BALANCING PUBLIC HEALTH AGAINST INDIVIDUAL LIBERTY: THE ETHICS OF SMOKING REGULATIONS

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ABSTRACT

Eleven years ago, philosopher Robert E. Goodin published *No Smoking: The Ethical Issues*. Goodin argued that the liberty of smokers can be justifiably limited for two reasons: to prevent harm to third persons and to prevent harm to smokers themselves under circumstances which make their decision to smoke substantially non-autonomous. In this article Thaddeus Pope reexamines the harm principle and the soft paternalism principle in light of more recent legal developments, gives them additional content, and carefully demarcates the justificatory scope of each. Pope also defines and defends a third liberty-limiting principle, hard paternalism, arguing that the liberty of smokers might be justifiably limited even when their decision to smoke is substantially autonomous.

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INTRODUCTION

In response to what is widely perceived as a public health crisis,[1] federal, state, and municipal governments are poised to implement new initiatives that would significantly regulate the manufacture, labeling, advertising, promotion, distribution, sale, and consumption of tobacco products.[2] Legal scholars have exhaustively discussed the various constitu-

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1.

> [T]obacco use is the single leading cause of preventable death in the United States. More than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease, often suffering long and painful deaths. Tobacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined.

Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,398 (1996)(footnotes omitted), struck down, *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000) (holding that FDA lacks authority to regulate tobacco products). "Consequently, tobacco use has become one of the most serious health problems facing the United States today." *Id.*; *see also* JACOB SULLUM, FOR YOUR OWN GOOD: THE ANTISMOKING CRUSADE AND THE TYRANNY OF PUBLIC HEALTH 56 (1998) (collecting other dramatic statements of the crisis); J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 270 JAMA 2207, 2208 (1993); R.T. Ravenholt, *Tobacco's Impact on 20th Century U.S. Mortality Patterns*, 1 AM. J. PREVENTIVE MED. 4, 14-15 (1992) ("Only the unquantifiable threat of nuclear annihilation poses a greater threat to health and life.").

2. With the death of the national settlement in 1998 and the Supreme Court's striking down of

tional, jurisdictional, and practical issues raised by these initiatives.[3] Less discussed, but no less important, are the ethical issues at stake.

In particular, scholars have neglected a critical underlying issue of political philosophy; namely, that of demarcating the limits to which these initiatives can restrict the liberty of tobacco-consuming individuals. A recent RAND Corp. study concluded:

> Even today, when smoking in public places is highly regulated in many states, the debate over the scope of that regulation is far from settled. The tension between individual liberties and governmental intervention to protect the public's health is at issue. That the state has the power to regulate smoking to secure the public's health is beyond question. The policy debate is about when, how, and under what circumstances the state should exercise that power.[4]

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the FDA regulations, no major federal initiatives remain. *See* Gordon Faircloth, *States May Regulate Tobacco in FDA's Absence*, WALL ST. J., Mar. 23, 2000, at B14; Robert S. Greenberger & Suein L. Hwang, *Court to Rule on FDA Role Over Tobacco*, WALL ST. J., Apr. 27, 1999, at A3; *see also* Michele Bloch et al., *A Year of Living Dangerously*, 113 PUB. HEALTH REP. 488 (1998) (reviewing federal action from 1997 to 1998). For the types and growth of state regulation, see, for example, Jan K. Carney et al., *No Butts About It: Public Smoking Ends in Vermont*, 87 AM. J. PUB. HEALTH 860 (1997) (describing how states can successfully pass and implement no smoking legislation); Peter D. Enrich & Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement*, 35 HARV. J. LEGIS. 87 (1998); Wendy Koch, *States Blaze Trail for Anti-Smoking Laws: Their Experiences Can Help Congress as it Plays Catch-Up*, USA TODAY, June 16, 1998, at 5A; *Clean Air Acts*, HOTEL & MOTEL MANAGEMENT, Nov. 2, 1998, at 140 (listing recent and proposed smoking bans), and compare WILLARD GAYLIN & BRUCE JENNINGS, THE PERVERSION OF AUTONOMY: THE PROPER USES OF COERCION AND CONSTRAINTS IN A LIBERAL SOCIETY 196 (1996) ("[M]any states and local communities are examining coercive measures to reinforce standards of social behavior.").

3. For constitutional issues, see, for example, *Hearings on Tobacco Legislation: Is It Constitutional? Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. 1 (1998) (testimony of Senator Orrin Hatch); George J. Annas, *Cowboys, Camels, and the First Amendment—The FDA's Restrictions on Tobacco Advertising*, 335 NEW ENG. J. MED. 1779 (1996); Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479 (1997); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143 (1999); Barbara A. Noah, *Constitutional Qualms Concerning Government Restrictions on Tobacco Product Advertising*, 29 U. TOL. L. REV. 637 (1998). For jurisdictional issues, see, for example, James T. O'Reilly, *Tobacco and the Regulatory Earthquake: Why the FDA Will Prevail After the Smoke Clears*, 24 N. KY. U. L. REV. 509 (1997); Symposium, *Are the Risks Worth Regulating? Tobacco v. The FDA*, 47 DUKE L.J. 1013 (especially contributions by Richard A. Merrill and Cass R. Sunstein). For practical issues, see, for example, John Slade & Jack F. Henningfield, *Tobacco Product Regulation: Context and Issues*, 53 FOOD & DRUG L.J. 43 (1998). Of course, regulation and legislation are not the only legal means to control public health risks. Tort law, particularly now with the so-called "third wave of litigation," has been offered as an effective form of public health law. *See, e.g.*, Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL., POL'Y & L. 769 (1999); Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897 (1998).

4. PETER D. JACOBSON & JEFFREY WASSERMAN, TOBACCO CONTROL LAWS: IMPLEMENTATION

The RAND researchers are right to identify this dearth of analysis. Professor Robert Rabin agrees: "[T]here is a real need for more systematic thought about the underlying justifications for the smoking policy that is developing piecemeal throughout the country."[5] Of course, this problem is not unique to anti-smoking legislation; surprisingly few books or articles address the fundamental rationales for public health interventions in any context.[6] Medical ethicist Daniel Callahan believes that "the time has

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AND ENFORCEMENT 3 (1997).

5. Robert L. Rabin, *Some Thoughts on Smoking Regulation*, 43 STAN. L. REV. 475, 496 (1991) (book review); *see also* ROBERT E. GOODIN, NO SMOKING: THE ETHICAL ISSUES vii, 137 (1989) (arguing that applied ethics can been overly restricted in its substantive scope); Jeffrey Kahn, *Bioethics and Tobacco*, BIOETHICS EXAMINER (University of Minnesota), Fall 1997, at 1 ("The ethics of public health policy is an area that has received precious little attention from the bioethics community."); SULLUM, *supra* note 1, at 42 (arguing that science "did not, by itself, indicate what the *government* should do about smoking, if anything. That is why Americans are still arguing about what, exactly, 'appropriate remedial action' is"); *cf.* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 162 (1988) (commenting that political issues regarding individual autonomy will be better addressed when more detailed studies of these issues are completed).

6. *See, e.g.*, TOM L. BEAUCHAMP, PHILOSOPHICAL ETHICS 388 (2d ed. 1991) [hereinafter PHILOSOPHICAL ETHICS] ("[W]e need to be able to specify as a matter of public policy what limits, if any, will be placed on . . . high-risk behaviors . . . ."); TOM CHRISTOFFEL, HEALTH AND THE LAW: A HANDBOOK FOR HEALTH PROFESSIONALS 224 (1982) ("[T]here is considerable controversy about when and to what degree government intervention to protect health is warranted . . . ."); DOUGLAS N. HUSAK, DRUGS AND RIGHTS 1 & 4 (1992) ("Moral rights have been all but ignored . . . by the state in its war on drugs . . . ." Despite the growing attention contemporary philosophers purport to pay to current moral and legal issues, almost all of their focus has been directed to a very few matters, usually involving life and death."); NINA NIKKU, INFORMATIVE PATERNALISM: STUDIES IN THE ETHICS OF PROMOTING AND PREDICTING HEALTH 22 (1997) ("[E]thics in the broad area of health promotion has not been explored that thoroughly."); ALAN PETERSEN & DEBORAH LUPTON, THE NEW PUBLIC HEALTH: HEALTH AND SELF IN THE AGE OF RISK ix (1996) ("Given the scope of the new public health . . . there has been surprisingly little critical analysis of its underlying philosophies and its practices."); PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 180 (1982) ("Much of the history of public health is a record of struggles over the limits of its mandate."); DONALD VANDEVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS ON BENEVOLENCE 304 (1986) (noting "the current absence of a perspicuous way of sorting the relevant questions and considerations" regarding "the morality of limiting risks"); Dan Beauchamp, *Books: Review/Commentary*, 23 CONTEMP. DRUG PROBS. 347, 349, 351 (1996) (reviewing GRIFFITH EDWARDS ET AL., ALCOHOL POLICY AND THE PUBLIC GOOD (1994)) (criticizing the authors for ignoring "implications for . . . restrictions on individual liberties" and suggesting that controversial ethical issues were omitted to ensure the authors' continued receipt of "official grants and research funds"); Philip Cole, *The Moral Bases of Public Health Interventions*, 6 EPIDEMIOLOGY 78, 78 (1995) ("Little has been written of the need for fundamental rationales for prevention programs."); Spyros Doxiadis, *Conclusions*, *in* ETHICAL DILEMMAS IN HEALTH PROMOTION 225, 225 (Spyros Doxiadis ed., 1987) ("[M]any of the problems have become evident only in recent years and they have not therefore been adequately and extensively discussed."); Edmund D. Pellegrino, *Health Promotion as Public Policy: The Need for Moral Groundings*, 10 PREVENTIVE MED. 371, 376 (1981) [hereinafter Pellegrino, *Health Promotion*] ("There is yet no formally developed ethic of prevention and health promotion . . . ."); Edmund D. Pellegrino, *Autonomy and Coercion in Disease Prevention and Health Promotion*, 5 THEORETICAL MED. 83, 90 (1984) [hereinafter Pellegrino, *Autonomy and Coercion*] (underscoring "the need for a

come for an extended and serious public and professional debate" regarding whether "the individual and social benefits of serious efforts to change behavior warrant strong, even severe, intrusions upon personal liberty."[7]

Tobacco regulations, particularly those aimed at directly restricting or prohibiting consumption under certain circumstances,[8] clearly interfere with the liberty[9] of tobacco-consuming individuals.[10] The RAND study

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continuing development of an ethics of preventive medicine"); Genevieve Pinet, *Health Legislation, Prevention and Ethics*, *in* ETHICAL DILEMMAS IN HEALTH PROMOTION 83, 96 (Spyros Doxiadis ed., 1987) ("[T]hese ethical dilemmas require much study and discussion."); Daniel Wikler & Dan E. Beauchamp, *Lifestyles and Public Health*, *in* 3 ENCYCLOPEDIA OF BIOETHICS 1366, 1368 (Warren T. Reich ed., 1995) (noting that government intervention in unhealthy lifestyles proceeds "from a rarely examined and rarely defended set of moral premises"); Scot Yoder, *Personal Responsibility for Health: Discovery or Decision?*, MED. HUMANITIES REP., Spring 1998, at 1, 1 ("[W]hat . . . public or private policies designed to influence or make people bear the burden for personal health-related behavior . . . should be implemented in a liberal society? Because lifestyle interventions almost inevitably infringe on individual autonomy, it is important that decisions regarding them not be arbitrary or discriminatory."); *cf.* Steven S. Coughlin et al., *Ethics Instruction at Schools of Public Health in the United States*, 89 AM. J. PUB. HEALTH 768, 770 (1999) (reporting that ethics instruction in public health schools is rare and inconsistent). *But see* DAN E. BEAUCHAMP & BONNIE STEINBOCK, NEW ETHICS FOR THE PUBLIC'S HEALTH ix (1999) ("The topics in this book differ from other bioethics readers in that they raise fundamental political questions.").

7. DANIEL CALLAHAN, FALSE HOPES: WHY AMERICA'S QUEST FOR PERFECT HEALTH IS A RECIPE FOR FAILURE 194 (1998).

8. In the regularly used philosophical terms, restricting smoking when it harms only the smoker herself is called "passive," "direct," and "negative" paternalism. *See, e.g.*, JOEL FEINBERG, HARM TO SELF 8-9 (1986) [hereinafter HARM TO SELF]; JOHN KLEINIG, PATERNALISM 14 (1983). It is "passive" because the restriction requires that individuals refrain from behavior rather than actively requiring behavior. It is "direct" because it entails intervention with the smokers themselves, the same persons who stand to benefit from the intervention rather than with third parties such as tobacco manufacturers or distributors. It is "negative" because it restricts individuals' liberty in order to protect them from harm rather than to secure them a benefit.

9. I follow Joel Feinberg and define "liberty" as having "permission to act in some particular way." Joel Feinberg, *Freedom and Liberty*, *in* 3 ROUTLEDGE OF ENCYCLOPEDIA OF PHILOSOPHY 753 (Edward Craig ed., 1998). "Liberty," therefore, refers to having no duty to act or having *de jure* ability to do something. "Freedom," on the other hand, refers to having the ability to act or having the *de facto* ability to do something. *See* JOEL FEINBERG, HARM TO OTHERS 8-9 & n.4 (1984) [hereinafter HARM TO OTHERS]; HARM TO SELF, *supra* note 8, at 62-65; *see also* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 168 & 187 n.92 (4th ed. 1994) (drawing a similar distinction between decisional and executional autonomy); Kent Greenawalt, *Some Related Limits of Law*, *in* THE LIMITS OF LAW 76, 87 n.1 (J. Roland Pennock & John W. Chapman eds., 1974). For example, I may not be at liberty to drive faster than 65 miles per hour, but I am still typically free to do so. Similarly, when regulations restrict or prohibit smoking, smokers are still typically free to smoke but they do not have the liberty to do so. Failure to make the distinction impoverishes the analysis. *See, e.g.*, Gerald Doppelt, *The Moral Limits of Feinberg's Liberalism*, 36 INQUIRY 255, 260-61 (1992) (using "liberty" to describe both concepts).

10. *See* John Duffy, *History of Public Health*, *in* 4 ENCYCLOPEDIA OF BIOETHICS 2157, 2160 (Warren T. Reich ed., 1996) ("Public-health regulations by their nature are designed to restrict certain activities on the part of individuals."); *see also* David Hawks, *The New Public Health: Nanny in*

concluded that "tobacco control reveals some of the most salient tensions in American political theory: Under what circumstances can government limit individual freedoms to protect citizens from the consequences of their personal and lifestyle choices?"[11] To state the question more directly, "Where does one draw the line between the power of the state to protect public health and the right of the people to make life-style choices?"[12]

Perhaps the most thorough analysis of the normative issues surrounding tobacco regulation can be found in Robert E. Goodin's 1989 book, *No Smoking: The Ethical Issues*.[13] There, Goodin recognizes that "moral philosophy is an indispensable first step in that larger political campaign."[14] After all, "[e]ven though a law may be legally supportable and even though it may be effective in reducing the toll of injuries, if it offends other socially important interests, maybe it *ought not* to exist as a law."[15] Professors Christoffel and Teret argue similarly that "[t]he question of whether a law ought to be passed, notwithstanding its legality and effectiveness, warrants reasoned exploration."[16]

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a New Hat?, 92 ADDICTION 1175, 1175 (1997) (describing "nannyism" as "attempts to manipulate life-style in the interest of better health").

11. JACOBSON & WASSERMAN, *supra* note 4, at 2; *see also* Peter D. Jacobson et al., *Historical Overview of Tobacco Legislation and Regulation*, 53 J. SOC. ISSUES 75, 75-76 (1997) (describing the primary "conundrum" surrounding tobacco regulation).

12. HOWARD M. LEICHTER, FREE TO BE FOOLISH: POLITICS AND HEALTH PROMOTION IN THE UNITED STATES AND GREAT BRITAIN 3 (1991). *See also* Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 69 (1999) ("[M]any disputes in public health turn less on its goal . . . and more on the proper scope of governmental intervention to achieve it."); HUSAK, *supra* note 6, at 73 (stressing the importance of determining "whether and under what circumstances paternalism is *ever* justified").

13. GOODIN, *supra* note 5.

14. *Id.* at 137; *cf.* BEAUCHAMP & CHILDRESS, *supra* note 9, at 8 ("Moral analysis is part of good policy formation. . . ."); Keith Butler, *The Moral Status of Smoking*, 19 SOC. THEORY & PRACTICE 1, 1 (1993) ("[T]he aim of this paper . . . is to provide a moral guide to the formation of a public policy toward smoking behavior."); Arthur L. Caplan, *When Liberty Meets Authority: Ethical Aspects of the Laetrile Controversy*, *in* POLITICS, SCIENCE, AND CANCER: THE LAETRILE PHENOMENON 133, 133 (Gerald E. Markle & James C. Peterson eds., 1980) ("Ethical language is often used to stake out the limits or boundaries of policy argumentation . . . ."); RALPH D. ELLIS, JUST RESULTS: ETHICAL FOUNDATIONS FOR POLICY ANALYSIS 7 (1998) ("[N]o policy belief can be logically justified unless it is supported by . . . at least one *value belief* . . . ."); GAYLIN & JENNINGS, *supra* note 2, at 24 ("This work will give us better conceptual tools for principled political argument . . . .").

15. TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 213 (1993); *see also* Lawrence Gostin, *The Legal Regulation of Smoking (and Smokers): Public Health or Secular Morality?*, *in* MORALITY AND HEALTH 331, 332 (Allan M. Brandt & Paul Rozin eds., 1997) ("If behaviors are regulated in the absence of a well-targeted public health strategy, the consequences are that other powerful personal and social values are needlessly undermined.").

16. CHRISTOFFEL & TERET, *supra* note 15, at 216; *see also* Tom Christoffel & Sandra Stein,

In this Article I undertake that exploration. I analyze what philosopher Gerald Dworkin calls "[o]ne of the central concerns of social and political philosophy . . . the issue of what limits, if any, there are to the right of the state to restrict the liberty of its citizens."[17] As Dworkin explains, "[o]ne of the tasks of political philosophy is to develop and elaborate a theory to determine where these boundaries lie."[18] In this Article I construct a normative framework by which lawmakers and others can evaluate the liberty-limiting aspect of tobacco regulation.[19] My frame-

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Using the Law to Protect Health: The Frustration Case of Smoking, MEDICOLEGAL NEWS, Winter 1979, at 5, 9 ("[F]or an effective smoking and health social action . . . [i]deas could be critically evaluated in terms of . . . equity . . . ."); Greenawalt, *supra* note 9, at 84 (comparing practical and moral limits of the law and posing the following question: "Assuming that a rule can be well formulated to reach particular behavior . . . is there still some reason why the behavior should be left free of legal control?").

17. Gerald Dworkin, *Liberty*, *in* ENCYCLOPEDIA OF PHILOSOPHY 303, 303 (Donald M. Borchert ed., Supp. 1996); *see also* JOHN STUART MILL, ON LIBERTY 63-64 (Penguin ed., 1974) (1859) ("[W]here to place the limit—how to make the fitting adjustment between individual independence and social control—is the principal question in human affairs.").

18. Dworkin, *supra* note 17, at 303; *cf.* HUSAK, *supra* note 6, at 81 ("What is required is a *principled* assessment . . . [of] whether and under what circumstances adults have or lack a *moral right* . . . ."); MILL, *supra* note 17, at 67 (establishing the "principle by which the propriety or impropriety of government interference is customarily tested"); Alan Dershowitz, *Toward a Jurisprudence of "Harm" Prevention*, *in* THE LIMITS OF THE LAW 135, 149 (J. Roland Pennock & John W. Chapman eds., 1974) ("[T]he business of balancing the liberty of the individual against the risks a free society must tolerate is very complex."). In this respect, philosophy is not unlike science which Albert Einstein described as "nothing more than a *refinement* of every day thinking." Albert Einstein, *Physics and Reality*, *in* OUT OF MY LATER YEARS 59, 59 (1950) (emphasis added); *see also* RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 5 (1986) ("Most of these principles are already embedded in public morality and policies, but only in a vague and imprecise form. The job of ethical theory is to lend precision without over simplification.").

19. I perform the distinctly philosophical task of identifying and articulating the normative issues at stake, clarifying those issues and drawing important distinctions, and applying logical analysis to the argumentation. *See generally* Tom L. Beauchamp, *What Philosophers Can Offer*, HASTINGS CENT. REP, June 1982, at 13; Dan W. Brock, *Truth or Consequences: The Role of Philosophers in Policy-Making*, 97 ETHICS 786 (1987); Paul T. Menzel, *Public Philosophy: Distinction Without Authority*, 15 J. MED. & PHIL. 411 (1990); Richard W. Momeyer, *Philosophers and the Public Policy Process: Inside, Outside or Nowhere at All?*, 15 J. MED. & PHIL. 391 (1990); James Rachels, *Can Ethics Provide Answers?*, *in* LIFE CHOICES: A HASTINGS CENTER INTRODUCTION TO BIOETHICS 3 (Joseph H. Howell & William F. Sale eds., 1995). It is interesting to note that my examination of legitimate liberty limiting principles parallels that of what constitutes a legitimate governmental interest in constitutional analysis. The process of identifying whether a law is paternalistic is similar to the process of determining whether a law has a rational basis. Moreover, constitutional law is directly relevant because paternalistic legislation may lack a rational basis as required by the federal Due Process Clause and analogous state constitutional provisions. *Cf.* Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998) (discussing whether bare assertions of public morality can justify regulations); R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions*

work is simple and familiar, and it is based on the central philosophical[20] and public health[21] literature defining liberty-limiting principles.

In part because there are "incommensurable and unbridgeable differences between what individuals consider good for themselves,"[22] American society places a high value on individual rights, autonomous decision making, and the protection of the private sphere from government intrusion.[23] Therefore, any interference with liberty is presumptively invalid

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of Advancement, Relationship and Burden, 28 U. RICH. L. REV. 1279, 1286-88 (1994) (outlining "legislature fit" analysis).

20. *See generally* DWORKIN, *supra* note 5 (exploring autonomy); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, separately published in four volumes as: HARM TO OTHERS (1984); OFFENSE TO OTHERS (1985) [hereinafter OFFENSE TO OTHERS]; HARM TO SELF (1986); and HARMLESS WRONGDOING (1988) [hereinafter HARMLESS WRONGDOING]; GOODIN, *supra* note 5 (discussing the ethical issues surrounding tobacco regulations); HUSAK, *supra* note 6 (discussing the ethical issues surrounding narcotics regulations); KLEINIG, *supra* note 8 (discussing paternalism generally); VAN-DEVEER, *supra* note 6 (discussing paternalism generally); Gerald Dworkin, *Paternalism*, *in* MORALITY AND THE LAW 107 (Richard A. Wasserstrom ed., 1971) (exploring the legitimacy of paternalistic interferences with individual behavior).

21. *See generally* DAN E. BEAUCHAMP, THE HEALTH OF THE REPUBLIC: EPIDEMICS, MEDICINE, AND MORALISM AS CHALLENGES TO DEMOCRACY 69-100 (1988); ROBERT L. RABIN & STEPHEN D. SUGARMAN, SMOKING POLICY: LAW, POLITICS, AND CULTURE 15 (1993) ("[O]ur primary intention has been to examine the norms underlying the wide array of impulses to regulate."); Rabin, *supra* note 5, at 477 (asking "what is the range of justifications for restricting the sale and use of tobacco?" and discussing "the appropriate role of the state in imposing restrictions on individual autonomy"); Nigel C. Unwin, *Cycle Helmets—When is Legislation Justified?*, 22 J. MED. ETHICS 41, 41 (1996) ("The aim [of this paper] . . . is to suggest a set of criteria on which the debate between opponents and proponents of mandatory cycle helmets should focus . . . I identify criteria by following a broad framework, or 'ethical map.' ").

22. ARTHUR L. CAPLAN, IF I WERE A RICH MAN, COULD I BUY A PANCREAS? 257 (1992); *cf.* CARL G. JUNG, MODERN MAN IN SEARCH OF A SOUL 60 (W.S. Dell & Cary F. Baynes trans., 1970) (1933) ("The shoe that fits one person pinches another; there is no recipe for living that suits all cases."); Dan W. Brock, *Paternalism and Autonomy*, 98 ETHICS 550, 561 (1988) ("One foundation for personal sovereignty . . . is a deep skepticism about whether there is any objective correct view of the good for persons. . . ."); Gillian Brock, *Paternalism and the (Overly?) Caring Life*, 6 BUS. ETHICS Q. 533, 533-42 (illustrating that one problem with paternalism is the lack of consensus as to an objective correct view of the good life); Richard M. Gilbert, *Ethical Considerations in the Prevention of Smoking in Adults and Children*, MEDICOLEGAL NEWS, June 1980, at 4, 4 ("[G]ood health should not necessarily be the preeminent objective of our social and political policymaking."); Richard Klein, *Light Up and Live*, WALL ST. J., Mar. 31, 1998, at A20 ("There are those for whom longevity is not the highest value in life . . . .").

23. *See generally* Doe v. Bolton, 410 U.S. 179, 211-13 (Douglas, J., concurring) (acknowledging a right to privacy encompassing "autonomous control over the development and expression of one's intellect, interests, tastes, and personality, . . . freedom of choice in the basic decisions of one's life, . . . freedom to care for one's health and person"); CHARLES FRIED, CONTRACT AS PROMISE (1981) (describing contracts as autonomous because they are self-imposed obligations); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (describing the role of the market in a free society); HARM TO OTHERS, *supra* note 9, at 9 ("[M]ost writers on our subject have endorsed a kind of 'presumption in favor of liberty.' "); HARM TO SELF, *supra* note 8, at 9, 14, 207, 211-12; GAYLIN & JENNINGS, *supra* note 2, at 54 & 58 (stating that autonomy "has been elevated to first place among the

and must be justified.[24] I will define and apply three "liberty limiting principles"[25] or reasons that can have "decisive weight"[26] when balanced against the case for liberty. These liberty limiting principles, which may justify the public health regulation of tobacco, are: (1) the harm princi-

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things we value and want to protect [and] ceased to be one value among many and has assumed pride of place as the moral touchstone of our personal lives and our social institutions"); FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1944); MILL, *supra* note 17; JOHN STUART MILL, ON SOCIAL FREEDOM: THE NECESSARY LIMITS OF INDIVIDUAL FREEDOM ARISING OUT OF THE CONDITIONS OF OUR SOCIAL LIFE 33 (Dorothy Fosdick ed., 1941) (1907); Thomas Morawetz, *Liberalism and the New Skeptics*, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 122, 122 (Jules L. Coleman & Allen Buchanan eds., 1994) ("The concept of autonomy is the bulwark of liberal theory in politics and law."); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (proposing that only a minimal state with very limited powers is justified); Peter L. Berger, *Furtive Smokers—and What They Tell Us About America*, COMMENTARY, June 1994, at 21, 26 ("[A] strong tradition of individual autonomy has existed in America, expressed in folklore literature, in everyday patterns of interaction ('it's a free country!'), and of course in political institutions and law."); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) (listing areas in which autonomy has been a subject of substantial discussion); Lawrence O. Gostin et al., *Privacy and Security of Health Information in the Emerging Health Care System*, 5 HEALTH MATRIX 1, 2 (1995) (listing polls illustrating Americans' concern with honoring autonomy).

The concept of liberty or autonomy is sometimes also expressed as "decisional privacy" or "expressive privacy." *See* JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 77-79 (1997). *See generally* Anita L. Allen, *Privacy in Health Care*, *in* 4 ENCYCLOPEDIA OF BIOETHICS 2064, 2065-67 (Warren T. Reich ed., 1996); Judith Wagner DeCew, *Defending the "Private" in Constitutional Privacy*, 21 J. VALUE INQUIRY 171 (1987) (discussing two distinct interests in privacy).

24. *See* JOHN KULTGEN, AUTONOMY AND INTERVENTION: PARENTALISM IN THE CARING LIFE 176 (1995) ("Since liberty is a central good, there is a moral presumption against all liberty-limiting measures."); Tziporah Kasachkoff, *Paternalism and Drug Abuse*, 58 MT. SINAI J. MED. 412, 412 (1991) ("[S]ince we value the right of individuals to lead their own lives . . . any interference with another's life . . . demands some justification."); *see also* NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS 80 (June 1997) [hereinafter 1997 NBAC REPORT] ("In the United States, governmental policies that prohibit or regulate human actions require justification because of a general presumption against governmental interference in individual activities."); *id.* at 75, 91-92; Robert C. L. Moffat, *Cloning Freedom: Criminalization or Empowerment in Reproductive Policy?*, 32 VAL. U. L. REV. 583, 586 (1998) (noting the uneasy case for criminalizing human cloning); David L. Shapiro, *Courts, Legislatives, and Paternalism*, 74 VA. L. REV. 519, 544 ("[A]ntipaternalism is the presumption, at least when it comes to action on behalf of the state, and . . . the paternalist therefore always has the burden of persuasion."); Wikler & Beauchamp, *supra* note 6, at 1366 ("[E]ach encroachment on individual autonomy is commonly regarded as standing in need of justification, especially in the United States, which has a cultural history marked by an ideology of individualism.").

25. I borrow this term from Feinberg. *See* HARM TO OTHERS, *supra* note 9, at 9-10; HARMLESS WRONGDOING, *supra* note 20, at ix; *cf.* JONATHAN SCHONSHECK, ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW 65-66, 101, 303 (1994) (renaming Feinberg's principles "Principles of State Authority" to distinguish his use of those principles in a novel methodology called "filtering").

26. Liberty limiting principles are neither necessary nor sufficient conditions for moral justifiability. Rather, as Feinberg stresses, they are merely "relevant reasons." *See* HARM TO OTHERS, *supra* note 9, at 10; HARMLESS WRONGDOING, *supra* note 20, at 321.

ple, (2) the soft paternalism principle, and (3) the hard paternalism principle.[27]

The first of these, the "harm principle," seeks to prevent individuals from causing harm to others. This liberty-limiting principle is recognized as the most morally legitimate because preventing or reducing harm to others is a traditional exercise of the state's police power, a classic and core function of government.[28] Without state regulation of such conduct,

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27. The harm and soft-paternalism principles are traditionally defended as liberty-limiting principles in the context of public health. *See* Dan E. Beauchamp, *Public Health: Philosophy of Public Health*, *in* 4 ENCYCLOPEDIA OF BIOETHICS 2161, 2164 (Warren T. Reich ed., 1996) [hereinafter Beauchamp, *Philosophy of Public Health*]; Dan E. Beauchamp, *Public Health and Individual Liberty*, 1 ANN. REV. PUB. HEALTH 121, 124 (1980) [hereinafter Beauchamp, *Health and Liberty*]; *see also infra* notes 244 & 253; *cf.* William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1243-45 (1998) (listing six liberty-limiting principles). Very few, however, defend hard paternalism as a liberty-limiting principle.

Although the harm principle, soft paternalism, and hard paternalism are the liberty-limiting principles most germane to the regulation of smoking, they are not the only liberty-limiting principles. Philosophers and other theorists have developed others. *See, e.g.*, Heta Häyry, *Paternalism*, *in* ENCYCLOPEDIA OF APPLIED ETHICS 449, 450 (Ruth Chadwick ed., 1998) (listing six liberty-limiting principles); HARM TO SELF, *supra* note 8, at xvi-xvii (listing ten liberty-limiting principles). Most notable among these others is legal moralism, by which a subject's liberty is limited not for her own physical good but for her moral good or for morality in general. *See* HARMLESS WRONGDOING, *supra* note 20, at 3-17. I do not discuss the applicability of legal moralism in this Article. That it is not relevant, however, is much disputed. *See, e.g.*, CASSANDRA TATE, CIGARETTE WARS: THE TRIUMPH OF THE LITTLE WHITE SLAVER 8 (1999) ("[T]he current campaign against smoking, while ostensibly more concerned with public health than private rectitude, remains entangled in moralism."); Dan E. Beauchamp, *Alcohol and Tobacco as Public Health Challenges in a Democracy*, 85 BRITISH J. ADDICTION 251, 252 (1990) [hereinafter Beauchamp, *Public Health Challenges*] (arguing that "the modern campaign against smoking is taking on the shape of a moral crusade" and that this is an ineffective way to deal with the public health challenge); Joseph R. Gusfield, *The Social Symbolism of Smoking and Health*, *in* SMOKING: WHO HAS THE RIGHT? 241, 252, 262 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998). Also notable among the other liberty-limiting principles is Dan Beauchamp's justification of public health interventions for the "common good" rather than for the good of a particular individual. *See* Dan Beauchamp, *Life-style, Public Health and Paternalism*, *in* ETHICAL DILEMMAS IN HEALTH PROMOTION 69, 75-76 (Spyros Doxiadis ed., 1987); BEAUCHAMP & STEINBOCK, *supra* note 6, at 99; *see also* Ronald M. Dworkin, *Introduction* to THE PHILOSOPHY OF LAW 1, 10 (R.M. Dworkin ed., 1977). Although Beauchamp offers his argument as a way around the quagmires of hard paternalism, it is unclear that Beauchamp's "common good" argument is really distinct either from hard paternalism, *see* VANDEVEER, *supra* note 6, at 340-41; Tom L. Beauchamp, *The Regulation of Hazards and Hazardous Behaviors*, 6 HEALTH EDUC. MONOGRAPHS 242, 250 (1978) [hereinafter Beauchamp, *The Regulation of Hazards*], or from legal moralism, see HARMLESS WRONGDOING, *supra* note 20, at 35-36. *But cf.* Pellegrino, *Autonomy and Coercion*, *supra* note 6, at 86 (drawing a distinction between measures for good of the community and for the good of the individual). Finally, in addition to beneficence, morality, and the common good, some propose that justice is a liberty-limiting principle. *See infra* note 102.

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> [T]he liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other

life would surely be, as Hobbes warned, "solitary, poor, nasty, brutish, and short."[29]

The other two liberty-limiting principles, soft paternalism and hard paternalism, are aimed at preventing individuals from harming themselves and are, therefore, more controversial bases for regulation.[30] Such regulation is especially controversial where the behavior does not even incidentally affect others. This is "pure" paternalism, and it holds that an individual's behavior can be regulated for the *sole* good of that individual.[31]

Ethically speaking, pure paternalistic intervention is most justified—and as a practical matter, *is* most often justified—on the basis that the individual lacks the requisite decision-making capacity. This type of pure paternalism has been described as "soft"[32] or "weak"[33] because it justifies intervention where the individual has assumed a risk without adequate information, without sufficient maturity, or without adequate free-

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basis organized society could not exist with safety to its members.

Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905); *see also* MICHAEL D. BAYLES, PRINCIPLES OF LEGISLATION: THE USES OF POLITICAL AUTHORITY 95-118 (1978) (considering the two purposes of political authority, namely, protecting people from harm by others and ensuring the government's existence); HARM TO OTHERS, *supra* note 9, at 187 ("[T]he harm-to-others principle is virtually beyond controversy."); LEICHTER, *supra* note 12, at 13 ("To the extent that such activities are 'other-regarding,' to use a phrase introduced by John Stuart Mill, or produce negative 'externalities,' a concept derived from economics, they arouse deep political concerns."); RABIN & SUGARMAN, *supra* note 21, at 13 ("Once the rationale for regulatory action is located in the domain of general public health and welfare legislation, it takes on the coloration of a traditional exercise of the state's police power. Those who engage in activities imposing health and safety risks on the public have routinely been subjected to governmental control through regulatory standards backed up by criminal or other sanctions."); Rabin, *supra* note 5, at 485 (considering the harm-to-others justification for tobacco regulation).

29. THOMAS HOBBES, LEVIATHAN 186 (Penguin ed. 1985) (1651).

30. *See* HUSAK, *supra* note 6, at 64 ("A more controversial rationale in favor of criminalization is that . . . it is harmful to *users* themselves.").

31. *See* Dworkin, *supra* note 20, at 111. Feinberg calls this "unmixed" or "direct" paternalism. HARM TO SELF, *supra* note 8, at 8-9. In order to maintain conceptual clarity and to precisely focus on the core ethical issues of paternalism, I will discuss only "pure" or "unmixed" paternalism. In discussing paternalistic liberty limiting principles in sections II and III, although in reality the harm principle would also apply, in order to examine each liberty limiting principle independently, I will presume that there are no negative externalities, that there are no harms or risks to third parties, that there is no justification for the regulation independent of the good of the individual with whose liberty the regulation interferes. *See infra* notes 153-55 and accompanying text.

32. *See, e.g.*, DWORKIN, *supra* note 5, at 124; HARM TO SELF, *supra* note 8, at 12-13.

33. *See, e.g.*, HARM TO SELF, *supra* note 8, at 12 n.16; JAMES F. CHILDRESS, WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE 17 (1982); VANDEVEER, *supra* note 6, at 81-87; Tom L. Beauchamp, *Paternalism, in* 4 ENCYCLOPEDIA OF BIOETHICS 1914, 1915 (Warren T. Reich ed., 1996) ("[T]he terms 'weak' and 'strong' seem to have more deeply influenced the bioethics literature and will be used here."); Häyry, *supra* note 27, at 453-54 (uniquely employing the terms 'hard' and 'soft' to draw a second distinction to distinguish conduct that constitutes a mere *prima facie* interference with autonomy).

dom from coercion.[34] The classic example, from John Stuart Mill, is detaining someone who is about to unknowingly cross a dangerously dilapidated bridge.[35] Under these circumstances it cannot fairly be said that the individual's decision was freely or autonomously made because the individual did not fully understand the dangerous consequences of her behavior. Thus, it is widely agreed that intervention under these circumstances is only "soft" paternalism; in fact, it is not really paternalistic at all.[36]

If soft paternalism represents interventions that do not interfere with autonomy, then the only real paternalism is "hard"[37] or "strong"[38] paternalism, which constrains individuals' decisions even when those decisions are informed and voluntary. Hard paternalism is not held in high regard in this country[39] and has even been described as an "un-American rationale" for government regulation.[40] Nevertheless, I argue that the hard

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34. For an overview of the conceptual terminology, see Beauchamp, *supra* note 33. John Kultgen argues that the term "parentalism" is preferable to "paternalism" because it does "not incorporate a negative evaluation in its very definition . . . [and therefore does not] bias judgment." KULTGEN, *supra* note 24, at 61; *see also id.* at x, 48. *But cf.* KLEINIG, *supra* note 8, at xiii (admitting the attractiveness of the alternate vocabulary but choosing, nevertheless, to "bow to convention"); NIKKU, *supra* note 6, at 18 n.2 (choosing the "notion paternalism" over that of "parentalism" because "it has a sharper and clearer association"); Brock, *supra* note 22, at 539 (rejecting the use of the term "parentalism" because it has "connotations which are just as negative as the term 'paternalism' ").

35. *See* MILL, *supra* note 17, at 166 ("They might seize him and turn him back without any real infringement of his liberty, for liberty consists in doing what one desires, and he does not desire to fall into the river.").

36. *See infra* notes 170-75 and accompanying text.

37. *See, e.g.*, DWORKIN, *supra* note 5, at 124; HARM TO SELF, *supra* note 8, at 12-13.

38. *See, e.g.*, HARM TO SELF, *supra* note 8, at 12 n.16; PHILOSOPHICAL ETHICS, *supra* note 6, at 413; VANDEVEER, *supra* note 6, at 81-86; Beauchamp, *supra* note 33, at 1915; Häyry, *supra* note 27, at 454-55.

39. *See* Shapiro, *supra* note 24, at 529-45.

40. *See* Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1103 (1983); *see also* WILLIAM A. DONOHUE, THE NEW FREEDOM: INDIVIDUALISM AND COLLECTIVISM IN THE SOCIAL LIVES OF AMERICANS 5 (1990) ("Americans have always prized liberty; it is the most defining characteristic of what it is to be an American."); Robert H. Blank, *Regulatory Rationing: A Solution to Health Care Resource Allocation*, 140 U. PA. L. REV. 1573, 1577 (1992) ("Americans depend heavily on the liberal tradition and emphasize individual autonomy, self-determination, and a shared belief in the value of the individual . . . ."); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 588 (1982) ("[P]aternalism is if anything more taboo than distribution as a subject for open discussion in the literature of decisions about rules."); Lawrence M. Mead, *Telling the Poor What To Do*, 132 PUB. INTEREST 97, 111 (1998) ("[P]aternalism . . . conflicts with American values . . . . In the land of the free, this is not welcome."); Daniel Wikler, *Who Should be Blamed for Being Sick?*, 14 HEALTH EDUC. Q. 11, 13 (1987) ("[P]aternalism is not, in this country, a respectable public rationale for coercive government policies.").

paternalism principle, like the harm principle and the soft paternalism principle, can (and does in some circumstances), serve as an ethically justifiable basis for the government regulation of tobacco. Acknowledging the use and permissibility of hard paternalism conceptually clarifies the issues at stake, allows us to provide a more obvious and natural explanation for current regulations, and lays the groundwork for future policy development.[41]

The harm, soft paternalism, and hard paternalism liberty-limiting principles represent morally relevant and often decisive reasons for limiting individual liberty. Nevertheless, given the strong presumption in favor of liberty, these principles should be strictly construed. The application of these three principles should be guided by one meta level rule: "the principle of the least restrictive alternative."[42]

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41. *See* Dershowitz, *supra* note 18, at 156 (calling for the justifiability of hard paternalism to be "exposed and openly debated" so that we "may decide how much deprivation of individual liberty should be permitted to achieve a tolerable level of safety."). After all, explains Dershowitz, " '[w]hen you get the dragon out of his cave on to the plain and into the daylight, you can count his teeth and claws, and see just what is his strength.' " *Id.* (quoting but not citing Oliver Wendell Holmes, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920)); *see also* JAMES BOVARD, FREEDOM IN CHAINS: THE RISE OF THE STATE AND THE DEMISE OF THE CITIZEN 50 (1999); Alisdair MacIntyre, *Utilitarianism and Cost-Benefit Analysis: An Essay on the Relevance of Moral Philosophy to Bureaucratic Theory*, *in* ETHICS AND THE ENVIRONMENT 139, 139 (Donald Scherer & Thomas Attig eds., 1983) ("One of the tasks of moral philosophy is to help us recognize and, if possible, to exorcise . . . unrecognized theoretical ghosts. . . . Being unrecognized they go uncriticized.").

42. Dworkin, *supra* note 20, at 126 ("I suggest a principle of the least restrictive alternative. If there is an alternative way of accomplishing the desired end without restricting liberty although it may involve great expense, inconvenience, etc., the society must adopt it."); SCHONSHECK, *supra* note 25, at 69 ("*[C]etris paribus* the less intrusive methods of discouraging [harmful] conduct are to be preferred over the more intrusive."); *see also* BEAUCHAMP & CHILDRESS, *supra* note 9, at 283 (arguing that intervention can be justified if "[t]he least autonomy-restrictive alternative that will secure the benefits and reduce the risks is adopted"); CALLAHAN, *supra* note 7, at 199 (explaining that although some coercive measures will be necessary to promote public health, it would be better to improve public health in ways that avoid conflict with personal liberty); GAYLIN & JENNINGS, *supra* note 2, at 199 ("Coercion by the state must be subject to the tightest controls utilizing the narrowest grounds of ethical justification."); HARM TO SELF, *supra* note 8, at 138; HUSAK, *supra* note 6, at 99 ("Whenever possible, the objectives of a social policy should be achieved by means less drastic than a total prohibition."); KLEINIG, *supra* note 8, at 74 ("If *x* is less or nonrestrictive of A's freedom . . . then *ceteris paribus*, *x* is to be preferred."); *id.* at 70, 135-37, 185, 216 (citing other examples where the least restrictive means of regulation is to be preferred); KULTGEN, *supra* note 24, at 167 (noting that legislators considering safety legislation should ask whether there is a less coercive means of meeting the need for public protection.); JONATHAN RILEY, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO MILL ON LIBERTY 141 (1998) (noting Mills's reluctance to support governmental intervention in certain cases); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 56 (1997) ("A good government should have a presumption in favor of the least intrusive means . . . ."); VANDEVEER, *supra* note 6, at 312 ("[L]egislatures rationally could create more fine-textured sets of laws . . . . Indeed, there is a presumption in favor of so doing—subject to constraints of workability."); Gostin et al., *supra* note

The principle of the least restrictive alternative demands that government regulation that interferes with individual liberty be no broader or more intrusive than necessary to accomplish the regulation's purpose.[43] As one commentator explained, "it is essential to think carefully about the 'fit' between any given set of policy proposals in a composite package and the underlying scientific and moral bases for regulatory action."[44] For example, the harm principle cannot justify a regulation restricting the use of chewing tobacco because that activity poses no apparent harm to others. Similarly, we cannot use soft paternalism to restrict an adult from smoking if her decision to smoke is informed and voluntary.

In this Article I will identify and evaluate three ethical bases for tobacco regulation and some particular policy options that each can justify. I discuss the "harm to others" liberty-limiting principle in Section One.

12, at 124 ("[S]tatutes should require health officials to choose the least restrictive alternative that will accomplish the public health goal."); Gostin, *supra* note 15, at 332 ("The intervention must also be no more restrictive than necessary to achieve the public health objective."); Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599, 604 (1998) ("[A] statute that is underinclusive is to be preferred to a statute that is overinclusive."); Michael Lavin, *Substance Abuse: Smoking*, *in* 5 ENCYCLOPEDIA OF BIOETHICS 2422, 2425 (Warren T. Reich ed., 1996); Pellegrino, *Health Promotion*, *supra* note 6, at 376 (arguing that coercion should be only as strong as necessary); Donald H. Regan, *Justifications for Paternalism*, *in* THE LIMITS OF LAW 189, 191 (J. Roland Pennock & John W. Chapman eds., 1974) (claiming we should interfere "only where people lack information"); Shapiro, *supra* note 24, at 570; Daniel Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles*, *in* PATERNALISM 35, 39, 45 (Rolf Sartorius ed., 1983) (suggesting limitations on state intervention); *cf.* Bruce A. Arrigo, *Paternalism, Civil Commitment and Illness Politics: Assessing the Current Debate and Outlining a Future Direction*, 7 J. L. & HEALTH 131, 151-54 (1992-93) (discussing the least restrictive alternative doctrine); Moffat, *supra* note 24, at 605 ("Criminalizing conduct . . . should always be our last resort in responding to social problems."). Indeed, the least restrictive alternative should guide public policy even though public health is the "preeminent justification for the government to act for the welfare of society." Lawrence O. Gostin, *Securing Health or Just Health Care?: The Effect of the Health Care System on the Health of America*, 39 ST. LOUIS U. L.J. 7, 12 (1994).

43. This principle might not always be so simple to apply. When effectiveness can be gained only with severely intrusive restrictions, tradeoffs will have to be made between effectiveness and intrusiveness. In other words, even the least restrictive alternative might be *too* restrictive when there is an alternative almost as effective but not nearly so restrictive. For an illustration of the different types of measures for reducing health damage, see William Haddon, Jr., *Advances in the Epidemiology of Injuries as a Basis for Public Policy*, 95 PUB. HEALTH REP. 411 (1980); W. Kip Viscusi, *Constructive Cigarette Regulation*, 47 DUKE L.J. 1095, 1098-99 (1998).

44. Rabin, *supra* note 5, at 495; *see also* RABIN & SUGARMAN, *supra* note 21, at 6 ("[T]here are many different senses in which the health risks of smoking can be viewed as 'a problem' warranting governmental intervention. . . . [E]ach perspective in turn implies different governmental responses."). This "least restrictive alternative" analysis parallels that used in constitutional law when analyzing government interference with "fundamental rights." *See, e.g.*, HARM TO SELF, *supra* note 8, at 87-94; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 532, 643 (1997); 1997 NBAC REPORT, *supra* note 24, at 81; Kelso, *supra* note 19, at 1298-1305.

In Section Two, I discuss the "soft paternalism" liberty-limiting principle. Finally, in Section Three, I discuss the "hard paternalism" liberty-limiting principle and conclude that policymakers ought to justify any regulation of tobacco smoking on the basis of one of these three principles. Furthermore, pursuant to the rule of the least restrictive alternative, the scope and manner of that regulation ought to be no broader or more intrusive than the underlying principle allows. Doing this will better frame the issues and lead to clearer,[45] more consistent,[46] and more legitimate[47] public policy.

I. REGULATION TO PREVENT HARM TO OTHERS: THE "HARM PRINCIPLE"

The most ethically sound basis upon which to justify the government regulation of tobacco is that the use of tobacco causes harm to others. In this section I will first define the harm principle. After laying that conceptual groundwork, I will demonstrate the harm principle's use as a liberty-limiting principle in the context of tobacco regulation. Finally, I argue that although the harm principle could theoretically justify almost any regulation, its limitations as a liberty-limiting principle leave much room for tobacco regulation on pure paternalistic grounds.

A. Defining "Harm to Others"

Regulating public health risks with the goal of preventing harm to others has proven to be the most politically compelling rationale for gov-

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45. *See supra* notes 5 & 6; *cf.* BEAUCHAMP & CHILDRESS, *supra* note 9, at 5 ("The purpose of theory is to enhance clarity, systematic order, and precision of argument in our thinking . . . ."); DWORKIN, *supra* note 5, at 165 ("[P]hilosophical theory . . . provid[es] a clearer picture as to what the conflicts are about . . . ."); Kahn, *supra* note 5, at 7 ("Ethical analysis can help frame the issues . . . make explicit the principles at issue and lead to more consistent and clear policy."); Wikler, *supra* note 40, at 25 ("[T]he debate over personal responsibility for health involves fundamental moral and philosophical questions . . . [p]arties in this dispute, however . . . will need to examine the logic of the respective positions . . . . We need to know what policy conclusions follow from what premises . . . .").

46. *Cf.* Beauchamp, *The Regulation of Hazards*, *supra* note 27, at 252 ("Without a systematic evaluative system that is itself normally justified we may stand condemned to the arbitrary preferences of those who emerge in society as the makers of policy. . . . Without some form of objective standards against which to judge their decisions, there will be no way to determine the appropriateness of their policy decisions.").

47. *Cf.* FADEN & BEAUCHAMP, *supra* note 18, at 216 (explaining that "basic principles not only can be 'applied' to develop guidelines, but also to properly serve as the *justification* of the guidelines."); Daniel I. Wikler, *Coercive Measures in Health Promotion: Can They Be Justified?*, 6 HEALTH EDUC. MONOGRAPHS 223, 225 (1978) ("In question, then, is the health educator's legitimacy. . . . On what moral foundation can this authority be justified? What mandate does he have to seek and use such power?").

ernment intervention.[48] The ethical foundation for such regulation is firmly established in the writings of John Stuart Mill.[49] Mill maintained that "the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others."[50] That, he argued, is the extent of the power we ceded when we entered into the social contract forming the basis of human society. Mill's theory is further delineated in a widely quoted paragraph:

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right. . . . The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence, of right, is absolute. Over himself, over his own body and mind, the individual is sovereign.[51]

For Mill, there is only one justification for state intervention: namely, that it is necessary to prevent harm to others.[52] It is a fairly ob-

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48. *See, e.g.*, FADEN & BEAUCHAMP, *supra* note 18, at 41 (listing as the most commonly invoked compelling interests supporting state intervention in patient treatment choices, the interests of particular third parties and the health and welfare of society at large); GOODIN, *supra* note 5, at 57, 136 (discussing harm to others as a basis for smoking restrictions); HARM TO OTHERS, *supra* note 9, at 11, 26 ("[T]he need to prevent harm . . . to parties other than the actor is always an appropriate *reason* for legal coercion."); HUSAK, *supra* note 6, at 63 ("The least controversial rationale in favor of criminalization is that the conduct to be prohibited is harmful *to others*"); Gilbert, *supra* note 22, at 7 ("In the case of smoking in public places, the ethical basis of legislative restrictions upon smoking is uncomplicated."); *see also id.* at 145 ("[D]efenders of the harm principle need not struggle with the legitimacy of their rationale for legal intervention."); KLEINIG, *supra* note 8, at 189 ("Where significant externalities are predictable, there is a case for imposing standards that will minimize or diminish their likelihood.") (citations omitted); PHILOSOPHICAL ETHICS, *supra* note 6, at 389 ("The harm principle is almost universally accepted as a valid autonomy-limiting principle."); Lavin, *supra* note 42, at 2425 ("All defensible theories of just laws recognize a conduct's harmfulness to others as a good reason for regulating it."); Daryl B. Matthews, *Where There's Smoke There's Ire*, MEDICOLEGAL NEWS, Winter 1979, at 4, 19 ("[T]here is far greater consensus . . . about the role of law in protecting the nonsmoker . . . .").

49. *See, e.g.*, Dworkin, *supra* note 17, at 303 (noting Mills's influence in this area); *cf. supra* note 23.

50. MILL, *supra* note 17, at 68.

51. *Id.* at 68-69; *see also* IMMANUEL KANT, ON THE OLD SAN THAT IT MAY BE RIGHT IN THEORY, BUT IT WON'T WORK IN PRACTICE 58 (E.B. Ashton trans., 1974) (1793) ("No man can compel me to be happy after his fashion, according to his conception of the well being of someone else. Instead, everybody may pursue his happiness in the manner that seems best to him provided he does not infringe on other people's freedom to pursue similar ends. . . .").

52. The "harm to others" fairly includes harm to non-human others, the mere risk of harm as opposed to actual harm, and harm to public goods. *See* Albert Weale, *Paternalism and Social Policy*, 7 J. SOC. POL'Y 157, 159 (1978).

vious proposition that "[i]f a person does an act hurtful to others . . . he is *de jure* amenable to those whose interests are concerned."[53] This principle is known as Mill's "harm principle" and it has become the primary philosophical, political, and legal rationale for interfering with individual autonomy.[54]

B. Applying the Harm Principle

The reluctance to accept pure paternalism, that is, government intervention for the sole good of the individual restrained, leads philosophers and courts to justify liberty-limitation largely on a harm-to-others basis. Fortunately for these self-professed anti-paternalists, harm to others or, in the parlance of economists, "negative externalities,"[55] can be found in almost any type of behavior.[56] Even smoking and motorcycle riding, activities which appear to affect only those who engage in them, can create the added social costs of health care, reduced productivity, and increased Social Security disability payments.[57] As Mill recognized,[58] the notion of indirect harm is subject to limitless expansion.[59]

In the late 1960s, the supreme courts of Michigan, Illinois, Ohio, and other states held unconstitutional statutes requiring motorcyclists to wear protective helmets and automobile drivers to wear seatbelts.[60] These

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53. MILL, *supra* note 17, at 70; *see also id.* at 141 ("As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it."); *id.* at 163 ("[T]he individual is not accountable to society for his actions in so far as these concern the interests of no person but himself.").

54. *See, e.g.*, HARM TO OTHERS, *supra* note 9, at 11; Shapiro, *supra* note 24, at 546.

55. *See generally* DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 22-34 (1992) (discussing negative externalities); RALPH T. BYRNS & GERALD W. STONE, ECONOMICS 91-92 (4th ed. 1989) (same); R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (same); Carl J. Dahlman, *The Problem of Externality*, 22 J. L. & ECON. 141 (1979) (same).

56. *See infra* notes 115-40 and accompanying text.

57. *See* Kenneth E. Warner, *Bags, Buckles, and Belts: The Debate Over Mandatory Passive Restraints in Automobiles*, 8 J. HEALTH POL., POL'Y & L. 44, 67 (1983).

58. Mill recognized this possibility but argued that contingent harm to others was not a sufficient basis for social control of individual behavior. MILL, *supra* note 17, at 147-49. Mill required that the harm be localized to particular individuals and constitute more than *de minimus* loss. On the other hand, modern economic theory allows us to take account of diffuse and cumulative effects. *See* HARM TO OTHERS, *supra* note 9, at 216.

59. *See infra* notes 115-40 and accompanying text.

60. *See* People v. Fries, 250 N.E.2d 149, 151 (Ill. 1969) ("The manifest function of the headgear requirement in issue is to safeguard the person wearing it . . . . Such a laudable purpose, however, cannot justify the regulation of what is essentially a matter of personal safety."); American Motorcycle Ass'n v. Davids, 158 N.W.2d 72 (Mich. Ct. App. 1968); State v. Betts, 252 N.E.2d 866, 872 (Ohio Misc. 1969) ("Whether or not a motorcyclist wears a helmet and goggles is a matter of concern solely to the individual involved. Included in a man's 'liberty' is the freedom to be as fool-

courts determined that the protection of the individual from himself did not bear a substantial—or indeed, any—relation to the public health or welfare. As the public health or welfare was the only legitimate basis for interfering with individual liberty, the courts concluded that the statutes were invalid.[61] The helmet and seatbelt laws did not restrict liberty in order either to prevent or reduce harm to others or negative externalities. Therefore, the statutes could not be justified.

Eventually, however, these courts and others shifted gears, upholding both motorcycle helmet and automobile seatbelt laws[62] on the basis of the harm principle. Not surprisingly, courts expanded their notion of harm to others, perceiving that the risks that riders and drivers posed to themselves translated into a drain on medical resources.[63] "Indeed, the conduct proscribed by so-called 'victimless' crimes is, upon further reflection, not at all victimless. . . . The accident victim's injuries impose a burden on the entire community."[64] Eventually, this account came to be recognized as so obvious that one court wrote, "[w]e do not understand a

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ish, foolhardy or reckless as he may wish, so long as others are not endangered thereby."); *see also* Picou v. Gillum, 874 F.2d 1519, 1520 & nn.1-2 (11th Cir. 1989) (collecting cases); Kenneth M. Royalty, Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355, 355 n.7 (1969) (same). Most states had helmet laws in the late 1960s because the federal government mandated such laws as a condition for receiving federal highways funds. *See* Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966); 23 C.F.R. § 1204.4 (1979). Ostensibly to protect individual liberty, the helmet requirement was dropped when the law was amended in 1976. *See* Stephen P. Teret & Ruth Gaare, *The Law and the Public's Health*, BIOLAW § 3, at 29, 39-40 (1986) (quoting House and Senate floor statements).

61. *See* Michael R. Pollard & John T. Brennan, Jr., *Disease Prevention and Health Promotion Initiatives: Some Legal Considerations*, 6 HEALTH EDUC. MONOGRAPHS 211, 215 (1978) ("Few courts have been willing to uphold motorcycle helmet legislation solely on the grounds that the state has an inherent power to protect individuals from their own imprudent actions. In fact, courts have gone out of their way to avoid basing their decision on this justification."); *see also* Teret & Gaare, *supra* note 60, at 41 ("[T]he courts seem to have strained to establish society's interest in motocycle helmet use."). *But see* Jonathan M. Purver, Annotation, *Validity of Traffic Regulations Requiring Motorcyclists to Wear Protective Headgear*, 32 A.L.R.3d 1270, § 4 (1970 & Supp. 1998) (collecting cases in which courts upheld helmet regulations where the only identified state interest was the protection of the motorcyclist himself).

62. *See* People v. Kohrig, 498 N.E.2d 1158, 1164-66 (Ill. 1986); People of City of Adrian v. Poucher, 247 N.W.2d 798 (Mich. 1976); State v. Stouffer, 276 N.E.2d 651 (Ohio Ct. App. 1971); *see also* Simon v. Sargent, 346 F. Supp. 277 (D. Mass), *aff'd*, 409 U.S. 1020 (1972); Purver, *supra* note 61, § 3(a) & § 5 (collecting cases where courts upheld helmet regulations because they found a public welfare justification).

63. *See* Jonathan D. Moreno & Ronald Bayer, *The Limits of the Ledger in Public Health Promotion*, HASTINGS CENTER REP., Dec. 1985, at 37, 39.

64. Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still a Wonderful Life?*, 70 NOTRE DAME L. REV. 519, 526 (1995). *But see* Daniel I. Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles*, 56 HEALTH AND SOC'Y (MILLBANK MEMORIAL FUND Q.) 303, 319 (1978) (questioning the legitimacy of the economic rationale).

state of mind that permits plaintiff to think that only he himself is concerned."[65] Courts and legislatures not only recognized and identified negative externalities but began to premise lifestyle control regulation on the basis of those externalities.

Today, the argument that "[i]t's my body and I have the right to do as I please with it"[66] is usually defeated not by denying the existence or validity of this right, but rather by illustrating that seemingly personal behavior does in fact violate the harm principle and is therefore subject to societal control. For example, Mary Ann Glendon responds to the individual rights plea to be free of lifestyle controls like motorcycle helmet laws:

> This way of thinking and speaking ignores the fact that it is a rare driver, passenger, or biker, [or smoker] who does not have a child, or a spouse, or a parent. It glosses over the likelihood that if the rights-bearer comes to grief, the cost of his medical treatment, or rehabilitation, or long-term care will be spread among many others. The independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward.[67]

A 1979 report by the Surgeon General similarly concludes that although "[m]otorcyclists often contend that helmet laws infringe on personal liberties. . . . the high costs of disabling and fatal injuries, the burdens on families, and the demands on medical care resources are borne by society as a whole."[68]

In the liberty-limiting lifestyle control context of motorcycle helmet and automobile seatbelt laws, courts initially were unreceptive to "regulations which have as their purpose and effect *solely* the protection of the individual from his own folly."[69] These same courts later justified the same regulations by showing that they were "directed [only] on a primary level toward protecting the individual from [herself; more importantly,] . . . on a secondary level they protect much broader societal interests."[70] The *direct* effects on the restrained individual, no matter how

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65. *Simon*, 346 F. Supp. at 279.

66. MARY ANN GLENDON, RIGHTS TALK 45 (1991).

67. *Id.* at 45-46.

68. U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, HEALTHY PEOPLE: THE SURGEON GENERAL'S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION 112 (1979); *see also* U.S. DEP'T TRANS. NATIONAL HIGHWAY SAFETY ADMINISTRATION, WITHOUT MOTORCYCLE HELMETS WE ALL PAY THE PRICE 11-16 (Aug. 1998) (DOT Pub. HS-808-601).

69. State v. Cotton, 516 P.2d 709, 710 (Haw. 1973).

70. *Id.*; *see also* Tom Christoffel, *The Role of Law in Reducing Injury*, 17 L. MED. & HEALTH CARE 7, 11 (1989) ("When it comes to forcing individuals to protect themselves through mandatory use of seat-belts and motorcycle helmets, the courts often rely on the indirect cost of injuries to soci-

substantial, as a matter of principle (*i.e.* the harm principle) could not justify the regulations. These direct effects had to be conjoined with *indirect* effects on society before courts agreed to uphold laws regulating apparently private behavior.[71]

This same transition took place in the arena of tobacco regulation. As with motorcycle helmet and seatbelt laws, the pure paternalistic basis for tobacco regulation was rejected from the start. In the nineteenth century, smoking was viewed as a moral problem, a problem of the individual alone.[72] Goodin explains that Victorian moralists were pragmatic and "took care to express their disapproval in such a way that their moral authority would remain unimpaired when their injunctions were widely disregarded."[73] Smoking was thus established as best controlled through etiquette and social pressure.[74] Victorian moral philosophers bolstered this approach and agreed that it was not society's place to stop us from doing things that harm only ourselves.[75]

In spite of this Victorian attitude, the United States witnessed a brief period of pure paternalistic government regulation of tobacco.[76] "At the beginning of the 20th century, 14 states had passed laws banning the production, sale, advertisement, or use of cigarettes within their boundaries."[77] This paternalism reached its high water mark in 1900, when the United States Supreme Court upheld Tennessee's complete prohibition of the sale and manufacture of tobacco products on the grounds that such

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ety to justify the mandates.").

71. For an extended application and exposition of this argument, see *People v. Carmichael*, 279 N.Y.S.2d 272, 277 (1967), *rev'd*, 288 N.Y.S.2d 931 (1968).

72. *See generally* JOHN C. BURNHAM, BAD HABITS: DRINKING, SMOKING, TAKING DRUGS, GAMBLING, SEXUAL MISBEHAVIOR, AND SWEARING IN AMERICAN HISTORY 89-92 (1993) (describing societal attitudes toward smoking in the Victorian era); TATE, *supra* note 27, at 19, 47, 52-53, 120, 148.

73. GOODIN, *supra* note 5, at 2.

74. *See id.* at 3; *cf.* PIERRE LEMIEUX, SMOKING AND LIBERTY: GOVERNMENT AS A PUBLIC HEALTH PROBLEM 82-84 (1997).

75. *See* GOODIN, *supra* note 5, at 3 (citing Mill, Spencer, and Sidgwick).

76. *See* RONALD J. TROYER & GERALD E. MARKLE, CIGARETTES: THE BATTLE OVER SMOKING 34 (1983) (describing prohibitions in various states at beginning of twentieth century); Christopher Cobey, Note, *The Resurgence and Validity of Antismoking Legislation*, 7 U.C. DAVIS L. REV. 167, 169 (1974) (describing the increase in state restrictions on smoking in early twentieth century America); *see generally* Gordon L. Dillow, *Thank You for Not Smoking: The Hundred-Year War Against the Cigarette*, AM. HERITAGE, Feb./Mar. 1981, at 94; Rivka Widerman, *Tobacco is a Dirty Weed. Have We Ever Liked It? A Look at Nineteenth Century Anti-Cigarette Legislation*, 38 LOY. L. REV. 387 (1992). These regulations were directed almost exclusively at cigarettes and not at other forms of tobacco. *See* Cobey, *supra*, at 169 n.14.

77. JACOBSON & WASSERMAN, *supra* note 4, at 4; TATE, *supra* note 27, at 120, 159-60 (listing both laws and proposed laws).

products were "wholly noxious and deleterious to health."[78] The state supreme court explained that the use of cigarettes "is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. . . . [T]heir every tendency is towards the impairment of physical health and mental vigor."[79] By 1901, all but two states had considered legislation which would have restricted the tobacco trade or prohibited it entirely.[80] By 1921, fourteen states had enacted such legislation.[81]

Nonetheless, regulation of tobacco on a pure paternalistic basis died out quickly.[82] By 1927, all anti-smoking legislation had been repealed,[83] and even the courts became less receptive to pure paternalistic regulation.[84] For example, in 1914 an Illinois court struck down an ordinance that prohibited tobacco smoking in any public place in the city of Zion because the ordinance prohibited smoking in instances where it posed no harm or offense to anyone other than the smoker.[85] The court held that

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78. Austin v. State, 48 S.W. 305, 306 (Tenn. 1898), *aff'd*, 179 U.S. 343 (1900). The United States Supreme Court declined to "take judicial notice of any special injury resulting from [the use of cigarettes]" as the Tennessee court did. Austin v. State, 179 U.S. 343, 348 (1900). However, in affirming the state supreme court, the U.S. Supreme Court expressly recognized that "a belief in [cigarettes'] deleterious effects . . . has become very general." *Id.*

79. *Austin*, 48 S.W. at 306; *see also* State v. Nossaman, 193 P. 347 (Kan. 1920) (upholding prohibition on the sale, barter, and gift of cigarettes).

80. *See* Cobey, *supra* note 76, at 169; Victoria L. Wendling, Note, *Smoking and Parenting: Can They Be Adjudged Mutually Exclusive Activities?*, 42 CASE W. RES. L. REV. 1025, 1030 (1992).

81. *See* Cobey, *supra* note 76, at 171; *see also* Wendling, *supra* note 80, at 1031 (calling 1921 the peak of the anti-smoking movement).

82. *See* Rabin, *supra* note 5, at 476 ("[B]y the 1920s, political initiatives aimed at regulating smoking were moribund."); *see also* Elaine Nuehring & Gerald E. Markle, *Nicotine and Norms: The Re-emergence of a Deviant Behavior*, 21 SOC. PROB. 513, 514-15 (1974) (describing the rise and fall of the early anti-smoking movement).

83. *See* Cobey, *supra* note 76, at 171; *see also* TATE, *supra* note 27, at 120 & n.5, 132; Wendling, *supra* note 80, at 1031 (describing the repealment of early anti-smoking laws); Widerman, *supra* note 76, at 418 (describing same, focusing on Kansas legislation).

84. *See* Osborne M. Reynolds, Jr., *Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 443 (1984) ("[T]he early smoking cases showed considerable deference to the rights of smokers and great judicial readiness to strike down smoking restrictions . . . ."). The chronology of cases upholding and invalidating smoking bans is uneven. This is largely explained by two factors. First, the laws in the several states differed in form and substance. Second, courts more readily invalidated statutes that were directly paternalistic (*i.e.* applied to the smoker herself) rather than ones that were indirectly paternalistic (*i.e.* applied to a distributor). *See* Widerman, *supra* note 76, at 403, 422.

85. *See* City of Zion v. Behrens, 104 N.E. 836, 837 (Ill. 1914); *see also* Dempsey v. Stout, 107 N.W. 235, 235 (Neb. 1906) (holding the cigarette law applied only to the "manufacturer" of cigarettes); State v. Lowry, 77 N.E. 728, 733 (Ind. 1906) (construing the state statute to not apply to the act of smoking cigarettes); Hershberg v. City of Barboursville, 133 S.W. 985, 986 (Ky. 1911) (invalidating an ordinance banning smoking in the city limits because the smoker has the "right to control his own personal indulgences").

"[t]he personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare."[86]

As the decades progressed, it became increasingly obvious that in order to pass constitutional and ethical muster, tobacco laws needed a solid public welfare justification.[87] Such a justification was definitively provided in 1986 when the Surgeon General identified the dangers of secondhand or environmental tobacco smoke (ETS).[88] ETS comes from two sources: "mainstream smoke," which is drawn through the cigarette into the mouth and exhaled by the smoker; and "sidestream smoke," emitted by the burning end of the cigarette in between puffs.[89] Today, it is well established[90] that both sources of ETS cause physical harm to nonsmokers varying from minor irritations to demonstrable respiratory, cardiovascular, and carcinogenic effects.[91]

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86. *City of Zion*, 104 N.E. at 837.

87.

> [T]he anti-smoking movement had to overcome a widely held sentiment that, harm or no harm, everyone should be allowed to do his own thing.
>
> A way, therefore, had to be found to argue that smokers harmed not only themselves but others. In other words, an 'innocent bystander' had to be uncovered.

Berger, *supra* note 23, at 23; *see also* Susan P. Baker & Stephen P. Teret, *Freedom and Protection: A Balancing of Interests*, 71 AM. J. PUB. HEALTH 295, 296 (1981). Even after harm to others was found, many laws still had "impure" rationales, aimed at protecting *both* third parties and smokers themselves. Indeed, public space bans do reduce smoking. *See* Julie A. Fishman et al., *State Laws on Tobacco Control—United States 1998*, 48 MORTUALITY & MORBIDITY WEEKLY REP. 21, 29 & nn.22-24 (June 25, 1999).

88. *See* OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986). Of course, harm to others had been identified before 1986. The harm from ETS had been discussed in several earlier Surgeon General reports. *See, e.g.*, U.S. DEP'T HEALTH, EDUC. AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING 117-35 (1972). The potential fire hazard from smoking has been a basis for smoking regulation since Colonial days. *See* Morley Swingle, Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 445 (1980).

89. *See* Flue-Cured Tobacco Co-op. Stabilization Corp. v. EPA, 4 F. Supp. 2d 435, 450 & n.21 (M.D.N.C. 1998), *appeal filed*, Nos. 98-2407 & 98-2473 (4th Cir., filed Sept. 15, 1998).

90. Although there are a number of independent studies on the dangers of ETS, a particularly vigorous debate has focused on the scientific validity of the Environmental Protection Agency's 1992 Report. *See, e.g., Flue-Cured Tobacco*, 4 F. Supp. 2d at 450-63 (questioning the methodology used by the EPA in finding a correlation between ETS and health problems); *Hearing Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong., 2d Sess. (May 11, 1994) (collecting testimony, statements, and other material both attacking and defending the EPA's report); GIO B. GORI & JOHN C. LUIK, PASSIVE SMOKE: THE EPA'S BETRAYAL OF SCIENCE AND POLICY 13-46 (1999); RALPH HARRIS & JUDITH HATTON, MURDER A CIGARETTE: THE SMOKING DEBATE (1998); Antony Flew, *Passive Smoking, Scientific Method, and Corrupted Science*, *in* SMOKING: WHO HAS THE RIGHT? 336 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998); Michael Fumento, *Is EPA Blowing Its Own Smoke? How Much Science is Behind Its Tobacco Finding?*, INVESTOR'S BUS. DAILY, Jan. 28, 1993, at 1; LEMIEUX, *supra* note 74, at 12-29.

91. *See generally* U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF

Protecting the nonsmoker from the direct adverse health effects of tobacco smoke is now the cited basis for most existing private, local, state, and federal regulation of tobacco. The federal government, forty-nine states, and over 800 local municipalities now restrict smoking in some manner in public places.[92] Across the country, smoking is restricted (and often banned) in airplanes,[93] buses[94] elevators,[95] workplaces,[96] office buildings,[97] retail stores,[98] libraries,[99] and restaurants[100] to list only a few examples. Some jurisdictions have even banned smoking in open outdoor spaces.[101]

PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992) [hereinafter 1992 EPA REPORT]; U.S. ENVIRONMENTAL PROTECTION AGENCY, SETTING THE RECORD STRAIGHT: SECOND HAND SMOKE IS A PREVENTABLE HEALTH RISK 1, 44 (1994); NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURE AND ASSESSING HEALTH EFFECTS (1986); CALIFORNIA EPA, HEALTH EFFECTS OF EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE (Sept. 1997); *see also* Deborah E. Barnes & Lisa A. Bero, *Why Review Articles on the Health Effects of Passive Smoking Reach Different Conclusions*, 279 JAMA 1566 (1998) (concluding that conclusions of such articles are strongly associated with affiliations of their authors); Elizabeth T.H. Fontham et al., *Environmental Tobacco Smoke and Lung Cancer in Nonsmoking Women*, 271 JAMA 1752, 1759 (1994) (finding that long-term exposure to ETS increases risk of lung cancer in nonsmoking women); *cf.* Helling v. McKinney, 509 U.S. 25, 35-37 (1993) (holding that a prisoner's cellmate's heavy smoking stated a cause of action under the Eighth Amendment).

92. *See* JACOBSON & WASSERMAN, *supra* note 4, at 10-14; *see also* WORLD HEALTH ORG., TOBACCO OR HEALTH: A GLOBAL STATUS REPORT 224 (1998); Fishman et al., *supra* note 87, at 23-28 (summarizing state anti-smoking laws categorized by type and severity of restriction). *But see* Peter D. Jacobson & Jeffrey Wasserman, *The Implementation and Enforcement of Tobacco Control Laws: Policy Implications for Activists and the Industry*, 24 J. HEALTH POL., POL'Y & L. 567, 569 (1999) (noting that mere enactment of tobacco control measures does not imply that these measures will be rigorously enforced).

93. *See* 49 U.S.C. § 41706 (1994).

94. *See, e.g.*, COLO. REV. STAT. § 25-14-103(e) (1999); D.C. CODE ANN. § 6-913(5) (1995); MASS GEN. LAWS ch. 270, § 22 (1990).

95. *See, e.g.*, CONN. GEN. STAT. § 19a-342(b)(6) (Supp. 1999); ILL. COMP. STAT. ANN. ch. 720, para. 56013 (West 1993); OR. REV. STAT. § 479.015 (1987).

96. *See, e.g.*, CAL. LAB. CODE § 6404.5 (West Supp. 1989); D.C. CODE ANN. § 6-913(8) (1995).

97. *See, e.g.*, CAL. GOV'T CODE §§ 19994.30-.34 (1995); OR. REV. STAT. § 243.350 (1991).

98. *See, e.g.*, D.C. CODE ANN. § 6-913(2) (1995); HAW. REV. STAT. ANN. § 328K-2(7) (Michie 1996); MASS GEN. LAWS ch. 270, § 22 (1990).

99. *See, e.g.*, HAW. REV. STAT. ANN. § 328K-2(5) (Michie 1996); MASS GEN. LAWS ch. 270, § 22 (1990); N.Y. PUB. HEALTH LAW § 1399-o (McKinney 1990 & Supp. 2000).

100. *See, e.g.*, D.C. CODE ANN. § 6-913(7) (1995); *see also* Sayville Inn 1888 Corp. v. County of Suffolk, No. 98-CV-4527 (E.D.N.Y. Aug. 3, 1998) (denying preliminary injunction against law prohibiting smoking in restaurants because "[i]t is beyond dispute that secondhand smoke is a carcinogen.").

101. *See, e.g.*, N.Y. CITY ADMIN CODE §§ 17-501 to -514; *see also infra* notes 272-79 and accompanying text; SULLUM, *supra* note 1, at 156 (describing various bans on smoking); Marv Balousek, *Smoking Ban May Expand: Proposal Includes Some Outdoor Areas*, WALL ST. J., Oct. 8, 1998, at A1 (discussing proposed anti-smoking ordinance); Douglas Belkin, *Smoking Flags Going*

Still, immediate health risks are not the only harm smokers pose to others.[102] Tobacco regulations are also aimed at protecting "others" from more indirect forms of harm imposed by smokers.[103] Today it is widely recognized that "[t]he most persuasive argument for singling out smokers [is based on] the *costs* these behaviors impose on society."[104] The FDA

Up at Boca Area Beaches, Parks, PALM BEACH POST, June 22, 1999, at A1 (describing recent ban restricting smoking and tobacco use on beaches and in parks); Richard Berman, *A Smoking Ban Goes Too Far*, RESTAURANT BUS., Dec. 10, 1996, at 169 (discussing outdoor smoking ban); Elsa Brenner, *Battle Over Smoke Moves Outdoors*, N.Y. TIMES, June 21, 1998, at WC-1 (describing recent laws banning smoking in various public places); Maria Alicia Gaura, *Smoked Out—Laws Increasingly Target Right to Light Up in the Open Air*, S.F. CHRON., May 11, 1998, at A13 (reporting on California municipal ordinances); Shandra Martinez, *Holland Council OKs Limits on Smoking in 8 City Parks*, GRAND RAPIDS PRESS, July 22, 1999, at A14 (describing new anti-smoking ordinance); Marcia Meyers, *Smoking Limits Spread Outdoors*, BALT. SUN, Apr. 26, 1998, at A1 (reporting bans in Santa Cruz, CA, Mesa, AZ, and Sharon, MA). Some private institutions have also gone beyond banning smoking in the workplace. Motorola, Inc., for example, forbade smokers from smoking even inside their own cars in the company parking lot. *See Motorola Bans Smoking in Workers' Cars*, ARIZ. REP./PHOENIX GAZETTE, July 3, 1996, at A2. Other companies have installed special outdoor structures that contain and filter the air. *See, e.g.*, Heather Kamins, *The Exiled Smoker*, BOST. GLOBE, June 12, 1999, at F1 (describing such a measure). Disney has recently banned both tobacco sales and smoking in its California and Florida theme parks. *See* E. Scott Reckard, *More Smoking Limits at Disneyland*, L.A. TIMES, Nov. 3, 1999, at C4.

102. *See, e.g.*, Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1229-36 (1998) (discussing "noninsurance externalities"); Lavin, *supra* note 42, at 2425 ("The rationales are in two general forms: social costs and health risks."). The argument for liberty restriction in order to prevent or reduce these indirect costs is often made in terms of justice and fair allocation of costs. *See, e.g.*, KLEINIG, *supra* note 8, at 113-15 (discussing "distributive justice"); Amy Darby, *The Individual, Health Hazardous Lifestyles, Disease and Liability*, 4 DEPAUL J. HEALTH CARE L. 787 (1999) (discussing the legitimacy of justice-based arguments for distributing the economic burden of health hazardous lifestyles); Rajendra Persaud, *Smokers' Right to Health Care*, *in* SMOKING: WHO HAS THE RIGHT? 318 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998); Robert L. Schwartz, *Making Patients Pay for Their Lifestyle Choices*, 4 CONTEMP. Q. HEALTHCARE ETHICS 393 (1992); Robert M. Veatch, *Voluntary Risks to Health: The Ethical Issues*, 243 JAMA 50, 53-55 (1980) (discussing justice-based arguments); Wikler, *supra* note 47, at 232-34 (discussing fair distribution of societal burdens). The judgment of voluntariness in these discussions is really about responsibility and blameworthiness rather than autonomy. *Cf.* Cass R. Sunstein, *A Note on "Voluntary" Versus "Involuntary" Risks*, 8 DUKE ENVTL. L. & POL'Y F. 173, 176-77 (1997).

103. *See* Moffat, *supra* note 24, at 589 (arguing that state intervention for this reason ought to be characterized as the prevention of "secondary harm" because in these cases, "no specific person is injured even though the community as a whole may suffer in some way").

104. Jendi B. Reiter, Essay, *Citizens or Sinners?—The Economic and Political Inequity of "Sin Taxes" on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443, 465 (1996) (emphasis added); *see also* HARM TO SELF, *supra* note 8, at 138 ("A rather more persuasive nonpaternalistic argument . . . appeals to the great public cost . . . ."); David Charny, Book Review, *Economics of Death*, 107 HARV. L. REV. 2056, 2066-67 & n.31 (1994) (justifying the singling out of smokers on basis of efficiency); Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329 (1989) (citing preventive jurisprudence as basis for regulation of dangerous behaviors); Robert Veatch & Peter Steinfels, *Who*

calculated these costs at $97 billion. This figure includes $50 billion in direct health care costs, $7 billion in indirect morbidity costs—like the value of economic output lost while individuals are unable to work—and $40 billion in lost future earnings from premature death.[105]

Some commentators have observed that "[t]he focus on the economic costs of personal behavior like smoking . . . seems to suggest that if it were possible to limit the costs to the smoker . . . there would be little justification for tolerating government intrusion."[106] According to the principle of the least restrictive alternative,[107] they are absolutely correct. If the harm that smokers cause can be eliminated, prevented, or ameliorated in a feasible way that does *not* interfere with smokers' liberty, then *ceteris paribus* that alternative ought to be preferred.[108] Recouping the economic costs of smoking may increase the cost of cigarettes, but it interferes with liberty less than the direct prohibition of smoking.[109] To illustrate by way of contrast, the costs imposed by

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Shall Pay for Smokers' Medical Care?, HASTINGS CENTER REP., Nov. 1974, at 8.

105. 61 Fed. Reg. 44,572, 44,575-76 (1996). Because states had absorbed many of these costs over the years through Medicare and other social service programs, they sued and later settled with the tobacco companies. *See generally* Jana Schrink Strain, Note, *Medicaid vs. The Tobacco Industry: A Reasonable Legilative Solution to A State's Financial Woes?*, 30 IND. L. REV. 851 (1997) (addressing the propriety of such lawsuits). Mississippi, Florida, Minnesota, and Texas settled their claims for $36 billion. *See* Bob Van Voris, *Laws Targeting Tobacco Spread*, NAT'L L.J., July 6, 1998, at A6. The rest of the states and the District of Columbia settled their claims for $206 billion. *See* Milo Geyelin, *States Agree to $206 Billion Tobacco Deal*, WALL ST. J., Nov. 23, 1998, at B13. The United States Government also sued to recover medical costs from the tobacco companies. *See* Alissa J. Rubin & Henry Weinstein, *Tobacco Suit Represents a Quick Reversal Law*, L.A. TIMES, Sept. 25, 1999, at A13. Foreign nations and American Indian tribes have also brought lawsuits in United States federal courts to recover their smoking-related health care costs. *See* Carrie Johnson, *Tobacco Fights on a Foreign Front*, LEG. TIMES, Nov. 23, 1998, at 1; Milo Geyelin, *Four Tobacco Firms Are Sued by Indian Tribes*, WALL ST. J., June 4, 1999, at B5. *But cf.* Milo Geyelin, *Tobacco Lawsuit Filed by Guatemala Dismissed by Judge*, WALL ST. J., Dec. 31, 1999, at B7 (reporting that the D.C. Federal District Court dismissed Guatemala's lawsuit and predicting a similar fate for suits brought by several other countries). Union health funds, on the other hand, have generally been unsuccessful in recovering the costs of smoking to employee health and welfare funds. *See* Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 120 S.Ct. 844 (2000) (denying certiorari to three federal appellate courts that affirmed dismissals of the welfare fund's claims).

106. Moreno & Bayer, *supra* note 63, at 41.

107. *See supra* notes 42-44 and accompanying text.

108. *See id.*; *see also* SCHONSHECK, *supra* note 25, at 114-15.

109. Of course, once recouped costs reach a certain point, the tobacco companies will withdraw from the market. Several scholars have recently argued that the political unpalatibility of paternalism in the legislatures has led to the *de facto* paternalistic regulation of unhealthy and risky activities like smoking via tort law in the courts. *See, e.g.*, Peter W. Huber, *Guns, Tobacco, Big Macs—and the Courts*, COMMENTARY, June 1999, at 32; Greg Sobo, *Look Before You Leap: Can the Emergence of the Open and Obvious Danger Defense Save Diving from Troubled Waters?*, 49 SYRACUSE L. REV. 175 (1998); Bill Pryor, *Looking Down the Barrel: More "Tobacco-Like" Suits Threaten Lib-*

helmetless motorcycle riders supported helmet laws.[110] On the contrary, the costs imposed by smokers cannot justify laws restricting smoking. In the first place, although costs may be imposed, the *net* economic impact—surely the most relevant measure[111]—is arguably positive.[112] Moreover, even if smoking does impose societal costs, a ready alternative exists by which states can recoup them.[113] It would violate the least restrictive alternative principle to interfere with smokers' liberty so as to *prevent* the costs (if any) of smoking when it is feasible, and in fact easier, to simply *recover* those costs.[114]

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erty, the Law, ARIZ. REP., May 2, 1999, at E14; *cf.* W. Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 CUMB. L. REV. 523, 544-45 (1998/99).

110. *See* CALLAHAN, *supra* note 7, at 194-98. *But cf.* HARM TO SELF, *supra* note 8, at 139-41 (arguing that not health but only psychic costs can support helmet laws).

111. *See* Richard A. Epstein, *The Harm Principle—and How it Grew*, 45 U. TORONTO L.J. 369, 417 (1995).

112. *See generally* WILLIAM G. MANNING ET AL., THE COSTS OF POOR HEALTH HABITS 62, 77 (1991) (demonstrating costs of dangerous health habits); KIP VISCUSI, NATIONAL BUREAU OF ECONOMIC RESEARCH, CONGRESSIONAL RESEARCH SERVICE, CIGARETTE TAXATION AND THE SOCIAL CONSEQUENCES OF SMOKING (1995); Hanson & Logue, *supra* note 102, at 1232-59 (reviewing and critiquing the central literature regarding whether the fact that smokers die sooner, consume fewer medical and old age expenses, and collect less social security and pensions, is related to the fact that the net cost of smoking is a savings); Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601, 636 (1998) (illustrating the costs and benefits of smoking to taxpayers); Andre Raynaulalt & Jean-Pierre Vidal, *Smokers' Burden on Society: Myth and Reality in Canada*, 18 CAN. PUB. POL'Y 300 (1992) (examining the burden smokers place on Canadian resources); Viscusi, *supra* note 109, at 534-37; Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, *in* TAX POLICY AND THE ECONOMY 51 (James Poterba ed., 1995); *cf.* HARM TO SELF, *supra* note 8, at 378 n.29; KLEINIG, *supra* note 8, at 114 (discussing potential social costs of decreased smoking); LEMIEUX, *supra* note 74, at 71-75 (same); Jacob Sullum, *Following Suit: Clinton Wants to Stick It to Smokers Again*, REASON, Apr. 1999, at 6, 7 (discussing costs and benefits of tobacco).

113. *See supra* notes 105-09 and accompanying text. Of course, such a cost recovery is not always feasible. *Cf.* Robert F. Meenan, *Lifestyles: Controlled or Libertarian*, 294 NEW ENG. J. MED. 732, 732 (1976) ("Dr. Charrette's suggestion that individuals compensate society for their unhealthy behavior is certainly reasonable in theory but presents some practical problems.").

114. *See, e.g.*, BEAUCHAMP & CHILDRESS, *supra* note 9, at 316 (recommending along a similar line that chemical plants protect susceptible workers not by banning them from employment but by devising protective equipment or altering the work environment); DWORKIN, *supra* note 5, at 126-27 (analyzing costs); HARM TO OTHERS, *supra* note 9, at 24-25 (same); HARM TO SELF, *supra* note 8, at 136, 139; KLEINIG, *supra* note 8, at 93 (same); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 75-76 (1993) (same); Ronald Bayer, *Public Health Policy and Tuberculosis*, 19 J. HEALTH POL., POL'Y & L. 149, 153 (1994) ("Proposals . . . meet[ing] the threat of tuberculosis with a carrot rather than a stick [are laudatory because they] appear to obviate the need to choose between liberty and the public health. They are, for the most part, uncontroversial."); Wikler & Beauchamp, *supra* note 6, at 1367 ("Paternalistic arguments . . . may indeed seek to justify curbs on [unhealthy] behavior in order to forestall the imposition of burdens. But this can also be accomplished by requiring the individual to pay his or her own way, perhaps through excise taxes, without any diminution of the unhealthy behavior."). Similarly, employers ought not to prohibit employees from smoking off-site when the only justification is to save costs. *But see* City of North Miami v. Kurtz, 653 So. 2d 1025,

C. *Limitations of the Harm Principle*

Because the harm principle provides the least controversial basis for regulation, and because some kind of harm can always be attributed to a particular behavior, many invoke the harm principle to "explain" regulations that would be more appropriately justified on pure paternalistic grounds. Alan Dershowitz explains that "[t]he best evidence of how influential Mill's principle has become . . . may be the repeated efforts of those who would compel a given action against protesting individuals to *rationalize* such force by reference to the rights of *others* than by reference to the good of the compelled individual."[115] Indeed, many describe the nearly universal agreement on the harm principle's moral acceptability as "superficial and deceptive" because often "the harm principle is hardly more than a pious remark."[116] Given the harm principle's malleability, "harm to others" accounts are frequently "employed only to camouflage a rejection of Mill's [harm principle] criterion."[117] In other

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1028-29 (Fla. 1995), *cert. denied*, 516 U.S. 1043 (1996) (upholding regulation requiring job applicants to sign an affidavit that they have not smoked for one year prior to employment); Deborah Lynn Stewart, Note, City of N. Miami v. Kurtz—*Is It Curtains for Privacy in Florida?*, 20 NOVA L. REV. 1393, 1402 (1996) (disagreeing with *Kurtz*'s conclusion). Still, cost recovery is not the only less restrictive alternative. *Cf.* KLEINIG, *supra* note 8, at 95 (discussing other alternatives). Some commentators have suggested that rather than restricting smoking, it can be scientifically redesigned to be less harmful. *See, e.g.*, Michael Day, *The Lesser of Two Evils*, NEW SCIENTIST, May 8, 1999, at 18.

115. Alan M. Dershowitz, *Introduction*, to JOHN STUART MILL, ON LIBERTY AND UTILITARIANISM vii, x (Bantam 1993).

116. HARM TO SELF, *supra* note 8, at 24.

117. Note, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605, 621 (1970); *see also* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 90 (1998) ("[T]he modern expansion of the harm principle . . . is wholly destructive of the original Millian mission of limiting the scope of government action."); *id.* at 102 ("The current view sees externalities *everywhere*, or, more concretely, *negative* externalities everywhere."); HARM TO OTHERS, *supra* note 9, at 13 ("Most of the controversial criminal statutes that receive apparent blessing from the principles alternative to the harm principle . . . have often been said to have support also from the harm principle itself. Often the consequences . . . are said to be harmful to others in some very subtle way . . . . So much confusion has resulted from these allegations . . . ."); HARM TO SELF, *supra* note 8, at 138 (observing that "[n]umerous writers have noticed how forced and contrived" harm principle arguments seem); *id.* at 141 (criticizing "evasive rationales"); HARMLESS WRONGDOING, *supra* note 20, at 37 ("[E]nlarging our conception of what can count as harm . . . render[s] respectable some [paternalistic] causes 'dressed in harm principle clothes' ") (quoting Gerald Postema, *Collective Evils, Harms, and the Law*, 97 ETHICS 414, 433 (1987)); KLEINIG, *supra* note 8, at 82 ("Paternalistic rationales are clearly an embarrassment, and strenuous efforts are usually made to provide a nonpaternalistic justification. . . . But as we shall see, it is only with some difficulty that these considerations . . . can sustain [lifestyle] legislation, and there is often a surreptitious appeal to paternalistic reasons."); *id.* at 108 ("[T]here is a tendency to favor arguments in which some public interest can be discerned and appealed to . . . ."); SCHONSHECK, *supra* note 25, at 250-51 (noting tendency of government to find

words, the harm principle is invoked to justify regulations that are actually grounded in pure paternalism. Bioethicists Willard Gaylin and Bruce Jennings explain:

> [P]ublic policy-makers sometimes coerce individuals to change their behavior (because they believe it is morally right to do so), then justify the coercion by arguing that the old behavior was harmful to others. . . . Policy-makers are forced into this deceptive stance by the culture of autonomy, which says, in essence, that public officials are not supposed to make moral judgments in their official capacity; that their sole legitimate job is to protect the public and individuals from harm. In other words, we first purport to find something to be harmful to others, then on that ground label it wrong. *In reality, we often first conclude that something is wrong, then seek evidence that it is harmful.*[118]

The problem, then, is that the actual harm to others—the harm supposedly justifying the liberty limitation—is often so small and indirect that the regulation loses all credibility.[119] Because it is important to be clear with justificatory principles, I argue that if we are going to reject

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harm to others in clearly self-affecting behavior); Donald A. Dripps, *The Liberal Critique of the Harm Principle*, CRIM. JUST. ETHICS, Summer/Fall 1998, at 3, 9 ("A little causal creativity can go a long way toward eviscerating the harm principle."); *id.* at 8 (suggesting that Feinberg stretches the harm principle in "strugl[ing] mightily to explain away laws that require motorcyclists to wear helmets"); Epstein, *supra* note 111, at 371 ("The principle that was once a shield of individual liberty has been forged into a sword against it."); Moffat, *supra* note 24, at 590 ("[P]ublic harms are by their very nature the most abstract, indirect, and ephemeral in character. For that same reason, they are also the most easily abused . . . ."); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1943 (1986) ("[T]he social-interconnectedness justification probably masks a paternalistic argument."); Regan, *supra* note 42, at 201 ("[W]e can bring much paternalistic legislation under the 'harm principle,' so that it presents no special problem at all."); Wikler, *supra* note 40, at 13 ("[P]aternalism is not, in this country, a respectable public rationale for coercive government policies. The paternalistic argument, then, tends to be either *masked* as something else, or else marshalled only in support of relatively innocuous programs, such as consumer education." (emphasis added)); Wikler & Beauchamp, *supra* note 6, at 1366 ("In the United States, paternalist justifications are rarely provided as such . . . . [L]ip service is still paid to the tradition of John Stuart Mill's *On Liberty*."); Walter E. Williams, *Cigarettes and Property Rights*, *in* SMOKING: WHO HAS THE RIGHT? 305, 317 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998) ("Social costs or external diseconomies are a politician's dream."); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 231 n.5 (1998) (observing a "tendency to bypass the issue of paternalism"). Of course, a particular regulation might be unjustifiable on either harm to others or paternalistic grounds.

118. GAYLIN & JENNINGS, *supra* note 2, at 64-65 (emphasis added).

119. *See, e.g.*, KULTGEN, *supra* note 24, at 166-67 ("Some authors who . . . have saddled themselves with a categorical condemnation of paternalism attempt to define their paternalism away by tortured appeals to the interests of third parties. . . . The magnitude and probability of bystander harms are [often] too slight to justify curtailment of [individual] liberty."); Epstein, *supra* note 111, at 416 ("[T]he modern theories presuppose an alternative theory of harm that is indefensible: the exercise of individual choice is now regarded as an act of pure negative externality.").

the harm principle, we should do so openly rather than secretly.[120] If a principle other than harm to others is the true basis of some public health law, it is better to recognize that explicitly.

The concept of harm to others is subject to limitless expansion. As John Donne eloquently put it, "No man is an island."[121] Mill recognized this, stating:

> The distinction here pointed out between the part of a person's life which concerns only himself and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of a society be a matter of indifference to the other members? No person is an entirely isolated being. It is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his near connections, and often far beyond them.[122]

Theoretically, there is little, if any, individual conduct that does not "harm" other people. The term "harm" is thus plagued with conceptual ambiguities that permit its expansive interpretation.[123]

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120. *See* Dershowitz, *supra* note 115, at xi (arguing against Lawrence Tribe: "I, too, favor mandatory seat belt laws, but I recognize that support for such paternalistic legislation requires a compromise with Mill's principle. And it is a compromise I am prepared to make explicitly rather than uncomfortably try to squeeze seat belt laws into Mill's principle by invoking flying people and convoluted logic."); *see also id.* at xv-xvi ("[I]t is far better to argue about the limits of the principle itself rather than to accept it as an almost biblical (or constitutional) rule of action and then try to find ways to squeeze what are really exceptions into the parameters of the principle."); *cf.* Richard J. Arneson, *Liberalism, Freedom and Community*, 100 ETHICS 368, 371 n.7 (1990) ("We should put aside unpersuasive arguments to the effect that harms to nonconsenting third parties could justify a ban . . . ."); Epstein, *supra* note 111, at 417 (calling for "revitalizing the harm principle"); John Kleinig, *The Ethical Challenge of AIDS to Traditional Liberal Values*, 5 AIDS & PUB. POL'Y J. 42, 44 (1990) ("[L]iberal values . . . are in need of regular attention and rearticulation."). For an illustration of an open and a masked rejection of the harm principle, compare *State v. Mele*, 247 A.2d 176, 178 (Hudson County Ct. 1968) ("[T]he state has an interest in attempting to protect people from the consequences of their own carelessness."), with *People v. Carmichael*, 288 N.Y.S.2d 931, 935 (Genesee County Ct. 1968) (offering a thinly veiled rejection of Mill).

121. JOHN DONNE, *Meditation XVII*, *in* DEVOTIONS UPON EMERGENT OCCASIONS 87 (Anthony Raspa ed., 1975) (1624) ("No man is an *Iland*, intire of it selfe; every man is a peece of the *Continent*, a part of the *maine* . . . Any Mans *death* diminishes *me*, because I am involved in *Mankind*; And therefore never send to know for whom the *bell* tolls; It tolls for *thee*.").

122. MILL, *supra* note 17, at 146-47.

123. *See, e.g.*, Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 155 (1969) ("Even Mill's strenuous effort to mark the distinction between the spheres of private and social life breaks down under examination."); EPSTEIN, *supra* note 117, at 76 ("[T]he broader the definition of harm, the more extensive the justified role of government intervention. The definition of harm thus becomes as a first approximation, the litmus test for the use of state power."); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 404 (1978) ("The notion of harm appears to be infinitely expandable."); HARM TO SELF, *supra* note 8, at 22 ("Indeed, the public interest is always involved, at least to some small extent, when persons harm themselves."); *id.* at 56 ("[E]very decision is bound to have some 'ripple-effect' on the interests of others."); PHILOSOPHICAL ETHICS, *supra* note 6, at 390

For this reason, it is easy for policymakers to "invoke every possible kind of social harm, however remote or speculative, to justify an intervention that would otherwise have to be supported on paternalistic grounds."[124] Although the harm principle is frequently offered as an *ex-*

("Little debate surrounds the *justifiability* of the harm principle (by contrast to the *meaning* of harm)."); *id.* at 389 ("[C]ertain ambiguities surround the concept of a harm and how far the harm principle stretches."); VANDEVEER, *supra* note 6, at 310 ("The question of whether persons in their actions 'impose costs on others' is slippery for two reasons. First, there is the question of what is to count as a cost or a harm. Second, . . . when is a cost *imposed* on others?"); *id.* at 430 (arguing that the harm principle "may justify more extensive constraints than may initially be obvious."); Beauchamp, *The Regulation of Hazards, supra* note 27, at 242; Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991); Dripps, *supra* note 117, at 3 ("The idea of harm is too vague, too dependent on baseline assessments of private rights, too open to long chains of causal speculation . . . ."); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 455-56 (1983); Robert F. Meenan, *Improving the Public's Health: Some Further Reflections*, 294 NEW ENG. J. MED. 45, 45 (1976) ("[V]irtually all aspects of lifestyle could be said to have an effect on the health or well-being of society."); Moreno & Bayer, *supra* note 63, at 37; John P. Safranek & Stephen J. Safranek, *Can the Right to Autonomy be Resuscitated After* Glucksberg*?*, 69 COLO. L. REV. 737, 745 (1998) ("[T]he harm principle's formal character mitigates its jurisprudential utility. . . . [w]hat constitutes harm . . . will be governed by one's view of the good."); Williams, *supra* note 117, at 316 ("[I]t is possible to prove that every private act has external effects of one sort or another.").

124. *See* Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, *in* ETHICS TEACHING IN HIGHER EDUCATION 245, 249 (Daniel Callahan & Sissela Bok eds., 1980); *see also* Robert Crawford, *Individual Responsibility and Health Politics in the 1970s*, *in* HEALTH CARE IN AMERICA 255 (Susan Reverby & David Rosner eds., 1979) ("The cost of sloth, gluttony, alcoholic intemperance, reckless driving, sexual frenzy and smoking have now become a national, not an individual, responsibility. . . . [O]ne man's or woman's freedom in health is now another man's shackle in taxes and insurance premiums.") (quoting John Knowles, former president of the Rockefeller Foundation); HARM TO OTHERS, *supra* note 9, at 222 ("Advocates of legal coercion are always tempted to use the elasticity of the 'public interest' to stretch the harm principle so that it will justify criminal prohibition of disapproved conduct that is at first sight harmless to persons other than the actors . . . ."); RILEY, *supra* note 42, at 98; *id.* at 208 (observing that states have "hidden truly self-regarding acts, by transforming them into fake other-regarding acts that cause no harm."); HENRY SIDGWICK, THE METHODS OF ETHICS 477-78 (7th ed. 1907); H.E. Baber, *The Ethics of Dwarf Tossing*, INT'L J. APPLIED PHIL., Fall 1989, at 1 (arguing that although the participants may be willing, the practice of dwarf tossing hurts not only the participants but all little people); Epstein, *supra* note 111, at 378 (noting the "ominous" parallels with the expansive interpretation of the Constitutional Commerce Clause); Faith T. Fitzgerald, *The Tyranny of Health*, 333 NEW ENG. J. MED. 196, 197 (1994) ("Certain failures of self-care have become, in a sense, crimes against society, because society has to pay for their consequences."); Bruce M. Hannon & Timothy G. Lohman, *The Energy Cost of Overweight in the United States*, 68 AM. J. PUB. HEALTH 765 (1978) (arguing that obesity consumes a substantial fraction of the nation's fossil fuels, because the excess food consumption entails fuel costs in food production (farm machinery, transportation, etc.)); Emmet B. Keeler et al., *The External Costs of a Sedentary Life-style*, 79 AM. J. PUB. HEALTH 975 (1989); Matthews, *supra* note 48, at 4; Meenan, *supra* note 123, at 45 ("[V]irtually all aspects of life-style could be said to have an effect on the health or well-being of society, and the conclusion reached that personal health choices should be closely regulated."); Tom Nagel, *The Enforcement of Morals*, HUMANIST, May/June 1968, at 20, 21-23.

planation for liberty-limiting regulation, it is less often an adequate *justification.*[125] Indeed, many current anti-smoking legislative efforts lack a coherent underlying justification because the harm at issue is simply insignificant.[126] To stretch the concept of "harm" to others this far renders Mill's harm principle less useful. "If the principle is not susceptible to falsification, it becomes vacuous, and in the view of some, meaningless."[127] Essentially, the state may use the concept of harm to others to justify any regulation. The result, as John Kleinig explains, is to "open the door to 'unlimited paternalism.' "[128]

The harm principle simply cannot be trusted to limit state intervention.[129] Its overuse (and, indeed, misuse) creates a slippery slope that would justify far-reaching government regulation of tobacco and other consumer products.[130] Given our historical and cultural emphasis on per-

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125. *See* HARM TO SELF, *supra* note 8, at 16 ("The reason that in fact supports it, may not then be the reason that impelled a legislator to vote for it.").

126. *See* Jacobson et al., *supra* note 11, at 77 (citing Rabin); *see also infra* notes 273-79 and accompanying text (discussing restrictions on smoking outdoors).

127. Dripps, *supra* note 117, at 15 (arguing that the harm principle should be abandoned in favor of "practical institutional limits"). *See, e.g.,* FLETCHER, *supra* note 123, at 404; Epstein, *supra* note 111, at 399 ("The modern expansion of the harm principle, however, is destructive of the original Millian mission to use the harm principle as a way to restrain the scope of government action."); Nagel, *supra* note 124, at 22 (arguing that the harm principle "excludes virtually *nothing* from the scope of justifiable legal enactment—*unless* some agreement is first reached on what to count as 'harm or evil to others' "); *cf.* Kentucky v. Wasson, 42 S.W.2d 487, 512-13 (Ky. 1992) (Wintersheimer, J., dissenting) ("If the Mill concept was ever valid, it has been totally overcome by the development of the interconnection of modern society . . . . Clearly, almost any act that a person performs may affect prejudicially the interests of others.").

128. KLEINIG, *supra* note 8, at 94. One of the more famous examples of stretching the harm principle to justify paternalistic (albeit impurely paternalistic) legislation can be found in Justice Holmes's almost Naziesque opinion upholding Virginia's sterilization law. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (arguing that the mentally disabled "sap the strength of the State" and that therefore "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.").

129. Some commentators argue that Mill's principle, at least as articulated in *On Liberty*, has *never* been a coherent or useful limit. *See, e.g.,* RILEY, *supra* note 42, at 189-90; Joseph Hamburger, *Individual and Moral Reform: The Rhetoric of Liberty and the Reality of Restraint in Mill's On Liberty*, 24 POL. SCI. REV. 7, 42, 51-52 (1995); Richard Warner, *Liberalism and the Criminal Law*, 1 S. CAL. INTERDISCIPLINARY L.J. 39, 44 (1992) (arguing that the harm principle "draws *no line at all*—not even a blurry line").

130. *Cf.* TREBILCOCK, *supra* note 114, at 75 ("Once one moves beyond rather tangible harms to third parties, however, many activities might be viewed as generating some of these third-party effects, including inadequate dietary or exercise regimens, excessively stressful work habits, risky leisure activities[,] . . . or risky business investments, thus inviting wholesale social controls on all kinds of activities."); John Cottingham, Book Review, 28 PHIL. BOOKS 242, 243 (1987) (reviewing JOEL FEINBERG, HARM TO SELF (1986)) ("[A]ppeal to what we may call 'other-regarding side-effects of self-regarding conduct' seems to involve a dangerous slippery slope . . . ."). Several of the courts ruling on the helmet laws expressed a fear of unlimited paternalism because the "public harm" argu-

sonal liberty, we must establish clear limits on the state's ability to regulate private behavior.[131] "Almost every act in a complex, crowded, industrial society involves externalities, but we would not expect government to institute rules for all of them. Consequently, an important task is to determine which externalities might be candidates for government intervention and which should clearly be ruled out."[132]

Clearly, not every externality is sufficient to justify state intervention; common sense tells us that some threshold of harm to others must be met before the state can interfere with the behavior at issue. Some social costs—be they financial, psychological or otherwise—simply do not warrant government regulation.[133] Professor Roger Dworkin explains that "[a] full social impact calculus would consider the number of persons affected, the nature and extent of the effects on them, the certainty of the effects on them, and alternative ways to modify those effects, as well as the interests of the person most affected."[134] Intervention is justified if the costs to others outweigh the costs to the smoker. This idea can be represented formulaically as PS(M) > PS(N1 N2 . . . . Ni), where 'P' is probability, 'S' is the severity of all types of negative effects (physical, financial, emotional, psychic), 'M' is the smoker, and 'N' is a collateral person.[135] Obviously, it is impossible to place values on all these variables, and I do not attempt to do so here. What is clear is that defining the "harm to others" threshold, and the minimal harm necessary to justify government intervention, is no easy task.

Notwithstanding this difficulty, one limit can be drawn with the principle *de minimus non curat lex* to exclude trivial harms.[136] "Since the

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ments were so tenuous and obscure. *See, .e.g.*, American Motorcycle Assoc. v. Davids, 158 N.W.2d 72, 75 (Mich. 1968); People v. Fries, 250 N.E.2d 149, 151 (Ill. 1969).

131. *See* Wikler, *supra* note 40, at 20 ("The problem . . . is part of the more general debate . . . of separating 'self-regarding' and 'other-regarding' behavior."); *see also* EPSTEIN, *supra* note 117, at 82 ("The intuitive invocation of the harm principle thus fails to answer the simple question of which harms should be prohibited by the legal system . . . ."); GAYLIN & JENNINGS, *supra* note 2, at 237 ("The definition of harm is a crucial question and a thorny problem for public policy."); KLEINIG, *supra* note 8, at 32-34.

132. ALAN STONE, REGULATION AND ITS ALTERNATIVES 91 (1982); *see also* Butler, *supra* note 14, at 3-4.

133. *See* Dworkin, *supra* note 20, at 125 ("[T]here must be a heavy and clear burden of proof placed on the authorities to demonstrate the exact nature of the harmful effects . . . ."); DWORKIN, *supra* note 5, at 127 ("[T]hese arguments either are not relevant to justifying restrictions on behavior . . . or, if they are relevant, do not seem strong enough to tip the scale by themselves.").

134. Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 IND. L.J. 727, 737-38 (1993).

135. *See id.*

136. *See, e.g.*, HARM TO OTHERS, *supra* note 9, at 189; HUSAK, *supra* note 6, at 186-89; MILL,

raison d'etre of public health statutes is to protect the welfare of the community, it may not be surprising that the law often confines itself to conditions that pose *immediate* risks to others."[137] Even Mill required the harm to constitute a "definite damage" or "perceptible hurt;"[138] under this theory, disease and perhaps irritation caused by ETS might constitute sufficient harm, but mere annoyance would not.[139] Although this limitation is perhaps a good starting point, it does not sufficiently protect the liberty of individuals engaging in "harmful" behaviors:

> [T]he harm principle must be made sufficiently precise to permit the formulation of a criterion of "seriousness," and also, if possible, some way of grading types of harms in terms of seriousness. Without these further specifications, the harm principle may be taken to invite state interference without limit, for virtually every kind of human conduct can affect the interests of others for better or worse to *some* degree, and thus would properly be the state's business.[140]

Joel Feinberg has provided the most thoughtful analysis of this problem,[141] arguing that the concept of harm must be normative in charac-

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supra note 17, at 147-49. Of course, not only must the harm be non-trivial but also there must be sound scientific evidence that it is, in fact, harmful. *See* Pellegrino, *Autonomy and Coercion, supra* note 6, at 89-90.

137. Lawrence O. Gostin, *Tuberculosis and the Power of the State: Toward the Development of Rational Standards for the Review of Compulsory Public Health Powers*, 2 U. CHI. L. SCH. ROUNDTABLE 219, 255 (1995) (emphasis added); *see also* HARM TO SELF, *supra* note 8, at 56 (arguing that indirect and remote effects of self-regarding behavior does not make it other-regarding).

138. MILL, *supra* note 17, at 149.

139. *But see* Butler, *supra* note 14, at 7-11 (arguing that even this consideration carries "some moral weight").

140. HARM TO OTHERS, *supra* note 9, at 12; *see also* LEICHTER, *supra* note 12, at 14 ("Clearly the government cannot interfere in every instance in which personal behavior has the potential to cause discomfort, harm, or cost to others."); Unwin, *supra* note 21, at 44 ("[I]ts logical extension is that any type of behaviour that increases the chance of an individual calling upon the 'common resource' should be prevented. Thus, it would be logical to . . . make sedentary people take more exercise, and to prevent people practising dangerous sports . . . .").

141. *See, e.g.*, GERALD F. GAUS, VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY 420 (1990) (suggesting that after Feinberg "anything one has to say on the subject is hopelessly incomplete and sketchy"); RILEY, *supra* note 42, at 146; Michael D. Bayles, Book Review, 7 L. & PHIL. 107, 109 n.3 (1988) (reviewing JOEL FEINBERG, HARM TO SELF (1986)) ("Feinberg deftly handles the much-discussed question of whether there is any purely self-regarding conduct. He admits that conduct in which persons harm themselves always involves the public interest at least to a slight extent, but often not enough to invoke the harm to others principle."); Dripps, *supra* note 117, at 8 ("Joel Feinberg has devoted the greatest care to explicating the concept."); Dworkin, *supra* note 17, at 304 ("One of the most fully developed views that seeks to provide answers [about the nature and limits of harm] . . . is that of Joel Feinberg."); Epstein, *supra* note 111, at 374 n.13; John Gray, *An Epitaph for Liberalism*, TIMES LITERARY SUPP., Jan 12-18, 1990, at 31, 31 ("Feinberg's minute and illuminating taxonomy of the notions of harm and interests aims to give Mill's 'one very simple principle' . . . a definite sense sufficient at least for its use in contexts of legal policymaking."); Ian

ter.[142] It is empirically indisputable that smokers exert physical effects on others; according to Feinberg, the relevant question is whether those effects are both significant and wrongful.[143] Feinberg gives the vague notion of "harm" some "flesh and blood,"[144] defining "harm" as a (1) wrongful (2) setback to a person's interests.[145] Taking the second element first, harm includes not just any interference with another person's preference (e.g., to be free of all tobacco smoke), but only interference with those things in which the other person has a stake (e.g., to be free of tobacco smoke that is sufficiently dense to adversely affect the body). Thus, under many circumstances, smoking is not sufficiently harmful to justify its regulation. For example, although there is ETS in open outdoor spaces, it is rarely concentrated enough to cause harm by Feinberg's definition.[146] Each cigarette slightly increases the concentration of ETS, but the ETS level still remains below the threshold of what is considered

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Hunt, *Risking One's Life: Soft Paternalism and Feinberg's Account of Legal Liberalism*, 8 CAN. J.L. & JURISPRUDENCE 311, 314 (1995) ("Feinberg's account of harm . . . is an important advance on Mill's rather vague and hazy conception.").

142. *See* HARM TO OTHERS, *supra* note 9, at 36, 214, 245; *see also* Joel Feinberg, *Harm and Offense*, *in* ENCYCLOPEDIA OF ETHICS 437 (Lawrence C. Becker & Charlotte B. Becker eds., 1992); Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 SOC. PHIL. & POL'Y 145 (1986) (refining his analysis of harm).

143. *See* HARM TO OTHERS, *supra* note 9, at 36, 105; *cf.* TREBILCOCK, *supra* note 114, at 20 ("Determining which of these impacts, if negative, are to count . . . poses major conceptual problems.").

144. HARM TO SELF, *supra* note 8, at 24.

145. These two elements are independent so that conduct can be harmful but not wrongful (for example, where a surgeon cuts a patient with her informed consent) and wrongful but not harmful (for example, where one trespasses upon unused land). *See* HARM TO OTHERS, *supra* note 9, at 33-34; HARM TO SELF, *supra* note 8, at 11; *see also* BEAUCHAMP & CHILDRESS, *supra* note 9, at 193; NATIONAL BIOETHICS ADVISORY COMMISSION, RESEARCH INVOLVING HUMAN BIOLOGICAL MATERIALS: ETHICAL ISSUES AND POLICY GUIDANCE: REPORT AND RECOMMENDATIONS 42-43 (Aug. 1999).

146. *See, e.g.*, Ronald M. Davis, *Exposure to Environmental Tobacco Smoke: Identifying and Protecting Those at Risk*, 280 JAMA 1947 (1998); S. Katherine Hammond et al., *Occupational Exposure to Environmental Tobacco Smoke*, 274 JAMA 956 (1995); Michele I. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 806 & n.182 (1998); *cf.* LEMIEUX, *supra* note 74, at 64; Reynolds, *supra* note 84, at 442 n.45 (observing that the Illinois Supreme Court in striking the municipal smoking ban in *City of Zion*, was influenced by the fact that "city streets and ways were wide and that much of the smoking here prohibited therefore would occur in open spaces"). Notably all the federal agency reports focus exclusively on the effects of *indoor* smoking. *See, e.g.*, 1992 EPA REPORT, *supra* note 91, 3-51 to 3-52; *Hearing Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong., 2d Sess., at 21 (1994) (testimony of Carol Browner, Administrator of EPA); *id.* at 63 (statement of Browner). Of course, such laws are motivated not by just physical harm but also by other externalities such as litter and the message to children. *See* Tyler, *supra*, at 806 & nn.184, 186. However, it is unclear that the litter is more than *de minimus* or that smoking, apart from the effects of ETS, constitutes an "offense" to bring it under the scope of the harm principle; *cf.* OFFENSE TO OTHERS, *supra* note 20, at 34-35.

medically deleterious.[147] The other element of Feinberg's definition further narrows the concept of harm by restricting it to cases where the interference is "wrongful," or violates a right.[148]

As the harm principle is stretched to its limits, it becomes clear that "harm to others" simply cannot justify some smoking regulations such as outdoor bans. If these regulations are justifiable at all, that justification must be grounded in the prevention of harm to *self* rather than harm to *others*.[149] Pure paternalistic justification offers a conceptually and methodologically more principled basis upon which to premise intervention when the harm to others is insignificant.[150]

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147. *Cf.* HARM TO OTHERS, *supra* note 9, at 228.

148. *See id.* at 34-36, 110. Of course, determining what is "wrongful" requires recourse to a theory of rights. *See generally id.* at 109-14, 215; HARMLESS WRONGDOING, *supra* note 20, at 11 ("Some interests are unavoidably in conflict . . . . Deciding which should be protected is a moral decision on grounds of greater relative worthiness or importance."); *see also* KLEINIG, *supra* note 8, at 16 ("[T]he harm principle is not concerned with harm merely in the sense of damage. It is concerned with harm as an injury, a wrong."); *id.* at 33-36 (suggesting that even this definition might not be sufficient and it might be better to focus on the motivation for restriction rather than the conduct restricted); Doppelt, *supra* note 9, at 260.

149. *See* Thompson, *supra* note 124, at 268 (observing that lawmakers often "stretch the concept of social harm to the point where it merges with paternalism"); *see also* City of Zion v. Behrens, 104 N.E. 836, 836-37 (Ill. 1914) (finding the municipal ban too broad to be upheld on the basis of fire prevention); GAYLIN & JENNINGS, *supra* note 2, at 182 ("[T]hey try to use prevention of harm to others as the rationale for rules or policies that limit individual freedom of choice. This bad habit of civic discourse frequently leads to ethically distorted arguments and sometimes to dishonest or at least disingenuous ones."); Michael N. Goldman & Alan O. Goldman, *Paternalistic Laws*, 18 PHIL. TOPICS 65, 72 (1990) ("Such justifications should not be morally convincing, however. If we can interfere in free choice whenever doing so prevents such possible indirect costs from being incurred, then the scope of protected free choice will be vanishingly small."); Jacobson et al., *supra* note 11, at 79 (discussing "conceptual limitations in the current regulatory regime"); Regan, *supra* note 42, at 202 ("[T]he tenuousness of the connection between the conduct and the 'harm' gives the argument something of the false ring of rationalization."); Jendi B. Reiter, *Citizens or Sinners? The Economic and Political Inequity of 'Sin Taxes' on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443, 460 (1996) (arguing that stretching the harm principle leaves the regulations with "dubious moral legitimacy").

150. *Cf.* HARM TO SELF, *supra* note 8, at 22 & n.30 ("We can assume . . . a line can be drawn . . . between other-regarding behavior and behavior that is primarily self-regarding and only indirectly and remotely, therefore, trivially other-regarding."). Of course, when there is clear harm to others, the harm principle is properly invoked and justifies liberty restriction to prevent the harm. In such circumstances it is unnecessary to examine the justifiability of paternalism. The harm principle is both a sufficient and preferable liberty limiting principle. *Cf.* VANDEVEER, *supra* note 6, at 433-34. Of course, the least restrictive alternative principle still requires that the regulation be only as restrictive as is necessary to abate the harm.

II. REGULATION TO PREVENT HARM TO SELF: SOFT PATERNALISM

Not all regulation of tobacco can be justified on the basis of harm to others. Smokers do not always light up in public. There is no second-hand smoke from chewing tobacco. These activities create minimal if any, negative externalities. They do, however, pose health risks to the users themselves. Such conduct can often be justifiably regulated on the basis that the individuals engaging in these activities are acting without sufficient voluntariness. Their decision to smoke or to chew may be uninformed, misunderstood, or coerced. The justification for regulation under these circumstances is the soft paternalism liberty-limiting principle.

In this section I will first elucidate the concept of soft paternalism. After laying this conceptual groundwork, I will demonstrate soft paternalism's role as a liberty-limiting principle. Finally, I will identify the limitations of soft paternalism, arguing that although the soft paternalism principle, like the harm principle, can be manipulated to justify almost any regulation, its appropriate limitations leave room for hard paternalism.

A. *Defining "Soft Paternalism"*

The principal argument for the pure paternalistic regulation of voluntarily assumed risks is that "it is difficult for the individual decision makers to obtain, process, and use information on the consequences of their choices."[151] In the context of tobacco regulation, overriding a smoker's decision to smoke is justified primarily on the basis that the choice was not factually informed, was not adequately understood, was coerced, or was otherwise not autonomous.[152]

The overriding of stated preferences to preserve individual autonomy and to protect the good of the individual is "pure" soft paternalism.[153] Of

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151. Richard Zeckhauser, *Measuring Risks and Benefits of Food Safety Decisions*, 38 VAND. L. REV. 539, 541-42 (1985).

152. *See, e.g.*, Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1166-69 (1986).

153. In "pure" paternalism, the benefit to be provided or the harm to be prevented by the intervention pertains only to the restricted individual herself. *See* Dworkin, *supra* note 20, at 111 ("In 'pure' paternalism the class of persons whose freedom is restricted is identical with the class of persons whose benefit is intended to be promoted by such restrictions."); *see also* HARM TO SELF, *supra* note 8, at 12-16; KLEINIG, *supra* note 8, at 12; VANDEVEER, *supra* note 6, at 28, 66, 312 & n.14, 314; Beauchamp, *The Regulation of Hazards*, *supra* note 27, at 245 (citing Joel Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105, 113 (1971)). "Pure" paternalism will also be "direct" when the benefitted individual is the only one whose liberty is restricted to provide the benefit. *See, e.g.*,

course, in reality most intervention is "impure" paternalism, that is, it is for the good of the individual *and also* of others.[154] Nevertheless, I examine only "pure" paternalism, in which "the interference with a person's liberty of action is justified by reasons referring *exclusively* to the welfare, good, happiness, needs, interests, or values of the person being coerced."[155] For example, the Food and Drug Administration ("FDA") relied on pure paternalism to justify its tobacco regulations.[156] In its "Statement of Need for Action" the FDA writes, "FDA's justification of this regulation [banning tobacco for children] relies on the total costs associated with childhood addiction to tobacco, rather than on the external

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HARM TO SELF, *supra* note 8, at 9; KLEINIG, *supra* note 8, at 13-14.

154. *See* Dworkin, *supra* note 20, at 108 ("[I]t is not easy to find 'pure' examples of paternalistic interferences."); *see also* HARM TO SELF, *supra* note 8, at 16 (calling "impure paternalism" this "mixed paternalism" because it aims to "protect the directly restricted party himself, but also to protect third parties from indirect harm"); *id.* at 56 ("Clear examples of wholly self-regarding decisions are less easy to come by because 'No man is an island,' and every decision is bound to have some 'ripple effect' on the interests of others."); KULTGEN, *supra* note 24, at 79; Dan E. Beauchamp, *Community: The Neglected Tradition of Public Health*, HASTINGS CENTER REP., Dec. 1985, at 28, 29; Deborah Jones Merritt, *The Constitutional Balance Between Health and Liberty*, HASTINGS CENTER REP., Dec. 1985, at S2, S4.

155. Dworkin, *supra* note 20, at 108. Most philosophers doubt that there are any truly self-regarding risks. Nevertheless, as discussed in section I.C., at some point harm-to-others justifications becomes so tenuous that it is appropriate to characterize the paternalism as pure. *See* HARM TO SELF, *supra* note 8, at 22 (admitting that conduct in which persons harm themselves always involves the public interest to some extent but often not enough to invoke the harm principle); *see also id.* at 56 ("As John Stuart Mill pointed out, however, a rough and serviceable distinction can be drawn between decisions that are plainly other-regarding . . . and those that are 'directly,' 'chiefly,' or 'primarily' self-regarding."); HUSAK, *supra* note 6, at 64 ("Perhaps there are no examples of 'pure' or 'unmixed' paternalism, that is, of an interference with liberty that is justifiable solely on the ground that the conduct to be prohibited harms the doer . . . [I]t is a distinction between *rationales* for laws . . . the distinction between harm to oneself and harm to others . . . must be drawn in order to evaluate each of the arguments . . . ."); KLEINIG, *supra* note 8, at 12 ("What is important so far as paternalism is concerned is not whether it is possible to isolate a class of 'paternalistic' impositions, but whether a particular (*e.g.* paternalistic) rationale for imposing upon others has any moral standing, and if so, how much."); *id.* at 18 ("Unless something like this [distinction] is assumed, the whole issue of paternalism is rendered academic."); NIKKU, *supra* note 6, at 122-24.

156. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, Final Rule, 61 Fed. Reg. 44,396 (1996). The U.S. Supreme Court later struck down these regulations, holding that the FDA lacks authority to regulate tobacco products. *See* FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291, 1316 (2000) ("Reading the Food, Drug and Cosmetic Act as a whole, as well as in conjunction with Congress's subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority that it seeks to exercise here."). Nevertheless, the tobacco industry is already obligated to do many of the same things required by the regulations pursuant to contractual obligations in the national Medicaid settlement with the states. *See* National Ass'n of Attorneys Gen., *Master Settlement Agreement* (Nov. 23, 1998) (visited Feb. 7, 2000) <http://www.naag.com/cigmsa.rtf>; *see also* Ross D. Petty, *Tobacco Marketing Restrictions in the Multistate Attorney General Settlement: Is This Good Public Policy?*, 18 J. PUB. POL'Y & MKTG. 249 (1999).

or spillover costs to nonusers."[157] In other words, the FDA aimed to control children's access to tobacco *for their own good.*

Pure soft paternalism holds that it is proper to interfere with an individual's liberty for that individual's own good only if—indeed, precisely because—her contrary choice was not, or may not have been, substantially autonomous. For example, if you were about to eat a hot dog that only I knew was poisoned, then on soft paternalistic grounds I could justifiably interfere with your liberty and prevent you from eating that hot dog. My interference would be justified because you were unaware of this important feature of your action. I did not stop you from doing what you wanted to do, *i.e.* eat a hot dog. Rather, I stopped you from doing something that you (almost certainly) did not want to do, *i.e.* eat a *poisoned* hot dog.[158]

Intervention is proper not only when the person's conduct is clearly not substantially voluntary but also when the subject's conduct is *very probably* or *strongly suspected* to be not substantially voluntary. Under such circumstances, voluntariness must somehow be ascertained. After all, "[p]eople do not always want what they say; they do not always say what they want; and they do not always want what they say they want."[159] Individuals' desires and preferences are not always reflected in the choices they make. A lack of information, maturity, or voluntariness can thwart the realization of desires.[160] For these reasons, soft paternalism

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157. 61 Fed. Reg. at 44,572. In fact, this rule was not 100% "pure" paternalism. The FDA noted social benefits of reduced medical costs and fire costs. Nevertheless, the paternalism was close to pure. The agency was clear that the "major beneficiaries" were the children themselves. *Id.* at 44,574. In contrast, Dan Beauchamp might justify the same regulation, but by reference to the "collective good." Beauchamp, *supra* note 27.

158. Voluntariness will, of course, vary inversely relative to the thickness of the description of the act. *See* FADEN & BEAUCHAMP, *supra* note 18, at 244 & n.13; HARM TO SELF, *supra* note 8, at 123, 129, 132, 277, 282, 294, 304-05; *see also* Sunstein, *supra* note 152, at 179; VANDEVEER, *supra* note 6, at 30; *see generally* CARL GINET, ON ACTION 45-71 (1991) (discussing key literature on individuation, particularly DONALD DAWDSON, ESSAYS ON ACTIONS AND EVENTS (1980) and ALVIN I. GOLDMAN, A THEORY OF HUMAN ACTION (1970)).

159. Carl Elliott, *Meaning What You Want*, 4 J. CLINICAL ETHICS 61, 63 (1993).

160. *See* Cass R. Sunstein, *Disrupting Voluntary Transactions*, *in* MARKETS AND JUSTICE (NOMOS XXXI) 279, 282, 290 (John W. Chapman & J. Roland Pennock eds., 1989) [hereinafter *Disrupting Voluntary Transactions*] ("Absence of information is of course a conventional basis for the disruption of voluntary transactions."); *see also* Sunstein, *supra* note 152, at 1158-66; Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFFAIRS 3, 24-27 (1991) [hereinafter *Preferences*]. The principles of soft pure paternalism are mirrored in, among other places, products liability law. Specifically, the "assumption of risk defense bars recovery where (1) a dangerous condition exists which is inconsistent with the injured party's safety, (2) the injured person is actually aware of the condition and appreciates the danger, and (3) the injured person voluntarily exposes himself to the danger which produces the injury." Forrest City Mach. Works v. Aderhold, 616 S.W.2d 720, 724

is widely accepted as an appropriate basis for intervention.[161] Mill allowed that an individual's own good is "good reason for remonstrating with him, or persuading him, or entreating him."[162] Even professed libertarians will allow regulation on soft paternalistic grounds.[163]

Soft paternalism is not foreign to public health issues.[164] As Robert Goodin explains, "[t]o a very large extent . . . the justification of public health measures in general must be baldly paternalistic."[165] For example, the FDA exists in large part to protect consumers from being duped; it prevents people from making uninformed and involuntary decisions about which foods to ingest or which drugs or devices to use.[166] Indeed, the stated mission of the FDA is to protect the "health of people which, in the circumstances of modern industrialism, [is] largely beyond self-protection."[167] In explaining the philosophy of FDA regulation, Peter

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(Ark. 1981); *see also* RESTATEMENT (SECOND) OF TORTS § 892A (1977); STUART M. SPEISER ET AL., 3 THE AMERICAN LAW OF TORTS § 12:52-§ 12:54 (1986 & Supp. 1998). The basic idea is that only if the individual's (*i.e.* the prospective plaintiff's) behavior is not substantially voluntary or informed, does the (tort) law have a role (*i.e.* a soft paternalistic role) to play. Otherwise, the individual is presumably able to adequately protect (or, if she wishes, not protect) herself. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 18 (4th ed. 1971) ("It is a fundamental principle of the common law that *volenti non fit injuria*—to one who is willing no wrong is done. The attitude of the courts has not, in general, been one of paternalism. Where no public interest is contravened, they have left the individual to work out his own destiny, and are not concerned with protecting him from his own folly in permitting others to do him harm. In the field of negligence, this policy has been given effect by the doctrine of assumption of risk . . . .").

161. *See, e.g.*, Beauchamp, *The Regulation of Hazards*, *supra* note 27, at 245; Gerald Dworkin, *Paternalism*, *in* ENCYCLOPEDIA OF ETHICS 939, 940 (Lawrence C. Becher & Charlotte B. Becker eds., 1992).

162. MILL, *supra* note 17, at 68; *cf.* Marion Smiley, *Paternalism and Democracy*, 23 J. VALUE INQUIRY 299, 316 n.1 (1989) ("Contemporary philosophers often begin their discussions of paternalism by pointing out that they are in accordance with John Stuart Mill's principle of paternalism.").

163. *See, e.g.*, CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN 104 (1997).

164. *See* Ronald Bayer et al., Book Review, *Trades, AIDS, and the Public Health: The Limits of Economic Analysis*, 83 GEO. L.J. 79, 84 (1994).

165. GOODIN, *supra* note 5, at 31; *see also* Robert D. Tollison & Richard F. Wagner, *Self-Interest, Public-Interest, and Public Health*, 69 PUB. CHOICE 323, 325 (1991) ("[P]aternalism is sometimes advanced as a third type of explanation for the supply of public health.").

166. *See generally* JAMES T. O'REILLY, FOOD AND DRUG ADMINISTRATION (2d ed. 1995); PETER BARTON HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW (2d ed. 1991).

167. *See* United States v. Dotterweich, 320 U.S. 277, 280 (1943). There is also a diachronic aspect to the problem. Motorcycle helmet laws often find justification in that "riders fail to grasp, poignantly, what their feelings will be if a horrible crash without a helmet leaves them battered or paralyzed." Eric Rakowski, *Review of Dworkin's Sanctity of Life*, 103 YALE L.J. 2049, 2110 (1994) (citing Donald H. Regan, *Paternalism, Freedom, Identity and Commitment*, *in* PATERNALISM 113, 122-127 (Rolf Sartorius ed., 1983)); *see also* Sanford Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 873-74 & n.77 (1992); Thaddeus Mason Pope, *The Maladaptation of* Miranda *to Advance Directives: A Critique of the Patient Self Determination Act*, 9 HEALTH MATRIX 139, 171-80 (1999). Similarly, smokers do not identify with their later selves.

Barton Hutt quotes from the United States Supreme Court's opinion in *Dalehite v. United States*:[168]

> This is a day of synthetic living, when to an ever increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days. . . . Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers.[169]

The underlying premise of the soft paternalism liberty-limiting principle is that the only "real" decisions (*i.e.* those with which the government should not interfere) are those that are informed and voluntary, free of either cognitive or volitional defects. Pure soft paternalism is "soft" because it does not override any "real" decisions.[170] On the contrary, it constrains only impaired decisions, decisions which are the product of "compulsion, misinformation, excitement or impetuousness, clouded judgment . . . or immature or defective faculties of reasoning."[171] Thus, soft-paternalism, rather than counteracting autonomy, actually helps to protect and promote it.[172] Despite its nomenclature, most ethicists do not

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168. 346 U.S. 15 (1953).

169. Peter Barton Hutt, *Philosophy of Regulation Under the Food, Drug, and Cosmetic Act*, 50 FOOD & DRUG L.J. 101, 101 (1995) (quoting *Dalehite v. United States*, 346 U.S. 15, 51-52 (1953) (Jackson, J., dissenting)); *see also Who Benefits?*, N.Y. TIMES, Mar. 29, 1981, at 19 (reprinted from PHIL. LEDGER, Aug. 28 & 30 (1852)) ("Leave everyone to regulate his own business, and let consumers take care of themselves . . . . Yes! And after they are blown up, run over and crushed, knocked down dead, or poisoned to death, they will discover that have made a mistake . . . ."); KULTGEN, *supra* note 24, at 105-06.

170. *See, e.g.*, HANS BLOKLAND, FREEDOM AND CULTURE IN WESTERN SOCIETY (Michael O'Loughlin trans., 1997) (explaining that substantially nonvoluntary choices can be restricted because they are "just as alien to the individual as someone else's choices"); Feinberg, *infra* note 173, at 391-92 ("To restrict his liberties in such circumstances . . . we will not be interfering with his real self or blocking his real will . . . ."); HUSAK, *supra* note 6, at 130 ("[A]n agent's apparent choice is not truly *his* if it is nonvoluntary, so interference with it would not violate his autonomy."); Kasachkoff, *supra* note 24, at 413 ("Paternalistic restrictions in these cases—sometimes called cases of 'soft' or 'weak' paternalism—can be countenanced by a liberal society because they do not deprive the individual of any autonomous choice that he or she is in fact capable of making."); MILL, *supra* note 17, at 69 ("[T]his doctrine [of liberty] is meant to apply only to human beings in the maturity of their faculties."); NIKKU, *supra* note 6, at 126-27; Thompson, *supra* note 124, at 245 ("If a paternalistic intervention restricts only decisions that are already unfree, . . . the paternalism can be consistent with the principle of liberty.").

171. Joel Feinberg, *Legal Paternalism*, *in* PATERNALISM 3, 7 (Rolf Sartorius ed., 1983).

172. *See* Häyry, *supra* note 27, at 454 ("The core idea of all weak paternalism is . . . interventions can actually support their autonomy instead of suppressing it."); *see also* KLEINIG, *supra*

identify "soft paternalism" as being truly paternalistic;[173] under circumstances of coercion or cognitive defect, the individual has not exercised her autonomy. Robert Goodin explains,

> If it is autonomy that we are trying to protect in opposing paternalistic legislation in general, then the same values that lead us to oppose such legislation in general will lead us to welcome it in those particular cases where what we are being protected from is something that would deprive us of the capacity for autonomous choice.[174]

Nevertheless, it is conceptually important to distinguish "soft paternalism" as a form of paternalism. Whatever its underlying premise, soft paternalism still results in some tangible interference with the individual's range of opportunity—even if the interference actually preserves her

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note 8, at 100; Pope, *supra* note 167, at 188-90 ("There is no usurpation of autonomous decision-making because there was none to usurp. On the other hand, soft paternalism is needed to *ensure* autonomous decision making." (emphasis added)).

173. *See, e.g.*, TOM L. BEAUCHAMP & LAURENCE B. MCCULLOUGH, MEDICAL ETHICS: THE MORAL RESPONSIBILITIES OF PHYSICIANS 93-94, 96 (1984); HARM TO SELF, *supra* note 8, at 12 ("It is not clear that 'soft paternalism' is 'paternalism' at all, in any clear sense."); *id.* at 14 (arguing that it is "severely misleading to think of [soft paternalism] as any kind of paternalism"); HETA HÄYRY, INDIVIDUAL LIBERTY AND MEDICAL CONTROL 29-30, 34 (1998); PHILOSOPHICAL ETHICS, *supra* note 6, at 413; RILEY, *supra* note 42, at 198 ("Mill's absolute ban on paternalism *can be* compatible with what is often called 'soft' or 'weak' paternalism."); Beauchamp, *supra* note 33, at 1917 ("Weak paternalism, then, seems to be a defensible but noncontroversial position that nearly everyone accepts in some form. Weak paternalism is thus not a form of paternalism that can be distinguished in any morally relevant respect from antipaternalism."); Tom L. Beauchamp, *Medical Paternalism, Voluntariness, and Comprehension*, *in* ETHICAL PRINCIPLES FOR SOCIAL POLICY 123, 136 (John Howie ed., 1983) [hereinafter *Medical Paternalism*]; Tom L. Beauchamp, *Paternalism and Bio-Behavioral Control*, 60 MONIST 62, 67 (1977) ("[Weak paternalism] is not paternalism in any interesting sense, because it is not a liberty limiting principle *independent* of the 'harm to others' principle.") [hereinafter *Paternalism and Bio-Behavioral Control*]; Joel Feinberg, *Paternalism*, *in* ENCYCLOPEDIA OF PHILOSOPHY 390, 391 (Donald M. Borchert ed., Supp. 1996) ("Clarity would be improved if philosophers would speak of paternalism only when what is meant is hard paternalism."); Soren Holm, *Autonomy*, *in* ENCYCLOPEDIA OF APPLIED ETHICS 267, 272 (Ruth Chadwick ed., 1998) ("If the decision overridden is not fully autonomous . . . the problem is not a problem of paternalism . . . ."); Bill New, *Paternalism and Public Policy*, 15 ECON. & PHIL. 63, 67-69 (1999) (making the same argument in economic terms); Regan, *supra* note 42, at 191 ("Since the person . . . is unfree even if we do not intervene to constrain his choice, we are not really decreasing his freedom by intervening . . . ."); Shapiro, *supra* note 24, at 547 (arguing that soft paternalism "justif[ies] a particular intervention on the grounds that the preconditions for autonomy are not present").

174. GOODIN, *supra* note 5, at 7; *see also* Lawrence O. Gostin et al., *FDA Regulation of Tobacco and Youth Smoking: Historical, Social, and Constitutional Perspectives*, 277 JAMA 410, 412 (1997) ("The principal objection to stricter tobacco regulation—that it represented an inappropriate form of paternalism—began to erode. In its place, regulators could argue, based on science, that nicotine actually diminishes the capacity of an individual to make voluntary reasoned choices about whether to continue smoking.").

autonomy.[175]

B. Applying the Soft Paternalism Liberty-Limiting Principle

The precise conditions that make one's decisions to smoke "autonomous" remain unclear.[176] Nevertheless, some necessary elements of autonomy include: (1) having sufficient relevant information (knowledge); (2) being of majority age (maturity); and (3) being free of coercion (voluntariness). When any of these conditions are not substantially met, the choice to smoke is not substantially autonomous and soft-paternalistic intervention is justified.[177]

The earliest federal regulation of smoking was premised on the belief that smokers were unaware of the risks.[178] It is upon the other two soft paternalistic bases (lack of maturity and lack of voluntariness) that the FDA premised its short-lived regulation of tobacco.[179] First, the FDA argued that children lack both the relevant facts and the mental capacity to rationally process risk information. Second, the FDA argued that the addictive nature of tobacco impairs the voluntariness of smokers. I will

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175. The antipaternalism of soft paternalism can be helpfully explained using Gerald Dworkin's distinction between "liberty" and the "richer notion" of "autonomy." DWORKIN, *supra* note 5, at 13-15, 104-07. "In limiting his liberty . . . we promote, not hinder, his [autonomy]." *Id.* at 106; *see also supra* notes 32-36; *cf.* KLEINIG, *supra* note 8, at 21 ("[I]n the case of invasions of liberty, autonomy may not always be threatened . . . weak paternalism need involve no threat to autonomy . . . ."); *id.* at 58; VANDEVEER, *supra* note 6, at 30 n.20 ("*Even if* we concede that stopping S against his will . . . it remains true, certain puzzles aside, that the intervener does restrict S's liberty of action."). Heta Häyry draws a similar distinction between actions that do not interfere at all (*e.g.* mere provision of information) and those which interfere (*e.g.* pursuant to any liberty limiting principle). Unfortunately, she uses the terms "hard" and "soft," which I and many others already use in the same manner that Häyry uses "strong" and "weak." *See* HÄYRY, *supra* note 173, at 42; *see also* NIKKU, *supra* note 6, at 128 n.22. Instead of additional vocabulary, Tom Beauchamp has proposed restricting the use of the term "paternalism" to instances of hard paternalism. *See Medical Paternalism*, *supra* note 173, at 136-37; *see also* NIKKU, *supra* note 6, at 38. This proposed usage has generally been rejected. *See, e.g.*, BERNARD GERT ET AL., BIOETHICS: A RETURN TO FUNDAMENTALS 208 (1997).

176. *See* HARM TO SELF, *supra* note 8, at 115-17.

177. *See* Lavin, *supra* note 42, at 2423. Donald VanDeVeer adds further conditions for the justifiability of soft paternalism. *See* VANDEVEER, *supra* note 6, at 354-55 (arguing that the mere presence of some lack of voluntariness does not mean a forfeiture of ascriptive autonomy); *cf.* GERT ET AL., *supra* note 175, at 226 ("[J]ust because people are not competent to make a rational decision does not mean that it is justified to violate any moral rule with regard to them."); KULTGEN, *supra* note 24, at 78.

178. *See* SULLUM, *supra* note 1, at 64.

179. 61 Fed. Reg. 44,248-44,441 (1996); *see also* 21 C.F.R. §§ 897.14, 897.16, 897.30; David A. Rienzo, *About Face: How the FDA Changed Its Mind, Took on the Tobacco Companies in Their Own Back Yard and Won*, 53 FOOD DRUG L.J. 243 (1998).

demonstrate pure soft paternalism's operation as a liberty-limiting principle through an examination of these three justifications.

1. Regulation to Protect the Uninformed

No behavior, including smoking, can be autonomous unless done with adequate knowledge and understanding of the nature and consequences of that conduct. "Obviously people cannot voluntarily accept the health risks of smoking if they do not know what they are."[180] Therefore, soft paternalism is justified because it eliminates ignorance and enhances understanding.[181]

Education is always an appropriate government response to public health risks.[182] Even Mill allowed labeling of dangerous products, arguing that when an individual makes an unwise decision, that is good reason for "remonstrating with him, or reasoning with him, or persuading him, or entreating him."[183] By pointing out the consequences of one's behav-

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180. GOODIN, *supra* note 5, at 20; *see also* NIKKU, *supra* note 6, at 219-20; Pope, *supra* note 167, at 186-96; *cf. Luke* 23:34 ("Father, forgive them; for they know not what they do.").

181. If education could, in fact, accomplish this, then, pursuant to the principle of the least restrictive alternative, there would not be any need for more intrusive restrictions. However, "the difficulties in disseminating adequate, intelligible information . . . are so formidable that some kinds of regulation are necessary." KLEINIG, *supra* note 8, at 110.

182. *See, e.g.*, NORMAN DANIELS, JUST HEALTH CARE 158 (1985); Gerald Dworkin, *Paternalism*, *in* PATERNALISM 19, 21 (Rolf Sartorius ed., 1983); HARM TO SELF, *supra* note 8, at 134 ("The way for the state to assure itself that [smoking] practices are truly voluntary is continually to confront smokers with the ugly medical facts so that there is no escaping the knowledge of what the medical risks exactly are."); KULTGEN, *supra* note 24, at 70 ("[R]ational persuasion hardly needs justification."); PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN OUR FREE COUNTRY 608-09 (1996); RILEY, *supra* note 42, at 122, 145 ("[G]overnment should provide relevant information but otherwise leave individuals alone . . . ."); *id.* at 162 ("[P]ersuasion, advice, counsel, encouragement, attempts to inform and the like are not the same thing as coercion."); VANDEVEER, *supra* note 6, at 128 ("[I]t is permissible to use fair, open means to dissuade him."); *id.* at 317 ("[A]n information-providing policy is defensible . . . ."); *id.* at 321-22, 336, 424; Dworkin, *supra* note 20, at 110, 124; Joel Feinberg, *Legal Paternalism*, *in* PATERNALISM 3, 11 (Rolf Sartorius ed., 1983); Gilbert, *supra* note 22, at 5; *Medical Paternalism*, *supra* note 173, at 132; Regan, *supra* note 167, at 114-16; Daniel Wikler, *Persuasion and Coercion for Health*, *in* PATERNALISM 35, 53-53 (Rolf Sartorius ed., 1983). Admittedly, education might influence individuals' decisions but only an extreme form of influence, manipulation, comes close to determining the choice. *Cf.* Barbara Rippel, *Welcome to Wellville*, CONSUMER'S RES. MAG., Feb. 1999, at 34. *But see* Douglas J. Den Uyl, *Smoking, Human Rights, and Civil Liberties*, *in* SMOKING: WHO HAS THE RIGHT? 267, 272 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998) (arguing that the expenditure of public funds for smoking education is unjustifiable hard paternalism).

183. MILL, *supra* note 17, at 68; *see also id.* at 163 (allowing "advice, instruction, persuasion"). The government instructs and persuades not only through direct exhortation but also through providing incentives. For example, the IRS now permits a tax deduction for the costs of quitting smoking. *See* Rev. Rul. 99-28, 1999-25 I.R.B.; Michael Lynch, *Kick the Habit*, 188 J. ACCOUNTANCY 99 (1999).

ior without actually restricting that behavior, education actually *increases* autonomy.[184]

Not surprisingly, education was the focus of regulatory efforts until the 1980s. One year after the release of the 1964 Surgeon General's report, Congress passed the Cigarette Labeling and Advertising Act of 1965.[185] This law mandated the health warning on cigarette packaging: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Assuming that people would not engage in risky behavior if they knew better, early efforts focused on providing information.[186] Congress later provided for rotating warnings in the Comprehensive Smoking Education Act of 1984.[187] These warnings were stronger and meant to impress the

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184. *See, e.g.*, FADEN & BEAUCHAMP, *supra* note 18, at 347 ("Reasoned argument in defense of an option is itself information."); KULTGEN, *supra* note 24, at 101 ("[K]nowledge enhances her chance of choosing actions that will succeed in their purpose."); Daniel Wikler & Dan E. Beauchamp, *Health Promotion and Health Education*, *in* 2 ENCYCLOPEDIA OF BIOETHICS 1126, 1127 (Warren T. Reich ed., 1996). Education is, in Heta Häyry's terminology, not only *not* "strong" (*i.e.* "hard" as used in this article) paternalism but it is not even "hard" paternalism (*i.e.* prima facie in need of justification). *See* HÄYRY, *supra* note 173, at 73; *see also id.* at 57-65; NIKKU, *supra* note 6, at 198; Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 625 (1999). On the other hand, some scholars have argued that the mere provision of information can be paternalistic either when individuals do not want to receive the information or when it is presented in a very persuasive manner. *Cf.* RUTH CHADWICK ET AL., THE RIGHT TO KNOW AND THE RIGHT NOT TO KNOW (1997); GERT ET AL., *supra* note 175, at 211-12 (providing an example of informative paternalism); KULTGEN, *supra* note 24, at 71; NIKKU, *supra* note 6, at 23 ("[I]nformative actions can be performed paternalistic . . . ."); *id.* at 199 ("[T]he purpose of health information is not only improved knowledge but also a steering of habits toward what authorities consider health promotion and right behavior. When this is performed through information we may talk about informative paternalism."); Allen E. Buchanan, *Medical Paternalism*, *in* PATERNALISM 61, 62 (Rolf Sartorius ed., 1983); Ruth R. Faden & Alan I. Faden, *The Ethics of Health Education as a Public Health Policy*, 6 HEALTH EDUC. MONOGRAPHS 180 (1978) (arguing that although education facilitates voluntary choice, as it becomes more persuasive, government bears a heavier burden of justification).

185. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-40).

186. *See generally* JACOBSON & WASSERMAN, *supra* note 4, at 9; SULLUM, *supra* note 1, at 64; TROYER & MARKLE, *supra* note 76, at 73; Allan M. Brandt, *The Cigarette, Risk, and American Culture*, DAEDALUS, Fall 1996, at 155, 176; Howard Leventhal et al., *Is the Smoking Decision an "Informed Choice"?: Effect of Smoking Risk Factors on Smoking Beliefs*, 257 JAMA 3371, 3373 (1987); E.L. Thompson, *Smoking Education Programs 1960-1976*, 68 AM. J. PUB. HEALTH 250 (1978).

187. Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified at 15 U.S.C. § 1333); *cf.* H.R. 2579, 106th Cong. (1999) (requiring federal warning labels on cigars); S. 1421, 106th Cong. (1999) (same). Canada is now considering far more graphic warnings which include, *inter alia*, a diseased heart, a diseased lung and a diseased mouth. *See* Julian Beltrame & Gordan Fairclough, *Canadians to Place Graphic Warnings of Smoking Dangers on Cigarette Packs*, WALL ST. J., Jan. 20, 2000, at B16; *Health Minister Reveals New Cigarette Labelling Measure*, HEALTH CANADA NEWS RELEASE 2000-07 (visited Feb. 7, 2000) <http://www.hc-sc.gc.ca/english/archives/releases/2000_07e.htm> (posting the labeling requirements and color photos of the proposed labels).

message upon the warning-jaded smoker: "Quitting Smoking Now Greatly Reduces Serious Risk to Your Health," "Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy."[188] To reduce the powerful countering effect of pro-smoking messages, Congress also banned television and radio advertising.[189]

Today, "[s]mokers are generally cognizant of the risks they face."[190] Indeed, knowledge of the risks is often presumed.[191] Still, federal, state, and local governments continue to develop and institute new educational measures.[192] These measures are uncontroversial because interference with liberty is minimal.[193] Moreover, these educational initiatives are typ-

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188. *See supra* note 187.

189. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-40); *cf.* FEDERAL TRADE COMM'N, CIGAR SALES AND ADVERTISING AND PROPORTIONAL EXPENDITURES FOR CALENDAR YEARS 1996 AND 1997 § V.B (1999) (calling for a similar ban on cigar advertising).

190. *See* KIP VISCUSI, SMOKING: MAKING THE RISKY DECISION 61-78 (1992) [hereinafter SMOKING]; PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL 179-204 (1988) [hereinafter 1988 SURGEON GENERAL REPORT]; *see also* Leventhal et al., *supra* note 186, at 3374; Daniel Shapiro, *Tobacco: Irrationality, Addiction, and Paternalism*, 8 PUB. AFFAIRS Q. 187, 188-93 (1994); W. Kip Viscusi, *Promoting Smokers' Welfare with Responsible Taxation*, 47 NAT'L TAX J. 547, 556 (1996). On the other hand, because new risks associated with smoking are still being identified, perhaps smokers are unaware of the scope and limits of their knowledge. *See* HARM TO SELF, *supra* note 8, at 160-61; *cf.* KLEINIG, *supra* note 8, at 185 ("Even where we have plenty of data, it may not be in a form that we need."); Michael Schoenbaum, *Do Smokers Understand the Mortality Effects of Smoking? Evidence from the Health and Retirement Survey*, 87 AM. J. PUB. HEALTH 755 (1997) (reporting that heavy smokers significantly underestimate the risks of premature mortality); Viscusi, *supra* note 43, at 1102 ("A *general* awareness of the hazards of smoking does not provide consumers the *specific* information they need to understand . . . ."); Kip Viscusi, *Smoke and Mirrors: Understanding the New Scheme for Cigarette Regulation*, 16 BROOKINGS REV. 14, 19 (1998) (explaining the need for a "standardized rating system to assess relative risks").

191. In product liability litigation the assumption of the risk defense has been a successful affirmative defense for the tobacco industry for over thirty years. *See* Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 867, 890 (1998). *But cf.* Gordon Faircloth, *Jury Tells Philip Morris, R.J. Reynolds to Pay $20 Million in Punitive Damages*, WALL ST. J., Mar. 28, 2000, at A3 (reporting the first jury verdict for a plaintiff, Leslie J. Whiteley, who began smoking after government-mandated health warnings first appeared on cigarette packs).

192. *See* Office on Smoking and Health, U.S. Dep't of Health & Human Servs., *Educational Materials* (visited Feb. 7, 2000) <http://www.cdc.gov/tobacco/edumat.htm>.

193. Of course, as a political and tactical matter, even these efforts are often opposed by the tobacco industry. *See, e.g.*, Gostin et al., *supra* note 12, at 73 (noting in regard to 1998 tobacco industry opposition to federal legislation that "[t]his classically liberal objection also commonly extends even to government advice on the ground that such a collective expression of proper behavior is inherently coercive"). Indeed, related to the regulation of smoking itself is a related but distinct debate concerning First Amendment issues and the construction of social meaning. *See, e.g.*, *id.* at 73 (citing *inter alia* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 947 (1995)); Noah, *supra* note 3; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 947 (1996).

ically aimed at children, with whose liberty the state may usually justifiably interfere.

2. *Regulation to Protect the Immature*

Most would agree that the ethical justification for the pure paternalistic regulation of children's conduct has a firm foundation.[194] Children are recognized as the "clearest case of permissible (even obligatory) paternalism."[195] After all, it is well recognized that immaturity prevents minors from making autonomous choices.[196] "We force young people to stay in school . . . we allow them to dishonor contracts, we don't allow

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194. *See* MILL, *supra* note 17, at 69 ("[T]his doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children who . . . must be protected against their own actions"); *see also id.* at 166; GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 12 (Barbara S. Lynch & Richard J. Bonnie eds., 1994) [hereinafter GROWING UP TOBACCO FREE]; KLEINIG, *supra* note 8, at 144-56; RILEY, *supra* note 42, at 47. Analogous reasons would justify pure paternalistic regulation for the senile and mentally defective. *See, e.g.*, BAYLES, *supra* note 28, at 139; Caplan, *supra* note 14, at 138 ("That the government should protect through law, rule, and sanction, the weak, the vulnerable, the incapacitated, and the traumatized is a political obligation whose standing seems secure."); Heta Häyry et al., *Paternalism and Finnish Anti-Smoking Policy*, 28 SOC. SCI. & MED. 293, 296 (1989); Regan, *supra* note 42, at 207 n.3.

195. Robert E. Goodin, *Democracy, Preferences, and Paternalism*, 26 POL'Y SCIENCES 229, 232 (1993); *see also* BEAUCHAMP & CHILDRESS, *supra* note 9, at 138 (observing that children are "judged incompetent because they fail on a pragmatic standard such as age"); BLOKLAND, *supra* note 170, at 163 ("[W]ith regard to children paternalism is generally considered not only acceptable but also desirable."); BOVARD, *supra* note 41, at 255; HARM TO OTHERS, *supra* note 9, at 202; HARM TO SELF, *supra* note 8, at 153, 325-32; HUSAK, *supra* note 6, at 246 ("[A]dolescents are and ought to be subject to a much wider ranger of paternalistic interference than adults."); KLEINIG, *supra* note 8, at 144-56; Dworkin, *supra* note 20, at 119 (arguing that it is "not only permissible but even a duty to restrict the child's freedom in various ways"); Gilbert, *supra* note 22, at 4 ("[I]n the case of children . . . legislation against their smoking . . . is appropriate."); *id.* at 6 ("[S]ociety has more of an obligation to protect the child's health. . . . [O]ur culture . . . recognizes children as being in need of special care and protection."); Gostin et al., *supra* note 23, at 414 ("Paternalism is often regarded as an appropriate state response for the protection of minors."). Although children are presumed incompetent, many writers have stressed (1) that children have varying degrees of capacity and (2) that children will eventually become autonomous. *See* Donald M. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self Determination and Social Science*, 37 VILL. L. REV. 1569 (1992); *see also* KULTGEN, *supra* note 24, at 53; DAVID SEEDHOUSE, LIBERATING MEDICINE 118 (1991) (describing the "autonomy flip," the point at which respecting self determination takes precedence over creating autonomy); TREBILCOCK, *supra* note 114, at 150-51; VANDEVEER, *supra* note 6, at 139-40, 346, 436 (distinguishing children as "precompetent" as opposed to "incompetent"); Goodin, *supra*, at 232 ("The children's own preferences in all of this do not exactly count for nought."); Richard Nicholson, *The Greater the Ignorance, the Greater the Dogmatism*, HASTINGS CENTER REP., May/June 1993, at 4.

196. *See* GROWING UP TOBACCO FREE, *supra* note 194, at 12-13; *see also* U.S. DEP'T OF HEALTH & HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 261-63 (1994) [hereinafter 1994 SURGEON GENERAL'S REPORT].

them to purchase alcohol."[197] Unlike adults, children cannot adequately appreciate the consequences of their actions.[198] They focus on the short-term and discount the long-term consequences of their actions.[199] Even the U.S. Supreme Court has recognized "the peculiar vulnerability of children [and] their inability to make critical decisions in an informed, mature manner."[200]

Given this presumption of incompetence,[201] it is natural that tobacco regulation has long been based largely on the protection of children.[202] By 1890, twenty-six states passed laws banning cigarette sales to minors.[203] In a recent opinion, the Supreme Court of California noted that "[a]s early as 1891, the Legislature cared deeply enough about smoking and minors that it prohibited the sale of cigarettes to them . . . with a watchful eye, in its role as *parens patriae* it has maintained a paternalistic vigilance over this vulnerable segment of our society."[204]

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197. RABIN & SUGARMAN, *supra* note 21, at 8.

198. *See generally* LAURA M. PURDY, IN THEIR BEST INTERESTS: THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN (1992); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607 (1992); *see also* Note, *Good Whiskey, Drunk Driving and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury*, 45 S.C. L. REV. 269, 314 n.215 (1994).

199. *See, e.g.*, GROWING UP TOBACCO FREE, *supra* note 194, at 13-15 (citing Paul Slovik, *What Does It Mean to Know a Risk? Adolescents' Perceptions of Short-term and Long-term Consequences of Smoking*, Report No. 94-4 (June 1994)); Bruce C. Hafen, *Review: The Changing Legal World of Adolescents*, 81 MICH. L. REV. 1045, 1060 (1983) (noting that children do not have sense of their long-term future); *see also* Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 Q.L.R. 403, 406-13 (1999) (reviewing research on not only cognitive factors but also psychosocial factors affecting adolescent decisionmaking).

200. Bellotti v. Baird, 443 U.S. 622, 634 (1979); *see also* Thompson v. Oklahoma, 487 U.S. 815, 834-35 & n.43 (1988).

201. Although often irrebuttable (as in the case of statutory rape), some writers argue that the strength of the presumption should be inversely proportional to the ability of the child and directly proportional to the complexity of the decision. *See, e.g.*, KLEINIG, *supra* note 8, at 154-56.

202. *See, e.g.*, TATE, *supra* note 27, at 29 ("The opening wedge in the organized campaign against cigarettes was the charge that they corrupted the young."); Jennifer McCullough, Note, *Lighting Up the Battle Against the Tobacco Industry: New Regulations Prohibiting Sales to Minors*, 28 RUTGERS L.J. 709, 727 n.114 (1997); Widerman, *supra* note 76, at 398 ("The first statutes curbing tobacco use prohibited the sale of snuff and chewing tobacco to minors."). In addition to the ethical justification, regulating the use of tobacco by children has a pragmatic benefit. Most smokers begin as children, and if they are prevented from smoking at that time, then they probably will not ever begin to smoke. *See* 61 Fed. Reg. 45,248-49, 44,441 (1996). Because of the addictive nature of tobacco, it is most effective to prevent individuals from becoming smokers in the first place. *See* 61 Fed. Reg. 49,399 (1996) (citing 1994 SURGEON GENERAL REPORT, *supra* note 196, at 5, 50, 65-67); *see also* GOODIN, *supra* note 5, at 30, 137; GROWING UP TOBACCO FREE, *supra* note 194, at 5; RABIN & SUGARMAN, *supra* note 21, at 8; David A. Kessler, *Remarks by the Commissioner*, 51 FOOD & DRUG L.J. 207 (1996).

203. *See* SULLUM, *supra* note 1, at 28 (citing TROYER & MARKLE, *supra* note 76, at 34).

204. Mangini v. R.J. Reynolds, 875 P.2d 73, 83 (Cal. 1994).

In 1992, Congress required every state to adopt and enforce laws banning the sale and distribution of tobacco products to minors.[205] All states now have such laws.[206] Moreover, because many children still manage to obtain cigarettes in spite of these laws,[207] municipal regulations in many areas prohibit children from smoking in public.[208]

In 1996, the FDA also aimed to regulate tobacco in order to protect children. The agency conceded that "some children do make rational choices," but maintained that these exceptional cases cannot alone rebut the presumption of immaturity. The FDA explained that "the agency's regulatory determinations must reflect the societal conviction that children under the age of legal consent cannot be assumed to act in their own best interest."[209]

3. Regulation to Protect the Coerced

The justification for pure paternalistic intervention on the basis of tobacco's addictive qualities is similar but distinct from the justifications based on immaturity. In both cases, the decision-maker's autonomy is called into question. However, addiction does not affect one's ability to understand the risks of smoking. Rather, it renders the decision to smoke,

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205. *See* Alcohol, Drug Abuse and Mental Health Reorganization Act, 42 U.S.C. § 300x-26 (known as the Synar Amendment, restricting federal grant allocations on state compliance); *see also* Pro Children Act of 1994, 20 U.S.C. §§ 6081-84 (prohibiting smoking in federally funded indoor facilities used for the delivery of services to children such as schools and daycare); 45 C.F.R. § 96.130 (detailing requirements for state compliance with the Synar Amendment).

206. *See, e.g.*, GROWING UP TOBACCO FREE, *supra* note 194, at 201; WORLD HEALTH ORG., *supra* note 92, at 223; Fishman et al., *supra* note 87, at 26-27.

207. *See, e.g.*, Fishman et al., *supra* note 87, at 30-31; Jean L. Forster et al., *The Effect of Community Policies to Reduce Youth Access to Tobacco*, 88 AM. J. PUB. HEALTH 1193 (1998); *cf.* Centers for Disease Control, *Tobacco Use Among High School Students—1997*, 47 MORTALITY & MORBIDITY WEEKLY REP. 229 (1998) (reporting that 43% of American teenagers use tobacco); Joni Hersch, *Teen Smoking and the Regulatory Environment*, 47 DUKE L.J. 1143 (1998); Mark Wolfson et al., *Adolescent Smokers' Provision of Tobacco to Other Adolescents*, 87 AM. J. PUB. HEALTH 649 (1997).

208. *See, e.g.*, *Ault Bans Teen Smoking in Public*, ROCKY MTN. NEWS, July 16, 1998, at A8; Janice D'Arcy, *Can Law Douse Teen Smoking?*, HARTFORD COURANT, July 4, 1998, at A1; Tom Hester, *Limits on Teen Smoking Sweep Legislature*, STAR LEDGER (Newark, N.J.), Jan. 11, 2000, at 18; Reginald Johnson, *Fighting Tobacco at the Local Level*, N.Y. TIMES, July 12, 1998, at 14CN. Smoking is, of course, already forbidden in schools. *See* 20 U.S.C. § 6083(a).

209. 61 Fed. Reg. at 44,571 (citing GOODIN, *supra* note 5, at 30-32); *see also* HARM TO SELF, *supra* note 8, at 325-32 (explaining boundary problems); Glen McGee & Frederic D. Burg, *When Paternalism Runs Amok*, 15 POLITICS & LIFE SCI. 308 (1996). *But see* Ahaon Aviram, *The Paternalistic Attitude Toward Children*, 41 EDUC. THEORY 199 (1991) (arguing that the presumption is conceptually and empirically unsound).

in whole or in part, volitionally deficient.[210]

In the materials supporting its 1996 regulation,[211] the FDA cited a plethora of scientific evidence to demonstrate that the nicotine in tobacco is addictive.[212] Addiction is defined as the presence of physiological effects after regular use and the presence of physiological impediments upon withdrawal.[213] Clinical criteria developed by the American Psychiatric Association for the diagnosis of addiction state that "addiction" is[214]

> a maladaptive pattern of substance abuse, leading to clinically significant impairment or distress, as manifested by three (or more) of the following occurring at any time in the same 12 month period:
> 1) Tolerance marked by need for increased amounts of the substance or diminished effects with use of the same amount
> 2) Characteristic withdrawal symptoms
> 3) Taken in larger amounts or over a longer period of time than intended
> 4) Persistent desire for the substance or an unsuccessful desire to cut down on it
> 5) Much time spent to obtain the substance
> 6) Important social, occupational, or recreational activities given up for the substance
> 7) Continued use despite knowledge of physical or psychological problems

Regular users of tobacco satisfy all seven of these criteria.[215]

The upshot of this clinical and epidemiological evidence is that tobacco exerts a *coercive* or *compulsive* effect on its users.[216] With time,

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210. *See* GOODIN, *supra* note 5, at 25-30; *cf.* MILL, *supra* note 17, at 166 (accepting as a basis for soft paternalistic intervention "some state of excitement or absorption incompatible with the full use of the reflecting faculty"). Joel Feinberg uses "voluntariness" as an umbrella concept, which characterizes autonomous action. He identifies compulsion and coercion as two voluntariness-reducing factors relevant to addiction. *See* HARM TO SELF, *supra* note 8, at 150-52. I will use "voluntary" and "autonomous" interchangeably to describe actions substantially free of ignorance, immaturity, or coercion. In this section I will also use "voluntariness" to describe behavior substantially free from only coercion and compulsion.

211. *See supra* note 179.

212. *See* 61 Fed. Reg. 44,555-56, 44,701-48 (1996); *see also* Brief for the American College of Chest Physicians, FDA v. Brown & Williamson Tobacco, Corp. (U.S. No. 98-1152), 1999 WL 492568 (filed July 9, 1999) (arguing in support of the FDA and citing recently released tobacco industry internal memoranda recognizing the addictive nature of nicotine).

213. *See, e.g.*, 1988 SURGEON GENERAL REPORT, *supra* note 190, at 7; GOODIN, *supra* note 5, at 25-28; RABIN & SUGARMAN, *supra* note 21, at 9.

214. AMERICAN PSYCHIATARIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 166 (3d ed. rev. 1987); Harold Kalant, *Addiction: Concepts and Definitions*, *in* 1 ENCYCLOPEDIA OF DRUGS AND ALCOHOL 18 (Jerome H. Jaffe ed., 1995); *see also* Jack E. Henningfield & John Slade, *Tobacco Dependence, Medications: Public Health and Regulatory Issues*, 53 FOOD & DRUG L.J. 75 (1998).

215. *See* 61 Fed. Reg. 44,731 (1996).

216. Of course, this is true only if the scientific evidence is accurate. The focus of this article is to probe the normative as opposed to the empirical assumptions of smoking regulation. For the

the decision to use tobacco becomes less than fully autonomous.[217] For example, although "15 million smokers try to quit, fewer than 3% achieve one year of abstinence."[218] As the physiological effects are "in fact, very hard to overcome, then on philosophical grounds, we should regard the [smoker] as deprived of free choice."[219] Simply put, addiction makes the choice to smoke, or more precisely the decision to continue to smoke, nonautonomous.

In order to explain how addiction interferes with autonomy, it is useful to use the Dworkin/Frankfurt conception of autonomy. According to Philosophers Harry Frankfurt and Gerald Dworkin, "[a] person is autonomous if he identifies with his desires, goals, and values and such identification is not influenced in ways which make the process of identification in some way alien to the individual."[220] This identification takes place when an individual determines what he desires and, at a higher level, approves of having these desires. This higher level desire is a desire *about* a desire, for example, the desire to smoke. Here, the lower order desire (LOD) would be the desire to smoke a cigarette. The higher order desire (HOD) might be to *not* have the (LOD) desire to smoke. Without getting too deeply immersed in metaphysical issues of free will, the basic point is that our HODs should control and be congruent with

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purpose of this normative enquiry, I will assume the accuracy of the FDA's conclusions and make no effort to assess the scientific evidence. *Cf.* Richard A. Knox, *Nicotine Vaccine Takes Aim at Smoking Addiction*, BOST. GLOBE, Dec. 17, 1999, at A3 (reporting that scientists have developed a vaccine that blocks the effects of nicotine). *But see supra* note 90.

217. Joel Feinberg characterizes addiction as "compulsive pressure" for while addiction is resistible, such resistance is very "difficult, inconvenient, troublesome, or costly." HARM TO SELF, *supra* note 8, at 190; *see also id.* at 151, 158, 166, 189-228. Feinberg introduces some finer conceptual distinctions but he also observes that it is often "nearly impossible to distinguish" compulsive pressure (where no conscious decision is made) from coercive pressure (where a conscious decision is made that resistance is too difficult). *Id.* at 194-95, 199. Daniel Shapiro argues that this compulsive pressure is insufficiently strong to make the decision to smoke less than substantially voluntary. *See* Shapiro, *supra* note 190, at 198-200.

218. 61 Fed. Reg. 44,372 (1996).

219. Rabin, *supra* note 5, at 481; *see also* Neal L. Benowitz & Alice S. Fredericks, *Tobacco Dependence*, *in* 3 ENCYCLOPEDIA OF DRUGS AND ALCOHOL 1026 (Jerome H. Jaffe ed., 1995). *But see* HUSAK, *supra* note 6, at 110-17 (requiring a higher level of coercion before an act is nonvoluntary); *id.* at 72 ("The most plausible paternalistic arguments . . . suffer not only from theoretical defects but also from dubious empirical assumptions.").

220. DWORKIN, *supra* note 5, at 14-15; Harry Frankfurt, *Freedom of the Will*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT 11, 20 (1988); Gerald Dworkin, *The Concept of Autonomy*, *in* THE INNER CITADEL 61 (John Christman ed., 1989); Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 1 (1971); *see also* Irving Thalberg, *Hierarchical Analysis of Unfree Action*, *in* THE INNER CITADEL, *supra*, at 123. This is, of course, a purely formal conception of autonomy, allowing persons to "give meaning to their lives in all kinds of ways." DWORKIN, *supra* note 5, at 31.

our LODs.[221] Addiction makes the LODs insusceptible to HODs; that is, the individual doesn't want to want to smoke but just can't help it. This makes the decision to smoke—or to continue to smoke—less than substantially voluntary.

Just as lack of knowledge (regarding the risks of smoking) prevents individuals from autonomously deciding whether to smoke, so does the coercive or compulsive pressure imposed by addiction impinge on autonomy.[222] Indeed, regulation under these circumstances actually *protects* autonomy by ensuring that an individual's choice reflects her true preferences.[223] Robert Goodin explains that "[w]here people 'wish to stop smoking but do not have the requisite willpower . . . [intervention is] not imposing a good on someone who rejects it. [It is] simply using coercion to enable people to carry out their own goals.' "[224]

C. *Limitations of the Soft Paternalism Liberty-Limiting Principle*

Like the harm principle, soft paternalism can theoretically justify *any* intervention. Just as we can always find harm to others in a particular activity, we can always argue that a decision was made without substantial autonomy.[225] "Autonomy," like "harm" is an inherently vague and variable concept;[226] thus, soft paternalism, like the harm principle,

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221. *See* Gerald Dworkin, *Autonomy and Behavioral Control*, HASTINGS CENTER REP., Feb. 1976, at 23.

222. It is not necessary that the smoker have no choice at all in the matter. The smoker's decision to smoke is made nonautonomous when to do otherwise would be unreasonably difficult. *See* HARM TO SELF, *supra* note 8, at 150-52, 189-95, 340-43; *see also id.* at 158 ("His act need not be close to the extreme of total involuntariness in order to be 'involuntary enough' to warrant interference."); JON ELSTER, STRONG FEELINGS: EMOTION, ADDICTION, AND HUMAN BEHAVIOR §§ 3.2-3.4 (1999).

223. *Cf.* GOODIN, *supra* note 5, at 48 (arguing that intervention in the case of addiction "helps people implement their own preferred preferences. It overrides people's preferences, to be sure, but the preferences which it overrides are ones which people themselves wish they did not have."). Of course, someone's true preferences might be to smoke. Still, at least temporary intervention is justified to determine this. *See* Dworkin, *supra* note 20, at 124 (arguing that there is "no theoretical problem . . . simply using coercion to enable people to carry out their own goals").

224. GOODIN, *supra* note 5, at 28 (quoting Dworkin, *supra* note 182, at 32).

225. *See supra* notes 115-40 and accompanying text.

226. *See* JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW 243-76 (1988); Feinberg, *supra* note 173, at 392 (discussing work by Gert and Culver and noting that "voluntariness is usually a matter of degree with no conveniently placed bright lines to guide us. In this respect it resembles the concept of harm . . . ."); *cf.* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 371 (1985). Wibren Van der Burg would also characterize the use of a notion like "hypothetical consent" as a slippery slope. Wibren Van der Burg, *Slippery Slope Arguments*, *in* 4 ENCYCLOPEDIA OF APPLIED ETHICS 129, 133 (Ruth Chadwick ed., 1998) ("The gray zone in the second slippery slope argument is usually the result of both semantic indeterminacy and epistemic indeterminacy."). Wibren Van der

poses the threat of the slippery slope and potentially unlimited government intervention.

In its most extreme form this slippery slope is exemplified by the notion of "hypothetical consent."[227] This type of consent is used to justify interventions for a person's own good when that person does not consent to the intervention.[228] Her hypothetical consent is obtained by presuming, in spite of her contemporaneously expressed contrary preferences (or simply without regard to her preferences when none are expressed or elicited), that *if* she truly understood the risks or were truly free of autonomy-reducing factors, then she *would* consent to the intervention because that would be the *rational* thing to do.[229]

The framing of hypothetical consent as an enterprise of what a person would do if rational and informed is misleading.[230] At bottom, there is a strong normative judgment that persons ought to be rational and, moreover, be rational *in a certain way*.[231] Gerald Dworkin, a leading exponent of hypothetical rational consent,[232] admits that "there is always a danger that a dispute over agreement and rationality being a disguised version of evaluative and normative disagreement."[233] The only justifica-

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Burg argues, however, that legislation and regulation, as opposed to judicial decisionmaking, are not subject to this kind of slippery slope because the slide in those contexts can be stopped by choosing (even arbitrarily) some bright line. *See id.* at 134, 137. Of course, this is inapposite when it comes to making laws in the first place.

227. *See generally* HARM TO SELF, *supra* note 8, at 184-86; KULTGEN, *supra* note 24, at 123; VANDEVEER, *supra* note 6, at 70-75; Daniel Brudney, *Hypothetical Consent and Moral Force*, 10 L. & PHIL. 235 (1991).

228. *See* DWORKIN, *supra* note 5, at 88-89.

229. *See* PHILOSOPHICAL ETHICS, *supra* note 6, 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.").

230. *See* Beauchamp, *supra* note 33, at 1916 ("A justification based on consent may do more to obscure than to clarify issues."); *see also* KLEINIG, *supra* note 8, at 63 ("[A]ny pretense of an actual consent is abandoned and replaced by what is effectively a concern with rationally justifiable interferences.").

231. *See, e.g.*, MRS. GASKELL, CRANFORD 242 (1907) (nicely illustrating the problem with hypothetical rational consent where Martha, upon the loss of her money, exclaims "I'll not listen to reason . . . . Reason always means what some one 'else has got to say.' "); KLEINIG, *supra* note 8, at 63 ("There is a tendency for the rational individual to reflect the understanding and values of upholders of power or the dominant ideology. It [The Argument from Hypothetical Rational Consent] is therefore prey to idiosyncrasy and partisan constructions."); ROBERT YOUNG, PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY 67 (1986) ("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.").

232. *See* DWORKIN, *supra* note 5, at 76, 124; Dworkin, *supra* note 20, at 119.

233. Dworkin, *supra* note 20, at 120; *cf.* JONATHAN GLOVER, CAUSING DEATH AND SAVING

tion for this judgment is another appeal to what persons would do.[234] Yet this only pushes the normative foundation deeper. Thus, hypothetical consent relies not on the supposition that the individual *would* consent if she were rational, but instead on the normative judgment that she *should* consent.[235] As Douglas MacLean explains,

> 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.[236]

Because the notion of rationality is necessarily infused with subjective values, any theory that appeals to hypothetical consent to justify paternalistic actions will justify too much. "Almost *any* risk accepted by an agent can form the basis of an intervention on grounds that no rational person would assume the risk."[237]

Despite the masking dangers of hypothetical consent, there are forms of soft paternalism that serve as legitimate liberty-limiting princi-

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LIVES 80 (1979) ("[T]his loophole cannot be stretched far without the autonomy principle collapsing into utilitarianism."); HUSAK, *supra* note 6, at 134 ("[R]elatively weak . . . irrationality . . . rationale for interference would open a far wider door to paternalism than almost anyone should accept."); VANDEVEER, *supra* note 6, at 74 ("[T]he concept of a 'fully rational person' is too indeterminate . . . a logical construct . . . ."); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 HASTINGS L.J. 175, 205 n.92 (1994) ("To suggest that persons who *fail* to perceive what is in their interest *could* perceive it if they engaged in a Rawlsian gedanker experiment does not alter the fact that they do not perceive it, and that others are accordingly acting on their behalf."); *Medical Paternalism*, *supra* note 173, 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 . . . ."); Smiley, *supra* note 162, at 303-06.

234. Donald VanDeVeer offers an alternative that he calls the "Principle of Hypothetical Individualized Consent (PHIC)." VANDEVEER, *supra* note 6, at 75-81. In VanDeVeer's alternative, the hypothetical is answered by reference to facts and values of the subject of restriction. The inquiry is "empirically focused" on the subject. *Id.* at 83 n.30. VanDeVeer argues that this lessens the imposition of alien values typical in hypothetical rational consent. *See id.* at 75-81, 234, 336; *see also id.* at 398-414 (making a similar analysis of paternalism toward prior competents); KLEINIG, *supra* note 8, at 59 (making a similar argument in terms of "integrity"). Nevertheless, the agent of paternalism still retains a not insignificant range of discretion regarding the interpretation and extrapolation of the subject's preferences. *Cf.* VANDEVEER, *supra* note 6, at 392.

235. *See* Kennedy, *supra* note 40, at 637 ("[T]here 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.' ").

236. Douglas MacLean, *Risk and Consent: Philosophical Issues for Centralized Decisions*, *in* VALUES AT RISK 25 (Douglas MacLean ed., 1986); *see also* Douglas MacLean, *Introduction*, *in* VALUES AT RISK, *supra*, at 5 ("As the kind of consent becomes more indirect, the role of rationality becomes correspondingly more important.").

237. BEAUCHAMP & CHILDRESS, *supra* note 9, at 281 (emphasis added).

ples. Just as society devised limits to make the harm principle workable, society may specify limits to make soft paternalism workable. Although necessarily arbitrary to some extent, we can set threshold ages above which individuals must be to engage in certain kinds of risky conduct. We can set threshold levels of addictiveness above which substances must exhibit to render their use less than substantially voluntary. We can set threshold levels of understanding above which individuals must have with regard to their conduct in order to engage in it with substantial voluntariness. Soft paternalism is a legitimate and particularly germane liberty-limiting principle in the smoking context. The danger lies in setting any of these thresholds too low.

In order to maintain conceptual clarity, it is important to demarcate the justificatory limits of soft paternalism. As Gerald Dworkin explains, "[i]t is possible to relate [all] cases to the soft paternalistic thesis by claiming ignorance or weakness of the will, [but] the strategy seems too *ad hoc* to be convincing."[238] Nevertheless, as discussed in the next section, this is precisely the project that Joel Feinberg undertakes in *Harm to Self*, the third volume of his treatise, *The Moral Limits of the Criminal Law*.[239] Whether and to what degree Feinberg succeeds helps to establish a much-needed distinction between soft and hard paternalism.

III. REGULATION TO PREVENT HARM TO SELF: HARD PATERNALISM

Hard paternalism is the intentional overriding of an individual's informed and voluntary choice for the sole purpose of benefitting that individual. In this section I will begin by clarifying this definition. Next, I will demonstrate hard paternalism's plausibility, both descriptively and normatively, as a liberty-limiting principle.[240] Finally, I will identify the

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238. DWORKIN, *supra* note 5, at 125 ("[T]his approach seems implausible."); *see also* HARM TO SELF, *supra* note 8, at 181 (calling hypothetical consent a "dangerous counterfeit[] of consent that cannot have the moral purchasing power of the real thing"); *id.* at 187 (calling hypothetical consent "a sham and an outrage"); KLEINIG, *supra* note 8, at 134 ("Weak paternalistic arguments . . . stretch the criteria for noncompetence to breaking-point . . . ."); Dworkin, *supra* note 20, at 119 (observing that "[t]he dangers of . . . extensions of [soft] paternalism . . . have been sufficiently exposed by Berlin in his *Two Concepts of Freedom*").

239. *See infra* notes 280-318 and accompanying text.

240. I do not make a complete normative defense of the hard paternalism liberty-limiting principle. Instead, after defining hard paternalism's conceptual boundaries, I merely make a descriptive case for it, performing the conceptual analysis necessary to recognize hard paternalistic legislation for what it is. Although I *suggest* that such legislation might be morally justifiable, I leave a careful defense of that proposition to another day. *See* Thaddeus Mason Pope, Are There Good Reasons for Limiting the Liberty of Autonomous Persons: A Definition and Defense of Hard Paternalism (unpublished thesis proposal for Ph.D. dissertation in Philosophy, § V, Georgetown University) (on file with

limitations of hard paternalism as a liberty-limiting principle.

A. *Defining "Hard Paternalism"*

Hard paternalism is the position that it is morally justifiable to protect adults against their will from the harmful consequences of their choices, even when those choices are informed, voluntary, and do not harm others. The state "protects" the adult by overriding her autonomous decision. Thus, hard paternalism holds that autonomy can be trumped by beneficence;[241] that is, the "good" of an individual can outweigh her right to self-determination.[242]

As Joel Feinberg explains, hard paternalism "seems to imply that . . . the state can know the interests of individual citizens better than the citizens can know themselves."[243] Not surprisingly, this liberty-limiting principle is widely condemned "because it foists on people a conception of the good that they, on reflection, find unattractive."[244] In part because

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the Georgetown University Graduate School, Washington, D.C.).

241. *See* BEAUCHAMP & CHILDRESS, *supra* note 9, at 281, 271-84 ("Beneficence alone truly justifies paternalistic actions . . . ."); *see also* KLEINIG, *supra* note 8, at 5. In contrast, soft paternalism sanctions intervention only when and because conduct is not substantially voluntary. *See supra* notes 158-75. Douglas Husak offers two ways to conceptualize hard paternalism. The first conception is that "autonomy applies to and protects the decision to take a risk, unless the extent of the risk exceeds a given critical threshold." HUSAK, *supra* note 6, at 94. The second conception is that "autonomy applies to and protects the decision to take any risk, however great. But after the extent of a risk exceeds a given critical threshold, the protection afforded by the principle of autonomy is outweighed by the need to prevent persons from harming themselves." *Id.* The second way is more clearly recognizable as hard paternalism, allowing the supposed good of an individual to trump her autonomy. Yet, there is really no difference between the two conceptions. In both, an alternative conception of the good is being imposed. In the first case, it is simply being imposed indirectly.

242. An alternative conception holds that autonomy is a component of a person's good, which is outweighed by other ingredients of the good. *See* KULTGEN, *supra* note 24, at 177.

243. HARM TO SELF, *supra* note 8, at 23; *see also* BOVARD, *supra* note 41, at 224 ("Paternalism presumes that government will serve the people even better than the people could have served themselves. And why? Because government knows best.").

244. HARM TO SELF, *supra* note 8, at 134 ("As a principle of public policy [hard paternalism] has an acrid moral flavor and creates serious risks of government tyranny."); BAYLES, *supra* note 28, at 119, 128-32; *see also* HARM TO SELF, *supra* note 8, at 23 ("[L]egal paternalism is . . . arrogant and demeaning. . . . patronizing . . . ."); *id.* at 60-61, 70, 98 ("We undermine his status as a person . . . if we force our better conception of his own good upon him."); HUSAK, *supra* note 6, at 138-41; KULTGEN, *supra* note 24, at 16 ("Being treated paternalistically inclines us to condemn it. We resent incursions on our autonomy."); *id.* at 211 ("[P]aternalism is firmly entrenched as a tag of disapproval."); TREBILCOCK, *supra* note 114, at 150 ("The problems posed by hard paternalism are obvious: once one abandons as the principal reference point an individual's own preferences, the danger of an authoritarian imposition of others' preferences . . . are relatively unconstrained."); Brock, *supra* note 22, at 559 ("[P]aternalistic interference involves the claim of one person to know better what is good for another person than that other person him or herself does."); Dworkin, *supra* note 20, at 124 (describing paternalism as "imposing a good on someone in that given his current ap-

our political system rejects the notion of an objectively definable "good life," the right to self-determination has become the preeminent value in the United States.[245] Given this value, it is widely believed that "people are capable of making up their own minds about what is good for them."[246] Americans are naturally reluctant to give the government the authority to tell them what is and is not in their own best interests.

The central assumption of hard paternalism is that even when individuals are informed and uncoerced, they often fail to act in their own best interests.[247] Critics of hard paternalism "resist the suggestion that there is only one acceptable conception of the 'good.' "[248] They maintain that laws constraining voluntary, informed, and solely self-affecting actions are "profoundly insulting."[249] Although anti-hard paternalists may

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praisal of the facts, he doesn't wish to be restricted"); Feinberg, *supra* note 173, at 391 ("Those who are strongly opposed to paternalism find it not only mistaken but arrogant and demeaning.").

> Despite the attractiveness of policies aimed at the prevention of tobacco use . . . the moral defensibility of policies that go beyond education and the protection of nonsmokers is suspect. It is difficult to discern what moral grounds could support such policies, if the grounds are neither weakly paternalistic nor rooted in the harm principle.

Lavin, *supra* note 42, at 2426; *see also* Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1123 (1993); Viscusi, *supra* note 43, at 1101-02 ("The mere existence of a large risk, however, is not a legitimate rationale for government regulation . . . . In a world of rational choice, with full information, there would be no rationale . . . for interfering with those decisions."); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 231 (1998) (recognizing "hostility toward paternalism that characterizes the prevailing liberal discourse").

245. *See supra* notes 22-24 and accompanying text.

246. Capital Broad. v. Mitchell, 333 F. Supp. 582, 593 (D.D.C. 1971) (Wright, J., dissenting). *See also* John H. Knowles, *The Responsibility of the Individual*, 106 DAEDULUS 57, 66 (1977) ("[M]any people won't change their habits . . . and are annoyed with the restrictions on their freedom when someone tries to make them."); David Skinner, *Reasons to Smoke*, 132 PUB. INTEREST 117, 121 (1998) ("[I]t is hard to see what justifies this usurpation of moral agency.").

247. Goodin describes this as soft paternalism. *See* GOODIN, *supra* note 5, at 23 ("What is involved here is a relatively weak form of paternalism, one that works within the individual's own theory of the good and merely imposes upon him a better means of achieving what after all are his own ends."). However, given the epistemological problems of ascertaining what is, in fact, an individual's own theory of the good, Goodin's approach is imprudent. It comes very close to engaging in the same masking as theories of hypothetical consent. *See supra* notes 227-37 and accompanying text.

248. DANIELS, *supra* note 182, at 156.

> [W]e cannot invasively intervene in his choices on the basis of a myopic focus on what constitutes *his own good* even if we happen to possess superior insight on that score . . . . To do otherwise is to treat [the smoker] as a 'good receptacle' or a 'utility location,' but persons are not just that. They are arbiters of their own well-being, and not merely sentient, computing, devices to be kept in good repair.

VANDEVEER, *supra* note 6, at 112; *cf.* BENEDICT SPINOZA, ETHICS 143 (A. Boyle trans., E.P. Dutton & Co. 1941) (1677) ("One and the same thing can at the same time be good, bad, and indifferent.").

249. *See, e.g.*, Berlin, *supra* note 123, at 136-37 ("[N]othing is worse than to treat them as if they were not autonomous . . . whose choices are manipulated by their rulers . . . ."); *id.* at 157 ("Paternalism is despotic . . . because it is an insult to my conception of myself as a human being

concede that people are often poor judges of their own interests,[250] they will not admit that anyone else is in a better position to judge those interests.[251]

. . . ."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 263 (1978); KLEINIG, *supra* note 8, at 4 (describing paternalism as "distasteful" and "insulting"); *id.* at 38 ("demeaning" and "degrading"); KANT, *supra* note 51, at 58-59 ("If a government were . . . a *paternalistic government* (*imperium paternale*) . . . such a government would be the worst conceivable *despotism*."); Mead, *supra* note 40, at 111-12 ("Paternalism . . . is demeaning, for it implies that these individuals cannot manage their own lives."); Paul Starobin, *A World of Risk*, 31 NAT'L J. 2006, 2012 (1999) (calling paternalism "undeniably elitist"); Vermont Royster, *Thinking Things Over: The Eighth Deadly Sin*, WALL ST. J., Feb. 26, 1986, *available in* 1986 WL-WSJ 286305 (arguing paternalism is self-righteousness).

250. *See, e.g.*, KLEINIG, *supra* note 8, at 29 ("If we are often affronted by the presumption of paternalists, we ought to be no less astonished at the carelessness, thoughtlessness, and stupidity of people with respect to the unelevating character or self-destructive potential of their self-regarding behavior."); *id.* at 48 ("Despite the interest that people have in their well-being, there is ample evidence that they are often poor judges of it."); Rippel, *supra* note 182, at 34 ("People do not always make the right choices for their health or their well-being, but the question is whether others can better decide for them.").

251. *See, e.g.*, KLEINIG, *supra* note 8, at 29-30 ("Argument from Paternalistic Distance"); *id.* at 183 (quoting Robert Reich who said that " '[s]ubstitution of the choices of bureaucrats for those of consumers carries with it a not so subtle implication that consumers are powerless, if not incompetent ' "); LEMIEUX, *supra* note 74, at 48 ("Individual choices are not always optimal, but neither are the paternalistic state's coercive interventions."); *id.* at 49 ("There is nothing to suggest that the state has a superior capability . . . or that its ability to make the right choices about the risks people take in their lives is necessarily better."); RILEY, *supra* note 42, at 127 ("Given that all are fallible . . . the individual ought to decide for himself . . . ."); TREBILCOCK, *supra* note 114, at 158 (paraphrasing *Matthew* 15:14 and stating that state paternalism is "a quintessential case of the socially constructed blind leading the blind"); Richard J. Arneson, *Paternalism*, *in* 7 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 250, 251 (Edward Craig ed., 1998) ("[H]umans, including the humans who would administer any paternalistic rule, are imperfectly rational, imperfectly well-informed, and not always disposed to be moral."); Dworkin, *supra* note 20, at 125 ("[R]ational men knowing something about the resources of ignorance, ill-will, and stupidity available to the law-makers of a society . . . will be concerned to limit such intervention to a minimum."); Gerald Dworkin, *Autonomy*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 359, 361 (Robert E. Goodin & Philip Petit eds., 1993) ("[T]he state must not justify its actions on the basis that some ways of life are intrinsically better than others."); Goodin, *supra* note 195, at 237; Daniel B. Klein, *The Moral Consequences of Paternalism*, 44 THE FREEMAN 238 (1994); Rippel, *supra* note 182, at 34 ("[P]eople still prefer to choose . . . rather than have somebody else making those decisions for them."); John Skorupski, *Introduction* to CAMBRIDGE COMPANION TO MILL 1 (John Skorupski ed., 1998) (arguing that modern liberalism grounds liberty in value neutrality or epistemological barriers, in contrast to classical liberalism which held liberty as a substantive ideal); *cf.* New, *supra* note 173, at 71, 75, 81 (arguing that individuals are subject to various reasoning failures, paternalism is justified only if the state can "make these decisions *better* than individuals."). Even if they were to make this concession, that would not mean the paternalism was justified. There is a value in choosing apart from the wisdom or consequences of the choice. In other words, autonomy has both an intrinsic and an instrumental value. *See, e.g.*, BOVARD, *supra* note 41, at 222 ("Paternalism perceives happiness as deriving solely from a final result . . . [b]ut happiness is also the result of an active pursuit of one's own values."); GLOVER, *supra* note 233, at 81 ("[P]eople can mind more about expressing themselves than about the standard of result."); KLEINIG, *supra* note 8, at 30-32 ("[E]ven if they do not make the best choices, there is a value in choosing . . . ."); KULTGEN, *supra* note 24, at 103-04. Indeed, this

B. Applying the Hard Paternalism Liberty-Limiting Principle

Protecting public health on the basis of hard paternalism has not always been so controversial.[252] Today, however, it seems that hard paternalism is universally rejected.[253] Autonomous "self-affecting behaviors,

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seems to be the point of the classic dystopian novels in which there was adequate security but little liberty or freedom. *See, e.g.*, RAY BRADBURY, FAHRENHEIT 451 (1953); ALDUOUS HUXLEY, BRAVE NEW WORLD (1939); GEORGE ORWELL, 1984 (1949); YEVGENY ZAMYATIN, WE (Mirra Ginsburg trans., 1972) (1952).

252. Before the 1960s paternalism was still offered (and accepted!) as a policy rationale. *See* Berger, *supra* note 23, at 23 ("Puritan impulses were rather muted in the post-1960's culture . . . ."); Starobin, *supra* note 249, at 2007-08 ("By the prosperous and secure 1950s, paternalism had become the unquestioned establishment ethos . . . . It was the Sixties' New Left, with its commitment to radical individualism, that struck the first blow against the paternalistic compact that governed 1950s America."). It was not until the late 1960s that individualism, in the wake of the consumer protection and civil rights movements, became firmly established. *See generally* ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 56-65 (1996); FADEN & BEAUCHAMP, *supra* note 18, at 86-132; ALBERT R. JONSEN, THE BIRTH OF BIOETHICS (1998); DAVID J. ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISIONMAKING (1991); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 24-30 (1990).

Although paternalism was better received before the 1960s, that dark history serves as a better argument against paternalism than "a volume of logic." *Cf.* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). Paternalistic rationales were often (and sometimes still are) employed to justify gender, racial, and other invidious discrimination. *See, e.g.*, KULTGEN, *supra* note 24, at 78, 171; Jack D. Douglas, *Cooperative Paternalism Versus Conflictual Paternalism*, *in* PATERNALISM 171, 197-98 (Rolf Sartorius ed., 1983); Zamir, *supra* note 244, at 281. For gender discrimination, see, for example, Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (striking on 5th Amendment due process grounds a military regulation that presumed only female spouses are dependents for benefits purposes). The *Frontiero* court noted that "[t]raditionally, [discrimination against women] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.* at 684 (citing Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), which upheld a state law refusing to grant women, for their own good, the license to practice law). For racial discrimination, see, for example, KLEINIG, *supra* note 8, at 171; Anita L. Allen & Thaddeus Pope, *Social Contract Theory, Slavery, and the Antebellum Courts*, *in* A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY (Tommy Lott & John Pittman eds., forthcoming 2000). For disability discrimination, see, for example, Harlan Hahn, *Paternalism and Public Policy*, 20 SOC'Y 36 (1983); Mike Jackman, *Enabling the Disabled: Paternalism is Enemy No. 1*, PERSPECTIVES: CIV. RTS. Q., Winter/Spring 1983, at 22.

253. *See supra* notes 39-40 and accompanying text; *see also* BEAUCHAMP & CHILDRESS, *supra* note 9, at 278 ("[S]trong paternalism is rejected by most writers . . . ."); KLEINIG, *supra* note 8, at 9 ("*Ceteris paribus*, the stronger the paternalism, the heavier the burden on the interferer . . . ."); KULTGEN, *supra* note 24, at ix ("Most authors who write about paternalism condemn it in most of its forms."); Robert E. Goodin, *Permissible Paternalism: In Defense of the Nanny State*, 1 RESPONSIVE COMMUNITY 42, 42 (1991) ("Paternalism is desperately out of fashion."); Häyry, *supra* note 27, at 449 ("The paternalistic attitude has been widely discredited . . . ."); *cf.* MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 291 (1992); Bayer, *supra* note 114, at 150-51 ("The argument for [liberty] restrictions must, however, always be that the public's health is in danger, not that the competent individual's well-being, survival, or liberty are in danger."). *But see infra* notes 340-41.

however harmful, tend to be seen as falling within a sphere of individual freedom."[254] In the context of smoking, Joel Feinberg argues that "a demonstrated danger to the user is a *necessary* condition of justified government prohibition of a dangerous substance on self-regarding grounds."[255] However, Feinberg argues, it is not a *sufficient* condition; there must also be "a further showing that the users do not voluntarily choose to run the risks."[256] In the United States there is a strong individual rights attitude which holds that "as long as individuals understand the hazards involved, they should be free to engage in [any] risky activity that provides personal satisfaction."[257]

I argue that in spite of this liberal attitude, hard paternalism is frequently the unrecognized but fundamental ethical justification of much public health law. It is unrecognized because it is usually masked by an appeal to the harm principle or to the soft paternalism principle.[258] One hundred years ago, there was widespread consensus "that the state should extend special protection to those who are incapable of judging their own best interest, or of taking care of themselves . . . and . . . in [public health] matters the public at large are thus incompetent."[259] As Robert Goodin explains, even today "[w]e do not leave it to the discre-

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254. DANIELS, *supra* note 182, at 142; *see also* Wikler & Beauchamp, *supra* note 6, at 1369 ("Much of the bioethics literature on lifestyles indicates that the choices posing the greatest problem for public-health authorities are those which involve personal or intimate behavior, are entirely self-regarding, and represent fully voluntary behavior.").

255. Joel Feinberg, Review Essay, 5 BIOETHICS 150, 151 (1991) (reviewing ROBERT E. GOODIN, NO SMOKING: THE ETHICAL ISSUES (1989)).

256. *Id.*

257. RABIN & SUGARMAN, *supra* note 21, at 7; *see also* Dworkin, *supra* note 251, at 361 ("[T]he state must recognize and acknowledge the autonomy of persons . . . . In order to recognize this ideal of autonomy the state must not justify its actions on the basis that some ways of life are intrinsically better than others."); Rabin, *supra* note 5, at 479 ("Once information about risk has been adequately conveyed, the standard liberal position holds that individual choice should be respected rather than limited."); *id.* at 482 ("[O]ur political culture has resisted telling individuals what is good for them . . . ."); Weale, *supra* note 52, at 169 ("[T]he chief objection to paternalistic intervention is that it interferes with the autonomy of the individual . . . ."). Interestingly, legal moralism is more widely accepted as a liberty limiting principle, at least in the context of constitutional analysis. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (upholding Indiana's ban on nude dancing against a First Amendment challenge because protection of morals is a substantial government interest); *id.* at 574-75 (Scalia, J., concurring) ("[T]here is no basis for thinking that our society has ever shared that Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal—much less for thinking that it was written into the Constitution . . . . Our society prohibits . . . certain activities . . . because they are considered . . . immoral.").

258. *See supra* notes 115-49 and accompanying text; *see also supra* notes 227-37 and accompanying text.

259. John S. Billings, *Introduction*, to TREATISE ON HYGIENE AND PUBLIC HEALTH 38 (Albert H. Buck ed., 1879).

tion of consumers, *however well-informed*, whether or not to drink grossly polluted water, ingest grossly contaminated foods, or inject grossly dangerous drugs."[260] Hard paternalism may be appropriate in some contexts but not others. Goodin continues: "*Ordinarily* it is not the business of public policy to prevent people from relying on false inferences from full information that would harm only themselves. *Sometimes, however, it is.*"[261]

1. Overt Hard Paternalism: Laetrile and Outdoor Smoking Bans

The controversy in the 1970's surrounding the drug laetrile is a classic example of hard paternalism in public health regulation.[262] Laetrile was introduced as a cancer-fighting drug, though, in fact, no study proved that the drug offered any clinical benefit.[263] Nevertheless, terminally ill patients fought desperately for the right to use laetrile; the drug gave them hope, even if it did not necessarily provide any medical benefit.[264]

The FDA denied these cancer patients the opportunity to try laetrile *even though* the patients were fully aware of its shortcomings and potential side effects.[265] Because the FDA could not adequately justify its denial by invoking the harm principle,[266] or soft paternalism,[267] a federal

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260. GOODIN, *supra* note 5, at 30-31 (emphasis added).

261. *Id.* at 21 (emphasis added).

262. *See, e.g.*, VANDEVEER, *supra* note 6, at 323 ("So long as competent persons are aware of the results of scientific studies—so that their choices do not reflect ignorance of relevant data—a paternalistic prohibition of laetrile seems unjustified."); Beauchamp, *supra* note 33, at 1918; Caplan, *supra* note 14, at 145 ("[T]here is little justification for asking mature adults to subscribe to a system in which laetrile is restricted for sale and use."); Lisa H. Newton, *Liberty and Laetrile: Implications of Right of Access*, 15 J. VALUE INQUIRY 55, 66 (1981); Thompson, *supra* note 124, at 267 (arguing that "paternalistic prohibition of its use would be justifiable" only if FDA can show that "the decision to use [Laetrile] is substantially impaired"). Another popular example of FDA hard paternalism concerns breast implants. *See, e.g.*, MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICINE AND THE LAW IN THE BREAST IMPLANT CASE (1996); Marcia Angell, *Breast Implants: Protection or Paternalism*, 326 NEW ENG. J. MED. 1695 (1992); Beauchamp, *supra* note 33, at 1918-19 (arguing that the issue of "breast implants exemplifies paternalistic controversies that have beset the FDA"); Lisa S. Parker, *Social Justice, Federal Paternalism, and Feminism: Breast Implants in the Cultural Context of Female Beauty*, 3 KENNEDY INST. ETHICS J. 57 (1993).

263. *See* Arnold S. Relman, *Closing the Books on Laetrile*, 306 NEW ENG. J. MED. 236 (1982) (reviewing the major studies).

264. *See, e.g.*, Richard M. Cooper, *Laetrile—Of Choice and Effectiveness*, 38 FOOD DRUG COSM. L.J. 417, 420 (1983); J.C. Holland, *Why Patients Seek Unproven Cancer Remedies: A Psychological Perspective*, CANCER J. FOR CLINICIANS, Jan.-Feb. 1982, at 10; Newton, *supra* note 262, at 65.

265. *See* Laetrile, 42 Fed. Reg. 39,768, 39,803 (1977). *But see* HUSAK, *supra* note 6, at 137 (arguing that patients were misinformed).

266. Patients' use of laetrile does slow research of other drugs. *See* Caplan, *supra* note 14, at

district court and the United States Court of Appeals for the Tenth Circuit held that patients had a right to laetrile.[268] The Supreme Court unanimously reversed the decision of the lower courts in *Rutherford v. United States*,[269] accepting the FDA's argument that because the drug had not been proven clinically effective, there were no benefits to outweigh the risks inherent in taking the drug.[270] Because there were only risks and no benefits, the net benefit of taking laetrile was negative. Thus, the FDA and the Supreme Court denied terminally ill patients the right to take laetrile because according to the economic model of choice, their desire to take it was irrational and did not deserve to be honored.

The same hard paternalism used to justify the FDA's denial of laetrile can—and in fact, already does—justify tobacco regulation. Some people smoke despite the costs. They are fully rational, knowledgeable, and are able to accurately assess the consequences of smoking, including potential addiction. To them, the pleasures of smoking simply outweigh the costs. Because such people constitute a large proportion of smokers and because these people often smoke in circumstances in which there is no significant harm to others, much tobacco regulation is plausibly justifiable only as hard paternalism.[271]

Take, for example, the recent bans on smoking in outdoor areas like beaches and parks.[272] In these places the low concentration of ETS can hardly cause irritation, much less disease.[273] Therefore, these regulations cannot seriously be justified on the basis of the harm principle. As applied to adults who make the decision to smoke with substantial auton-

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140. Still, this unquantifiable and indirect harm is not of the type identified in section one sufficient to invoke the harm principle.

267. There may have been some soft paternalistic basis for the denial, though it was not a major factor in the ethical and constitutional debate that surrounded this case. *See supra* notes 136-48 and accompanying text. The Commissioner pointed out that laetrile, unlike traditional cancer treatments, did not have painful side effects. Thus, when cancer patients took laetrile, they sometimes *falsely* believed that their condition was ameliorated. *See* Rutherford v. United States, 442 U.S. 544, 557 n.15 (1979) (citing 42 Fed. Reg. at 39,777, 39799-800).

268. *See* Rutherford v. United States, 399 F. Supp. 1208, 1215 (W.D. Okla. 1975), *aff'd*, 542 F.2d 1137 (10th Cir. 1976).

269. 442 U.S. 544 (1979).

270. *See id.* at 559.

271. *Cf.* KULTGEN, *supra* note 24, at 167.

272. *See supra* note 101.

273. *See supra* note 146. Even more extreme hard paternalism underlies the proposed Universal Tobacco Settlement, which anticipated the complete ban of cigarettes after 2009. *See* S. 1415, 105th Cong. §§ 907(e)(1) & 3(6) (1997) (allowing FDA to "completely eliminate the nicotine yields in a tobacco product"). *But see id.* at § 903 (forbidding FDA from prohibiting "the sale and distribution of a tobacco product solely on the basis of the fact that tobacco causes disease.").

omy, such regulations can neither be justified on the basis of soft paternalism.[274] Outdoor smoking bans can thus only be justified on hard paternalistic grounds.

One such ban was passed expressly and admittedly on the basis of hard paternalism. In 1996, the city council of the Maryland village of Friendship Heights, just outside Washington, D.C., passed an ordinance that prohibited smoking outdoors everywhere in the village except the two main commercial streets.[275] The ordinance was the most restrictive of its kind in the United States.[276] Surprisingly, the city council admitted that the ordinance was the result of a governmental "judgment call."[277] Rather than attempting to justify the regulation on the basis of harm to others or lack of autonomy, the law's drafter explained, "Just as we regulate what's in the best interest of the community with seat-belt laws, alcohol restrictions, and motorcycle helmets, in this case we're trying to *persuade people to stop smoking* with a little gentle pressure."[278] The Friendship Heights ordinance, had it been enforced, would have restricted smokers' liberty *for their own good.*[279]

2. *Masked Hard Paternalism: Feinberg and His Soft Paternalistic Strategy*

Joel Feinberg argues that hard paternalism is never justified.[280] At the same time he admits that many quite reasonable laws *seem* to have hard paternalistic rationales.[281] In order to reconcile these two positions,

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274. *See supra* notes 159-77.

275. *See* Karl Vick, *Maryland Village Votes to Ban Nearly All Outdoor Smoking*, WASH. POST, Oct. 16, 1996, at D4.

276. The ordinance, as written, was one of the more restrictive anti-smoking laws ever drafted and proposed. However, it was never approved or enforced. Friendship Heights is an unincorporated municipality and its ordinances must be approved by Montgomery County in which it is situated. The village discarded the ordinance because county approval was unlikely. *See* Manuel Perez-Rivas, *Montgomery Snuffs Another Smoking Curb*, WASH. POST, Nov. 20, 1996, at B1.

277. *See* Janet Firschein, *Physician-Mayor Fights for Nation's Toughest Smoking Ban*, AM. MED. NEWS, Nov. 4, 1996, at 6.

278. Michael Janofsky, *No Smoking Section: Entire Village?*, N.Y. TIMES, Oct. 5, 1996, at 8 (emphasis added).

279. This assumes, of course, that what the Council says genuinely expresses its reasons. *Cf.* KLEINIG, *supra* note 8, at 17 n.10, 178.

280. *See* HARM TO OTHERS, *supra* note 9, at 15; HARM TO SELF, *supra* note 8, at 26, 54-55, 59-61. *But see* HARMLESS WRONGDOING, *supra* note 20, at 319-23 (making the "trivial" concession that paternalism puts *some* weight, though not *decisive* weight, on the decisional scales).

281. *See* HARM TO SELF, *supra* note 8, at 25, 98; *see also* Feinberg, *supra* note 173, at 391 ("[I]f we reject paternalism altogether, we seem to fly in the face both of common sense and of long-established customs and laws.").

Feinberg argues that what seems like hard paternalism can often be adequately explained as soft paternalism.[282] He calls his "strategy for dealing with apparently reasonable paternalistic regulations from a liberal (anti-paternalistic) point of view"[283] the "soft paternalistic strategy."[284]

Feinberg's soft paternalistic strategy justifies restrictions of liberty on the grounds that individual behavior is not substantially autonomous, or in his own words, "voluntary enough."[285] He is careful to emphasize that "eccentric, even 'unreasonable' judgments of the relative worthwhileness of that which is risked and that which is gained do not count against voluntariness at all."[286] Feinberg makes the point "over and over again: one can quite voluntarily be unreasonable."[287] For Feinberg, intervention is never justified simply because an action is risky or even extremely risky. He argues, "[T]here must be a right to err, to be mistaken,

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282. *See* HARM TO SELF, *supra* note 8, at 19, 25 ("Often legitimate government intervention in dangerous situations is not intended to prevent harm so much as to guarantee voluntariness."); *id.* 141-42; *see also* Bayles, *supra* note 141, at 109 ("The soft paternalist strategy against hard paternalism is to show that hard paternalism is implausible and not needed to handle any plausible legislation."); Kennedy, *supra* note 40, at 643 ("The plausibility of principled anti-paternalism is therefore linked to the ability to dismiss or to explain away cases in which one wants to act paternalistically but can't rationalize the action in terms of incapacity.").

283. HARM TO SELF, *supra* note 8, at 141-42.

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

285. *Id.* at 118, 154, 158-60.

286. *Id.* at 159; *see also id.* at 12, 112, 119, 159, 360-61.

> One cannot argue a priori that persons who do such things are acting nonvoluntarily . . . . Although there might be empirical evidence for the nonvoluntary character of many such actions, it is unlikely that all such acts will be nonvoluntary. I do not see how one can rule out the possibility that hard paternalism may be the only position that can justify restrictions on such actions.

DWORKIN, *supra* note 5, at 126; *see also* GERT ET AL., *supra* note 175, at 208 ("It is crucial not to confuse irrational decisions with unusual or unpopular ones . . . ."); VANDEVEER, *supra* note 6, at 133, 245 ("It is clear that autonomous choices are not necessarily prudent choices."). Feinberg distinguishes "irrational" choices from ones that are merely unreasonable. Intervention with the former are justified. However, it will be rare that the decision to smoke can be fairly characterized as irrational. *See* Joni Hersch & W. Kip Viscusi, *Smoking and Other Risky Behaviors*, 28 J. DRUG ISSUES 645, 659 (1998) ("Smokers, through their greater proclivity to bear risks of all kinds, clearly meet [one] aspect of a rationality test.").

287. HARM TO SELF, *supra* note 8, at 137; *see also id.* at 184, 321; *cf.* Application of President & Dir. of Georgetown College, Inc., 331 F.2d 1000, 1016 (D.C. Cir. 1964) (Burger, J., dissenting) (denying rehearing en banc of an order issued by a single appellate judge authorizing a blood transfusion against a patient's wishes) ("Nothing in this utterance suggests that Justice Brandeis thought that an individual possessed these rights [to privacy] only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable, and even absurd ideas . . . ."); KLEINIG, *supra* note 8, at 150 ("If reasonableness is not distinct from voluntariness, then the criteria are subject to a type of 'Catch-22' application whereby the subject will be determined to lack voluntariness in just those instances in which she rejects the values of the paternalistic agent."); VANDEVEER, *supra* note 6, at 418.

to decide falsely, to take big risks, if there is to be any meaningful self-rule."[288]

Feinberg maintains that intervention is justified only when behavior is not voluntary or autonomous enough. Explaining that "the state has the right to prevent self-regarding harmful conduct when but *only when* it is substantially non-voluntary,"[289] he argues that "legitimate government intervention in dangerous situations is not intended to prevent harms so much as to guarantee voluntariness."[290] The central question, and the one to which Feinberg devotes the bulk of *Harm to Self*, asks what conditions make an action substantially voluntary.

In defining what is "voluntary enough," Feinberg argues that the greater the risk or the gravity of the harm, the higher the level of voluntariness that should be required.[291] This is not an unfamiliar principle.[292]

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288. HARM TO SELF, *supra* note 8, at 62; *see also id.* at 109.

289. *Id.* at 126 (emphasis added); *see also id.* at 110 ("[I]t is a lack of voluntariness that justifies interference with a person's liberty for his own good, not lack of 'rationality.' "); *id.* at 119 ("The defining purpose of soft paternalism is to prevent people from suffering harm that they have not truly chosen to suffer . . . ."); *id.* at 261, 351.

290. *Id.* at 142; *see also* BEAUCHAMP & MCCULLOUGH, *supra* note 173, at 92 ("[I]ntervention in the lives of such individuals is justified by the weak paternalist's standard *only if there is questionable autonomy*, and not alone because their actions are dangerous or unreasonable."); HÄYRY, *supra* note 173, at 9 ("[T]he justification for the use of force is the agent's mental state, not the potential harm.").

> [T]he concern in cases of so-called weak paternalism is not with the wisdom of whatever it is that has elicited the imposition, but with whether whatever that is genuinely represents the person's will. So, the focus of attention and ground for interference . . . is not the danger involved, but the fact that it [was not voluntary].

KLEINIG, *supra* note 8, at 9; *see also id.* at 101-02 ("Whether it is bizarre depends on the reasons for it, and not simply on its content."); Beauchamp, *The Regulation of Hazards*, *supra* note 27, at 246 ("[I]t is only because there is questionable voluntariness or definite nonvoluntariness that intervention in their lives is justified, not because of the dangerous or unreasonable character of their action."); *Medical Paternalism*, *supra* note 173, at 135; C.L. TEN, MILL ON LIBERTY 112 (1980) ("Weak paternalism . . . is not a cloak for enforcing the values and preferences of the person interfering on society at large."); *id.* at 109 (distinguishing the "decision-aspect" and the "consequence-aspect" of a subject's conduct and arguing that soft paternalists must focus only on the former).

291. *See* HARM TO SELF, *supra* note 8, at 117, 118-24, 127. Richard Arneson describes this as a "sliding scale" of autonomy rights because if the presumption varies with voluntariness and voluntariness varies with the risk, then transitively the presumption varies with the risk. *See* Arneson, *supra* note 251, at 252.

292. *See, e.g.*, CALLAHAN, *supra* note 7, at 194-95 (requiring serious and demonstrable harm and only slight and transitory interventions); DWORKIN, *supra* note 5, at 127 (supporting intervention when it poses only a "minimal risk of harm to them at the cost of a trivial interference with their freedom"); KULTGEN, *supra* note 24, at 182 ("In a significant concession to common sense, Feinberg asserts that the line will differ according to the kind of intervention."); JOHN RAWLS, A THEORY OF JUSTICE 249 (1971) ("It is also rational for [smokers] 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 conse-

Feinberg appeals to this intuitive approach and argues for a context-relative means of determining the level of "voluntariness" required to immunize a choice from paternalistic interference.[293] Thus, the line between soft and hard paternalism varies with the behavior at issue and the risks it imposes.

Feinberg takes this approach one step further, arguing that sometimes when the risk and harm is very substantial, the state can safely presume that the act is not voluntary.[294] He writes, "a choice may be so extremely and unusually unreasonable that we might reasonably suspect that it stems at least in part as the product of impairment."[295] For example, if we saw someone about to chop off her hand, Feinberg believes we would be justified in intervening *not* because chopping off one's hand is a very bad idea but because it is so outrageous and uncommon that we can presume with near certainty that the individual is not acting autonomously; she probably does not really want to chop off her hand.[296] Simi-

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quences of their imprudent behavior."); Unwin, *supra* note 21, at 43 (arguing that there should be "balance between the degree of infringement of personal liberty and the amount of benefit to be gained.").

293. *See* HARM TO SELF, *supra* note 8, at 117, 146, 261, 309, 335, 338; HARMLESS WRONGDOING, *supra* note 20, at xviii ("I treat voluntariness as a 'variable concept,' determined by varying standards depending on the nature of the circumstances . . . .").

294. *See* HARM TO SELF, *supra* note 8, at 103. This presumption is in principle rebuttable. But practical difficulties make this unlikely. *See id.* at 125, 127 n.23, 174-75; *see also* HARMLESS WRONGDOING, *supra* note 20, at xviii, 331 ("Unreasonableness is not the same thing as involuntariness, of course, but extreme unreasonableness creates a strong presumption of nonvoluntariness that would be difficult to rebut, and the state might even be justified in making the presumption conclusive for practical reasons."). Feinberg does not think smoking is so unreasonable as to raise the presumption of nonvoluntariness. *See* HARM TO SELF, *supra* note 8, at 134 (arguing it is sufficient to "confront smokers with the ugly medical facts").

295. HARM TO SELF, *supra* note 8, at 132-33; *see also id.* at 62, 79, 101-02, 120 (arguing that some actions are "so bizarre that they raise the suspicion of general irrationality or insanity, which of course annuls voluntariness"); *id.* at 124 ("[W]hen the act in question is of a type that is rarely chosen voluntarily . . . [t]his statistical information may rightly make us suspicious of the voluntariness . . . ."); *id.* at 125-27, 160-62 (arguing that some conduct is "so unreasonable as to raise the suspicion of impaired capacity"); *id.* at 266-67, 308; HARM TO OTHERS, *supra* note 9, at 116 ("[W]hen the consented-to-behavior seems so patently harmful that no sane person could ever consent to it, we may properly assume that the consenter is *not* sane . . . ."); HARMLESS WRONGDOING, *supra* note 20, at 215 (explaining that intervention is not paternalistic when the conduct is "flagrantly irrational"); *cf.* KLEINIG, *supra* note 8, at 188-89 (advocating a ban of those consumer goods that almost nobody would voluntarily purchase but noting the costs involved in such an approach); NIKKU, *supra* note 6, at 86-87, 145; VANDEVEER, *supra* note 6, at 268 (arguing that bizarre conduct "may be *evidence* that the intender is incompetent"); *id.* at 270 ("[W]e may be justified in intervening to *find out* whether the person is competent.").

296. *See* HARM TO SELF, *supra* note 8, at 124-27. Intervention in such circumstances is thought to be justified only as a temporary measure—*i.e.* just long enough to determine whether or not the individual engaging in bizarre conduct is, in fact, doing so substantially voluntarily. This

larly, the state, faced with an outrageous public health problem, might presume that smokers do not autonomously decide to smoke.[297]

Of course, some and perhaps many smokers do smoke autonomously; regulations based on the presumption that all smokers act without substantial voluntariness are therefore necessarily overinclusive. Feinberg is probably right to accept the overinclusive nature of these presumptions as an unfortunate but practically unavoidable part of legislation,[298] for laws are necessarily general and their blanket application will prohibit even autonomous behavior.[299] "[G]iven the costs and other practical difficulties . . . the state often will simply ban the . . . activity in question, presuming non-voluntariness conclusively."[300] It would not be feasible to make *ad hoc* determinations of autonomy.[301] But can Fein-

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principle seems to underlie the waiting period requirement for very serious and controversial conduct such as abortion or sterilization. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 883, 885 (1991); 42 C.F.R. § 50.201 (1999).

297. Feinberg provides only very extreme examples of when the presumption of nonvoluntariness is most plausible. *See, e.g.*, HARM TO SELF, *supra* note 8, at 126. He admits, however, that these "hardly fit the more usual examples of risky choice making." Feinberg, *supra* note 173, at 392. If the soft paternalistic strategy is limited to a few outrageous examples, then it is not useful for the very purposes for which Feinberg devised it. Of course, as the social meaning of smoking changes, it may someday automatically raise suspicion of lack of voluntariness. *Cf.* Garrison Keillor, *Where There's Smoke, There's Ire*, AM. HEALTH, Dec. 1989, at 50 (comparing smoking to taking out a dead rat and chewing on it).

298. *But see* VANDEVEER, *supra* note 6, at 93 (criticizing Feinberg's approach as "overly permissive with regard to state intervention.").

299. *See* HARM TO SELF, *supra* note 8, at 128; *cf.* NIKKU, *supra* note 6, at 64-65; Hunt, *supra* note 141, at 317 ("Clearly, however, prohibitions against self-inflicted harm in general will apply on the *presumption* that the actions prohibited are substantially non-voluntary and thus may well apply to actions which in fact are voluntary . . . .") (emphasis added); *id.* at 318 ("[Soft paternalism] must in practice impose constraints even on voluntary self-inflicted harms.").

300. HARM TO SELF, *supra* note 8, at 174-75; *see also* HARM TO OTHERS, *supra* note 9, at 116 ("[I]f our *sole* evidence of insanity or other invalidating nonresponsibility is the patently harmful character of the agreed-to conduct itself . . . then we cannot invalidate the consent without reasoning in a circle."); *id.* at 79, 125 ("The presumption, however, should always be taken as rebuttable in principle."); *id.* at 133 (requiring other evidence of nonvoluntariness to avoid circularity); *id.* at 188, 258, 326, 351, 354, 374, 391 n.23 (rebuttable in principle but not in reality); HUSAK, *supra* note 6, at 135. Some smokers might meet the higher threshold of voluntariness but the "law, necessarily expressed in general terms, should be responsive to the most common, typical reason why persons assume risks." HUSAK, *supra* note 6, at 132; *see also* Caplan, *supra* note 14, at 145; Häyry, *supra* note 27, at 296.

301. Although this limitation has much intuitive appeal, Feinberg has been rightly criticized for espousing it. If, as Feinberg argues, autonomy is an un-trumpable principle, it should not be overridden in the face of administrative costs. *See, e.g.*, KULTGEN, *supra* note 24, at 183 ("Feinberg's position is in danger of collapsing into [paternalism] where the sliding marker stops in determining questions of utility for the beneficiary, not by his autonomy as a moral trump card."); VANDEVEER, *supra* note 6, at 92-94 (arguing that "there is a moral presumption against the legitimacy of invasive interference and no compelling reason why adult persons themselves should have to establish their

berg presume a lack of substantial autonomy from the very nature of the act itself?[302] It seems he is smuggling in the very same evaluative judgments he expressly disavows.

What Feinberg overlooks is that the assessment of a risk as extreme or unusual is not a wholly objective enterprise.[303] He does recognize that assessments of *unreasonableness* necessarily involve imposing our own value judgments of what is worthwhile and rational.[304] However, Feinberg ignores the fact that a presumption of *non-voluntariness* involves the same evaluative elements.[305]

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competence . . . . [T]he epistemological burden [should] not be placed on the shoulders of restricted competent subjects . . . ."); YOUNG, *supra* note 231, at 75 (arguing that "we already find it needful and possible to test voluntariness in other important legal matters"); Richard J. Arneson, *Paternalism, Utility, and Fairness*, 43 REV. INT'L PHIL. 409, 426-27 (1989); Norman O. Dahl, *Against Legal Paternalism*, 7 CRIM. JUST. ETHICS 67, 75 (1988) (reviewing Joel Feinberg's HARM TO SELF (1984)) ("[I]f the right to autonomy is as strong as Feinberg says that it is, then why shouldn't it be protected in spite of these additional costs? If such laws really are justified, then the right to autonomy doesn't seem to be as strong as Feinberg says it is; and the door to legal paternalism is left open."); Hunt, *supra* note 141, at 322; SCHONSHECK, *supra* note 25, at 160-74 (arguing against the feasibility of a "voluntariness tribunal"). *But cf.* VANDEVEER, *supra* note 6, at 327 & n.28 (allowing the costs of protecting autonomy to justify restriction). There is one instance for which Feinberg seems to allow for *ad hoc* determinations. Feinberg suggests that requests for euthanasia can be honored with adequate evidence. *See* HARM TO SELF, *supra* note 8, at 349; *cf.* Dworkin, *supra* note 20, at 124; KLEINIG, *supra* note 8, at 131. Such an evidentiary standard has been implemented in Oregon for physician-assisted suicide. *See* OR. REV. STAT. §§ 127.800-.897 (Supp. II 1998); *see also* Arthur E. Chin et al., *Legalized Physician Assisted Suicide in Oregon—The First Year's Experience*, 340 NEW ENG. J. MED. 577 (1999).

302. It is a central tenet of soft paternalism that temporary restrictions are justifiable in order to determine voluntariness. However, Feinberg's version of soft paternalism makes the restriction presumptively and conclusively. This seems to underscore the importance of ensuring that the presumption is sound.

303. *See generally* MacLean, *supra* note 236; KRISTIN SHRADER-FRECHETTE, RISK AND RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS (1991); KRISTIN SHRADER-FRECHETTE, SCIENCE, POLICY, ETHICS AND ECONOMIC METHODOLOGY (1985); Kristin Shrader-Frechette, *Values, Scientific Objectivity and Risk Analysis: Five Dilemmas*, *in* QUANTITATIVE RISK ASSESSMENT: BIOMEDICAL ETHICS REVIEWS 159 (James M. Humber & Robert F. Almeder eds., 1987); *cf.* Bernard Gert & Charles M. Culver, *The Justification of Paternalism*, 89 ETHICS 199, 207 n.11 (1979). Feinberg recognized with respect to the harm principle that after more precisely defining it with mediating maxims, it lost its "normative neutrality." HARM TO SELF, *supra* note 8, at xii, 3; *see also* HARM TO OTHERS, *supra* note 9, at 25. He also recognizes that in determining risk, a legislature must consider not only a conduct's magnitude and probability of harm but also the "independent value of the risk-creating conduct." HARM TO OTHERS, *supra* note 9, at 191; *see also* HARM TO SELF, *supra* note 8, at 101-02. Feinberg apparently fails to see that voluntariness, which is similarly malleable, cannot be normatively neutral.

304. *See* HARM TO SELF, *supra* note 8, at 103 ("[T]he risk decision may defy objective assessment because of its component value judgments."); *id.* at 110-11, 119.

305. Admittedly, Feinberg does note that voluntariness will vary depending on what is taken as the relevant background or perspective, the "norms of expectability," the "benchmark," the "baseline." HARM TO SELF, *supra* note 8, at 128 (noting that "the term 'norm' can always mask an

One cannot determine the voluntariness of a decision without considering the content of the decision itself. The enterprise of identifying activities for which higher levels of voluntariness ought to be required is implicitly based on judgments regarding the value or importance of those activities.[306] Decision scientist and risk expert Paul Slovik explains:

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

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evaluative element").

306. *See, e.g.*, GLOVER, *supra* note 233, at 180 (arguing that our intuitions regarding the boundaries of paternalistic legislation are shaped by "social traditions"); KLEINIG, *supra* note 8, at 52 ("Judgments of competence cannot be detached completely from cultural expectations, and there is a tendency to read any marked deviation from convention as evidence of incompetence."); *id.* at 101 ("[T]o call [conduct] bizarre [so to create a presumption of nonvoluntariness] is to go a long way toward begging the question at issue."); KULTGEN, *supra* note 24, at 236, 241 (discussing Smiley); NIKKU *supra* note 6, at 163; TEN, *supra* note 290, at 116-17; VANDEVEER, *supra* note 6, at 317, 358-61 & n.11 (observing that the threshold of voluntary enough is a line set by changing social standards); YOUNG, *supra* note 231, at 67; Angell, *supra* note 262, at 1695 (explaining that risks in the case of breast implants are not objective but have to do with "personal judgments about the quality of life, which are subjective and unique to each woman."); Robert H. Bork, *Government Efforts to Deal With Tobacco Betrays an Ultimate Ambition to Control Americans' Lives*, NAT. REV., July 25, 1997, at 28 (noting that "[a]utomobiles kill tens of thousands of people every year and disable perhaps that many again. We could easily stop the slaughter. Cars could be made with a top speed of ten miles an hour and with exteriors the consistency of marshmallows. Nobody would die, nobody would be disabled, and nobody would bother with cars very much."); Dan W. Brock, *A Case for Limited Paternalism*, 4 CRIM. JUST. ETHICS 79, 87 (1985) (reviewing JOHN KLEINIG, PATERNALISM (1984)) ("[P]aternalistic balancing takes place as part of the determination of competence. . . ."); Dershowitz, *supra* note 18, at 151-53 (comparing how the self-imposed risk of an elderly widow was judged to be unacceptable but similar conduct by an elderly male Supreme Court Justice was permitted); Dripps, *supra* note 117, at 10 (explaining that the line between those activities permitted and those not permitted is not drawn on the basis of harmfulness alone but also on the basis of social value ascribed to activities); Kasachkoff, *supra* note 24, at 414-15 (arguing, at least with respect to drugs, that "benevolence alone does not explain our willingness to legally restrict our fellow citizens' behavior" and that morals and ideals also underlie the restriction); *Paternalism and Bio-Behavioral Control*, *supra* note 173, at 72 ("The difficulty of disentangling judgments of unreasonableness and abnormality from judgments of moral attitude and evaluative outlook is notoriously difficult."); Robert L. Schwartz, *Lifestyle Health Status, and Distributive Justice*, 3 HEALTH MATRIX 195, 211 (1993) ("High risk activities of the rich and famous—skiing, high stress life styles (sic), flying private planes, scuba diving—seem acceptable. High risk activities of the poor—smoking, overeating, drinking—seem to be morally unacceptable."); Smiley, *supra* note 162, at 303 ("Feinberg appears able to avoid a *direct* reference to assessment of an individual's ends only by assuming . . . standards or normalcy."); *id.* at 307 ("He ends up smuggling the seriousness of harm into his criteria for deciding whether or not an individual has chosen freely."); Robert D. Tollison & Richard E. Wagner, *Tobacco and Public Policy: A Constitutional Perspective*, *in* SMOKING: WHO HAS THE RIGHT? 292, 301 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998) ("What about skiing, mountain climbing, hang gliding, drinking alcohol, and working long hours? Are the risks 'too high'? By whose standard?").

ing . . . . Defining risk is thus an exercise in power.[307]

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

The subjective nature of risk assessment does not necessarily mean that we cannot justify the classification of some activities as more risky (and thus requiring a higher level of autonomy). However, it *does* preclude such classification from being properly characterized as part of a "*soft* paternalistic strategy."[308] Such identification involves the surreptitious substitution of values and is therefore more appropriately characterized as hard paternalism.[309]

Feinberg's explanation of hard paternalism as soft paternalism can best be exposed as an *ad hoc* move by looking at a diagram[310] he uses to explain his strategy:

	More or Less Voluntary Assumption of Risk to Oneself	Less Than Voluntary Assumption of Risk to Oneself
Reasonable risk of harm	(1) E.g. most of daily activities of life.	(2) E.g. drunk sandwich ordering
Unreasonable risk of harm	(3) E.g. cigarette smoking	(4) E.g. drunk driving on a private road

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

308. *Cf.* Shapiro, *supra* note 24, at 529 ("Surely the case for a claim of weak paternalism is itself weakened, for instance, when the asserted incapacity exists on a question of basic values or assumptions . . . .").

309. Commentators have observed that what is perceived as too risky (and thus for Feinberg sufficient for raising requisite voluntariness) is based on social values. *See, e.g.*, Doppelt, *supra* note 9, at 260 (arguing that what is considered to be harmful "is culture dependent and changes over time"); Fitzgerald, *supra* note 124, at 197 ("[O]ur understanding of self abuse is subject to uncertainty and to arbitrary social fashion."); Schwartz, *supra* note 102, at 394-95; Wikler, *supra* note 64, at 229 (arguing that the health educator must "transcend cultural biases and distinguish the foreign and idiosyncratic from the involuntary"); *id.* at 230 ("[P]ractices typically singled out for condemnation . . . are being penalized merely for having values different from those of persons in power."); Yoder, *supra* note 6, at 5 ("Which lifestyle interventions represent justified infringements on individual autonomy? . . . Any answer will be pragmatic relative to our values, goals, and interests."). The law of battery incorporates this limit, requiring not only that there be an application of force to another but also that it be offensive. *See* RESTATEMENT (SECOND) OF TORTS §§ 13, 18, 19 (1965). On the other hand, there is, as John Kleinig observes, at bottom "a distinction to be drawn" between conduct that is and is not substantially voluntary. KLEINIG, *supra* note 8, at 63. "The difficulty is to know how to draw it without importing distorting factors." *Id.*

310. HARM TO SELF, *supra* note 8, at 105 (Diagram 20-3). This is not an exact reproduction of Feinberg's diagram: I simplified the examples inside the grid.

Categories (one) and (four) are uncontroversial. Liberals and nonliberals alike will generally refrain from interfering with the substantially voluntary assumption of reasonable risks, such as the conduct in Category One. Similarly, both liberals and nonliberals will almost always interfere with the non-substantially voluntary assumption of unreasonable risks, such as the conduct in Category Four. Category Two is also uncontroversial. Although not substantially voluntary, the conduct represented by this category concerns activities and harms too trivial with which to be concerned.[311]

The controversial category is the third. Of those risks worth regulating, the soft paternalism principle typically justifies only the regulation of the behavior in Category Four. The hard paternalism principle, on the other hand, typically justifies regulation of the conduct in both Categories Three and Four. Feinberg's argument is that some of the behavior in Category Three is so unreasonable that it more properly belongs in Category Four. He thereby avoids defending the regulation of conduct in Category Four by re-describing it as Category Three conduct.

The behaviors represented in Categories Three and Four are both harmful. What makes one so outrageous that it is presumptively nonautonomous is not, as Feinberg assumes, merely its objective aspects such as the magnitude and the severity of the risks at stake.[312] The presumption of nonautonomy also involves a judgment as to the social worth of the activities at stake.[313] Feinberg admits that to override behavior in Category Three on the ground that it is unreasonable would be hard paternalism. Yet he implicitly appeals to a subjective notion of reasonableness when he characterizes behavior in Category Three as "outrageous" and

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311. *See, e.g.*, FLETCHER, *supra* note 123, at 450 ("[M]any routine acts of daily life are not aptly described either as voluntary or as involuntary."); HARM TO SELF, *supra* note 8, at 118 ("Persons may act nonvoluntarily . . . provided no harm is caused thereby."); VANDEVEER, *supra* note 6, at 11, 123-24, 353, 407. Therefore, the lack of substantial voluntariness is a necessary but not a sufficient condition for intervention. *See id.* at 125 ("Even substantially nonvoluntary choices deserve protection unless there is good reason to judge them as dangerous."). Notwithstanding the intuitive appeal of this point, it is an important area of research to discern which of aspects of daily life for which voluntariness is more important and should be better assured. *Cf.* Robert L. Arrington, *Advertising*, *in* 1 ENCYCLOPEDIA OF APPLIED ETHICS 51 (Ruth Chadwick ed., 1998); James M. Ebejer & Michael J. Morden, *Paternalism in the Marketplace: Should a Salesman Be His Buyer's Keeper?*, 7 J. BUS. ETHICS 337 (1988); Bailey F. Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893 (1990).

312. *See* HARM TO SELF, *supra* note 8, at 103 (explaining that conduct may be prohibited as "manifestly unreasonable to the point of suggesting impaired rationality" only "in respect to its objectively assessable components"); *cf. id.* at 119, 127, 158, 364.

313. *See supra* notes 303-12.

thus defines it as Category Four behavior.[314] Feinberg's argument for intervention may be sound.[315] Feinberg errs, however, in failing to characterize this argument as hard paternalism.[316] He "smuggles" into his account of voluntariness the very evaluative judgments of reasonableness that he denies are relevant when determining voluntariness.[317]

As some commentators have described it, Feinberg's soft paternalistic strategy represents "ad hoc tinkering . . . to ensure that all justified paternalism can be seen as restraining only involuntary actions."[318] In order to justify what he admits to be reasonable laws, he "masks" what is clearly hard paternalism as a sort of soft paternalism. Feinberg is not alone.[319] The manipulation or "masking" of the soft paternalism princi-

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314. *Cf.* KLEINIG, *supra* note 8, at 187 ("The Argument from Weak Paternalism is in principle unobjectionable. The difficulty is in applying it fairly and economically."); KULTGEN, *supra* note 24, at 90 (arguing that an approach like Feinberg's "puts phenomena into neat bins for analysis, but distorts them and confounds our intuitions"); Richard A. Wasserstrom, *Introduction* to MORALITY AND THE LAW 9 (Richard A. Wasserstrom ed., 1971) ("[T]he characterization of laws (e.g. as cases of [one liberty limiting principle or another]) is a more complicated and ambiguous undertaking than has so far been supposed."); Weale, *supra* note 52, at 172 ("[T]he difficulty comes not so much with stipulating what conditions paternalism has to satisfy before it is legitimate, but in knowing *when* cases fall under the appropriate heading.") (emphasis added).

315. Such intervention might also be justified on the ground that smoking imposes "significant, preventable harm" which could be easily prevented by minimally intrusive intervention. *See* BEAUCHAMP & CHILDRESS, *supra* note 9, at 283 (listing the conditions that justify hard paternalism); *see also* Beauchamp, *supra* note 33, at 1917.

316. Indeed, Feinberg recognizes that his strategy may make out a "compromise with hard paternalism." HARM TO SELF, *supra* note 8, at 119; *see also id.* at 126 ("We are thus led to a liberal doctrine which in its immediate effects can be confused with paternalism . . . ."); Gray, *supra* note 141, at 31, 32 (observing that "Feinberg's intellectual virtues of rigor and honesty compelled him to abandon the Liberal Position with which he began . . . and 'allow[] that . . . legal paternalism states reasons that are always relevant.' "); *cf.* Brock, *supra* note 22, at 565 (arguing that Feinberg's theory "in fact require[s] a balancing of respecting an individual's autonomy against protecting his good.").

317. *See* Smiley, *supra* note 162, at 299 (arguing that Feinberg's soft paternalism principle "ultimately embodies the same kind of communal standards that are, according to [his] own principles, illegitimate justifications for interference with individual liberty"); *see also* Stanley S. Kleinberg, *Review of* HARM TO SELF, 11 PHIL. INVESTIGATION 177, 178 (1988) ("His object is to show how there can be good non-paternalistic reasons for some laws which are often advocated on paternalistic grounds . . . [but i]n practice Feinberg does not carry off the trick with complete success."); Edward Sankowski, *Paternalism and Public Policy*, 22 AM. PHIL. Q. 1, 6 (1985) (arguing that Feinberg's use of voluntariness "seems susceptible of use to justify morally unacceptable interventions, depending on how the self-avowedly artful term 'voluntary' is used."); Alan Soble, *Paternalism, Liberal Theory, and Suicide*, 12 CAN. J. PHIL. 335, 343 (1982) ("Even though Feinberg is still applying a person-mediating maxim, it is a maxim whose application is made possible only by appealing, for epistemological reasons, to an act-mediating maxim.").

318. Goldman & Goldman, *supra* note 149, at 68.

319. Perhaps the other most notable soft paternalism "stretcher" is Cass R. Sunstein. *See, e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 40 (1990) (arguing that individual preferences are social constructs, and therefore state interference with those

ple, like that associated with the harm principle, is pervasive.[320] As Duncan Kennedy argues, "paternalism is a more pervasive issue . . . than people will generally admit."[321] It is, Kennedy explains, "everywhere, coming out of the woodwork."[322] Masking is not only widespread but it is also dangerous because it frequently shields discriminatory and ill-founded regulation from criticism.[323] Recognizing the true ethical basis

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preferences "removes a kind of coercion"); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541 (1998) ("[B]ounded rationality pushes toward a sort of anti-antipaternalism . . . ."); Cass R. Sunstein, *How the Law Constructs Preferences*, 86 GEO. L.J. 2637, 2639 (1998) ("Recent revisions in understanding human behavior . . . support a form of anti-antipaternalism.").

320. *See, e.g.*, Volunteer Med. Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 225 (6th Cir. 1991) (quoting New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1360 (2d Cir. 1989)) ("[A]mong that 'we are doing this for your own good' [is] a contention that usually shields one's actual motive."); HARM TO SELF, *supra* note 8, at 4 ("[W]e would expect hardly anyone to confess to paternalistic tendencies, much less boldly affirm the paternalistic principle and wave the paternalistic banner."); *id.* at 85 ("The more overt paternalistic language seems much less contrived and more honest."); VANDEVEER, *supra* note 6, at 213 ("[I]t is sometimes thought, and argued, that there is little reason to worry over whether or not this or that paternalistically based defense of interference is justified, since such philosophical fastidiousness about paternalistic strategies of justification can be set aside—set aside because there is a legitimate, familiar, and nonpaternalistic ground . . . ."); *id.* at 7 ("One important ground for delimiting risks is paternalistic in nature . . . . [T]his fact . . . has not been sufficiently recognized in existing discussions."); Robert Clark, *The Soundness of Financial Intermediaries*, 86 YALE L.J. 1, 20 (1976) ("[S]ince [paternalistic] theories strike many persons as an insult to human dignity, inevitably there is pressure to disguise these theories when they do underpin regulation."); Goldman & Goldman, *supra* note 149, at 68 (cautioning against "ad hoc tinkering" by the soft paternalist to ensure that all justifiable paternalism can be seen as restricting only involuntary actions); *id.* at 72 ("One strategy for sidestepping the limitation that prohibits paternalistic laws is to try to provide non-paternalistic justification for such laws."); Kennedy, *supra* note 40, at 646 ("We decide these cases paternalistically, to our credit, but then bury them under other rubrics . . . ."); *id.* at 590 ("The rhetoric of paternalism . . . is *never* an acknowledged motive . . ."); *id.* at 624 ("[B]ecause of its pariah status [paternalism] is usually mentioned last, if at all."); Moffat, *supra* note 24, at 589 ("[P]aternalism has been highly controversial, except among legislators."); Shapiro, *supra* note 24, at 530 ("[T]he question of paternalism is seldom raised quite so starkly."); *id.* at 535 & n.64; *id.* at 536 (recognizing the "unwillingness to take an openly paternalistic stance"); *id.* at 545 ("We never rest easy, though, with choices that seem justified, if at all, primarily on paternalistic grounds."); Peter Suber, *Paternalism*, *in* 2 PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 632, 635 (Christopher Berry Gray ed., 1999) ("Paternalism can be converted to non-paternalism only when we modulate the notions of harm and consent sufficiently. While this is sometimes distressingly easy, at least as often it is an exercise in sophistry, oversimplification, or self-deception."); Zamir, *supra* note 244, at 281 ("[P]olicymakers in western liberal democracies rarely resort to paternalistic justifications for their regulation in present times."). *See also supra* note 258.

321. Kennedy, *supra* note 40, at 645.

322. *Id.* at 646.

323. *Cf.* Berger, *supra* note 23, at 26 ("Under a continuing rhetoric of individual autonomy and rights, an insidious collectivism is becoming the new norm."); James Madison, *Speech in the Virginia Convention; reply to Patrick Henry* (June 16, 1788), *reprinted in* 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 83 (Jonathan Elliot, 2d ed., Buffalo NY, William S. Hein & Co.

for liberty-limiting regulations clarifies the issues at stake, allows us to provide an obvious and natural explanation for current regulations, and better lays the groundwork for future policy development.[324]

C. *Limitations of the Hard Paternalism Liberty-Limiting Principle*

As with the harm and the soft paternalism principles, the hard paternalism liberty-limiting principle is subject to limitless expansion and the slippery slope.[325] Those opposed to hard paternalism argue that government intervention grounded in this doctrine would lead to "an ominous growth in big government"[326] and the "enforcement of prudence."[327] They suggest that "if extended to its logical limits, [hard] paternalism would support regulation of almost any activity. Mandatory seat belt and helmet laws, laws limiting consumption of unhealthful foods, and laws requiring regular medical examinations are just a few examples of laws that [hard] paternalism could justify."[328] After all, "almost by definition

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1996) ("[T]here are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations."); ORWELL, *supra* note 251 (illustrating the masking of totalitarianism with "Newspeak" and "Doublethink"); Zamir, *supra* note 117, at 285 ("[T]he fear that paternalism will be used as a pretext for attaining extraneous, discriminatory goals is less significant than it is with regard to other alleged bases of regulation . . . .").

324. *See supra* notes 41 & 120.

325. *See* HARM TO SELF, *supra* note 8, at 24 ("The trick is stopping short . . . hard paternalism justifies too much."); *see also id.* at 77; Schauer, *supra* note 226, at 368-69. Opponents to hard paternalism might also be making an argument distinct from the slippery slope, the argument "from added authority." *Id.* at 367-68; *see also* Van der Burg, *supra* note 226, at 131. This argument is not based on anything particular to the decision to prohibit the substantially autonomous decision to smoke. Rather, the concern is "jurisdictional," because merely allowing the government to regulate substantially autonomous self-regarding behavior at all increases the risk that it will regulate other such behavior. This argument has also been described as "statism." *See* Enrique Salgado, *Paternalism and the Narcotics Industry*, 40 AM. BEHAV. SCIENTIST 944, 944 (1997). Of course, hard paternalism, like any liberty-limiting principle, provides only a morally relevant reason, and not necessarily a decisive reason in support of state intervention. *See supra* note 26 and *infra* note 361.

326. Dan E. Beauchamp, *Injury, Community, and the Republic*, 17 L. MED. & HEALTH CARE 42, 46 (1989); *see also* Gilbert, *supra* note 22, at 5 ("Some aspects of the current vogue to alter unacceptable lifestyles are pernicious and verge on the totalitarian.").

327. HARM TO SELF, *supra* note 8, at 25.

328. David B. Ezra, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1072 (1990); *see also* City of North Miami v. Kurtz, 653 So. 2d 1025, 1029 (Fla. 1995) (Kogan, J., dissenting) ("There is a 'slippery slope' problem here because, if governmental employers can inquire too extensively into off-job-site behavior, a point eventually will be reached at which the right of privacy . . . clearly will be breached."); State v. Cotton, 516 P.2d 709, 714 (Haw. 1973) (Abe, J., dissenting from an opinion upholding the state motorcycle helmet law); HUSAK, *supra* note 6, at 141 ("I hope it is clear just how strong and open-ended a hard paternalistic rationale would have to be . . . . [A]ny such rationale, I suspect, would prove far too much and would justify a wider range of paternalistic interferences over individual liberty than should be tolerated . . . .");

everything that people do affects public health."[329]

Smokers may ask "[w]hat's next . . . a ban on alcohol? Butter? Bungee Jumping? How about mandatory jogging, yoga, or weight lifting?"[330] Indeed "[t]he next victims of such rulemaking may be whistlers, gum chewers, bone crackers, dandruff scratchers, lint pickers, and popcorn eaters."[331] A poem published in the *Philip Morris Magazine* colorfully captures their concern:

> Smoking is a civil right,
> Those who don't should join the fight.
> For if one right does disappear,
> The loss of others may be near. . . .
> Too many calories can cause you to die,
> So let's have a ban on apple pie.
> Once a government restricts a right,
> The end will never be near in sight.
> There's a lesson here . . . this is no joke,

LEICHTER, *supra* note 12, at 133-34; SULLUM, *supra* note 1, at 269; Beauchamp, *supra* note 33, at 1918 ("Paternalism could in principle prohibit smoking, drinking, and hazardous recreational activities such as hang-gliding, mountain-climbing, and white-water rafting . . . ."); B.J. Boughton, *Compulsory Health and Safety in a Free Society*, 10 J. MED. ETHICS 186 (1984); Mark Cunningham, *Got a Light?*, NAT'L. REV., Mar. 23, 1998, at 51, 52 (reviewing JACOB SULLUM, FOR YOUR OWN GOOD (1998)) ("Beware, ye other merchants of premature, politically incorrect death—ye distillers, fatty-food distributors, gun-makers, auto-makers."); Dworkin, *supra* note 20, at 125 ("[The] difficulty is that of drawing a line so that it is not the case that all ultra-hazardous activities are ruled out . . ."); Feinberg, *supra* note 173, at 319 ("[P]aternalism justifies too much, the flat-out prohibition, for example, of whiskey, cigarettes, and fried foods . . . ."); Joseph Kadow, *From Cigarettes to Perfume: Movement to Limit Choice Attacks Personal Freedom*, NATION'S RESTAURANT NEWS, Apr. 13, 1998, at 40, 74; Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway—Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 646 (1994); Stewart, *supra* note 114, at 1401-03; Renée M. Szobonya, City of North Miami v. Kurtz*: Is Sacrificing Employee Privacy Rights the Cost of Health Care Reform?*, 27 U. TOL. L. REV. 545, 545-46 (1996).

329. Gostin et al., *supra* note 12, at 91.

330. David B. Ezra, *Get Off Your Butts: The Employer's Right to Regulate Employee Smoking*, 60 TENN. L. REV. 905, 937 (1993); *see also* Arthur L. Caplan, *Sinners, Saints, and Health Care: Personal Responsibility and Health*, NORTHWEST REP., Apr. 1994, at 20, 23 ("The problem with personal responsibility at the policy level is that it may prove hard to draw a clear line between encouragement and coercion.").

331. GOODIN, *supra* note 5, at 124; *see also* Salgado, *supra* note 325, at 945 ("If the state intends to protect citizens' health from themselves, shouldn't it also regulate other health-related activities . . . . Policemen could go about making sure people do their obligatory push-ups and sit-ups. People who harm their health by eating high cholesterol foods or by hurting their ankles while playing soccer . . . could be arrested and charged for 'crimes against health.' "); Tollison & Wagner, *supra* note 165, at 301 ("If government has the power to protect people from making choices that include relatively high risks, why stop at tobacco consumption?"); Cathy Young, *Drug Fanaticism Endangers Our Freedoms*, DET. NEWS, Aug. 27, 1996, at A9 ("The War on Smoking may set an especially dangerous precedent in allowing the government to regulate unhealthy behavior. What next: Sugar? High-fat foods? Red meat? Coffee?").

I once had a right to smoke![332]

Indeed, there has been some "slipping" in what some have dubbed the "daddy state."[333] One economist has remarked that "[i]t is somewhat ironic that the government discourages smoking and drinking . . . yet when it comes to the major cause of death—heart disease . . . politicians let us eat with impunity."[334] In response to this apparent irony, a Yale psychologist has proposed a junk-food tax.[335] Others have proposed even more direct regulation of fatty foods.[336]

Surely, we must be cautious in using hard paternalism as a liberty-limiting principle.[337] Justice Brandeis was right when he warned that "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[338] Milton Friedman is

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332. Louis C. Mroz, *Smoking Ban? What Next?*, PHILIP MORRIS MAG., Summer 1987, at 29.

333. Ronald Brownstein, *When Daddy is a Nag*, U.S. NEWS & WORLD REP., June 1, 1998, at 30.

334. Jack Chambless & Sarah C. McAlister, *Eating with Impunity*, ORLANDO SENTINEL, Dec. 22, 1996, at G1.

335. *See* Kelly D. Brownell, *Get Slim With Higher Taxes*, N.Y. TIMES, Dec. 15, 1994, at A29; *see also* Bill Reel, *A Buck a Pack Is a Helluva Whack*, NEWSDAY, Mar. 25, 1994, at A43; Rippel, *supra* note 182, at 34.

336. *See, e.g.*, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, FORWARD PLAN FOR HEALTH FY 1977-81, at 104 (1975) (proposing controls on high sugar and low nutrition foods); John Doyle, *Why Fattening Foods are Being Positioned as the Next Targets for Public Health Officials*, NATION'S RESTAURANT NEWS, Aug. 10, 1998, at 42; Joyce Howard Price, *New Battle About Evil Spirits*, INSIGHT ON NEWS, Feb. 1, 1999, at 40 (reporting that Michael F. Jacobson, the executive director of the Center for Science in the Public Interest "argues that people can't be trusted to make wise and healthful decisions on their own," and describing CSPI's attacks on Chinese food, movie popcorn, Mexican food, and soft drinks); Cori Vanchieri, *Lessons from the Tobacco Wars Edify Nutrition War Tactics*, 90 J. NAT'L CANCER INST. 420 (1998).

337. *See* KLEINIG, *supra* note 8, at 74 ("Opponents of paternalism rightly worry about a steadily increasing use of paternalistic measures."). In order to emphasize our cautiousness we might adopt John Kultgen's term "soft antipaternalism." This concept sanctions the same intervention as hard paternalism but places the emphasis on the opposition to the practice. *See* KULTGEN, *supra* note 24, at 132, 136.

338. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."); *see also* KULTGEN, *supra* note 24, at 56 ("Whenever anyone professes to act altruistically, we must suspect a desire to dominate.") (discussing Douglas, *supra* note 252, at 179-80); ALAN JAY LERNER, MY FAIR LADY, act I, scene ii (1956) ("[T]hey're always throwing goodness at you. But with a little bit of luck, a man can duck.").

> The preventive function of government, however, is far more likely to be abused, to the prejudice of liberty, than the punitory function; for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency.

THOMAS SZASZ, OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET 73 (1992) (quoting JOHN STUART MILL, ON LIBERTY); *see also* HENRY DAVID THOREAU, LIFE IN THE WOODS 118 (Houghton Miflin

also right that once one accepts the principle that some shall decide for others, "[t]here is no *formula* that can tell us where to stop."[339] We ought to heed the warning to beware hard paternalistic regulation. Nevertheless, the dangers are not unavoidable. Although only a few writers have made arguments defending hard paternalism,[340] there is no reason to think that hard paternalism cannot ever serve as a legitimate basis for the regulation of tobacco.[341]

1906) (1854) ("If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life."); VANDEVEER, *supra* note 6, at 443 ("The otherwise commendable aim of liberalism . . . has sometimes led to a kind of *aggressive benevolence* and related disregard for the conception of the good possessed by those whom liberals have been bent on helping.") (emphasis added); Douglas, *supra* note 252, at 179-80 (discussing the nature of altrusic intentions); Eugene Feingold, *Public Health versus Civil Liberties*, 113 PUB. HEALTH REP. 334, 335 (1998) ("[I]s public health's claim of benevolence suspect—a cloak for the imposition of the claimant's values on the supposed beneficiary?"); Alan Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 557 (1967) ("[T]he benevolent have a tendency to colonize, whether geographically or legally."); Pellegrino, *Health Promotion*, *supra* note 6, at 375 ("Involuntary measures also assume a benign, wise, and responsive government—something history finds singularly rare."); ORWELL, *supra* note 251 (illustrating the masking of totalitarianism with "Newspeak" and "Doublethink"); Zamir, *supra* note 117, at 281 ("A common argument against paternalism is that the paternalist's benevolent rhetoric may disguise other, less legitimate motivations . . . . History provides numerous examples of false paternalism, where whole sectors of society (women, minority groups) were oppressed 'for their own good.' ").

339. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 33-34 (1962) (emphasis added).

340. *See, e.g.*, KLEINIG, *supra* note 8, at 67-73, 173 (defending hard paternalism); CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS 33 (1998) (arguing for a shift away from the present emphasis on autonomy); Ronald Bailey, *Warning: Bioethics May Be Hazardous to Your Health*, REASON, Aug.-Sept. 1999, at 24, 27 ("[M]any bioethicists are rediscovering the virtues of paternalism."); Beauchamp, *supra* note 33, at 1920 (observing that in the past decade "many voices began to be heard that were more sympathetic to various paternalistic appeals"); Daniel Callahan, *Current Trends in Biomedical Ethics in the United States*, 24 BULLETIN OF PAN AMERICAN HEALTH ORG. 530, 531 (1990) (observing that some commentators believe the "repudiation of medical paternalism . . . has gone much too far."); Michael L. Gross, *Autonomy and Paternalism in Communtarian Society: Patient Rights in Israel*, HASTINGS CENTER REP. Jul.-Aug. 1999, at 19 & n.25 (observing a "gradual slide toward . . . weaker formulations of autonomy . . . and a growing realization that a little paternalism might be a good thing"); Mead, *supra* note 40, at 104 (reporting that people are more open to paternalism for *others*, particularly those on welfare); Regan, *supra* note 42, at 192 ("I have a lingering feeling that it may be permissible to prevent cigarette smoking even by a smoker who has no family, who is clear headed and as free of neuroses as a person can be, who is well informed about his chances of getting cancer and the general diminution of his life expectancy, and who just doesn't give a damn."); Starobin, *supra* note 249, at 2012 ("Daddy state paternalism is aimed largely at social behavior and its principal targets are relatively powerless people."); Weale, *supra* note 52, at 166.

341. *Cf.* Beauchamp, *supra* note 33, at 1918 ("Careful defenses of paternalism would disallow these extreme interventions . . . ."); James Curran, *The Libertarian Non-Smoker's Defence of Smoking*, 352 LANCET 745, 747 (1998) ("Rather than all-powerful paternalistic tyrants, we are simply 'redefining the unacceptable' and working to protect the health of individuals and society.").

As Frederic Schauer has explained, a slippery slope argument "depends for its persuasiveness upon temporally and spatially contingent empirical facts."[342] Such an argument "needs to be justified and not merely intoned."[343] In the context of smoking, the empirical foundation of the slippery slope argument is weak.[344] It ignores the unique nature of the risks from smoking, risks that are easily distinguished from the risks accompanying self-affecting behaviors further down the (not so slippery) slope.[345]

No one has shown that the risks from tobacco *cannot* be distinguished from those of other risky behaviors. In fact, Professor Robert

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342. Schauer, *supra* note 226, at 381; *see also* HARM TO OTHERS, *supra* note 9, at 346-47; Van der Burg, *supra* note 226, at 137-38. There are non-empirical forms of the slippery slope argument. For example, the form attaching to the harm and soft paternalism principles is a "logical version" in which the slide is not due to psychological and social forces but to the vague conceptual scope of the principles themselves. *See supra* note 226.

343. KLEINIG, *supra* note 8, at 94; *see also* Van der Burg, *supra* note 226, at 141 ("Slippery slope arguments are often not so much rational arguments as expressions of an underlying feeling of concern about general trends in society . . . . [T]hey are rarely valid and plausible . . . .").

344. *See* HUSAK, *supra* note 6, at 87 ("But surely [hard paternalism] would not endorse a sweeping condemnation of every dangerous recreational pastime. Clearly, distinctions would have to be drawn on the basis of empirical evidence . . . .").

345. Another empirical counter-argument to the slippery slope is that it ignores political and social reality. There is no foundation for fear that permitting limits to the personal risks involved in tobacco use exposes the individual to unlimited and unchecked public health activism. Because legislatures and state judges are politically accountable to the voters, they cannot become totalitarian institutions without at least the consent of those whom they rule. Dan Beauchamp explains:

> Beyond limits on alcohol, and tobacco through increased taxes and controls on availability, handgun controls, helmets for motorcyclists, and seatbelts and airbags for cars, there are few remaining measures on the horizon available to democratic government. Imaginative philosophers might still envision a time when American legislatures would dictate that American citizens run three miles every day (or at least take long walks), eat more bran, eschew bacon, and so forth, but I see no prospect that we are slouching, even slowly, toward a vast paternal power exercised by our elected officials.

BEAUCHAMP, *supra* note 21, at 97; *see also* KLEINIG, *supra* note 8, at 191 ("The slippery slope looks slippery only because we consider one factor in isolation from others that are also important if government interference is to be justified."); Perez-Rivas, *supra* note 276 (reporting that Friendship Heights' hard paternalistic ordinance was killed due to opposition based in large part on the issue of personal liberty); Teret & Gaare, *supra* note 60, at 46 ("[I]t is questionable whether any measure so extreme would be enacted by a legislature because of our strong political and moral bias toward personal liberty and autonomy . . . ."). *But see, e.g.*, VANDEVEER, *supra* note 6, at 337 ("[T]he claim that whatever policies are decided by elected representatives in a majoritarian, constitutional democracy are all right fails to address our basic questions. . . ."); Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 79-80 (1989) (observing that "social choice theorists have demonstrated reasons why multi-member bodies cannot . . . reflect majority wishes"); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124 (1990); Wikler, *supra* note 47, at 226.

Rabin argues that such a clear and categorical distinction can be made. Rabin argues that smoking can be distinguished from other voluntarily assumed risks by the very nature of the harm it imposes.[346] Smoking stands alone in the magnitude of abuse it creates, the magnitude of risk it imposes, and the magnitude of difficulty one encounters when trying to break the habit.[347]

First, all smokers are at risk of serious physiological consequences. The magnitude of the harm is well established and hardly worth reciting. According to the latest Surgeon General's Report, smoking is highly associated with various cancers, including cancers of the lung, cervix, esophagus, mouth, stomach, and bladder.[348] Other adverse health consequences include chronic obstructive pulmonary disease, coronary heart disease, and cerebrovascular disease.[349]

Second, the probability of harm to the user is higher than that of other harmful activities.[350] Skydiving, for example, certainly increases the risks of injury or death, but most participants enjoy the sport without incident.[351] Smoking, on the other hand, not only increases the risk of harm, it is intrinsically—and *always* harmful.[352] Research clearly illustrates that "tobacco is harmful *whenever* it is smoked."[353] It is the only product that, *even when used as intended*, is still harmful to your health.[354] Not only has no safe level been determined, but smokers de-

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346. *See* RABIN & SUGARMAN, *supra* note 21, at 10-11; *see also* Rabin, *supra* note 5, at 483-84.

347. *See supra* note 346.

348. *See, e.g.*, OFFICE U.S. DEPT. HEALTH & HUMAN SERVS., TOBACCO USE AMONG U.S. RACIAL/ETHNIC MINORITY GROUPS: A REPORT OF THE SURGEON GENERAL 137, 152, 153, 155, 155-56 (1998).

349. *See id.* at 158, 160, 164. Smoking also causes smokers to have poor teeth, sore throats, stained fingers, and ruined skin. But these cosmetic "harms" are not significant enough to warrant restriction of individual liberty. *Cf. supra* notes 136-48.

350. *See* Hersch & Viscusi, *supra* note 286, at 645 (estimating that the "overall lifetime mortality risk" to smokers in 1993 ranged from one-sixth to one-third); SMOKING, *supra* note 190, at 80; *cf.* Graham E. Kelden, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 64 & nn.3-13 (1997) (reviewing the probabilities of smoking-related death due to particular diseases).

351. *See* DAN POYNTER, PARACHUTING: A SKYDIVER'S HANDBOOK (6th ed. 1991), *reprinted at* <http://www.afn.org/skydive/sta/stats.html> (reporting a fatality rate of 29 deaths per year); PARACHUTIST (U.S. Hang Gliding Ass'n), Apr. 1990, at 13 (table), *reprinted at* <http://www.afn.org/skydive/sta/stats.html> (reporting a 1988 fatality rate of 25 per 100,000 participants).

352. *See* HARM TO SELF, *supra* note 8, at 101.

353. GOODIN, *supra* note 5, at 127.

354. *See* Tyler, *supra* note 146, at 794 ("Tobacco is unlike any other legal product; it is the only available consumer product that is hazardous to health when used as intended . . . alcohol and fatty foods can be used in moderation.").

velop tolerances that keep them well above whatever level that might be.[355]

Third, smoking pervades life activities.[356] Smokers use cigarettes to deal with "an exceedingly wide range of everyday social activities . . . coping with bad news, enjoying a good meal, beginning a difficult work assignment."[357] Smoking affects "attention, arousal, mood, and under certain conditions, cognition."[358] Other risky activities, like skydiving, are more compartmentalized. Caffeine is used in much the same manner as cigarettes, but the risk and magnitude of harm from caffeine consumption is insignificant when compared to the risks of tobacco use.[359] Few products match tobacco on all three of these dimensions of harmfulness. Thus, justifying tobacco regulation on the basis of hard paternalism will not necessarily lead to the regulation of other activities.[360] The slippery slope is by no means a certainty.

CONCLUSION

In this Article I have provided the conceptual "tools" with which policymakers can forge ethically honest and justifiable anti-smoking laws.

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355. *See* 61 Fed. Reg. 44,726-27 & 44,737-38.

356. *See* Corrine G. Husten et at., *Intermittent Smokers: A Descriptive Analysis of Persons Who Have Never Smoked Daily*, 88 AM. J. PUB. HEALTH 86, 88 (1998) (reporting that more than 90% of smokers smoke every day).

357. Rabin, *supra* note 5, at 484; *see also* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS xiii-xvi (Vintage Books 1997) (1996) (describing the ways in which smoking functions as an "all-purpose psychological crutch"); SULLUM, *supra* note 1, at 244 ("A smoker might depend on cigarettes to control stress, to stay slim, to keep focused at work, to fill idle time, to mingle at parties, even to define an identity."); *id.* at 257 (observing that most smokers smoke every day, averaging at least once per waking hour); TATE, *supra* note 27, at 148 ("[C]igarettes serve a number of important psychosocial functions—as self-medication for either depression or excitability, as emblems of solidarity with peers, as expressions of identity."); Christopher Hitchens, *Smoke and Mirrors*, VANITY FAIR, Oct. 1994, at 88 ("Cigarettes improve my short-term memory and my digestion, make me a finer writer and a better dinner companion . . . .").

358. 61 Fed. Reg. 44,740 (1990).

359. *See* 61 Fed. Reg. 44,728-29; *see also* J.W. Daly & B.B. Fredholm, *Caffeine—An Atypical Drug of Dependence*, 51 DRUG & ALCOHOL DEPENDENCE 199, 206 (1998). Gwendolyn Prothro, *The Caffeine Conundrum: Caffeine Regulation in the United States*, 27 CUMB. L. REV. 65, 68-75 (1996/97).

360. I have sketched some of the considerations and distinctions that support the hard paternalistic regulation of tobacco smoking. *See also* Pope, *supra* note 240. A complete and cogent argument will have to confront formidable counterarguments. For example, while I present evidence regarding the importance of smoking to smokers in order to substantiate an argument *for* the hard paternalistic regulation of smoking, philosopher John Kleinig, on the other hand, argues that just because smoking is a "concern[] of real importance to the individual" the degree of liberty limited by regulation is greater and, therefore, the regulation is *less* justifiable. KLEINIG, *supra* note 8, at 110.

In short, policymakers considering the public health regulation of tobacco should follow this simple three-step formula: (1) begin with a presumption of liberty; (2) identify and articulate the normative justification or liberty-limiting principle for the regulation; and (3) choose particular policy options that are no broader than the normative justification. Of course, this formula cannot by itself determine the development of public policy.[361] However, if policymakers follow this formula as they determine the scope and manner of tobacco regulation, that regulation will have a firm normative foundation by which the regulation can be justified and future policy can better develop.

361. *See* Joel Feinberg, *Harm to Others—A Rejoinder*, 5 CRIM. JUST. ETHICS 16, 16-17 (1986) (explaining that a liberty limiting principle is only a "relevant reason" and not a "decisive reason" for legislation: "[A] proposed law can be morally permissible to enact and yet be ineffective, impolitic, or unwise."); *see also* BEAUCHAMP & CHILDRESS, *supra* note 9, at 10 ("[W]e cannot move with assurance from a judgment that act '*x*' is morally right (or wrong) to a judgment that a law or policy 'y' is morally right (or wrong) because it mandates or encourages (or prohibits) act 'x'. . . . Factors such as the symbolic value of law, the costs of a program and its enforcement, and the demands of competing programs must also be considered."); BEAUCHAMP & STEINBOCK, *supra* note 6, at 7 ("[P]ublic health is a species of public policy. Public policy certainly includes ethical considerations, but it must also consider nonethical factors, such as politics."); CALLAHAN, *supra* note 7, at 197 (arguing that although "a theoretical case might, therefore, be made for forceful interventions . . ., it is by no means easy to see how to develop the public policy"); HARM TO OTHERS, *supra* note 9, at 16, 232; HARM TO SELF, *supra* note 8, at 141-42, 374; PHILOSOPHICAL ETHICS, *supra* note 6, at 421 ("The making of law and policy is more complex than determining what is morally wrongful."); RILEY, *supra* note 42, at 114-15, 191; SCHONSHECK, *supra* note 25, at 70-79 (explaining that in order to be morally justified, a liberty-limiting law must pass not only the (moral) "principles" and "presumptions" "filters," but also a "pragmatics filter" in which the costs and benefits of the law are assessed); Wikler, *supra* note 47, at 240.