decisions free from cognitive and volitional defects, are worthy of respect. In soft paternalism, there is no usurpation of autonomy because there is none to usurp. You cannot take control away from someone who doesn't have it. Indeed, instead of counteracting autonomy, soft paternalistic regulation actually helps to protect and promote it by ensuring that an individual's choices reflect her true preferences. Prescription drug laws, for example, do not bar access to therapeutic drugs. They just say, "Hold on! Is your decision to take that drug substantially informed and voluntary?" Soft paternalism sanctions intervention only to protect the subject from harm to which she did not consent or to ensure that the subject really did consent to the harm.

The hard paternalism liberty limiting principle, on the other hand, legitimizes benevolent intervention in an individual's self-regarding conduct even when that individual's conduct is both substantially informed and substantially volitional. Hard paternalism sanctions intervention in spite of the substantially autonomous nature of an individual's conduct. In contrast to soft paternalism, hard paternalism does not enable or empower consumers to make more informed decisions. Instead, hard paternalism is aimed at overriding consumer's decisions. For example, the rationale for motorcycle helmet laws commonly has been considered to be hard paternalistic. Hard paternalism doesn't help the consumer make an informed choice; it eliminates the choice. Consequently, hard paternalism is generally considered to be unjustified and inconsistent with Millian liberalism.⁴

Pope (2004)]. For example, the rationale for requiring a prescription for some drugs is that no label could be written for these drugs that would enable the consumer to make a substantially informed decision to take the drug. Expert professional medical supervision is required to make a consumer's decision substantially autonomous. See generally Peter Barton Hutt, *A Legal Framework for Future Decisions on Transferring Drugs from Prescription to Nonprescription Status*, 37 FOOD DRUG COSM. L.J. 427 (1982); PETER TEMIN, *TAKING YOUR MEDICINE* (1980); Peter Temin, *The Origin of Compulsory Drug Prescriptions*, 22 J. L. & ECON. 91-105 (1979).

4. See generally Pope (2004), *supra* note 3; Thaddeus Mason Pope, *Monstrous Impersonation: A Critique of Consent-Based Justifications for Hard Paternalism*, 73 UMKC L. REV. 681, 683-85 (2005) [hereinafter Pope (2005)].

B. Feinberg's Masking of Hard Paternalism as Soft Paternalism

Feinberg, a committed classical liberal, has only one self-regarding liberty limiting principle with which to justify state interference with self-regarding individual conduct: soft paternalism.⁵ Unfortunately, the scope of soft paternalism is simply not adequate to justify all the state intervention that Feinberg wants to justify. Soft paternalism is, nevertheless, the only principle that Feinberg has to work with. This presents a real problem, namely, a scarcity of normative resources.

Thus, just as many of us, with not enough money to buy all the things we think we ought to have, "stretch our paychecks," Feinberg "stretches" soft paternalism in order to expand its justificatory scope. Feinberg's stretching improperly distorts soft paternalism. Although an ill-equipped carpenter could use a hammer to drive in a screw, that is an improper use of the tool. Similarly, using soft paternalism to justify the restriction of substantially voluntary conduct is an improper use of that liberty limiting principle.

In trying to characterize all the real-life liberty limitation that seems reasonable and justifiable as soft paternalism, Joel Feinberg blurs the line between hard paternalism and soft paternalism. Because Feinberg is the most thorough and influential writer on paternalism, it is important to redraw the conceptual boundary between hard paternalism and soft paternalism and bring that line back into clear focus.⁶

5. See Joel Feinberg, *Paternalism*, in *ENCYCLOPEDIA OF PHILOSOPHY* 390, 391 (Donald M. Borchert ed., Supp. 1996).

6. See, e.g., *State v. Mallan*, 950 P.2d 178, 196 n.6 (Haw. 1998) (*Harm to Self: The Moral Limits of the Criminal Law* "may constitute the most comprehensive and rigorous philosophical dissection of the subject matter to date."); Richard J. Arneson, *Joel Feinberg and the Justification of Hard Paternalism*, 11 *LEG. THEORY* 259, 259 (2005) (calling Feinberg's passionate and deeply insightful treatment of paternalism the "jewel in this crowning achievement"); Michael D. Bayles, *Review of Harm to Self*, 7 *LAW & PHIL.* 107, 122 (1988); John Cottingham, *Review of Harm to Self*, 28 *PHIL. BOOKS* 242, 244 (1987); John Martin Fischer, *Review of Harm to Self*, 98 *PHIL. REV.* 129, 134 (1989) ("*Harm to Self* is the best systematic discussion of the problem of paternalism that is available."); John Gray, *An Epitaph for Liberalism*, *TIMES LITERARY SUPPLEMENT*, Jan. 12, 1990, at 31 ("Feinberg's work . . . is comprehensive, systematic, argued with such rigor and scrupulousness, unmatched, let alone surpassed, in any comparable study."); Russ Shafer-Landau, *Liberalism and Paternalism*, 11 *LEG. THEORY* 169, 169 (2005) ("Joel Feinberg's brief against paternalism . . . is undoubtedly the most scrupulous, nuanced, and thorough critique . . .").

Masking is dangerous because it often shields discriminatory and ill-founded regulation from criticism. As James Madison observed in a speech he delivered in 1788, “there are more instances of the abridgment of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations.”⁷ If hard paternalism is the operative rationale for reasonable laws then we should recognize it as such. No longer should we keep the dragon locked in his cave. No longer should we resort to fictions to preserve the apparent integrity of a position (i.e., categorical anti-hard paternalism) that has, in actuality, been subverted.

Rather, we should, as Holmes encouraged, “get the dragon out of his cave on to the plain and in the daylight.”⁸ Recognizing the true basis for liberty-limiting regulation conceptually clarifies the issues at stake, allows us to give a more obvious and natural explanation for current regulations, and better lays the groundwork for constructive critique and reform.

In this article, I analyze the confusion between hard paternalism and soft paternalism. In Section Two, I state and explain “the masking problem” - the making of strained appeals to soft paternalism and the harm principle to avoid concluding that reasonable laws can sometimes have hard paternalistic rationales. In Section Three, I describe Feinberg’s “soft paternalism strategy,” through which he tries to show that all seemingly hard paternalistic restrictions can be justified on soft paternalistic grounds. Next, in Section Four, the central section of this article, I critique Feinberg’s soft paternalism strategy by demonstrating how it masks hard paternalism. Finally, in Section Five, I conclude that Feinberg fails in his attempt to justify, as soft paternalism, all the self-regarding conduct that our intuitions suggest ought to be restricted. Only

7. James Madison, Speech in the Virginia Convention; Reply to Patrick Henry (June 16, 1788) in 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 83 (1996). See also *infra* note 176; Peter L. Berger, *Furtive Smokers and What They Tell Us About America*, COMMENTARY, June 1, 1994, at 21, 26 (“Under a continuing rhetoric of individual autonomy and rights, an insidious collectivism is becoming the norm.”); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 285 (1998) (“[T]he fear that paternalism will be used as a pretext for attaining extraneous, discriminatory goals is less significant than it is with regard to other alleged bases of regulation . . .”).

8. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 110 HARV. L. REV. 991, 1001 (1997). See also G. EDWARD WHITE, TORT LAW IN AMERICAN 104 (1980).

through distorting soft paternalism is Feinberg able to make his soft paternalism strategy seem plausible.

II. THE MASKING PROBLEM

A. *The Source of the Masking Problem*

Joel Feinberg is notable in his attempt to redefine hard paternalism so narrowly, and soft paternalism so broadly, that he can justify what seems to be hard paternalistic interventions as soft paternalistic ones. Feinberg's *motivation* in masking hard paternalism as soft paternalism is obvious. Soft paternalism is thought to be universally justified. As Beauchamp and Childress put it, soft paternalism is the "paradigmatic form of justified paternalism."⁹ Indeed, soft paternalism is even thought not to be paternalistic at all. Hard paternalism, by contrast, is widely thought to be unjustified.¹⁰

Liberal philosophers like Joel Feinberg must explain or account for reasonable self-regarding liberty limitation either on the grounds that it is: (1) in fact, not self-regarding (and, therefore, not paternalistic); or (2) soft paternalistic. However, in order to do this and also adhere to his absolutist position that self-regarding substantially voluntary conduct should never be restricted, Feinberg is motivated to manipulate the scope of soft paternalism.¹¹

9. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 273 (4th ed. 1994) [hereinafter BEAUCHAMP & CHILDRESS 4TH].

10. See generally Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 136-37 (1969); JAMES F. CHILDRESS, *WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE* 69, 73 (1982); HARM TO SELF, *supra* note 2, at 23, 27 (describing paternalism as "arrogant," "demeaning," "patronizing," "belittling," and "degrading"); Fred M. Frohock, *Liberal Maps of Consent*, 22 *POLITY* 231, 235 (1989) ("The offensiveness of paternalism is also clear on liberal concepts. Paternalism insults individual integrity by overriding or avoiding consent."); JOHN KLEINIG, *PATERNALISM* 4, 38, 183 (1984) (describing paternalism as "distasteful," "insulting," "demeaning," and "degrading").

11. See generally JAMES BOVARD, *FREEDOM IN CHAINS: THE RISE OF THE STATE AND THE DEMISE OF THE CITIZEN* 50 (1999); Charles M. Culver & Bernard Gert, *The Inadequacy of Incompetence*, 68 *MILBANK MEMORIAL Q.* 619, 621, 623 (1990) ("It is only a misguided adherence to the absolute principle . . . that leads physicians, lawyers, and judges to claim that the patient who makes a seriously irrational decision is ipso facto not competent to make that kind of decision."); *id.* at 639-40 ("No good purpose is served by pretending to hold on to the view that no competent patient's decision should ever be overruled, no matter what the decision is, and then adopting a concept of competence so

Feinberg's *method* in masking hard paternalism as soft paternalism is a bit more complicated than his *motive*. In Section Four of this article, I show that Feinberg "masks" hard paternalism by a "conceptual sleight-of-hand trick,"¹² in which he stretches the soft paternalism liberty limiting principle beyond the bounds of plausibility. Feinberg does this by building substantive conceptions of the good into the concepts of "voluntariness," "autonomy," and "competence."

Now, it is important to note that, notwithstanding Feinberg's masking, Feinberg and I do roughly agree on the *content* of contemporary Anglo-American morality.¹³ Moreover, neither of us is

that competence is at least partially decided on the basis of whether the decision should be overruled."); *id.* at 642 (arguing that interpreting competence strictly and openly addressing paternalism protects liberty more than a context variant approach); Alan Dershowitz, *Toward a Jurisprudence of 'Harm' Prevention*, in *THE LIMITS OF THE LAW* 135, 156 (Pennock J. Roland & John W. Chapman eds., 1974) (calling for the justifiability of hard paternalism to be "exposed and openly debated" so that we "may decide how much liberty should be permitted to achieve a tolerable level of safety"); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 42 (1991) (arguing against the "illusion of absoluteness"); HETA HÄYRY, *THE LIMITS OF MEDICAL PATERNALISM* 72 (1991) ("[T]heorists who allegedly accept the liberal position may try to *smuggle* 'strong' interventions into their systems by defining them as instances of weak paternalism.") (emphasis added); KLEINIG, *supra* note 10, at 82 ("Paternalistic rationales are clearly an embarrassment, and strenuous efforts are usually made to provide a nonpaternalistic justification. . . . But as we shall see, it is only with some difficulty that these considerations, taken individually or together in some combination, can sustain [lifestyle] legislation, and there is often a surreptitious appeal to paternalistic reasons."); *id.* at 96 ("[C]omplexities that are not obvious if it is characterized and then dismissed as 'paternalistic.' Some paternalism probably is involved, yet I do not believe that paternalism -- even strong paternalism -- is all of a piece."); Loretta M. Kopelman, *The Role of Value Judgments in Psychological Practice*, in *MEDICAL ETHICS* 275, 288 (Robert M. Veatch ed., 2d ed. 1997) (decrying "the *redescription* of people in psychological terms to control them or to disvalue them or their reasoning"); Perri 6, *The Morality of Managing Risk: Paternalism, Prevention and Precaution, and the Limits of Proceduralism*, 3 *J. RISK RES.* 135, 143 (2000) ("If one takes the position that all paternalism should be rejected, then one is left with a limited number of options. One is to seek to justify some of the interventions on other, non-paternalistic grounds . . ."); Dennis Thompson, *Paternalistic Power*, in *POLITICS, ETHICS, AND PUBLIC OFFICE* 148, 154 (1987) ("Those few writers who have held that paternalism is never justified either have limited their claim to certain kinds of paternalism (such as that enforced by the criminal law), or have narrowed the definition of paternalism so that a restriction of liberty that may appear to be paternalistic is not."); Zamir, *supra* note 7, at 231 n.5 (observing a "tendency to bypass the issue of paternalism").

12. DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE* 348 (1986).

13. *Cf.* TOM L. BEAUCHAMP, *PHILOSOPHICAL ETHICS* 17 (3d ed. 2001) [hereinafter

criticizing these beliefs or advocating a modification of these beliefs. The heart of our disagreement is over how to *categorize* some of these beliefs - either as soft paternalism or as hard paternalism.

First order descriptive ethics is a sociological and anthropological enterprise in which a society's actual moral beliefs (e.g., suicide is wrong, drivers ought to wear seatbelts) are factually described or catalogued.¹⁴ This is not the locus of my disagreement with Feinberg. Second order descriptive ethics, sometimes called "metaethics," on the other hand, does not describe actual practices. Instead, metaethics is a description of the description.¹⁵ This is where our disagreement lies.

That is, Feinberg and I agree on which sorts of conduct ought to be restricted, but we do not agree on how to name or describe that restriction.¹⁶ If we were to draw a pie chart, Feinberg and I would include the same conduct in the domain of justifiable restrictions on liberty. But some of the conduct which Feinberg would include within the intersection of *soft* paternalism and justifiable restriction, I would instead locate within an intersection of *hard* paternalism and justifiable restriction.

PHILOSOPHICAL ETHICS 3D] ("*Morality*, we might say, consists of what persons ought to do in order to conform to society's norms of behavior, whereas *ethical theory* concerns the philosophical reasons for or against the morality that is stipulated by society or by some social group.") (emphasis added); TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 2-5 (5th ed. 2001) [hereinafter BEAUCHAMP & CHILDRESS 5TH].

14. See TOM L. BEAUCHAMP, PHILOSOPHICAL ETHICS 34-35 (2d ed. 1991) (hereinafter PHILOSOPHICAL ETHICS 2D); PHILOSOPHICAL ETHICS 3D, *supra* note 13, at 16; BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 2; JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW 143 (1988) (hereinafter HARMLESS WRONGDOING).

15. See PHILOSOPHICAL ETHICS 2D, *supra* note 14, at 34-35; PHILOSOPHICAL ETHICS 3D, *supra* note 13, at 16-17; BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 2.

16. See generally Michael Moore, *Liberty and Drugs*, in DRUGS AND THE LIMITS OF LIBERALISM: MORAL AND LEGAL ISSUES 76 (Pablo de Greiff ed. 1999) ("The difference between the legal moralist and the classical liberal thus lies not so much in the *content* of recommended restrictions on legislation, but in the form of the *argument* for those restrictions.") (emphasis added); Albert Weale, *Paternalism and Social Policy*, 7 J. SOC. POL'Y 157, 172 (1978) ("[T]he difficulty comes not so much with stipulating what conditions paternalism has to satisfy before it is legitimate, but in knowing *when* cases fall under the appropriate heading.") (emphasis added). Furthermore, as Andrew Weale observes, "if in liberal democracies we already accept a good deal of paternalism in those matters, it seems less serious that any new policies we may develop also suffer from the same fault, and it is correspondingly harder to raise an objection to them in principle." Albert Weale, *Invisible Hand or Fatherly Hand? Problems of Paternalism in the New Perspective on Health*, 7 J. HEALTH POL. POL'Y & LAW 784, 793 (1983).

B. The Solution to the Masking Problem

An argument that hard paternalism is justifiable does not necessarily entail an argument for an *expansion* of the scope of liberty limitation. In spite of the dominant liberal attitude, hard paternalism often (now) actually serves as the unrecognized fundamental ethical justificatory basis of much public health law. Hard paternalism's justificatory role remains unrecognized because it is usually masked by an appeal to the harm principle or to the soft paternalism principle.

For instance, Joel Feinberg, as I will argue later in this article, has *already* stretched the domain of soft paternalism to cohere with our intuitions regarding which conduct ought to be restricted. This stretching is what permits Feinberg to make the virtually Tartuffian claim that hard paternalism is never justifiable. In this article, I will refine and re-define the conceptual categories to re-describe some liberty-limitation, which (now characterized as soft paternalism) is *already* considered ethically justifiable, as hard paternalism.

In this article, I demarcate where the justificatory power of the soft paternalism liberty limiting principle ends and where the hard paternalism liberty limiting principle begins. In doing so, I will show that much liberty-limitation purportedly justified on non-paternalistic (i.e., harm principle, offense principle, or soft-paternalistic) grounds is really only plausibly justifiable on paternalistic (i.e., hard paternalistic) grounds. This is what I call the "descriptive case for hard paternalism."

Acknowledging the use and (apparent) permissibility of hard paternalism conceptually clarifies the issues at stake, allows us to give a more obvious and precise explanation for current regulations, and lays the groundwork for future policy development. This "unmasking" of hard paternalism is a metaethical task of introducing clarity and precision of argument to the discussion of paternalism.¹⁷

17. See generally David Archard, *Political and Social Philosophy*, in THE BLACKWELL COMPANION TO PHILOSOPHY 257, 277 (Nicholas Bunnin & E.P. Tsui-James eds., 1996) ("The function of critique is to display these gaps and thus the distance between actuality and the moral pretensions generated by that actuality."); Tom L. Beauchamp, *The Regulation of Hazards and Hazardous Behaviors*, 6 HEALTH EDUC. MONOGRAPHS 243, 252 (1978) ("Without a systematic evaluative system that is itself normatively justified, we stand condemned to the arbitrary preferences of those who emerge in society as the makers of policy Without some form of objective standards against which to judge their decisions, there will be no way to determine the

In sum, much liberty-limiting legislation which is said to be justified on the basis of the harm principle, on the basis of the offense principle, or on the basis of the soft paternalism principle is really best (i.e., most plausibly) characterized as hard paternalism. Justifications based on these other principles are often strained and unconvincing.

Law professor Duncan Kennedy, for example, writes that “[t]he plausibility of principled anti-paternalism is therefore linked to the ability to *dismiss or to explain away* cases [involving the restriction of self-regarding conduct] in which one wants to act paternalistically but can’t rationalize the action in terms of incapacity.”¹⁸ I will show that attempts to avoid justifying liberty-limitation *as* hard paternalism, particularly Feinberg’s soft paternalistic strategy, fail because they cannot *fairly* justify all the regulation that we want to justify. Attempts, such as Feinberg’s, stretch the soft paternalism principle beyond the bounds of credulity.

appropriateness of their policy decisions.”); BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 5 (“The purpose of theory is to enhance clarity, systematic order, and precision of argument in our thinking”); Carl F. Cranor, *Empirically and Institutionally Rich Legal and Moral Philosophy*, 23 MIDWEST STUDIES PHIL. 286, 298 (1999) (“Problems arise when we are not clear about consciously designing our institutions to recognize these issues.”); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 165 (1988) (“[P]hilosophical theory . . . provide[s] a clearer picture as to what the conflicts are about”); Heta Häyry et al., *Paternalism and Finnish Anti-Smoking Policy*, 28 SOC. SCI. MED. 293, 295 (1989); Jeffrey Kahn, *Bioethics and Tobacco*, BIOETHICS EXAMINER [U. Minn.], Spring 1997, at 1, 7 (“Ethical analysis can help frame the issues . . . make explicit the principles at issue and lead to more consistent and clear policy.”); Daniel Wikler, *Who Should be Blamed for Being Sick*, 14 HEALTH EDUC. Q. 11, 25 (1987) (“[T]he debate over personal responsibility for health involves fundamental moral and philosophical questions . . . parties in this dispute . . . will need to examine the logic of the respective positions We need to know what policy conclusions follow from what premises”); Daniel I. Wikler, *Coercive Measures in Health Promotion: Can They Be Justified?* 6 HEALTH EDUC. MONOGRAPHS 223, 223 (1978) (“In question, then, is the health educator’s legitimacy On what moral foundation can this authority be justified? What mandate does he have to seek and use such power?”).

18. Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 643 (1982) (emphasis added). This is, as discussed below, just the sort of language Feinberg and other “redescription” theorists employ.

III. FEINBERG'S SOFT PATERNALISTIC STRATEGY

A. *An Outline of the Soft Paternalistic Strategy*

Joel Feinberg argues that hard paternalism is never justified. At the same time, he admits that many reasonable laws *seem* to have hard paternalistic rationales.¹⁹ Feinberg writes, "if we reject paternalism altogether, we seem to fly in the face both of common sense and of long-established customs and laws."²⁰ In order to reconcile these two incompatible positions: (1) "the seeming reasonableness of some apparently paternalistic regulations;" and (2) "our general repugnance for paternalism,"²¹ Feinberg argues that what seems like hard paternalism can always be adequately explained as soft paternalism.²² He writes: "Often legitimate government intervention in dangerous situations is not intended to prevent harm so much as to guarantee voluntariness."²³

Basically, Feinberg's argument can be represented as follows:

19. See HARM TO SELF, *supra* note 2, at 4; *id.* at 25 ("[T]here are many laws now on the books that *seem* to have hard paternalism as an essential part of their implicit rationales, and that some of these at least, seem to most of us to be sensible and legitimate restrictions."); *id.* at 98; HARMLESS WRONGDOING, *supra* note 14, at xvii ("In favor of the principle is the fact that there are many laws now on the books that *seem* to have hard paternalism as an essential part of their implicit rationale, and that some of these, at least, seem to most of us to be sensible and legitimate restrictions."); *id.* at 165, 240, 274. See also Thompson, *supra* note 11, at 154.

20. Feinberg, *supra* note 5, at 391. See also HARM TO SELF, *supra* note 2, at 24; Amy Gutmann & Dennis Thompson, *The Latitude of Liberty*, in DEMOCRACY AND DISAGREEMENT 230, 261-62 (1996) ("This absolute opposition to paternalism is difficult to maintain consistently, especially in contemporary society, where citizens face so many risks they cannot adequately evaluate even when they receive information about them.")

21. HARM TO SELF, *supra* note 2, at 25.

22. Feinberg also argues that what seems to be hard paternalism can often be explained on grounds of the harm principle or the offense principle. But his primary focus is explaining away hard paternalism by showing it to be, at bottom, soft paternalism.

23. HARM TO SELF, *supra* note 2, at 25. See also *id.* at 19, 98-99, 141-42; MICHAEL D. BAYLES, PRINCIPLES OF LEGISLATION: THE USES OF POLITICAL AUTHORITY 109 (1978) ("The soft paternalist's argument against hard paternalism is to show that hard paternalism is implausible and *not needed* to handle any plausible legislation.") (emphasis added); Bayles, *supra* note 6, at 112; Marion Smiley, *Paternalism and Democracy*, 23 J. VALUE INQUIRY 299, 300 (1989) (arguing that Feinberg's soft paternalistic strategy is an "elaborate conception of impaired decision making . . . compatible with Mill's own insistence that seriousness of harm not take precedence over individual liberty" and that it "enables [Feinberg] to justify a variety of paternalistic laws").

1. Laws x, y, and z seem reasonable.
2. Laws x, y, and z seem morally justifiable on only hard paternalistic grounds.
3. In fact, however, laws x, y, and z are supportable on only soft paternalistic grounds (i.e., the subject's conduct is, in fact, not substantially voluntary).

Feinberg calls his "strategy for dealing with apparently reasonable paternalistic regulations from a liberal (anti-paternalistic) point of view"²⁴ the "soft paternalistic strategy."²⁵ The soft paternalistic strategy is a project of redescription. It is, Feinberg explains, "simply the attempt to provide, when plausible, a non[-hard] paternalistic rationale for such restrictive legislation."²⁶ Feinberg explains that he must "consider the most impressive examples of apparently reasonable paternalistic legislation, and argue, case by case, either that they are not reasonable, or that they are not (hard) paternalistic."²⁷ The main part of the soft paternalistic strategy is the latter course: to defend soft paternalism as an alternative liberty limiting principle - one that can legitimize what would otherwise be hard paternalistic legislation, and one that can assume the justificatory load.

In other words, Feinberg aims to "show that the reasonableness of the [apparently hard paternalistic] restriction [actually] consists in the protection it provides the actor from dangerous choices that are not truly his own."²⁸ The soft paternalistic strategy shows that apparently

24. HARM TO SELF, *supra* note 2, at 141-42.

25. *Id.* at 26, 62, 98-99, 113, 141-42, 172-73, 175.

26. *Id.* at 175.

27. *Id.* at 26.

28. *Id.* at 99. See also *id.* at 113, 135-36; *id.* at 141 (describing his "strategy for dealing with apparently reasonable paternalistic regulations from a liberal (anti-paternalistic) point of view"); *id.* at 142 (arguing that "apparently reasonable coercive rules might be supportable on nonpaternalistic grounds"); *id.* at 172-73 ("The soft paternalist strategy [can] distinguish voluntary from nonvoluntary self-regarding actions and restrict the state's power to the regulation of the latter."); *id.* at 175, 246; HARMLESS WRONGDOING, *supra* note 14, at xvii ("The most promising antipaternalist strategy would be to construct a convincing conception of personal autonomy that can explain how that notion is a moral trump card, and then to consider the most impressive examples of apparently paternalistic legislation, and argue, case by case, either that they are not reasonable or that they are not (hard) paternalistic. The latter project led me to defend 'soft paternalism' as an *alternative*, essentially liberal, rationale for what seems

reasonable hard paternalistic regulations are, after all, not hard paternalistic because the subject's restricted conduct is not substantially voluntary.

Feinberg's soft paternalistic strategy requires him to justify restrictions of liberty on the grounds that individual behavior is not substantially autonomous, or in his own terms, "voluntary enough"²⁹ or "sufficiently voluntary."³⁰ Hence, Feinberg defines his grounds for restricting liberty with admirable care and precision. Most importantly,

reasonable in apparently reasonable paternalistic restrictions.") (emphasis added); *id.* at xviii ("[T]he soft paternalistic strategy . . . attempts to show that there is a rationale for protective interference with some self-endangering risk-taking that gives decisive significance, after all, to respect for *de jure* autonomy."); *id.* at 10 (arguing that nonliberal liberty limiting principles are "redundant"); *id.* at 126; *id.* at 143 (arguing that Feinberg must "account for certain features of our present criminal law"); *id.* at 172 (discussing what is "explainable on entirely liberal grounds"); *id.* at 171 (discussing how to account for what seems "embarrassing to the liberal"); *id.* at 211 (discussing how to "handle the cases"); *id.* at 220 ("[T]here are a number of common crimes now in our statute books that are difficult to explain. . . . [T]he liberal must either discover or invent a more plausible liberal rationale or argue that the criminal prohibitions in question are morally illegitimate."); *id.* at 221-22 (showing that liberal liberty limiting principles are sufficient); *id.* at 274 (arguing that "actions whose criminalization, at first sight at least, seem to be called for by common sense, even though they do not, at first sight, appear to have harmed victims" -- "claim that some of them do not cause right-violating harm after all"); *id.* at 325 ("I have grappled with all the main types of these counterexamples [from liberalism's opponents] . . . attempting to *explain away* any need to resort to nonliberal principles in response to them.") (emphasis added); *id.* at 330 ("In the end, [the liberal] will *find* nonpaternalistic grounds B doubts about voluntariness and appeals to the prevention of public dangers . . .") (emphasis added).

29. HARM TO SELF, *supra* note 2, at 104-05 ("voluntary enough to be immune from interference"); *id.* at 113 ("[H]ow voluntary is voluntary enough?"); *id.* at 118 ("voluntary enough to be immune from restriction"); *id.* at 119, 143 ("voluntary enough to preclude interference"); *id.* at 149 ("[J]udgments of voluntariness for legal purposes tend to be made relative to a given context . . ."); *id.* at 154, 157, 165 ("voluntary enough to render the risky conduct of an autonomous actor immune from outside interference"); *id.* at 158 ("involuntary enough:" observing that a greater lack of voluntariness is required to escape responsibility for harm to others); *id.* at 159 ("voluntary enough to preclude temporary interference"); *id.* at 160, 161, 168 ("voluntary enough to be immune from interference"); *id.* at 170 ("voluntary enough to exempt him from protective interference"); *id.* at 174, 175, 198, 211, 248, 253, 263, 273, 274, 278, 280, 283, 304, 309, 311, 312, 314, 333, 335, 339, 340-41, 342, 347, 354; *id.* at 309 ("[V]oluntariness . . . itself a matter of degree measured on various sliding scales . . ."); *id.* (observing that validity is a distinct concept which is the point at which voluntariness is "voluntary enough" "for a given moral or legal purpose"); HARMLESS WRONGDOING, *supra* note 14, at xviii.

30. HARM TO SELF, *supra* note 2, at 105, 121, 124, 201, 211, 253, 254, 305, 307, 311, 338, 343.

Feinberg is careful to emphasize that "eccentric, even 'unreasonable' judgments of the relative worthwhileness of that which is risked and that which is gained do not count against voluntariness at all."³¹ "The point has to be made over and over again: one can quite voluntarily be unreasonable."³² For Feinberg, intervention is never justified simply

31. *Id.* at 159; *see also id.* at 12 ("[T]he soft paternalist points out that the law's concern should not be with the wisdom, prudence, or dangerousness of B's choice, but rather with whether or not the choice is truly his."); *id.* at 112, 119, 159, 360-61; JOEL FEINBERG, *OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 36-37 (1985) [hereinafter *OFFENSE TO OTHERS*] (expressing reluctance to allow the state to make official judgments of the reasonableness of conduct). *Cf.* DWORKIN, *supra* note 17, at 126 ("One cannot argue a priori that persons who do such [odd] things are acting nonvoluntarily Although there might be empirical evidence for the nonvoluntary character of many such actions, it is unlikely that all such acts will be nonvoluntary. I do not see how one can rule out the possibility that hard paternalism may be the only position that can justify restrictions on such actions."); Charles M. Culver, Bernard Gert & K. Danner Clouser, *Paternalism and Justification*, in *BIOETHICS: A RETURN TO FUNDAMENTALS* 195, 208 (1997) ("It is crucial not to confuse irrational decisions with unusual or unpopular ones"); John Hospers, *Libertarianism and Legal Paternalism*, 4 *J. LIBERTARIAN STUD.* 255, 264 (1980) ("[P]eople can certainly act voluntarily and yet foolishly."); JOHN KULTGEN, *AUTONOMY AND INTERVENTION: PARENTALISM IN THE CARING LIFE* 194 (1995) ("If the latter expresses reservations about the professional's actions, he should take this as evidence not that she is defective in rationality, but that her values are atypical"); VANDEVEER, *supra* note 12, at 133; *id.* at 245 ("It is clear that autonomous choices are not necessarily prudent choices."); Daniel I. Wikler, *Paternalism and the Mildly Retarded*, 8 *PHIL. & PUB. AFF.* 377, 384 (1979).

32. *HARM TO SELF*, *supra* note 2, at 137. *See also id.* at 106 ("Perfectly rational persons can have unreasonable preferences"); *id.* at 126 ("Reasonableness is one thing, and voluntariness is another."); *id.* at 132, 33 ("[A]n unreasonable choice may yet be voluntary"); *id.* at 133 (requiring other evidence on nonvoluntariness to avoid circularity); *id.* at 184, 321, 329 ("Voluntariness should not be confused with harmfulness, shockingness, or other elements of wickedness."); JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 116 (1984) [hereinafter *HARM TO OTHERS*] ("[I]f the sole evidence of insanity or other invalidating nonresponsibility is the patently harmful character of the agreed-to conduct itself, then we are 'reasoning in a circle.'"). *Cf. In re President & Dir. of Georgetown Coll., Inc.*, 331 F.2d 1000, 1017 (D.C. Cir. 1964) (denying rehearing en banc of an order issued by a single appellate judge authorizing a blood transfusion against a patient's wishes) (Burger, J., dissenting) ("Nothing in his utterance suggests that Justice Brandeis thought that an individual possessed these rights [to privacy] only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest that he intended to include a great many foolish, unreasonable, and even absurd ideas") (emphasis added) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928)); Culver & Gert, *supra* note 11, at 632 ("Irrationality is a concept independent of incompetence"); Gerald Dworkin, *Autonomy and Informed Consent*, in *PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF*

because an action is risky or even extremely risky.³³ He explains: “There must be a right to err, to be mistaken, to decide foolishly, to take big risks, if there is to be any meaningful self-rule”³⁴

For Feinberg, intervention is justified only when the subject’s behavior is not substantially voluntary (i.e., autonomous as an actual condition). He explains, “the state has the right to prevent self-regarding harmful conduct when but *only when* it is substantially non-voluntary.”³⁵

INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP: VOLUME THREE: APPENDICES STUDIES ON THE FOUNDATIONS OF INFORMED CONSENT 63, 65 (1982); KLEINIG, *supra* note 10, at 150 (“Competence is not a matter of coming up with the right answers. We can competently make wrong decisions.”); Eric Matthews, *Can Paternalism Be Modernized?* 12 J. MED. ETHICS 133, 134 (1986) (“[I]t must be the right of every grown human being to be foolish if that is what he or she chooses to be.”); Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 21 (1991) (“If the patient is competent, his decision must be respected, even if he refuses treatment, no matter how foolish the decision is thought to be.”); *id.* If reasonableness is not distinct from voluntariness then the criteria are subject to “a type of ‘Catch-22’ application” whereby the subject will be determined to lack voluntariness in just those instances in which she rejects the values of the paternalistic agent. See VANDEVFER, *supra* note 12, at 418.

33. See HARM TO SELF, *supra* note 2, at 103 (“[I]t is a tenet of the soft paternalistic view we are developing that if the state is to be given the right to prevent a person from risking harm to himself (and only himself), it must not be on the ground that the prohibited action is risky, or even that it is extremely risky, but rather on the ground that the risk is extreme and, in respect to its *objectively assessable components*, manifestly unreasonable to the point of suggesting impaired rationality.”) (emphasis added).

34. HARM TO SELF, *supra* note 2, at 62; see also *id.* at 61 (“He has a sovereign right to choose in a manner we think, plausibly enough, to be foolish, provided only that the choices are truly voluntary.”); *id.* at 67 (“An autonomous being has the right to make even unreasonable decisions determining his own lot in life, provided only that his decisions are genuinely voluntary (hence truly his own), and do not injure or limit the freedom of others.”); *id.* at 69, 109, 159-60 (“[T]here are natural temperamental differences among people in their judgments of the acceptability of risks [O]nly when these judgments are so unreasonable as to raise the suspicion of impaired capacity, or lack of clear understanding . . . can interference be justified”); *id.* at 307 (“If he is an autonomous being, he has the right to decide foolishly in self-regarding matters.”); ALLEN BUCHANAN & DAN BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 41 (1989); HARM TO OTHERS, *supra* note 32, at 116-17. *But cf.* Ronald Dworkin, *Euthanasia, Morality, and Law Transcript*, 31 LOY. L.A. L. REV. 1147, 1152 (1998) (conceding that state has a legitimate role in determining the “reasonableness” of suicide decisions).

35. HARM TO SELF, *supra* note 2, at 126 (emphasis added). See also *id.* at 143 (“Entirely self-regarding and voluntary behavior is none of the criminal law’s business. But sometimes . . . risky behavior is a good deal less than voluntary, and the soft paternalist would justify interference with it when, but only when, there is a well-founded suspicion that the actor’s choice was not really his own.”); *id.* at 261, 351.

For Feinberg, "it is a lack of voluntariness that justifies interference with a person's liberty for his own good, not lack of 'rationality.'"³⁶ "The defining purpose of soft paternalist," Feinberg writes, "is to prevent people from suffering harm that they have not truly chosen to suffer."³⁷ "[L]egitimate government intervention in dangerous situations is not intended to prevent harm so much as to guarantee voluntariness."³⁸ Accordingly, Feinberg's central question, and the one to which he devotes the bulk of *Harm to Self*, regards just when a person's actions are "voluntary enough."³⁹

36. HARM TO SELF, *supra* note 2, at 110. See also *id.* at 111 ("[I]f none of the voluntariness-reducing factors is present, his odd choice must be explained as due to his judgment that the goal he seeks is worth the extreme risk he voluntarily takes."); *id.* at 126 ("The point of the procedure would not be to evaluate the wisdom or worthiness of a person's choice, but rather to determine whether the choice is really his.").

37. HARM TO SELF, *supra* note 2, at 119. See also *id.* at 130 ("The question then is when is a person's mistake 'his own'?).

38. HARM TO SELF, *supra* note 2, at 142. See also Beauchamp, *supra* note 17, at 246 ("[I]t is only because there is questionable voluntariness or definite nonvoluntariness that intervention in their lives is justified, not because of the dangerous or unreasonable character of their action."); Tom L. Beauchamp, *Medical Paternalism, Voluntariness and Comprehension*, in ETHICAL PRINCIPLES FOR SOCIAL POLICY 123, 135 (John Howie ed. 1983); Tom L. Beauchamp & Laurence B. McCullough, *Medical Paternalism*, in MEDICAL ETHICS: THE MORAL RESPONSIBILITIES OF PHYSICIANS 79, 92 (1984) ("[I]ntervention in the lives of such individuals is justified by the weak paternalist's standard *only if there is questionable autonomy*, and not alone because their actions are dangerous or unreasonable."); HARM TO OTHERS, *supra* note 32, at 116 ("[I]f the sole evidence of insanity or other invalidating nonresponsibility is the patently harmful character of the agreed-to conduct itself, then we are 'reasoning in a circle.'"); Gutmann & Thompson, *supra* note 20, at 265 ("[T]he evidence for showing that a decision is impaired must be based on lack of information, emotional distress, or some similar deficiency, not on disapproval of [the subject's conduct] itself."); *id.* ("[T]he basis for establishing the impairment must be independent of the good or end that the individual chooses."); *id.* ("[I]t is important to keep views of the morality of the practice separate from views about the competence of those who decide to engage in it."); HETA HÄYRY, INDIVIDUAL LIBERTY AND MEDICAL CONTROL 9 (1998) ("[T]he justification for the use of force is the agent's mental state, not the potential harm."); KLEINIG, *supra* note 10, at 9 ("[T]he concern in so-called cases of weak paternalism is not with the wisdom of whatever it is that has elicited the imposition, but with whether whatever that is genuinely represents the person's will. So, the focus of attention and grounds for interference . . . is not the danger involved, but the fact that it [was not voluntary]."); *id.* at 102 ("Whether it is bizarre depends on the reasons for it and not simply on its content.").

39. HARM TO SELF, *supra* note 2, at 99; HARMLESS WRONGDOING, *supra* note 14, at xviii. Cf. Mitsuho Umezo, *Paternalism in Japanese Business Ethics* 30 (1999) (UMI unpublished thesis AAT9930591).

B. The Details of the Soft Paternalistic Strategy

The feature of the soft paternalistic strategy that I want to emphasize is the fact that Feinberg effectively evades the issue of whether intervention is justified *even if* the subject's conduct turns out to be substantially voluntary. That possibility (the possibility of justified hard paternalism) is categorically denied and logically precluded.

If an intervention seems justified, the soft paternalistic strategy invariably assesses that intervention as soft paternalism. Consequently, Feinberg never wrestles with the tough normative question of whether hard paternalistic intervention is justified. Feinberg avoids this question through arguing that, as a matter of practicality, he would never be certain the subject acted substantially voluntarily. This convenient outcome (for Feinberg), I contend in Section Four, is a result of the soft paternalistic strategy's use of context variant determinations of voluntariness. I will describe this use before proceeding to my critique of it.

1. Context Variance and Determination of Voluntariness

In defining what is "voluntary enough," Feinberg argues that more voluntariness (or at least more evidence of voluntariness) should be required - to meet this threshold - as the magnitude of the risk or gravity of the harm increases.⁴⁰ Feinberg writes that, "[t]he more serious the risks to himself assumed by the actor . . . the *less* stringent the standards for determining the nonvoluntariness that can warrant preventive interference for the actor's own sake."⁴¹

Feinberg appeals to this inverse proportionality intuition in arguing for a context-relative approach to determining just how voluntary conduct must be in order to be immune from paternalistic interference.⁴²

40. See HARM TO SELF, *supra* note 2, at 117, 118-24, 127; *id.* at 175, 457 ("Since death is irrevocable, of course, what is 'voluntary enough' must be determined by stringent standards . . ."). Still, Feinberg realizes that there are plausible limits to how high the 'voluntary enough' threshold can be raised. See *id.* at 186.

41. *Id.* at 158.

42. See *id.* at 117, 121, 146, 254, 261, 280, 309, 335, 338 ("[S]tandards of voluntariness vary with context and purpose."); HARMLESS WRONGDOING, *supra* note 14, at xviii ("I treat voluntariness as a 'variable concept,' determined by varying standards depending on the nature of the circumstances . . ."). Feinberg also considers the subject's *reasons* for engaging in her conduct. See HARM TO SELF, *supra* note 2, at 154,

Thus, on Feinberg's risk-relative approach, the line between soft and hard paternalism varies with the context.⁴³

Unfortunately, throughout *Harm to Self*, Feinberg waivers between a true context variant standard (i.e., actually strengthening the *criteria* of voluntariness) and a context variant evidentiary standard (i.e., raising only the requisite level of *evidence* to establish that fixed criteria of voluntariness are satisfied). Indeed, Feinberg, like Buchanan and Brock before him, seems to confuse the criteria of voluntariness with the evidentiary standards for determining the presence of those criteria.⁴⁴

At many points, Feinberg suggests that the variance is of the *evidentiary standards* only.⁴⁵ For example, Feinberg argues that

168-69.

43. Note that Feinberg has the standards of voluntariness correspond to the consequences of the subject's conduct. This is significantly different from other forms of context variance in which the standards correspond to the nature, substance, or complexity of the subject's conduct. See BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 140; see also *id.* at 123 ("The line between what is substantial and insubstantial often appears arbitrary, and therefore our analysis might seem imperiled. However, thresholds marking substantially autonomous decisions can be carefully fixed in light of specific objectives . . ."); *id.* at 124, 134 ("[A]ppropriate criteria of *substantial autonomy* are best addressed in a particular context, rather than pinpointed through a general theory of a substantial amount.") (emphasis added).

44. See BUCHANAN & BROCK, *supra* note 34, at 51.

45. See, e.g., HARM TO SELF, *supra* note 2, at 79 ("Since the renunciation of rights is both total and irrevocable in [self-enslavement], the standards of voluntariness employed must be higher . . . The risks are so great that the possibility of *mistake* must be reduced to a minimum.") (emphasis added); *id.* at 118 ("duty to cross examine"); *id.* at 119 ("Voluntariness should be determined by standards whose *stringency* varies directly with the gravity of the risked harm and with the probability of the risked harm occurring.") ("[W]e owe it to the actor to *confirm* that his assumption of the risk is voluntary by appropriately stringent standards.") (emphasis added); *id.* at 120 ("[G]reater care is required in *testing* the voluntariness of [irrevocable] acts . . ."); *id.* ("The voluntariness of [such] decisions . . . must be determined . . . by *stringent* standards.") (emphasis added); *id.* at 126 ("[A]ctual *standards of voluntariness* need not be higher than in other cases, the *standards of evidence* should perhaps be more strict.") (emphasis added); *id.* at 158 ("The more serious the harm caused or threatened to others . . . the *more stringent* the standards for determining the nonvoluntariness that can excuse it.") (emphasis added); *id.* ("The more serious risks to himself assumed by the actor . . . the *less stringent* the standards for determining the nonvoluntariness that can warrant preventive interference for the actor's own sake.") (emphasis added); *id.* at 175 (arguing that in cases of death "what is voluntary enough must be determined by *stringent* standards, so that a mere reassuring word from the primary parties would not be enough to require C to withdraw. More formal and public *procedures for determining* voluntariness in cases like this would also be necessary . . .") (emphasis added); *id.* at 351 ("What it is that makes a choice voluntary to a given degree" is distinct from "how we can *know* when voluntariness . . . is

“bigamy and usury when freely consensual ought not to be crimes, but that dueling and slavery should be forbidden categorically because of insolvable problems of *verifying* voluntariness.”⁴⁶ At other points, Feinberg suggests that variance applies to the *criteria* of voluntariness themselves.⁴⁷ This confusion is unfortunate.⁴⁸

present.”) (emphasis added); *id.* at 347 (“[A] very high degree of voluntariness is required of consent to one’s own death.”); *id.* at 364 (“[R]isk [i]s compounded out of the degree of harm and the probability of its occurring” Therefore, in cases of death “the gravity of the risk . . . is as great as it can be. That is why the *tests* of the genuineness of the patient’s choice are so stringent.”) (emphasis added); HARMLESS WRONGDOING, *supra* note 14, at xviii (“[F]or total and irrevocable transactions even of a wholly self-regarding kind, the highest standards for *testing* voluntariness are required, and these would necessitate the use of cumbersome and highly fallible tests.”) (emphasis added); *id.* at 129 (“The higher the risk of harm involved, the stricter must be the standards, one would think, for voluntariness Perhaps, as we have seen, the state would have the right, on liberal principles, to require such things as psychiatric interviews, multiple witnessing, *cooling off periods*, and the like”) (emphasis added).

46. HARMLESS WRONGDOING, *supra* note 14, at 166 (emphasis added) (citations omitted). See also KLEINIG, *supra* note 10, at 141.

47. See, e.g., HARM TO SELF, *supra* note 2, at 104-05 (“[W]e may formulate relatively strict (high) standards of voluntariness or relatively low standards of voluntariness in deciding, in a given context and for a given purpose, whether a dangerous choice is voluntary enough to be immune from interference.”); *id.* at 117 (“[W]e should treat voluntariness as a ‘variable concept,’ determined by higher and lower cut-off points depending on the nature of the circumstances, the interests at stake, and the moral or legal purpose to be served. In this case, we could expect higher standards in some circumstances and for some kinds of choices than for others.”); *id.* at 120 (“Aged patients in terrible pain . . . might choose death voluntarily by standards a good deal lower”); *id.* (discussing the “requisite level of voluntariness”); *id.* at 121 (comparing knowing and understanding a risk and “elevated standards”); *id.* at 122 (“expect[ing] as great a variance in standards of voluntariness” as in the law) (“[W]e can expect the point of legal voluntariness to vary”); *id.* at 122-23 (providing as an example of “contextual variations for ascriptions of voluntariness” a headache which makes nonvoluntary some activity but not other activity); *id.* at 124 (“[T]he *standards* are determined only by the rules of thumb described in § 5, but that in cases of the present kind they should be *applied* with all the greater care.”) (emphasis added). Here, Feinberg clearly distinguishes the variance of evidentiary standards from variance of criteria, and clarifies that he endorses a context variance of the *criteria* themselves. See also *id.* at 254 (“That is where contextual relativity comes in. The *point* of ‘insufficient voluntariness’ will vary depending on the nature of that to which consent is expressed, and the legal or moral purpose for which consent is considered.”) (emphasis added); *id.* at 313 (“[D]egree of voluntariness is the same (low) but that contextual variations among them require different standards of *validity* be applied.”) (emphasis added); *id.* at 332 (“[W]e can expect variations in the stringency of our standards of voluntariness, and in the minimum age at which voluntary consent is deemed possible”); *id.* at 347 (“[A] very high degree of voluntariness is required of consent to one’s own death, if it is to be acceptably valid.”).

2. Context Variance and Presumptions of Substantial Nonvoluntariness

Feinberg takes his context variant approach to voluntariness one step further. He argues that not only does the standard (or at least the evidentiary criteria for meeting the standard) of voluntariness become more stringent as the riskiness of the conduct increases, but also, sometimes, when the risk and harm are very substantial, the state can safely "presume" that the act is not substantially voluntary.⁴⁹ Feinberg writes, "a choice may be so extremely and unusually unreasonable that we might reasonably suspect that it stems at least in part, not from odd

48. See generally BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 140; Gita S. Cale, Abstract, *Continuing the Debate over Risk-Related Standards of Competence*, 13 BIOETHICS 131, 145 n.25 (1999) (agreeing that "when more is at stake . . . there is reason to take measures to be *more certain* that the person making the decision is competent to do so," but nevertheless requiring that, "the *level* of abilities and capacities that must be possessed in order to be judged competent must remain the same." Certainty measures, "only raise the question of whether or not overriding a decision made by those competent to decide can be justified.") (emphasis added); *id.* at 148 ("While the risks related to a decision might be grounds for taking more *care in assessing* a person's competence, they should not provide grounds for increasing the *standards* by which a person's competence is assessed.") (emphasis added); H. Tristram Engelhardt, Jr., *Making Choices for Others: Three Forms of Paternalism*, in FOUNDATIONS OF BIOETHICS 321, 325 (2d ed. 1996); RUTH FADEN & TOM BEAUCHAMP, A THEORY AND HISTORY OF INFORMED CONSENT 54, 290-91 (1986); ALAN MEISEL, THE RIGHT TO DIE 343 (2d ed. 1995); Mark R. Wicclair, Discussion, *The Continuing Debate Over Risk-Related Standards of Competence*, 13 BIOETHICS 149, 153 (1999) ("It is important to distinguish between (1) a requirement for more *cognitive ability*, and (2) a requirement for more *evidence* of cognitive ability."). But see Jonathan D. Moreno, 103 ETHICS 173 (1992) (requiring both "higher level competence" and "confidence in that competence"); Ian Wilks, *Asymmetrical Competence*, 13 BIOETHICS 154 (1999) (arguing that there is no material difference between higher reliability and a higher standard, but reaching this conclusion by confusing performance and decision standards of competence).

49. See, e.g., HARM TO SELF, *supra* note 2, at 103. See also HARM TO OTHERS, *supra* note 32, at 116 ("Of course, when the consented-to-behavior seems so patently harmful that no sane person could ever consent to it, we may properly assume that the consenter is *not* sane and that his conduct was therefore not valid."); *id.* at 308; HARMLESS WRONGDOING, *supra* note 14, at xviii ("Given the . . . strong general presumption of nonvoluntariness, the state might be justified in presuming nonvoluntariness conclusively in every case as the least risky course."); *id.* at 331 ("Unreasonableness is not the same thing as involuntariness, of course, but extreme unreasonableness creates a strong presumption of nonvoluntariness that would be difficult to rebut, and the state might even be justified in making the presumption *conclusive* for practical reasons.") (emphasis added).

values genuinely held, nor from simple factual mistakes, but rather from deeper psychological impairment.”⁵⁰

For example, according to Feinberg, if we saw someone about to chop off her hand, we would be justified in intervening *not* because chopping off one’s hand is a very bad idea, but rather because chopping off one’s own hand is so outrageous and so uncommon that, based on our common sense expectations instilled by general experience, we can presume with very high certainty that the individual is not acting substantially autonomously. That is, she probably does not really (i.e.,

50. HARM TO SELF, *supra* note 2, at 132-33. See also *id.* at 62, 79, 101-02; *id.* at 103 (“[I]t is a tenet of the soft paternalist view we are developing that if the state is to be given the right to prevent a person from risking harm to himself (and only himself), it must not be on the ground that the prohibited action is risky, or even that it is extremely risky, but rather on the ground that the risk is extreme and, in respect to its objectively assessable components, manifestly unreasonable to the point of suggesting impaired rationality.”); *id.* at 120 (arguing that some actions are “so bizarre that they raise the suspicion of general irrationality, or insanity, which of course annuls voluntariness”); *id.* at 124 (“[W]hen the act in question is of a type that is rarely chosen voluntarily . . . [t]his statistical information may rightly make us suspicious of the voluntariness”); *id.* at 125-27, 132 (“He suffers from no delusions or misconceptions. Yet, his choice is so odd that there exists a reasonable presumption that he has been deprived somehow of the ‘full use of his reflective faculty.’”); *id.* at 133-34 (“[T]he risks incurred appear so unreasonable as to create a powerful presumption of irrationality and therefore of nonvoluntariness.”); *id.* at 160-62 (arguing that some conduct is “so unreasonable as to raise the suspicion of impaired capacity”); *id.* at 266-67, 308; HARM TO OTHERS, *supra* note 32, at 116 (“[W]hen the consented-to-behavior seems so patently harmful that no sane person could ever consent to it, we may properly assume that the consentor is *not* sane”); HARMLESS WRONGDOING, *supra* note 14, at 215 (explaining that intervention is not paternalistic when the conduct is “flagrantly irrational”); KLEINIG, *supra* note 10, at 188-89, 101 (advocating a ban of those consumer goods that almost nobody would voluntarily purchase, but also noting the costs involved in such an approach); NINA NIKKU, INFORMATIVE PATERNALISM: STUDIES IN THE ETHICS OF PROMOTING AND PREDICTING HEALTH 86-87, 145 (1997); VANDEVEER, *supra* note 12, at 268-70, 324 (arguing that bizarre conduct “may be *evidence* that the intender is incompetent” and that “we may be justified in intervening to *find out* whether the person is competent”). *But cf.* Dan W. Brock & Steven A. Wartman, *When Competent Patients Make Irrational Choices*, in CONTEMPORARY ISSUES IN BIOETHICS 109, 111 (Tom L. Beauchamp & LeRoy Walters eds., 1994) (noting the “difficulty of distinguishing among patients who, for example, ignore a risk (that is, acknowledge the risk but decide to accept it), irrationally deny the probability that an untoward event could happen to them, have ‘magical’ or illusory beliefs about their vulnerability to harm, or simply have a different view of viewing the medical problem.”); *id.* at 114 (“[D]istinguishing irrational preferences from those that simply express different attitudes, values, and beliefs can be difficult in both theory and practice.”).

voluntarily) want to chop off her hand.⁵¹

Feinberg suggests that because it is rare in the collective experience of the human race for people to, for example, season their eggs with arsenic, "we are entitled to infer, in the absence of any other information, that a person intent on doing [this], is doing so by mistake."⁵² Feinberg continues:

[W]e may be obliged to intervene in this fashion when the act in question is of a type that is rarely chosen voluntarily, and relatively often chosen nonvoluntarily. This *statistical information* may rightly make us suspicious of the voluntariness in the case at hand Our justification for extra caution in the present cases is simply our expectation based on experience that the act is not voluntary Our statistical information justifies the intervention⁵³

"[W]hen the behavior seems patently self-damaging and is of a sort that most calm and normal persons would not engage in, then there are strong grounds, of only a *statistical sort*, for inferring the opposite; and these grounds, on Mill's principle, would justify interference."⁵⁴ In short, for Feinberg, the severity of the harm can be a good indication, "proxy," or "surrogate end point" for a lack of voluntariness.⁵⁵

51. Cf. HARM TO SELF, *supra* note 2, at 124-27.

52. *Id.* at 127.

53. *Id.* at 124 (emphasis added).

54. *Id.* at 125 (emphasis added). See also *id.* at 174 ("When consent to a given kind of dangerous conduct is so rare and unlikely that it would hardly ever be given unless in ignorance, under coercive pressure, or because of impaired faculties, then a legislature might simply ban it on the basis of the harm to others principle, *assuming* for all practical purposes that consent to *that* kind of agreement never is voluntary enough.") (emphasis added); *id.* at 175 (relying on "empirical data bearing on the voluntariness of consent in the typical cases"); *id.* at 203 (making presumptions reflecting what constitutes coercion to *most* persons); DOUGLAS N. HUSAK, DRUGS AND RIGHTS 132, 135 (1992) (arguing that the "law, necessarily expressed in general terms should be responsive to the most common, typical reason why persons face risks.").

55. Feinberg provides only very extreme examples, where the presumption of non-voluntariness is most plausible. HARM TO SELF, *supra* note 2, at 126. He admits, however, that these "hardly fit the more usual examples of risky choice making." Feinberg, *supra* note 5, at 392. If the soft paternalistic strategy is limited to a few outrageous examples, then it would not be useful for the very purposes for which Feinberg devised it.

Note that Feinberg is already stretching the soft paternalism principle beyond its usual role.⁵⁶ Interference with extraordinary and unusually risky conduct is typically thought to be justified as only a temporary measure, i.e., just long enough to determine whether the individual engaging in the bizarre conduct is, in fact, doing so substantially voluntarily.⁵⁷ For example, take how soft paternalism legitimizes the waiting period requirement for very serious and controversial conduct such as abortion, sterilization, and physician-assisted suicide.⁵⁸ United States citizens have a constitutionally protected right to engage in this conduct. Yet, the state *temporarily* restricts this conduct, because it wants to make sure that persons engaging in such conduct do so substantially voluntarily.

56. See, e.g., VANDEVEER, *supra* note 12, at 93 (criticizing Feinberg's approach as "overly permissive with regard to state intervention").

57. See HARM TO SELF, *supra* note 2, at 125 ("The point of calling the hypothesis a 'presumption' is to require that it be overridden."); *id.* at 126 (supporting "detaining the person until the voluntary character of his choice can be established"); *id.* at 157 ("But if the stuntman, after his reprieve and a careful reconsideration, agrees to try his jump then and there after all, then the intervener must take the stuntman's word for it that he is ready, appraise the risks as voluntarily (enough) assumed, and reluctantly withdraw."). See also Nicholas Dixon, *The Morality of Intimate Faculty-Student Relationships*, 79 *MONIST* 519, 524-25 (1996); N. Fotion, *Paternalism*, 89 *ETHICS* 191, 192 (1979); HARMLESS WRONGDOING, *supra* note 14, at 127 ("[T]he state has a right to make sure that the actors . . . are voluntary participants."); *id.* at 129 ("The higher the risk of harm involved, the stricter must be the standards, one would think, for voluntariness Perhaps, as we have seen, the state would have the right, on liberal principles, to require such things as psychological interviews, multiple witnessing, *cooling off periods*, and the like . . .") (emphasis added); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 67 at 354 (Cambridge Univ. Press 1960) (1698) ("The subjection of a minor places in the father a temporary Government, which terminates with the minority of the child . . ."); *id.* § 170 ("paternal or parental power . . . govern them, for the children's good, till they come to the use of reason or a state of knowledge . . .").

58. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 885 (1992) (upholding the constitutionality of a 24-hour waiting period for abortion); 42 C.F.R. § 50.203(d) (2005) (requiring a 72-hour waiting period for sterilization); OR. REV. STAT. §§ 127.800-.897 (2003) (requiring a 15-day waiting period for physician-assisted suicide). See also Paula Abrams, *The Tradition of Reproduction*, 37 *ARIZ. L. REV.* 453, 487 (1995) (discussing waiting periods generally); Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 *AM. J. L. & MED.* 45, 102 (1995) (proposing a 24-hour waiting period as protection for indigent persons selling their organs); William A. Galston, *Divorce American Style*, *THE PUB. INT.*, June 6, 1996, at 22 (proposing a 5-year waiting period for divorce); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 795-96 (1983).

Nevertheless, Feinberg argues that, although preferred, temporary measures are often not feasible. Nonvoluntariness presumptions are an unfortunate but practically unavoidable effect of legislation.⁵⁹ “[G]iven the costs and other practical difficulties . . . the state often will simply ban the . . . activity in question, presuming non-voluntariness conclusively.”⁶⁰ It would not be feasible to make *ad hoc* determinations

59. Feinberg admits that this presumption is in principle rebuttable, but argues that practical difficulties make this unlikely. See HARM TO SELF, *supra* note 2, at 125, 127 n.23, 174-75. Ascriptions of a lack of substantial voluntariness ought to be defeasible. Feinberg's conclusive ascription is problematic since it is not defeasible. It is a central tenet of soft paternalism that temporary restrictions are justifiable in order to determine voluntariness. However, Feinberg's version of soft paternalism makes the restriction presumptive and conclusive. This underscores the importance of ensuring that the presumption is sound. Thus, the temporary and limited nature was crucial to the justification. See Tom L. Beauchamp, *Paternalism*, in ENCYCLOPEDIA OF BIOETHICS 1914, 1916 (Warren T. Reich ed., 1996); Beauchamp (1983), *supra* note 38, at 137, 141; KLEINIG, *supra* note 10, at 101, 103; NIKKU, *supra* note 50, at 263; VANDEVEER, *supra* note 12, at 92-94, 270, 336, 424. Furthermore, it is unclear why the presumption should fall against liberty. Compare HARM TO SELF, *supra* note 2, at 79, 125, with *id.* at 168 (“[We] do not yet have reliable methods, at least without extensive and costly examinations, to identify severe neurosis, with the confidence that would be required to justify interference with liberty.”) (“The extreme degree of danger . . . is no proof of neurotic compulsiveness.”). Why do these presumptions fall in different directions? Cf. Mark D. Needle, 13 N.Y.U. REV. L. & SOC. CHANGE 989, 993 (1984-85) (observing that in his earlier 1971 article, Feinberg allowed individuals to rebut the presumption).

60. HARM TO SELF, *supra* note 2, at 175; *id.* at 79 (“Given the uncertain quality of evidence on these matters, and the strong presumption of nonvoluntariness, the state might be justified simply in presuming nonvoluntariness conclusively in every case as the least risky course.”); *id.* (“The legislative machinery for testing voluntariness would be so cumbersome and expensive as to be impractical.”); *id.* at 125 (“The presumption, however, should always be taken as rebuttable in principle.”); *id.* at 128; *id.* at 174 (“When consent to a given kind of dangerous conduct is so rare and unlikely that it would hardly ever be given unless in ignorance, under coercive pressure, or because of impaired faculties, then a legislature might simply ban it on the basis of the harm to others principle, assuming for all practical purposes that consent to that kind of agreement never is voluntary enough.”); *id.* at 175 (“[G]iven the costs and other practical difficulties of . . . case by case testing of voluntariness . . . equity boards . . . [or] tribunals . . . the state will often simply ban the agreements or activities in question, presuming nonvoluntariness conclusively.”); *id.* at 188, 258, 326, 351, 354, 374, 391 n.23 (rebuttable in principle but not in reality); HARMLESS WRONGDOING, *supra* note 14, at xviii; *id.* at 168-69. See also BAYLES, *supra* note 23, at 109 (“Even if some instances of a type of conduct might be voluntary there are several reasons a soft paternalist might use for prohibiting it . . . due to the difficulty and likely errors in determining voluntariness.”); Arthur L. Caplan, *When Liberty Meets Authority: Ethical Aspects of the Laetrile Controversy*, in POLITICS, SCIENCE, AND LAETRILE: THE LAETRILE PHENOMENON 133, 145 (1980); Häyry, *supra* note 17, at 296; Peter Suber, *Paternalism*, in 2 PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 632, 635 (Christopher B. Gray ed., 1999) (“Careful interviews minimize the problems [of false

of autonomy.⁶¹ Unfortunately, laws are necessarily general and their blanket application will inevitably prohibit even autonomous (i.e., substantially voluntary) behavior.⁶²

Feinberg introduces the notion that the state could establish some sort of “tribunal” to make individual determinations of subjects’ voluntariness.⁶³ Thereby, state paternalism could presumably more

presumptions], but at such a great cost . . .”).

61. Although this limitation has much intuitive appeal, Feinberg has been rightly criticized for espousing it. If, as Feinberg argues, autonomy is an un-trumpable principle, it should not be overridden in the face of mere administrative costs. Richard J. Arneson, *Paternalism, Utility, and Fairness*, 43 *REV. INT’L PHIL.* 409, 426-27 (1989) (“[W]illingness to support the proposal to institute *voluntariness determination boards* . . . will depend on the extent of one’s commitment to the value of personal autonomy.”); *id.* at 435 (arguing that “autonomy trumps” is “just another perfectionist imposition of values”); Norman O. Dahl, *Review Essay - Against Legal Paternalism*, 7 *CRIM. JUST. ETHICS* 67, 75, 78 (1988) (arguing that if administrative costs can outweigh autonomy then autonomy is not as strong as Feinberg says); Fischer, *supra* note 6, at 133-34; Jan Hunt, *Risking One’s Life: ‘Soft Paternalism’ and Feinberg’s Account of Legal Liberalism*, 8 *CAN. J. L. & JURISPRUDENCE* 311, 321 (1995) (arguing that Feinberg never coherently held this position anyway and that Feinberg gives no reason why beneficence ought not to have some weight, perhaps even decisive weight, in some circumstances); KULTGEN, *supra* note 31, at 183 (“Feinberg’s position is in danger of collapsing into [paternalism] Where the sliding marker stops is determined by questions of utility for the beneficiary, not by his autonomy as a moral trump card.”); VANDEVEER, *supra* note 12, at 92-94 (arguing that “there is a moral presumption against the legitimacy of invasive interference and no compelling reason why adult persons should have to establish their competence [T]he epistemological burden [should] not be placed on the shoulders of restricted subjects”); ROBERT YOUNG, *PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY* 75 (1986) (rejecting Feinberg’s administrative costs argument on empirical grounds) (arguing that “we already find it needful and possible to test voluntariness in other important legal matters”). *But cf.* VANDEVEER, *supra* note 12, at 327 n.28 (similarly allowing the costs of protecting autonomy to justify restriction). There is at least one instance in which Feinberg seems to allow for *ad hoc* determinations. Feinberg suggests that requests for euthanasia can be honored with adequate evidence. *See* HARM TO SELF, *supra* note 2, at 349. *Cf.* Gerald Dworkin, *Paternalism: Some Second Thoughts*, in *PATERNALISM* 105, 124 (Rolf Sartorius ed., 1983); KLEINIG, *supra* note 10, at 131. Just such an evidentiary standard has been implemented in Oregon for physician-assisted suicide. *See* OR. REV. STAT. §§ 127.800-.897 (2003).

62. *See* HARM TO SELF, *supra* note 2, at 128. *Cf.* Hunt, *supra* note 61, at 317 (“Clearly, however, prohibitions against self-inflicted harm in general will apply on the *presumption* that the actions are substantially non-voluntary and thus may well apply to actions which in fact are voluntary”) (emphasis added); *id.* at 318 (“[S]oft paternalism . . . must in practice impose constraints even on voluntary self-inflicted harms.”); NIKKU, *supra* note 50, at 64-65.

63. *See* HARM TO SELF, *supra* note 2, at 79, 125-28, 131, 162, 174-75. *See also* John D. Hodson, *Legal Paternalism*, in *THE ETHICS OF LEGAL COERCION* 43, 49 (1983).

closely resemble the interpersonal characteristics of private paternalism.⁶⁴ However, Feinberg recognizes that in reality a voluntariness tribunal would be an impracticable and burdensome mechanism.⁶⁵ Legal paternalism operates through regulations, policies, or laws rather than through more particular actions.⁶⁶ Therefore, presumptions about subjects' voluntariness must be made on the basis of

64. See generally JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION*, ch. XVII, § XV (Prometheus Books 1988) (1781) ("It is a standing topic of complaint, that a man knows too little of himself. Be it so: but is it so certain that the legislature must know more? It is plain, that of individuals the legislature can know nothing: concerning those points of conduct which depend upon the particular circumstances of each individual, it is plain, therefore, that he can determine nothing to advantage. It is only with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may he in a way to engage, that he can have any pretence for interfering . . ."); RONALD M. DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION AND EUTHANASIA* 213 (1993); E.L. Fox, *Paternalism and Friendship*, 23 CAN. J. PHIL. 575, 588 (1993) (discussing the "privileged epistemological position"); Kent Greenawalt, *Some Related Limits of Law*, in *THE LIMITS OF THE LAW* 76, 85 (Roland J. Pennock & John W. Chapman eds., 1974) ("[G]overnmental action may be inappropriate even when parallel private action would be justified. At least when the government acts through generalized rule of policy . . . it must be less closely involved . . . less able to consider individual factors and to tailor attempted influence accordingly The state should, therefore, be much more cautious"); Henrik Kjeldgaard Jorgensen, *Paternalism, Surrogacy, and Exploitation*, 10 KENNEDY INST. ETHICS J. 39, 55 (2000) ("[I]ntimates are in a much better position to interfere in the right way. Primarily, this is so because they often are better able to acquire knowledge of the [subject] . . . such knowledge is essential to the decision of whether to interfere paternalistically."); KULTGEN, *supra* note 31, at 171-72, 234; JULIE ANN WHITE, *DEMOCRACY, JUSTICE AND THE WELFARE STATE: RECONSTRUCTING PUBLIC CARE* 11-15, 123-52 (2000) ("expert impartiality"); James Woodward, *Paternalism and Justification*, in *NEW ESSAYS IN ETHICS AND PUBLIC POLICY* (Kai Nelson & Steven C. Patten eds.), published as 8 CAN. J. PHIL. 67, 87-88 (Supp. 1982); Zamir, *supra* note 7, at 236.

65. See *HARM TO SELF*, *supra* note 2, at 79 ("[T]he testing would have to be thorough, time-consuming, and expensive. The legal machinery for testing voluntariness would be so cumbersome and expensive as to be impractical."); *id.* at 128, 175, 258 ("[H]uman legislatures and courts of law . . . are forced for practical reasons to formulate rules based on the presumptive preferences of standard persons . . ."). See also C. Edwin Harris, Jr., *Paternalism and the Enforcement of Morality*, 8 S.W. J. PHIL. 85, 90 (1977) (arguing that although it "might be permissible in principle," the "legal machinery necessary for testing voluntariness would be so cumbersome and expensive as to be impractical"). Nevertheless, Feinberg argues, presumptions of voluntariness are rebuttable *in principle* -- with particular facts. See *HARM TO SELF*, *supra* note 2, at 125-26.

66. Of course, individual government agents often *apply* the law to particular individuals on a case-by-case basis. Yet, the implications of this twist on the legitimacy of state/legal paternalism lie outside the scope of this dissertation.

“statistical” or other inductive evidence.⁶⁷ This presumption is in principle rebuttable, but practical difficulties make this unlikely.

67. See generally FADEN & BEAUCHAMP, *supra* note 48, at 343, 361 (arguing that in policy contexts the state can use an objective standard based on the reasonable, ordinary, or average person); *id.* at 260 (suggesting the plausibility of objectivity tied to average persons); *id.* at 46 n.28 (explaining the objective standard of a reasonable person as “common behavioral assumptions” that are “prescriptive as well as descriptive”); HARM TO OTHERS, *supra* note 32, at 50-51 (“In general, the application of the harm principle requires some conception of normalcy [S]tatutes, to be effective, must employ general terms without the endless qualification that would be needed to accommodate the whole range of idiosyncratic vulnerabilities.”); *id.* at 112, 188 (positing a “standard person”); *id.* at 192, 203, 216, 235; OFFENSE TO OTHERS, *supra* note 31, at 33-34; HARM TO SELF, *supra* note 2, at 79 (“Given the uncertain quality of evidence on these matters, and the strong general presumption of nonvoluntariness, the state might be justified simply in presuming nonvoluntariness conclusively in every case as the least risky course.”); *id.* at 103, 127 n.23, 128 (“[T]he law must often be couched in general terms”); *id.* at 174-75; *id.* at 181 (using “actuarial tables”); *id.* at 203; *id.* at 210 (law uses objective standards); *id.* at 219-28 (norms of expectability); *id.* at 228; *id.* at 258 (“In human legislatures and courts of law . . . for practical reasons to formulate rules based on the presumptive preferences of standard persons, thus discouraging subsequent judicial inquiry into actual preferences of real individuals.”); *id.* at 259-60, 274-75 (“[T]he law must create order and predictability by using some notion of a ‘standard individual’ [P]ublic rules take both the arbitrariness and the vulnerability out of voluntary transactions”); *id.* at 290 (determining intent); *id.* at 300 (making presumptions when conduct is “exceedingly rare”); *id.* at 324 (providing examples of where one would want to be pushed out of the way of a bus -- “indirect statistical evidence when overwhelming” or even the best interest standard when there is no subjective evidence); HARMLESS WRONGDOING, *supra* note 14, at xviii; *id.* at 331 (“Unreasonableness is not the same thing as involuntariness, of course, but extreme unreasonableness creates a strong presumption of nonvoluntariness that would be difficult to rebut, and the state might even be justified in making the presumption conclusive for practical reasons.”); RUSSELL HARDIN, MORALITY WITHIN THE LIMITS OF REASON 137, 142 (1988) (“The defense of apparently paternalistic actions by a state or other collective body is therefore not that a particular instance of the action affecting a particular individual is necessarily in that individual’s interest (perhaps contrary to the individual’s assertions) but that *institutionalization* of that action in general in relevant circumstances is best overall.”) (emphasis added); Hodson, *supra* note 63, at 50 (“relevance of judgments as to what most competent persons would decide to do in similar circumstances”); HUSAK, *supra* note 54, at 132 (“[T]he law, necessarily expressed in general terms, should be responsive to the most common, typical reason why persons assume risks.”); KLEINIG, *supra* note 10, at 89 (arguing that if it’s severely intrusive then it is a cost of the law and not paternalism, but an administrative justification as to them. Moreover, exemptions can be made if they are feasible); KULTGEN, *supra* note 31, at 161; NIKKU, *supra* note 50, at 97-102, 244, 261 (offering as alternatives to PHIC the HC of a “minimally rational person” or of the majority); SUSAN B. RUBIN, WHEN DOCTORS SAY NO: THE BATTLEGROUND OF MEDICAL FUTILITY 127-28 (1998) (placing reliance on social consensus); Danny Scoccia, *Moral Paternalism, Virtue, and Autonomy*, 78 AUSTRALIAN J. PHIL. 53, 70 (2000) (“The difficulty for the moral paternalist is that the criminal law, if it forbids performances of an

We need not dwell on the question of whether presumptions of voluntariness ought to be conclusive or rebuttable. The crucial question is not whether Feinberg, in paradigm cases of autonomous action, can make conclusive presumptions of non-substantial voluntariness, but rather, whether Feinberg can presume a lack of substantial autonomy at all - from the very nature of the act itself. Restricting a subject's conduct because of skepticism about her voluntariness is an acceptable liberal reason for liberty limitation. However, Feinberg employs this reason in an illiberal way, thus rigging the dice to come up substantially nonvoluntary.

IV. CRITIQUE OF FEINBERG'S SOFT PATERNALISTIC STRATEGY

Feinberg observes that "[i]t is all too easy to confuse soft and hard paternalism."⁶⁸ I will argue, effectively, that Feinberg fails to heed his own warning. He has confused soft paternalism with hard paternalism. In this section I demonstrate that, through his soft paternalistic strategy, Feinberg smuggles in the very same evaluative judgments he expressly criticizes and disavows. Particularly, Feinberg smuggles evaluative commitments into his determinations of voluntariness.

My critique of Feinberg's soft paternalistic strategy consists of six separate but interdependent arguments. First, I establish that setting threshold levels of voluntariness is not a wholly empirical enterprise, but actually applies evaluative judgments. Second, I compare the masking of hard paternalism with soft paternalism to the masking of hard paternalism with the harm principle. Third, I argue that Feinberg's

act-type, cannot feasibly distinguish between individuals who perform it excessively and those who perform it moderately; the ban must apply to both."); Smiley, *supra* note 23, at 305-08; C.L. Ten, *Paternalism and Morality*, 13 *RATIO* 56, 57 (1971) ("What is regarded as harmful depends on the common values of the community and the ideal patterns of life cherished by it."); *id.* (also arguing that physical harm need not face such problems); VANDEVEER, *supra* note 12, at 107 ("Legislatures, of course, typically promulgate laws for entire classes of persons."); *id.* at 359; Weale, *supra* note 16, at 171 (discussing the cumulative interference problem in CHARLES FRIED, *AN ANATOMY OF VALUES* 178-82 (1970)); Wikler, *supra* note 31, at 388. Matjaz Zwitter et al., *Professional and Public Attitudes Toward Unsolicited Medical Intervention*, 318 *BMJ* 251 (1999) (providing statistics for normalcy inferences). *Cf.* OFFENSE TO OTHERS, *supra* note 31, at 103 (aptness words). Feinberg employs this conception when making his presumptions of nonvoluntariness.

68. HARM TO SELF, *supra* note 2, at 6.

masking is due, in part, to his confusion of empirical and normative questions surrounding use of the concept “voluntariness.” Fourth, I argue, largely through a comparison to the recent debate among bioethicists over the use of the term “competence,” that Feinberg’s masking is due, in part, to his confusion of the subject and the subject’s conduct. Fifth, I argue that Feinberg’s masking is due, in part, to his confusion of the distinct notions: “substantial voluntariness” and “voluntary enough.” Last, I summarize the case against the soft paternalistic strategy.

A. Feinberg Implicitly and Illicitly Appeals to Values

1. The Value-Laden Character of Risk

Feinberg’s soft paternalism strategy relies heavily upon a standard (either criterial or evidentiary) of voluntariness that varies in direct proportion with the riskiness of the conduct to which it is applied. Feinberg purports to define this crucial standard of voluntariness in normatively neutral terms, as if it were wholly a matter of empirical fact.⁶⁹ But he fails. The assessment of a risk as extreme or unusual, a necessary component of Feinberg’s context variant approach to voluntariness, is simply not a wholly objective enterprise.⁷⁰

69. See HARM TO SELF, *supra* note 2, at 119 (“[T]o jack up our standards of voluntariness because [the goal for the sake of which the actor assumed the risk is not worth a risk of that magnitude] would be to compromise with hard paternalism’s policy of imposing his own judgments of worthwhileness on unwilling autonomous agents. What we would be doing, in effect, would be *throwing into the equation for deciding voluntariness* (and thus permissibility) our own judgments of worthwhileness instead of the actor’s.”) (emphasis added).

70. See generally Tom L. Beauchamp, *Competency*, in COMPETENCY: A STUDY OF INFORMED COMPETENCY DETERMINATIONS IN PRIMARY CARE 49, 67 (Mary Ann Cutter & Earl A. Shelp eds., 1991) [hereinafter Beauchamp, *Competency*] (“[O]nce the criteria for application of the concept of competence have been established -- i.e., chosen from an evaluative point of view -- it is then, in principle, an objective, empirical, and testable question whether someone *has* the abilities.”); Tom L. Beauchamp, *Value Judgments in Social Science*, in 9 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 575, 576 (Edward Craig ed., 1998); BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 133 (regarding the determination of competence: “The test is an empirical measuring device, but normative judgments determine how the test will be used to sort persons of the two classes of competent and incompetent. They are normative judgments”); *id.* at 292 (“[R]isk is both a descriptive and an evaluative concept.”); *id.* at 293 (“Values determine *what* will count as costs, harms, and benefits as well as *how much* particular costs, harms, and

Feinberg recognizes with respect to the harm principle, after more precisely defining it, interpreting it, and qualifying it with "mediating maxims," that it lost its "normative neutrality."⁷¹ Feinberg also recognizes that in assessing a risk, the legislature must consider not only a conduct's magnitude and probability of harm but also the "independent value of the risk-creating conduct."⁷²

Nevertheless, Feinberg abandons this "nonnormativism" when it comes to voluntariness.⁷³ He apparently fails to see that "voluntariness," which is as malleable as "harm," cannot be normatively neutral. In sum, Feinberg recognizes that an assessment of *unreasonableness* necessarily requires an agent to impose his *own* judgments of worthwhileness and his *own* values.⁷⁴ However, Feinberg fails to recognize that a

benefits will count -- that is how much weight they will have in our calculations."); *id.* at 313 ("[V]alue judgments pervade the entire process."); *id.* at 289, 297-300, 303; Greg Bloche, *Beyond Autonomy: Coercion and Morality in Clinical Relationships*, 6 HEALTH MATRIX 229, 251-57 (1996) (arguing with regard to coercion that autonomy-negating influences are not empirically measurable but normatively set); Bernard Gert & Charles M. Culver, *The Justification of Paternalism*, 89 ETHICS 199, 207 n.11 (1979); Alisdair MacIntyre, *Utilitarianism and Cost Benefit Analysis: An Essay on the Relevance of Moral Philosophy to Bureaucratic Theory*, in ETHICS AND THE ENVIRONMENT 139, 139 (Donald Scherer & Thomas Attig eds., 1983) ("[A]ll nontrivial activity presupposes some philosophical point of view and that not to recognize this is to make oneself the victim of bad or at the very least inadequate philosophy."); DOUGLAS MACLEAN, VALUES AT RISK (1985); Ernest Nagel, *The Enforcement of Morals*, HUMANIST, May-June 1968, at 18, 22 ("[A]n explication of what is understood as harmful . . . cannot escape reference to some more or less explicit and comprehensive system of moral and social assumption . . .") ("Moral assumptions and considerations of social policy surely control this classification of some conduct as more or less harmful."); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 529 (1988) ("Surely the case for a claim of weak paternalism is itself weakened, for instance, when the asserted incapacity exists on a question of basic values or assumptions, especially (but not exclusively) when those values or assumptions are shared by a large number of mature adults."); KRISTIN SHRADER-FRECHETTE, RISK AND RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS (1991); Ten, *supra* note 67, at 57 ("What is regarded as harmful depends on the common values of the community and the ideal patterns of life cherished by it."); Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181, 186, 189, 192 (1999).

71. HARM TO SELF, *supra* note 2, at xii, 3; HARM TO OTHERS, *supra* note 32, at 25.

72. HARM TO OTHERS, *supra* note 32, at 191. See also HARM TO SELF, *supra* note 2, at 101-02; *id.* at 128 ("[T]he term 'harm' can always mask an evaluative element, which being a matter of personal judgment of worthwhileness, may indeed be beyond the scope of external expertise.").

73. See Arthur L. Caplan, *The Concepts of Health, Illness, and Disease*, in MEDICAL ETHICS 57, 64 (Robert M. Veatch ed., 2d ed. 1997).

74. See HARM TO SELF, *supra* note 2, at 103 ("[T]he risk decision may defy objective

presumption of *non-substantial voluntariness* involves the same evaluative elements.

One cannot determine the voluntariness of an individual's conduct without making significant reference to its content. The enterprise of identifying activities for which higher levels of voluntariness are required is implicitly based on judgments regarding the value or importance of those activities.⁷⁵ Decision scientist and risk expert Paul Slovik explains:

assessment because of its component value judgments."); *id.* at 111 ("When we judge another's actions as 'unreasonable,' we are criticizing them, unfavorably evaluating them, rejecting them But when the actor assumes a risk that would in fact be unreasonable in relation to our goals, we have a tendency to project our goals (or the way we rank goals) onto him.") (arguing that in "label[ing] his conduct 'unreasonable' . . . all we are doing is employing our own judgment of comparative worthwhileness") (emphasis added); *id.* at 119.

75. Commentators have observed that what is perceived as "too risky" (and thus for Feinberg sufficient for raising requisite voluntariness) is based on social values. See, e.g., Marcia Angell, *Breast Implants -- Protection or Paternalism?* 326 *NEW ENG. J. MED.* 1695 (1992) (explaining that risks in the case of breast implants are not objective but have to do with "personal judgments about the quality of life, which are subjective and unique to each woman"); Tom L. Beauchamp, *Paternalism and Biobehavioral Control*, 60 *MONIST* 62, 72 (1977) ("The difficulty of disentangling judgments of unreasonableness and abnormality from judgments of moral attitude and evaluative outlook is notoriously difficult."); BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 292 ("[S]tatements of risk are also evaluative, inasmuch as is necessarily attached to the occurrence or prevention of the events. No risk exists unless a prior negative evaluation of some condition has taken place. Thus, risk is both a descriptive and an evaluative concept."); Robert H. Bork, *Government Efforts to Deal with Tobacco Betrays an Ultimate Ambition to Control Americans' Lives*, *NAT. REV.*, July 28, 1997, at 28 (noting that "[a]utomobiles kill tens of thousands of people every year and disable perhaps that many again. We could easily stop the slaughter. Cars could be made with a top speed of ten miles an hour and with exteriors made of marshmallows. Nobody would die, nobody would be disabled, and nobody would bother with cars very much."); Dan Brock, *A Case for Limited Paternalism*, 4 *CRIM. JUST. ETHICS*, Summer/Fall 1985, at 79, 87 ("[P]aternalistic balancing takes place as part of the determination of competence."); Brock & Wartman, *supra* note 50, at 111 (noting the "difficulty of distinguishing among patients who, for example, ignore a risk (that is, acknowledge the risk but decide to accept it), irrationally deny the probability that an untoward event could happen to them, have 'magical' or illusory beliefs about their vulnerability to harm, or simply have a different view of viewing the medical problem."); *id.* at 114 ("[D]istinguishing irrational preferences from those that simply exercise different attitudes, values, and beliefs can be difficult in both theory and practice."); Dershowitz, *supra* note 11, at 151-53 (comparing how the risk of an elderly widow was judged to be unacceptable but similar conduct by an elderly male Supreme Court Justice was permitted); Gerald Doppelt, *The Moral Limits of Feinberg's Liberalism*, 36 *INQUIRY* 255, 260 (1993) (arguing that what is considered to be harmful "is culture dependent and changes over time"); Donald A. Dripps, *The Liberal*

[R]isk is socially constructed. Risk assessment is inherently subjective and represents a blending of science and judgment with important psychological, social, cultural, and political factors If you define risk one way, then one option will rise to the top If you define it another way . . . you will likely

Critique of the Harm Principle, 17 CRIM. JUST. ETHICS, Summer/Fall 1998, at 3, 10 (explaining that the line between those activities permitted and those not permitted is not drawn on the basis of harmfulness alone but rather on the basis of social value ascribed to activities); Faith T. Fitzgerald, *The Tyranny of Health*, 331 NEW ENG. J. MED. 196, 197 (1994) (“[O]ur understanding of self abuse is subject to uncertainty and to arbitrary social fashion.”); Jonathan Glover, *Paternalism and Gambling with Life*, in CAUSING DEATH AND SAVING LIVES 179, 180 (1977) (arguing that our intuitions regarding the boundaries of paternalistic legislation are shaped by “social traditions”); Tziporah Kasachkoff, *Paternalism and Drug Abuse*, 58 MT. SINAI J. MED. 412, 414-15 (1991) (arguing, at least with respect to drugs, that the magnitude and probability of harm “alone does not explain our willingness to legally restrain our fellow citizens’ behavior” and that morals and ideals also underlie the restriction); KLEINIG, *supra* note 10, at 52 (“Judgments of competence cannot be detached completely from cultural expectations, and there is a tendency to read any marked deviation from convention as evidence of incompetence.”); KULTGEN, *supra* note 31, at 236, 241 (discussing Smiley); NIKKU, *supra* note 50, at 163; UDO SCHUKLENK, ACCESS TO EXPERIMENTAL DRUGS IN TERMINAL ILLNESS 48 (1998); Robert L. Schwartz, *Lifestyle, Health Status, and Distributive Justice*, 3 HEALTH MATRIX 195, 211 (1993) (“High risk activities of the rich and famous -- skiing, high stress lifestyles, flying private planes, scuba diving -- seem acceptable. High risk activities of the poor -- smoking, overeating, drinking -- seem to be morally unacceptable.”); Robert L. Schwartz, *Making Patients Pay for Their Lifestyle Choices*, 1 CAMBRIDGE Q. HEALTHCARE ETHICS 393, 394-95 (1992); Smiley, *supra* note 23, at 307 (“He ends up smuggling the seriousness of harm into his criteria for deciding whether or not an individual has chosen freely.”); C.L. TEN, MILL ON LIBERTY 116-17 (1980); Robert D. Tollison & Richard E. Wagner, *Tobacco and Public Policy: A Constitutional Perspective*, in SMOKING: WHO HAS THE RIGHT? 292, 301 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998) (“What about skiing, mountain climbing, hang gliding, drinking alcohol, and working long hours? Are the risks ‘too high’? By whose standard?”); VANDEVEER, *supra* note 12, at 317, 358-61, 361 n.11 (observing that the threshold of voluntary enough is a line set by changing social standards); Wikler, *supra* note 31, at 229 (arguing that public health must “transcend historical cultural biases and distinguish the foreign and idiosyncratic from the involuntary”); *id.* at 230 (“The practices singled out for condemnation . . . are being penalized merely for having values different from those of persons of power.”); Scott Yoder, *Personal Responsibility for Health: Discovery or Decision*, 19 MED. HUMANITIES REP. NO. 3 (1998) (“Which lifestyle interventions represent justified infringements on individual autonomy . . . ? Any answer will be pragmatic relative to our values, goals, and interests.”); YOUNG, *supra* note 61, at 67. On the other hand, there is, as John Kleinig observes, at bottom “a distinction to be drawn” between conduct that is and is not substantially voluntary. See KLEINIG, *supra* note 10, at 63. “The difficulty is to know how to draw it without importing distorting factors.” *Id.*

get a different ordering Defining risk is thus an exercise in power.⁷⁶

The determination of risk is based on assumption-laden theoretical models. Evaluative assumptions underlie and influence the way in which the risk is measured - for example, by number of deaths or by number of injuries.⁷⁷

Beauchamp and Childress identify a good example of the value-laden character of risk: the Food and Drug Administration's ("FDA's") regulation of breast implants. Beauchamp and Childress criticize the FDA's decision to permit breast implants for only reconstructive purposes - and not for cosmetic purposes - as "unjustifiably paternalistic."⁷⁸ Beauchamp and Childress argue that rather than prohibiting such implants, the FDA should have simply ensured that women adequately understood the risks (i.e., that their decision to have silicone breast implants was substantially autonomous).⁷⁹

But even taking the FDA's explanation for the prohibition at face value - on the assumption that medical devices ought to be banned (instead of restricted) when the risks outweigh the benefits - the FDA decision still illicitly commingles evaluative commitments and objective assessment. Specifically, as Beauchamp and Childress explain, the FDA "overweighed the unknown risks, in part, because it has viewed the benefits of breast implants as subjective and limited"⁸⁰

76. Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, 12 U. CHI. LEGAL F. 59, 95 (1997); see also Howard Kunreuther & Paul Slovic, *Science, Values, and Risk*, 545 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 119-21 (1996).

77. See, e.g., BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 293 ("Values determine what will count as costs, harms, and benefits as well as how much particular costs, harms, and benefits will count - that is how much weight they will have in our calculations."); *id.* at 305 ("[N]o value-free assessment of RBAs exist."); BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 206; Kopelman, *supra* note 11, at 284.

78. BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 303. Tziporah Kasachkoff similarly observes that the distinction between drugs that are tolerated in the market and illegal drugs is based on value assumptions and not just empirical features. All drugs have an effect on the body. What is a negative effect and what is a sufficiently negative effect to warrant illegalization are both normative questions. See Kasachkoff, *supra* note 75, at 415.

79. See BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 204-05.

80. BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 303; BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 205.

The value-laden nature of risk precludes an enterprise (such as Feinberg's), which entails raising the requisite level of voluntariness relative to the level of risk, from being properly characterized as part of a "soft paternalistic strategy." Professors Appelbaum, Lidz, and Meisel argue that "a standard by which the nature of the decision determines whether the patient is incompetent seriously undermines patient autonomy. Such a standard is paternalism to the extreme."⁸¹ Feinberg's strategy involves the surreptitious substitution of values and is, therefore, more appropriately characterized as hard paternalism.

2. Feinberg's Manipulation of the Value-Laden Nature of Risk

Feinberg's masking of hard paternalism as soft paternalism can effectively be exposed as an *ad hoc* move by examining a diagram that Feinberg uses to explain his strategy:⁸²

81. PAUL S. APPELBAUM, CHARLES W. LIDZ & ALAN MEISEL, INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 87 (1987). See also KLEINIG, *supra* note 10, at 101 ("[T]o call [conduct] bizarre [so to create a presumption of nonvoluntariness] is to go a long way toward begging the question at issue."); Shapiro, *supra* note 70, at 529 ("Surely the case for a claim of weak paternalism is itself weakened, for instance, when the asserted incapacity exists on a question of basic values or assumptions . . ."); Smiley, *supra* note 23, at 303 ("Feinberg appears able to avoid a *direct* reference to our assessment of an individual's ends only by assuming . . . standards or normalcy.").

82. HARM TO SELF, *supra* note 2, at 105 (Diagram 20-3). I have modified the diagram in several respects from that printed in Feinberg's text. First, I employ the term "substantially voluntary" rather than "fully voluntary." Second, I have shortened the descriptions of the exemplary conduct in categories two and three.

	More or Less Substantially Voluntary Assumptions of Risk to Oneself	Less Than Substantially Voluntary Assumptions of Risk to Oneself
Reasonable risk of harm to oneself	(1) E.g., most of the normally risky daily activities of life, like driving a car or crossing a street	(2) E.g., drunk sandwich ordering
Unreasonable risk of harm to oneself	(3) E.g., cigarette smoking	(4) E.g., high speed automobile driving on an empty private road while drunk

Categories (1) and (4) are uncontroversial. Liberals and nonliberals alike will almost *never* interfere with a subject's substantially voluntary assumption of reasonable risks (i.e., the conduct in category (1)). Our participation in many (if not most) of the daily activities of modern life poses risks. For example, by simply driving to the office, we increase the chance that we will be killed or injured in a serious automobile accident. But we cannot all stay at home. It's just not worth preventing what is usually an uneventful activity, particularly when it's undertaken substantially voluntarily. Similarly, both liberals and nonliberals alike will almost *always* interfere with a subject's non-substantially voluntary assumption of unreasonable risks (i.e., the conduct in category (4)). Not only does such conduct pose grave risks, but also the subjects engaging in such conduct either do not even know what they are doing or they cannot help it.

Category (2) is also uncontroversial. Although not substantially voluntary, the conduct represented by this category concerns activities and harms too trivial with which to be concerned.⁸³ Unless people were regularly fatally allergic to strawberries, it wouldn't be worth it to prevent them from ordering the wrong sandwich or prevent them from erroneously putting strawberry, rather than cherry, jam on their toast.

83. See, e.g., GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 450 (1978) ("[M]any routine acts of daily life are not aptly described as either voluntary or as involuntary."); HARM TO SELF, *supra* note 2, at 118 ("Persons may act nonvoluntarily . . . provided no harm is caused thereby."); VANDEVEER, *supra* note 12, at 11, 123-24; *id.* at 125 ("Even substantially nonvoluntary choices deserve protection unless there is good reason to judge them dangerous."); *id.* at 353, 407.

The lack of substantial voluntariness is a necessary but not a sufficient condition for intervention. "Even substantially nonvoluntary choices deserve protection unless there is good reason to judge them as dangerous."⁸⁴

The controversial category is category (3): the substantially voluntary assumption of unreasonable risks. Of those risks worth regulating, the soft paternalism principle, by definition, justifies only the regulation of the behavior in category (4): the non-substantially voluntary assumption of unreasonable risks. Only the hard paternalism principle, on the other hand, typically justifies regulation of the conduct in category (3). In short, category (3) conduct can be restricted only on the basis of hard paternalism. On the other hand, category (4) conduct can be restricted on the basis of soft paternalism. We might summarize how liberty limiting principles correspond to these categories by referencing to Feinberg's chart as follows:

(1) Interference is not sanctioned by any liberty limiting principle.	(2) Interference could be sanctioned by soft paternalism, but the conduct is not worth interfering with.
(3) Interference is sanctioned by only hard paternalism	(4) Interference is sanctioned by only soft paternalism.

Feinberg does not explain his soft paternalistic strategy in terms of his chart, but it is accurate to state Feinberg's argument in these terms. Feinberg's argument is that the behavior in category (3) is so unreasonable that it more properly belongs in category (4).⁸⁵ Therefore, Feinberg avoids defending the regulation of conduct in category (3) - and avoids grappling with the justifiability of hard paternalism - by re-describing that conduct as category (4) conduct, which can be restricted on soft paternalistic grounds.

Feinberg's redescription of category (3) conduct as category (4) conduct is illicit. The conduct represented in both categories (3) and (4) is harmful. What makes some of it so outrageous that it can be presumed

84. VANDEVEER, *supra* note 12, at 125.

85. What remains in Category (3), then, is the substantially voluntary conduct which does not seem reasonable to regulate. But that conduct is already captured by Category (1). So, Category (3) turns out to be an empty or null set because all the conduct in that set is pushed out either into Category (1) or into Category (4).

to be nonautonomous (and thus in category (4)), however, is not determined, as Feinberg seems to assume, by just the magnitude and the severity of the risks at stake.⁸⁶ Instead, by determining conduct to be not substantially voluntary, Feinberg, as I more fully argue below, judges (secretly) the social worth of the activities at stake.⁸⁷

Feinberg admits that to override behavior in category (3) on the ground that it is “unreasonable” would be hard paternalism. In addition, Feinberg is correct that restricting conduct in category (4) is only soft paternalism. Yet, Feinberg tries to have his cake and eat it too. He implicitly appeals to a notion of reasonableness (a notion he contends is employed by only hard paternalists) when he characterizes behavior in category (3) as outrageous and thus presumptively not substantially voluntary - and consequently more accurately belonging to category (4). Feinberg’s argument for intervention may be sound. Feinberg errs, however, in failing to characterize this intervention as hard paternalism.⁸⁸

Notably, Feinberg recognizes that his soft paternalism strategy may make out a “compromise with hard paternalism.”⁸⁹ Feinberg writes, “[w]e are thus led to a liberal doctrine which, in its immediate effects, can be confused with [hard] paternalism”⁹⁰ Nevertheless, Feinberg proceeds to “smuggle” into his account of voluntariness the very evaluative judgments of reasonableness which he denies are ever

86. Cf. HARM TO SELF, *supra* note 2, at 103 (explaining that conduct may be prohibited as “manifestly unreasonable to the point of suggesting impaired rationality” only “in respect to its objectively assessable components”). See also *id.* at 119, 127, 158, 364.

87. See *infra* notes 177 to 206, 232 to 237, and accompanying text.

88. See generally CHILDRESS, *supra* note 10, at 194 (“Critics of Mill’s principle have tried to take the sting out of it largely by contending that voluntary self-regarding conduct is practically a *null class* because our risky actions are other-regarding and/or nonvoluntary.”) (emphasis added); KLEINIG, *supra* note 10, at 187 (“The Argument from Weak Paternalism is in principle unobjectionable. The difficulty is in applying it fairly and economically.”); KULTGEN, *supra* note 31, at 60 (“Authors *categorize cases* in ways that anticipate the normative judgments they make.”) (emphasis added); *id.* at 90 (arguing that an approach like Feinberg’s “puts phenomena into neat bins for analysis, but distorts them and confounds our intuitions”); RICHARD WASSERSTROM, ED., MORALITY AND THE LAW 19 (1971) (“[T]he characterization of laws (e.g., as cases of [one liberty limiting principle or another]) is a more complicated and ambiguous undertaking than so far has been supposed.”); Weale, *supra* note 16, at 172 (“[T]he difficulty comes not so much with stipulating what conditions paternalism has to satisfy before it is legitimate, but in knowing *when* cases fall under the appropriate heading.”) (emphasis added).

89. HARM TO SELF, *supra* note 2, at 119.

90. *Id.* at 126.

relevant to soft paternalism and determinations of voluntariness.⁹¹ As some commentators have described, Feinberg's soft paternalistic strategy represents "ad hoc tinkering . . . to ensure that all justified paternalism can be seen as restraining only involuntary actions."⁹² In other words, Feinberg employs soft paternalism as a *pretextual justification* for what is really hard paternalism.

Feinberg is not alone.⁹³ John Kultgen observes that the "boundary problem plagues" many authors.⁹⁴ This stretching, or "masking," of hard

91. See Smiley, *supra* note 23, at 299 (arguing that Feinberg's soft paternalism principle "ultimately embodies the same kind of communal standards that are, according to [his] own principles, illegitimate justifications for interference with individual liberty"). See also Dan Brock, *Paternalism & Autonomy*, 98 ETHICS 550, 565 (1988) (arguing that Feinberg's theory "in fact require[s] a balancing of respecting an individual's autonomy against protecting his good."); Gray, *supra* note 6, at 32 (observing that "Feinberg's intellectual virtues of rigor and honesty compelled him to abandon the Liberal Position with which he began . . . and 'allow[] that . . . legal paternalism states reasons that are always relevant."); S.S. Kleinberg, *Review of Harm to Self*, 11 PHIL. INVESTIGATIONS 177, 178 (1988) ("His object is to show how there can be good non-paternalistic reasons for some laws which are often advocated on paternalist[sic] grounds . . . [but i]n practice Feinberg does not carry off the trick with complete success."); Edward Sankowski, *Paternalism and Social Policy*, 22 AM. PHIL. Q. 1, 6 (1985) (arguing that Feinberg's use of voluntariness "seems susceptible of use to justify morally unacceptable interventions, depending on how the self-avowedly artful term 'voluntary' is used."); Umezo, *supra* note 39, at 32 ("Here the voluntariness is no longer the ultimate independent criterion for the justification of paternalism; the volitional element is interdependent with the rational element . . . nonvoluntariness becomes a correlative concept of all things considered.").

92. Michael N. Goldman & Alvin I. Goldman, *Paternalistic Laws*, 18 PHIL. TOPICS 65, 68 (1990). Feinberg is guilty of just the sort of tinkering with which he charges Plato. Cf. HARM TO OTHERS, *supra* note 32, at 66-67. Later, Feinberg explicitly recognizes that there are limits to which the soft paternalism strategy can be stretched without straining plausibility. See HARMLESS WRONGDOING, *supra* note 14, at 180. See also *id.* at 212 (warning of "back door paternalism").

93. Perhaps the other most notable soft paternalism "stretcher" is University of Chicago law professor Cass R. Sunstein. See, e.g., Cass R. Sunstein, *How the Law Constructs Preferences*, 86 GEO. L.J. 2637, 2639 (1998) ("Recent revisions in understanding human behavior . . . support a form of anti-antipaternalism."); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN L. REV. 1471, 1541 (1998) ("[B]ounded rationality pushes toward a sort of anti-antipaternalism . . ."); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 40 (1990) (arguing that individual preferences are social constructs and, therefore, state interference with those preferences "removes a kind of coercion") (emphasis added).

94. KULTGEN, *supra* note 31, at 64. See also *id.* at 60 ("Authors categorize cases in ways that anticipate the normative judgments they make."); CHILDRESS, *supra* note 10, at 17 ("[I]t is difficult to determine both the *relevance* and *weight* of particular defects,

paternalism with the soft paternalism principle is pervasive.⁹⁵ As Duncan Kennedy argues, “[hard] paternalism is a more pervasive issue

encumbrances, and limitations in decision making and acting. This task is complicated because extended [i.e., hard] paternalism sometimes masquerades as restricted [i.e., soft] paternalism, presenting value judgments as judgments about competency.” (emphasis added); *id.* at 194 (“Critics of Mill’s principle have tried to take the sting out of it largely by contending that voluntary self-regarding conduct is practically a null class because our risky actions are other-regarding and/or nonvoluntary.”); HÄYRY, *supra* note 38, at 72 (“[T]heorists who allegedly accept the liberal position may try to smuggle ‘strong’ interventions into their systems by defining them as instances of ‘weak’ paternalism.”) (emphasis added); *id.* at 76-77 (criticizing views that define voluntariness too strictly); KLEINIG, *supra* note 10, at 165 (arguing that what others offer as weak paternalism is substantially voluntary -- social security); *id.* at 85-86 (arguing that not all encumbrances take the individual below the threshold of substantial voluntariness); George W. Rainbolt, *Prescription Drug Laws: Justified Hard Paternalism*, 3 *BIOETHICS* 45 (1989) (suggesting that most soft paternalists, from Richard Arneson to Donald VanDeVeer, are stretchers).

95. *See, e.g.*, *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 225 (6th Cir. 1991) (“An argument that ‘we are doing this for your own good’ [is] a contention that usually *shields* one’s actual motive.”) (emphasis added); Robert Clark, *The Soundness of Financial Intermediaries*, 86 *YALE L.J.* 1, 20 (1976) (“[S]ince . . . [paternalistic] . . . theories strike many persons as an insult to human dignity, inevitably there is pressure to *disguise* these theories when they do underpin regulation.”) (emphasis added); Goldman & Goldman, *supra* note 92, at 68 (cautioning against “ad hoc tinkering by the soft paternalist to ensure that all justifiable paternalism can be seen as restricting only involuntary actions”); *id.* at 72 (“One strategy for sidestepping the limitation that prohibits paternalistic laws is to try to provide non-paternalistic justification for such laws.”); HARM TO SELF, *supra* note 2, at 4 (“[W]e would expect hardly anyone to *confess* to paternalistic tendencies, much less boldly affirm the paternalistic principle and wave the paternalistic banner.”) (emphasis added); *id.* at 85 (“The more overt paternalistic language seems much less *contrived* and more honest.”) (emphasis added); Kennedy, *supra* note 18, at 646 (“We decide these cases paternalistically, to our credit, but we then bury them under other rubrics”); *id.* at 590 (“The rhetoric of paternalism . . . is *never* an acknowledged motive”); *id.* at 624 (“[B]ecause of its pariah status [paternalism] is usually mentioned last, if at all.”); Robert C.L. Moffat, *Cloning Freedom: Criminalization or Empowerment in Reproductive Policy*, 32 *VAL. U. L. REV.* 583, 589 (1998) (“[P]aternalism has been highly controversial, except among legislators.”); Shapiro, *supra* note 70, at 530 (“[T]he question of paternalism is seldom raised quite so starkly.”); *id.* at 535 n.64; *id.* at 536 (recognizing the “unwillingness to take an openly paternalistic stance”); *id.* at 545 (“We never rest easy, though, with choices that seem justified, if at all, primarily on paternalist grounds.”); VANDEVVEER, *supra* note 12, at 213 (“[I]t is sometimes thought, and argued, that there is little reason to worry over whether or not this or that paternalistically based defense of interference is justified, since such fastidiousness about paternalistic strategies of justification can be set aside -- set aside because there is a legitimate, familiar, and nonpaternalistic ground”); *id.* at 7 (“One important ground for delimiting risks is paternalistic in nature [T]his fact has not been sufficiently recognized in existing discussions.”); Wicclair, *supra* note 48, at 150 (warning of the danger of “*hidden* paternalism”) (emphasis added); Zamir, *supra* note 7, at 281 (“[P]olicymakers in western liberal democracies rarely resort to paternalistic

. . . than people will generally admit."⁹⁶ It is, Kennedy explains, "everywhere, coming out of the woodwork."⁹⁷

3. Examples of Feinberg's Manipulation of the Value-Laden Nature of Risk

In order to fully appreciate Feinberg's context variant conception of voluntariness, it is instructive to examine several of his particular examples. Feinberg argues that the "consistent liberal position" would permit the consent defense to all crimes except: "[1] where doing so would be harmful to third parties or [2] where because of difficulties in confirming voluntariness, it would not be workable."⁹⁸

As we are focusing on pure paternalism, we can set aside the harm principle exception to the consent defense. With regard to the soft paternalism exception to consent, Feinberg argues that the following conduct can be presumed not substantially voluntary and thus "forbidden categorically:"

- (1) Mutilation of the genitals⁹⁹
- (2) Self blinding¹⁰⁰
- (3) Suicide¹⁰¹
- (4) Dueling¹⁰²
- (5) Bigamy—on the part of the second spouse¹⁰³

justifications for their regulation in present times.").

96. Kennedy, *supra* note 18, at 645.

97. *Id.* at 646.

98. HARMLESS WRONGDOING, *supra* note 14, at 175.

99. HARM TO SELF, *supra* note 2, at 126, 144-45 (avoiding discussion of the issue because of his focus on the criminal law) (avoiding the case of the "religious fanatic").

100. HARM TO SELF, *supra* note 2, at 126.

101. *Id.* at 144-45. *But see id.* at 69 ("A rational adult could have very good reasons for terminating his own life . . ."); *id.* at 127 ("[I]f all we know about a person is that he intends to kill himself, we are probably not entitled to 'presume' anything at all about the voluntariness of his choice . . . [T]here is commonly no reliable presumption at all of a *statistical sort.*") (emphasis added).

102. HARM TO OTHERS, *supra* note 32, at 262 n.2; HARM TO SELF, *supra* note 2, at 175; HARMLESS WRONGDOING, *supra* note 14, at 166 (arguing that it "should be forbidden categorically because of insolvable problems of verifying voluntariness"); *id.* at 172-73.

103. HARM TO SELF, *supra* note 2, at 266-67 ("To be sure the voluntariness of the consent of the added spouse might be suspect, but that would be a ground for nullifying their matrimonial contracts rather than for punishing the contractors."); HARMLESS WRONGDOING, *supra* note 14, at 166 (not endorsing criminalization but endorsing other

- (6) Putting arsenic on eggs¹⁰⁴
- (7) Consensual battery¹⁰⁵
- (8) Gladiator contests¹⁰⁶
- (9) Crossing unsafe bridges¹⁰⁷
- (10) Swimming in highly polluted waters¹⁰⁸

On the other hand, Feinberg argues that substantial voluntariness must be presumed in the following cases, with which interference is not justified on self-regarding grounds:

- (1) Smoking¹⁰⁹
- (2) Motorcycling without a helmet¹¹⁰
- (3) Slavery contracts¹¹¹
- (4) Mayhem¹¹²

forms of hard paternalism).

104. HARM TO SELF, *supra* note 2, at 127.

105. HARMLESS WRONGDOING, *supra* note 14, at 173 (arguing that in communities with a “cult of machismo” the fear of losing face makes voluntariness of accepting challenges suspect).

106. *Id.* at 130.

107. HARM TO SELF, *supra* note 2, at 127; *id.* at 132 (“[F]actual errors willfully persisted in against clear evidence . . . cancel voluntariness in cases in which there is an approximation to certain knowledge of the danger . . .”).

108. *Id.* at 127.

109. *Id.* at 134 (“Many perfectly normal rational persons voluntarily choose to run precisely these risks for whatever pleasure they find in smoking. The way for the state to assure itself that such practices are truly voluntary is continually to confront smokers with the ugly medical facts so that there is no escaping the knowledge of what the medical risks exactly are.”).

110. *Id.* at 136 (arguing that although such risktakers “could no doubt profit from more detailed information,” this lack of information does not make their conduct sufficiently nonvoluntary) (arguing that “[t]he ‘typical’ motorcyclist . . . is simply not mistaken about the factual basis of the risks he takes”) (“It seems unlikely that we can justify compulsory helmet legislation on soft paternalistic grounds . . .”). Feinberg does make a tenuous case for the applicability of the harm principle.

111. *Id.* at 71-74. Admittedly, Feinberg does note that voluntariness will vary depending on what is taken as the relevant background or perspective, the “norms of expectability,” the “benchmark,” the “baseline.” See also *id.* at 128 (noting that “the term ‘norm’ can always mask an evaluative element”). The judgment of voluntariness in these discussions is really about responsibility and blameworthiness rather than autonomy. Cf. Cass R. Sunstein, *A Note on ‘Voluntary’ Versus ‘Involuntary’ Risks*, 8 DUKE ENVTL. L. & POL’Y F. 173, 176-77 (1997).

112. HARMLESS WRONGDOING, *supra* note 14, at 171 (“It will be very difficult to comprehend the motive for consent in these cases, and the suspicion of nonvoluntariness

Perhaps most remarkable about this classification of some conduct as presumptively not substantially voluntary and other conduct as presumptively substantially voluntary is that Feinberg, in contradiction to Mill and many other liberal writers,¹¹³ would legally permit individuals to consent to slavery contracts. Feinberg writes that it "would be dogmatic to insist that necessarily and in each case, all motives in this [self-enslavement] category must fail the test of voluntariness."¹¹⁴ After all, "[w]e can," Feinberg explains, "imagine any number of intelligible (though not attractive) motives in this category for entering irrevocable rightless slavery."¹¹⁵

Perhaps slavery can be substantially voluntary. The slave might be motivated by an offer to give \$10,000,000 to a loved one or to a worthy cause. However, we can also surely and equally imagine intelligible motives for each of the ten types of conduct described above - conduct that Feinberg presumes is not substantially voluntary.

Gerald Dworkin explains that "[a]lthough there might be empirical evidence for the nonvoluntary character of many such actions, it is unlikely that all such acts will be nonvoluntary."¹¹⁶ Now, Feinberg correctly claims that "[c]onsistency requires [that] the liberal in each category of crime either to uphold the consent defense or to reject it for acceptable . . . reasons (protection of third parties or skepticism about voluntariness)."¹¹⁷ But Feinberg is *not* consistent. Feinberg's "skepticism about voluntariness" ebbs and flows with no apparent rhyme or reason - according to his own evaluative commitments.¹¹⁸

will be strong. Nevertheless, the liberal would permit the consent defense out of respect for personal autonomy, subject to appropriately stringent standards of voluntariness.").

113. See, e.g., DWORKIN, *supra* note 17, at 128-29 (changing his position from an earlier paper and allowing that there may be presumptions of nonvoluntariness but that they must be rebuttable); JOHN STUART MILL, *ON LIBERTY* ch. IV (1859); Alan G. Soble, *Paternalism, Liberal Theory, and Suicide*, 12 CAN. J. PHIL. 335, 341, n.12 (1982).

114. HARM TO SELF, *supra* note 2, at 73.

115. *Id.* at 74. See also *id.* at 69 ("A rational adult could have very good reasons for . . . selling himself into slavery And even if we do not think much of his reasons, we may have to concede that he is making a perfectly genuine voluntary choice of his own, albeit an unreasonable one by our standards."). But see HARM TO SELF, *supra* note 2, at 79; HARMLESS WRONGDOING, *supra* note 14, at 166.

116. DWORKIN, *supra* note 17, at 126.

117. HARMLESS WRONGDOING, *supra* note 14, at 166.

118. Many writers on state paternalism focus exclusively on the criminal law. Indeed, this focus had become so prevalent that in the introduction to his anthology on paternalism, Richard Wasserstrom cautioned readers to "keep in mind that the law is

For example, take Feinberg's analysis of dueling. Feinberg approves of prohibition on dueling because it is probably nonvoluntary.¹¹⁹ The duelists, Feinberg argues, do not duel voluntarily because they are coerced by a code of honor, perhaps inculcated since their childhood, to go through with the duel.¹²⁰

In contrast, Feinberg does *not* approve of prohibition of mayhem, although it is equally nonvoluntary. Feinberg argues: "It will be very difficult to comprehend the motive for consent in these cases, and the suspicion of nonvoluntariness will be strong Where the motive for

more than the criminal law and enforcement occurs in ways other than through the threatened or actual application of a penal sanction." WASSERSTROM, *supra* note 88, at 8. See also Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 109 (Richard Wasserstrom ed., 1971); DWORKIN, *supra* note 17, at 121; Thompson, *supra* note 11, at 154 ("Those few writers who have held that paternalism is never justified either have *limited* their claim to certain kinds of paternalism (such as that enforced by the criminal law).") (emphasis added). Of course, it's not a fault to study paternalism in just one well-defined and important field of the law. This is what Joel Feinberg does. Nevertheless, Feinberg focuses so narrowly on state paternalism through the mechanism of the criminal law that it seems unclear if Feinberg is even opposed to other forms of state paternalism. See, e.g., HARM TO OTHERS, *supra* note 32, at 3; HARM TO SELF, *supra* note 2, at 143-45; HARMLESS WRONGDOING, *supra* note 14, at 166. For example, without strong evidence of nonvoluntariness, he rejects outright prohibition of smoking and similar drug use, but he is willing to allow "taxing, regulatory, and persuasive powers" to make them "more difficult or less attractive." HARM TO SELF, *supra* note 2, at 134; see also HARM TO OTHERS, *supra* note 32, at 23-24. This is far less liberal than Mill who rejected *all* such forms of state interference with substantially voluntary self-regarding conduct. John Stuart Mill, *Of the Grounds and Limits of the Laissez-Faire or Non-Interference Principle*, in *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 937 (J.M. Robson ed., 1965) (1848) (distinguishing "authoritative interference of government" from other kinds of intervention such as "giving advice and promulgating information"); Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 136 n.6 (Rolf Sartorius ed., 1983) (focusing on the non-enforcement of contracts as much as on interference through the criminal law); VANDEVEER, *supra* note 12, at 342. Furthermore, Feinberg recognizes that tort law imposes a duty of legal obligation as much as the criminal law does. See HARMLESS WRONGDOING, *supra* note 14, at 253, 364 n.62. Yet, he shirks his burden to explain or account for such restrictions as soft paternalism. See, e.g., HARM TO OTHERS, *supra* note 32, at 242; HARM TO SELF, *supra* note 2, at 126, 144-45, 264; HARMLESS WRONGDOING, *supra* note 14, at 166, 217. So too does contract law impose a duty of obligation equivalent to that imposed by the criminal law. See, e.g., Dworkin (1971), *supra* note 118, at 109 (providing as an example of paternalism: "Laws regulat[ing] the types of contracts which will be upheld as valid"); VANDEVEER, *supra* note 12, at 212.

119. HARM TO OTHERS, *supra* note 32, at 262 n.2; HARM TO SELF, *supra* note 2, at 175; HARMLESS WRONGDOING, *supra* note 14, at 166, 172-73.

120. HARM TO SELF, *supra* note 2, at 175.

self-mutilation or consent to mayhem seems mysterious . . . the presumption of nonvoluntariness because of psychological impairment is very strong."¹²¹ Notwithstanding these concerns, Feinberg would "permit the consent defense out of respect for personal autonomy, subject to appropriately stringent standards of voluntariness."¹²²

Like me, Richard Arneson finds Feinberg's distinction (restricting the liberty of the duelist but not restricting the liberty of the mayhemer) implausible.¹²³ Feinberg's argument comes very close (perhaps too close) to judging the reasonableness of the conduct as opposed to its voluntariness. Feinberg even notes that a "human element" moves the liberal to question the presence of voluntariness and "[i]n the end he will find [read "invent"] nonpaternalistic grounds - doubts about voluntariness" for intervention.¹²⁴ In short, Feinberg all but admitted that his determinations of voluntariness are subjective.

I contend that, not only in the mayhem case but also in a number of similar cases, the core problem is Feinberg's standard of voluntariness. The standard, by which Feinberg determines whether a subject's conduct is voluntary, is context specific. This permits Feinberg both to redefine all the conduct that he considers reasonably regulated as not substantially voluntary and to redefine the intervention with such conduct as soft paternalism.¹²⁵ Feinberg is thereby able to avoid a heavy burden of

121. HARMLESS WRONGDOING, *supra* note 14, at 171.

122. *Id.*

123. See Richard J. Arneson, *Liberalism, Freedom and Community*, 100 ETHICS 368, 372 (1990).

124. HARMLESS WRONGDOING, *supra* note 14, at 330.

125. See HARM TO SELF, *supra* note 2, at 104 ("[W]e may formulate relatively strict (high) standards of voluntariness or relatively low standards of voluntariness . . ."); *id.* at 146 ("[R]emembering the point about contextual relativity among standards of voluntariness, we should be prepared for asymmetries."); *id.* at 153 ("[C]ommon to all the voluntariness-defeating factors . . . [is] tailoring standards to special contexts."); *id.* at 154 ("[L]ower should be our standard of 'voluntary enough'"); *id.* at 158 (observing that the criminal law requires a greater lack of voluntariness to evade responsibility); *id.* at 170 ("If our purpose is to decide whether some person's impending dangerous but self-regarding conduct is voluntary enough to exempt him from protective interference, then we are likely to use standards tailored more closely to the specific circumstances . . ."); *id.* at 261 (espousing "standards of voluntariness whose stringency varies with the nature of the context"); *id.* at 332 ("The more irrevocable the risked harm, the greater the degree of voluntariness required if it is to be permitted."); *id.* at 335 ("[S]tandards of voluntariness vary with context and purpose."); *id.* at 338 ("[T]here is no paradox, once we have adjusted to the variable standard theory of voluntariness . . . the idea that two equally nonvoluntary expressions of consent can have different legal effects in different

normative justification. Feinberg writes: "I treat voluntariness as a 'variable concept' determined by varying standards depending on the nature of the circumstances, the interests at stake, and the moral or legal purpose to be served."¹²⁶ Feinberg also states: "[W]e should treat voluntariness as a 'variable concept,' . . . depending on the nature of the circumstances, the interests at stake, and the moral or legal purpose to be served. In that case, we could expect higher standards in some circumstances and for some kinds of choices than for others."¹²⁷ On this standard, the restriction of conduct likely to pose great harm is *more* likely justifiable because the conduct is less likely voluntary.

But what harm is great harm is not a purely objective matter. This is evident by plotting the two variables on a Cartesian diagram. Plot on the x-axis the degree of voluntariness (or evidence of voluntariness) required to be substantially voluntary. Plot on the y-axis the degree of risk. While there is undoubtedly a positive correlation between these two variables, there are many different curves that can be drawn. Although both charts show a positive relationship between the two variables, the precise correlation can vary significantly. The factors that go into determining the precise *shape* of the curve can be manipulated.¹²⁸ Feinberg can (and does) move voluntariness up and down to accommodate his needs.¹²⁹

Feinberg's soft paternalistic strategy gives far too great a role to the concept of voluntariness in determining the justifiability of intervention. The entire debate over the justifiability of paternalistic restriction of individual liberty is simply transplanted into the allegedly or "supposedly" empirical context of determining what constitutes voluntariness. For Feinberg, voluntariness is the central question.¹³⁰ But the problem of the justifiability of hard paternalism cannot be solved by the use of such a model. Rather, the problem becomes distorted because

contexts . . .").

126. HARMLESS WRONGDOING, *supra* note 14, at xviii.

127. HARM TO SELF, *supra* note 2, at 117.

128. Cf. Richard J. Arneson, *Paternalism*, in 7 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 250, 252 (Edward Craig ed., 1998).

129. See HARM TO SELF, *supra* note 2, at 118 (diagram 20-6, showing a "sliding marker").

130. *Id.* at 99.

the soft-hard model, a distinction regarding just one single dimension of paternalism, is too simple to reflect the true complexity of the debate.¹³¹

B. Comparison of the Masking of Hard Paternalism with Soft Paternalism to the Masking of Hard Paternalism with the Harm Principle

It is a familiar trick and a sure fallacy to disguise normative judgments under a mask of an empirical observation.¹³² For example, in the 1970s, some scholars argued that homosexuality was immoral because it is "unnatural." However, on closer examination, philosophers recognized that calling something "unnatural" in this type of situation is an act of prescription, not description.¹³³ Other scholars, for example, have used the purportedly neutral and value-free concepts such as "disease,"¹³⁴ "death,"¹³⁵ and "futility"¹³⁶ to mask value judgments. There are many more examples.¹³⁷

131. Legislators as well as judges are guilty of masking their value judgments. For example, Justice Scalia recently criticized the *Casey* majority for employing the "undue burden" standard of determining the constitutionality of laws regulating abortion. Scalia contended that the "undue burden" standard is not a real legal standard at all but rather a mere unprincipled "policy-judgment-couched-as-law." *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

132. See VICTOR GRASSIAN, *MORAL REASONING* 33-36 (2d ed. 1992).

133. See, e.g., Burton M. Leiser, *Homosexuality and the 'Unnaturalness Argument,'* in *LIBERTY, JUSTICE, AND MORALS: CONTEMPORARY VALUE CONFLICTS* 52-59 (2d ed. 1979), reprinted in *ETHICS: THEORY AND PRACTICE* 339-45 (Manuel E. Velasquez & Cynthia Rostankowski eds., 1985).

134. See, e.g., Caplan, *supra* note 73, at 58, 61, 65, 70; H. Tristram Engelhardt, Jr., *Health and Disease - Philosophical Foundations*, in *ENCYCLOPEDIA OF BIOETHICS* 1101 (1996) ("Concepts of health and disease . . . may conceal value judgments that should be treated more explicitly as bioethical issues."); *id.* at 1104 ("Henrik Wolff has argued that an exclusively biological or empirical model of illness contributes to paternalistic medical practice."); Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 67 (1968) ("The bare statement that 'alcoholism is a disease' is most misleading since . . . it conceals what is essential -- that a step in public policy is being recommended, not a scientific discovery announced."); JAMES M. HUMBER & ROBERT F. ALMEDER EDS., *WHAT IS DISEASE: BIOMEDICAL ETHICS REVIEWS* (1997); HENRY E. SINGER, *CIVILIZATION AND DISEASE* (1943).

135. See, e.g., PETER SINGER, *RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS* 35, 42 (1994); DOUGLAS WALTON, *INFORMAL LOGIC: A HANDBOOK FOR CRITICAL ARGUMENTATION* 240-41 (1989).

136. See, e.g., BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 191-93; CHILDRESS, *supra* note 10, at 45, 165-66; Ruth Macklin, *Medical Futility: The Limits of Patient Autonomy*, in *ENEMIES OF PATIENTS* 166, 172 (1993) ("The concept of futility is vague

It is enlightening to explore one of these examples. So, I compare the masking of hard paternalism as soft paternalism with a similar problem: the masking of hard paternalism by the harm principle.¹³⁸ In both cases, “liberals try to meet the challenge of [hard] paternalism by denying its existence.”¹³⁹ We could collapse paternalism, moralism, and other liberty-limiting principles so that the harm would be the sole

and ambiguous, and its meaning is rarely specified precisely in circumstances in which it is invoked”); *id.* at 174 (“[T]o stretch the concept of futility beyond its narrow meaning is illicit.”); *id.* at 175 (“My only argument here is that it is not acceptable to *fudge* the solution to this ethical dilemma by broadening the meaning of ‘futility.’ That maneuver may appear to settle the ethical dilemma, but only at the price of *linguistic dishonesty*.”) (emphasis added); *id.* (“[I]t is *confused and dishonest* to *cloak* decisions to withhold [scarce medical resources] . . . under the mantle of futility.”) (emphasis added); *id.* at 179 (arguing the debate is “not a technically medical dispute, but rather a dispute over what kind of life is worth prolonging”); *id.* at 182 (“For reasons of *conceptual clarity* and *linguistic honesty*, among others, I have been urging that the concept of futility be understood in a narrow sense.”) (emphasis added); *id.* at 184 (“It is important not to misuse the language of futility to *mask* quality-of-life judgments. *Honesty* demands that the issue of quality of life be confronted squarely.”) (emphasis added).

137. See, e.g., Paul R. Helft et al., *Rise and Fall of the Futility Movement*, 343 *NEW ENG. J. MED.* 293-96 (2000).

138. Cf. Goldman & Goldman, *supra* note 92, at 72; Donald H. Regan, *Justifications for Paternalism*, in *THE LIMITS OF THE LAW* 189, 209 n.16 (J. Roland Pennock & John W. Chapman eds., 1974); Shapiro, *supra* note 70, at 570, 573; Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, in *ETHICS TEACHING IN HIGHER EDUCATION* 245, 249 n.16, 266 (Daniel Callahan & Sissela Bok eds., 1980).

139. Gutmann & Thompson, *supra* note 20, at 262. See also Bayles, *supra* note 6, at 109 (“The soft paternalist’s argument against hard paternalism is to show that hard paternalism is implausible and *not needed* to handle any plausible legislation.”) (emphasis added); CHILDRESS, *supra* note 10, at 194 (“Critics of Mill’s principle have tried to take the sting out of it largely by contending that voluntary self-regarding conduct is practically a null class because our risky actions are other-regarding and/or nonvoluntary.”); Goldman & Goldman, *supra* note 92, at 72 (“One strategy for sidestepping the limitation that prohibits paternalistic laws is to try to provide non-paternalistic justification for such laws.”); Kennedy, *supra* note 18, at 643 (“The plausibility of principled anti-paternalism is therefore linked to the ability to *dismiss or to explain away* cases in which one wants to act paternalistically but can’t rationalize the action in terms of incapacity.”) (emphasis added); KULTGEN, *supra* note 31, at 60 (“Authors categorize cases in ways that anticipate the normative judgments they make.”); VANDEVEER, *supra* note 12, at 213 (“[I]t is sometimes thought, and argued, that there is little reason to worry over whether or not this or that paternalistically based defense of interference is justified, since such fastidiousness about paternalistic strategies of justification can be set aside -- set aside because there is a legitimate, familiar, and nonpaternalistic ground”); Zamir, *supra* note 7, at 281 (“[P]olicy-makers in western liberal democracies rarely resort to paternalistic justifications for their regulation in present times.”).

standard for determining the justifiability of restricting individual liberty. But this would be an even more impoverished model than Feinberg's soft paternalism strategy. Such a model would require us to build a tremendous number of normative and conceptual assumptions into the concept of "harm."¹⁴⁰

1. The Motivation for Stretching the Harm Principle

Still, because the harm principle provides the least controversial basis for regulation, and because harm, in one form or another, can always be identified, the harm principle is often employed to "explain" regulations that are more appropriately justified on pure paternalistic grounds. Alan Dershowitz explains that "[t]he best evidence of how influential Mill's principle has become . . . may be the repeated efforts of those who would compel a given action against protesting individuals to *rationalize* such force by reference to the rights of *others* than by reference to the good of the compelled individual."¹⁴¹

The agreement over the harm principle's moral acceptability has been described as "superficial and deceptive" because often "the harm principle is hardly more than a pious remark."¹⁴² Given the harm principle's malleability, "harm to others" accounts are often "employed only to camouflage a rejection of Mill's [harm principle] criteria."¹⁴³ Willard Gaylin and Bruce Jennings explain:

140. Mill, of course, claims to hold this position. But even Mill had to provide many qualifications. Cf. RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 76 (1998) ("[T]he broader the definition of harm, the more extensive the justified role of government intervention. The definition of harm thus becomes a first approximation, the litmus test for the use of state power."); HARM TO OTHERS, *supra* note 32, at 214 ("[W]e can preserve that illusion of harm as a single determinate even purely empirical notion. The analysis . . . however, reveals that harm is a very complex concept with hidden normative dimensions . . . [and requires] supplementary criteria (or 'mediating maxims') . . ."); Nagel, *supra* note 70, at 22 (arguing that the harm principle "excludes virtually *nothing* from the scope of justifiable legal enactment -- *unless* some agreement is first reached on what to count as 'harm or evil to others'").

141. Alan M. Dershowitz, *Mill on Liberty*, in *ON LIBERTY AND UTILITARIANISM BY JOHN STUART MILL* x (1993).

142. HARM TO SELF, *supra* note 2, at 24.

143. George A. Hisert, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605, 621 (1970). See also BENTHAM, *supra* note 64, at ch. XVI, § LXIV(10) ("The best plan for punishing [self-regarding offenses] is founded on a faint probability there may be of there being productive of a mischief, which, if real, will

place them in the class of public ones"); Dripps, *supra* note 75, at 9 ("A little causal creativity can go a long way toward eviscerating the harm principle."); *id.* at 8 (suggesting that Feinberg stretches the harm principle in "strugg[ling] mightily to explain away laws that require motorcyclists to wear helmets"); EPSTEIN, *supra* note 140, at 90 ("[T]he modern expansion of the harm principle . . . [is] wholly destructive of the original Millian mission of limiting the scope of government action."); *id.* at 102 ("The current view see externalities *everywhere*, or more concretely, *negative externalities everywhere*."); Richard A. Epstein, *The Harm Principle and How It Grew*, 45 U. TORONTO L.J. 369, 371 (1995) ("The principle that was once a shield of individual liberty has been forged into a sword against it."); HARM TO OTHERS, *supra* note 32, at 13 ("Most of the controversial criminal statutes that receive apparent blessing from the principles alternative to the harm principle . . . have often been said to have support also from the harm principle itself Often the consequences . . . are said to be harmful to others in some very subtle way So much confusion has resulted from these allegations"); HARM TO SELF, *supra* note 2, at 138 (observing that "[n]umerous writers have noticed how forced and contrived" harm principle arguments seem); *id.* at 141 (criticizing "evasive rationales"); HARMLESS WRONGDOING, *supra* note 14, at 37 ("[E]nlarging our conception of what can count as 'harm' . . . render[s] respectable some . . . [paternalistic] . . . causes 'dressed in harm principle clothes'"); Robert N. Harris, Jr., *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 581 (1967) ("Calling conduct he wishes to prohibit 'harmful' is the lawmaker's *pet gambit*: attaching the label seems to discharge the onus of justification. An aura of legitimacy surrounds rules designed to prevent harm.") (emphasis added); KLEINIG, *supra* note 10, at 82 ("Paternalistic rationales are clearly an embarrassment, and strenuous efforts are usually made to provide a nonpaternalistic justification. But as we shall see, it is only with some difficulty that these considerations, taken individually or together in some combination, can sustain [lifestyle] legislation, and there is often a surreptitious appeal to paternalistic reasons."); *id.* at 108 ("[T]here is a tendency to favor arguments in which some public interest can be discerned and appealed to"); Moffat, *supra* note 95, at 590 ("[P]ublic harms are by their very nature the most abstract, indirect, and ephemeral in character, for that same reason, they are also the most easily abused"); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1943 (1986) ("[T]he social-interconnectedness justification probably masks a paternalistic argument."); Regan, *supra* note 138, at 201 ("[W]e can bring much paternalistic legislation under the 'harm principle,' so that it presents no special problem at all."); Wikler, *supra* note 17, at 13 ("[P]aternalism is not, in this country, a respectable public rationale for coercive government policies. The paternalistic argument, then, tends to be either *masked* as something else, or else marshaled only in support of relatively innocuous programs, such as consumer education."); Daniel Wikler & Dan E. Beauchamp, *Lifestyles and Public Health*, in ENCYCLOPEDIA OF BIOETHICS 1366 (Warren T. Reich ed., 1996) ("In the United States paternalistic justifications are rarely provided as such . . . lip service is still paid to the tradition of John Stuart Mill's *On Liberty*."); Walter E. Williams, *Cigarettes and Property Rights*, in SMOKING: WHO HAS THE RIGHT? 305, 317 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998) ("Social costs or external diseconomies are a politician's dream."); Zamir, *supra* note 7, at 231 n.5 (observing a "tendency to bypass the issue of paternalism"). Of course, a particular regulation might be unjustifiable on both harm to others and paternalistic grounds.

[P]ublic policy-makers sometimes coerce individuals to change their behavior (because they believe it is morally right to do so), then justify the coercion by arguing that the old behavior was harmful to others. . . . Policy-makers are forced into this *deceptive* stance by the culture of autonomy, which says, in essence, that public officials are not supposed to make moral judgments in their official capacity; that their sole job is to protect the public and individuals from harm. In other words, we first purport to find something to be harmful to others, then on that ground label it wrong. In reality, we often first conclude that something is wrong, then seek evidence that it is harmful.¹⁴⁴

Perhaps most notable among superficial and deceptive uses of the harm principle are state supreme court decisions in the 1970s that uphold the constitutionality of motorcycle helmet laws. These laws had been widely struck down by the courts in the 1960s because they intruded on the (arguably) self-regarding choices of motorcycle riders. But a few years later, the courts sustained the laws on the grounds that they were, after all, not self-regarding. The only harm to others these courts mustered to identify was the indirect medical costs incurred by the state as a result of injuries sustained by the riders.¹⁴⁵

In short, philosophers try to “squeeze” liberty limitation into the justificatory scope of the harm principle because the vagueness of that principle helps them both to mask controversial paternalistic rationales and to maintain their absolute categorical opposition to paternalism.

2. The Method of Stretching the Harm Principle

The concept of harm to others is subject to limitless expansion. As John Donne so eloquently noted almost 400 years ago, “[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main. . . . Any man’s death diminishes me because I am involved in

144. WILLARD GAYLIN & BRUCE JENNINGS, *THE PERVERSION OF AUTONOMY: THE PROPER USES OF COERCION AND CONSTRAINT IN A LIBERAL SOCIETY* 64-65 (1996) (emphasis added).

145. *Cf.* Dripps, *supra* note 75, at 9 (“A little causal creativity can go a long way toward eviscerating the harm principle.”); *id.* at 8 (suggesting that Feinberg stretches the harm principle in “strugg[ling] mightily to explain away laws that require motorcyclists to wear helmets”); HARM TO SELF, *supra* note 2, at 139-41.

mankind and therefore never send to know for whom the bell tolls; it tolls for thee”¹⁴⁶ Mill recognized this point, writing:

The distinction here pointed out between the part of a person’s life which concerns only himself and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of a society be a matter of indifference to the other members? No person is an entirely isolated being. It is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his near connections, and often far beyond them.¹⁴⁷

Theoretically, there is very little, if any, self-harming individual conduct that does not also “harm” other people. This is because the term “harm” is plagued with conceptual ambiguities that permit its expansive interpretation.¹⁴⁸

146. John Donne, *Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS 87 (Anthony Raspa ed., 1975) (1624).

147. MILL, *supra* note 113, at 146-47. Bentham captured this point with his notion of “transitivity.” See BENTHAM, *supra* note 64, at ch. VII, § XIII.

148. See generally PHILOSOPHICAL ETHICS 2D, *supra* note 14, at 390 (“Little debate surrounds the *justifiability* of the harm principle (by contrast to the *meaning* of harm.”); *id.* at 389 (“[C]ertain ambiguities surround the concept of a harm and how far the harm principle stretches.”); PHILOSOPHICAL ETHICS 3D, *supra* note 13, at 353-54; Guido Calabresi, *The Pointless of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1211 (1990); Amy Darby, *The Individual, Health Hazardous Lifestyles, Disease, and Liability*, 2 DEPAUL J. HEALTH CARE L. 787, 814 (1999) (noting that although the harm principle is “relatively agreed upon,” “what actually constitutes harm is not readily apparent”); Dripps, *supra* note 75, at 3 (“The idea of harm is too vague, too dependent on baseline assessments of private rights, too open to chains of causal speculation”); EPSTEIN, *supra* note 140, at 76 (“[T]he broader the definition of harm, the more extensive the justified role of government intervention. The definition of harm thus becomes a first approximation, the litmus test for the use of state power.”); *id.* at 82 (“The intuitive invocation of the harm principle thus fails to answer the simple question of which harms should be prevented by the legal system”); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 NOTRE DAME L. REV. 445, 455-56 (1983); HARM TO OTHERS, *supra* note 32, at 12 (“[I]n its present form, the [harm] principle is too vague to be of any potential use at all [T]he harm principle must be made sufficiently precise”); *id.* at 31-32; OFFENSE TO OTHERS, *supra* note 31, at 6-7 (“Practically all human activities, unless carried on in a wilderness, interfere to some extent with others”); HARM TO SELF, *supra* note 2, at 22 (“Indeed, the public interest is always involved, at least to some small extent, when persons harm themselves.”); *id.* at

For this reason, it is rather easy for policymakers to "invoke every possible kind of social harm, however remote or speculative, to justify an intervention that would otherwise have to be supported on paternalistic grounds."¹⁴⁹ Hence, although the harm principle is often offered as an

56 ("[E]very decision is bound to have some 'ripple-effect' on the interests of others."); FLETCHER, *supra* note 83, at 404 ("The notion of harm appears to be infinitely expandable."); Gutmann & Thompson, *supra* note 20, at 262 (arguing that some Millians "desperately look for some social harm" so that they can "avoid acknowledging that paternalism might sometimes be justified"); Harris, *supra* note 143, at 581 ("Harm' is a normative word suffering the fate of normative words generally B the notorious dearth of unanimity over when the word properly applies."); Kopelman, *supra* note 11, at 300; Robert F. Meenan, *Improving the Public's Health: Some Further Reflections*, 294 NEW ENG. J. MED. 45 (1976) ("[V]irtually all aspects of lifestyle could be said to have an effect on the health or well-being of society."); Jonathan D. Moreno & Ronald Bayer, *The Limits of the Ledger in Public Health Promotion*, HASTINGS CENTER REP., Dec. 1985, at 37; Nagel, *supra* note 70, at 22 (arguing that the harm principle "excludes virtually nothing from the scope of justifiable legal enactment -- unless some agreement is first reached on what to count as 'harm or evil to others'"); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 20 (1993) ("Determining which of these impacts, if negative, are to count . . . poses major conceptual problems."); VANDEVEER, *supra* note 12, at 310 ("The question of whether persons in their actions 'impose costs on others' is slippery for two reasons. First, there is the question of what is to count as a cost or a harm. Second . . . when is a cost imposed on others?"); *id.* at 430 (arguing that the harm principle "may justify more extensive restraints than initially may be obvious"); Wikler, *supra* note 31, at 20 ("The problem . . . is part of the more general debate . . . of separating 'self-regarding' and 'other-regarding' behavior."); Williams, *supra* note 143, at 316 ("[I]t is possible to prove that every private act has external effects of one sort or another.").

149. Thompson, *supra* note 11, at 249. See also *Kentucky v. Wasson*, 842 S.W.2d 487, 512-13 (Ky. 1992) (Wintersheimer, J., dissenting) ("If the Mill concept was ever valid, it has been totally overcome by the development of the interconnection of modern society Clearly, almost any act that a person performs may affect prejudicially the interests of others."); H.E. Baber, *The Ethics of Dwarf Tossing*, 4 INT'L J. APPLIED PHIL. 1 (1989) (arguing that although the participants may be willing, the practice of dwarf tossing hurts not only the participants but all little people); Robert Crawford, *Individual Responsibility and Health Politics in the 1970s*, in *HEALTH CARE IN AMERICA* 255 (Susan Reverby & David Rosner eds., 1979) ("The cost of sloth, gluttony, alcohol intemperance, reckless driving, sexual frenzy, and smoking have now become a national and not an individual responsibility. One man's or woman's freedom is now another man's shackles in taxes and insurance premiums.") (quoting John Knowles, former president of the Rockefeller Foundation); Epstein, *supra* note 143, at 378 (noting the "ominous" parallels with the expansive interpretation of the Constitutional Commerce Clause); HARM TO OTHERS, *supra* note 32, at 222 ("Advocates of legal coercion are always tempted to use the elasticity of the 'public interest' to stretch the harm principle so that it will justify criminal prohibition of disapproved conduct that is at first sight harmless to persons other than the actors") (emphasis added); Fitzgerald, *supra* note 75, at 197 ("Certain failures of self care have become, in a sense, crimes against society, because society has

“explanation” for liberty-limiting regulation, it less often constitutes an adequate “justification.”¹⁵⁰ Indeed, many current legislative efforts lack

to pay for their consequences.”); FLETCHER, *supra* note 83, at 403 (noting that theorists “wrestle with the concept of harm in order to make the proposition stick”) (emphasis added); Gutmann & Thompson, *supra* note 20, at 262 (arguing that some Millians “desperately look for some social harm” so that they can “avoid acknowledging that paternalism might sometimes be justified”); B.M. Hannon & T.G. Lohman, *The Energy Cost of Overweight in the United States*, 68 AM. J. PUB. HEALTH 765 (1978) (arguing that obesity consumes a substantial fraction of the nation’s fossil fuels, because the excess food consumption entails fuel costs in food production (farm machinery, transportation, etc.)); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 139 (1999) (“During the course of the last two decades, the proponents of legal enforcement have increasingly deployed the *rhetoric* of harm.”) (emphasis added); *id.* at n.112 (“Many . . . have turned to harm arguments purely for rhetorical purposes . . .”); Emmet B. Keller et al., *The External Costs of a Sedentary Lifestyle*, 79 AM. J. PUB. HEALTH 975 (1989); Daryl B. Matthews, *Where There’s Smoke There’s Ire*, MEDICOLEGAL NEWS, Winter 1979, at 4; Meenan, *supra* note 148, at 45 (“Virtually all aspects of lifestyle could be said to have an effect on the health or well-being of society, and the decision reached that personal health choices should be closely regulated.”); Nagel, *supra* note 70, at 20, 21-23; JONATHAN RILEY, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO MILL *ON LIBERTY* 98, 208 (1998) (observing that states have “hidden truly self-regarding acts by transforming them into *fake* other-regarding acts that cause no harm”) (emphasis added); Paul Robinson, *A Theory of Justification: Societal Harm as Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975); HENRY SIDGWICK, *THE METHODS OF ETHICS* 477-78 (7th ed. 1907); Thompson, *supra* note 11, at 153; *id.* at 175 (“[P]roponents stretch the concept of social harm to the point where it merges with paternalism.”).

150. *Cf.* HARM TO SELF, *supra* note 2, at 16 (“The reason that in fact supports it, may not then be the reason that impelled a legislator to vote for it.”); *id.* at 17 (“Sometimes we can reconstruct an implicit rationale for the law . . . a plausibly coherent rational reconstruction.”); *id.* at 19 (“So it is useful to look for an ‘implicit rationale’ . . .”); *id.* at 25 (“[T]here are many laws now on the books that *seem* to have hard paternalism as an essential part of their implicit rationale, and that some of these at least, seem to most of us to be sensible and legitimate restrictions.”); HARMLESS WRONGDOING, *supra* note 14, at xvii (“In favor of the principle is the fact that there are many laws now on the books that *seem* to have hard paternalism as an essential part of their *implicit rationales*”) (emphasis added); *id.* at 220 (using “the most plausible rationale we can reconstruct”); *id.* at 224 (“[T]here was a harm principle rationale . . . even though, in many instances, it may not have been *their* rationale.”). *See also* Gutmann & Thompson, *supra* note 20, at 253 (“If we probed officials and citizens . . . we would no doubt find many different kinds of reasons But the dominant reasoning and the *most cogent justifications* for the ban rely on moralist categories”) (emphasis added); Douglas N. Husak, *Liberal Neutrality, Autonomy, and Drug Prohibition*, 29 PHIL. & PUB. AFFAIRS 43, 60 (2000) (“[T]he quest for the rationale of a law seems no less elusive than the quest for legislative intent [H]ow can anyone pretend to have identified the rationale of a law? Liberals should struggle to decide whether any *plausible rationale* for drug proscriptions can satisfy the neutrality constraint.”) (emphasis added); KLEINIG, *supra* note 10, at 178, 197; KULTGEN, *supra* note 31, at 167; Thompson, *supra* note 11, at 171; Weale, *supra*

a coherent underlying justification because the "harm" at issue is not significant.¹⁵¹

To stretch the concept of "harm" this far might seem to make the principle very useful and powerful. In fact, however, it renders Mill's harm principle *less* useful as a liberty limiting principle and as a limit on state intervention.¹⁵² Law professor George Fletcher questions the usefulness of (prevailing analyses of) the harm principle by writing, "[W]e should be mindful of the lesson to be learned in the distortions produced . . . by the effort to save conceptual propositions at the price of vacuous truth."¹⁵³ Fletcher also writes: "At a certain point we have to wonder whether our proposition is still subject to falsification. If we cannot imagine a crime that *would not* threaten harm, the proposition has

note 16, at 790 (discussing when it is justified in "attributing" paternalistic intentions to policymakers).

151. See, e.g., Peter D. Jacobson et al., *Historical Overview of Tobacco Regulation*, 53 J. SOC. ISSUES 75, 77 (1997).

152. See generally PHILOSOPHICAL ETHICS 3D, *supra* note 13, at 359 ("Some have attacked Mill's theory as useless, because he is too vague in drawing the line between harm and nonharm"); Fred R. Berger, *Paternalism and Autonomy*, in THE RESTRAINT OF LIBERTY 37, 50 (Thomas Attig, Donald Cullen & John Gray eds., 1985) ("If we allowed that for grounds for interfering with behavior that has significant self-regarding features . . . there would be little or no room for a truly individual mode of life."); Dripps, *supra* note 75, at 15 (arguing that the harm principle should be abandoned in favor of "practical institutional limits"); EPSTEIN, *supra* note 140, at 399 ("The modern expansion of the harm principle, however, is destructive of the original Millian mission to use the harm principle as a way to restrain the scope of government action."); EPSTEIN, *supra* note 140, at 76 ("[T]he broader the definition of harm, the more extensive the justified role of government intervention. The definition of harm thus becomes a first approximation, the litmus test for the use of state power."); HARM TO OTHERS, *supra* note 32, at 214 ("[W]e can preserve that illusion . . . of harm as a simple determinate even purely empirical notion. The analysis . . . however, reveals that harm is a very complex concept with hidden normative dimensions . . . [and requires] supplementary criteria (or 'mediating maxims')"); Gutmann & Thompson, *supra* note 20, at 262-63 ("This kind of rationale [an unconstrained harm principle] is therefore far more *dangerous* than acknowledging that paternalism may sometimes be justified.") (emphasis added); Nagel, *supra* note 70, at 22 (arguing that the harm principle "excludes virtually *nothing* from the scope of justifiable legal enactment -- *unless* some agreement is first reached on what to count as 'harm or evil to others'"). Some commentators argue that Mill's principle, at least as articulated in *On Liberty*, has *never* been a coherent or useful limit. See, e.g., Joseph Hamburger, *Individual and Moral Reform: The Rhetoric of Liberty and the Reality of Restraint in Mill's On Liberty*, 24 POL. SCI. REV. 7, 42, 51-52 (1995); RILEY, *supra* note 149, at 189-90; Richard Warner, *Liberalism and the Criminal Law*, 1 S. CAL. INTERDISC. L.J. 39, 44 (1992) (arguing that the harm principle "draws *no line at all* - not even a blurry line").

153. FLETCHER, *supra* note 83, at 405.

become vacuous, and in the view of some, meaningless."¹⁵⁴ Law professor Bernard Harcourt also concludes:

The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate. Today, the issue is no longer *whether* a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare.¹⁵⁵

Harcourt continues: "Harm to others is no longer a *limiting* principle. It no longer *excludes* categories of moral offenses from the scope of the law."¹⁵⁶ Instead of serving as a liberty *limiting* principle, the harm principle is now employed to legitimize state intervention in voluntary and arguably *self-regarding* conduct such as pornography, homosexuality, and recreational drug use.¹⁵⁷

The result, as John Kleinig explains, is to "open the door to 'unlimited paternalism.'"¹⁵⁸ The harm principle, some argue, simply is not defined tightly enough to limit to state intervention. This lack of a tight definition, they argue, creates a "slippery slope" whereby the harm principle can justify wide ranging government regulation of self-regarding conduct and deep intrusion of individual liberty.¹⁵⁹

154. *Id.* at 404.

155. Harcourt, *supra* note 149, at 113.

156. *Id.* at 182.

157. *See id.* at 110-13.

158. KLEINIG, *supra* note 10, at 94. One of the more infamous examples of stretching the harm principle to justify paternalistic legislation can be found in Justice Holmes' almost Nazisque opinion upholding Virginia's sterilization law. *See* *Buck v. Bell*, 274 U.S. 200, 207 (1927) (arguing that the mentally disabled "sap the strength of the state" and that therefore "[t]he principle that sustains vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.") (citations omitted).

159. *See, e.g.*, *Am. Motorcycle Ass'n v. Davids*, 158 N.W.2d 72, 75 (Mich. Ct. App. 1968) (expressing a fear of unlimited paternalism because "public harm" arguments are so tenuous and obscure); *People v. Fries*, 250 N.E.2d 149, 151 (Ill. 1969); Cottingham, *supra* note 6, at 243 ("[A]ppeal to what we may call 'other-regarding side-effects of self-regarding conduct' seems to involve a dangerous slippery slope . . ."); HOWARD M. LEICHTER, *FREE TO BE FOOLISH: POLITICS AND HEALTH PROMOTION IN THE UNITED*

3. Constraining the Stretching of the Harm Principle

The harm principle may serve as a useful limit on liberty intervention depending on the analysis of "harm" provided. The literature criticizing the harm principle does not show such an analysis to be impossible. However, it does highlight the need to carefully attend to this analysis. "Almost every act in a complex, crowded, industrial society involves externalities, but we would not expect government to institute rules for all of them. Consequently, an important task is to determine *which* externalities might be candidates for government intervention and *which* should clearly be ruled out."¹⁶⁰

Therefore, even if we were to collapse the whole ethical debate concerning liberty limitation into the definition of harm, we would still have to confront the same paternalism issues. The questions would simply be framed in terms of whether "x is harmful" rather than in terms of whether "individual liberty to choose x should be restricted." In sum, the definition of harm is a crucial question.¹⁶¹ Limits must be established.¹⁶²

STATES AND GREAT BRITAIN 14 (1991) ("Clearly the government cannot interfere in every instance in which personal behavior has the potential to cause discomfort, harm, or cost to others."); TREBILCOCK, *supra* note 148, at 75 ("Once one moves beyond rather *tangible* harms to third parties, however, many activities might be viewed as generating some of these third party effects, including inadequate dietary or exercise regimes, excessively stressful work habits, risky leisure activities . . . or risky business investments, thus inviting wholesale social controls on all kinds of activities.") (emphasis added); Nigel Unwin, *Cycle Helmets -- When Is Legislation Justified*, 22 J. MED. ETHICS 41, 44 (1996) ("[I]ts logical extension is that any type of behaviour [sic] that increases the chance of an individual calling upon the 'community resource' should be prevented. . . . Thus, it would be logical to . . . make sedentary people take more exercise and to prevent people practising [sic] dangerous sports . . .").

160. ALAN STONE, *REGULATION AND ITS ALTERNATIVES* 91 (1982) (emphasis added).

161. See Keith Butler, *The Moral Status of Smoking*, 19 SOC. THEORY & PRACTICE 1, 3-4 (1993); GAYLIN & JENNINGS, *supra* note 144, at 237 ("The definition of harm is a crucial question and a thorny problem for public policy."); KLEINIG, *supra* note 10, at 32-34.

162. See HARM TO OTHERS, *supra* note 32, at 26 (arguing that the harm principle must "argue for some systematic conception of what is to count as 'harm or evil to others.'" That project, in turn, "cannot escape reference to some more or less explicit and comprehensive system of moral and social assumptions -- more fully articulated than Mill's." Consequently, Feinberg attempts "a thorough analysis of the critical concept of 'harm,' by articulating maxims to mediate application of the harm principle"); Perri 6, *supra* note 11, at 151 ("[T]here must also be some limitations upon the scope of avoiding harm to others arguments, or they would permit the imposition of almost any

The harm principle requires more specification. “The harm principle must be made sufficiently precise to permit the formulation of a criterion of seriousness, and also, if possible, some way of grading types of harms in terms of seriousness.”¹⁶³ Without these further specifications, Feinberg argues, “the harm principle may be taken to invite state interference without limits, for virtually every kind of human conduct can affect the interests of others to some degree, and thus would properly be the state’s business.”¹⁶⁴

Joel Feinberg has provided the most thoughtful analysis of this problem,¹⁶⁵ arguing that the concept of harm must be normative in character.¹⁶⁶ It is empirically indisputable that virtually all risky conduct exerts *some* physical effects on others. The relevant question is whether those effects are both significant and wrongful.¹⁶⁷ Feinberg gives the vague notion of “harm” some “flesh and blood.”¹⁶⁸ He defines harm as (1) a wrongful (2) setback to a person’s interests.¹⁶⁹

Taking the second element first, harm does not include *any* interference with a preference but rather only interference with those things in which the subject has a “stake.”¹⁷⁰ On Feinberg’s definition, smoking, under many circumstances, is not sufficiently harmful to justify

obligations.”)

163. HARM TO OTHERS, *supra* note 32, at 12.

164. *Id.*

165. See generally Bayles, *supra* note 6, at 109 n.3 (“Feinberg deftly handles the much-discussed question of whether there is any purely self-regarding conduct. He admits that conduct in which persons harm themselves always involves the public interest at least to a slight extent, but often not enough to invoke the harm to others principle.”); Dripps, *supra* note 75, at 8 (“Joel Feinberg has devoted the greatest care to explicating the concept.”); Gerald Dworkin, *Liberty*, in *ENCYCLOPEDIA OF PHILOSOPHY* 303, 304 (Donald M. Borchert ed., Supp. 1996) (“One of the most fully developed views that seeks to provide answers . . . about the nature and limits of [harm] . . . is that of Joel Feinberg.”); Epstein, *supra* note 143, at 374 n.13; Gray, *supra* note 6, at 31 (“Feinberg’s minute and illuminating taxonomy of the notions of harm and interests aims to give Mill’s ‘one very simple principle’ . . . a definite sense sufficient at least for its use in contexts of legal policymaking.”); Hunt, *supra* note 61, at 314 (“Feinberg’s account of harm . . . is an important advance on Mill’s rather vague and hazy conception.”); RILEY, *supra* note 149, at 93, 184.

166. See HARM TO OTHERS, *supra* note 32, at 36, 214, 245; see also HARM TO SELF, *supra* note 2, at 145 (refining his analysis of harm).

167. See HARM TO OTHERS, *supra* note 32, at 36, 105.

168. See OFFENSE TO OTHERS, *supra* note 31, at xii; HARM TO SELF, *supra* note 2, at 24.

169. See HARM TO OTHERS, *supra* note 32, at 36.

170. See HARMLESS WRONGDOING, *supra* note 14, at 56.

its regulation. This is because although a person produces environmental tobacco smoke ("ETS") when she smokes in open outdoor spaces, the ETS is rarely concentrated enough to cause harm on Feinberg's definition of the term. Each cigarette slightly increases the concentration of ETS, but the concentration remains below a threshold of plausible harmfulness.¹⁷¹

The first element (wrongfulness) of Feinberg's definition further narrows the concept of harm by restricting it to those cases where the setback to interests violates a "right."¹⁷² These two definitional elements are independent of each other so that conduct can be harmful but not wrongful (e.g., where consent is given to a surgeon's cutting) and wrongful but not harmful (e.g., as in a trespass on unused land).¹⁷³ However, both elements are necessary for the harm principle to apply.

Even with these available mediating maxims, philosophers and policymakers continue to stretch the harm principle. As the harm principle is stretched to its limits, the liberty limitation it purports to legitimize would be more naturally justified on the basis of harm to *self* rather than on the basis of harm to *others*.¹⁷⁴ Amy Gutmann and Dennis

171. Cf. HARM TO OTHERS, *supra* note 32, at 228. Of course, in some outside spaces, such as in line for an ATM, the concentration of ETS might be higher. Local laws across the United States regulate smoking in such places. See Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 441-42 n.101 (2000).

172. See HARM TO OTHERS, *supra* note 32, at 34-36, 110. Of course, determining what is "wrongful" requires recourse to a theory of rights. See *generally id.* at 109-14, 215; Doppelt, *supra* note 75, at 260; HARMLESS WRONGDOING, *supra* note 14, at 11 ("Some interests are unavoidably in conflict . . . [d]eciding which . . . should be protected is a moral decision on grounds . . . of greater relative worthiness or importance."); *id.* at 151-53; KLEINIG, *supra* note 10, at 16 ("[T]he harm principle is not concerned with harm merely in the sense of damage. It is concerned with harm as an injury, a wrong."); *id.* at 33-36 (suggesting that even this definition might not be sufficient and it might be better to focus on the motivation for restriction rather than the conduct restricted).

173. See HARM TO OTHERS, *supra* note 32, at 33-34; HARM TO SELF, *supra* note 2, at 11. See also BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 193; NATIONAL BIOETHICS ADVISORY COMMISSION, RESEARCH INVOLVING HUMAN BIOLOGICAL MATERIALS: ETHICAL ISSUES AND POLICY GUIDANCE: REPORT AND RECOMMENDATIONS 42-43 (1999).

174. See Thompson, *supra* note 11, at 268 (observing that lawmakers often "stretch the concept of social harm to the point where it merges with paternalism"). See also GAYLIN & JENNINGS, *supra* note 144, at 182 ("[T]hey try to use prevention of harm to others as the rationale for rules or policies that limit individual freedom of choice. This bad habit of civic discourse frequently leads to ethically *distorted* arguments and sometimes to dishonest or at least *disingenuous* ones.") (emphasis added); Goldman & Goldman, *supra* note 92, at 72 ("Such justifications should not be morally convincing,

Thompson argue that we should avoid “strained efforts” to squeeze “all considerations of individual self-harm into the straight-jacket of social harm.” Instead, they urge that we “confront the challenge of paternalism more directly . . . acknowledge that some paternalism may be justified, and seek to develop . . . acceptable criteria to limit its scope.”¹⁷⁵

Because paternalism offers a conceptually and methodologically more principled basis upon which to premise intervention when the harm to others is insignificant, we ought not disguise this fact. Rather, we should explicitly recognize it and explicitly address whether the paternalism is justified. The actual harm caused to others which supposedly justifies liberty limitation is often so small and indirect that it loses all plausibility. Because it is important to be clear with justificatory principles, if a principle other than harm to others is the true basis of some law, it is better to recognize that openly and explicitly.¹⁷⁶

however. If we can interfere in free choice whenever doing so prevents such possible indirect costs from being incurred, then the scope of protected free choice will be vanishingly small.”); Jacobson, *supra* note 151, at 77 (discussing “conceptual limitations in the current regulatory regime”); Regan (1974), *supra* note 138, at 202 (“[T]he *tenuous* connection between the conduct and the ‘harm’ gives the argument something of the false ring of *rationalization*.”) (emphasis added); *see also* Regan, *supra* note 118, at 123; Jendi B. Reiter, *Citizens or Sinners? The Economic and Political Inequity of ‘Sin Taxes’ on Tobacco and Alcohol Products*, 29 COLUM. J. L. & SOC. PROBS. 443, 460 (1996) (arguing that stretching the harm principle leaves it with “dubious moral legitimacy”).

175. Gutmann & Thompson, *supra* note 20, at 263. *See also* CHILDRESS, *supra* note 10, at 72 (arguing that rather than affirming a principle as ultimate because of its generality and vagueness, it is instead “more plausible and helpful to recognize several basic principles”).

176. *See generally* Arneson, *supra* note 61, at 371 n.7 (“We should put aside unpersuasive arguments to the effect that harms to nonconsenting third parties could justify a ban”); BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 130 (“Although writers in biomedical ethics often resort to fictions such as deemed consent, it is more defensible to argue *straightforwardly* that a patient’s autonomy, liberty, privacy, or confidentiality can be justifiably overridden”) (emphasis added); Caplan, *supra* note 73, at 70; James F. Childress, *If You Let Them, They’d Lie in Bed All Day*, in PRACTICAL REASONING IN BIOETHICS 59, 67 (1997) (“It is more defensible to *face directly the conflict* between . . . [autonomy] . . . and other principles rather than reinterpret . . . [autonomy] . . . by extending it to circumstances where it does not apply. Then we can determine more clearly whether . . . [autonomy] . . . can be outweighed by competing principles in the circumstances.”) (emphasis added); Dershowitz, *supra* note 141, at xi (arguing against Lawrence Tribe, “I, too, favor mandatory seat belt laws, but I recognize that support for such paternalistic legislation requires a compromise with Mill’s principle. And it is a compromise I am prepared to make *explicitly* rather than uncomfortably try to *squeeze* seat belt laws into Mill’s principle by invoking flying people and convoluted logic.”) (emphasis added); *see also id.* at xv-xvi (“[I]t is far better to argue about the limits of the

principle itself rather than to accept it as an almost biblical (or constitutional) rule of action and then try to find ways to *squeeze* what are really exceptions into the parameters of the principle.” (emphasis added); Epstein, *supra* note 143, at 417 (calling for “revitalizing the harm principle”); *id.* at 416 (“The modern theories presuppose as alternative theory of harm that is indefensible: the exercise of individual choice is now regarded as an act of pure negative externality.”); HARM TO OTHERS, *supra* note 32, at 214 (“[W]e can preserve that illusion of harm as a single determinate even purely empirical notion. The analysis . . . however, reveals that harm is a very complex concept with hidden normative dimensions . . . [and requires] supplementary criteria (or ‘mediating maxims’)”); HARMLESS WRONGDOING, *supra* note 14, at 170; ANTONY FLEW, HOW TO THINK STRAIGHT: AN INTRODUCTION TO CRITICAL REASONING 79-81 (1998) (criticizing Orwell’s NEWSPEAK); Lawrence O. Gostin, *Public Health Law in a New Century: Public Health Regulation: A Systematic Evaluation*, 283 JAMA 3118, 3119 (2000) (criticizing “strained conceptions of social harms” and recommending “recognizing certain public health interventions as justified paternalism”) (emphasis added); Gutmann & Thompson, *supra* note 20, at 250 (arguing that rather than making a “strained” argument to find some other-regarding harm, that “[t]he more straightforward approach is to concede that some moralist [or paternalist] claims may count, and to try to develop criteria for separating those that should count from those that should not.”); Harris, *supra* note 143, at 592 (“The test for consent should not mask circularity of reasoning or irrationality. If Y is capable of contracting, he should be able to consent. If there is a good reason that consent should be negated in the X-Y situation, that reason needs articulation and justification.”); KLEINIG *supra* note 10, (1990) at 44 (“[L]iberal values . . . are in need of regular attention and rearticulation.”); Kopelman, *supra* note 11, at 316 (“When unexamined or unjustifiable values are seeded into policy and decisions, the result may be a harvest of bias, injustice, and prejudice.”); KULTGEN, *supra* note 31, at 166-67 (“Some authors who have saddled themselves with a categorical condemnation of paternalism attempt to define their paternalism away by *tortured appeals* to the interests of third parties The magnitude and probability of bystander harms are [often] too slight to justify curtailment of [individual] liberty.”) (emphasis added); Macklin, *supra* note 136, at 175 (“My only argument here is that it is not acceptable to *fudge* the solution to this ethical dilemma by broadening the meaning of ‘futility.’ That maneuver may appear to settle the ethical dilemma, but only at the price of *linguistic dishonesty*.”) (emphasis added); *id.* at 175 (“[I]t is *confused and dishonest* to *cloak* decisions to withhold [scarce medical resources] under the mantle of futility.”) (emphasis added); *id.* at 182 (“For reasons of *conceptual clarity* and *linguistic honesty*, among others, I have been urging that the concept of futility be understood in a narrow sense.”) (emphasis added); *id.* at 184 (“It is important not to misuse the language of futility to *mask* quality-of-life judgments. *Honesty* demands that the issue of quality be confronted squarely.”) (emphasis added); MILL, *supra* note 113, at IV (“If grown persons are to be punished for not taking proper care of themselves, I would rather it be for their own sake than under *pretence* of preventing them from impairing their capacity or imparting society benefits.”) (emphasis added); Rainbolt, *supra* note 94, at 56 (“In defending the soft paternalist line, authors have been driven to positions which seem very *ad hoc*.”) (“Acknowledging that paternalism is sometimes permissible would allow us to give the most obvious and natural explanation of these laws”); Sankowski, *supra* note 91 at 10; Winick, *supra* note 32, at 26. For an illustration of an open and a masked rejection of the harm principle, compare *State v. Mele*, 247 A.2d 176, 178 (N.J. 1968) (“[T]he state

C. *Feinberg Confuses Empirical and Normative Questions*

Feinberg recognizes the dangers of stretching and masking the elasticity of the harm principle,¹⁷⁷ and he confronts these dangers. Feinberg also recognizes similar dangers surrounding the elasticity of "voluntariness."¹⁷⁸ However, he fails to confront these analogous dangers.

Like the harm principle, the soft paternalism liberty limiting principle also has a vagueness problem. "[V]oluntariness is usually a matter of degree with no conveniently placed bright lines to guide us. In this respect it resembles the concept of harm"¹⁷⁹ Soft paternalism, like the harm principle, can theoretically justify almost *any* intervention. Just as harm can always be found for application of the harm principle, a lack of substantial voluntariness can always be found for application of the soft paternalism principle.

Like harm, "voluntariness" (i.e., autonomy as an actual condition) is an inherently vague and variable concept.¹⁸⁰ As Gerald Dworkin

has an interest in attempting to protect people from the consequences of their own carelessness."), *with* *People v. Carmichael*, 288 N.Y.S.2d 931, 935 (N.Y. 1968) (offering a thinly veiled rejection of Mill).

177. See, e.g., *HARM TO OTHERS*, *supra* note 32, at 13 (arguing that conduct is often "said to be harmful to others in some very subtle way, or produced by some partially concealed or indirect process. So much confusion has resulted from these allegations That confusion can only be dispelled by a careful analysis of the concept of harm, and the formulation of relatively precise maxims to mediate the application of the harm principle to the hard cases."); *id.* at 222 ("Advocates of legal coercion are always tempted to use the elasticity of the 'public interest' to stretch the harm principle so that it will justify criminal prohibition of . . . conduct that is at first sight harmless to persons other than the actors, so we should proceed . . . cautiously."); *HARMLESS WRONGDOING*, *supra* note 14, at 11 (admitting that "before any adequate notion of harm can be applied, an unavoidably controversial decision must be made about *which* interests to protect") (emphasis added); *id.* at 37 ("The acknowledgment of collective harms . . . does threaten to permit the reintroduction of many of the legal moralist's favorite causes 'dressed in harm principle clothes.' That is to say that by enlarging our conception of what can count as 'harm' and what can count as 'wrong,' the acknowledgment of collective harms may render respectable some version of 'impure legal moralism in the broad sense' that the liberal, given his respect for autonomy, has every motive to exclude.").

178. See, e.g., *HARM TO SELF*, *supra* note 2, at 213 (explaining that coercion, one of the voluntariness-vitiating factors, "is related, both internally and externally, to moral and other evaluative considerations in a fashion that is so intimate . . .").

179. Feinberg, *supra* note 5, at 392.

180. See Jules L. Coleman, *Market Contractarianism*, in *MARKETS, MORALS, AND THE LAW* 243-76 (1988); *HARM TO OTHERS*, *supra* note 32, at 245; Feinberg, *supra* note 5,

explains, “[i]t is possible to relate [all] cases to the soft paternalistic thesis by claiming ignorance or weakness of the will, [but] the strategy seems too *ad hoc* to be convincing.”¹⁸¹ When Antonio observes in the *Merchant of Venice* that “even the devil can cite scripture of his purpose,” he was making an important observation about the sources that are selected as the authorities of choice. Like scripture, the concept of “voluntariness” permits a panoply of interpretations and uses.

Feinberg takes full advantage of the vagueness of voluntariness. He collapses the (properly) separate matters of (1) the justifiability of paternalism and (2) the voluntariness of the subject’s conduct so that both matters can be simultaneously determined by ascertaining the subject’s voluntariness. Indeed, the bulk of *Harm to Self* consists of a systematic explanation of voluntariness.

But the justifiability of paternalism and the voluntariness of a subject’s conduct should not be collapsed together. They should be kept separate. The reason for this, as discussed earlier,¹⁸² is that the enterprise of setting threshold levels of substantial voluntariness (the demarcation between hard and soft paternalism) is implicitly based not only on contingent empirical evidence about the voluntariness of a subject’s conduct, but also on judgments regarding the value or importance of that conduct.

at 392 (“[V]oluntariness is usually a matter of degree with no conveniently placed bright lines to guide us. In this respect it resembles the concept of harm . . .”) (discussing work by Gert and Culver); STANLEY FISH, *A MATTER OF PRINCIPLE* 4 (1999) (arguing that neutral principles like autonomy cannot be defined “in ways not hostage to any partisan agenda.”) (“There are no neutral principles, only so-called principles that are already informed by the substantive content to which they are rhetorically opposed.”); Frohock, *supra* note 10, at 239 (“Competence is a truly mysterious term on liberal premises, one that can threaten the negative liberty that is typically advanced as its complement.”).

181. DWORKIN, *supra* note 17, at 125 (“[T]his approach seems implausible.”); *see also* Dworkin, *supra* note 118, at 119 (observing that “[t]he dangers of . . . extensions of [soft] paternalism . . . have been sufficiently exposed by Berlin in his *Two Concepts of Freedom*”); KLEINIG, *supra* note 10, at 134 (“Weak paternalistic arguments . . . stretch the criteria for noncompetence to breaking point . . .”); Regan, *supra* note 118, at 115 (“[O]ur whole lives might be subject to paternalistic supervision if the approach we have been expounding were taken seriously.”); *id.* at 116 (“[I]f we regard as unfree acts that are performed in ignorance, or under coercion, or as a result of weakness of will, we can indulge in a great deal of paternalism without interfering with freedom at all. This approach, however, *threatens* to justify more paternalism than we are comfortable with.”) (emphasis added).

182. *See supra* notes 69 to 97 and accompanying text.

The strict deontological position, which Feinberg espouses, forces Feinberg to shift emphasis from the genuine *moral* problem of justifying the limitation of individual liberty to the (illusory) *epistemological* problem of determining whether the subject acts with substantial voluntariness. As Gert and Culver observe, this “transforms a genuine moral problem of *justifying* paternalistic invasion into a question of whether the action *is really* paternalistic.”¹⁸³ Beauchamp and Childress have cogently argued that, “[The] debate about whether a [person] is substantially autonomous [as fact] or substantially nonautonomous . . . is a conceptual or empirical problem about the nature and conditions of autonomy, *not* a problem about the moral grounds of intervention.”¹⁸⁴

Beauchamp and Childress explain that although “[p]aternalism has a valid place in medicine . . . its place is not in fixing criteria of competence.”¹⁸⁵ Rather, they argue, “the issue of justified paternalism should be distinguished from criteria of competence, so as to avoid situations in which we [first] decide that a patient’s decision is too risky and that he or she is therefore incompetent.”¹⁸⁶

Jeffrie Murphy, who uses “competence” in much of the same way that Feinberg uses “voluntariness,”¹⁸⁷ is also careful to maintain that “a judgment of incompetence ought never to be regarded as a sufficient condition for [paternalistic] intervention.”¹⁸⁸ Otherwise, argues Murphy, the primary issues cannot be squarely faced because the question will seem to be simply whether the term “incompetence” properly applies.

183. Culver, Gert & Clouser, *supra* note 31, at 227 (emphasis added).

184. BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 279 (emphasis added).

185. *Id.* at 141.

186. *Id.*

187. Jeffrie G. Murphy, *Incompetence and Paternalism*, in RETRIBUTION, JUSTICE, AND THERAPY 165, 167-73 (1979) (both are defeated by ignorance, compulsion, and devoid of reason). The concepts of competence and substantial voluntariness are often used differently so that one can be competent but not substantially voluntary. But the reverse is not true. They are used the same in the respect relevant here. Both competence and substantial voluntariness serve a gatekeeping function, demarcating those whose conduct must be respected. See generally David Archard, *Self-Justifying Paternalism*, 27 J. VALUE INQUIRY 341, 347 (1993); Beauchamp, *supra* note 70, at 60 (noting that although the meaning of competence and autonomy are different, the criteria are the same); BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 135-36, 141; Joan C. Callahan, *Paternalism and Voluntariness*, 16 CAN. J. PHIL 199, 200 n.1 (1986) (observing that competence and voluntariness are treated as equivalent); Culver & Gert, *supra* note 11, at 624.

188. Murphy, *supra* note 187, at 166.

Moreover, Murphy argues, "we always run the risk of *smuggling* our moral judgments in under an *apparently* value-neutral description."¹⁸⁹ We will say that we should intervene because the subject is incompetent. But, in fact, we are really concluding that the subject is incompetent because we (already) think that it is proper to intervene.

Murphy recognizes the danger of confusion that arises from pretending that the liberty limitation issue can be resolved "simply by getting clear on how to apply correctly the description 'incompetent.'"¹⁹⁰ And Murphy is correct that "the real problem of paternalism" is a "moral issue, one *not* to be completely resolved simply by analyzing the meaning of 'incompetent' and then applying that concept to cases."¹⁹¹

Other scholars have also warned of the danger of putting the proverbial normative cart before the conceptual horse.¹⁹² Indeed, John

189. *Id.* (emphasis added). See also CHILDRESS, *supra* note 10, at 104 ("[T]he assessment of the patient's competence should be somewhat *independent* of the risks. Otherwise strong paternalism could *masquerade* as weak paternalism, since -- the argument might go -- no competent person would knowingly and voluntarily accept some risks.") (emphasis added); *id.* at 105 (arguing that using the content of the subject's decision "would support strong paternalism under the *guise* of weak paternalism") (emphasis added); CHRISTOPHER HOOKWAY, QUINE: LANGUAGE, EXPERIENCE, AND REALITY 128 (1988) (on Quine and the indeterminacy of translation: "Does the translator 'discover' some objective fact of the matter . . . ? Or is his choice determined by subjective, pragmatic, non-factual considerations?"); Thompson, *supra* note 11, at 156 ("[P]aternalists often mistake a disagreement about values for impairment of judgment . . . To avoid this mistake, we should try to keep the criterion of impairment *separate* from judgments about the evils of action.") (emphasis added); Winick, *supra* note 32, at 26 ("Talk about competency is thus largely normative discourse, although not always understood as such. Failure to make this recognition causes us to assume that the competency issue is a clinical one and to forget that it is essentially a legal one . . . This confusion about the concept of competence *masks* [normative] assumptions in the cloak of medical expertise.") (emphasis added).

190. Murphy, *supra* note 187, at 173-74.

191. *Id.* at 174.

192. See, e.g., Bloche, *supra* note 70, at 256 n.85 (noting the "subterfuge" in how the various "constructs in the literature on autonomy *obscure* underlying normative choices") (emphasis added); Hans Theodorus Blokland, *Emancipation and Paternalism*, in FREEDOM AND CULTURE IN WESTERN SOCIETY 163, 172 (Michael O'Loughlin trans., 1997); Joan C. Callahan, *Liberty, Beneficence, and Involuntary Confinement*, 9 J. MED. & PHIL. 261, 270 (1984) ("[O]nce we allow that a person's incompetence provides a legitimate reason for interfering with his self-regarding choices, we must be careful to disallow easy justifications of claims that people are incompetent."); Doppelt, *supra* note 75, at 285 (allowing intervention with conduct such as slavery and certain drugs which involve not just a diminishment but an abdication or utter destruction of autonomy. Doppelt resists calling this hard paternalism because it is done out of respect for

Stuart Mill himself observed the tendency of scholars and state officials to confuse normative and empirical issues surrounding paternalism. For example, in the context of civil confinement, Mill warned that eccentric individuals “are in peril of a commission of *de lunatico*.”¹⁹³ Mill was troubled by the fact that the state might use clinical/empirical judgments to mask evaluative commitments.¹⁹⁴ Mill urged that “[i]f grown persons are to be punished for not taking proper care of themselves, I would rather it be for their own sake than under *pretence* of preventing them from impairing their capacity or imparting society benefits.”¹⁹⁵

Edward Sankowski also recognizes the danger in confusing the conceptual and normative questions surrounding paternalism. Sankowski observes that Feinberg’s strategy “seems too susceptible of use to justify morally unacceptable interventions, depending on how the self-avowedly neutral term “voluntary” is used. And the moral *obscurities* about when paternalism is justifiable would simply be pushed back a step further, in specifying an account of a voluntary-non-voluntary distinction.”¹⁹⁶

Sankowski criticizes Feinberg’s use of “voluntary” because “[t]he moral difficulties about when paternalism is justifiable would not be solved but would be *hidden* within the problem of specifying an account of a voluntary/non-voluntary distinction.”¹⁹⁷

autonomy -- but notes that it is distinct from soft paternalism.); HARRY, *supra* note 38, at 72 (“[T]heorists who allegedly accept the liberal position may try to *smuggle* ‘strong’ interventions into their systems by defining them as instances of ‘weak’ paternalism.”) (emphasis added); *id.* at 76-77 (criticizing views that define voluntariness too strictly); KULTGEN, *supra* note 31, at 60 (“Authors categorize cases in ways that anticipate the normative judgments they make.”); Shapiro, *supra* note 70, at 522 (“Commentators have disagreed about the appropriate definition of paternalism, and sometimes these disagreements *mask* further disputes over what is morally permissible.”) (emphasis added); Soble, *supra* note 113, at 336 (“What Feinberg is proposing to formulate here is a mediating maxim which would qualify paternalism so that the resulting principle will prohibit what he (preanalytically) wants to prohibit -- the activities of the sale and use of heroin -- and will not prohibit what he does not want to prohibit -- the activities of the sale and use of whiskey, cigarettes, and fried food.”); VANDEVEER, *supra* note 12, at 32, 40 (separating the question of whether an act is classifiable as paternalism and whether it is justifiable).

193. MILL, *supra* note 113, at III.

194. *See id.* at ch. I (“No one, indeed, acknowledges to himself that his standard of judgment is his own liking.”).

195. *Id.* at ch. IV (emphasis added).

196. Sankowski, *supra* note 91, at 6 (emphasis added).

197. *Id.* at 10 (emphasis added).

In sum, context-relative standards for determining whether conduct is substantially voluntary are problematic. "If we strengthen [too much] the requirements to be met by a person in order to deserve respect for his or her decisions . . . then we make the principle of respect for autonomy *useless*."¹⁹⁸ Depending on which context is chosen, individual conduct could always be described as not substantially voluntary and thus open to justifiable interference (on soft paternalistic grounds). This vagueness makes the soft paternalism principle conceptually distorted and utterly useless.

D. Feinberg Confuses the Subject and the Her Conduct

Feinberg's confusion of empirical and normative issues tracks a similar confusion between what C.L. Ten calls the "decision-aspect" of conduct and the "consequence-aspect" of conduct.¹⁹⁹ Just as Feinberg collapses both empirical and normative issues into the concept of voluntariness, he conflates these two separate "aspects" of the subject's conduct.

Instead of focusing on the subject's volitional and epistemic defects (as he claims to be doing in elaborating "voluntariness"), Feinberg is, in fact, also relying on a conception of what is desirable. That is, he is judging (or is reserving for the state to judge) the *value* of the acts he wants to prohibit - the very value judgments he avowedly wants to reserve for the individual to make herself.²⁰⁰ Feinberg would agree with Ten that soft paternalism ought not be "a cloak for enforcing the values and preferences of the person interfering or society at large."²⁰¹ Still, a "cloak" is just what Feinberg's soft paternalism turns out to be.

It is helpful to explain Feinberg's confusion of the subject and her conduct not only in terms of Ten's decision-consequence distinction but also in terms of a very similar distinction drawn by Alan Soble. Feinberg purports to be proposing what Soble calls a "person-mediating maxim" -

198. TORBJORN TANNSJO, COERCIVE CARE: THE ETHICS OF CHOICE IN HEALTH AND MEDICINE 14 (1999). See also HÄYRY, *supra* note 38, at 76-77 (criticizing views that define voluntariness too strictly); Winick, *supra* note 32, at 43 ("To prevent excessive paternalism, it is appropriate to presume, in the absence of gross incompetence, that individuals who are able to express a choice are competent.").

199. Ten, *supra* note 67, at 56; TEN, *supra* note 75, at 109.

200. See Soble, *supra* note 113, at 338-39.

201. TEN, *supra* note 75, at 112, 116.

referring only to the "properties or characteristics [voluntariness] of the person who is the object of paternalistic intervention."²⁰² But, in fact, Feinberg (secretly) appeals to an "act-mediating maxim"²⁰³ - referring to "the property of the acts which [h]e want[s] to prohibit."²⁰⁴

Soble explains that "[e]ven though Feinberg is still applying a person-mediating maxim, it is a maxim whose application is made possible only by appealing, for epistemological reasons [to determine what is not substantially voluntary], to an act-meditating maxim."²⁰⁵ In sum, whether we use Ten's decision-consequence vocabulary or Soble's person-act vocabulary, it is clear that Feinberg's confusion between the subject and her conduct is a specification of his more general confusion of empirical and normative issues.

1. Analogous Confusion with the Concept of Competence

In order to fully appreciate Feinberg's confusion of the person/decision aspect and the act/consequence aspect of the conduct of which he judges the voluntariness, it is helpful to look to a related debate regarding the concept "competence."²⁰⁶ The conflation of person/decision and act/consequence maxims, in connection with determination of competence, is familiar to bioethicists and particularly to medical ethicists.²⁰⁷ In a recently reinvigorated debate which reached its original zenith between 1989 and 1991, scholars widely discussed

202. Soble, *supra* note 113, at 337.

203. *See id.*

204. *See id.* at 338.

205. *Id.* at 343.

206. This issue is sometimes, though rarely, analyzed under the broader topic of the definition of disease. *See, e.g.*, Caplan, *supra* note 73, at 68-70.

207. *See, e.g.*, BUCHANAN & BROCK, *supra* note 34, at 50 ("An adequate standard of competence will focus primarily not on the *content* of the patient's decision but on the *process* of the reasoning that leads to that decision."); Culver & Gert, *supra* note 11, at 620-21 ("[T]he particular decision made should never be conclusive in determining competence, otherwise we are not really dealing with the person's competence . . ."); KLEINIG, *supra* note 10, at 101 ("[J]udgments of psychiatric illness are notorious for their variability."); Robert M. Wettstein, *Competence*, in *ENCYCLOPEDIA OF BIOETHICS* 447 (Warren T. Reich ed., 1996) ("A competence standard that focuses upon the outcome of the decision can be faulted for granting greater priority to the values of the person [agent] assessing the person's [subject's] competence than to the values of the [subject].").

whether the concept of "competence" should implicitly or explicitly incorporate underlying normative assumptions.²⁰⁸

I contend that the confusion of empirical and normative issues regarding "competence" is similar to Feinberg's confusion of empirical and normative issues regarding "voluntariness." Just as Feinberg builds normative considerations into his threshold concept of "voluntariness," some bioethics scholars build normative considerations into the threshold concept of "competence." Although both concepts (voluntariness and competence) are self-avowedly neutral, neither, in fact, is neutral. Both concepts contain a built-in judgment as to the justifiability of paternalism. Consequently, when resolving questions of paternalism, the concepts of "competence" and "voluntariness" are typically, at best, useless and, at worst, question begging and misleading.²⁰⁹

As early as 1944, Milton Green "suggested that in evaluating competency, courts [often] act in accordance with an unexpressed premise, actually assessing the *reasonableness* of the transaction rather than the *ability* of the alleged incompetent to understand it."²¹⁰ There is, Green recognized, a distinct danger that paternalistic agents "will manipulate or selectively use competence criteria."²¹¹

In one recent illustrative case, *In re Maynes-Turner*, a Florida appellate court reversed a lower court and ordered a patient restored to full competency.²¹² The physician's diagnosis stated: "Cognitively, she

208. See, e.g., Tom Buller, *Competence and Risk Relativity*, 15 *BIOETHICS* 93-109 (2001); David Checkland, *On Risk and Decisional Capacity*, 26 *J. MED. & PHIL.* 35-59 (2001).

209. See generally Cale, *supra* note 48, at 148 ("[A]ny interference in the autonomy of the individual cannot find its valid justification in an appeal to the individual's incompetence."); Carl Elliott, *Competence as Accountability*, 2 *J. CLINICAL ETHICS* 167, 168 (1991); HARM TO SELF, *supra* note 2, at 133 ("It would be circular to argue that the choice *must* be a symptom of an illness, and that the illness in turn renders the choice nonvoluntary. We must have *other* evidence of incapacitation to break the circle."); *id.* at 359-61 (stating Catch-22 arguments that "make it *a priori* impossible . . . to prove the voluntariness"); Wicclair, *supra* note 48, at 150 ("[T]he statement that a competent [person's] decision may not be overridden for paternalistic reasons is a *tautology* rather than an expression of an important liberal democratic principle.") (emphasis added).

210. See Winick, *supra* note 32, at 35 (emphasis added). In order to control against this tendency, Thomas Szasz argued that competence judgments are defensible only when it can be linked to a known bodily disease. See THOMAS SZASZ, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (rev. ed. 1974).

211. See Wettstein, *supra* note 207, at 448.

212. *In re Maynes-Turner*, 746 So. 2d 564 (Fla. Dist. Ct. App. 1999).

does reasonably well. She would seem to possess the necessary knowledge that would be required for restoration. . . ."²¹³ However, the physician did not restore the patient, explaining: "[T]he patient might pose significant risks for herself on the basis of those decisions that she would make."²¹⁴ The trial court had followed the physician's recommendation; the appellate court did not.

The appellate court closely scrutinized the physician's recommendation. It appropriately identified the physician's recommendation to physically restrain Ms. Turner as paternalistic, and rejected the physician's recommendation. The appellate court explained:

[W]e must take care that in our zeal for protecting those who cannot protect themselves, we do not unnecessarily deprive them of some rather precious individual rights. Absent his paternalistic notion that she might make decisions that could harm her, the doctor found Ms. Turner possessed the requisite level of capacity for full restoration.²¹⁵

Unlike the physician and the trial court, the appellate court was careful to *separate* the voluntariness of Ms. Turner's requests from her physician's (or their own) evaluation of her need to be protected from herself.

Determinations of competence are influenced by two competing considerations:

1. The need to protect the subject from harmful decisions she might make, and;
2. The need to maximize the subject's self-determination.

Although each of these two considerations are normative issues, they are not always recognized as such. Bruce Winick explains: "Although many physicians undoubtedly regard a competency assessment as an exercise in clinical description, it inevitably involves subjective, cultural, social, political, and legal judgments which are essentially normative in

213. *Id.* at 564.

214. *Id.*

215. *Id.*

nature. The concept of 'competency' is social constructed . . . [and] contains an inherently evaluative component."²¹⁶

Even more forcefully, Tom Beauchamp writes: "It is a mistake to infer that empirical judgments of psychological competence are free of evaluative commitments. The reverse is true: they are inescapably value-laden."²¹⁷ He continues:

[O]ur moral judgments of beneficence and respect for autonomy are inescapably intertwined with our determination of what will, in the circumstances, count as competence. More strongly worded, there is no such thing as competence apart from our *moral* judgments about where appropriate thresholds *should* be set. There is no threshold without a moral judgment, and no competence without a threshold.²¹⁸

Just as Feinberg defends a context-variant conception of "voluntariness," Allen Buchanan and Dan Brock defend a context-variant concept of "competence."²¹⁹ Buchanan and Brock recognize that

216. Winick, *supra* note 32, at 25, n.29; *id.* at 26 ("Talk about competency is thus largely normative discourse, although not always understood as such. Failure to make this recognition causes us to assume that the competency issue is a clinical one and to forget that it is essentially a legal one This confusion about the concept of competence *masks* [normative] assumptions in the cloak of medical expertise.") (emphasis added).

217. Beauchamp, *supra* note 70, at 53. *See also id.* at 66-67 (describing competence as an "essentially contested concept"); BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 133; KLEINIG, *supra* note 10, at 52.

218. Beauchamp, *supra* note 70, at 71.

219. *See* BUCHANAN & BROCK, *supra* note 34, at 83 (espousing a standard varying not only with risk but also with complexity of the decision). *See also id.* at 55 (evaluating risk in terms of the patient's values); Beauchamp, *supra* note 70, at 70-71 (defending "moveable thresholds"); Dan Brock, *Informed Consent*, in LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS 21, 41-43 (1993); Dan W. Brock, *Informed Consent*, in ENCYCLOPEDIA OF PHILOSOPHY 261, 262 (Borchert ed., 1996); James F. Drane, *The Many Faces of Autonomy*, HASTINGS CENTER REP. 17 (1985); Moreno, *supra* note 48, at 173; Pope, *supra* note 171, at 485-91; Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCH. 279 (1977); Wilks, *supra* note 48 (defending "risk-related standards of competence"); Winick, *supra* note 32, at 44, 61 (observing that in a clinical context, assent to a physician's recommendations is usually lower risk while refusal is higher risk and thus demands a higher standard of competence). In the clinical context, context variance is often referred to as "asymmetry" because a patient's competence will differ depending upon whether she concurs with her physician's recommendation. BUCHANAN & BROCK, *supra* note 34, at 55; Culver & Gert,

their concept of competence involves a tradeoff of values. They recognize that if the threshold line is simply drawn at a very low point, patients' autonomy will be protected at the expense of their safety.²²⁰ Nevertheless, following Feinberg,²²¹ Buchanan and Brock maintain a context-variant concept of competence because, as they put it, such a conception "better coheres with our basic legal framework" and the absolutist principle that all competent decisions ought to be respected.²²²

Buchanan and Brock's context-variant approach has been rightly criticized by Charles Culver and Bernard Gert, among others, for failing to keep apart the logically independent questions:

1. What is the patient's capacity? (i.e., How do we assess the subject, decision, empirical dimension?)
2. Is paternalism justifiable? (i.e., How do we assess the act, consequence, normative dimension?)²²³

supra note 11, at 625; HARM TO SELF, *supra* note 2, at 128. This illustrates the fact that competence determination is consequence-focused and not subject-focused because although the subject has the same psychological assessment, different competence determinations are inferred. See Culver & Gert, *supra* note 11, at 634-35.

220. See BUCHANAN & BROCK, *supra* note 34, at 40-41.

221. See *id.* at 46-47 (noting that they are following Feinberg's "variable standard of voluntariness" but, unlike Feinberg, observing that although voluntariness is supposedly all that matters in determining whether restriction is justifiable, autonomy is not really sovereign because voluntariness *itself* balances autonomy and beneficence).

222. *Id.* at 62; see also *id.* at 62-63 (expressly rejecting having distinct and independent concepts, and espousing building justificatory factors right into the concept of competence); *id.* at 69 (arguing that Culver and Gert's model is subject to an "intolerable level of abuse in practice" and would allow the imposition of alien values because "rationality" is such a vague term). But see *id.* at 67 (conceding that if they were "starting afresh," they would employ the concept of "competence" in the manner defended by Culver and Gert).

223. See Culver & Gert, *supra* note 11. See also *id.* at 628 (criticizing "enlarging the concept of competence to include . . . the seriousness of the pointless harms that overruling will prevent."); APPELBAUM, LIDZ & MEISEL, *supra* note 81, at 87 ("[A] standard by which the nature of the decision determines whether the patient is incompetent seriously undermines patient autonomy. Such a standard is paternalism to the extreme."); Robert M. Arnold & Lachlan Furrow, *Review of Deciding for Others*, 11 J. LEG. MED. 121, 124 (1990); BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 141 ("[T]he issue of justified paternalism should be distinguished from criteria of competence, so as to avoid situations in which we decide that a patient's decision is too risky, and that he or she is therefore incompetent.") (emphasis added); Cale, *supra* note 48, at 148 ("[A] standard of competence should keep distinct the interests of the patient as seen from the institution's perspective, and questions concerning an individual's capacity and ability to decide on [a course of action].") (emphasis added); CHILDRESS,

Culver and Gert argue that "lumping very different concepts under the name of just one of them"²²⁴ and then using that one term to answer both questions results in "competence" being used in questionable ways.²²⁵

Once individuals' capacity is lumped together with the reasonableness of their choices, then raising the standard of competence allows us to maintain the absolute stance (the fiction) that the decisions of competent persons ought never be overridden for their own good. Conflating capacity and reasonableness also gives us more latitude to override them as incompetent.²²⁶ This is dishonest. It is better to be

supra note 10, at 104 ("[T]he assessment of the patient's competence should be somewhat *independent* of the risks. Otherwise strong paternalism could *masquerade* as weak paternalism, since -- the argument might go -- no competent person would knowingly and voluntarily accept some risks." (emphasis added); *id.* at 105 (arguing that using the content of the subject's decision "would support strong paternalism under the *guise* of weak paternalism") (emphasis added); Culver & Gert, *supra* note 11, at 632 ("Irrationality is a concept *independent* of incompetence . . .") (emphasis added); Dworkin, *supra* note 32, at 65; KLEINIG, *supra* note 10, at 150 ("Competence is not a matter of coming up with the right answers. We can competently make wrong decisions."); Kopelman, *supra* note 11, at 296 ("A *danger* exists for this policy [Buchanan & Brock's] . . . people may introduce unjustifiable paternalism by *adjusting* the level of competence by simply whether they like the choice.") (emphasis added); SCHUKLENK, *supra* note 75, at 51 ("[I]t is clear that the risk-related threshold for competence becomes a quite *dangerous* instrument in the hand of de facto strong paternalists.") (emphasis added); Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 21 (1991) ("If the patient is competent, his decision must be respected, even if he refuses treatment, no matter how foolish the decision is thought to be."); Winick, *supra* note 32, at 1735.

224. Culver & Gert, *supra* note 11, at 634-36. See also *id.* at 636-39 (arguing that Buchanan and Brock attempt to make competence perform too many functions); *id.* at 637 (formulating a "definition of competence that is dependent on characteristics of both the patient and the patient's situation"); *id.* (arguing that this legal fiction is the result of an uncritical acceptance of the absolute view and is the cause of a distortion of the concept of competence).

225. See Culver & Gert, *supra* note 11, at 631 (arguing that disagreement over what is irrational and serious harm is "one of the primary motivations for trying to deal with the question of patient refusal solely in terms of competency"); *id.* at 633 (criticizing Drane's sliding scale model of competence as not a scale of competence but instead as when paternalism is justified -- thus *conflating* the competence of the individual's decision with the rationality of the individual's decision).

226. See Cale, *supra* note 48, at 138 (criticizing the context variant approach because it makes competence asymmetrical and because "understanding competence as related to outcomes requires the unjustified imposition of normative values in the assessment of competence."). Cale argues that the context variant approach assesses not only the

clear that we are overriding the choice of a competent person when that is, in fact, what we are doing.²²⁷

Culver and Gert contend that “the reluctance” on the part of Buchanan and Brock and others to “challenge openly the absoluteness of the principle that a competent adult’s refusal should never be overruled . . . has led to confusion and to a distortion of the concept of competence.”²²⁸ Culver and Gert want to expose this legal fiction and openly recognize “limited but important exceptions to the principle.”²²⁹ They argue that this “would better preserve the freedom of competent patients than the present hypocritical acceptance of the absoluteness of the principle.”²³⁰

2. How this Confusion Leads to Masking

Feinberg’s use of “voluntariness,” like Buchanan and Brock’s use of “competence,” is packed with normative punch. Feinberg’s criteria for determining substantial voluntariness are “infected” with subjective elements. What is purported to be a distinction made by reference to relatively objective factors relating to the *subject herself* (i.e., whether

subject’s abilities but also assesses the subject’s safety. This is partly an individuation problem because we must determine whether we are assessing the subject’s ability to do X or her ability to do X safely. *Id.* at 142; HARM TO SELF, *supra* note 2, at 122-23, 128-29, 132, 149-50, 170, 209, 219-28, 237, 261, 282, 294, 304; KLFENIG, *supra* note 10, at 58 (“Wanting is referentially opaque.”). This is a problem because “allowing the value of safety to be included as part of the definition of the task removes an important protection for an individual’s autonomy.” *Id.* Cale describes this as an “illicit inclusion of a normative value of safety into [the] assessment of competence” and as a “preference for a certain type of outcome.” Cale, *supra* note 48, at 144-45. Cale recommends that “competence to perform a task must be assessed *independent* of an evaluative and normative judgment concerning the risks and outcomes associated with performing a task (or making a decision).” *Id.* at 143 (emphasis added).

227. See *supra* note 176.

228. Culver & Gert, *supra* note 11, at 621.

229. *Id.*

230. *Id.* See also *id.* at 642 (arguing that interpreting competence strictly and openly addressing paternalism protects liberty more than a context variant approach); *id.* at 623 (“It is only a misguided adherence to the absolute principle . . . that leads physicians, lawyers, and judges to claim that the patient who makes a seriously irrational decision is ipso facto not competent to make that kind of decision.”); *id.* at 639-40 (“No good purpose is served by *pretending* to hold onto the view that no competent patient’s decision should ever be overruled, no matter what the decision is, and then adopting a concept of competence so that competence is at least partially decided on the basis of whether the decision should be overruled.”) (emphasis added).

she acts with substantial understanding and volition), in fact, involves the surreptitious substitution of the paternalistic agent's values regarding the subject's *conduct* (i.e., whether such conduct is worthwhile or valuable). The central problems surrounding paternalism are not solved by combining the decision aspect and the consequence aspect of conduct. Instead, they are merely obscured.

Just as Culver and Gert criticized Buchanan and Brock for "smuggl[ing] the concept of rationality into the concept of competence,"²³¹ political science professor Marion Smiley has forcefully made the same basic objection against Feinberg's soft paternalistic strategy. Smiley argues that the standard Feinberg invents "for designating a particular harmful act involuntary ultimately embodies the kind of communal standards that are, according to [his] own principles, illegitimate justifications for interference with individual liberty."²³²

Smiley argues that Feinberg (along with Gerald Dworkin and others) "smuggles" communal values into his account by "incorporating the 'reasonableness of the risk taken' into the conditions of 'voluntariness.'"²³³ While Feinberg claims to keep the voluntariness of conduct and the reasonableness of conduct separate, they are, in fact, hopelessly intertwined.²³⁴

Smiley explains that Feinberg's standard of "normalcy," by which he determines whether conduct is sufficiently voluntary to be immune from restriction, actually "rests primarily on [his] *own* assessment of the individual's ends."²³⁵ Thus, argues Smiley, Feinberg *avoids* facing or defending hard paternalism and *avoids* a real conflict between beneficence and autonomy only because he already "smuggles [his]

231. Culver & Gert, *supra* note 11, at 642. See also *id.* at 641 (arguing that the concept of irrationality is "conceptually *distinct* from the concept of competence") (emphasis added).

232. Smiley, *supra* note 23, at 299.

233. *Id.* at 301 (charging Feinberg with "invoking a series of communal values" and with smuggling in values "via the 'reasonableness' of an individual's actual choices." Thus, he is only able to "appear able to retain the primacy of individual liberty"). See also Arneson, *supra* note 123, at 252 (describing this as a "sliding scale" of autonomy rights because if the presumption varies with voluntariness and voluntariness varies with the risk then transitively the presumption varies with the risk); David Crossley, *Paternalism and Corporate Responsibility*, 21 J. BUS. ETHICS 291, 295-96 (1999) (discussing elasticity).

234. See BUCHANAN & BROCK, *supra* note 34, at 42 (identifying and criticizing "Feinberg's inability to avoid the balancing that he explicitly rejects").

235. Smiley, *supra* note 23, at 301-02 (emphasis added).

(communal) valuation of physical well-being into [his] criteria of rationality.”²³⁶

E. Feinberg Confuses the Standards “Substantial Voluntariness” and “Voluntary Enough”

I contend that the reason Feinberg’s criteria for determining substantial voluntariness are infected with subjective elements is that Feinberg assumes that substantial voluntariness is purely empirically measurable. This assumption is erroneous. In order to apply the threshold concept of “substantial voluntariness” to particular conduct, one needs evaluative commitments.²³⁷

Feinberg’s failure to fully appreciate the formal nature of his notion of voluntariness led him to confuse the distinct questions of whether voluntariness is “substantial”²³⁸ and whether it is “valid,”²³⁹ “sufficient,”²⁴⁰ or “enough.”²⁴¹ The *substantiality* of voluntariness refers

236. *Id.* at 308. See also HAYRY, *supra* note 38, at 71 (“It would be possible at this point to question the rationality of anybody who attempts to cross an unsafe bridge, but this would shift the focus of attention from the *technical* and *descriptive* criteria of reasonable decision making to *normative* views concerning the legitimate *content* of rational and moral choices.”).

237. See HARM TO OTHERS, *supra* note 32, at 26 (conceding that mediating the harm principle requires value assumptions).

238. See, e.g., HARM TO SELF, *supra* note 2, at 125; *id.* at 126 (“substantially nonvoluntary”); *id.* at 306, 309, 336 (adopting Beauchamp and Childress’ conception for informed consent); see also HARMLESS WRONGDOING, *supra* note 14, at xvii, 127, 128, 200 (“voluntary”); HARM TO SELF, *supra* note 2, at 79; *id.* at 172 (“nonvoluntary”).

239. See, e.g., HARM TO SELF, *supra* note 2, at 254, 261, 280, 305, 309, 311, 313, 314, 330, 343, 347.

240. See, e.g., *id.* at 105, 121, 124, 201, 211, 253, 254, 305, 307, 311, 338, 343.

241. See, e.g., *id.* 104-05 (“voluntary enough to be immune from interference”); *id.* at 113 (“[H]ow voluntary is voluntary enough?”); *id.* at 118 (“‘voluntary enough’ to be immune from restriction”); *id.* at 119, 143 (“‘voluntary enough’ to preclude interference”); *id.* at 149 (“[J]udgments of voluntariness, for legal purposes, tend to be made relative to a given context”); *id.* at 154 (“‘voluntary enough’ to render the risky conduct of an autonomous actor immune from outside interference”); see also *id.* at 155, 157; *id.* at 158 (“involuntary enough:” observing that a greater lack of voluntariness is required to escape responsibility for harm to others); *id.* at 159 (“‘voluntary enough’ to preclude temporary interference”); *id.* at 160 (“‘voluntary enough’ to be immune from interference”); *id.* at 161; see also *id.* at 168; *id.* at 170 (“voluntary enough to exempt him from protective interference”); *id.* at 174, 175, 198, 211, 248, 253, 263, 273, 274, 278, 280, 283, 304, 309, 311, 312, 314, 333, 335, 339, 340-41, 342, 347, 354; *id.* at 309 (“[V]oluntariness . . . itself a matter of degree measured on various sliding scales”); *id.* (observing that validity is a distinct concept which is the point where voluntariness is

to a psychological description of the subject. It is a matter of degree.²⁴² The *sufficiency* of voluntariness, on the other hand, refers to a policy judgment of what self-harm should be permitted.²⁴³ It is a threshold concept.²⁴⁴

Nevertheless, Feinberg employs all of these terms and concepts interchangeably.²⁴⁵ Specifically, Feinberg borrowed fixed notions of voluntariness as embodied in the law too uncritically. He did not develop an independent concept of "substantial voluntariness" ("SV") or substantial autonomy, but instead relied on what the law has *already* codified as "voluntary enough" ("VE").

The problem with piggybacking the SV inquiry on the VE inquiry is that the critical questions will be begged and the tough moral issues will evaporate.²⁴⁶ Just because criminal law happens to peg some conduct as

'voluntary enough' "for a given moral or legal purpose"); HARMLESS WRONGDOING, *supra* note 14, at xviii.

242. See HARM TO SELF, *supra* note 2, at 254, 295, 309.

243. See *id.* at 118 (arguing that voluntariness is a variable concept. One factor on which voluntariness varies is its political/legal purpose and determining what should be immune from restriction).

244. See *id.* at 254 (arguing that validity is an all or nothing term which depends on the "nature of that to which consent is expressed, and the legal or moral purpose for which consent is considered"); *id.* at 261 (arguing that validity "cannot be read off the facts"); *id.* at 285; *id.* at 309 (arguing that validity is a matter of policy whose stringency varies with the nature of the context); *id.* at 313-15; *id.* at 314 (recognizing that voluntariness can be low but that validity depends on the circumstances: "downgrade the voluntariness of his consent, but probably not to the point of invalidating it"); *id.* at 338.

245. See, e.g., *id.* at 254 (arguing that voluntariness and validity "stand in complex and subtly shifting relations to one another"). Worst of all, Feinberg defines hard paternalism by the validity of consent. See *id.* at 338-39. See also *id.* at 354 ("The soft paternalist, if he can be convinced that the choice is voluntary enough by reasonable tests, is firmly committed to a policy of non-interference."). But even a hard paternalist will leave the subject alone if his conduct is voluntary *enough!* By definition, the "voluntary enough" standard, defines what conduct should be immune from interference. Feinberg's argument states a tautology at best and is an indication of equivocation at worst.

246. See generally FLETCHER, *supra* note 83, at 396-401; JEAN HAMPTON, POLITICAL PHILOSOPHY xiii (1997) ("The political philosopher must go beyond mere description . . . examining day-to-day operations of existing societies . . . and engage in both conceptual analysis and moral theorizing to formulate possible answers."). Feinberg seems to recognize this problem with respect to the harm principle -- what is a wrongful setback to interest (and thus harm) cannot be just what is a violation of legal rights. But trying to determine what ought to be a legal right is viciously circular. See HARM TO OTHERS, *supra* note 32, at 110-11; HARM TO SELF, *supra* note 2, at xiv-xv (noting that using the purely descriptive word "obscene" interchangeably with the normative word "pornographic" is "to beg the essentially controversial question").

“not voluntary enough” does not mean that a particular subject’s engagement in such conduct is “not substantially voluntary.” As Feinberg observes, “[O]ur present law is not based on exclusively liberal principles.”²⁴⁷ So, that the state has chosen to criminalize some conduct does not automatically mean that such criminalization is justifiable as soft paternalism.²⁴⁸

When establishing the justifiability of paternalism, we must take a critical stance toward accepted practices. Otherwise, we risk begging the question of the justifiability of hard paternalism by describing all permitted restriction of self-regarding conduct as soft paternalism.

The VE threshold can, in principle, fall anywhere within the spectrum of voluntariness.²⁴⁹ Where it is placed is determined by policy concerns and expedience.²⁵⁰ Feinberg recognizes this.²⁵¹ VE might be

247. HARMLESS WRONGDOING, *supra* note 14, at 165.

248. See HARM TO SELF, *supra* note 2, at 43 (“De facto autonomy, it would seem, is a conceptually presupposed condition of most judgments of responsibility.”); see also *id.* at 121 (“The concept of voluntariness . . . is used in all the major branches of the law . . .”); *id.* at 389 n.1; Smiley, *supra* note 23, at 313; Bernard Williams, *What Has Philosophy to Learn from Tort Law?* in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 487-97 (David G. Owen ed., 1995).

249. See FADEN & BEAUCHAMP, *supra* note 48, at 239.

250. See generally Beauchamp, *supra* note 70, at 53 (“Although empirical investigation can establish whether a person has the abilities required for competence, the choice of criteria or tests of incompetence is not an empirical matter.”); *id.* at 56 (“[I]t is an evaluative matter . . . how and where the threshold line marking incompetence is drawn.”) (emphasis added); *id.* at 69; BUCHANAN & BROCK, *supra* note 34, at 47 (“There is no reason to believe that there is one and only one optimal tradeoff between the two competing values of well being and self-determination, nor, hence, any one unique level of capacity at which to set the threshold of competence -- even for a particular decision under specified circumstances. In this sense, setting a standard for competence is a *value choice*, not solely a scientific or factual matter.”) (emphasis added); *id.* at 40-41, 83; FADEN & BEAUCHAMP, *supra* note 48, at 24, 330; VANDEVEER, *supra* note 12, at 358-61; Wikler, *supra* note 17, at 381 (“We may be able to distinguish various levels of mental ability through tests, but any line drawn between mentally ‘impaired’ and mentally ‘unimpaired’ is arbitrary.”); *id.* at 391 (“My argument, while showing that the threshold between mental incompetence and competence is not arbitrary, also shows it to be set by society The boundary is, of course, a vague one. The decision to draw the line at some precise point . . . is arbitrary. What is nonarbitrary is . . . drawing the line at some point below the average”); Winick, *supra* note 32, at 25 (“The decision regarding which standard of competency should be utilized turns upon moral, legal, and *political judgments* concerning the appropriate level of ability that patients wishing to make treatment decisions must possess.”) (emphasis added); *id.* at 41.

251. See, e.g., HARM TO SELF, *supra* note 2, at 165 (“[O]ur present law is not based on exclusively liberal principles.”); *id.* at 254 (explaining that voluntariness and validity

placed, and, admittedly, often seems to be placed, just where the SV threshold line is drawn. However, as illustrated in the diagram printed below, even non-substantially voluntary behavior might, in some circumstances, be "voluntary enough" to be justifiably free from legal interference.²⁵² Conversely, substantially voluntary conduct might, in some circumstances, not be voluntary enough to be justifiably free from legal interference.

- Fully Voluntary
- Substantially Voluntary, but still not Voluntary Enough
- Substantially Voluntary
- Not Substantially Voluntary, yet Voluntary Enough
- Involuntary

After observing that the same act with the same degree of voluntariness can be sufficiently voluntary for contract law but not sufficiently voluntary for criminal law, Feinberg asks, "How . . . can we account for this relativity?"²⁵³ Feinberg recognizes that he seems to have a paradox in that two *equally* voluntary acts can have different legal consequences.²⁵⁴ This paradox arises because the fact that a subject's conduct fails to be substantially voluntary fulfills neither a necessary nor a sufficient condition for interference. SV and VE are *separate* concepts. But Feinberg does not keep them separate.

of consent are independent concepts); *id.* at 261 ("How much voluntariness is required for a valid (legally effective) act of consent is at least partly a matter of *policy* . . . standards of voluntariness whose stringency varies with the nature of the context . . . and the particular legal outcome at issue . . .") (providing examples) (emphasis added); *id.* at 285 ("[T]he proper limits of risk . . . assumptions . . . is not a conceptual question so much as a *policy* issue for courts and legislatures . . .") (emphasis added); *id.* at 296 (comparing the effect of fraud in rape and battery where voluntariness levels are different); *id.* at 298-99 (noting voluntariness is not the only factor determining sufficient voluntariness); *id.* at 313-15 (noting that some cases where conduct is not substantially voluntary might still be voluntary enough -- depending on *policy* reasons); *id.* at 330 ("Expressions of assent may vary in degree of voluntariness, but short of that degree required for validity, a miss is as good as a mile."); *id.* at 338; HARMLESS WRONGDOING, *supra* note 14, at xviii; *id.* at 165 ("[O]ur present law is not based on exclusively liberal principles . . .")

252. See FADEN & BEAUCHAMP, *supra* note 48, at 241.

253. HARM TO SELF, *supra* note 2, at 253.

254. See *id.* at 338. Cf. *id.* at 358-61 (cautioning against circularity).

Unlike SV, VE is not useful as a demarcation between hard and soft paternalism. VE is dependent upon policy considerations, and, therefore, it cannot be used to assess particular laws as hard or soft paternalism.²⁵⁵ John Kultgen notes this confusion between “voluntariness of consent” and “validity of consent” and argues that “Feinberg’s position is in danger of collapsing” into hard paternalism.²⁵⁶ By using VE, Feinberg begs the question of the justifiability of hard paternalism.

The difference between hard paternalism and soft paternalism pertains to *the subject only*. VE, on the other hand, includes other considerations such as social values. Because it is impossible to determine the voluntariness of a decision without making significant reference to its content, equating VE and SV “masks” the core question regarding the justifiability of hard paternalism.²⁵⁷

F. Summary of the Argument Against Context Variance

Context variance is a good idea. More evidence of voluntariness should be required for more risky conduct.²⁵⁸ However, variance should not be built into the very definition of substantial voluntariness. Instead,

255. See Sunstein, *supra* note 93, at 178 (arguing that voluntariness serves as a “placeholder for an argument that there is no sufficient ground for governmental action”); Wicclair, *supra* note 48, at 150 (“[T]he statement that a competent [person’s] decision may not be overridden for paternalistic reasons is a tautology rather than an expression of an important liberal democratic principle.”). In short, you cannot use a thicker concept to do the work of a thinner one. Cf. CHILDRESS, *supra* note 10, at 72; Culver & Gert, *supra* note 11, at 634-36. Earlier in this section (see *supra* notes 132 to 137) I discussed the limitations on the use of concepts such as “natural,” “disease,” “death,” and “futility.” Not only must philosophers exercise great caution when employing these concepts in ethical arguments, philosophers must also exercise caution when employing “voluntary enough.” If a paternalistic agent decides that the subject’s conduct ought to be restricted then doing so is a judgment that the voluntariness of her conduct is not *sufficient*. Now, the sufficiency of voluntariness has a strong positive correlation to the substantiality of voluntariness. However, they are independent concepts.

256. KULTGEN, *supra* note 31, at 183; see also John D. Hodson, *The Principle of Paternalism*, 14 AM. PHIL. Q. 61, 64 (1977) (“Feinberg nowhere provides a general account of voluntary action . . .”).

257. See David Archard, *Paternalism Defined*, 50 ANALYSIS 36, 41 (1990) (arguing that it is dangerous to use voluntariness as a proxy for “acceptable individual choice”); BAYLES, *supra* note 23, at 128 (warning of the danger of confusing what is a different value and what is not substantially voluntary); Tom L. Beauchamp, *On Justifications for Coercive Genetic Control*, in BIOMEDICAL ETHICS AND THE LAW 361, 373 (Robert F. Almeder & James M. Humber eds., 1976).

258. See BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 74-77.

the criteria by which substantial voluntariness is determined should be applied consistently and without regard to the consequences of the conduct with which an individual engages. This view is widely supported in literature.

1. Context Variance Pertains to the Justifiability, Not the Definition of Hard Paternalism

Beauchamp and Childress seem to endorse a context invariant standard, writing that, “[f]or an action to be autonomous we should only require a substantial degree of understanding and freedom from constraint”²⁵⁹ They continue, writing: “A person’s appreciation of information and independence from controlling influences in the health care setting *need not exceed*, for example, a person’s information and independence in making a financial investment, hiring a new employee, buying a new house, or selecting a university.”²⁶⁰

Beauchamp and Childress admit the appeal of shifting standards according to the risk attached to a decision. But they conclude that the “position seems questionable.”²⁶¹ They explain, for example, that “[a] person’s competence to decide whether to participate in cancer research does *not* depend on the decision’s consequences.”²⁶² Beauchamp and Childress further explain that “[n]o basis exists for believing that risky decisions require more ability at decisionmaking than less risky decisions.”²⁶³ The evidentiary standards by which the determination of fixed criteria are met can be raised, but *not* the criteria themselves.²⁶⁴

Beauchamp and Childress go even further, suggesting that a context variant standard is downright disrespectful of autonomy. They explain that allowing competents to decide what to do with their children and financial affairs, but not allowing them to decide whether to be intubated is an “incoherent” approach. Without addressing Feinberg in particular, Beauchamp and Childress, like Gert and Culver, argue that the sliding

259. BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 123.

260. *Id.* (emphasis added). See also *id.* at 139 (rejecting a “sliding-scale strategy” of determining competence).

261. *Id.* at 139 (albeit writing in the context of determining standards for competence rather than SV).

262. *Id.* at 140 (emphasis added).

263. *Id.* (emphasis added). See also FADEN & BEAUCHAMP, *supra* note 48, at 240-41.

264. See BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 141.

scale context variant strategy entails a “conflation of criteria for justified paternalism and standards of competence.”²⁶⁵ Beauchamp and Childress conclude that the “core thesis” of the sliding-scale strategy is “both conceptually and morally perilous.”²⁶⁶ In sum, unlike Feinberg, Beauchamp and Childress do not endorse raising or lowering substantial voluntariness according to the consequences of decisions.²⁶⁷

I agree. If a particular activity is risky then we should not raise the standards of substantial voluntariness which individuals must satisfy in order to be free from soft paternalistic intervention. Rather, we ought to keep the substantial voluntariness threshold line in one place. Once an individual’s conduct meets those *fixed* standards, intervention with that individual’s conduct, for the appropriate benevolent reasons, must be called “hard paternalism.” That some particular activities happen to be particularly risky ought not (by itself) make an individual’s participation in such activities less than substantially voluntary.

If the riskiness of conduct is to play a justificatory role, that role should be made explicit.²⁶⁸ We should not build this factor secretly into the criteria which purport to describe the subject rather than her conduct. Otherwise, we would distort the purportedly empirical enterprise of assessing capacity.

Feinberg is correct to suggest that a paternalistic agent (e.g., the state) ought to require more *evidence* of voluntariness from individuals who wish to participate in very risky activities. I only disagree that this *extra* requirement—an implication of context variance—ought to be a factor in the determination of substantial voluntariness itself.

Feinberg criticizes Anthony Kronman, where Kronman defends the rule of non-disclosure in cases of deliberate search for mineral wealth as Pareto-optimal, for not “wrap[ping] his intuitions in a weaker principle.”²⁶⁹ I criticize Feinberg for the same thing. He should have wrapped his intuitions regarding context variance into a standard that did

265. *Id.*

266. *Id.* at 139; BEAUCHAMP & CHILDRESS 5TH, *supra* note 13, at 76.

267. See BEAUCHAMP & CHILDRESS 4TH, *supra* note 9, at 141 (“Paternalism has a valid place in medicine, but its place is not in fixing criteria of competence.”).

268. See HARM TO OTHERS, *supra* note 32, at 245 (arguing that to employ the harm principle, one must “use *some* supplementary criteria, because otherwise the harm principle is a mere empty receptacle, awaiting the provision of normative content before it can be of any use.”).

269. See HARM TO SELF, *supra* note 2, at 403-04 n.6.

not alter the very *criteria* of substantial voluntariness. Context variance should not factor into the *definition* of what liberty limitation constitutes hard paternalism. Instead, it should factor explicitly and directly into the *justifiability* of hard paternalism. We must distinguish judgments of the *sufficiency* of voluntariness from assessments of the *substantiality* of voluntariness. When the subject acts substantially voluntarily, we should admit that the subject has "consented" to her conduct. If we still consider that interference with the subject's conduct is warranted then we *must* acknowledge that the subject's consent, though (empirically) substantially voluntary, is not (normatively) voluntary enough. This way, we do not mask the fact that the subject's conduct is (at least) substantially voluntary. Nor do we mask the fact that our restriction of the subject's conduct is hard paternalism and not soft paternalism.

2. Building Context Variance into the Definition of Hard Paternalism Makes Hard Paternalism Too Thick

Feinberg over-emphasizes the importance of the distinction between hard paternalism and soft paternalism.²⁷⁰ He builds tremendous importance into the SV threshold line and ignores the significance of other (even large) gradations in voluntariness.²⁷¹ Gert and Culver object, "There is not such a sharp line . . . and, even if there were, it has not yet been reliably enough determined to allow it to play such an important role in determining whether it is justified to break a moral rule toward someone without consent."²⁷² "Assigning people to precisely delimited

270. See Arneson, *supra* note 61, at 436 n.27; DWORKIN, *supra* note 17, at 124-25 (focusing on the agent and also on the risk of conduct); Peter Hobson, *Another Look at Paternalism*, 1 J. APPLIED PHIL. 293, 301 (1984) (arguing that there are "two central features relevant to justifying paternalism." One must consider not just the subject but also "the beneficial consequences to be brought about."); KULTGEN, *supra* note 31, at 132-33; Norman Linzer, *Autonomy Versus Paternalism*, in RESOLVING ETHICAL DILEMMAS IN SOCIAL WORK PRACTICE 138 (1999) (discussing Reamer, who considers *both* attributes of clients and attributes of situations as reasons to justify paternalism in social work); Bill New, *Paternalism and Public Policy*, 15 J. ECON. & PHIL. 63, 64 (1999); NIKKU, *supra* note 50, at 339 (focusing on the agent, consequences, and degree of intrusion); Soble, *supra* note 113, at 336.

271. Cf. Steven Lee, *On the Justification of Paternalism*, 7 SOC. THEORY & PRACTICE 193, 200-02 (1981).

272. Culver, Gert & Clouser, *supra* note 31, at 227-28. See also Withrow v. Williams, 507 U.S. 680, 711-12 (1993) (O'Connor, J., concurring) (arguing with respect to *Miranda* warnings that a "threshold test of voluntariness, for all its alleged brightness,

and homogenous categories rather than taking account of the subtle differences among them is harmful in practice."²⁷³

Ellen Fox observes that "[t]he emphasis has been on the autonomy (or lack thereof) of the subject of the intervention." But, Fox contends, "[t]hough clearly an important part of any justificatory story, the individual's autonomy is not the only consideration."²⁷⁴

Fox is right. The apparatus for marking the distinction between hard and soft paternalism admittedly plays a very large role in determining the justifiability of all paternalism.²⁷⁵ But it's not the whole story. While Feinberg's formal uni-dimensional approach allows for a clear and crisp "principle of paternalism," we should sacrifice this simplicity for a conceptual model that makes the various normative appeals explicit. The significance of other materially relevant variables precludes a bright line algorithm of justifiability based on voluntariness alone.

Joel Feinberg maintains an absolutist position: that *only* self-regarding conduct that is not substantially voluntary can be justifiably restricted. But this absolutist position obscures both the fact that voluntariness is a matter of degree and the fact that the degree of harm is a function of justifiability.²⁷⁶ Bright lines are often useful surrogates for precise determinations, but Feinberg's bright lines are not adequate

is not without its difficulties . . . supposedly 'bright' lines . . . have turned out to be rather dim and ill defined The totality of the circumstances approach, on the other hand, permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous."); Beauchamp, *supra* note 70, at 54 (rejecting "wooden doctrines" and arguing that "we can tend the gate by saying that the competent person is presumptively the legitimate authority"); *id.* at 56 ("Competence should also be understood as resting on a continuum."); BUCHANAN & BROCK, *supra* note 34, at 27-28.

273. KULTGEN, *supra* note 31, at 90. *See also id.* at 90-91.

274. Fox, *supra* note 64, at 577.

275. *See* HARM TO SELF, *supra* note 2, at 99 ("[T]he soft paternalistic strategy' . . . makes critical use of the concept of a voluntary choice"); *id.* at 142 (explaining that his argument must "rest heavily on the concept of voluntariness"); HARMLESS WRONGDOING, *supra* note 14, at xviii ("[M]y strategy makes critical use of the concept of a voluntary choice, which is such a difficult notion that in effect [most of Volume 3] is devoted to its elucidation and application").

276. *See* Richard Arneson, *Mill Versus Paternalism*, 90 ETHICS 470, 481 (1980) ("It would seem that nothing short of a lexicographic ordering of values placing autonomy first would suffice to guarantee that one's condemnation of paternalism will not admit of exceptions."); Lee, *supra* note 271, at 200.

surrogates for the balancing that ought to be taking place here. They are too insensitive.²⁷⁷

Characterizing context variance separate from substantial voluntariness clarifies (or at least doesn't obscure the fact) that the individual's actions *already* are substantially voluntary. Because the individual's actions already satisfy (at least) the substantial voluntariness standard, any interference with those actions (for the individual's own good) is hard paternalism.

On the other hand, building context variance into the definition of "substantial voluntariness" itself, as Feinberg does, is tantamount to stretching soft paternalism to the virtual exclusion of the very possibility of intervention ever being hard paternalism. The following syllogism, representing Feinberg's soft paternalistic strategy, captures my objection:

1. Hard paternalism is a restriction of substantially voluntary conduct.
2. Substantially voluntary (i.e., voluntary enough) conduct is that conduct that should be permitted.
3. Therefore, hard paternalism is restriction of that conduct which should be permitted.

Because of the way Feinberg defines "substantially voluntary" in premise 2, he defines hard paternalism not only as a particular form of liberty limitation but also as *unjustified* liberty limitation.²⁷⁸

Jonathan Riley, without referencing Feinberg, observes that if suitably "thick" criteria [higher epistemic and volitional requirements] are imposed for "substantial voluntariness," then that would merely "serve as a guise of true ('hard' or 'strong') paternalism."²⁷⁹ Riley, like me, argues that "thin" criteria are appropriate for determining substantial

277. Cf. Lee, *supra* note 271, at 202.

278. By using the concept SV and VE interchangeably, Feinberg commits the fallacy of equivocation. Cf. FLEW, *supra* note 176, at 15; JOHN SHAND, ARGUING WELL 55-56 (2000); WALTON, *supra* note 135, at 250-53, 277; DOUGLAS WALTON, FALLACIES ARISING FROM AMBIGUITY 5, 19-20, 48-51, 61-66 (1996).

279. RILEY, *supra* note 149, at 198. See also KLEINIG, *supra* note 10, at 85-86 (cautioning against making the conditions for soft paternalism "too permissive" and that voluntariness-reducing factors do not always take conduct below the SV threshold); KULTGEN, *supra* note 31, at 219 ("[T]he intervener can reasonably set high standards for a subject to be 'adequately informed.'"); *id.* at 214 (arguing that simplicity is better than adding odd notions to make a conception work); Thompson, *supra* note 11, at 264.

voluntariness. Peter Suber similarly observes, "Paternalism can be converted to non-paternalism only when we modulate [i.e., widen] the notions of harm and consent sufficiently. While this is sometimes distressingly easy, at least as often it is an exercise in sophistry, oversimplification, and self-deception."²⁸⁰

Other scholars also recognize the danger in stretching substantial voluntariness. George Rainbolt warns that the "clever soft paternalist will adopt the decision-relative conception of voluntariness."²⁸¹ Hence, the clever soft paternalist "will argue that if a very serious mistake is possible, then the [voluntariness] threshold must be raised high enough . . . and [consequently] our intervention will not be an instance of hard paternalism."²⁸² Dan Brock argues that "[i]n requiring a higher degree of voluntariness for an individual's choice to be respected . . . Feinberg gives less weight to the agent's choosing for himself as the choice appears increasingly to conflict with his good."²⁸³ Alan Soble argues that "[p]aternalism, as an instance of interference with freedom, is to be minimized. And this can be accomplished by minimizing the occurrence and the duration of the situations in which persons do not satisfy the requirements of the person-mediating maxim."²⁸⁴

Goldman and Goldman argue, "It might be objected to this variable conception [of voluntariness] that it represents *ad hoc* tinkering by the soft paternalist to ensure that all justified paternalism can be seen as restraining only involuntary actions."²⁸⁵ Richard Arneson argues that "soft paternalism tends to melt into plain old fashioned paternalism [because] its core idea of a substantially autonomous choice is elusive and not clearly distinct from the straight utility-maximizing notion of a choice that ought to be forcibly interfered with for the agent's own good."²⁸⁶

280. Suber, *supra* note 60, at 635.

281. Rainbolt, *supra* note 94, at 49. See also KULTGEN, *supra* note 31, at 219.

282. Rainbolt, *supra* note 94, at 49.

283. Brock, *supra* note 91, at 562. See also David Gordon, *Comment on Hospers*, 4 J. LIBERTARIAN STUDIES 267, 270 (1980) ("Hospers's criteria of voluntariness seem to be unsatisfactory for his purposes, viz. the delineation of a sphere of action within which paternalism is justifiable. Hospers's non-coercion requirement, in particular, seems intolerably broad.")

284. Soble, *supra* note 113, at 348.

285. Goldman & Goldman, *supra* note 92, at 68 (but defending the conception on other grounds).

286. Richard J. Arneson, *Paternalism, Utility and Unfairness*, 43 REV. INT'L PHIL.

In short, as I have argued and as this quick review of the literature confirms, Feinberg is balancing beneficence against autonomy. He is not frank about it. Rather, Feinberg masks this balancing *within* the conceptual definition of "voluntariness." Feinberg criticizes Aristotle's conception of voluntariness as being too elevated so that "relatively few acts could satisfy it" and "interference with dangerous self-regarding behavior would very often be justified."²⁸⁷ The net effect, Feinberg observes, is that "soft paternalism would differ little in its application from hard paternalism."²⁸⁸ I criticize Feinberg along similar lines. His standard is not, like Aristotle's, too *high*.²⁸⁹ Instead, Feinberg's voluntariness standard is too *flexible*.

V. CONCLUSION

In this article, I presented Feinberg's soft paternalistic strategy. I then explained that although Feinberg offers his strategy as an argument against hard paternalism, his strategy actually masks hard paternalism. By equating the notion of "substantial voluntariness" (which distinguishes hard and soft paternalism) and the notion of "voluntary enough" (which is a value judgment about what conduct should be permitted), Feinberg effectively defines soft paternalism as that paternalistic intervention which is justified and defines hard paternalism as that paternalistic intervention which is not justified. Feinberg thereby begs the tough and interesting question of whether and when hard paternalism is justified.

Feinberg's objective in devising his soft paternalistic strategy was to demonstrate that the hard paternalism liberty limiting principle is unnecessary (and thus unjustified) because the soft paternalism liberty limiting principle can justify all the liberty limitation thought to be appropriate. However, Feinberg is able to (seemingly) succeed in this project only through grossly distorting the conceptual boundaries of the soft paternalism and hard paternalism liberty limiting principles. Feinberg offered the soft paternalistic strategy as an "attempt to provide,

409, 429 (1989).

287. HARM TO SELF, *supra* note 2, at 114.

288. *Id.*

289. *Cf.* Arneson, *supra* note 276, at 481 (criticizing Feinberg for this and proposes a weaker notion of voluntariness).

when plausible, a nonpaternalistic rationale.”²⁹⁰ But what he offers is *not* plausible.

Feinberg fails to adequately appreciate that there is a *gap* between conduct that is *substantially voluntary* and conduct that is *voluntary enough*. Feinberg tries to justify restricting the self-regarding conduct that our intuitions suggest should be restricted by appealing to epistemic and volitional defects. But he cannot escape appealing to reasonableness. We ought to make this appeal explicit, and abandon efforts to mask hard paternalism.

We ought to admit that there are cases of intuitively reasonable and appropriate hard paternalistic liberty limitation. Only then, can we articulate a principled consequentialist explanation for why liberty limitation in such cases is justified. Only then, can we develop arguments for the increasingly pressing question: Under what circumstances do the benefits secured for a subject outweigh the restrictions on that subject’s liberty necessary to secure those benefits?

290. See HARM TO SELF, *supra* note 2, at 175 (emphasis added).