

TESTING ANTI-PATERNALISM : SOME MEDICAL CASES

I

In talking of paternalism we are referring to the treatment of adults or near adults as parents treat their children. Construed more narrowly, as it typically is in ethical discussions, to speak of paternalism is to speak of the restriction of the liberty of individuals without their consent, where the rationale or justification for so acting is either the prevention of some harm they might do to themselves or the production of some benefit for them they might not otherwise secure. Paternalists hold we can interfere in a person's life to, on the one hand, prevent that person from seriously harming himself or, on the other, to aid in his doing what really answers to his interests in a way that may be quite independent of his own view of the matter.

II

Moral reflection, I believe, creates a presumption against paternalism, though this presumption, like any presumption, might be defeated. Depending on exactly how paternalism is characterized it may create a presumption so strong that we should say, where adults or near adults, who are mentally non-incapacitated, are concerned, paternalism is never, or at least almost never, justified. What I shall characterize in a moment as 'strong paternalism' is, I shall argue, never, justified while 'weak paternalism' may be. It might, in turn, be said that 'weak paternalism' is not really paternalism. Be that as it may, there is a

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presumption against paternalism in any recognizable form. But many believe that under certain circumstances that presumption is defeated. I want to examine whether this is so. I want to ascertain, if I can, just when, if ever, paternalism is justified promoting the interests of particular persons who by the intervention are prevented from harming themselves. I am not assuming what is surely false, namely that individuals always understand best what is in their own interests. What is at issue is not that sometimes others know better than the individual concerned what is in her or his own interests but, even when this is so, whether others are sometimes justified in intervening in certain specific ways in the life of mentally competent adults or near adults to insure a protection or promotion of their interests: interests of which they may not be aware. Are we ever justified in violating their autonomy, usurping their decision-making, either by preventing them from doing what they have decided or interfering with the ways in which they come to make their decisions. Paternalism, recall, is the coercive interference with a human being's liberty of action (life more generally) which is justified, if paternalists are right, by protective or beneficent reasons which in such situations refer exclusively to the interests, needs, welfare, good, happiness of the human [being who is being coerced or in some other way interfered with. Put more exactly, paternalism can be formulated in the following two conceptions which I shall call *formulation A* and *formulation B*. Formulation A is a slightly more standard formulation, but formulation B, I am inclined to believe, has the advantage of setting out somewhat more perspicuously what is involved in paternalism and why it is so frequently objected to. But it is also a conception under which the possibility of justified paternalism is considerably lessened. In both formulations we have an attempt at a substitution of one person's judgment for another's to promote the latter's good.

Formulation A Paternalism is interference with a person's freedom of action or freedom of information, or the deliberate dissemination of misinformation, where the alleged justification for interfering or misinforming is that it is for the good of the person who is interfered with or misinformed.¹

Formulation B Paternalism is the belief that a person or group of persons can, and indeed sometimes should, determine (indeed even coercively determine), for mentally competent adult, or near adult, where only that person's interests are affected, what she ought to do or how she ought to live her life, even when that goes against what she on reflection would desire or choose, were she fully informed and firmly in control of herself. (Recall that what we desire or take an interest in, may not be in our own interest.) Such interference with such people for their own good is thought by the paternalist to be justified in certain circumstances. (This is a very strong form of paternalism.) Later I shall take note of the way these formulations differ but for now I shall consider whether, on either or both formulations, we can make a good case for there being instances of justified medical paternalism. In attempting to do this, we should keep in mind that whether a doctor or other health professional is acting paternalistically depends upon whether she will proceed with what she thinks is best for the patient regardless of the patient's expressed wishes on the matter.

III

Extreme mental retardation or extreme senility will render a person mentally non-competent and will justify some acts of what is sometimes called paternalism toward that individual. (It would certainly be paternalism under formulation A) Suppose that such a person makes it as clear as he can that he wants to go on living and suppose further that a certain operati-

on is necessary for that and he, to some degree, understands that and assents to the operation but still he stubbornly refuses to take a medication that is really necessary for him to take prior to the operation. In such a situation the nurse or doctor is justified in tricking him into taking the medicine or even forcing him, if necessary, to do so. Here, paradoxically, while the act is arguably a paternalistic act, it still, on formulation B, is not paternalism, for the individual in question is not mentally competent. But it clearly and unequivocally is on formulation A, for there no qualification about mental competence is made and a person's freedom of action is interfered with for his own good. In the above case there is evidence of an end he clearly wants, namely his continued life, defective though it be, end the medication is a necessary means to that. To will the end is to will the necessary means to the end. There is no lack of respect here for his person or any treating him as a means. There is rather a concern for his good and there is respect for him as a person. His autonomy, of course, is extremely limited but that is not the result of any act or any attitude of the person acting paternalistically, though he is tricked into something he does not want to happen to him. It is, that notwithstanding misleading to say that what little autonomy he has is violated.

Consider now the case of a very disturbed person who comes to a psychiatrist and who says he knows he is in a bad way and asks the psychiatrist's advice about being hospitalized. Suppose the psychiatrist recognizes that he is indeed in a bad way, that he is very self-destructive and that he might commit suicide or badly harm himself (say gouge out an eye or something like that.) The psychiatrist urges him to have himself hospitalized and the patient consents to the hospitalization. No paternalistic act has yet occurred. But suppose further that later the patient wishes to be discharged from the hospital and the doctor refuses

permission because he believes (and believes on good grounds) that the patient may do himself serious harm if he leaves. Here, depending on what else the doctor believes, we do have a paternalistic act on the doctor's part. For it to be paternalistic the doctor must believe that discharging him from the hospital will cause the patient harm. However, if he also thinks he is a threat to others or in some other way may harm others and acts on that belief then the act is not paternalistic. Hence my above qualifying phrase. But if he acts simply to protect the patient then he acts paternalistically

Whether it is justified paternalism turns on whether the patient is mentally competent. This in some circumstances is very hard to decide. Reasonable persons will disagree and in such circumstances, given the value we place on human autonomy, it would be better to err on the side of leniency. But there will be clear cases where a person is so mentally incompetent, so out of control, so incapable of acting in his own interests, or even recognizing them, that such paternalistic acts are justified. Suppose, for example, that he is very likely, if discharged, to mutilate himself: lacerate himself with a razor, cut off his tongue, toes or gouge out an eye. Such a person in such a state is mentally incompetent. The very craziness of any such act, under normal circumstances, shows that the person is plainly mentally incompetent.² To say we respect his person, respect his autonomy, by letting him do such things makes no sense at all.

However, by contrast, the very fact that he wants to commit suicide is not at all enough to justify a refusal to discharge him or to justify any other sort of paternalistic treatment of him. Whether suicide attempts can rightly be paternalistically interfered with depends very much on the circumstances. If his suicidal intent was a result of a temporary depression or other mental agitation and there is good reason to believe that in time

he would come to react to things differently and that then he would be grateful to the doctor for not providing him with the wherewithal to commit suicide then such a paternalistic act would be justified. But it is also the case that he would not be acting against what he would choose in a rational frame of mind. But there are other circumstances in which it would be wrong to prevent someone from committing suicide. Suppose the man—like some of the characters out of Eugene O'Neill—knew himself very well indeed and knew how self-destructive he was and how destructive to others he was and suppose he also knew that there was very little that he or other could do to alter that behaviour in any relatively permanent way. Suppose while hospitalized he thought about it carefully and rationally and, with a clear understanding of his alternatives, decided in a cool hour to end it all. That could very well be the rational act of a mentally competent person and I do not see how acting paternalistically toward such a person in such circumstances could be justified. So acting would not be to respect his person or his autonomy. Suicide is not always an irrational act or an unjustified act as can be seen from the following even clearer instance. A well-known Danish philosopher late in life had a plainly terminal cancer which in its later stages would be utterly debilitating and very painful. He would become a burden to himself and to others. He, with a good medical understanding of his condition, worked and lived his life fully until the time his debilitating condition started to set in and then in as painless and non-fussy way as possible committed suicide. This indeed seems to me to be a rational act on his part, indeed an admirable act showing considerable integrity and self-control. It is certainly not something that could justify paternalistic intervention.

Consider another case of a putatively justified paternalistic act. Envisage a member of a religious group that believes blood

transfusions are so sinful that they will not be able to go to heaven if they have one. Suppose such a religious person is involved in a serious automobile accident and loses a large amount of blood. On arriving at the hospital, he is still conscious and informs the doctor of his views on blood transfusions. Shortly thereafter he faints from loss of blood. The doctor believes that if he is not given a transfusion he will die. Thereupon, while the patient is still unconscious, the physician orders and carries out the blood transfusion.⁸ This is plainly a bit of paternalism on the first formulation of paternalism (formulation A) and probably on the second formulation as well. It is also plainly a difficult case concerning which reasonable, morally concerned people will disagree. I think here the disagreement is not rooted in deeply conflicting considered moral convictions but in disagreements about the facts, including facts about human nature. If you believe that when push comes to shove that the patient, very near death, will very likely abandon or rationalize his religious convictions, and ask for the blood transfusion, then the right thing to do is to act as the doctor did and carry out the transfusion. You will believe that when the person regains consciousness and indeed thereafter (or at least until his religious ideology sets in full force) he will be grateful to you for ordering the transfusion and saving his life. On the other hand, if you believe that he will probably stick by his convictions through thick and thin, then you will not be justified in ordering the transfusion. To order the transfusion, if that is the case, would be to show a lack of respect for persons and for their autonomy. It would, that is, be to show a lack of respect for what they, as rational, morally competent individuals, on reflection and with deliberation, would choose. I think that such religious beliefs are about as wrong-headed as can be, but to run rough shod over a person's firm convictions, shows a very deep lack of respect for him as a human being and that is

something which is very wrong indeed. But, if *au contraire*, it is not very likely the accident victim would really stick with his religious beliefs when death really deeply threatens, then such a weak paternalism is justified. That is to say, the religious sectarian's settled convictions are not to be run over because the doctor judges that the patient's own good is thereby served.

Consider now the case of a doctor lying to a woman on her deathbed when she asks about her son. The doctor tells her that her son is fine when he knows that he has been killed trying to escape from prison after having been indicted for multiple rape and murder. The act is paternalistic at least on formulation A and the motivation is to relieve distress and suffering. But does it show a lack of respect for persons, a lack of respect for the woman's autonomy and integrity? It is not clear to me that it shows disrespect. To lie to someone is in most circumstances to show disrespect for that person. To assume that there is a truth which you can stand but he cannot is in most circumstances not to treat the other person as your moral equal. (Normally to substitute your judgement for his is not to treat that other person as your moral equal.) But not in all circumstances. In certain very special circumstances, such as the above, most people, when they look carefully at it prospectively or retrospectively, would not, where they could distance themselves and universalize, want to be told the truth. Suppose the woman in the above case was just hours from her death. What would be the point of knowing the truth about her son? It is at least plausibly arguable that showing respect for her would in such a circumstance not be to inflict such pointless suffering on her. There is no way, as it is the case in more usual circumstances, where she could face it and with integrity come to grips with it. In the usual circumstance, we cannot, out of respect for their autonomy, play God with people and hide facts from them

that are vital to their lives. We have no right to do this and indeed to so act reflects a considerable moral failure. But in the circumstances of the above case there is no one playing God with the woman. If their roles were reversed the doctor would no doubt want the same treatment. At least many reflective people would and it is not unreasonable for the doctor to believe that the woman would also withhold the information from him if their roles are reversed. Here we have the reciprocity required by morality. The idea of undermining her autonomy here is ridiculous.

Consider now a rather different case. Suppose a woman must undergo surgery in a few days for a malignant tumor in her breast. She intellectually understands her situation perfectly well but appears rather unconcerned about it, curiously minimizing the emotional gravity of her situation. Her doctor is well aware of the fact that women in such a situation, who before mastectomy do not experience some grief and some concern about their operation and its implications, often have very severe and depressive post operative reactions. Because of that, and against her patient's insistence that she does not want to talk about it, her doctor talks about it anyway for her own good in order emotionally to prepare her for her post-operative situation.

That is plainly a paternalistic act. Is it justified paternalism? It all depends on an important psychological fact about the patient. If subsequently, after she has gone through the emotional stress of the effects of the operation, and comes to terms with it, she realizes she was hiding things from herself and comes to feel grateful for the doctor's talk, then, if this really happens, his paternalism (if that is the right word for it) was justified. If not, not. If her more normal reaction—that is, how she would react in less stressful situations—is such that she would be glad that the doctor forced that talk on her, then we have, in terms

of her own normal reaction, evidence that at the time the doctor forced that conversation on her, she was in the relevant respect in an important way mentally incapacitated. However, if she would not so react and if later she would still resent the doctor's forcing that conversation on her, then it would be the case that the doctor would be violating her autonomy and by ignoring her deliberate and considered choice her physician would not be showing respect for her as an adult person capable of organizing and running her own life. The doctor has to make a possibly risky psychological bet on how his patient will react rooted in his knowledge of human nature. (There may be very little here his professional training prepares him for.) Whether his paternalistic act was justified depends on the doctor's beliefs about some facts about human nature and on how reasonable it is for him to have these beliefs. He could be justified in so acting, even if it turns out that in fact the doctor was mistaken about this particular patient. If he had acted on the best information reasonably available to him at the time and if that information was that it was far more probable than not that she would subsequently be grateful for the conversation, then he would be justified in acting as he did. He was acting correctly on the best evidence available to him at the time.

Let us move on to a psychiatric case. Suppose an outpatient of a psychiatrist during the last few minutes of one of his first sessions with her insistently requests some medicine for his nerves and for vague poorly localized pains which he describes. She believes that there is no medical reason for giving him medication but she is also of the opinion that if she refuses his request a productive therapeutic session will end on a sour note that might very well ruin or at least retard further therapeutic progress. But the psychiatrist also does not believe in administering active drugs for no medical reason. So she resolves the

situation by prescribing for him a week's supply of placebos and makes a note on her chart to discuss the issue of medication with him in detail during their next session.⁴ This is plainly at least weak paternalism. But is it justified? What is at issue here is something like the previous case. But there are also differences. One difference is that atypically in the previous example the doctor forces a recognition and a taking-to-heart of the facts on the patient while in this example she, more typically, conceals something from the patient. But in both instances the doctor acts in the interests of the patient knowing that this is *not* how the patient will construe his or her interests *at the time* the paternalistic action is taken. If in this last case the psychiatrist can reasonably assume that as the therapy progresses and the patient sees his situation more clearly that he will then come to approve of the earlier deception as being in his own interests, and indeed as enabling him to attain a fuller autonomy, then the paternalistic act (putatively paternalistic act) was justified. If in retrospect that is not how the patient sees it, particularly when he attains a rather fuller mental competence, then the paternalistic act is not justified, though if the doctor had very good reason to believe the patient would retrospectively approve then he was justified in so acting. What *a person* is justified in doing at a given time might not turn out to be the right thing to do, the thing we would be justified in doing *if* we had fuller information. What if the patient does not retrospectively recognize what in fact is in his interest or, even if he does, objects to the means taken to realize what in fact is in his best interests? Would the 'paternalistic act' in such a circumstance be justified? The patient was disturbed, but if any psychological disturbance is going to count as mental incapacitation then all of us are going to turn out to be mentally incapacitated. There are degrees here of mental incapacitation. Is it possible for paternalistic acts which override a patient's wishes to be justified? Where the mental

incapacitation is such that the patient is no longer even remotely in control of his or her own life can we not rightly speak of a mental incapacitation that would justify paternalism? It would be justified in a situation where the patient was not capable of making anything even remotely like a reflective and informed choice.⁵ It would be justified if his mental incapacitation was such that he had very little understanding indeed of what he was doing and why he was doing it. But this is not the situation of the patient in this case, so if the patient does not retrospectively approve of the deception then that paternalistic act was not justified. In real life situations it is often very difficult to ascertain what the relevant facts are. We need to ascertain what degree of mental incapacitation exists and how badly the therapy would be effected if the deception were not carried out. But the principle we are acting on is reasonably clear. Moreover, given the *prima facie* wrongness—the presumptive wrongness—of the paternalistic acts, it would be better here to develop a conservative policy and require very good evidence indeed that the refusal to practice such deception would undermine the therapy. It is doubtful that the psychiatrist has any hard information and this makes paternalistic act even more questionable.

Let us consider another psychiatric case. A psychiatrist is leading a group therapy session where the patients all claim they have difficulties in relating to other people. One of the patients, a single successful professional man of around thirty, complains that he is unable to maintain lasting friendships with either men or women. The doctor notes in the group therapy sessions that this individual is self-centered, critical of others and smugly certain about his own opinions. Moreover, he has no insight into his having these characteristics. To help him gain insight into his having these characteristics, characteristics which he will try to change once he has gained insight into them, the

psychiatrist encourages the other members of the group to confront this man with their feelings about him despite what he predicts will be his anger and considerable discomfort when they begin to do so. When they do so he does indeed become angry and upset and denies their accusations and feels ill done by.

Again we have what appears at least to be a paternalistic act, albeit of a rather unusual sort. The question is to determine whether it is justified. Here the man enters into the therapy because he knows though he does not clearly understand the specific ways in which this works, that there is something amiss with his personality. He in effect makes a contract with the psychiatrist to ascertain and correct, if he can, this behaviour and in this instance the psychiatrist is using reasonably standard means to make this correction. Subsequently, when the man's therapy has progressed further, and he has some reasonable insight into his situation, he will be grateful for that therapeutic tactic, anxiety-arousing though it was at the time. He, as a rational being with a conception of his own good, wills it, so the psychiatrist is not violating his autonomy and treating him as a means only in using that therapeutic tactic. On formulation A, it is clearly paternalism, though not so clearly on formulation B. But in any event, whether it is paternalism or not it is something the psychiatrist is justified in doing.

Consider now what was once, and perhaps still is, a widespread practice among physicians of not telling patients in a far-advanced stage of cancer, where the prognosis is very bleak, that they have cancer... The doctors who do this believe that if they tell the patient he has cancer and indeed such a far advanced cancer, that they would be depriving him of all hope and that the loss of hope would result in suicidal

depression or at least a serious worsening of the patient's condition. This is often thought to be a justifiable paternalism, but it seems to me it almost never is. Here the doctor is indeed playing God. A person in control of his faculties has a right to know what his condition is and to decide in the light of as adequate information as there is available what to do with what remains of his life. Any other treatment is incompatible with treating him as a person, the moral equal of the doctor. Most people have things they want to do with their lives; they have life plans they want to carry out. Having what is very likely a terminal cancer will typically deeply effect those plans and the patient has a right to information so vital to his life, to his whole conception of who he is and what he wants to do. If there is little in the way of hope for recovery then all the more reason for the patient to know just that. The claim that people generally cannot stand such evidence rests on no sound psychological foundation⁶ It is perfectly true that such knowledge would be depressing and might very well drive some people to despair and even to suicide. But, as we have seen, suicide is not always either irrational or immoral. The depression and the possibility of despair are indeed bad things, but in moral deliberation they must be weighed against the violation of one's person through lack of respect for one's moral autonomy. When the depression and possible or even likely despair is very overwhelming the case is very difficult indeed, particularly when an awareness of the truth is very likely to worsen the patient's condition. Rather than play God, the physician should candidly, carefully and humanely discuss all these matters with the patient doing his utmost to help the patient come to grips with his life in this terrible situation.

Consider now a moral situation that arises in neonate intensive care units. There we have very difficult cases requiring

decisions about whether to initiate or not to initiate or to discontinue life-sustaining therapy for infants. We have, for example, infants with Downe's syndrome with potentially fatal but surgically correctable congenital cardiovascular or gastrointestinal defects. There are surgical techniques to correct this but a large percentage of the infants so treated suffer varying degrees of permanent brain damage and paralysis. The paternalistic problem here is between the doctor and the afflicted children's parents. There are physicians who take the position that they should undertake the responsibility for making decisions about the life and death of such defective newborns in order to relieve parents of the trauma and guilt of making the decision. It is just too cruel, some paternalistic physicians reason, to ask the parents to decide whether their child shall live or die. This is plainly paternalism. Is it justified ?

If the parents are at all normal, I do not think they can justifiably be excluded from the decision process. It, after all, is a moral decision and not merely a technical, medical decision. Moreover, the doctor has no more moral expertise than do the parents. Once the relevant factual information is clearly set out, and it is plain the issue is moral, the doctor has no more expertise than anyone else. The parents have an intimate interest in their children's lives. Such life and death decisions are horrible for anyone but it is not treating the parents as moral equals to exclude them from the decision making process. What the physician must do, rather than paternalistically making the decision for them, is to develop techniques for as fully and clearly explaining to them the condition of their child and the various options and the probable effects of taking those options. He must never hide in jargonese. The real functional decision should in most circumstances not be made by the doctor or by

a team of doctors alone. Under normal circumstances the parents must be fully involved. Anything else is unjustified paternalism.

Let us now consider the case of the paternalistic implications of the ban on Laetrile. Laetrile (Vitamin B-17) is a substance long noted in certain circles as a cure for cancer. However, scientific studies suggest that Laetrile is not effective in the treatment of cancer. The FDA in the United States defends its somewhat paternalistic ban on the use of Laetrile on the grounds that the cancer victim's choice between Laetrile and other therapies cannot be free, for the cancer victim decides in a climate of fear and anxiety created by the especially morbid nature of the disease and exacerbated by pecuniary and political pressures that the pro-Laetrile movement itself has produced. Labelling Laetrile as ineffective is not sufficient because many people are aware that this is the considered scientific assessment but they are so desperate that they will grab at any straw. They are, that is, incapable here of making a rational decision. They are in reality over these matters mentally incapacitated and the FDA, it is argued, must act in these matters paternalistically to protect them from themselves. Hence the FDA ban on Laetrile.

Again is this a justified paternalism? Where the decision to use the drug rather than use other therapies is substantially impaired so that there is really mental incompetency then the paternalistic prohibition of the drug is justified along the lines we have taken concerning previous cases. But this would hardly be the typical case. To overrule autonomous decision making where only one's own good is at issue cannot be justified. Such paternalism is never justified. This is the heart of the anti-paternalist case. However, where the mental incapacitation is very deep there can be no autonomous choice but mental impairment admits of degrees and it is *not* very likely that most people seeking to use Laetrile are so incapacitated that they

cannot make choices with any degree of autonomy, so while the ban on Laetrile may be justified on some other grounds it is not justified on paternalistic grounds. After all, desperate people wishing to try Laetrile are not like deranged persons seeking to cut out their tongues, particularly where they will try other more standard therapies as well, the banning of Laetrile is grossly unjustified.⁷ I shall give three more cases. The first two seem to me plainly cases of unjustified paternalism, though they are all cases of medical paternalism that have been practiced by the medical or legal profession. The last case, however, seems to be about as strong a case as can be made for medical paternalism.

The first case is that of a magistrate ordering involuntary psychosurgery for a compulsive gambler and psychopath charged with larceny and misrepresentation. The argument for this was not, as one might expect, a utilitarian one that it was in the best interest of the public, i. e. for their protection but the paternalistic one that it was in the best interests of the criminal patient. It would remove otherwise irreversible health deficiencies, remove extreme risks to him and enhance his range of freedom. But here we have a case of a person's personality being so altered that there is no question of his coming to accept later the paternalist action of the doctor. No doubt he would accept it, after psycho-surgery, but the person accepting it is then such a different person that it no longer makes sense to speak of the criminal/patient's consequent consent. Such deep personality alterations through surgical intervention are, to put it conservatively, deeply suspect morally; they are a very deep assault on the person's autonomy and indeed on his very person. Our sense of the importance of respect for persons forbids it. Keep him in jail for our common protection; employ, if it will do any good, more conventional psychotherapy that will not so deeply alter

who he is and will work in such a way that what alterations there are will be rooted in his understanding of himself and in that fundamental way will be cognitive. But do not use such psycho-surgery for his own good—a surgery which would radically alter who he is.

To this it might be replied: 'When you really consider *who* he is, concretely and non-evasively, you will sing another song. After all he is a compulsive gambler and psychopath who has engaged in larceny and misrepresentation.' Those are indeed bad things that the public must be protected from and it would be good if we can, by legitimate means, correct his behaviour. But there are other ways of protecting the public and no such deep assault on his very person is justified for his own good. Such paternalism, though in fact practiced, is not morally acceptable.

The second example of what is sometimes taken to be justified paternalism is the modifying of children's behaviour by the use of amphetamines for hyperkinetic children. This will indeed quiet them down at home and in school. But it is, I think, just a considerably less drastic assault on their person than the assault we had in the previous case. For convenience at home or in school, or even for their own good, such interventions are not justified.

Now, as my last case, I want to consider, what seems to me, the strongest kind of case for a justified paternalism—namely a drug control case. I have in mind here the preventing of someone under the influence of LSD from self-inflicted death. Here such paternalistic intervention is justified. But it is important to see what the justification would consist in. If under the influence of LSD someone suddenly wanted to kill himself—particularly if he had exhibited no suicidal tendencies before, then that would be very good evidence indeed that he was temporarily mentally

incapacitated, indeed severely incapacitated. The reasonable assumption would be that when he came out of the influence of LSD he would be grateful for the paternalistic intervention. It would be something he would choose to have done to him under such circumstances when a cool hour returned and he could rationally deliberate. It is not even remotely a question of overriding his rational autonomy. By contrast with the compulsive gambler-psychopath case, the person wanting to kill himself under the influence of LSD does not have his person assaulted for his own good. Rather than being like the gambler-psychopath case, it is more like the taking of the automobile keys of a very drunk person who wants to drive. On formulation B it is not even paternalism, but, paternalism or not, it is something we are justified in doing.

IV

Reflecting back on all these cases together, I want now to make some generalizations about paternalism. I think these cases provide us with at least the beginning of a justification for believing that paternalism, where adult persons or near adult persons are involved, is only justified when such a person is so deeply mentally incapacitated that he no longer has any control over his life and any conception of how he should live his life. This has two forms, temporary incapacitation and life long incapacitation. (There are, of course, all sorts of in between cases.) Where the incapacitation is life-long, and severe, paternalism is justified. It is analogous to the treatment of a child or perhaps even an infant or an animal. (Consider, for example, how you might correctly and humanely train a German Shepherd. Permissiveness will hardly do the dog a service.) People so severely incapacitated are not capable of acting autonomously, so no question arises of overriding their autonomy. Someone has to act for them and so paternalism is justified. The other form is where a person, capable of some autonomy at least, is

temporarily incapacitated as a drunken person or a person under the influence of LSD. Where that is the case, there again can be a presumption in favour of paternalism, but it is only a presumption. The presumption is this. When the person temporarily incapacitated regains control of himself, overcomes his mental incapacity, he will approve of the paternalistic control for his own good during those times when he was incapacitated. What is done for him is what he would do for himself if at the time he would have acted as an autonomous agent. The thing is we are never justified in overriding the autonomous choices of a person *for her own good*. There may be other reasons for overriding them but never, in such circumstances, *paternalistic* reasons. So paternalistic acts are only justified if the person to whom they are directed is deeply mentally incapacitated throughout her life or for a considerable section of her life or where she is temporarily incapacitated and there is a reasonable presumption that when she recovers from that incapacitation she will approve of the paternalistic act.

That I use phrases like 'deeply mentally incapacitated' indicates that there is a certain indeterminacy in application here. How deeply must a person be incapacitated before we should say that he has no reasonable control over his life and someone must act for him? There will be no agreement about the boundaries here and reasonable people will continue to disagree about difficult cases even after philosophical clarification. Conceptual analysis can only carry us so far. But there will also be wide agreement about clear cases and, working from these clear cases, we can refine somewhat our criteria, though we should not be self-congratulatory about how far this will carry us.

Let us finally look at how the formulations differ. Formulation A clearly is the more neutral formulation. It leaves more space for justified paternalism. If, however, I have been near to the

mark in my arguments, we are only justified in restricting a person's freedom for his own good or not informing him, where it normally would be our business to do so, for his own good or misinforming him for his own good, when he is mentally incapacitated in the several ways we have described. Formulation A makes no such limitation about 'mental incapacitation' and so would allow a lot of paternalism which is not justified but it will also allow some which is justified. It would, that is, allow as justified paternalism, in the sense of 'paternalism' specified by formulation A, paternalistic acts done even when the conditions for justification specified above obtain.

Formulation B, if my arguments have been correct, does not allow of any instances of justified paternalism. For it talks of coercing the behaviour for their own good of mentally competent adults even when paternalists act for them in ways that they, even when were fully informed and in control of themselves, would *not* have approved. If my arguments have been correct, we are never justified in acting paternalistically in this strong sense, though we can, of course, act coercively against such individuals to prevent harm to others. But so acting has nothing to do with paternalism. (If in formulation B I had added 'even' before for a mentally competent adult, there could be justified cases of paternalism, namely paternalistic acts toward children and the mentally incompetent. Clearly those acts in certain circumstances are justified. On formulation B they would not count as paternalistic. If that is deemed too paradoxical, add 'even' to the formulation. This will rid the formulation of paradox and allow that there are some justified paternalistic acts, though they will never be to mentally competent adults or near adults.)

Nothing of substance turns on whether we adopt formulation A or formulation B. The same acts remain unjustified and the

same acts justified no matter which formulation we adopt. The only question that remains is whether certain justified acts should be called paternalistic acts. The issue here is the issue of which is the least misleading nomenclature. Once we are aware of that, we will see that nothing substantial turns on which characterization of paternalism we use. Formulation A leaves room for justified paternalism and formulation B does not, but formulation B, as I have remarked, brings out clearly, in a phrase or so, what is so objectionable about paternalism. What is so objectionable is the determining for a mentally competent adult or near adult what she should do or how she should act or should live her life, quite against her reflective and informed choices, where only her life is effected. If we have respect for persons—something essential for moral agency—we will not so relate to others.⁸ No such persons should have what is only their own good determined by others. That there is so very seldom *only* their own good involved attests to the limited scope of liberalism without denying the moral insight underlying liberalism. Moreover, this has nothing at all to do with bourgeois individualism.

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NOTES

1. Allen Buchanan, "Medical Paternalism", *Philosophy and Public Affairs*, Vol 7, No. 1 (Fall 1978), p. 372.
2. That even such acts can have, under very special circumstances, an intelligible rationale is well exemplified in the Argentinian film *Time for Revenge*.
3. Charles M. Calver and Bernard Gert, "Paternalistic Behavior" *Philosophy and Public Affairs*, Vol. 6, (Fall 1976). p 46.
4. *Ibid* , p. 54.
5. We need to be careful of the application of this. They must really be severely mentally retarded. If our criteria for being able to make reflective and informed choices is too high, we will paternalistically act against many people who should not be so treated.
6. Daniel Wikler, "Paternalism and the Mildly Retarded," *Philosophy and Public Affairs*, Vol. 8, No. (Summer 1979), pp. 377-89.
7. The more dicey circumstance is the situation where they will not try the other therapies at all but go straight for the Laetrile. Were it only an individual's own fate that was involved we should, after remonstrating with him, let him go his own way, but if that very likely would not be the case and it might spur many others to similar behavior and people would die of cancer where they could be cured, then the situation is rather different. If anything like that is the case, we have good grounds for banning Laetrile of the standard harm to others sort. The justification for banning, however, would not be paternalistic. I do not want to say that the FDA has such a justification here but only that if they do that still the justification would not be a paternalistic one and it would be a justification that a consistent anti-paternalist could readily accept.
8. This is vividly illustrated in Nils Malmros's film *Beauty and the Beast*.

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