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# MONSTROUS IMPERSONATION: A CRITIQUE OF CONSENT-BASED JUSTIFICATIONS FOR HARD PATERNALISM

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## I. INTRODUCTION

When may the state justifiably restrict our liberty to protect us from ourselves? May it do so when we voluntarily engage in risky conduct and hurt no one but ourselves? In other words, when is hard paternalism justified? This question is becoming increasingly important as hard paternalism is offered as the rationale for ever-growing numbers of laws and legal decisions.

One popular position holds that hard paternalistic laws are justified only when those subject to such laws *consent* to having their liberty restricted. Tom Beauchamp observes that "an appeal to some kind of consent is central to the strategy of . . . prominent theories of justified paternalism."<sup>1</sup> This position is, perhaps, to be expected. Consent theory, as Don Herzog observes, "provides perhaps the single most prevalent paradigm structuring our thinking about law, society, morality, and politics."<sup>2</sup>

But perhaps more importantly, the attractiveness of consent-based arguments comes from the fact that when a subject consents to having her liberty restricted for her own good, the paternalistic agent's intervention with the subject's liberty is "distanced from moral taint" and seems justified.<sup>3</sup> Consent, as John Kleinig explains, "alters the normative relations in which others stand with respect to what they may do."<sup>4</sup>

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<sup>1</sup> TOM L. BEAUCHAMP, *PHILOSOPHICAL ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY* 380 (3d ed. 2001). See also TOM L. BEAUCHAMP, *PHILOSOPHICAL ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY* 418 (2d ed. 1991); TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 280 (4th ed. 1994) [hereinafter *BIOMEDICAL ETHICS*]; TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 184 (5th ed. 2001) [hereinafter *PRINCIPLES*]. However, it is unclear whether this is still the case.

<sup>2</sup> DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 215 (1989).

<sup>3</sup> Tziporah Kasachkoff, *Paternalism: Does Gratitude Make It Okay?* 20 *SOC. THEORY & PRAC.* 1, 5 (1994).

<sup>4</sup> John Kleinig, *Consent*, in *ENCYCLOPEDIA OF ETHICS* 206, 207 (Lawrence C. Becker & Charlotte B. Becker eds. 1992). See also JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 53, 176, 177-78, 197 (1986) ("Whatever else consent may do, it transfers at least one part of the responsibility for one person's act to the shoulders of the consentor," referring to consent as "granting of permission" or "to grant a privilege") [hereinafter *HARM TO SELF*]; JOHN KULTGEN, *AUTONOMY AND INTERVENTION: PARENTALISM IN THE CARING LIFE* 117 (1995); Thomas J. Lewis, *On Using the Concept of Hypothetical Consent*, 22 *CAN. J. POL. SCI.* 793, 799 (1989) ("Consenting, like promising, is a decision to alter a given distribution of rights"); Rosemary Carter, *Justifying Paternalism*, 7 *CAN. J. PHIL.* 133, 134-35 (1977) (arguing that consent, through alienating a subject's prima facie right to non-interference, "plays the central role in justifying paternalism").

In other words, if the subject consents to having her liberty restricted, then restricting her liberty for her own good seems not to violate liberalism's principle of neutrality by imposing an alien conception of the good on the subject. Instead, according to the venerable principle *volenti non fit injuria*: when an agent intervenes pursuant to the subject's consent, then the agent does not violate the subject's autonomy.<sup>5</sup>

Even philosophers and legal theorists taking an absolutist stance regarding the value of autonomy (relative to other values such as beneficence and justice) can endorse consent-based hard paternalistic interventions. This is because when the subject consents to intervention, her presumptive right to noninterference is not overridden. Rather, it is waived.<sup>6</sup>

But have patients really consented to having physicians override their healthcare decisions? Have clients really consented to having their lawyers' override their legal instructions? Have motorcyclists consented to helmet laws? Have smokers consented to outdoor smoking bans? Have recreational drug users consented to the criminalization of marijuana? Have sex workers consented to the criminalization their chosen profession? Have disabled workers consented to being fired from their jobs because of their disability?

Hardly.<sup>7</sup> While consent-based arguments have a prima facie plausibility, I will show that they are, in fact, plagued with conceptual and normative

<sup>5</sup> See RESTATEMENT (SECOND) OF TORTS §§ 496B, 496C & 892A (1965); JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF CRIMINAL LAW 115-17, 215, 220 (1984) [hereinafter HARM TO OTHERS]; JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 32-33 (1985) [hereinafter OFFENSE TO OTHERS]; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 18, at 101 (4th ed. 1971) ("It is a fundamental principle of the common law that *volenti non fit injuria*—to one who is willing no harm is done. The attitude of the courts has not, in general, been one of paternalism"); DONALD VAN DE VEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE 172 (1986) ("The law has long assigned an important role to the presence of voluntary consent in its determination of the propriety of nontrivial interactions between persons"); Kasachkoff, *supra* note 3, at 7.

<sup>6</sup> See JOHN KLEINIG, PATERNALISM 55 (1984); KULTGEN, *supra* note 4, at 115. For this reason, consent-based arguments are often characterized as taking a "deontological approach" to justifying hard paternalism. See *id.* at 145.

<sup>7</sup> See generally *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002) (rejecting worker's challenge to being fired because of "harm to self"); *Hoofnel v. Segal*, No. 2004-CA-000412-MR, 2004 WL 911794, \*3-4 (Ky. Ct. App., Apr. 30, 2004) (rejecting battery claim concerning physician's removal of her ovaries because a "reasonable person" in her position would have consented), *cert. granted*, No. 2004-SC-000381 (Ky. Feb. 9, 2005); *N.Y.C. C.L.A.S.H. v. City of New York*, 315 F.Supp.2d 461 (S.D.N.Y. 2004) (rejecting challenge to smoking ban); *The Pros and Cons of Drug Legalization, Decriminalization and Harm Reduction: Hearings Before the Subcomm. On Criminal Justice, Public Policy, and Human Resources of the House Comm. On Government Reform*, 106<sup>th</sup> Cong. (July 13, 1999) (testimony of R. Keith Stroup, Esq., Executive Director, NORML) (arguing for legalization of marijuana); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523 (2000); Motorcycle Riders Foundation, *Around the USA*, MRF REP., July/Aug. 2004, at 8-9 (summarizing efforts in various states to resist helmet laws); Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 B.Y.U. L. REV. 307 (1997). It is, of course, debatable whether this liberty-limiting is properly characterized

contradictions. Consent fails as a coherent or convincing justification for hard paternalism.

After more fully defining hard paternalism in Section II, I explore all the major varieties of consent-based arguments. In Section III, I discuss actual forms of consent, including "contemporaneous consent," "prior consent," and "tacit consent." In Section IV I examine conjectural forms of consent, including, "subsequent consent," "hypothetical rational consent," and "hypothetical individualized consent." I argue that all these consent arguments are torn between incoherence and lacking moral force.

In Section V, I argue that very few consent-based arguments for the justifiability of hard paternalism successfully resolve this tension. But even these arguments appeal to a notion of beneficence for their justification. But if it is beneficence that ultimately justifies hard paternalism, then for the sake of honesty and clarity, that should be transparent. In Section VI, I conclude that writers should not make strained efforts to demonstrate that the subject of hard paternalism has "consented" to the limitation of her liberty. They should, instead, calibrate the moral scales to ascertain the circumstances under which restricting liberty achieves benefits of sufficient weight to justify overriding individual liberty. A balancing framework makes explicit the tradeoffs at issue. And using such a framework will lead to clearer, more consistent, and more legitimate public policy.

## II. DEFINITION OF HARD PATERNALISM

Before proceeding to examine arguments for the justifiability of hard paternalism, "hard paternalism" must be defined. If we are uncertain about the definition of hard paternalism, we cannot productively assess arguments for its justifiability.<sup>8</sup> While I have defended a definition of hard paternalism elsewhere, it is useful to review the key elements of the definition.<sup>9</sup>

Hard paternalism is the rationale for restricting a subject's liberty under the following four conditions. The first definitional condition of hard paternalism requires that the paternalistic agent act intentionally and actually limit the subject's liberty.<sup>10</sup> As Gerald Dworkin explains, "P acts paternalistically toward Q if and only if . . . P's act is a limitation of Q's autonomy or liberty."<sup>11</sup> A necessary condition of hard paternalism is that the agent intentionally limits the subject's liberty.<sup>12</sup> Limitation should be construed broadly. It is sufficient that

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as hard paternalism. Still, while other rationales (e.g. harm to others, social welfare, allocative fairness, moralism, efficiency) might be applicable in a certain case, it is important to have the conceptual and normative structure of hard paternalism developed; so that *when and where* it is applicable, we can assess its applicability and defend the conditions for its justifiability.

<sup>8</sup> See Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 680-81 (2004) [hereinafter *Definition*].

<sup>9</sup> *Id.*

<sup>10</sup> See *id.* at 684-85.

<sup>11</sup> Gerald Dworkin, *Paternalism*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 564 (Robert Audi ed., 2d ed. 1995).

<sup>12</sup> *Id.* at 564.

the paternalistic agent intentionally acts as an obstacle to either the subject's formulation or implementation of substantially voluntary decisions.

The second definitional condition of hard paternalism requires that the agent's motive for restricting the subject's liberty is subject-focused.<sup>13</sup> Specifically, the motive must be benevolent toward the subject. As Dworkin explains, "P acts paternalistically toward Q if and only if . . . P acts with the intent of averting some harm or promoting some benefit for Q."<sup>14</sup> Van De Veer similarly explains, "[I]f A acts paternalistically he does so with an altruistic motive; he aims at promoting the good of another."<sup>15</sup> The paternalistic agent must limit the subject's liberty with the primary motive either to confer a benefit upon or to avert harm from the subject.

The third definitional condition of hard paternalism requires that the agent's motive for intervention be independent from and without regard to the subject's contemporaneous preferences.<sup>16</sup> Dworkin explains that "P acts paternalistically toward Q if and only if . . . P acts contrary to (or is indifferent to) the current preferences, desires, or values of Q."<sup>17</sup> Childress explains that the paternalistic agent acts "on" the subject's behalf but not "at" the subject's behest.<sup>18</sup>

This condition is key. It is not hard paternalism for an agent to limit the subject's liberty at the subject's request. It was not hard paternalism, for example, for Odysseus' crew to bind him to the mast.<sup>19</sup> They were merely following Odysseus' orders.<sup>20</sup> If the subject *wants* the agent to intervene and if the agent intervenes because the subject wants her to intervene, then the agent's intervention is not paternalistic.<sup>21</sup> If the agent's intervention is neither contrary to nor independent from the subject's contemporaneous preferences, then the agent's intervention is altruism, not paternalism.

The fourth definitional condition of hard paternalism requires that the agent either disregards whether the subject engages in the restricted conduct substantially voluntarily, or deliberately limits the subject's substantially voluntary conduct.<sup>22</sup> This condition distinguishes hard paternalism from soft paternalism.<sup>23</sup>

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<sup>13</sup> See *Definition*, *supra* note 8, at 694-96.

<sup>14</sup> Dworkin, *supra* note 11, at 564.

<sup>15</sup> VAN DE VEER, *supra* note 5, at 12.

<sup>16</sup> See *Definition*, *supra* note 8, at 704-07.

<sup>17</sup> Dworkin, *supra* note 11, at 564.

<sup>18</sup> JAMES F. CHILDRESS, WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE 4 n.52 (1982). Cf. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 617 (2004) ("A regulation is no less paternalistic for its happy congruence with the preferences of the regulated person, who may not even be consulted about the regulation").

<sup>19</sup> THE ODYSSEY OF HOMER BOOK XII, 189 (Harper & Row 1967).

<sup>20</sup> *Id.*

<sup>21</sup> Dworkin, *supra* note 11, at 564.

<sup>22</sup> See *Definition*, *supra* note 8, at 670-72, 708.

<sup>23</sup> See *id.*

Soft paternalism sanctions intervention only either to protect the subject from harm to which she did not consent, or to ensure or confirm that the subject really did consent to the harm.<sup>24</sup> Soft paternalism is soft because it does not call for the constraint of any “real” decisions.<sup>25</sup> Rather, it calls for the constraint of only impaired decisions, decisions that are the product of compulsion or misinformation.<sup>26</sup> Prescription drug laws, for example, have a soft paternalistic rationale. No label could be written for such drugs that would enable consumers to make substantially informed decisions to take them. Expert professional medical supervision is required to make consumers’ decisions substantially autonomous.<sup>27</sup>

Hard paternalism, on the other hand, 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. Hard paternalism doesn’t help the consumer make an informed choice—it eliminates the choice. As suggested by the examples above, hard paternalism is very controversial.

### III. ACTUAL CONSENT ARGUMENTS

#### A. Objection from Incoherence

Perhaps the paradigm case of consent is contemporaneous consent, where the subject consents to the agent’s restriction of her liberty at the time of restriction. For example, a physician might ask a patient, “Would you like me to give you something to make you feel more comfortable?” or “I need to draw some blood, okay?” If the patient understands and agrees, then the physician will promptly proceed to act on the patient.

Many writers have attacked the very coherence of consent-based arguments for the justifiability of hard paternalism. The typical objection asks: How, if the subject consents to having her liberty restricted, can a restriction of her liberty be paternalistic? After all, if the subject has consented to the interference so as to remove the normative problems, then the subject’s consent also makes the

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<sup>24</sup> Some subjects are categorically unable (or presumed to be unable) to consent. For example, children and the insane are generally considered to be proper subjects of soft paternalism. See Thaddeus Mason Pope, *Balancing Public Health against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 409, 454-66 (2000) [hereinafter *Balancing*].

<sup>25</sup> See *id.* See also *Definition*, *supra* note 8, at 667-72.

<sup>26</sup> See *Balancing*, *supra* note 24. See also *Definition*, *supra* note 8, at 667-72.

<sup>27</sup> See generally PETER TEMIN, *TAKING YOUR MEDICINE* (1980); Peter Barton Hutt, *A Legal Framework for Future Decisions in Transferring Drugs from Prescription to Non-Prescription Status*, 37 FOOD DRUG COSM. L.J. 427 (1982); Peter Temin, *The Origin of Compulsory Drug Prescriptions*, 22 J. L. & ECON. 91 (1979).

agent's interference something other than a limitation of autonomy or paternalism.<sup>28</sup>

This objection makes good sense. A definitional condition of hard paternalism requires that an agent's restriction of a subject's liberty be independent from the subject's preferences.<sup>29</sup> If the subject consents to having her liberty restricted, then, the objection goes, the agent's restriction of the subject's liberty is no longer independent from, but is, instead, dependent upon (*i.e.* pursuant to) the subject's preferences. Thus, the consent-based argument for paternalism seems to beg the question of whether hard paternalism is justifiable.

The Objection from Incoherence can be reduced to the following syllogism:

1. Hard paternalism requires (as a logically necessary condition) that the agent act independently from the subject's preferences.
2. If the agent acts pursuant to the subject's consent, then the agent is not acting independently from the subject's preferences.
3. Therefore, if the agent acts pursuant to the subject's consent, the agent is not acting paternalistically.

If the subject consents, then the agent's liberty limitation simply cannot be paternalism. The subject's consent might make the limitation justifiable. However, it doesn't answer the question of whether *hard paternalistic* restriction is justifiable, because consented—to restriction would not be hard paternalistic.

### B. Response to the Objection from Incoherence

Escape from the Objection from Incoherence is difficult. The proponent of consent-based arguments is confronted with a choice between two mutually exclusive alternatives. She is faced with a dilemma between drawing upon the justificatory force of the subject's consent, on the one hand, and having the subject's consent redefine the intervention as non-paternalism, on the other hand.

While it is possible, with additional conceptual precision, to retain the paternalistic nature of the liberty restriction; this can be done only through simultaneously losing the requisite justificatory force of the subject's consent.

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<sup>28</sup> See CHILDRESS, *supra* note 18, at 156 n.52 (1982); KULTGEN, *supra* note 4, at 116; Tom L. Beauchamp, *Medical Paternalism, Voluntariness and Comprehension*, in ETHICAL PRINCIPLES FOR SOCIAL POLICY 123, 132 (John Howie ed. 1983) [hereinafter Beauchamp, *Medical Paternalism*]; 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, 70 n.4 (Supp. 1982); David Archard, *Self-Justifying Paternalism*, 27 J. VALUE INQUIRY 341, 342 (1993); Douglas M. Husak, *Paternalism and Autonomy*, 10 PHIL. & PUB. AFFAIRS 27, 30-31 (1981); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 244 n.4 (1998); Kurt Melvin Armsden, *Paternalism: Its Scope and Limits* 94-97, 111 (1989) (unpublished dissertation) (on file with author).

<sup>29</sup> See *supra*, notes 16 to 18, and accompanying text. Furthermore, paternalism and consent have historically been presented as opposite and inconsistent notions. See, e.g., Thor v. Sup. Ct., 855 P.2d 375 (Cal. 1993); STEPHEN WEAR, INFORMED CONSENT: PATIENT AUTONOMY AND CLINICIAN BENEFICENCE WITHIN HEALTHCARE 29-48 (2d ed. 1998).

Take, for example, the standard form of the Objection from Incoherence, the case where the agent acts *pursuant* to the subject's consent. The force of the objection comes in the assumption that when the subject consents, the agent restricts her liberty *because* she consented. In other words, the Objection from Incoherence assumes that the subject's consent is the motivation for the agent's intervention.

However, this is not the only possible connection between a subject's consent and an agent's intervention. We can distinguish between (1) consent as authorization and (2) consent as the motivation or basis for an agent's restriction of a subject's liberty. The subject may give her consent, but it need not serve as the agent's motive for intervening.<sup>30</sup> The agent can act *consistent with*, but not *pursuant to*, the subject's preferences. In other words, the agent might restrict the subject's liberty. The subject might even consent to that restriction. But there need not be any *causal* connection between the two events.

The paternalistic agent and the subject may agree *that* the agent should intervene, but to be paternalistic, the agent and subject cannot agree on *why* the agent should intervene. The agent's decision to limit the subject's liberty must be independent from the subject's consent such that it is "motivationally impotent." The subject might think the agent should intervene because that is what she, the subject, wants. However, the paternalistic agent does not care that the subject wants him to intervene; it is not a relevant consideration. The paternalistic agent intervenes for his own, albeit benevolent, independent reasons. The paternalistic agent intervenes because he thinks that he knows better than the subject how the subject ought to behave.

In other words, the subject's *consent* does not *necessarily* make the agent's liberty limitation non-paternalistic. The subject's consent makes the agent's intervention non-paternalistic only if the subject's consent is the primary factor motivating the agent to intervene. If the agent was going to intervene anyway—regardless of the subject's consent—then the fact that the agent and subject merely happen to agree that the agent should intervene does not make the agent's intervention non-paternalistic.

If the subject consents and the agent does not know, or care about, the consent, then the agent's motive is still paternalistic. For example, the subject might have left a written note on her refrigerator, authorizing the agent to restrict her liberty in manner M under circumstance C. But on the occurrence of circumstance C, the paternalistic agent restricts the subject's liberty in manner M without ever having seen or read the subject's note. Under such circumstances, the subject's consent does not change the proper definition of the agent's liberty limitation as paternalistic.

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<sup>30</sup> See 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 INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP: VOLUME THREE: APPENDICES STUDIES ON THE FOUNDATIONS OF INFORMED CONSENT 63, 71 (1982) [hereinafter Dworkin, *Autonomy and Informed Consent*].



However, while the subject's consent under these circumstances does not change the paternalistic nature of an agent's intervention, neither does it add anything to the justification of the agent's intervention. The subject's consent might have some evidentiary value. But it cannot affect the justifiability of the agent's hard paternalistic intervention because it is causally unconnected to the intervention. The consent was not the reason or basis for the agent's intervention. Instead, it is just a contingent fact describing the intervention and the agent-subject relationship.

In sum, formulating a coherent contemporaneous consent-based justification for hard paternalism seems impossible. There seems to be a dilemma. On the one hand, if the subject's consent justifies the intervention, then the intervention cannot be hard paternalism. On the other hand, if the subject's consent is such that it does not change the hard paternalistic nature of the intervention, then the consent cannot have any justificatory force.

Proponents of consent-based justifications for paternalism must walk a tightrope. On the one hand, they must be careful not to allow the force of the subject's consent to make the agent's interference non-paternalistic. And, on the other hand, they must be careful to allow the consent to have enough force to produce sufficient justificatory weight. This tension pulls on consent-based arguments for hard paternalism.

### C. Prior Consent

Donald Van De Veer has offered an innovative response to the Objection.<sup>31</sup> Van De Veer's strategy is to separate (1) the subject's consent to the agent's interference from (2) the subject's preferences expressed at the time of the agent's interference.<sup>32</sup> In other words, Van De Veer relies on the subject's prior consent instead of her contemporaneous actual consent.<sup>33</sup>

Van De Veer makes two arguments which jointly comprise what he calls the "Principle of Autonomy-Respecting Paternalism" ("PARP").<sup>34</sup> PARP holds that an agent A may justifiably interfere X with a subject S where:

- (1) S has given currently operative valid consent to A to do X
- OR
- (2) S would validly consent to A's doing X if:
  - (a) S were aware of the relevant circumstances
  - AND
  - (b) S's normal capacities for deliberation and choice were not impaired

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<sup>31</sup> See generally, VAN DE VEER, *supra* note 5.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> See *id.* at 45-94.

<sup>34</sup> *Id.* at 45-94, 128-29.

Van De Veer names the first condition (1) the "Restricted Consent Principle" ("RCP").<sup>35</sup> Van De Veer names the second condition (2) the "Principle of Hypothetical Individualized Consent".<sup>36</sup> Van De Veer concedes to the Objection from Incoherence that with a subject's contemporaneous consent, an agent's intervention cannot be paternalistic.<sup>37</sup> But Van De Veer contends the Objection lacks force under some circumstances of consent.<sup>38</sup>

In his Restricted Consent Principle, Van De Veer temporally separates (1) the subject's prior consent to intervention from (2) the agent's subsequent interference with the subject's liberty.<sup>39</sup> Therefore, the agent can intervene *pursuant* to the subject's consent (given at  $T_1$ ), yet can still do so (satisfying the definitional condition of hard paternalism) *independent* from or even *contrary* to the subject's current preferences (expressed at  $T_2$ —*i.e.* those preferences contemporaneous with the intervention).<sup>40</sup>

Van De Veer's RCP proposal is examined in terms of the simplified logical form of the Objection from Incoherence:

1. Hard paternalism requires that the agent act independently from the subject's preferences.
2. If the agent acts pursuant to the subject's consent, then the agent is not acting independently from the subject's preferences.
3. Therefore, if the agent acts pursuant to the subject's consent, the agent is not acting paternalistically.<sup>41</sup>

Van De Veer distinguishes the subject's preferences in premise (1) from the subject's consent in premise (2).<sup>42</sup> Since each of these preferences or "expressions" of the subject has an independent evidentiary basis, premise (2) is false. In other words, the agent might act with the subject's (prior) consent yet still do so contrary to her (present) preferences. Therefore, argues Van De Veer, although consent-based, the agent's restriction of the subject's liberty can still be paternalistic.<sup>43</sup>

Moreover, argues Van De Veer, the paternalistic agent's intervention is *justified* because the subject's *prior* consent is still "currently operative"<sup>44</sup> so that

<sup>35</sup> *Id.* at 51-58.

<sup>36</sup> VAN DE VEER, *supra* note 5, at 75-81.

<sup>37</sup> *See id.* at 64.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 51-58.

<sup>40</sup> *See id.*

<sup>41</sup> *See* VAN DE VEER, *supra* note 5, at 51-58.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 51-58.

<sup>44</sup> *Id.* at 51, 57; *see also* HARM TO SELF, *supra* note 4, at 181-82 ("Proof that it was once validly granted . . . is a demonstration of actual consent still functioning"); Armsden, *supra* note 28, at 83-93; Valdar Parve, *Value-Neutral Paternalism*, 219 BOSTON STUD. PHIL. SCI. [ESTONIAN STUD. HIST. & PHIL. SCI.] 271, 280 (2001) ("Certainly an act committed in accordance with the recipient's self-binding consent, but contradictory to the recipient's current consent, is paternalism").

the intervention is "sanctioned interference."<sup>45</sup> In sum, Van De Veer shows that consent can justify hard paternalism without redefining it as non-paternalism.<sup>46</sup> He does this by distinguishing between *contemporaneous* actual consent and *prior* actual consent.<sup>47</sup>

It is important to note that Van De Veer's RCP allows not just any prior consent but only "currently operative" prior consent to justify paternalism.<sup>48</sup> This is an important distinction. Prior consent has the moral purchase of concurrent actual consent only when it is specific to the circumstances.<sup>49</sup> For example, Odysseus' consent to being bound to the mast retained its justificatory force even in the face of Odysseus' later contrary choices only because, having been advised by the Goddess Circe, he understood and carefully specified the circumstances under which he wanted to be restrained.<sup>50</sup>

Another example of circumstance-specific prior consent is where individuals ask their family or friends to take their car keys at a party should they drink too much.<sup>51</sup> Here, the subject's prior consent clearly anticipates the precise circumstances under which the agent might later interfere—presumably contrary to the subject's later (drunken) preferences.<sup>52</sup>

In contrast, should the subject consent to only a general *type* of treatment, her consent cannot have the same value. Beverly Woodward explains that "on a consent-based theory there must be (actual, expected, or hypothetical) consent to the *specific* kind of interference contemplated and not just a general recognition on the part of the subject of the desirability of the good which the interference is designed to protect."<sup>53</sup> To be "currently operative," the subject's prior consent must be specific to the later circumstances (under which the agent intervenes).

<sup>45</sup> VAN DE VEER, *supra* note 5, at 65, 203, 204-13, 301 n.73, 424. See also NINA NIKKU, *INFORMATIVE PATERNALISM: STUDIES IN THE ETHICS OF PROMOTING AND PREDICTING HEALTH* 69, 92 n.30 (1997); Sin Yee Chan, *Paternalistic Wife? Paternalistic Stranger?* 26 *SOC. THEORY & PRAC.* 85, 90 n.16 (2000).

<sup>46</sup> VAN DE VEER, *supra* note 5, at 49-58.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 51.

<sup>49</sup> See KULTGEN, *supra* note 4, at 138; Bailey H. Kuklin, *Self Paternalism in the Marketplace*, 60 *U. CIN. L. REV.* 649, 656-57 nn.10-16 (1992).

<sup>50</sup> See VAN DE VEER, *supra* note 5, at 294-301. Of course, Odysseus' subsequent conduct was almost certainly not substantially voluntary. He was, after all, under the admittedly coercive influence of the siren songs. *Id.* at 295. Therefore, Odysseus' crew would have been justified in keeping him bound to the mast for soft paternalistic reasons. See *id.* But even were the soft paternalism liberty limiting principle not applicable, on Van De Veer's theory, Odysseus' prior consent would have legitimized his crew's hard paternalistic intervention.

<sup>51</sup> See, e.g., Carter, *supra* note 4, at 134-36.

<sup>52</sup> See *id.* Another example is where an injured patient recognizes that without physical therapy she will never walk again. In light of this, she concludes that walking is more important than avoiding pain and asks to be "forced" to undergo therapy, even against her inevitable protestations. See John K. Davis, *Precedent Autonomy and Subsequent Consent*, 7 *ETHICAL THEORY & MORAL PRAC.* 267, 276 (2004).

<sup>53</sup> Woodward, *supra* note 28, at 73. See also John Harris & Kirsty Keywood, *Ignorance, Information and Autonomy*, 22 *THEORETICAL MED.* 415, 421 (2001) ("Ignorance of crucial

The problem is that empirical research shows that people have great difficulty anticipating later circumstances with sufficient specificity.<sup>54</sup> While prior consent (sometimes referred to as self-paternalism) may be coherent,<sup>55</sup> it has limited applicability.<sup>56</sup>

For example, while motorcyclists might vote for the democratic representatives who later enact public health regulations, they never gave any specific consent to, for example, a helmet restriction.<sup>57</sup> In these circumstances, the motorcyclist's prior consent is not "currently operative," and lacks justificatory force.<sup>58</sup> The same vagueness plagues the prior-consent argument for most other cases of hard paternalism. Currently operative prior consent is a valid means of using a subject's consent to justify hard paternalistic intervention. However, it is, as a practical matter, rarely applicable.

#### D. Tacit Consent

Local conventions establish all sorts of unstated conduct as providing valid consent. This sort of consent, either expressed by omissions or inferred from actions, is typically referred to as "tacit consent."<sup>59</sup> Professor Craig Carr explains

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information is inimical to autonomy . . . where the individual is ignorant of information that bears upon rational life choices she is not in a position to be self-governing"); Barbara Pinto, *Automatic Consent*, ABC NEWS, June 1, 2004 (reporting criticism of the R-card on the grounds that parents would not know what films their kids would be watching while not chaperoned). *But cf.* George W. Rainbolt, *Prescription Drug Laws: Justified Hard Paternalism*, 3 *BIOETHICS* 45, 50-51 (1989) (arguing that metaknowledge, knowledge of the extent of one's knowledge of specific facts, though not the specific facts themselves, is sufficient for consent).

<sup>54</sup> See, e.g., Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, HASTINGS CTR REP., Mar./Apr. 2004, at 30.

<sup>55</sup> See HARM TO SELF, *supra* note 4, at 186.

<sup>56</sup> See *id.* at 82. Most typical cases of prior consent are cases where the paternalistic intervention is already justified as soft, not hard, paternalism. Indeed, this may even be necessary because, otherwise, it would be unclear why an earlier substantially voluntary choice should trump a later substantially voluntary choice. *Cf.* Mikko Weinberg, *Modeling Hypothetical Consent*, 17 *J. LIBERTARIAN STUD.* 16, 22-24 (2003). One answer is that the earlier choice also includes a "resolution preference" concerning how to resolve the conflict. See Davis, *supra* note 52, at 274. But even the more cogent articulations of this position "are limited to where the agent's competence declines . . . substantially over time." *Id.* at 275. "[P]recedent autonomy occurs only when the agent is earlier able to comprehend a choice he cannot later comprehend." *Id.* at 289.

<sup>57</sup> See, e.g., *Abate of Georgia v. State*, 137 F. Supp. 2d 1349 (N.D. Ga. 2001) (dismissing case challenging constitutionality of helmet law); *Balancing*, *supra* note 24, at 435-37 (collecting legal challenges to helmet laws); A. Barton Hinkle, *Bare-Headed Pursuit of Happiness Should Be Rider's Choice*, RICHMOND-TIMES DISPATCH, Jan. 23, 2001, at A11.

<sup>58</sup> VAN DE VEER, *supra* note 5, at 251. See also *Balancing*, *supra* note 24. Obviously, the use of consent in the democratic and legislative context is more complicated than in the one-on-one context. Alas, a systematic analysis of the differences is beyond the scope of this article.

<sup>59</sup> See, e.g., HARM TO SELF, *supra* note 4, at 183-84. Beauchamp and Childress employ the term "tacit consent" to refer to only the case where an inference is made from the subject's (passive) omission. See PRINCIPLES, *supra* note 1, at 128. Childress uses the separate term "implicit

that “[i]ndividual actions or general action plans will signal consent when they are embedded in a social context that identifies them as actions associated with participation in some rule-governed activity or association.”<sup>60</sup>

At an auction, for example, just by raising one’s hand during the bidding one consents to purchase the auctioned item at the price of the current bid. In other situations, a nod of the head will signal consent. In still other situations, the signal of consent might come from more involved participation. For example, were someone to play the first three innings in a softball game, we would understand that person to have consented to play the whole game, and to do so according to the rules.<sup>61</sup>

If tacit consent can substitute for actual explicit contemporaneous consent, then there seems to be no reason why tacit consent cannot act as a full substitute for any other form of consent.<sup>62</sup> Therefore, as long as the evidentiary basis for inferring consent is sufficiently well-grounded in social conventions, a subject’s consent can be tacit. Tacit consent is like an American Express Traveler’s Cheque: it’s as good as cash, or as good as the real thing. Nevertheless, tacit consent refers only to the vehicle of expression and not to the “content” of consent. While a subject’s consent may be *expressed* tacitly, that does not reach the more difficult normative question: What sort of consent (however it is expressed) can justify hard paternalistic liberty limitation? Consequently, the normative value of a subject’s tacit consent will depend on the sort of actual consent (*e.g.* actual contemporaneous, prior) that it represents.

#### IV. CONJECTURAL CONSENT ARGUMENTS

So far I have examined three forms of *actual consent*: contemporaneous consent; prior consent; and tacit consent. I concluded that only prior explicit consent and, by extension, prior tacit consent, can justify hard paternalistic intervention—and even then, in only very limited circumstances. Now, I examine *conjectural forms* of consent.

Legal and philosophical writers have found conjectural consent arguments strained and unconvincing.<sup>63</sup> They can, as Bailey Kuklin, observes, “run

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consent” to refer to the case where an inference is made from the subject’s (active) action. *See also* CHILDRESS, *supra* note 18, at 80-82.

<sup>60</sup> Craig L. Carr, *Tacit Consent*, 4 PUB. AFF. Q. 335, 337 (1990).

<sup>61</sup> *See* Daniel Brudney, *Hypothetical Consent and Moral Force*, 10 LAW & PHIL. 235, 263-64 (1991); Carr, *supra* note 60, at 338 (using the examples of chess and tennis); *id.* at 342 (“We presume in large measure that an ordinary person living an ordinary life will come to grasp the social meaning of a great many of the participatory acts and action plans present in his or her society”).

<sup>62</sup> *See* HARM TO SELF, *supra* note 4, 183-84, 186; NIKKU, *supra* note 45, at 107-09, 111; VAN DE VEER, *supra* note 5, at 173; A. John Simmons, *Consent*, in 2 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 596, 597 (Edward Craig ed. 1998); Chan, *supra* note 45, at 91, 91 n.18 (“Tacit consent justifies as well as explicit consent does”); Cynthia Stark, *Hypothetical Consent and Justification*, 97 J. PHIL. 313, 315 (2000) (“Tacit consent is a kind of actual consent”).

<sup>63</sup> KLEINIG, *supra* note 6, at 66, 132.

amuck."<sup>64</sup> Beauchamp and Childress explain that "fictions of consent . . . are misleading and dangerous."<sup>65</sup> "A justification based on consent may do more to obscure than to clarify the issues."<sup>66</sup> And John Kleinig echoes this concern, charging consent-based arguments with "ad hocery."<sup>67</sup> Kleinig writes that "some of the consent-based arguments for paternalism make nonsense of consent."<sup>68</sup>

Notwithstanding these criticisms, conjectural consent arguments pervade the legal, philosophical, and bioethical literature, and they supply the decisional framework employed by legislatures and courts.<sup>69</sup> These conjectural consent arguments include: (1) subsequent consent; (2) hypothetical rational consent; and (3) modified hypothetical consent. While these conjectural consent arguments are not subject to the Objection from Incoherence like the actual consent arguments,<sup>70</sup> they do strain for sufficient moral warrant.

### A. Subsequent Consent

Subsequent consent is what the subject gives when she signifies authorization for an agent's interference *after* the interference has *already* occurred.<sup>71</sup> What makes subsequent consent problematic is that consent requires more than acquiescence.<sup>72</sup> A subject may agree the outcome of her choice is

<sup>64</sup> Kuklin, *supra* note 49, at 660 n.23.

<sup>65</sup> PRINCIPLES, *supra* note 1, at 129.

<sup>66</sup> Tom L. Beauchamp, *Paternalism*, in ENCYCLOPEDIA OF BIOETHICS 1914, 1916 (Warren T. Reich, ed. 1996).

<sup>67</sup> KLEINIG, *supra* note 6, at 62.

<sup>68</sup> *Id.* at 132, 59 (arguing that consent "figures as a normative explanation for what are believed to be justifiable impositions"). See also HARM TO OTHERS, *supra* note 5, at 90 (disowning backward causation); HARM TO SELF, *supra* note 4, at 182-83; HETA HÄYRY, THE LIMITS OF MEDICAL PATERNALISM 118-19 (1991); KLEINIG, *supra* note 6, at 61-63; KULTGEN, *supra* note 4, at 119, 120-21, 123, 139, 224 (arguing that consent arguments "could be extended to almost any intervention by the enthusiastic paternalist" and that they go down the "road of implausibility"); NIKKU, *supra* note 45, at 81-88, 110; VAN DE VEER, *supra* note 5, at 66-70; Archard, *supra* note 28, at 342; Carter, *supra* note 4; Chan, *supra* note 45, at 90-92; John D. Hodson, *The Principle of Paternalism*, 14 AM. PHIL. Q. 61, 63 (1977); Husak, *supra* note 28, at 33; Kasachkoff, *supra* note 3, at 6-20; Rainboldt, *supra* note 53, at 57 ("This view has little plausibility"); Alan G. Soble, *Paternalism, Liberal Theory, and Suicide*, 12 CAN. J. PHIL. 335, 351 (1982); Stark, *supra* note 62, at 321 ("Only actual consent sanctions coercion"); Albert Weale, *Paternalism and Social Policy*, 7 J. SOC. POL'Y 157, 171-72 (1978); Woodward, *supra* note 28, at 70-71 n.5; Armsden, *supra* note 28, at 81, 114-48.

<sup>69</sup> One conjectural consent argument was recently explicitly incorporated into Israel's Patient's Rights Law of 1996. Israel Patient's Rights Law, ch.4 § 15(2)(c) (1996). The IPRL requires "retroactive consent" as one of three conditions that must be satisfied before a patient can be forcibly treated." For other examples, see *infra*, notes 71-164, and accompanying text.

<sup>70</sup> See *supra* notes 28-29 and accompanying text.

<sup>71</sup> See HARM TO SELF, *supra* note 4, at 173.

<sup>72</sup> See *id.*; KLEINIG, *supra* note 6, at 56-58; KULTGEN, *supra* note 4, at 138; NIKKU, *supra* note 45, at 81-88, 110.

undesirable and yet refuse to consent to interference.<sup>73</sup> “[C]onsent’ in the sense of mere psychological willingness or passive acquiescence is not *authorization*; it does not transfer responsibility for A’s act jointly to B.”<sup>74</sup>

Take the case of Donald “Dax” Cowart. Dax was terribly burned in a propane gas explosion.<sup>75</sup> For the next fourteen months, Dax endured very painful burn treatments.<sup>76</sup> During those fourteen months, Dax repeatedly demanded that he be allowed to die.<sup>77</sup> Yet, despite his deliberate decision to die, treatment was forced upon him against his own wishes and for his own good.<sup>78</sup> The doctors explained, “[w]e don’t believe you really want to die. . . . It’s just your pain and depression talking. One day you’ll thank us for this.”<sup>79</sup>

Dax Cowart ultimately acquiesced in the “new” life that his doctors provided for him.<sup>80</sup> He later married, earned his law degree, and is glad to be alive.<sup>81</sup> Nevertheless, Dax has made it clear that: “If at this moment, I found myself in the same or similar circumstances . . . my decision would be the same.”<sup>82</sup> In every interview that he has given, Dax is very clear that he does not find *justified* what the doctors did.<sup>83</sup> Nor does he forgive their paternalistic intervention.<sup>84</sup>

20/20: Do you believe the doctors made the right decision to treat you, knowing now what you’ve been able to do, the person you’ve been able to become?

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<sup>73</sup> HARM TO SELF, *supra* note 4, at 173.

<sup>74</sup> *Id.*

<sup>75</sup> Lonnie D. Kliever, *Preface to DAX’S CASE: ESSAYS IN MEDICAL ETHICS AND HUMAN MEANING*, at xi, xi (Lonnie D. Kliever ed. 1989).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* Contrast this with the consent to treatment that was famously found to be implied in *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907). In that case, the patient was unconscious and expressed no preferences, much less substantially voluntary preferences against treatment.

<sup>78</sup> *Id.*

<sup>79</sup> Alice Steinbach, *Please Let Me Die: Dax’s Story*, *BALT. SUN*, Apr. 26, 1998, at 10E. Notwithstanding the doctors’ implications that Dax was incompetent, it appears that Dax’s demands to die were substantially autonomous. See JUDITH AREEN ET AL., *LAW, SCIENCE AND MEDICINE* 1112-17 (1984) (transcript of videotaped interview of Dax conducted by Robert B. White, M.D., at the time of treatment).

<sup>80</sup> See generally AREEN ET AL., *supra* note 79, at 1117 n.1; KLIEVER, *supra* note 75, at xi; Tonya Eippert, *A Proposal to Recognize a Legal Obligation on Physicians to Provide Adequate Medication to Alleviate Pain*, 12 J. L. & HEALTH 381, 398 (1998).

<sup>81</sup> Eippert, *supra* note 80, at 398.

<sup>82</sup> Pamela Spencer, *Patient Rights Advocate Speaks at Michigan State U.*, *U-WIRE*, Oct. 18, 1999.

<sup>83</sup> See, e.g., AREEN, *supra* note 79, at 1112-17.

<sup>84</sup> See, e.g., *id.*; James F. Childress & Courtney C. Campbell, “Who Is a Doctor to Decide Whether a Person Lives or Dies?” *Reflections on Dax’s Case*, in *DAX’S CASE: ESSAYS IN MEDICAL ETHICS AND HUMAN MEANING* 23-41 (Lonnie D. Kliever, ed. 1989); Christine Wicker, *Sentenced to Life—Dax Cowart Crusader for Right to Die*, *HOUS. CHRON.*, May 21, 1989, at 9.

Dax: No, they made the wrong decision. . . . I think their heart was pure, but they were wrong.<sup>85</sup>

Baltimore Sun: Do you still wish you'd been allowed to die?

Dax: The best I can answer is that I'm glad to be alive. I've had some happy experiences I wouldn't have had if I had died. But I still believe I should have been the one to make that choice at that time. And my choice was to refuse treatment. If the same thing were to happen today—even knowing that I could reach this point—I would still make the same choice.<sup>86</sup>

But even if Dax had given his subsequent approval—"Thank you, doctor. You were right and I'm glad you made me endure those burn treatments"—and in such a way that it was substantially voluntary,<sup>87</sup> would that justify the paternalistic intervention? Or, instead, would it simply make the doctors less blameworthy?

The consensus is that subsequent consent can only affect the agent's culpability and never his responsibility.<sup>88</sup> Feinberg explains, "B's forgiveness cannot change history or magically recreate the past. Her forgiveness now has a point only because there *is* something to forgive."<sup>89</sup> In other words, the agent did not act *with* the subject's consent at the time he intervened.<sup>90</sup> The subject's subsequent *approval*, even if forthcoming, is not equivalent to subsequent *consent*.<sup>91</sup>

Subsequent consent, in short, "come[s] too late to be morally operative at the time the decision to intervene must be made. If it does come at a later time, it

<sup>85</sup> *ABC News 20/20, A Man of Endurance*, (ABC television broadcast, Mar. 22, 1999) available at 1999 WL 6790606.

<sup>86</sup> Alice Steinbach, *Dax's Story: This Office Needed Dax. The Office Was Drifting, and He Has Brought Us Together*, *BALT. SUN.*, Apr. 29, 1998, at 1E (quoting Dax's response to a student's question at a question and answer forum at Texas A & M University).

<sup>87</sup> See RONALD M. DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 218, 269 (2000); Carter, *supra* note 4, at 139-42 (listing conditions that would vitiate the voluntariness of subsequent consent). John K. Davis suggests that subsequent consent cannot justify hard paternalism because it is "limited to cases where the consenting party enjoyed a substantial increase in mental competence after the interference and before giving subsequent consent." Davis, *supra* note 53, at 283. See also *id.* at 288 ("Cases of genuine subsequent consent require a significant increase in competence over time, are therefore probably rare, perhaps confined to occasional situations involving very young children or adults suffering serious but temporary mental impairment").

<sup>88</sup> See generally ALAN DONAGAN, *THE THEORY OF MORALITY* (1977); Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 137-38 n.17 (Rolf Sartorius ed. 1983) ("[R]etropective consent is neither a necessary nor a sufficient condition for the justifiability of paternalistic intervention").

<sup>89</sup> *HARM TO SELF*, *supra* note 4, at 182.

<sup>90</sup> KLEINIG, *supra* note 6, at 63.

<sup>91</sup> *Id.*



cannot have the effect of retroactively warranting the prior intervention."<sup>92</sup> John Kleinig explains: "If any rights were violated, they were violated, not when consent was not subsequently given, but when the person was initially interfered with. The so-called subsequent consent does not alter that, for it is not, in any nonpersuasive sense, a form of consent."<sup>93</sup>

Subsequent consent is interesting because the subject gives (or purports to give) express or tacit consent to the agent's intervention. Still, subsequent consent is not a form of actual consent because, coming *after* the intervention, it cannot alter the normative status of that intervention.<sup>94</sup> There must be a causal connection between the subject's consent and the agent's intervention. And, given the sequence of events, that causal connection is lacking where the subject gives subsequent consent.

For example, suppose a physician, in a non-emergency situation, seized, sedated, and operated on a patient, thereby successfully curing a condition for which the patient had not sought treatment. The patient's subsequent consent to the intervention, upon her being later informed of her medical condition and the reason for the operation, would not justify the earlier intervention.<sup>95</sup> Indeed, Sin Yee Chan argues that not only does subsequent consent fail to justify paternalistic intervention, but it does just the opposite: it "underscores the wrongness of the act forgiven."<sup>96</sup> The patient's consent emphasizes that her

<sup>92</sup> HARM TO SELF, *supra* note 4, at 187.

<sup>93</sup> KLEINIG, *supra* note 6, at 63.

<sup>94</sup> See PRINCIPLES, *supra* note 1, at 156 ("[R]etroactive approval is not a substitute for informed consent or refusal"); CHILDRESS, *supra* note 18, at 93 ("Because the intervention has already occurred (or at least begun), it may be misleading to describe the patient's subsequent approval as 'consent,' as though it creates rights in the same way as past or present consent"); HARM TO SELF, *supra* note 4, at 182 ("There is very little that can be done, despite the ingenious efforts of some philosophers, to extract coherence from the strange notion of 'subsequent consent'"); OFFENSE TO OTHERS, *supra* note 5, at 90 (disowning backward causation); Peter Gardner, *Paternalism and Consent in Education*, 17 J. PHIL. & EDUC. 57, 62 (1983) ("Talk of subsequent consent is somewhat odd because consenting, like giving permission and granting, is concerned with the present or future"); David Gordon, *Comment on Hospers*, 4 J. LIBERTARIAN STUD. 267, 272 (1980) (thankfulness and even a change of mind is not consent); Donald Van De Veer, *Paternalism and Subsequent Consent*, 9 CAN. J. PHIL. 631, 638 (1979) (calling subsequent consent a "philosophical fiction").

<sup>95</sup> See RESTATEMENT (SECOND) OF TORTS § 15 cmt. a, illus. 1 (1965).

A has a wart on his neck. His physician, B, advises him to submit to an operation for its removal. A refuses to do so. Later A consents to another operation, and for that purpose is anesthetized. B removes the wart. The removal in no way affects A's health, and is in fact beneficial. A has suffered bodily harm.

*Id.* This is consistent not only with tort law but also with criminal law. A victim's subsequent consent is ordinarily not a defense to a criminal prosecution unless consent is an element of the offense. See generally CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 46 (15<sup>th</sup> ed. 1993); BERNARD WITKIN, *CALIFORNIA CRIMINAL LAW: DEFENSES* § 87 (3d ed. 2000).

<sup>96</sup> Chan, *supra* note 45, at 88.

autonomy (as a right) was violated and serves only as *evidence* of whether the intervention was justified.<sup>97</sup>

In sum, if subsequent consent is to have any justificatory force, it must come from the force that such consent might have only *at the time* of the intervention. James Childress makes this point by arguing that the subject might die before having the opportunity to signify her consent. The subject's death under such circumstances would produce the odd result that the intervention would be unjustified as a result of an arbitrary event.<sup>98</sup> The defender of subsequent consent is forced to respond that what is really required is not the subject's subsequent *actual* subsequent consent but her *anticipated* consent.<sup>99</sup> Thereby, subsequent consent reveals itself to be, at bottom, a form of hypothetical consent argument. So, we turn now to examine that argument.<sup>100</sup>

<sup>97</sup> See JAMES F. CHILDRESS, PRACTICAL REASONING IN BIOETHICS 130 (1997) [hereinafter CHILDRESS, PRACTICAL REASONING] ("An appeal to future ratification is insufficient to justify paternalistic interventions, and it is also unnecessary to justify such actions"); *id.* at 63-64 ("[A]ctual or predicted future consent is neither necessary nor sufficient to justify interventions against current choices. At most a patient's probable future consent may provide *evidence* that the criteria for justified paternalistic interventions have been met") (emphasis added); KULTGEN, *supra* note 4, at 121 (arguing that subsequent approval "has a certain *epistemological value* for the agent" but that this "does not add to the justification of the action") (emphasis added); Shimon M. Glick, *The Morality of Coercion*, 26 J. MED. ETHICS 393, 393 (2000); Wennberg, *supra* note 56, at 21.

<sup>98</sup> See, e.g., CHILDRESS, *supra* note 18, at 96.

<sup>99</sup> See, e.g., HARM TO SELF, *supra* note 4, at 182 ("Most of the work assigned to this concept can be handled adequately by the notion of dispositional consent. . . . The 'subsequent consent theory' . . . holds that when we intervene we are 'betting' our moral capital on the other's subsequent consent."); Davis, *supra* note 53, at 271-72 ("The preference expressed in subsequent consent arrives too late; at best, one can act on *anticipated* subsequent consent"); *id.* at 286 ("[I]t makes more sense to speak of being authorized by *anticipated* subsequent consent"); Shimon M. Glick, *Unlimited Human Autonomy—A Cultural Bias?* 336 NEW ENG. J. MED. 954-56 (1997). One more recent defender of subsequent consent concedes: "it's your present expectation of future consent that matters, not the actual future consent." Eric Lee-Kuo Chwang, *The Duty Against Paternalism* 222 (unpublished dissertation 2003). Chwang further concedes that "the most reasonable expectation about subsequent consent won't be high enough to reach whatever threshold you think is sufficient to justify your action." *Id.* at 221.

<sup>100</sup> Philosophers offer anticipated and dispositional consent as distinct forms of consent that can justify paternalistic intervention. Compare KLEINIG, *supra* note 6, at 59-61; KULTGEN, *supra* note 4, at 139, 202; NIKKU, *supra* note 45, at 106-07; Armsden, *supra* note 28, at 123; Husak, *supra* note 28, at 34, with GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 87-90 (1988) [hereinafter DWORKIN, AUTONOMY]; ALAN GEWIRTH, REASON AND MORALITY 259 (1978); KULTGEN, *supra* note 4, at 122; Michael D. Bayles, *Book Review*, 7 L. & PHIL. 107, 114 (1988) (reviewing JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW (1986)); Dworkin, *Autonomy and Informed Consent*, *supra* note 30, at 77-78. But these arguments are not substantially distinguishable from either hypothetical rational consent or hypothetical individualized consent arguments. If the agent anticipates the subject's consent or supposes that the subject was disposed to consent, it must be, on the one hand, because the agent knows (or thinks he knows) the subject's settled preferences on this matter. See HARM TO SELF, *supra* note 4, at 173 ("Dispositional consent then is not actual consent, and can only be presumed, not known"); *id.* at 174 (in dispositional consent there is no opportunity to obtain consent and circumstances

## B. Hypothetical Rational Consent

Some philosophers and legal theorists employ the notion "hypothetical rational consent" to justify interventions for a person's own good when actual consent is not forthcoming.<sup>101</sup> Actual consent is not forthcoming because, at the time of intervention, the individual prefers that there be no intervention. Her "hypothetical consent" is obtained by presuming, in spite of or without regard to her (possibly contrary) contemporaneously expressed preferences, that *if* she truly understood the risks or were wholly free of voluntariness-reducing factors, then she *would* consent because that would be the *rational* thing to do.<sup>102</sup> This sort of consent is called "hypothetical rational consent,"<sup>103</sup> "objective hypothetical consent,"<sup>104</sup> or the "'real will' argument."<sup>105</sup>

Perhaps the most famous exposition of a hypothetical rational consent argument for hard paternalism appears in John Rawls' *A Theory of Justice*, where Rawls argues that parties in the original position will not acknowledge "duties to self."<sup>106</sup> He writes:

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make it fair to infer); *id.* at 324. If so, then that is a case of individualized hypothetical consent. If, on the other hand, the agent anticipates the subject's consent because the agent considers that is the rational thing to do, then that is a case of hypothetical rational consent. See KULTGEN, *supra* note 4, at 222-23 (finding dispositional consent "problematic," an "untenable thesis of post facto justification," and a theory that goes "down the road of implausibility"); Gewirth, *supra* note 100, at 260 (observing that "the appeal to dispositional consent may be used in a paternalistic way to justify acting on recipients without regard for their actual desires or beliefs or occurrent consent (or dissent)").

<sup>101</sup> See, e.g., DWORKIN, AUTONOMY, *supra* note 100, at 88-89; BERNARD GERT ET AL., BIOETHICS: A RETURN TO FUNDAMENTALS 249 n.18 (1997); KLEINIG, *supra* note 6, at 63-67; KULTGEN, *supra* note 4, at 139, 202; NIKKU, *supra* note 45, at 89-90; JOHN RAWLS, A THEORY OF JUSTICE 249 (1971); VAN DE VEER, *supra* note 5, at 70-75; Richard J. Arneson, *Mill Versus Paternalism*, 90 ETHICS 470, 474 (1980); Hodson, *supra* note 68, at 63; Marion Smiley, *Paternalism and Democracy*, 23 J. VALUE INQUIRY 299, 304-06 (1989); Armsden, *supra* note 28, at 82, 119-20.

<sup>102</sup> See BEAUCHAMP, *supra* note 1, at 414 ("[T]he justification of the position rests on the argument that completely rational agents fully aware of their circumstances would 'consent to paternalism' and would consent to a scheme of penalties that would deter them from any motive to undertake a foolish action"); ISALAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 133 (1969) ("[T]hey would not resist me if they were as rational and as wise as I and understood their interests as I do"); Mark Sagoff, *Values and Preferences*, 96 ETHICS 301, 307 (1986) ("An advocate . . . might argue that we would surely agree with him, if only our heads were screwed on right"); Wennberg, *supra* note 56, at 17 ("Arguments based on hypothetical consent are widely used . . . these arguments have become popular in legal theory as well").

<sup>103</sup> Lewis, *supra* note 4, at 797.

<sup>104</sup> *Id.*

<sup>105</sup> KLEINIG, *supra* note 6, at 58-59, 63-67.

<sup>106</sup> RAWLS, *supra* note 101, at 248. Joel Feinberg notes that it is unclear if Rawls defends hard paternalism or soft paternalism because it is unclear what sorts of encumbrances Rawls has in mind. HARM TO SELF, *supra* note 4, at 185-86. I contend that the same ambiguity is true of many other philosophers. Many who appear, at first sight, to be soft paternalists because they appeal to some cognitive or volitional defect in the subject are, after all, not necessarily soft paternalists. Not every appeal to a lack of voluntariness is automatically a soft paternalistic argument because not all lacks of voluntariness make the subject's conduct non-substantially voluntary. See KLEINIG, *supra*

It is also rational for them to protect themselves against their own irrational inclinations by consenting to a scheme of penalties that may give them a sufficient motive to avoid foolish actions and by accepting certain impositions designed to undo the unfortunate consequences of their imprudent behavior.

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note 6, at 69; David Archard, *For Our Own Good*, 72 AUSTRALIAN J. PHIL. 283, 290 (1994); Hodson, *supra* note 68, at 62. Many writers assume that all appeals to impairment, encumbrance, or lack of voluntariness are necessarily arguments properly characterized as soft paternalism. This is wrong. Surely, not everything short of full voluntariness is soft paternalism. This is why I follow Faden and Beauchamp, and Beauchamp and Childress, in employing a threshold standard "substantial voluntariness." Hard paternalists also appeal to epistemic and volitional defects in making their justificatory case. *See, e.g.*, TOM L. BEAUCHAMP & LAURENCE B. MCCULLOUGH, *MEDICAL ETHICS: THE MORAL RESPONSIBILITIES OF PHYSICIANS* 97 (1984) ("[T]he typical 'strong paternalist' refer to factors that influence or fail to influence. . . . There is rarely a naked appeal to a . . . paternalistic interest"); *id.* at 98 ("[T]he justifying reasons used by an alleged strong paternalist may turn out to be similar in kind to those used by weak paternalists . . . . That is, the appeal may in the end be to inordinately powerful psychological or situational factors.") This is true even for what Beauchamp and McCullough call "cases of strong medical paternalism" in "pure form." *See also* HETA HÄYRY, *INDIVIDUAL LIBERTY AND MEDICAL CONTROL* 31 (1998); Beauchamp, *Medical Paternalism*, *supra* note 28, at 139 ("[T]he strong paternalist . . . will ultimately agree that the fundamental consideration that makes legitimate apparently paternalistic interventions is the substantially nonautonomy of a particular agent. . . . There will seldom if ever be a naked appeal to a beneficent paternalistic interest, unqualified by considerations of limited capacity or knowledge"); Tom L. Beauchamp, *Paternalism and Refusals to Sterilize*, in *RIGHTS AND RESPONSIBILITIES IN MODERN MEDICINE: THE SECOND VOLUME IN A SERIES ON ETHICS, HUMANISM, AND MEDICINE* 137, 140 (Marc D. Basson ed. 1981) ("The grounds are that some agents capable of autonomous decisions do not *know* their own best interests despite possessing adequate information about their situation and despite being substantially voluntary") (emphasis added). So, we must examine the defects more carefully and more precisely in order to determine *which* defects makes an appeal soft paternalistic and which defects make an appeal hard paternalistic. Murphy appeals to "incompetence"; Hodson appeals to "encumbrance"; H. L. A. Hart refers to "defects"; Thompson requires "impairment". Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, in *ETHICS TEACHING IN HIGHER EDUCATION* 245, 250-51 (Daniel Callahan & Sissela Bok eds. 1980). *See also* KULTGEN, *supra* note 4, at 226; Dan Brock, *Paternalism and Promoting the Good*, in *PATERNALISM* 237, 244 (Rolf Sartorius ed. 1983). It is unclear whether these concepts correlate precisely to soft paternalism. These concepts might be broader such that they cover both soft paternalism and hard paternalism. Robert Young observes that some commentators have construed Gerald Dworkin as defending hard paternalism. ROBERT YOUNG, *PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY* 63, 69 (1986). Young, however, thinks that Dworkin is defending only soft paternalism. *Id.* However, no such limit is explicit in Dworkin's writings. Moreover, even if he *purported* to justify only soft paternalism (something for which there is no evidence), that does not mean that his argument is thus limited. George Rainboldt is wrong to assume that the "idea behind them all is the same" and that the existence of any of these factors makes interference soft paternalism. Rainboldt, *supra* note 53, at 46. However, Rainboldt's assumption is not surprising in light of the fact that, as he explains, his "discussion draws primarily on Joel Feinberg's explication of the concept" of voluntariness. *Id.* at 46 n.6.

Others are authorized and sometimes required to act on our behalf and to do what we would do for ourselves if we were rational, this authorization coming into effect only when we cannot look after our own good.<sup>107</sup>

Notwithstanding its distinguished pedigree, the framing of hypothetical rational consent as an enterprise of what a person *would* do if rational and informed is misleading.<sup>108</sup> The argument relies not (as it purports to rely) upon the supposition that the individual *would* consent but instead relies upon the supposition that she *should* consent.

There is a strong normative judgment that persons *ought* to be rational and, moreover, be rational in a certain way.<sup>109</sup> Gerald Dworkin, a leading exponent of hypothetical rational consent,<sup>110</sup> admits that "there is always a danger of the dispute over agreement and rationality being a disguised version of evaluative and normative disagreement."<sup>111</sup> Hypothetical rational consent *masks* a disagreement about the dangerousness and/or value of the underlying conduct.<sup>112</sup>

The notion of "rationality" is, after all, necessarily infused with subjective values.<sup>113</sup> As Douglas MacLean explains:

<sup>107</sup> RAWLS, *supra* note 101, at 249.

<sup>108</sup> See KLEINIG, *supra* note 6, at 63 ("[A]ny pretense of actual consent is abandoned and replaced by what is effectively a concern with rationally justifiable interferences"); Beauchamp, *Paternalism*, *supra* note 66, at 1916 ("A justification based on consent may do more to obscure than to clarify issues").

<sup>109</sup> Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 119 (Richard A. Wasserstrom, ed. 1971).

<sup>110</sup> See *id.* at 118-26; DWORKIN, *AUTONOMY*, *supra* note 100, at 76-78, 124-29.

<sup>111</sup> Dworkin, *Paternalism*, *supra* note 109, at 120; see also Gardner, *supra* note 94, at 69 ("[H]ypothetical consent, as a justificatory device, is redundant"); Smiley, *supra* note 101, at 304-06.

<sup>112</sup> See Smiley, *supra* note 101, at 315.

<sup>113</sup> See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 203, 229 (1978) ("In assuming such consent, all the biases afflicting the [agent's] perspective are in force"); CHILDRESS, *PRACTICAL REASONING*, *supra* note 97, at 137 ("[I]t may be unjustifiably paternalistic, or imperialistic, to interpret a patient's story through a larger narrative pattern that *blurs* his or her own identity and individuality") (emphasis added); HARM TO OTHERS, *supra* note 5, 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") (emphasis added); *id.* at 112, 188 (positing a "standard person"); *id.* at 192, 216, 35; HARM TO SELF, *supra* note 4, at 184 ("[Hypothetical rational consent] is the notion that we can ascribe to a person as his actual consent what a hypothetical, perfectly rational person *would* consent to in his circumstances. The assumption behind this attribution seems to be the claim, which we have repeatedly rejected, that only rational (ideally reasonable) action is voluntary."); JOEL FEINBERG, *HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW* 142 (1988) (arguing that "limiting the jury of reasonable persons to those who have the *appropriate* moral qualifications" would be a "flagrantly circular procedure") (emphasis added); KLEINIG, *supra* note 6, at 63 ("There is a tendency for the rational individual to reflect the understanding and values of upholders of power or dominant ideology. [The Argument from Hypothetical Rational Consent] is therefore prey to idiosyncrasy and partisan constructions"); *id.* at 139-40 ("[M]ost judgments of mental illness have a strongly ideological

In order to yield any answer at all to the question of what a rational person would choose under ideal conditions, we must assume much more about that person than formal conditions of rationality, such as consistency. These further conditions will include assumptions about the values of a rational person.<sup>114</sup>

Duncan Kennedy similarly explains:

There is no clear line between what the parties 'would have decided had they adverted to this issue,' 'what reasonable people would have decided had they adverted to this issue,' and 'what the parties *should* have decided had they adverted to this issue.'<sup>115</sup>

In short, through its reliance on rational consent, hypothetical rational consent shrinks to the vanishing point any gap between "valid consent" and "wise consent."

This shrinkage is illustrated in a recent medical battery case decided by the Kentucky Court of Appeals.<sup>116</sup> In 2000, Eva Hoofnel "underwent a colonoscopy, which revealed a lesion in her lower rectum."<sup>117</sup> Hoofnel's physician recommended that in addition to colon surgery to remove the lesion, Hoofnel

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character: they tell you more about the values of the person making the judgments than about the condition of those in relation to whom the judgments are made"); KULTGEN, *supra* note 4, at 123 ("[T]he consent of the imaginary rational person has nothing to do with the actual subject . . . [and] adds nothing to the justification of an intervention in the actual person's life"); *id.* at 124 ("What she thinks the rational judge would decide is precisely what she thinks is rational by her own standards"); RAWLS, *supra* note 101, at 249 ("As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position"); YOUNG, *supra* note 106, at 67 ("Whether we acknowledge distortion or not tends to turn on what we *value*. This may circularly lead us to apply our conception of the good for a person as a criterion for the proper objects of rational and informed consent"); Douglas MacLean, *Introduction to VALUES AT RISK 5* (Douglas MacLean ed. 1986) ("As the kind of consent becomes more indirect, the role of rationality becomes correspondingly more important"); Brudney, *supra* note 61, at 260 ("[I]f a decision is to be reached by reference to the moral force of the preferences of a certain class of agents it seems important to explain why the preferences of that class are key"); Lewis, *supra* note 4, at 803 ("[I]f objective hypothetical consent is used to connote what abstract people in a state of nature would consent to, then this choice is determined by the properties *ascribed* to these abstract people") (emphasis added); Rainboldt, *supra* note 53, at 57 ("[W]e must define the character of the fully rational agent. . . . Any definition of 'fully rational' would impose values on those who do not fit the definition"); Thompson, *supra* note 106, at 263 ("To justify paternalism, we cannot appeal to what *rational* persons in general would desire if we can determine what a *particular* person would want in the circumstances") (emphasis added); Wennberg, *supra* note 56, at 29; Woodward, *supra* note 28, at 74.

<sup>114</sup> Douglas MacLean, *Risk and Consent: Philosophical Issues for Centralized Decisions*, in *VALUES AT RISK* 17, 25 (Douglas MacLean ed. 1986).

<sup>115</sup> 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, 637 (1982).

<sup>116</sup> Hoofnel, 2004 WL 911794.

<sup>117</sup> *Id.* at \*1.

should also undergo an appendectomy (to remove her appendix), an oophorectomy (to remove her ovaries), and a hysterectomy (to remove her uterus) because of the tendency of such organs to become cancerous.<sup>118</sup> Hoofnel agreed to the colon surgery and appendectomy, but explained "that she did *not* want her uterus or ovaries removed."<sup>119</sup> Nevertheless, during surgery, Hoofnel's physician "performed a hysterectomy and an oophorectomy."<sup>120</sup> Hoofnel filed a complaint alleging battery.<sup>121</sup> But the trial court granted the physician's motions for summary judgment.<sup>122</sup>

The appellate court affirmed the trial court, holding that there was no issue of material fact concerning whether Hoofnel had consented to the operations.<sup>123</sup> The appellate court explained that "no reasonable patient would have refused consent to having her ovaries removed in consideration that such consent would have been in her overwhelming best interest."<sup>124</sup> Cancer is a dreaded disease, and Hoofnel was a 56-year-old post-menopausal woman to whom, the court explained, her "uterus and ovaries were of no further utility."<sup>125</sup> Therefore, the court concluded that "there was implied or presumed consent to the removal of the ovaries."<sup>126</sup>

But, as the dissenting justice notes, "[w]hether or not the so-called 'reasonable person' in Hoofnel's position would have consented is not the relevant inquiry."<sup>127</sup> The relevant question is whether *this* patient in fact consented to undergo the procedure.<sup>128</sup> Similarly, whether or not the procedure was in Hoofnel's best interests is not the relevant inquiry.<sup>129</sup> Hoofnel's interests were for her to determine.<sup>130</sup>

Like the dissenting justice in *Hoofnel*, Joel Feinberg calls hypothetical consent a "a sham and an outrage" and a "dangerous counterfeit . . . of consent that cannot have the moral purchasing power of the real thing."<sup>131</sup> He is right.

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at \*1.

<sup>120</sup> *Id.* at \*2. The lead physician testified that the condition of Mrs. Hoofnel's ovaries and uterus did not present any type of emergency situation. See Motion for Discretionary Review at 4 (filed May 11, 2004).

<sup>121</sup> *Hoofnel*, 2004 WL 911794, at \*2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at \*1.

<sup>124</sup> *Id.* at \*4.

<sup>125</sup> *Id.* at \*5.

<sup>126</sup> *Hoofnel*, 2004 WL 911794, at \*4.

<sup>127</sup> *Id.* at \*6.

<sup>128</sup> *Id.* at \*5.

<sup>129</sup> *Id.* at \*5-7.

<sup>130</sup> See *id.*

<sup>131</sup> HARM TO SELF, *supra* note 4, at 187, 181. See also Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2201, 2305 (1992) ("Hypothetical consent lacks just the element that makes an act of consent morally significant; namely, consent"); Perri 6, *The Morality of Managing Risk: Paternalism, Prevention and Precaution, and the Limits of Proceduralism*, 3 J. RISK RES. 135, 144 (2000) ("[A]ppeals to likely subsequent consent or to hypothetical rational consent are

Any theory that appeals to hypothetical consent to justify paternalistic actions will justify far too much.<sup>132</sup> Almost *any* risk accepted by a subject can form the basis of an intervention on the grounds that no rational person would assume the risk.<sup>133</sup>

### C. Modified Hypothetical Consent

Recognizing the shortcomings of hypothetical rational consent, some writers have devised variations and alternatives to the argument to address these shortcomings. Even with these alternatives, the subject's consent is still hypothetical. But although "reconstructed," the subject's consent is more narrowly constrained. Rather than supposing that the subject would have consented to the paternalistic intervention because that is what an ideal or rational subject (as defined by the agent) would do, instead, on these alternative theories, the agent determines the subject's consent by reference to the subject's *own* well-established life plans.

Hypothetical individualized consent arguments have plausibility that hypothetical rational consent arguments lack. Rather than imposing "perfectionist notions of what is objectively good,"<sup>134</sup> individualized consent

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unconvincing; other authors have, in my view and that of most commentators, conclusively disposed of these arguments").

<sup>132</sup> See ALAN BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS* 36 (1989) ("A corrected preference account of individual well-being is also subject to considerable abuse, particularly if there is no adequate account of the sorts of corrections of preferences it should sanction"); HARM TO SELF, *supra* note 4, at 184-86; JONATHAN GLOVER, *CAUSING DEATH AND SAVING LIVES* 80 (1977) ("[T]his loophole cannot be stretched far without the autonomy principle collapsing into utilitarianism"); TIM GRAY, *FREEDOM* 101 (1991); DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 134-35 (1992) ("Relatively weak . . . irrationality . . . rationale for interference would open a far wider door to paternalism than almost anyone should accept"); KLEINIG, *supra* note 6, at 59 (arguing that the argument "opens the door to reconstructions that permit the overriding of any actual desire by a fictional one with a quite different character"); SUSAN MENDUS, *TOLERATION AND THE LIMITS OF LIBERALISM* 69, 94 (1989); VAN DE VEER, *supra* note 5, at 74 ("[T]he concept of a 'fully rational person' is too indeterminate . . . a logical construct"); *id.* at 70-75; Beauchamp, *Medical Paternalism*, *supra* note 28, at 131 ("[T]he identification of the 'informed rational individual' is often a *mask*. . . . The rationale for paternalistic policies is often nothing but the . . . rejection of an alternative lifestyle or set of preferences") (emphasis added); Brudney, *supra* note 61, at 235; Smiley, *supra* note 101, at 303-06; Woodward, *supra* note 28, at 75 ("Rational will arguments abstract from the specific plans, values, and beliefs of agents [such that] the contrast I have attempted to draw between consent-based and consequence-based justifications of paternalistic treatment will collapse").

<sup>133</sup> See BIOMEDICAL ETHICS, *supra* note 1, at 185; BUCHANAN & BROCK, *supra* note 132, at 56-57; CHILDRESS, *supra* note 18, at 85 ("Extended too far, the notion of consent becomes vacuous. . . . Appeals to a patient's rational will . . . are notoriously uncertain and even dangerous"); Gita S. Cale, *Continuing the Debate over Risk-Related Standards of Competence*, 13 *BIOETHICS* 131, 136 n.14 (1999); Thaddeus Mason Pope, *Is Paternalism Really Never Justified: A Response to Feinberg*, 29 *OKLA. CITY U. L. REV.* No. 3 (forthcoming 2005) (discussing analogous confusion and slippage concerning concepts such as competence).

<sup>134</sup> Michael N. Goldman & Alvin I. Goldman, *Paternalistic Laws*, 18 *PHIL. TOPICS* 65, 71 (1990).



arguments, in contrast, “place stronger theoretical and practical constraints on unwarranted paternalism by *grounding* individual well-being more squarely in the underlying and enduring aims . . . of the persons in question.”<sup>135</sup>

Notwithstanding his well-known discussion of ideal rational agents, this more individualized form of hypothetical consent may have been the sort of consent that Rawls had in mind in *Theory of Justice*:<sup>136</sup>

Paternalistic decisions are to be guided by the *individual's own settled preferences* and interests insofar as they are not irrational. . . . We must be able to argue that with the development or recovery of his rational powers the individual in question will accept our decision on his behalf and agree with us that we did the best thing for him.<sup>137</sup>

[P]aternalistic intervention must be . . . guided by the principles of justice and what is known about the *subject's more permanent aims and preferences* . . . to guarantee the integrity of their person and their final ends and beliefs whatever these are.<sup>138</sup>

But rather than unfruitfully engage in an exegesis of Rawls' work, I turn to examine the more elaborate individualized consent argument of John Hodson.

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<sup>135</sup> BUCHANAN & BROCK, *supra* note 132, at 36 (emphasis added). See also KULTGEN, *supra* note 4, at 122; NIKKU, *supra* note 45, at 90-97, 110; Danny Scoccia, *Paternalism and Respect for Autonomy*, 100 ETHICS 318, 326 (1990) (arguing that Berlin “wrongly supposes that *all* talk about a ‘rational will’ or the ‘hypothetical consent of a rational person’ is a smokescreen for imposing values on people that are quite alien to them”); Simmons, *supra* note 62, at 597 (hypothetical consent can be ideal, counterfactual, or dispositional but only the last one is genuine); Wennberg, *supra* note 56, at 24 (explaining HAI: “Actual Agent in Idealized Choice Situation”); Woodward, *supra* note 28, at 72 (offering only one consent-based criterion for hard paternalistic treatment: “that because of [the subject's] most deeply held projects and values he will consent to the treatment in the future”); *id.* at 74 (“If we are to take seriously the idea of . . . choosing as the subject herself would choose . . . we must . . . hold the [subject's] *actual* plans, values, and desires as nearly as intact as is consistent with imagining her to possess the capacity for rational consent and choice and then ask how she would choose if she possessed such capacities”) (emphasis added).

<sup>136</sup> See HARM TO SELF, *supra* note 4, at 184 (“Rawls' discussion of paternalism, however, is sketchy and does not give us clear warrant to attribute either the hypothetical rational theory of consent or the ‘reasonable will’ theory to him”). Feinberg concludes that some of Rawls' other remarks “suggest that Rawls is not prepared to go to the extreme of real-will theories.” *Id.* at 186.

<sup>137</sup> RAWLS, *supra* note 101, at 249 (emphasis added).

<sup>138</sup> *Id.* at 250 (emphasis added).

### 1. John Hodson's Principle of Paternalism

John Hodson offers his "Principle of Paternalism" to determine when paternalistic restriction is justified.<sup>139</sup> Hodson's principle requires:

1. Good evidence that the subject's decision is encumbered, and
2. Good evidence that the subject would be supportive of the intervention.<sup>140</sup>

With regard to the first condition, Hodson is unclear whether "encumbrance" pertains only to deficiencies that make a subject's conduct less than substantially voluntary.<sup>141</sup> So, it is unclear whether Hodson meant for his Principle of Paternalism to justify only soft paternalism or whether he meant it to justify both soft paternalism and hard paternalism.<sup>142</sup> Nevertheless, we can examine Hodson's Principle of Paternalism as a principle of justified hard paternalism. So, I take Hodson's first condition to represent that although "encumbered" to some degree, the subject still acts with substantial voluntariness.<sup>143</sup>

With regard to the second condition, Hodson argues that the agent must have "good evidence" that the subject would (*if* she were not encumbered) support the intervention.<sup>144</sup> In order to determine whether or not this condition is satisfied, the agent should try to determine what would be the subject's "hypothetical unencumbered decision" ("HUD").<sup>145</sup> In other words, argues Hodson, the agent should try to ascertain what the subject—though acting

<sup>139</sup> See generally Hodson, *supra* note 68.

<sup>140</sup> Hodson, *supra* note 68, at 65-67; JOHN D. HODSON, THE ETHICS OF LEGAL COERCION 46 (1983). See also HÄYRY, *supra* note 68, at 117-18.

<sup>141</sup> See Hodson, *supra* note 68, at 65-57.

<sup>142</sup> See *id.*

<sup>143</sup> Cf. Perri 6, *supra* note 131, at 144-45 ("The problem is finding a way to specify the context of the actual subject's actual unimpaired capacities, in which the concept of being 'unimpaired' does not lead the principle to collapse into the objectionable principle of hypothetically rational consent"). Even above the threshold of substantial autonomy, there is still a wide range of degrees to which conduct can be more or less autonomous. Even substantially autonomous choices may be made out of: impetuosity; laziness; inertial habit; and other transitory impulses, encumbrances, and deficiencies. See HARM TO SELF, *supra* note 4, at 115 (providing examples of temporarily distorting circumstances that do not vitiate substantial voluntariness: fatigued, nervous, agitated, excited); *id.* at 278 ("[H]is less-than-fully-voluntary consent will be 'voluntary enough' for a valid and irrevocable contract"); KLEINIG, *supra* note 6, at 66, 85-86 (arguing that not all encumbrances take the individual below the substantial autonomy threshold).

<sup>144</sup> Hodson, *supra* note 68, at 65.

<sup>145</sup> *Id.* at 66.

substantially voluntarily on the agent's stipulation—would decide were she free of her cognitive and volitional defects.<sup>146</sup>

In order to distinguish his Principle of Paternalism from the much-maligned arguments for hypothetical rational consent,<sup>147</sup> Hodson carefully distinguishes a "hypothetical unencumbered will" from a "rational will."<sup>148</sup> Hodson rejects the notion of a "rational will" because it is too abstract from the subject.<sup>149</sup> Using such a notion, Hodson argues, is equivalent to hard paternalism because it is not limited to the subject's epistemic or volitional encumbrances, but extends to evaluative encumbrances as well.<sup>150</sup>

The only legitimate use of the notion of a rational will, Hodson argues, is as secondary *evidence*—though certainly not conclusive evidence—of the subject's unencumbered empirical will.<sup>151</sup> That is, the subject's decision to encounter serious harm is *prima facie* evidence of the existence of an encumbrance, and is *prima facie* evidence that the subject's unencumbered empirical will or hypothetical unencumbered decision would be otherwise.<sup>152</sup> The notion of the "real will" is useful only as an adjunct to the more refined notion of the "hypothetical unencumbered will."

The difference between a rational will and a hypothetical unencumbered will lies in how broadly or narrowly the agent interprets the subject's defects. On a rational will approach, the agent interprets the subject's defects broadly. For example, the legislator, even upon learning of a motorcyclist's appreciation of and deliberation over the risks of helmet-less riding, concludes that the cyclist must be encumbered. Otherwise, the legislator reasons, the cyclist would not choose to engage in such risky conduct for no good reason.

In contrast, on a hypothetical unencumbered will approach, the agent construes the subject's defects narrowly, looking to what the subject's empirical choice *would be*, if it were unencumbered. The HUD is focused on the subject and is empirically verifiable in principle.<sup>153</sup> In determining the justifiability of hard paternalistic intervention on a hypothetical unencumbered will approach, the agent takes the particular goals, beliefs, and values of the subject into account in determining her HUD.<sup>154</sup> Thus, for example, an agent could not justifiably transfuse a Jehovah's Witness on the grounds that were she free from her "misunderstanding" of the world, she would not oppose the transfusion. To

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<sup>146</sup> Though substantially voluntary, a subject's conduct will still have cognitive and volitional defects. Human beings may never be able to act with "full voluntariness." But even when substantially voluntary, conduct can be more or less voluntary to some degree.

<sup>147</sup> See *supra* notes 101 to 133, and accompanying text.

<sup>148</sup> Hodson, *supra* note 68, at 66-67.

<sup>149</sup> *Id.* at 67.

<sup>150</sup> *Id.*

<sup>151</sup> See *id.* at 68. See also Wennberg, *supra* note 56, at 29 n.9 ("[W]hat would have been rational for parties *ex ante* does not entail what persons would have wanted to do, but it is the best evidence of it") (citing Jules L. Coleman, *Risks and Wrongs* 170 (1992)).

<sup>152</sup> See *id.* at 69; HODSON, *supra* note 128, at 46-48.

<sup>153</sup> See Hodson, *supra* note 68, at 67.

<sup>154</sup> See HODSON, *supra* note 140, at 51.

characterize the subject's religious beliefs as a "misunderstanding," or as an epistemic defect, would ignore the subject's values and beliefs.<sup>155</sup>

In sum, on a modified hypothetical consent approach, the subject's hypothetical consent is not determined by reference to a *rational* person. Instead, the subject's hypothetical consent is determined by reference to the actual facts and values of the particular real-life subject with whose liberty intervention is contemplated. The inquiry is "empirically focused" on this subject.<sup>156</sup> This is, Hodson argues, the alleged primary virtue of the modified hypothetical consent argument.<sup>157</sup> The "empirical focus" arguably lessens the imposition of alien values typical of (if not intrinsic to) hypothetical rational consent.<sup>158</sup>

## 2. Analysis of Modified Hypothetical Consent

The individualized forms of hypothetical consent are a significant improvement over the rational hypothetical consent arguments. They avoid many of the problems attributed to those much-maligned arguments. Nevertheless, modified hypothetical consent arguments are still vulnerable to several objections. Most notably, they still leave the paternalistic agent with too much discretion.

Marion Smiley agrees that hypothetical individualized consent arguments are superior to rational will arguments because, at least, they take the subject's own ends into consideration.<sup>159</sup> Smiley argues, however, that hypothetical individualized consent arguments are, nevertheless, not workable as a justification for *legal* paternalism.<sup>160</sup> This is because in legal paternalism, unlike physician paternalism, the agent (the state) has no particular knowledge of subjects. Without such information, the state must, out of practical necessity, revert to use of the rational will argument.

Smiley's objection might be too strong. The state agent may be able to employ a standard of "normalcy" to guide its judgments as to what would and what would not be a serious intrusion for particular groups of individuals.<sup>161</sup>

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<sup>155</sup> Cf. Wennberg, *supra* note 56, at 26-27 ("The question is not what one would choose if she had beliefs that she lacks in reality, but what she would choose if her *epistemic decision base* were in some respect different."). Like John Hodson, Donald Van De Veer also offers an alternative to hypothetical rational consent. Van De Veer names his argument, which is similar to Hodson's hypothetical unencumbered will argument, the "Principle of Hypothetical Individualized Consent." See VAN DE VEER, *supra* note 5, at 75-81. See also Perri 6, *supra* note 131, at 144 (adapting PHIC to the "extended consent principle" and dropping condition 2b).

<sup>156</sup> Cf. Woodward, *supra* note 28, at 83 n.30.

<sup>157</sup> See generally Hodson, *supra* note 68.

<sup>158</sup> See VAN DE VEER, *supra* note 5, at 392. See also KLEINIG, *supra* note 6, at 59 (making a similar argument in terms of "integrity"); VAN DE VEER, *supra* note 5, at 234, 336, 398-414 (making a similar analysis of paternalism toward prior competents); Woodward, *supra* note 28, at 75-81.

<sup>159</sup> See Smiley, *supra* note 101, at 306.

<sup>160</sup> See *id.* at 306.

<sup>161</sup> See RUTH FADEN & TOM BEAUCHAMP, A THEORY AND HISTORY OF INFORMED CONSENT 343, 361 (1986) (arguing that in policy contexts the state can use an *objective* standard based on the

Such a normalcy standard could be determined through sociological and anthropological research, and would permit the agent to justify intervention on the ground that—according to the (statistically supported) normalcy standard—the subject will *probably* be supportive.<sup>162</sup> Such a standard could be used to constrain the agent from imposing its own values.

Nevertheless, Smiley's objection certainly has force. Although the agent does not have the virtually *carte blanche* authority of hypothetical rational consent, the agent still has enormous discretion to discern and interpret the subject's values. For example, the agent can interpret the subject's values at varying levels of generality or specificity. The agent can interpret just how the subject's values apply to particular circumstances. And the agent can interpret how the subject's values are balanced against each other.<sup>163</sup> Modified

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reasonable, ordinary or average person) (emphasis added); *id.* at 260 (suggesting the plausibility of *objectivity* tied to average persons) (emphasis added); *id.* at 46 n.28 (explaining the objective standard of reasonable person as "common behavioral assumptions" that are "prescriptive as well as descriptive"); HARM TO OTHERS, *supra* note 5, 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 qualifications and refinements that would be needed to accommodate the whole range of idiosyncratic vulnerabilities") (emphasis added); *id.* at 112, 188 (positing a "standard person"); *id.* at 35, 192, 216; OFFENSE TO OTHERS, *supra* note 5, at 33-34; HARM TO SELF, *supra* note 4, at 128; *id.* at 181 (using "actuarial tables"); *id.* at 203, 228, 258; *id.* at 210 (law uses objective standards); *id.* at 219-28 (norms of expectability); OFFENSE TO OTHERS, *supra* note 5, at 258 ("In human legislatures and courts of law . . . for practical reasons they are forced to formulate rules based on the presumptive preferences of *standard persons*, thus discouraging subsequent judicial inquiry into actual preferences of real individuals") (emphasis added); *id.* at 259-60; *id.* at 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") (emphasis added); *id.* at 290 (determining intent); *id.* at 300 (making presumptions when conduct "exceedingly rare"); OFFENSE TO OTHERS, *supra* note 5, at 324 (providing examples where one would want to be pushed out of the way of a bus—"indirect statistical evidence, when overwhelming" or even best interest standard when no subjective evidence); HODSON, *supra* note 128, at 50 ("relevance of judgments as to what most competent persons would decide to do in similar circumstances"); HUSAK, *supra* note 28, at 132 ("[T]he law, necessarily expressed in general terms, should be responsive to the most common, *typical reason* why persons assume risks") (emphasis added); KULTGEN, *supra* note 4, at 161; NIKKU, *supra* note 45, at 97-102, 244, 261 (offering hypothetical consent of the majority); Smiley, *supra* note 101, 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") (emphasis added); VAN DE VEER, *supra* note 5, at 107 ("Legislatures, of course, typically promulgate laws for entire classes of persons"); *id.* at 359; Daniel Wikler, *Coercive Measures in Health Promotion: Can They Be Justified?* 6 *HEALTH EDUC. MONOGRAPHS* 223, 229-30 (1978); Matjaz Zwitter et al., *Professional and Public Attitudes Towards Unsolicited Medical Intervention*, 318 *BMJ* 251, 251-53 (1999) (providing statistics for normalcy inferences).

<sup>162</sup> This position has been recently defended in WILLIAM J. TALBOTT, *HUMAN RIGHTS AND HUMAN WELL-BEING* (forthcoming 2005).

<sup>163</sup> See generally LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 73-80 (1991) (discussing the problem of characterization of constitutionally protected rights: "At what level of generality . . . should the right be described?"). Of course, the agent has discretion in just how he individuates and describes not only the subject's preferences but also the subject's conduct.

hypothetical consent is surely a move in the right direction. But it needs a great deal of specification to become a convincing theory of justified hard paternalism.<sup>164</sup>

### V. FOCUSING ON CONSENT MISFRAMES THE ISSUE

Consent-based arguments for the justifiability of hard paternalism are torn between incoherence and a lack of moral force. The few forms of consent-based arguments (*i.e.* prior consent and hypothetical individualized consent) that successfully resolve this tension have a limited applicability and usefulness because of their narrow justificatory scope. But there is a more fundamental problem with consent-based arguments. Even if they do not fail on their own terms, consent is, nevertheless, an inferior framework for examining the justifiability of hard paternalism. Consent-based arguments do not capture and incorporate the tradeoffs that are being made.

The fundamental and most serious objection to consent-based arguments is that they rely on an appeal to beneficence.<sup>165</sup> Isaiah Berlin called consent-based arguments a "monstrous impersonation," explaining:

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*See* HARM TO SELF, *supra* note 4, at 123, 129, 132, 277, 282, 294, 304-05; FADEN & BEAUCHAMP, *supra* note 161, at 244 n.13; VAN DE VEER, *supra* note 5, at 6, 30; CARL GINET, ON ACTION 45-71 (1990) (discussing key literature on individuation); Gordon, *supra* note 94, at 268 ("[A]n action can be referred to by different descriptions"); Cass R. Sunstein, *A Note on "Voluntary" Versus "Involuntary" Risks*, 8 DUKE ENVTL. L. & POL'Y F. 173, 179 (1997); Albert Weale, *Invisible Hand or Fatherly Hand? Problems of Paternalism in the New Perspective on Health*, 7 J. HEALTH POL. POL'Y & L. 784, 788 (1983) ("[T]here is a certain indefiniteness about the identification of actions").

<sup>164</sup> Cf. Linda J. Emanuel, *Advance Directives: Do They Work?* 25 J. AM. C. CARDIOLOGY 35, 36 (1995) (noting the inability of spouses to predict the other's wishes). Cf. M.L. Gross, *Treating Competent Patients by Force: The Limits of Israel's Patients Rights Act*, 31 J. MED. ETHICS 29, 32 (2005) ("A patient may also change his values. He may become convinced that living without a leg or hooked up to a ventilator is no so bad after all. But then again he may not, and the health care professional has no way of knowing this in advance, nor are there sufficient grounds to make an educated guess.").

<sup>165</sup> *See* BERLIN, *supra* note 102, at 133-34; FADEN & BEAUCHAMP, *supra* note 161, at 9 ("If restriction is in order, the justification will rest on some competing moral principle"); PRINCIPLES, *supra* note 1, at 281; KLEINIG, *supra* note 6, at 62; VAN DE VEER, *supra* note 5, at 83, 154 (discussing Husak's consequentialist alternative to PHIC and observing that "[o]nce the notion of consent is omitted from the criteria . . . it becomes evident that the *central focus* is on the reasonableness of the interference") (emphasis added); Bayles, *supra* note 100, at 111; Beauchamp, *Paternalism*, *supra* note 66, at 1916; Dan Brock, *A Case for Limited Paternalism*, 4 CRIM. JUST. ETHICS, 79, 82-83 (1985); Dan W. Brock, *Paternalism and Autonomy*, 98 ETHICS 550, 556-65 (1988); *id.* at 13, 16-19; Peter Hobson, *Another Look at Paternalism*, 1 J. APPLIED PHIL. 301, 301 (1984) ("[I]f judgments about consent are to have any legitimacy, they will in practice be based on considerations to do with the nature of the subject and the sort of harm involved"); Woodward, *supra* note 28, at 75-76 (noting that it collapses into consequentialism); Zamir, *supra* note 28, at 241; Armsden, *supra* note 28, at 125.

It is one thing to say that I know what is good for X, while he himself does not; and even to ignore his wishes for its—and his—sake; and a very different one to say that he has *eo ipso* chosen it, not indeed consciously, not as he seems in everyday life, but in his role as a rational self which his empirical self may not know—the ‘real’ self which discerns the good, and cannot help choosing it once it is revealed.<sup>166</sup>

It is one thing to say that I may be coerced for my own good which I am too blind to see. . . . It is another to say that if it is my good, then I am not being coerced, for I have willed it, whether I know this or not.<sup>167</sup>

More recently, Douglas Husak argued that: “The notion of consent is retained in the criteria to create the *impression* that a concern for moral autonomy is preserved. In reality, however, consent plays only a token role in the criteria. . . . [T]he central focus is on the reasonableness of the interference.”<sup>168</sup> Nina Nikku similarly explains that the consequentialist way is more appropriate, “more positive towards paternalistic actions whereas the ways of justification where the individual’s right to self-determination is stressed entail more severe demands on the justification of a paternalistic action.”<sup>169</sup>

Of course, rather than offering conditions under which paternalism is reasonable, one could specify considerations for assessing the probability of obtaining the subject’s consent—and make *that* the test for the justifiability of hard paternalism.<sup>170</sup> But that would obscure the justificatory appeals and value trade-offs that are being made.<sup>171</sup> After all, the primary basis for assessing that the subject would probably consent is the agent’s judgment that the interference is reasonable for the subject.<sup>172</sup> Therefore, it is this (reasonableness) judgment that is the relevant target of normative inquiry.<sup>173</sup>

<sup>166</sup> BERLIN, *supra* note 102, at 133-34.

<sup>167</sup> *Id.* at 134.

<sup>168</sup> Husak, *supra* note 28, at 34-35 (emphasis added). See also Woodward, *supra* note 28, at 75 (“Rational will arguments abstract from the specific plans, values, and beliefs of agents [such that] the contrast I have attempted to draw between consent-based and consequence-based justifications of paternalistic treatment will collapse”).

<sup>169</sup> NIKKU, *supra* note 45, at 266.

<sup>170</sup> See Carter, *supra* note 4, at 139. Cf. Robert E. Goodin, *Permissible Paternalism: In Defense of the Nanny State*, 1 RESPONSIVE COMMUNITY 42, 43 (1991) (“Rights theorists and paternalists would still be at odds, but less so, if paternalists refrained from talking about interests in so starkly objective a way”).

<sup>171</sup> Nevertheless, consent-based arguments are not worthless. John Kultgen argues that even if consent arguments carry insufficient force to justify paternalistic interventions, they still have epistemic or “epistemological value.” KULTGEN, *supra* note 4, at 121, 124, 139, 235. They can still provide evidence of an individual’s conception of the good. That is, they are useful heuristically—in determining, as an evidentiary matter, what, in fact, will best promote a subject’s good. Cf. CHILDRESS, *supra* note 18, at 96; HARM TO SELF, *supra* note 4, at 187, 290; Kasachkoff, *supra* note 3, at 11. Cf. *supra* notes 151 to 152, and accompanying text.

<sup>172</sup> See *supra* notes 101 and 133; see also JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 188 n.5 (1990) (“How do we know they would consent. . . . Well, living by those rules is to their advantage—their real advantage, as opposed to what they might in the circumstances (and given

It is better to recognize and to explicitly incorporate the operative normative appeals.<sup>174</sup> James Childress contends "It is more defensible to *face directly the*

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their wants) think to be to their advantage. But then *that* is what does the moral work of justifying the thesis that those rules are just."); Wennberg, *supra* note 56, at 27 ("There is absolutely nothing in the concept of consent that is not already contained in a statement about one's preferences. . . . It seems to be exactly the same thing to say that something is justified because it increases one's welfare and to say that it is justified because one would give a consent to it."); *id.* at 32 (arguing that consent-based arguments "can be presented in welfarist terms, and the whole of idea of hypothetical consent becomes pointless").

<sup>173</sup>See, e.g., PRINCIPLES, *supra* note 1, at 281; *id.* at 271-84 ("Beneficence alone truly justifies paternalistic actions"); BEAUCHAMP & MCCULLOUGH, *supra* note 106, at 98-99, 102; CHILDRESS, PRACTICAL REASONING, *supra* note 97, at 60; DWORKIN, AUTONOMY, *supra* note 100, at 32, 114; FADEN & BEAUCHAMP, *supra* note 161, at 10; HARM TO SELF, *supra* note 4, at 75-79, 87; GERT, *supra* note 101, at 225-28 (rejecting the "strict deontological position"); GLOVER, *supra* note 132, at 75; HUSAK, *supra* note 28, at 89; KLEINIG, *supra* note 6, at 5; KULTGEN, *supra* note 4, at 38, 103, 111, 114; Richard J. Arneson, *Paternalism, Utility, and Fairness*, 43 REV. INT'L PHIL. 409, 436, n.27 (1989); Brock, *supra* note 106, at 552; Dworkin, *Paternalism*, *supra* note 109, at 116; Willard Gaylin, *Worshipping Autonomy*, HASTINGS CTR. REP., Nov./Dec. 1996, at 43, 45 ("The imperialism and arrogance of autonomy must be bridled. A work of recovery and remembering other dimensions of freedom is needed. This will give us better conceptual tools for principled political argument, social consensus, and moral common sense."); Hobson, *supra* note 165, 299-300 (1984); *id.* at 301 (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."); Ian Hunt, *Risking One's Life: "Soft Paternalism" and Feinberg's Account of Legal Liberalism*, 8 CAN. J. L. & JURIS. 311, 311-12 (1995); Kasachkoff, *supra* note 3, at 413; Bill New, *Paternalism and Public Policy*, 15 J. ECON. & PHIL. 63, 82 (1999) ("Inflexible and absolutist theoretical dogma is unhelpful in the real world"); Steven Lee, *On the Justification of Paternalism*, 7 SOC. THEORY & PRAC. 193, 200 (1981) ("[T]here must be a genuine weighing."). Cf. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 183 (1999); at 185 ("Those hidden normative dimensions are what do the work in the harm principle, not the abstract, simple notion of harm"); *id.* at 193 ("[T]he collapse of the harm principle . . . may force us to address the other normative dimensions lurking beneath the conception of harm").

<sup>174</sup>See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 250 (1996) (arguing that rather than making a "strained" argument to find some other-regarding harm, that "[t]he more straightforward response 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"); RUTH MACKLIN, *ENEMIES OF PATIENTS* 184 (1993) ("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); JOHN STUART MILL, *ON LIBERTY* 70-86 (David Spitz ed., w.w. Norton & Co. 1975) ("If grown persons are to be punished for not taking proper care of themselves, I would rather it for their own sake than under *pretence* of preventing them from impairing their capacity or imparting society benefits") (emphasis added); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 228-29 (1985) (noting the benefits of isolating elements of tort law: making more precise judgments and making them more transparent); Alan M. Dershowitz, *Mill on Liberty*, in *ON LIBERTY AND UTILITARIANISM* BY JOHN STUART MILL vii, xi (1993) (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); Lawrence O. Gostin, *Public Health Law in a New Century: Part III: Public Health Regulation: A*



*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.<sup>175</sup>

Similarly, Beauchamp and Childress write: "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."<sup>176</sup> A consent model obscures the operative normative appeals.<sup>177</sup> A balancing model, on the other hand, recognizes the operative normative appeals as relevant and incorporates them explicitly.<sup>178</sup>

Furthermore, conceptual clarity and linguistic honesty are not the only benefits of moving from a consent-based model to a beneficence-based balancing model. Because of the vagueness and imprecision required to fit "round" normative judgments into "square" conceptual holes, consent-based arguments provide a breeding ground for bias and prejudice.<sup>179</sup> A balancing model, on the

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*Systematic Evaluation*, 283 JAMA 3118, 3119 (2000) (criticizing "strained conception[s] of social harms" and recommending "recognizing certain public health interventions as justified paternalism"); Robert N. Harris, Jr., *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 592 (1967) ("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."); Rainboldt, *supra* note 53, at 56 ("Acknowledging that paternalism is sometimes permissible would allow us to give the most obvious and natural explanation of these laws"); Edward Sankowski, "Paternalism" and Social Policy, 22 AM. PHIL. Q. 1, 10 (1985); Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 26 (1991).

<sup>175</sup> CHILDRESS, PRACTICAL REASONING, *supra* note 97, at 67 (emphasis added). Joel Feinberg writes, "[t]he more overtly paternalistic language seems much less contrived and more honest." HARM TO SELF, *supra* note 4, at 85. "It much better serves the cause of moral clarity to call a spade a spade." *Id.* at 87. See also Richard Reeves, *Even in a Truly Liberal Society, Paternalism Must Sometimes Prevail*, NEW STATESMAN, Dec. 24, 2004, at 46, 48 ("Better honest paternalism than false liberalism . . . . The problem is that the argument is not taking place, so that a muddled or deliberately obfuscating government often ends up dressing a paternalistic policy in tatty liberal clothes.").

<sup>176</sup> PRINCIPLES, *supra* note 1, at 130.

<sup>177</sup> See BIOMEDICAL ETHICS, *supra* note 1, at 185 ("[A]ppeals to consent obscure more than they clarify the issues. It is best to keep autonomy-based justifications at arm's length from paternalism").

<sup>178</sup> The first criterion for sound theory is simplicity, also often referred to as economy or elegance. See generally BIOMEDICAL ETHICS, *supra* note 1, at 338-39; P. FRANK, PHILOSOPHY OF SCIENCE: THE LINK BETWEEN SCIENCE AND PHILOSOPHY 350-51 (1957); Bunge, *The Weight of Simplicity in the Construction and Assaying of Scientific Theories*, 28 PHIL. SCI. 120, 125-26 (1961); Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 268 (1989). The least complicated theory of explanation is preferred. The consent-based theory for hard paternalism fails to satisfy this criterion.

<sup>179</sup> Cf. *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) (criticizing the undue burden standard for determining the constitutionality of abortion laws as unprincipled "policy-judgment-couched-as-law"); Pope, *supra* note 133 (reviewing the use of other vague concepts to

other hand, does not require the distortions that the consent-based theory requires. A balancing model, therefore, hinders, rather than facilitates, the masking of illegitimate value judgments under purported neutral concepts.

## VI. CONCLUSION

Consent-based arguments for the justifiability of hard paternalism lack legitimacy and plausibility. And, as if this were not bad enough, consent-based arguments also misframe the normative inquiry. To avoid distortion and dishonesty, consent-based justifications, except perhaps for certain types of prior consent arguments, should be set aside. Policymakers and academics should instead employ beneficence-based arguments, and focus on articulating consequentialist arguments for why, in cases of intuitively reasonable and appropriate hard paternalistic liberty limitation, the benefits secured for the subject outweigh the subject's autonomy interests.

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shield discriminatory and ill-founded regulation: "disease," "death," "futility," "competence," and "naturalness").