

Paternalism and Political Philosophy: Libertarian Perspectives

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Note on Contributor: Peter Vallentyne is Florence G. Kline Professor of Philosophy at the University of Missouri, U.S.A. He writes on issues of liberty and equality in the theory of justice (and left-libertarianism in particular) and, more recently on enforcement rights (rights to protect primary rights).

Libertarianism is a natural-rights theory that holds that: (1) each agent initially fully owns herself, and (2) each agent has certain moral powers to acquire property rights in external things. The rights are typically understood as choice-protecting in the sense that rights are infringed when intruded upon *without the valid consent* of the rightholder. Thus, paternalistic actions that intrude upon the rights of an agent without her consent wrong her. This seems correct to me in cases where communication about consent with the rightholder is reasonably possible. Where, however, such communication is not reasonably possible, paternalistic intrusion without valid consent does not, I claim, always wrong the agent.

This chapter is nominally on paternalism from a libertarian perspective, but most of what I have to say applies (as explained below) to all choice-protecting rights theories. My claim is that standard accounts are mistaken to hold that (e.g., paternalistic) actions that intrudes upon a person's rights *without her consent* always wrong her. Libertarianism, and other rights-theories,

should instead endorse a *choice-prioritizing* theory (sketched below) that gives requires actual valid consent, when communication about consent/dissent is possible, but is sensitive to both hypothetical consent/dissent and the rightholder's interests, when communication is not possible.

1. Libertarianism and Wronging

An individual is *psychologically autonomous* (hereafter: autonomous) just in case (roughly) she has a sufficiently good capacity for rational reflection and revision of her beliefs, desires, and intentions. *Libertarianism* holds that each autonomous agent initially fully owns herself and has certain moral powers to acquire private property in external resources (see, e.g., Vallentyne 2000 and Vallentyne and van der Vossen 2014). The details won't matter here. The crucial point is that each autonomous agent has some rights and thus can be wronged.

An individual is *wronged* when and only when her rights are infringed.¹ Conceptually, it can be permissible to wrong someone when there is an overriding justification (e.g., shooting someone in the leg when this is the only way to avoid a social catastrophe). If there is no overriding justification, however, it is wrong to wrong someone.

Libertarians tend to hold that rights are absolute (always conclusive). Thus, they tend to hold that it is always wrong to infringe a person's rights (since they deny that there are any overriding justifications). Other rights-based theories, however, can allow that rights are merely strong pro tanto considerations, which can be overridden by significant benefits of the right kind. In what follows, I shall leave open whether rights are absolute. My topic concerns the conditions under which paternalism *wrongs the beneficiary*, not the question of when such actions are wrong (impermissible).

I shall assume that we have some (e.g., libertarian) rights and investigate the conditions

under which an *intrusion* (defined below) upon a person's rights *infringes* her rights in the sense she is *wronged* by the intrusion. If she is wronged, then the infringer owes her some kind of rectification (apology, compensation, etc.). I shall argue that the most plausible understanding of rights (in general, and for libertarianism) is such that, although many paternalistic acts do wrong the affected individual, many such acts that seem to wrong the rightholder do not in fact wrong her.

Paternalism is often defined as actions, motivated or justified by promotion of a person's good or wellbeing, that interfere with her, or limit her liberty or autonomy, against her will. From a libertarian perspective, however, whether a person is wronged does not depend on the agent's motives and intentions. It depends only on whether its causal impact infringes the person's rights. We shall therefore not address the notions of motivation, intention, interference, liberty, or autonomy. We shall focus solely on the question of when a rights intrusion (defined below) infringes rights (wronges the rightholder). This will implicitly cover all cases of paternalist rights-intrusions however paternalism is understood. We won't address cases of paternalistic actions that do not infringe rights, since libertarianism does not judge such actions to be wrongful.

2. Rights: Choice-Protecting and Interest-Protecting

Libertarians tend to assume that rights are *choice-protecting* in the sense that one's right that someone not perform some action (e.g., poke a needle into one's body) is *not* infringed when done with one's *valid consent*. Thus, one is not wronged when the doctor gives one a vaccination with one's valid consent.²

There are many important questions about the nature of the relevant *consent*. Is it merely a mental act, which need not be publically expressed? If it is a public act, does there need to be

uptake by the agent (or at least someone) in the sense that the consent is successfully communicated to the agent? I shall leave these issues open.

Whatever consent is, what is required for consent to be *valid*? Roughly speaking, the consent must be autonomous and suitably free and informed, but there are competing accounts of what this requires. Almost everyone agrees, however, that the validity of consent is undermined by lack of autonomy (e.g., as with young children and severely cognitively impaired people), by credible threats to wrongfully harm someone that one cares about if one does not consent (consent is not suitably free), and by intentional misrepresentation of significant facts that are relevant for consent (e.g., fraud). Many other factors may undermine the validity, but I shall not attempt to resolve this issue here. Instead, I shall simply appeal to the correct account of validity for consent (and dissent), whatever that is.³

Roughly speaking, choice-protecting rights make sense for agents that are psychologically autonomous (i.e., that can rationally reflect upon, and revise, their beliefs, desires, and intentions.) Their consent, when suitably free and informed, reflects the exercise of their autonomy. For individuals who are not psychologically autonomous, however, it makes little sense to have constraints protecting their choices (in any robust way). Choice-protecting theorists often hold that such beings (e.g., young children) do not have rights, on the ground that rights (conceptually) *must* be choice-protecting. This seems quite mistaken. Rights can also protect individuals by *protecting their interests*.⁴ Indeed, young children have such rights.

There are different ways that rights might protect interests, but the most direct, and most promising (I think), is for interests to play the same role that valid consent plays for standard choice-protecting rights. On this *directly interest-protecting* conception of rights, one's right that someone not perform some action-type (e.g., poke a needle into one's body) is infringed when

and only when an action of that type is *against one's best interests*.⁵ Thus, a child with the right not to have needles poked into her body is not wronged when the doctor gives her a vaccination, without her consent, and it is in her best interests. (Of course, parental consent may be required, but, if so, the parents, but not the child, are wronged when the vaccination is given without their consent.)

It's important to note here that directly interest-protecting rights do *not* give the right-holder a claim against *all actions* that are against her best interests. It is rather that individuals have claim-rights against certain independently specified action-types (e.g., that others not use their bodies; e.g., by poking needles in them). The question concerns when such rights are infringed (e.g., not when valid consent is given). This requires both that the action be of a type protected by rights (a rights intrusion) and that the intrusion be against the rightholder's best interests (just as on a standard choice-protecting theory it requires both that the action be of the specified type and that it be without the valid consent of the rightholder).

In order to develop the interest-protecting account, let us say that an autonomous action *intrudes* upon someone's rights when it would wrong the person, if there were no *authorization* by the rightholder for the action. Intrusions can thus be wrongful (when there is no authorization) or rightful (i.e., no wronging or infringement, when there is authorization). Let us understand authorization to require valid consent for choice-protecting rights and to require not being against the right-holder's best interest (as clarified below) for interest-protecting rights. Thus, authorization is here understood broadly in the sense that it can be generated by a person's interests and not merely by expressions of her will.

There are many important issues concerning the relevant conception of interests for the most plausible version of a directly interest-protecting conception of rights. I find it plausible

that the relevant interests typically include (1) more than a concern for one's own wellbeing (e.g., a parents' interests include their wellbeing the wellbeing of their children), and (2) for autonomous agents, an interest in being in control of ones' life (and not merely in what happens to one) and in being recognized and respected as an autonomous agent.⁶ I do not, however, assume this in what follows.

Even if we fix upon a specific understanding of interests, there are important issues about what is required to be *in* someone's interest. I believe that the best understanding for directly interest-protecting rights is (1) based on the *objective* facts, and not on what the agent believes or reasonably should believe given her evidence, and (2) based on (objective) *probabilities* of the various possible consequences of the action (where, if determinism is true, all probabilities are 0 or 1). Thus, I assume that an individual can be mistaken about what is in her interests. A similar account can, however, be provided in terms of what the agent's evidence supports, or, less plausibly, in terms of the agent's beliefs.

Let us say that an agent's intrusion is *in the rightholder's best interests* (relative to the agent's feasible options that wrong no one else) when and only when the intrusion has an objective expected value (based on objective chances and the agent's interests) that is: (1) greater than the expected value, if the agent does not intrude upon the rights of the rightholder, and (2) such that no alternative *intrusive action* by the agent (a) is no worse for the agent (in terms of expected value for his interests), (b) wrongs no one else, and (c) has a higher expected value for the rightholder. The first condition requires that the intrusion be (objectively) in the rightholder's interest (better than non-intrusion). The second condition requires that it be in her "best" interests in the sense that no alternative intrusion by the agent is better for the rightholder, without being worse for the agent or wronging others. My intrusively saving your (positive value) life, in a

particular way, at the cost of your losing a hand, is in your best interest, if (1) you will die, if I do not intrude upon your rights, and (2) I have no alternative way of intrusively saving your life that (a) wrongs no one else, (b) is at least as valuable for me (e.g., not more costly), and (c) is better for you. If, however, someone else will save you if I don't, with no associated harms, then my saving you (at the cost of your hand) is against your best interest. Or, if I have the alternative of saving your life at the cost of you losing only a finger (rather than your hand), and this would wrong no one, and cost me nothing, then saving you at the cost of your hand is against your best interest (in the stipulated sense).

As a first gloss, then, I claim that psychologically autonomous agents have choice-protecting rights, and non-autonomous individuals with interests have directly interest-protecting rights.

I shall now suggest that, even for autonomous agents, intruding upon their rights for their benefit without their consent does not always wrong them. This will involve a revisionary understanding of rights as (1) giving priority to the protection of autonomous choices, but (2) protecting their interests when they give neither (hypothetical or actual) valid consent nor valid dissent.

3. Choice-Prioritizing Rights

Below, I shall appeal both to consent and to *dissent*. The latter is the expression of the opposition of one's will to an action. Standard choice-protecting theories do not distinguish between the absence of valid consent and the presence of valid dissent, but I shall suggest that the latter has stronger moral force than the former.

There are several kinds of case where it is not reasonably possible to communicate with

the rightholder about current valid consent to an intrusion. Standard (purely) choice-protecting theories hold that, in such case, intrusion without valid consent wrongs the rightholder. I shall argue, however, that such intrusions do not wrong her, when (1) there is a certain kind of *hypothetical consent* from the rightholder, or (2) there is no *hypothetical dissent* and it is *not against her best interests*. I shall do this by claiming that rights are *choice-prioritizing*, where this allows, in certain cases, appeals to both the hypothetical consent/dissent of rightholders and to their interests.

To start, let us consider the case where it is *currently reasonably possible* to communicate with the rightholder about current valid consent to an intrusion. I won't attempt to give a full characterization of this notion, but the following should suffice to give its outlines. First, the issue only concerns the possibility of currently *communicating* a request for consent and of an answer being communicated back. The rightholder's disposition to *grant* consent is irrelevant. Second, the issue concerns communication about *current* (not past) consent/dissent. Third, it is *not* reasonably possible to communicate about valid consent when it is practically impossible. The rightholder may be *non-autonomous* (e.g., unconscious, demented, drunk, or having a panic attack). Or, the rightholder may be autonomous, but it is practically impossible for the agent to communicate with her prior to the intrusion in question (e.g., where there is not enough time). Finally, when practically possible, it is *reasonably possible* to communicate with the rightholder about valid consent when the *costs* of doing so, without acting impermissibly, are not "unreasonable" for either the agent or for the rightholder. I here leave open the important account of what costs are reasonable, except to say that trivial costs are reasonable and enormous costs are not.

I assume, in agreement with the standard choice-protecting theory, that:

Choice-Prioritizing Rights, Version 1: If it is currently reasonably possible to communicate with the rightholder about current valid consent to an intrusion, then the intrusion is authorized by the rightholder if and only if she has given unrevoked valid consent.

In what follows, I shall expand on this condition in ways that entail that an intrusion can be authorized (and thus not wrong the rightholder) both by a certain kind of hypothetical consent and by, in the absence of both hypothetical and actual valid dissent, not being against the rightholder's best interests.⁷

Let us now consider the case where it is *not reasonably possible* to communicate with the rightholder about current valid consent to an intrusion. It may be practically impossible (e.g., the rightholder is unconscious or there is not enough time to communicate) or possible but too costly (e.g., both the agent and rightholder will be seriously harmed if they communicate). To start, let us suppose that the rightholder has neither given *valid consent* to the intrusion, nor given *valid dissent* to the intrusion. A standard choice-protecting conception of rights holds that, if the rightholder is still autonomous, then there is no authorization in the absence of valid consent. This, however, seems mistaken. Suppose that you are about to be hit by a truck, and I have the time to push you out of the way, but not enough time to get your valid consent first. Given that there is no opportunity for consultation, surely, my pushing you out of the way is authorized, and thus does not wrong you.

I (Vallentyne 2007) previously thought that, in such cases, intrusion is authorized if it is not against rightholder's best interests, but I now think that this was a mistake. Consider a temporarily unconscious adult Jehovah's Witness who needs a blood transfusion (which intrudes

upon her rights) to survive, where this is very significantly in her interests. Suppose further that she never gave valid consent or dissent to a blood transfusion. Nonetheless, suppose that, when she was last autonomous (an hour ago, say), she *would have dissented* (i.e., denied permission) to a blood transfusion, if asked for consent—even if she were given all the information available to the agent about the costs and benefits of a blood transfusion (including those of any possible afterlife). This is so, let us suppose, because she is mistaken about what is in her interests (she has mistaken beliefs about the consequences of a blood transfusion, and/or mistaken beliefs about her interests). Is a blood transfusion authorized for her (and thus does not wrong her)? I claim that it is not.

Although below I shall endorse an appeal to a person's best interests under certain conditions, I believe that a certain kind of hypothetical consent/dissent, if present, is *lexically prior* to interest considerations. If it is not reasonably possible to communicate about current valid consent, and there is no prior consent/dissent, then (1) such *hypothetical consent* is sufficient for authorizing an intrusion, even if against the rightholder's interests, and (2) such *hypothetical dissent* is sufficient for the lack of authorization. Let us unpack this idea.

First, the consent/dissent at issue is to *the specific intrusion* by the agent against the rightholder in the actual circumstances (where the rightholder may lack some relevant information). It is not to intrusions of that type in general. Second, although the consent/dissent is hypothetical, it is based on the rightholder's *actual consent/dissent dispositions*, relative to her stable beliefs, values, and disposition to revise beliefs and values in light of information, *when she was last autonomous* (which is the time of the intrusion, if she is currently autonomous).⁸ If the individual was never autonomous, then there is neither hypothetical consent nor hypothetical dissent.⁹ The disposition to consent/dissent is based on her beliefs and values (as revised in light

of any hypothetically received new information). It is not based on the disposition to consent/dissent of people in general, or of some highly idealized version of the rightholder. Moreover, her beliefs and values may be mistaken, and her values need not be limited to her wellbeing. Third, the only idealizations involved are something like the following: (1) The rightholder is informed of (but need not accept) the beliefs of the intruding agent (and those with whom he coordinates for the intrusion) about the extent to which the intrusion is in her interests, as well as his supporting beliefs, and (2) the manner in which new information is presented, and the conditions for reflection and revision, are adequate for rational assessment of the issue and for any consent/dissent to be valid. With respect to new information, the rightholder may deem it irrelevant, accord it minor weight, or take it very seriously. This is determined by her prior beliefs, values, and disposition for reflecting upon and revising belief, values, and intentions.¹⁰

I do not assume that the individual would either consent to a given intrusion or dissent to it. It may be that, even if the individual has perfectly coherent beliefs and values, she might consent and she might dissent (e.g., depending on different adequate ways that information is presented or different adequate conditions for assessment). Also possible is that she would withhold both. In these cases, hypothetical consent/dissent does no work.

A significant problem arises given that people's beliefs and basic (belief-independent) values can be (are!) incoherent. This is indeed a problem, and I shall simply assume that there are admissible ways of cleaning them up to be coherent. Hypothetical consent (or dissent) holds, I stipulate, when and only when, relative to *all* admissible ways of cleaning them up, the individual *would* consent (or: dissent) to the intrusion. Thus, if, on some admissible clean-up, the rightholder might not consent, and on some other admissible clean-up, the rightholder might not dissent, then hypothetical consent and dissent will be empty and play no role in that case. It may

turn out, of course, that hypothetical consent/dissent will always be empty. I will proceed, however, on the optimistic assumption that at least sometimes they are not empty.¹¹

Let us pause to be explicit about the relation between wellbeing, interests, values, and hypothetical consent/dissent. A person's *interests* (as I use the term) are determined by the facts relative to what she *has reason to value*. They almost always include her *wellbeing* (what makes her life go well for her) but almost always include more (e.g., the wellbeing of her children). A person's *values* need not be identical with what she has reason to value (due to ignorance or failure of rationality). She may value some things that she has no reason to value and may fail to value some things that she has reason to value. Hypothetical consent (as understood here), like actual consent, is based on the individual's hypothetically revised beliefs and values, not on her interests (about which she may be partly ignorant/mistaken) or merely her wellbeing.

The relevant notion of hypothetical consent/dissent will, no doubt, need to be fine-tuned, but the above should be enough to make the basic idea clear.¹²

Consider then:

Choice-Prioritizing Rights, Version 2: (1) If it is *currently reasonably possible* to communicate with the rightholder about current valid consent to an intrusion, then the intrusion is authorized by the rightholder if and only if she has given unrevoked valid consent. (2) If it is *not currently reasonably possible* to communicate with the rightholder about current valid consent/dissent to an intrusion, *and the rightholder has given neither valid consent, nor valid dissent*, to the intrusion, then the intrusion is authorized if and only if (a) she hypothetically consents, or (b) she does not hypothetically dissent and the intrusion is not against her best interests.

This prioritizes consent over interests in two ways. First, where communication about current valid consent is reasonably possible, it is required for authorization. Second, where such communication is not reasonably possible, in the absence of actual valid dissent, hypothetical consent authorizes (even when against the rightholder's interests) and interests authorize only in the absence of hypothetical dissent.

There is one final case that we have not yet addressed. Suppose that the rightholder has given valid consent, or valid dissent, to the intrusion, but the agent has new information about the impact of intrusion, and it is not reasonably possible to elicit a reassessment by the rightholder. A standard choice-protecting conception of rights views current valid consent/dissent as dispositive of authorization, even in such cases. This seems implausible. For example, suppose that you have given valid consent to a routine operation, but after you have been given general anesthesia, the doctor discovers that you have a special condition that makes it very likely that you will die. Suppose that you would dissent from the operation, if you were given the new information. Surely, the doctor would wrong you, if he performs the operation. Respect for the rightholder's will, I claim, requires being sensitive to her consent/dissent in light of any new relevant information possessed by the agent. More exactly, hypothetical consent (or dissent) can sometimes *override* actual valid dissent (or consent), and not merely sometimes *fill in* in their absence.¹³

Consider then:

Choice-Prioritizing Rights, Final Version: (1) If it is *currently reasonably possible* to communicate with the rightholder about current valid consent to an intrusion, then the intrusion is authorized by the rightholder if and only if she has given unrevoked valid consent. (2) If it is

not currently reasonably possible to communicate with the rightholder about current valid consent/dissent to an intrusion, then the intrusion is authorized if and only if (a) she hypothetically consents (even if she validly dissented in the past), or (b) she does not hypothetically dissent, has not given unrevoked valid dissent, and the intrusion is not against her best interests.

This is the view that I wish to defend. It holds that actual consent is necessary and sufficient for authorization when it is reasonably possible to communicate with the rightholder about current valid consent. If it is not reasonably possible, then hypothetical consent or being in the rightholder's interest in the absence of both hypothetical dissent and actual valid dissent is necessary and sufficient for authorization. Interests, that is, determine authorization only where current actual consent is not reasonably possible, there is no hypothetical consent or dissent, and there is no actual valid consent or dissent.¹⁴ For beings that were never autonomous prior to the intrusion, the appeals to actual and hypothetical consent/dissent are irrelevant, and their interests are the only factor for authorization.

It's important to keep in mind that the relevance of hypothetical consent/dissent, like that of actual consent/dissent, applies only where one still possesses the right that is being intruded upon. If one has contractually transferred it to someone else (e.g., irrevocably transferred decision-making powers to another person for this decision), or forfeited it due to wrongful behavior, then one's will is no longer relevant. Just as one's past and present actual consent/dissent (e.g., to a specific action/procedure) are irrelevant, so too are one's hypothetical consent/dissent.

4. A Partial Defense

The above account appeals to hypothetical consent/dissent, *when last autonomous*, and this temporal specification might be challenged in several ways: (1) If the person has been non-autonomous for a long time, why not just appeal to interests? (2) If the person has degenerated from highly autonomous to non-autonomous, why not appeal to the last time she was at *her highest attained level* of autonomy? (3) If the person will regain autonomy, why not appeal to when she is *next* autonomous? The basic answer to each of these questions is the same: authorization by hypothetical consent is sensitive to time in the same way that authorization by actual consent is. As long the current person is the same person (in the morally relevant sense) as the past person, then: (1) The will of the past person takes precedence over the interests of the current person (e.g., your consent prior to the general anesthesia makes any appeal to your interests irrelevant). (2) The most recent expression of (revocable) valid autonomous consent/dissent takes precedence over earlier expressions, even if the rightholder was more autonomous at the earlier time. (3) Future consent (after the fact) does not authorize intrusion. The above account, I claim, rightly gives hypothetical consent the same priority to the most recent past.

The authorization conditions that I have articulated are in rough (see below) agreement with standard practice for informed consent and surrogate decision-making: One appeals to valid advance directives, when they exist. When they do not exist, and it is not possible to consult with the rightholder, one appeals to the substituted judgment standard (roughly hypothetical consent/dissent). If that is indeterminate, then one appeals to the best interest standard.¹⁵

There is, however, one possible difference. Hypothetical consent/dissent can, I claim, *override* actual valid consent/dissent. Where communication is not reasonably possible, and the

agent has crucial information not had by the rightholder, then, I claim, hypothetical consent/dissent (as characterized above) *better represents the autonomous will* of the rightholder than the less well informed actual valid consent/dissent, or absence thereof. Above, I gave the example of valid consent to an operation being overridden by hypothetical dissent in light of new information. Here is a second example. Suppose that you have *validly dissented* from my interfering with your smoking cigarettes but that I now have information, not reasonably communicable to you, that the cigarette that you are about to smoke has been laced with poison. Suppose that, if you were made aware of the information of lacing, you would consent to this particular interference. Your will, I claim, is best protected by my physically stopping you from smoking that particular cigarette.

The choice-prioritizing account implies something even more radical: where there is no reasonable opportunity to communicate, prior valid consent/dissent can be overridden by hypothetical dissent/consent, *even when there is no new information*. This can arise when valid consent/dissent is given, and the rightholder later changes her beliefs, values, or disposition to consent/dissent, without revoking her consent/dissent. This is a controversial implication, but space limitations prevent me from discussing this further. The important point to keep in mind is that such overridings occur only when it is not reasonably possible to communicate with the rightholder.

As a practical matter, we should normally judge actual consent/dissent to be overridden by hypothetical dissent/consent only when we have strong evidence for the hypothetical consent/dissent. Thus, in practice, it may be relatively rare for the evidence to favor such overridings. Nonetheless, I believe that, when there is no reasonable opportunity for current valid consent/dissent, the most plausible conception of rights will hold that hypothetical

consent/dissent overrides past valid dissent/consent.

Let us now consider an objection to combining choice-protection with interest-protection, and prioritizing the former. For simplicity, I here set aside hypothetical consent. For such theories, for autonomous agents, the will, when not silent, determines whether there is authorization for an intrusion, no matter how great the interest-benefit of the intrusion. For an individual who is *slightly below* the threshold for autonomy, however, her interests determine whether there is authorization for an intrusion, even when they are only trivially affected. This seems quite implausible (see, e.g., Scoccia 2013: 89 and Grill 2010: 14-18).

For conceptions of rights, such as the choice-prioritizing conception, that are sensitive to both choice-protection and interest-protection, this problem can be solved by holding that, for levels of autonomy below the threshold required for full choice protection, the more autonomy that is present, the greater the role for the will. There are, of course, many ways that this might be so, and the following is merely an illustration of one relatively plausible way. For a given degree of autonomy, there may be a maximal setback to interests, relative to what is best for interests, over which the will has the authority. (The setback to interests will include any benefits of learning from the experience.) For individuals with no autonomy, the maximal setback may be zero. Only their interests matter. For individuals who are above the relevant threshold of autonomy, the maximal setback over which the will has authority may be infinite. (Alternatively, the threshold can be dropped and authority will be infinite only for “perfect” autonomy.) Their wills have priority. In between, the maximal setback increases as the individual’s autonomy increases. The wills of young children may typically have authority over the color of their socks but not over whether to cross a busy street.¹⁶ In short, an adequate theory of authorization will include some account of how the authority of the will grows as the rightholder’s autonomy

grows. Indeed, it will also include an account of the how the authority of the will shrinks as the rightholder's autonomy shrinks (e.g., in cases of dementia).

Obviously, a full defense needs to address many other issues. I hope that the above is enough to provide some motivation for the account.

Let us now consider whether this choice-prioritizing account is compatible with libertarianism.

5. Libertarianism and Choice-Prioritizing Rights

Steve Wall (2009) has argued that libertarianism's endorsement of full self-ownership has very implausible implications for paternalism. Because the rights of *full* self-ownership are the strongest possible rights of self-ownership (e.g., rights to one's body), they are unconditional in application (apply under all conditions) and are absolute in force (always impermissible to infringe). Thus, the right not to have one's body touched holds no matter how great the benefits to the rightholder of being touched, and it is impermissible to infringe the right even when it greatly benefits the rightholder. I agree that these are problematic implications of libertarianism. On the choice-prioritizing view, however, the implications are much less problematic than on the standard choice-protecting view. Let me explain.

Rights of full self-ownership *apply unconditionally*, but this does not establish that it always wrongs the rightholder to intrude upon her rights, without her valid consent, in order to advance her interests. This is so on a purely choice-protecting conception, but not on the choice-prioritizing conception. On the latter view, protecting the interests of a rightholder can authorize an intrusion, when it is not reasonably possible to communicate about consent, and there is no hypothetical or actual valid dissent.

This leaves, however, one key objection from Wall (2009: 404). It may seem that *full* self-ownership leaves no room at all for interest-protection. Giving any role to interest-protection weakens the role of choice-protection, and that, it may seem, is incompatible with *full* self-ownership (the strongest set of rights over one's person). That, however, is a mistake. Full self-ownership is comprehensive in scope (includes all rights of self-ownership), unconditional in application, absolute in moral force, and with the strongest possible authorization conditions. The authorization conditions, however, have several relevant dimensions, and hence, as I now explain, there are several ways of being the strongest authorization condition.

Authorization conditions are stronger (1) when they provide a greater role (as sufficient conditions or as necessary conditions) to the rightholder's valid will (consent or dissent) and no lesser role for her interests, and (2) when they provide a greater role to the rightholder's interests and no lesser role for her valid will.¹⁷ Having no authorization conditions is not maximally strong, since introducing either choice-protecting authorization conditions, or interest-protecting authorization conditions, would be stronger. A purely choice-protecting conception of self-ownership is indeed maximally strong, but so is a purely interest-protecting conception. Indeed, any consistent combination of choice-protecting and interest-protecting conditions is maximally strong, as long as it is not possible to strengthen one of them without weakening the other. The choice-prioritizing conception that I have articulated is maximally strong in this sense. It is thus compatible with full self-ownership.

Of course, traditional libertarians will insist that for autonomous agents, rights are purely choice-protecting. If that is so, then full self-ownership must be purely choice-protecting. I agree that this is how full self-ownership is normally understood. My claim is that understanding rights, and full self-ownership in particular, in terms of choice-prioritizing rights is both possible

and more plausible than a purely choice-protecting account.

6. Conclusion

I have addressed the issue of when a rights intrusion is authorized and thus does not wrong the rightholder. Even if authorized, an intrusion may be impermissible because it wrongs someone else or impersonally wrong. Even if not authorized, an intrusion may be permissible because there is an overriding justification. I have not addressed these two issues.

I have articulated and partly defended a choice-prioritizing authorization condition. It holds that, when it is reasonably possible to communicate about consent, then valid consent is necessary and sufficient for an authorization. When it is not reasonably possible to communicate about consent, it holds that, hypothetical consent/dissent overrides actual valid dissent/consent and has priority over any appeal to interests. In the absence of hypothetical consent and dissent, and of valid consent and dissent, interests determine whether an intrusion is authorized.

Libertarians tend to endorse purely choice-protecting rights, but, I claim, a choice-prioritizing conception of libertarian rights is possible and indeed more plausible.¹⁸

Related topics: The Concept of Paternalism, Voluntariness, John Stuart Mill, Rights, Autonomy, Formerly Competent Incompetents, Children

References

Brock, D. and Buchanan, A.E. (1990) *Deciding for Others: The Ethics of Surrogate Decision-Making*, Cambridge: Cambridge University Press.

Cornell, N. (2015) "Wrongs, Rights, and Third Parties," *Philosophy and Public Affairs* 43: 109-

143.

Dworkin, G. (2014) "Paternalism," *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), Edward N. Zalta (ed.), URL =

<http://plato.stanford.edu/archives/sum2014/entries/paternalism/>>.

Enoch, D. (2017) "Hypothetical Consent and the Value(s) of Autonomy," *Ethics* 128: 6-36.

Feinberg, J. (1986) *Harm to self*, Oxford, Oxford University Press.

Grill, K. (2010) "Anti-paternalism and Invalidation of Reasons," *Public Reason* 2: 3-20.

Grill, K. (2015) "Respect for What? Choice, Actual Preferences, and True Preferences," *Social Theory and Practice* 41: 692-715.

Groll, D. (2015) "Medicine and Wellbeing" Guy Fletcher (ed.), *The Routledge Handbook of Philosophy of Well-Being*, New York, Routledge, pp 504-16.

Jaworska, A. (2009) "Advance Directives and Substitute Decision-Making", *The Stanford Encyclopedia of Philosophy* (Summer 2009 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2009/entries/advance-directives/>>.

Kramer, M.H., N.E. Simmonds, and H. Steiner (1998) *A Debate over Rights*, Oxford, Oxford University Press.

Kuflik, A. (2010) "Hypothetical Consent" in C. Coons and M. Weber (eds.), *Paternalism: Theory and Practice*, Cambridge: Cambridge University Press, pp. 131-62.

Scoccia, D. (2013) "The Right to Autonomy and the Justification of Hard Paternalism" in C. Coons and M. Weber (eds.), *Paternalism: Theory and Practice*, Cambridge: Cambridge University Press, pp. 74-92.

Vallentyne, P. (2000) "Left-Libertarianism: A Primer," in P. Vallentyne and H. Steiner (eds.) *Left Libertarianism and Its Critics: The Contemporary Debate*, New York, Palgrave

Publishers Ltd., pp. 1-20.

Vallentyne, P. (2007) "Libertarianism and the State," *Social Philosophy and Policy* 24: 187-205.

Vallentyne P. and B. van der Vossen (2014) "Libertarianism," in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, URL =

<<http://plato.stanford.edu/archives/fall2014/entries/libertarianism/>>.

VanDeVeer, D. (1986) *Paternalistic Interference*, Princeton, Princeton University Press.

Wall, S. (2009) "Self-Ownership and Paternalism," *The Journal of Political Philosophy* 17: 399
417.

Zimmerman, M.J. (2008) *Living with Uncertainty: The Moral Significance of Ignorance*,
Cambridge: Cambridge University Press.

Further Reading (on paternalism generally):

De Marneffe, P. (2006) "Avoiding paternalism," *Philosophy and Public Affairs* 34: 68-94.

(Argues that paternalism is not always disrespectful or wrong.)

Husak, D.N. (1981) "Paternalism and autonomy," *Philosophy and Public Affairs* 10: 27-46.

(Argues that paternalism is not incompatible with respect of autonomy.)

Mill, J.S. (1859) *On Liberty*, in J. Gray (ed.) *On Liberty and Other Essays*, Oxford, Oxford

University Press, 1991. (The classic anti-hard-paternalism statement.)

Shiffrin, S. (2000) "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy*

& Public Affairs 29: 205–250. (Analyzes the nature of paternalism and argues that the unconscionability doctrine in contract law need not involve paternalism.)

¹ Cornell (2015) argues that one can be wronged without having a right infringed, but I here

equate wronging with right-infringing.

² Of course, if past valid consent can make an intrusion rightful, this must be because the consenting person has rights over the later person whose rights are intruded upon (e.g., because she is the same person). The conditions under which this is so are, of course, controversial, and I shall simply assume that they hold in the cases that we discuss.

³ For superb discussions of what is required for valid consent, see VanDeVeer (1986: 45-58 and Feinberg (1986: 113-24 and chs. 22-26). An important issue that I will not address is whether (as I believe) non-revocable consent (as in the case of Odysseus) can be valid. For excellent discussion, see VanDeVeer (1986: 294-301 and Feinberg (1986): 68-87.

⁴ For excellent discussion of choice-protecting versus interest-protecting rights, see Kramer, Simmonds, and Steiner (1998).

⁵ A slightly more demanding account holds that a right is not infringed when and only when the intrusion is in the rightholder's best interests (cf. not against them).

⁶ For further discussion of this issue, see Feinberg (1986: 57- 62) and Dworkin (2014).

⁷ Throughout, we focus on consent and dissent in *revocably* authorizing an intrusion of a right currently possessed by the rightholder. Consent can also authorize *transfers* of rights to others (as when one sells or rents a car). When this is so, the transferor's consent/dissent ceases (at least temporarily) to be relevant to whether the right is intruded upon.

⁸ I appeal to the dispositions of the rightholder when *last* autonomous, rather than those she would have *if she were now autonomous*, because the latter might involve significant changes in the person's dispositions (e.g., the only way of restoring autonomy is an operation that radically alters her values and beliefs).

⁹ See the insightful Kuflik (2010), who also rejects the appeal to hypothetical consent for beings

that have never been autonomous. He also appeals to interests.

¹⁰ For a contrasting view, see Enoch (2017), who allows all information about all facts compatible with the rightholder's deep commitments.

¹¹ See Grill (2015) for insightful discussion of cleaning up incoherent preferences.

¹² For related appeals to hypothetical consent, see Feinberg (1986: 173-88), VanDeVeer (1986: 75-81), Grill (2015), and Scoccia (2013). Unlike those accounts, I explicitly appeal to both hypothetical consent and hypothetical *dissent*. Like Scoccia (and perhaps Grill), I focus on when an intrusion is authorized (does not wrong the rightholder) as opposed to it being permissible (e.g., VanDeVeer). I follow Feinberg (1986: 324), but not the others, in (1) limiting the appeal to hypothetical consent/dissent to cases where it is not reasonably possible to communicate about current valid consent, and (2) appealing to the rightholder's disposition to consent/dissent when she was *last* autonomous, rather than to her hypothetical disposition if her "capacities for deliberation and choice were not substantially impaired". Scoccia (2013), and perhaps others, limits the relevant information to empirical information, whereas I would also allow evidence about anything, including the supernatural (e.g., God) and values.

¹³ Scoccia (2013: 83) and VanDeVeer (1986:88) hold that hypothetical consent and actual valid consent are each sufficient. They thus leave no room for hypothetical dissent overriding valid consent, or hypothetical consent overriding valid dissent. Feinberg (1986: 181) seems to allow that hypothetical consent/dissent could override actual dissent/consent, but he holds that, as an epistemic matter, actual dissent/consent is non-overridable evidence of hypothetical dissent/consent. Grill (2015: 712) allows that actual consent can sometimes (e.g., if given under pressure) be overridden by hypothetical consent, but he rejects any priority rules.

¹⁴ VanDeVeer (1986), Scoccia (2013), and Grill (2015) make no appeal to interest-protecting

conditions. I follow Feinberg (1986: 324) in holding that they are relevant when neither actual, nor hypothetical, consent/dissent holds.

¹⁵ I thank Daniel Groll for bringing to my attention the standard practice for informed consent and surrogate decision-making. For further discussion, see Jaworska (2009), Groll (2015) and Brock and Buchanan (1990, ch. 2).

¹⁶ I here ignore the important possibility that the level of autonomy may be choice-relative. Children may be highly autonomous with respect to choosing sock color but not with respect to choosing whether to cross the highway.

¹⁷ For simplicity, I do not here address hypothetical consent and dissent. This is yet another dimension on which authorizations can be weaker or stronger.

¹⁸ For helpful comments, I thank Kalle Grill, Daniel Groll, Jason Hanna, Joe Mazor, and the audiences of my talks at Hebrew University of Jerusalem, The Institute for Future Studies (Stockholm), and the meeting of the Italian Society for Analytic Philosophy (Pistoia, Italy).