

A THIRD THEORY OF PATERNALISM

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This Article examines the normative significance of paternalism. That an action, a law, or a policy is paternalistic generally counts against it. This Article considers three reasons why this might be so—that is, three theories about what gives paternalism its normative character.

This Article’s claim is that the two most common explanations for paternalism’s negative character are mistaken. The first view, which underlies the recent work by Professors Thaler and Sunstein, maintains that paternalism is negatively charged because it involves coercive interference with people’s choices. This approach proves inadequate, however, because more coercive actions can be a less objectionable form of paternalism, and vice versa. Paternalism’s impermissibility varies independently from its coerciveness. The second common theory of paternalism focuses on the distinctive intention behind paternalistic interference. But this approach is ill suited to explain the normative significance of paternalism because permissibility is not generally dependent on intention.

This Article sketches a third conception of paternalism—one that locates its normative significance in neither coercion nor motive. This approach maintains that paternalism involves expressive content. Paternalism expresses the idea that the actor knows better than the person acted upon; it implies that the other party is not capable of making good judgments for herself. The normative significance of paternalism derives from the typical impermissibility of making such an expression. That is, paternalism is wrong in the same way that an insult is wrong. This understanding of paternalism’s normative significance provides the tools to make the charge of paternalism leveled against some policies intelligible, and conversely to explain why other paternalistic policies are permissible.

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INTRODUCTION

Paternalism is widely understood to have a negative connotation. Proposed laws—on topics ranging from seat belts¹ to sodas² to health insurance³—are frequently criticized on the grounds that they are paternalistic. Those defending criticized laws or policies often respond by developing nonpaternalistic justifications for the proposed policies.⁴ Both sides of the political aisle routinely characterize the other side as paternalistic.⁵ In short, paternalism carries a very negative connotation in legal and public policy discourse.

1. Compulsory seat belt laws are the classic example of paternalistic legislation. For an early discussion of this example, see Gerald Dworkin, *Paternalism*, 56 *MONIST* 64 (1972).

2. Mayor Bloomberg's proposed ban on large soft drinks has been one of several high-profile contexts in which paternalism has been debated recently. *E.g.*, Bettina Elias Siegel, *New York Mayor Bloomberg v Big Soda*, *GUARDIAN* (May 31, 2012, 5:38 PM), <http://www.theguardian.com/commentisfree/2012/may/31/new-york-mayor-bloomberg-v-big-soda> (“[F]orbidding people outright to buy the size of soda they desire strikes me as quite paternalistic and intrusive and . . . likely to fuel resentment.”).

3. The Affordable Care Act's individual mandate and requirements for existing plans have been heavily criticized as paternalism run amok. *E.g.*, Charles Krauthammer, Opinion, *Obamacare Laid Bare*, *WASH. POST*, Nov. 1, 2013, at A19, available at http://www.washingtonpost.com/opinions/charles-krauthammer-obamacare-laid-bare/2013/10/31/d229515a-4254-11e3-a624-41d661b0bb78_story.html (“Beyond mendacity, there is liberal paternalism, of which . . . forced cancellations [of insurance policies] are a classic case. . . . Sure, you freely chose the policy, paid for the policy, renewed the policy, liked the policy. But you're too primitive to know what you need. We do. Your policy is hereby canceled.”).

4. *E.g.*, Simon Rippon, *Imposing Options on People in Poverty: The Harm of a Live Donor Organ Market*, 40 *J. MED. ETHICS* 145 (2014) (developing a nonpaternalistic justification for prohibiting organ sales); Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *PHIL. & PUB. AFF.* 205 (2000) (developing a nonpaternalistic account of the unconscionability doctrine).

5. *See, e.g.*, Jessica Valenti, Editorial, *A War on Women: Latest Paternalistic Efforts to Control Female Sexuality Are Part of a Long Pattern*, *BALT. SUN*, Feb. 29, 2012, at 17A, available at http://articles.baltimoresun.com/2012-02-28/news/bs-ed-war-on-women-20120228_1_democratic-women-republicans-contraception; Meghashyam Mali, *Paul Ryan: Obama Contraception Ruling Reveals 'Paternalistic, Arrogant' Attitude*, *THE HILL* (Feb. 19, 2012, 4:36 PM), <http://thehill.com/policy/healthcare/211579-paul-ryan-obama-contraception-ruling-reveals-paternalistic-arrogant-attitude>.

This Article attempts to answer the question: What's wrong with paternalism? This isn't a rhetorical question meant to prompt reconsideration of whether paternalism is wrong. This Article takes as a starting point the assumption that paternalism is, at least generally, something to be avoided. This is not to say that paternalism is always wrong. But the fact that an action, law, or policy would count as paternalistic is at least a *prima facie* reason against adopting it—if a paternalistic action, law, or policy is permissible, it is permissible only in spite of its paternalism. The aim of this Article is to explore why paternalism is, in general, a bad thing. The answer to this question is important because it will inform when and to what extent a law or policy's paternalism should count against its adoption.

This Article considers three answers to this question—that is, three theories about what makes something paternalistic and what gives paternalism its normative character. The central thesis is that the two most common explanations for paternalism's character are mistaken. While philosophers and legal scholars have devoted a great deal of thought to the topic of paternalism, they have almost always focused on two elements: coercion and intent. What is wrong with paternalism, the common wisdom says, is either its use of coercion or the impermissible intentions behind it. According to these theories, paternalism is wrong because it prevents us from making our own choices, or because it intends to prevent us from making our own choices.

This Article sketches a third conception of paternalism—one that locates the normative significance of paternalism in neither coercion nor intention. The third—and I believe correct—theory holds that instances of paternalism are objectionable because of their expressive content. Paternalism is suspect because it implies that the other party is not capable of making good judgments for herself. While it is sometimes noted that paternalism is insulting, some other characteristic is usually taken to explain paternalism's impermissibility. The expressive account rejects this move. According to the expressive view, paternalism is objectionable because it constitutes an insult, and that is all that needs to be said. Focusing on the expressive content allows us to make sense of certain charges of paternalism and also to see where those charges are inappropriate. In particular, it highlights the way that paternalism's permissibility depends on various contextual factors.

This new understanding of paternalism's impermissibility has a significant bearing on policy. Recent high-profile policy proposals—most notably the Affordable Care Act—raised important questions about paternalism. But the ensuing debate can feel like ships passing in the night, with one side fixating on a visceral objection⁶ and the other side emphasizing more tangible consequences.⁷ Because both sides lack a coherent conceptual framework

6. See, e.g., Michael Tanner, *Paternalism and Principle*, NAT'L REV. (Oct. 5, 2011, 4:00 AM), <http://www.nationalreview.com/articles/279178/paternalism-and-principle-michael-tanner> (comparing efforts to ban incandescent light bulbs and the Affordable Care Act and arguing that they are similarly paternalistic).

7. See, e.g., Cass R. Sunstein, *Why Paternalism Is Your Friend*, NEW REPUBLIC (Apr. 8, 2013), <http://www.newrepublic.com/article/112817/cass-sunstein-simpler-book-excerpt-why-paternalism-your-friend>.

for thinking about paternalism, there is little meaningful engagement. My hope is that by clarifying the concepts underlying these arguments, we can begin to bridge this gap. This paper seeks to provide some framework for determining whether something like the Affordable Care Act or any other proposal is paternalistic in a problematic way. It attempts to point the critical lens at the appropriate set of considerations, many of which are often not appreciated.

Methodologically, this Article employs the tool of normative ethics and builds on and responds to recent philosophical work on paternalism.⁸ The goal of this philosophical project—a proper understanding of the normative significance of paternalism—is essential to clarifying our legal and policy discourse, in which paternalism serves as a routine bugaboo. Thus, I describe ways throughout that the abstract question—what’s wrong with paternalism—has substantive practical implications.

The Article proceeds in the following way. Part I examines the view that paternalism is negatively charged because it involves coercion. In particular, I focus on the recent position of libertarian paternalism, which suggests that paternalism that is not coercive is less objectionable. Part II considers the view that paternalism is bad because of the intentions that it involves. I offer reasons to doubt that intentions can explain what is normatively significant, both in general and in the particular context of paternalism. Part III describes a third alternative—namely, that paternalism’s normative character is based on its expressive content. A brief conclusion follows.

I. COERCION

The simplest theory of paternalism holds that paternalism is bad because it involves coercion. What is wrong with paternalism, according to this view, is that it denies individuals the ability to make choices about their own lives. This view underwrites recent calls for so-called “libertarian paternalism.” In the next Section, I examine this line of argument. After reviewing a common objection, I suggest that libertarian paternalism’s real difficulty is that paternalism isn’t necessarily wrong because it is coercive. Coercion, I argue, is not the touchstone for objectionable paternalism.

A. *Libertarian Paternalism*

The view that paternalism is bad because it involves coercion provides the theoretical framework for Professors Thaler and Sunstein’s widely acclaimed book, *Nudge*,⁹ and for subsequent behavioral economics policy

8. See, e.g., Richard J. Arneson, *Joel Feinberg and the Justification of Hard Paternalism*, 11 LEGAL THEORY 259, 274–75 (2005); Peter de Marneffe, *Avoiding Paternalism*, 34 PHIL. & PUB. AFF. 68 (2006); Shiffrin, *supra* note 4; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826 (2013).

9. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 11 (updated ed. 2009).

proposals.¹⁰ For Thaler and Sunstein, what makes paternalism wrong is that it violates the libertarian principle that one should respect individual choices.¹¹ This assumption opens the possibility that noncoercive paternalism is not wrong. Thaler and Sunstein offer a panoply of suggestions as to how noncoercive paternalism can be realized.¹² By altering the conditions under which choices are made, we can encourage people to make better choices—thereby improving their lives without coercing them at all. As long as the paternalism is libertarian, it is permissible.¹³ Thaler and Sunstein’s admirably succinct idea and its audaciously wide-reaching applications have received praise and public attention from commentators.¹⁴ Legal scholars and public policy experts have begun to internalize the main idea as a versatile tool to support various positions.¹⁵ Even Barack Obama and David Cameron have openly embraced Thaler and Sunstein’s proposals.¹⁶

The basic idea is elegant: because all sorts of small factors affect the choices that people make, policymakers can greatly improve people’s welfare by improving people’s choices. In other words, Thaler and Sunstein explain an empirical proposition—that seemingly trivial features of our situation when we make a choice can alter what choice we make—and then deploy this empirical finding as a policy tool.

Consider the empirical point first. As Thaler and Sunstein put it, “[S]mall and apparently insignificant details can have major impacts on people’s behavior. A good rule of thumb is to assume that ‘everything matters.’”¹⁷ The idea here isn’t anything new. One might say that Thaler and Sunstein are just summarizing the main insight of behavioral psychologists and economists. But the collection of various examples, presented all at once

10. Sunstein, *supra* note 8, at 1833–37.

11. See THALER & SUNSTEIN, *supra* note 9, at 5, 252–54.

12. See *id.* at 255.

13. See *id.*

14. See, e.g., Benjamin M. Friedman, Book Review, *Guiding Forces*, N.Y. TIMES, Aug. 24, 2008, at BR13, available at http://www.nytimes.com/2008/08/24/books/review/Friedman-t.html?pagewanted=all&_r=0 (calling most of Thaler and Sunstein’s proposals “the essence of common sense”).

15. See, e.g., Anuj C. Desai, *Libertarian Paternalism, Externalities, and the “Spirit of Liberty”*: How Thaler and Sunstein Are Nudging Us Toward an “Overlapping Consensus”, 36 LAW & SOC. INQUIRY 263, 263 (2011) (“I argue that the book is a brilliant contribution to thinking about policy making, but that ‘choice architecture’ is not just a solution to the problem of cognitive biases. Rather, it is a means of approaching any kind of policy making.”).

16. See, e.g., Nick Collins, *David Cameron Seeks to ‘Nudge’ People in Right Direction*, TELEGRAPH (Sept. 10, 2010, 7:30 AM), <http://www.telegraph.co.uk/news/politics/david-cameron/7993366/David-Cameron-seeks-to-Nudge-people-in-the-right-direction.html> (“While in opposition the Conservative leader was so impressed with the book that he required all shadow cabinet members to read it during their summer holiday.”); Michael Grunwald, *How Obama Is Using the Science of Change*, TIME (Apr. 2, 2009), available at <http://content.time.com/time/magazine/article/0,9171,1889153,00.html> (“‘Cass is one of the people in the Administration [Obama] knows best,’ says Thaler . . . ‘He knew what he was doing when he gave Cass that job.’”).

17. THALER & SUNSTEIN, *supra* note 9, at 3.

as an armada of human decisional failings, is impressive. Seemingly irrelevant suggestions will alter our assessments—writing down your phone number will affect your guess about what year Attila the Hun sacked Europe.¹⁸ We are heavily influenced by peer pressure—given simple factual questions that they would invariably get right on their own, people will give the wrong answer surprisingly often if surrounded by others giving the wrong answer.¹⁹ We unreflectively choose available options—people will eat vastly more of something they acknowledge isn't very good, like stale popcorn, merely because it is placed in front of them.²⁰ The list goes on and on. The point is that human choices are influenced by all sorts of small, seemingly irrelevant details.

If one believes that people could make better choices in many circumstances, then creating more favorable conditions can induce people to make choices that will ultimately make them better off. The big idea is that by slightly changing the structures within which people make choices, we can alter what choices they make. Thaler and Sunstein offer the example of a cafeteria, which can encourage diners to eat healthier foods based on where in the cafeteria different foods are displayed (first or last, eye-level or off to the side, etc.).²¹ They refer to such subtle influencing as making changes in the “choice architecture”²²—or, for short, “nudging.”²³ Of course, not everyone's choices will be altered, but even small changes in the choice architecture can induce significant shifts in distribution of choices by a population. And, if leveraged properly, this means that whoever determines the choice architecture can induce more people to make good choices, without shoving anything down their throats.

This last point is important to Thaler and Sunstein. Nudges aren't shoves—they don't *require* anything.²⁴ That is, changing the choice architecture isn't coercive in the way that simply mandating or prohibiting particular behavior is. It is gentler. Although Thaler and Sunstein concede that government intervention to try to make people better off is paternalistic,²⁵

18. *Id.* at 23–24.

19. *Id.* at 56–57.

20. *Id.* at 43.

21. *Id.* at 1–3.

22. *Id.* at 3, 11 (“A choice architect has the responsibility for organizing the context in which people make decisions. . . . Choice architects can make major improvements to the lives of others by designing user-friendly environments.”)

23. *Id.* at 6 (“A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid.”).

24. *Id.* (“Nudges are not mandates.”).

25. I think that Thaler and Sunstein are correct, as a descriptive matter, to say that nudges can still be a form of paternalism. For example,

[i]magine the government makes free psychotherapy available to gays and lesbians to help them change their sexual orientation, and that it does so with the aim of helping them to lead happier, more satisfying lives, and that this policy cannot be justified in any

this intervention is considered less objectionable precisely because it is less coercive. Thus their term “libertarian paternalism.” They explain as follows:

Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off. In its most cautious forms, libertarian paternalism imposes trivial costs on those who seek to depart from the planner’s preferred option. But the approach we recommend nonetheless counts as paternalistic, because private and public planners are not trying to track people’s anticipated choices, but are self-consciously attempting to move people in welfare-promoting directions.²⁶

The idea here is that nudges are admittedly paternalistic because they involve intervening in others’ choices in order to make them better, but they are not *objectionably* paternalistic because they are libertarian. Nudges are okay, as long as they don’t rise to the level of a push.

Although Thaler and Sunstein are not always explicit about it, their view of paternalism involves two important conceptual moves. First, they detach the idea of paternalism from the idea of coercion.²⁷ The term libertarian paternalism is meant to expand what counts as paternalism beyond the narrow coercive understanding. The very term “libertarian paternalism” implies that not all paternalism is coercive. Second, by endorsing this paternalism in its libertarian form, Thaler and Sunstein implicitly suggest that what is typically wrong with paternalism is its nonlibertarian qualities. They are, in a sense, saying, “What’s wrong with paternalism isn’t the paternalism per se, but the coercion—and we can get rid of that!”

The nudge/push distinction invokes a metaphor of physical contact. One can press that metaphor further. In an article discussing the worst officiating errors at the 2010 World Cup in South Africa, the *Christian Science Monitor* included the following description of one of the more dubious decisions:

At the end of the game, when Ivory Coast was bound for defeat, the Ivory Coast’s Abdelkader Keita apparently wished to exact some measure of revenge. This he did by approaching Brazilian superstar Kaka, then falling over in theatrical agony (clutching his face) when the Brazilian gave him a

other way. Some may think that if the intended beneficiaries do not want this policy, then it is objectionably paternalistic even if it does not, strictly speaking, limit anyone’s choices.

De Marneffe, *supra* note 8, at 74–75. This definitely strikes me as paternalistic, and not even a particularly fringe case. It seems right, therefore, that Thaler and Sunstein accept that even a gentle nudge may be appropriately called paternalistic.

26. Sunstein & Thaler, *supra* note 8, at 1162 (footnote omitted).

27. *Id.* at 1165 (“The second misconception is that paternalism always involves coercion.”). Others have noted that paternalism does not necessarily involve coercion. See N. Fotion, *Paternalism*, 89 *ETHICS* 191, 195 (1979) (“The fact is that some philosophers have given paternalism a far worse reputation than it deserves by associating it with coercion by definition and in effect confusing it with coercive paternalism.”).

playful nudge (in the ribs). Kaka's reward: a second yellow card, which meant ejection.²⁸

As another sportswriter observed, these theatrics were hardly something new: "At the 1998 World Cup, Slaven Bilic of Croatia cost [French great] Laurent Blanc a place in the final by exaggerating a nudge in the chest into a blow to the face, during France's 2-1 semi-final win."²⁹ In both cases, justice was miscarried because a mere nudge was penalized as though it were a flagrant foul.

Any soccer fan knows that it is not permissible to "push" another player on the field. But to "nudge" him, as these sportswriters imply, does not have the connotation of rising to an offense. A soccer fan can even imagine the voice of a protesting defender saying, "But I barely nudged him." In this context, the word is used to suggest that the physical contact did not determine the result. The merely "nudged" player isn't knocked to the ground, but chooses to fall to the ground.

One might say Thaler and Sunstein have a soccer theory of paternalism. They make the same distinction as the sportswriters—nudging, no foul; pushing, more problematic. Not only that, they make the distinction for the same reason. Thaler and Sunstein suggest that nudging is unobjectionable because it preserves the control of the party being nudged. Unlike a push, if one succumbs to the nudge it is by choice (or inaction) rather than by brute force. And this makes quite an important difference to concerns about paternalism. One might say that Thaler and Sunstein's work represents three propositions about paternalism: (1) nudging is generally a permissible form of paternalism; (2) pushing—for lack of a better term—is generally a more objectionable form of paternalism;³⁰ and consequently (3) what is primarily objectionable about paternalism is the coercive element.³¹

I want to suggest that all three of the above propositions are incorrect. In real life, if not in soccer, nudging may be as objectionable as pushing, or more. And pushing may sometimes be permissible. If these claims are correct—if the permissibility of paternalism doesn't simply depend on the

28. Mark Sappenfield, *Bad Calls: Top Five Refereeing Gaffes of the 2010 World Cup*, CHRISTIAN SCI. MONITOR (June 27, 2010), <http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/0627/Bad-calls-Top-five-refereeing-gaffes-of-the-2010-World-Cup>.

29. John Doyle, *The Dive*, GLOBE & MAIL, June 9, 2010, at E6, available at <http://www.theglobeandmail.com/sports/soccer/the-dive/article1372535/>.

30. See, e.g., THALER & SUNSTEIN, *supra* note 9, at 254 ("[W]e resist going further down the paternalistic path. . . . [D]eciding where to stop, and when to call a nudge a shove (much less a prison), is tricky. Where mandates are involved and opt-outs are unavailable, the slippery-slope argument can begin to have some merit, especially if regulators are heavy-handed. We agree that flat bans are justified in some contexts, but they raise distinctive concerns, and, in general, we prefer interventions that are more libertarian and less intrusive.").

31. See *id.* As the physical metaphors imply, the focus here is on brute control. For a contrasting conception of the morally significant idea of liberty, see Peter de Marneffe, *Self-Sovereignty and Paternalism*, in PATERNALISM: THEORY AND PRACTICE 56, 56–58 (Christian Coons & Michael Weber eds., 2013) (contrasting self-ownership with self-sovereignty).

degree of coercion—then a different account of what is objectionable about paternalism is required.

Backed by their conceptual framework, Thaler and Sunstein describe a great many ways that libertarian paternalism can be put to use. Changing the default options on retirement and organ donor forms, for example, has the potential to dramatically increase household savings and save thousands of lives per year in organ donations.³² Disclosure requirements may encourage people to make better choices with regard to mortgage or credit card debt. And so on. Many of the policies Thaler and Sunstein suggest strike me as excellent proposals.³³ I am less concerned with whether these policies are good, however, as with the justification offered for them. That is, does the background idea of libertarian paternalism provide a good framework for understanding why some paternalistic policies are justified but others may not be? I argue that it does not—and that a wholly different theory of paternalism is required.

B. *The Inadequacy of Appealing to Deception*

A number of commentators on Thaler and Sunstein's book have noted their discomfort with the idea of nudging.³⁴ Subtle behind-the-scenes manipulation of people's choices has a Big Brother element that understandably makes people nervous.

The discomfort with nudging may be based on the apparent deception involved. The idea that another person might be manipulating our choices without our knowledge is, in this case, a cause for unease. The Big Brother fear comes from the sense that we might be kept in the dark while we are

32. See THALER & SUNSTEIN, *supra* note 9, at 110–11, 177–78.

33. Many of the suggested nudges, it should be noted, don't seem terribly libertarian. For example, Thaler and Sunstein suggest various things that one might require from lenders, even things as small as the ability to automatically pay one's full credit card bill. See THALER & SUNSTEIN, *supra* note 9, at 146. Although such policies are nudges to consumers, they are shoves to credit card companies.

34. See, e.g., Shawn Macomber, *The Man Whispers*, AM. SPECTATOR, Oct. 2008, at 70 (describing Thaler and Sunstein's *Nudge* as a book "in which the eminent professors argue for a more sophisticated, subliminal Nanny State led by a less draconian nanny"); Dominique Lazanski, *A Nudge Towards Totalitarianism?*, INST. ECON. AFF. (Oct. 9, 2009), <http://www.iea.org.uk/blog/a-nudge-towards-totalitarianism-0> ("We should fear a nudge culture, be wary of elitists and continue to shun we-think. Being nudged is not far off from being regulated, and relegated, into a totalitarian society."); Dahlia Lithwick, *Taming Your Inner Homer Simpson: How to Opt Out of Our Own Stupid Choices*, SLATE (May 12, 2008, 7:03 AM), http://www.slate.com/articles/arts/books/2008/05/taming_your_inner_homer_simpson.html ("Is it oh-so-slightly creepy (or socialist) to envision a world in which shadowy choice architects are nudging you away from the cashews and toward organ donation?"); cf. MARK D. WHITE, *THE MANIPULATION OF CHOICE: ETHICS AND LIBERTARIAN PATERNALISM* 82 (2013) ("Even if one is comfortable with some paternalism on the part of the government if done openly and transparently, it is unseemly for policymakers to use people's decision-making flaws to manipulate them, subtly and secretly, into making choices that policymakers want them to make, rather than the ones they would have otherwise made themselves."); Daniel M. Hausman & Brynn Welch, *Debate: To Nudge or Not to Nudge*, 18 J. POL. PHIL. 123, 130 (2010) ("[T]here may be something more insidious about shaping choices than about open constraint.").

pushed about like pawns. In short, the whole idea of nudging feels, to use a technical term, too sneaky. This gut reaction motivates many responses to Thaler and Sunstein.

This form of the objection, however, is ultimately rather weak. There is really nothing about nudging that requires deception. For example, Thaler and Sunstein's iconic cafeteria could display signs telling customers that the foods have been arranged in a manner to encourage healthy choices. I doubt that such openness about the presence of nudging would truly allay the concerns of objectors. So it seems that it is not the deception that generates qualms about nudging.

I argue the concern is better understood in another way. This way of understanding the discomfort accounts for the fact that even candid nudging still carries the sting of paternalism. That is, it's not the deceptiveness that gives nudging its slightly ominous Big Brother feel, but rather something else—the something else that I will argue is fundamentally wrong with paternalism.³⁵ So even if the cafeteria puts up plenty of signs informing patrons that the food has been arranged to induce better choices (eliminating any lack of openness), and even if the policy is very clear that patrons are free to make whatever choices they like (eliminating any sense of coercion), the problem of paternalism will remain. It is the aim of this Article to say what this problem is—what is wrong with paternalism apart from its frequent (but not necessary) association with deception or coercion?

C. *Disentangling Force and Objectionable Paternalism*

From the perspective of libertarian paternalism, forcing another person to do something for her own benefit is generally less permissible than merely nudging her toward the decision on her own. But it's not clear that this is correct. Some degree of forcing each other to do things for our own benefit is permissible within—perhaps even characteristic of—our most caring relationships. That is, a touch of paternalistic coercion may be okay in the right contexts—occasional forceful intervention may even be preferable to nudging. Consider the following pair of examples.

35. Hausman and Welch make this particularly clear: "What matters is whether the policy-maker is attempting to bring about something against the beneficiary's will." Hausman & Welch, *supra* note 34, at 130; *see also* J.S. Blumenthal-Barby, *Choice Architecture: A Mechanism for Improving Decisions While Preserving Liberty?*, in *PATERNALISM: THEORY AND PRACTICE*, *supra* note 31, at 178, 191–92 ("[D]isclosure and transparency is [sic] not enough to preserve liberty since manipulation . . . occurs not just when a person is influenced without knowing it, but when they are influenced via exploitation of the non-rational elements of their psychological makeup."). Hausman and Welch's primary point is that an infringement on autonomy can take on another form than a simple constriction of the set of available choices. I agree with this insight, and I think that Hausman and Welch helpfully draw attention to one way in which the nudging arguments can be overly simplistic. Still, it seems that a policy can be objectionably paternalistic even when it is only attempting to counteract the beneficiary's foibles and help empower her own choice—which, as Thaler and Sunstein show, can be the aim behind a very many nudges.

Overworking 1: You have a tendency to spend far too many beautiful summer days in the office taking appointments and holding meetings. In particular, your Fridays are generally dominated by the staff meeting that you administer. As you frequently acknowledge, the meeting is hardly critical, and no one would be bothered if the meeting were canceled or delayed. But the inertia of routine always ends up winning out, and you are always stuck in the meeting on Friday. One Friday morning your husband shows up at the office and informs you that he has arranged with your secretary to reschedule your staff meeting and other appointments. He has rented a sailboat for the two of you, and packed bags and food for a three-day weekend itinerary of sailing and camping on some local islands. Although your husband is rather indifferent to it, you really love sailing and hardly ever get to do it. When you say you need to think about it, he informs you that the meeting has already been rescheduled and some people have already gone home. We might imagine him saying something like, “You always spend so much time in the office, but today you have no choice. I’m going to force you to get out and enjoy yourself.” And with that, he might physically take the briefcase out of your hands, place a firm arm around your waist, and pull you to the door—all over your meek protests.

Overworking 2: As with the first example, you tend to overwork yourself on matters that you acknowledge aren’t pressing. You admit that working a little less would be better for you, but you never seem to manage to change your habits. In this example, though, your husband always respects whatever choices you make, but he tries to give you little nudges so that you choose to work less. When you are working late in the office, he sometimes urges your daughter to call and tell you she misses you. As the two of you are heading out the door, he sometimes hides your Blackberry where you are apt to forget it. He rearranges the home office in a way that makes it less conducive to working at home in the evenings, which he thinks is bad for your health. He occasionally stalls or fails in passing along work-related phone messages that he doesn’t believe to be pressing.

I think that the husband in the first example is not, at least *prima facie*, acting impermissibly. In fact, one might see this as a very nice, or even romantic, gesture of care for the interests of his spouse. The behavior in the second example is, I think, substantially more objectionable. This is true even though the conduct in the second example is less forceful and easier for the spouse to resist.

One might be tempted to object here that the example is a bit loaded. For one thing, further descriptions of the background facts could be relevant: if the husband in the first example is frequently meddlesome or patronizing then the behavior might seem a lot worse. And surely that the parties are married is important. Note, however, that this cannot be because

marriage itself licenses some quantum of coercion—despite what innumerable poor jokes might tell us.³⁶ Lastly, it is unclear to what extent personal interventions like these examples can be compared to government policies. I will return to these various complexities.³⁷ But my aim here is merely to think about the relationship between coercion and paternalism.

In these examples, the behavior described is reasonably characterized as paternalistic. In each case, the husband attempts to alter his partner's behavior for the sake of the partner's interests. But the forceful intervention seems less problematic than the persistent nudging.

The contrast illustrates two critical points. First, the problematic feature of paternalism is not the coercive interference with choices. The second relationship—the less coercive one, in the sense that the subject can more readily continue on her preferred course of action—seems more objectionable. What's more, the second relationship seems more objectionable *for the reasons that paternalism is objectionable*.³⁸ That is, the second relationship is

36. I do not mean to deny that, in many intimate relationships, parties will implicitly or explicitly consent to limited forms of coercion. But it seems a mistake or a fiction to think that the appropriateness of coercive intervention always depends on some implied consent.

37. Lest one think that the argument is driven only by the idiosyncrasies of this example, consider another pair of examples.

Smoking 1: You are a smoker. You want to quit, and you tried a few times. Most of your friends are smokers too, and this social pressure makes it much more difficult to quit. Your best friend is also a smoker. The two of you sometimes discuss plans to quit together, but nothing ever comes to fruition. You often back out at the last minute, although you always regret it afterwards. Recently, the two of you planned a fishing trip together in Northern Canada, far from civilization. A water plane is dropping you off and picking you up two weeks later, with only emergency contacts. Unbeknownst to you, your friend removes the several cases of cigarettes that the two of you packed. Only after takeoff does your friend inform you that the fishing trip is going to be a chance to quit smoking cold turkey. He says that the two of you have tried so many times that something drastic was needed.

Smoking 2: Again, you are a smoker. You would like to quit, and your best friend would like to see you quit for the sake of your health. But your friend always says that quitting is a choice that you have to make—all he can do is encourage you to make it. So he is constantly giving you subtle encouragement. He tapes pictures of your children to your cigarette packages when you aren't around. He sends you emails with graphic photographs of body organs that have been ruined by years of smoking. He demands that you always ask permission to smoke around him—just as an extra hurdle, not because he ever denies it. And as the owner of the pharmacy that happens to be on the block where you live, he has even implemented a policy of charging you triple for cigarette packages—with the surplus going into a scholarship fund for your children, to whom he has begun referring to as “the poor little orphans-to-be.”

In this pair of examples, again, I think that the first friend may not be acting impermissibly; whereas, the second friend is almost surely treating his friend in an unacceptable way. Once again, however, the devil is in the details. One could object that there is an important difference between the examples: in the first, the friend is also a smoker. Surely this is significant. If the first example is altered so that the friend is not a fellow smoker, then it changes the complexion substantially. Once again, I will return to this point. But notice for now that it is not the case that coercion is generally permissible if the coercer puts himself through the same thing. One cannot place another in shackles merely because one has also shackled oneself. These examples suggest that an isolated bit of coercion can sometimes be permissible—sometimes more so than persistent, less intrusive intervention. But context matters tremendously.

38. Cf. Douglas N. Husak, *Paternalism and Autonomy*, 10 PHIL. & PUB. AFF. 27, 38 (1981) (“The conclusion that paternalistic interferences, qua interferences, are objectionable, is

problematic precisely because it exhibits the negative features of paternalism. The second relationship is bad because it is paternalistic, whereas the first relationship is, arguably, not bad despite its paternalism. The contrast between the examples, therefore, offers a clue into what is wrong with paternalism. Something about the paternalism in the second relationship must be the normatively significant element of paternalism.

This relates to the second point. The first example suggests that paternalism—even coercive paternalism—is not always impermissible. The husband forces a certain action on you, and, in each case, the action is meant to be for your own good. This is a classic example of paternalism. And yet, if enough background is provided and the action is viewed charitably, it may not seem at all objectionable. Whatever it is that is impermissible about paternalism, it seems to be either absent or muted in these cases. This potentially offers a second clue about what is wrong with paternalism.

If these points are correct, then the conventional link between impermissible paternalism and coercion³⁹ breaks down in both directions. An action can be impermissibly paternalistic without being coercive—that is, coercion is not necessary for impermissibility. And an action can be coercive and paternalistic yet not impermissible—that is, coercion is not sufficient for impermissibility.

II. INTENTION

Thus far, I have argued that the objectionable element of paternalism is not its coercive element. Obviously coercion is often impermissible, but what is distinctly objectionable about paternalism is not that it is coercive.

There is, however, a second theory of paternalism that deserves attention. It is tempting to think that the objectionable element of paternalism comes from the intention behind it. One might, for example, find something objectionable about acting with the intention of benefiting people in a way that they have not themselves accepted. For example, Gerald Dworkin says, “Paternalism might be thought of as the use of coercion to achieve a good which is not recognized as such by those persons for whom the good is intended.”⁴⁰ On such a view, the unique problem with paternalism lies in intending to bring about an end that is not endorsed by the other party. Or, slightly differently, what is objectionable about paternalism is that the agent intends to substitute her judgment for someone else’s—whether or not it is for that person’s benefit. Seana Shiffrin, for example, argues that “[a]n action may be paternalist . . . if it involves a person’s *aiming* to take over or

a good deal less interesting than the conclusion that paternalistic interferences, qua paternalism, are objectionable.”).

39. See THALER & SUNSTEIN, *supra* note 9, at 11.

40. Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 112 (Richard A. Wasserstrom ed., 1971).

control what is properly within the agent's own legitimate domain of judgment or action."⁴¹ On this view, an action may raise concerns of paternalism even if it is not done to benefit the person per se. For example, taking command of someone else's question during an academic discussion because one wants to see the question formulated properly might constitute paternalism.⁴²

In accounts of this form, whether an action counts as paternalistic—and relatedly, whether an action is objectionable—depends on the motive or intent behind the action.⁴³ It is natural to think that whether an action or policy is paternalistic depends on why it is undertaken. For example, if I decide not to serve dessert at a dinner party because I think my guests are getting a little overweight, that would seem quite paternalistic.⁴⁴ But if the omission were based on my own need to economize, then it surely would

41. Shiffrin, *supra* note 4, at 216 (emphasis added). Shiffrin rigorously explicates the concept:

I suggest that paternalism by A toward B may be characterized as behavior (whether through action or through omission) (a) aimed to have (or to avoid) an effect on B or her sphere of legitimate agency (b) that involves the substitution of A's judgment or agency for B's (c) directed at B's own interests or matters that legitimately lie within B's control (d) undertaken on the grounds that compared to B's judgment or agency with respect to those interests or other matters, A regards her judgment or agency to be (or as likely to be), in some respect, superior to B's.

Id. at 218. As de Marneffe points out, Shiffrin's own project of seeking a nonpaternalist rationale for the unconscionability doctrine seems to be in tension with holding a motive-based approach. de Marneffe, *supra* note 8, at 70–71.

42. Shiffrin, *supra* note 4, at 217.

43. See *id.* at 220 (“The motive, I think, is what is central to accounting for why paternalism delivers a special sort of insult to competent, autonomous agents. Even when paternalist behavior does not violate a distinct, independent autonomy right, it still manifests an attitude of disrespect toward highly salient qualities of the autonomous agent. The essential motive behind a paternalist act evinces a failure to respect either the capacity of the agent to judge, the capacity of the agent to act, or the propriety of the agent's exerting control over a sphere that is legitimately her domain.”). Note that my own account is actually quite similar to Shiffrin's in important ways. See *id.* I think that Shiffrin is entirely correct in viewing paternalism as objectionable because it represents an “insult” or “a failure to respect.” My difference with Shiffrin is that I do not take the motive to be the important aspect but rather the external meaning of the behavior. See *id.* at 217. I share Shiffrin's view that an action can be paternalistic without being aimed at benefiting the paternalized person.

44. It is interesting to contrast this example with the example of Thaler's dinner party, in which he takes the pre-dinner cashews away from the guests to ensure that everyone retains room for dinner. THALER & SUNSTEIN, *supra* note 9, at 40. Even worse than choosing not to serve dessert would be serving dessert and then taking it away upon realizing that guests were beginning to eat too much of it for their own waistlines. So why is retracting food to ensure others enjoy the rest of a dinner party perfectly acceptable, but retracting food to prevent others from putting on extra pounds obviously unacceptable? One plausible answer is that by coming to a dinner party, one surrenders a certain degree of control to the host over how one will enjoy the evening—one tacitly accepts the authority of the host to determine what makes for a good meal or entertaining activities. One certainly does not grant control over body weight issues. But this isn't the entire story. Imagine that it is not the host (Thaler), but another guest who removes the cashews so everyone enjoys the meal. This may often seem acceptable, but it is not because of some delegation of authority. Rather, I think, this is an

not be an example of paternalism. Despite this natural appeal, I suggest three related reasons to reject an intent-based approach to paternalism. These reasons derive from the fact that we can assess the permissibility of paternalistic actions or policies without delving into the actor's intention.

A. *Intentions, Permissibility, and the Doctrine of Double Effect*

The first reason to reject an intent-based account of paternalism is grounded in general philosophical concerns about the relationship between intent and permissibility. We care about the concept of paternalism because of its normative significance.⁴⁵ Paternalism is, at least sometimes, a feature of behavior that makes that behavior impermissible. But there is good reason to think that the intent with which an action is performed does not affect the permissibility of that action. If both of these premises are correct, then paternalism is not characterized by a particular kind of intent.

But why think that intent does not matter to permissibility? The answer can be seen by considering a set of recent philosophical arguments leveled against the so-called doctrine of double effect, which roughly says that one may cause a bad outcome in order to achieve a greater good if and only if one does not intend the bad outcome.⁴⁶ The recent assaults on this doctrine point out that the intention of an agent bears on how we would evaluate the agent, not on the permissibility of the action itself. To see the basic idea, consider an example from Judith Thomson:

Here is Alfred, whose wife is dying, and whose death he wishes to hasten. He buys a certain stuff, thinking it a poison and intending to give it to his wife to hasten her death. Unbeknownst to him, that stuff is the only existing cure for what ails his wife. Is it permissible for Alfred to give it to her? Surely yes. We cannot plausibly think that the fact that if he gives it to her he will give it to her to kill her means that he may not give it to her. (How could *his* having a bad intention make it impermissible for him to do what *she* needs for life?)⁴⁷

Alfred's attempt to kill his wife is quite probably blameworthy.⁴⁸ It reflects something bad about Alfred that he would try to kill his wife. But that is an evaluation of the agent, not the action. When one asks if the action

example of the way that paternalism may be permissible—it does not express an overall impermissible judgment about others.

45. See Shiffrin, *supra* note 4, at 212 (“[I]t seems worthwhile to assess what is central in our normative reactions to paternalism and to employ a conception of paternalism that compliments and makes intelligible our sense of paternalism’s normative significance.”). *But see* Sunstein & Thaler, *supra* note 8, at 1166 (“The thrust of our argument is that the term ‘paternalistic’ should not be considered pejorative, just descriptive.”).

46. F.M. KAMM, *INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM* 91–129 (2007); T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* 20–25 (2008); Judith Jarvis Thomson, *Self-defense*, 20 *PHIL. & PUB. AFF.* 283, 292–96 (1991).

47. Thomson, *supra* note 46, at 293–94.

48. Assume that Alfred doesn't have his wife's consent and isn't merely trying to relieve her suffering.

itself is permissible—i.e., may one permissibly give this compound to this woman—the answer seems to be yes. In other words, what seems to matter to permissibility is the nature of the action itself—its character and effects—rather than the mental state of the agent.⁴⁹ Someone might do something permissible with bad intent, and someone might do something impermissible with a good intention. If this is correct—if intent does not bear on permissibility⁵⁰—and if paternalism does affect permissibility, then paternalism must not be determined by intentions.

In response to this argument, one might be tempted to question the original premise that paternalism affects permissibility. The distinction between evaluating an action and evaluating an agent—between permissibility and blameworthiness—may be convincing. But one might think that the normative significance of paternalism is not that it describes a way in which an action may be impermissible, but rather a way in which it may be blameworthy. In other words, perhaps paternalism isn't something that matters in deliberating about an action, but rather is only significant as a way of criticizing an action.⁵¹ Paternalism, like the concept of malice, would identify a negative feature of another's attitudes, but not necessarily of their actions.

This is a plausible position, against which I can only suggest some considerations. The difficulty with this position is that the concept of paternalism seems to play a deliberative function. That a policy would be paternalistic is viewed as a reason not to adopt it.⁵² In political discussions

49. See KAMM, *supra* note 46, at 135 (“[W]hat is important for permissibility are the characteristics of the act itself and its effects When it is impermissible for an agent who intends evil (as a means or end) to do an act, it will usually be because of some characteristics of the act or its effects (or their relation) independent of his intention.” (footnote omitted)); SCANLON, *supra* note 46, at 23 (“[W]hat makes an action wrong is the consideration or considerations that count decisively against it, not the agent’s failure to give these considerations the proper weight.”); Thomson, *supra* note 46, at 294 (“It is irrelevant to the question whether X may do alpha what intention X would do alpha with if he or she did it.”).

50. This may be a bit too general. There may be cases in which intention does matter to permissibility. Scanlon, for example, discusses discrimination as an example. See SCANLON, *supra* note 46, at 69–74. But what generates the impermissibility in such cases is not the intention itself. In Scanlon’s terms, the intention may affect the meaning of the action, and in some contexts the meaning of the action will matter to permissibility. For example, a discriminatory motive makes an action count as discrimination. But if this is right, then it is the meaning of the action, e.g., that it is a racial insult, that determines permissibility, and the intention enters only because it is relevant to determining that meaning. *Cf. id.* at 72 (“[D]ecisions that we call discriminatory are objectionable because they involve a kind of insult—an expression of the view that certain people are inferior or socially unacceptable.”). In this case, it is the insult that matters to permissibility. The intention enters only contingently. For this reason, one can unintentionally discriminate, just as one can unintentionally paternalize.

51. *Cf. id.* at 26 (“It would be quite correct to say [that what makes an action wrong is the intention] if we were taking the relevant principle in its *critical* employment and assessing the way in which the agent decided what to do.”).

52. One might note that “it would be murder” might seem to count as a reason against a certain action. But this is only because murder has particular legal consequences associated with it. To see this point, notice that the knowledge that one would be found not guilty by

and policy debates, paternalism counts against adopting a particular policy.⁵³ For example, if a legislature were discussing requiring motorcycle helmets, presumably a large part of the argument against it would be that such a policy would be paternalistic. This is not mere name calling. It is identifying a particular reason, perhaps one that is not decisive, that counts against the proposed policy. If this is right, then paternalism seems to be a concept with a deliberative normative significance.

I think this is part of the reason why attempts to rationalize seemingly paternalistic policies in terms of nonpaternalistic reasons—for example, justifying a law requiring motorcycle helmets on the basis of public health expenditures—seem misguided. Such attempts implicitly presuppose something like the doctrine of double effect; it is assumed that causing a particular harm is permissible as long as one doesn't intend that harm. But it seems strange that, from the deliberative standpoint, the permissibility of an action depends on the intention of the actor. Either the action is permissible or it's not.

B. *Unintended Paternalism*

There are more particular reasons, as well, to think that the objectionable element of paternalism does not depend on intentions. Whether or not one accepts that permissibility is independent of intentions in the general way described in the previous section, there are some actions for which it is hard to dispute that impermissibility does not depend on having a bad intention. I argue that paternalism falls into such a class.

Verbal insults offer a clear example of actions that can be wrong regardless of the agent's intention. It is certainly less blameworthy to utter something offensive if one didn't intend it offensively. Perhaps one didn't know that one's interlocutor had recently lost a child, or is a Republican, or is an Arsenal supporter. Or perhaps one just blurted something out—something one doesn't even really believe. Or perhaps one was trying to be encouraging and it just came out wrong. But even if this sort of lack of intentionality can alter how blameworthy one is, it doesn't change permissibility. Saying X to person Y under conditions C may be wrong, regardless of the intent with which it is said.

I argue that the same is true of paternalism. Just as one can inadvertently insult someone, one can be inadvertently paternalistic. For example, suppose that a park ranger puts up a sign that says "Climbing on rocks prohibited" because she thinks it will protect certain delicate lichens. The policy ends up preventing rock climbers from using one of the area's more challenging ledges, which has seen some recent accidents. The park ranger,

reason of insanity would not in any way lessen the reasons against performing the action—except for those reasons related to the legal consequences for you.

53. See, e.g., *supra* notes 1–5 and accompanying text.

however, did not even think about the rock climbers as she created the policy. Nevertheless, a rock climber might plausibly criticize the policy as paternalistic.

Or suppose a father buys a gift for his adult daughter, genuinely thinking it will be something she will enjoy—perhaps a new business suit—when actually it is something that she would need only if her life were quite different than it is—perhaps she does not aspire to work in a business or office setting. One might say that this is objectionable because it is paternalistic, even though the father has no intent to circumvent his daughter’s judgment.⁵⁴

In both of these cases, the charge of paternalism might depend on a mistaken inference about the actor’s intentions. The rock climbers object because they assume the park ranger was trying to stop their climbing; the daughter objects because she assumes her father wants her to be more professional. This may be part of the story. But it is not the whole story. Explaining that the intention in question was not there does not necessarily remove the wrong. The park ranger and the father have not merely produced an illusion of paternalism; they have been paternalistic, albeit accidentally. Their actions were paternalistic, even if their intentions were not.

If paternalism can be accidental in this way, then paternalism does not require any particular intent or motive.⁵⁵ Paternalism, in this sense, refers to a generally bad way of treating others. We can commit this wrong through inattention, laziness, or negligence, as much as through deliberate choice. And that suggests that the problem with paternalism isn’t the intention behind it per se.

C. *Intentionality and Group Action*

Above, I suggest that what’s wrong with paternalism is not the intention behind it, both because intention does not generally alter permissibility and because actions can be objectionably paternalistic without any particular intention.

54. Shiffrin accepts that paternalism need not require an intent to benefit the subject, but even her motive-based account of paternalism requires an intent to remove a certain matter from someone else’s sphere of control. I argue that even this intention is not necessary. Shiffrin, *supra* note 4, at 217.

55. The Supreme Court sometimes misses this point. *See, e.g., Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue.”). The fact that a policy may not be intended to insult women does not mean that it is not insulting to women.

There is a third, but related, reason to reject an intent-based account of the wrongness of paternalism. Paternalism often applies most pointedly to actions for which it is difficult to ascribe any definite intention. Although it is used to describe individual actions, paternalism is especially prominent as a criticism of government action.⁵⁶ We criticize laws and policies, rules and regulations, as being paternalistic. Though by no means exclusively, paternalism is importantly a charge leveled against government policies. Whatever its content, then, paternalism must be a concept that can apply to government policies.

It is, however, notoriously difficult to ascribe a single intention to a law or other government action.⁵⁷ A law or government policy choice will usually be the result of many different individual actors, who may all have slightly or extremely different reasons for their actions. In this situation, it will be difficult, if not incoherent, to speak of an intention behind the action. Moreover, individual legislators may not be acting on policy reasons at all, but rather on reasons deriving from their institutional role. A legislator may vote for a law based on the belief that it is what the constituents want, or that it will get the legislator reelected, or that it is constitutionally required. Such beliefs can hardly constitute *the* intention behind the law.

These difficulties with identifying a collective intent create problems for a theory of paternalism that relies on intent. For example, consider a law requiring that all motorcyclists wear helmets. Is that law paternalistic? The intent-based approach would inquire into why the law was created. But there may be no single answer to this question. Some legislators may be moved by motorcyclists' well-being—thinking helmetless riders to be irrational and in need of protection. Others may want only to reduce the state healthcare costs. Others yet may be moved by a generous donation from the helmet manufacturers. And some may act based on what a majority of their constituents support, each of whom in turn may have a different motivation. And legislators may be moved by different combinations of these ideas. In this situation, it seems hopeless to identify a single intention and, on this basis, to classify the law as paternalistic or not.

It might be tempting to appeal to some idea of contribution here: if the paternalistic reasons contribute to the passage of the law, then the law is objectionably paternalistic. For example, if the helmet law would not pass without the reasons based on protecting motorcyclists from themselves, then the law is paternalistic.⁵⁸ This response is ultimately fruitless. In addition to

56. See, e.g., Valenti, *supra* note 5; Mali, *supra* note 5.

57. E.g., RONALD DWORKIN, *LAW'S EMPIRE* 317–27 (1986) (describing the impossibility of identifying a single intention behind a legislative act); Max Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 870–71 (1930) (arguing that a notion of a collective intent is incoherent because it is virtually impossible that a group of legislators will all have the same discernible intent); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 *INT'L REV. L. & ECON.* 239, 254 (1992) ("Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful.").

58. There is another way to make sense of contribution. One might consider not whether the paternalistic votes were necessary to the passage of the law but whether there were any at

introducing a seemingly unknowable counterfactual, the response produces incorrect results for an intent-based approach. If every legislator voted based on a desire to save motorcyclists from themselves, that would seem to be a paradigmatic example of paternalism. But it might be the case that, even without this reason, the law would be enacted for other reasons such as the healthcare costs. As soon as the analysis shifts from actual intention to hypothetical intention, the intent-based approach loses its appeal.

Even if there were some way to translate the intentions of the separate legislators into a single collective intention behind the law, a further problem exists. Above, I noted the general problems with thinking that permissibility depends on intention. The basic point was that permissibility is directly about the reasons for or against an action, not about the intention behind the action. This point is heightened in the collective choice context, where the deliberation process is even more disconnected from the “intention” with which the action or policy is adopted.⁵⁹ Paternalism is supposed to be a normatively significant concept. If a law is paternalistic, that should counsel legislators against enacting it. But this is not possible if a law’s status as paternalistic depends on the reasons for enacting it.

For example, imagine a legislator is considering whether to vote for the motorcycle helmet law. A constituent asks her not to vote for it because it is paternalistic. How is the legislator supposed to assess this argument? Should her vote depend on what she thinks will be the basis for other people’s votes? This would be strange, especially since other legislators might be going through the same assessment. It seems like the legislator’s decision about whether the law is a good one should depend on the reasons for and against the law itself, not on what reasons will motivate a selection of the policy.

If paternalism is to play this role—as something that counts against a policy choice itself—then it cannot be contingent on the manner in which the policy choice is enacted.⁶⁰ To capture paternalism’s normative content, an account is required in which paternalism inheres in the action or policy itself.

III. EXPRESSIVE CONTENT

I want to suggest that what gives paternalism its normative character is its expressive content. This thesis can be stated fairly simply. Paternalistic

all, necessary or not. The trouble with this view is that it would mean that a completely unnecessary vote could make a law paternalistic.

59. See, e.g., Shepsle, *supra* note 57, at 245 (arguing that committee versions of bills skew deliberations in a way that renders them disconnected from legislators’ actual intentions).

60. It is not impossible to imagine a situation in which a legislator would be moved by the expected motivations of other legislators, but such a situation provides a useful contrast. Suppose that a legislator believes that a proposed law is motivated by political gamesmanship. She might, in such a case, vote against the law because she refuses to participate in such an action, even though she thinks the law itself is a good one. Note that voting against a paternalistic law is not like this. That a law is paternalistic counts as a reason why it is not a good law, not simply as a reason to avoid voting for it.

actions imply that the actor knows better than the subject with regard to a matter within the subject's sphere of control, and paternalistic actions are impermissible insofar as this expression is offensive. That is, paternalism is impermissible to the extent that it expresses something insulting.

Whether any given instance of paternalism is insulting, it turns out, depends on a variety of context-specific factors. In some contexts, individuals should not feel insulted by limited paternalism. In other contexts, the expressive account offers the tools to explain otherwise perplexing complaints of paternalism. And when the government is the actor, that introduces an array of additional contextual factors. After introducing the expressive approach, the balance of this Part examines the influence of these different contextual factors.

A. *The Expressive Account of Paternalism*

Actions express things. In the most transparent cases, the expressive content of an action may be explicit and intended. For example, the movement of a ballet dancer may express sadness or joy,⁶¹ and burning a draft card may express one's opposition to the draft.⁶² Often, however, the expressive content will be more implicit, ambiguous, or even unintended. For example, giving advice might express a perceived superiority or a thoughtful caring; wearing an unusual outfit might express a defiance of custom or disrespect for one's host. The point is that actions, like words, can mean things—and these meanings can be multifarious, subtle, and unintended. Actions of the state, including the passage of particular laws, are no exception; they too can be expressive.⁶³ For example, punishing an offender may express the community's disdain for a criminal's actions;⁶⁴ zoning ordinances may express a vision of what a community wants to look like;⁶⁵ so-called "sin taxes" may express the idea that certain activities constitute moral

61. See Judith Snyder Jaffe, *The Expressive Meaning of a Dance*, 12 J. AESTHETICS & ART CRITICISM 518 (1954).

62. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

63. This idea has been discussed in the legal context. See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

64. See Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 398–99 (1965); see also Hugo Adam Bedau, *Feinberg's Liberal Theory of Punishment*, 5 BUFF. CRIM. L. REV. 103, 114–15 (2001); cf. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 9 (1968) (discussing how retribution is the application of the pains of punishment to an offender who is morally guilty).

65. Cf. *Fairlawns Cemetery Ass'n v. Zoning Comm'n*, 86 A.2d 74, 77 (Conn. 1952) (holding that zoning ordinances must be "expressive of a plan which is comprehensive").

vices.⁶⁶ As with individual actions, state actions can have implicit, complex, or unintended meanings.⁶⁷

My claim is that actions, including state actions, are paternalistic when they express the idea that the actor knows better than the person acted upon regarding something that is normally within that person's sphere of control.⁶⁸ For example, if I try to induce you to eat healthier foods, this counts as paternalism because it expresses the idea that I know what is good for you better than you do. If a law requires motorcyclists to wear helmets, this is paternalistic because it expresses the idea that the government knows better than motorcyclists what is good for them. The basic idea is that paternalistic actions are those that express the idea that the actor knows better than the other person.

On its own, however, this expressive content isn't sufficient. One wouldn't call the action of yelling "I know better than you" an act of paternalism. Paternalism also requires at least the superficial appearance of providing aid. Reasonable perception seems to be the important thing here, not intent. If I try to kill you with the genuine intention to send you to heaven, this would not seem like paternalism because a reasonable person would count this as providing aid. Thus, a more precise analysis would be something like: A's action X is paternalistic toward B if and only if X involves A providing some (not necessarily net) benefit to B and X implicitly expresses the claim that A knows better than B what will benefit B.⁶⁹

This is a descriptive account of paternalism—paternalism involves actions that express a certain view about the person acted upon. Paternalism's normative significance flows naturally from this description. What makes paternalism generally objectionable is that its expressive content is generally objectionable. It is usually insulting to be told that you do not know best with regard to your own matters.⁷⁰ When we confront paternalistic actions

66. Cf. Francesca Barigozzi & Bertrand Villeneuve, *The Signaling Effect of Tax Policy*, 8 J. PUB. ECON. THEORY 611, 611 (2006) (modeling the use of taxes to communicate to citizens the effects of certain actions).

67. For an excellent study of how a law can have significant expressive content beyond the particular sanction it imposes, see Adriaan Lanni, *The Expressive Effect of the Athenian Prostitution Laws*, 29 CLASSICAL ANTIQUITY 45 (2010).

68. Sometimes, paternalism is directed more at the other party's willpower than the party's judgment. That is, sometimes it may aim to prevent weaknesses of will. In such cases, the paternalism doesn't express the idea that the other party doesn't know what's good for her as much as it expresses that the other party is dysfunctional as an agent. I will generally talk in terms of "knowing better," but I mean to include cases in which what is expressed is that one is better as an agent.

69. I have put this in terms of benefit, but the idea might be modified to incorporate Shiffrin's point about control rather than benefit. On that view, the account would be: A's action X is paternalistic toward B if and only if X involves A interfering with B's control and X implicitly expresses the claim that A knows better than B with regard to the matter at issue. See Shiffrin, *supra* note 4, at 216–18.

70. The observation that paternalism involves an insult is not a new one. See, e.g., de Marneffe, *supra* note 8, at 68 ("Paternalism seems repugnant because it seems infantilizing. In limiting our liberty for our own good, it seems that the government treats us like children."); de Marneffe, *supra* note 31, at 72 ("The thought that paternalism is wrong is closely tied to the

or policies, our objection is based on what those actions or policies say about us. Thus, the objectionable feature of paternalism is not the nature of the interference (which is more or less coercive), nor the intention behind the interference, but rather what is expressed by that interference.

It is, of course, true that more forceful intervention will frequently be a statement of even greater superiority in judging one's welfare. So for this reason (and because the potential for injury is greater), forceful coercion will often seem more objectionable than gentler nudging. But it is not simply how coercive an act of paternalism is that dictates whether it is objectionable, but rather how much respect it shows to the subject.

To put the point another way, the expressive account recognizes that free choice is often important for its symbolic value—it reflects respect for the chooser. Libertarians claim to be moved by the value of liberty—that is, of having control over their own lives. But there are different reasons for valuing choice.⁷¹ One reason is instrumental: having choices will often allow me to better pursue my own well-being. Thaler and Sunstein show, however, that uninfluenced choice will sometimes work against this instrumental value.⁷² My choices will sometimes have more instrumental value if they are made under favorable conditions, such as those constructed by a good choice architect. But there are other reasons for valuing the ability to choose. In particular, my ability to make choices may be valuable as an indication of the respect others have for me. It is this value that the expressive theory says is harmed in cases of paternalism. And whether the symbolic value of choice is undermined does not necessarily correspond with the degree of coercion involved. As the examples above are meant to suggest, coercion sometimes will not symbolize an insulting assertion of superiority, and mere choice structuring sometimes will.

The expressive account thus begins to explain why details and context matter so much to paternalism. It is because the meaning of any expression varies greatly depending on context. The statement “I/We know better than you what's good for you” is more offensive in some contexts than in others. In some contexts, it may even be acceptable. Similarly, the impermissibility of a paternalistic action will depend heavily on the context. This dependence explains the pair of spousal interventions described previously.⁷³ In the first example, the paternalism is forceful but isolated. It assertively implies that the party knows best on this occasion. But importantly, it does not express

thought that there is something disrespectful about it, that it is disrespectful to coerce another adult on the assumption that he's mistaken about what's best for him.”); Husak, *supra* note 38, at 41 (“[T]he individual acting paternalistically towards another claims superiority by denying the autonomy of the person so treated.” (quoting Arthur White, *Paternalism* 73–74 (1974) (unpublished Ph.D. dissertation, University of Virginia)); Shiffrin, *supra* note 4, at 220 (“[P]aternalism delivers a special sort of insult to competent, autonomous agents.”).

71. See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 251–56 (1998); T.M. Scanlon, Jr., *The Significance of Choice*, in 8 *THE TANNER LECTURES ON HUMAN VALUES* 149, 149–216 (Sterling M. McMurrin ed., 1988).

72. See THALER & SUNSTEIN, *supra* note 9.

73. See *supra* Section I.C.

wholesale superiority of judgment. When someone's actions generally express respect for your autonomy, an isolated intervention may seem benign. General or widespread disrespect, in contrast, is precisely what makes the second relationship seem objectionable. Even if a friend or spouse doesn't ever force you to do anything, her actions can express the view that you cannot choose well for yourself.

Furthermore, the background relationship and particular facts about the intervention make an enormous difference. In the spousal examples, it matters that the coercive actor is a spouse. This is not because spouses have some sort of permission to coerce each other. Rather, the context matters because it implies a background of love and respect. If this is a good marriage, then the partners respect each other in a way that is compatible with acknowledging each other's particular failings. In the first smoking example,⁷⁴ it matters that the friend is a fellow smoker, because that blunts the implication of general superiority of judgment. For this reason, the same behavior from a nonsmoker might be objectionably paternalistic. And in each case, it matters that the implied failing is human and that the liberty being restricted is not one of great symbolic significance.⁷⁵ One could go on, but, in short, an action's impermissibility on grounds of paternalism depends on context, in the same way that an uttered sentence may be more or less objectionable depending on the context in which it is uttered.⁷⁶

B. *Expression and Justification*

The expressive theory holds that paternalism is characterized by what it expresses and not by the intent of the actor. In this Section, I want to explore a complexity that arises in this distinction. The complexity arises because the meaning expressed by an action may sometimes depend on the available justifications for it. As a result, inquiring what an action expresses will sometimes involve inquiring how it can be justified. This bears a strong

74. See *supra* note 37.

75. See de Marneffe, *supra* note 8, at 68 (“In limiting our liberty for our own good, it seems that the government treats us like children or that it impedes our development into fully mature adults, but there is no reason to think this is true of every paternalistic policy. Some liberties have a special value in symbolizing the status of adulthood within our society, the freedom to marry, for example. . . . Not every liberty, though, has this kind of significance: the freedom to drive without a seatbelt does not. So there is little reason to think that every paternalistic policy is infantilizing in this way.”). Overall, I am quite sympathetic with de Marneffe, but I think his focus on the type of liberty involved is too narrow. The particular liberty being infringed is, in my view, only one among many factors that determine whether the particular example of paternalism is actually objectionably insulting to one's agency.

76. In making this point, I disagree with Hausman and Welch's claim that, “[u]nlike constraining someone or substituting your judgment for theirs, providing information and giving advice treats individuals as fully competent decision makers.” Hausman & Welch, *supra* note 34, at 127. Even merely providing advice or information can count as objectionably paternalistic. If you don't believe me, try going to your nearest McDonald's and politely informing everyone in line of the nutritional information regarding their diets. Whether giving advice or information is perfectly respectful of another or not will depend on context. See George Tsai, *Rational Persuasion as Paternalism*, 42 PHIL. & PUB. AFF. 78 (2014).

resemblance to an inquiry into intent, but it is crucially different—the question of available justification does not involve examining the subjective motivation of the actor.

The general point—that meaning depends on available justification—is not terribly hard to grasp. When one friend laments, “Sally never called me back; I guess that means she isn’t interested in me,” and the other friend responds, “I don’t think it means that. I saw her two days ago and she said that she was having her wisdom teeth pulled out yesterday,” the exchange involves interpreting the meaning of an action (or inaction, in this case) against a backdrop of available justifications. In this case, Sally might not have called because she’s not interested (subjective motivation), but her failure to call doesn’t express that. And the asymmetry can run in the opposite direction as well—that is, a lack of other available justifications might mean that my action expresses something that I didn’t really intend. I might think that showing up to a cocktail party in a pirate costume will be humorous, but it turns out that this action will express disrespect to my hosts. (It turns out that “it’s funny” isn’t always a valid justification.) The general point, then, is that what an action expresses will often depend on what justifications are available.

For example, Thaler and Sunstein mention daylight saving time as an example of libertarian paternalism.⁷⁷ The thought is that by altering the time settings, the government is nudging us to get out of bed earlier and also to save energy.⁷⁸ Of course, we all could get up at 6 a.m. instead of 7 a.m. during the summer without the time change, but the government gives us a nudge in this direction—a nudge that isn’t a shove because we can all choose to get up at the same time in the summer, only now it will be called 8 a.m.

While it certainly is the case that the policy is designed to alter citizens’ behavior in favorable ways, it’s not clear that this is really an example of paternalism. To see why, one must notice that time is a social mechanism for coordinating behavior. We use time to synchronize our activities with one another. Imagine that there was no daylight saving time. An individual might enjoy the extended daylight hour by shifting her schedule an hour earlier. But for most people, this would not be possible. If the individual’s employer hires her 9:00–5:00, she cannot just decide to work 8:00–4:00. What’s more, many or most people might be in the same situation—wanting to change schedules, but constrained by others. It would be a classic coordination problem. By establishing daylight saving time, the government provides a solution.⁷⁹

77. THALER & SUNSTEIN, *supra* note 9, at 47.

78. *Id.*

79. *Cf.* Fotion, *supra* note 27, at 197 (“Providing police and military protection for the citizens on this analysis would not fall under the aegis of the paternalistic model, since one could not expect a person on his own ever to provide these services for himself. Nor would most regulatory functions of the state be classed as paternalistic.”).

But why does the existence of a coordination problem mean that the policy isn't really paternalism? After all, the government is implementing a policy to encourage people to act in their own best interests. Isn't the government saying to us, in a sense, "Without our help, you will adopt schedules that are to your disadvantage"? To see why the policy is not paternalistic, consider the justification that can be offered to a particular citizen. Because of the coordination problem, the government policy does not rely on the idea that the citizen is unable to judge his own interests. If a citizen asks, "What makes you [government] think that I don't know what is best for me?" then the government has a response: "We aren't denying that you know what's best for you, but in this case you (and everyone else) can't do it on your own—and that's why we're helping." In other words, the coordination problem means that the government need not justify its action on the premise that individuals don't know what's best for them. It does rely on the idea that we (collectively) wouldn't do what's best for us without government intervention. But this latter premise, unlike the former, contains nothing offensive to the values of autonomy. That is, it doesn't imply that we are incapable of governing our own lives.

As this example illustrates, some government policies that seek to induce the citizenry to act in ways that will serve its own interests will not count as paternalism. When Thaler and Sunstein use the term "libertarian paternalism," they sometimes seem to include any such policy.⁸⁰ But many times, these policies aren't forms of paternalism that are justifiable because they are libertarian. Rather, they aren't paternalism at all.

Such policies aren't paternalism because, given the available justifications, the policies don't express a judgment that citizens cannot make good decisions for themselves,⁸¹ even though the government's intent⁸² was paternalistic. Solving a coordination problem is a classic justification for government intervention. It is not paternalism when the government tells us which side of the road to drive on because this isn't justified by any sense that individuals are inadequate, but rather by a sense that individual actions need to be coordinated in order to overcome a collective action problem. It is coercive action that benefits individuals, but it is not justified by the idea that individuals cannot judge what is best for them.

80. See THALER & SUNSTEIN, *supra* note 9, at 6 (arguing that a libertarian paternalistic policy is any policy that attempts to move people in directions that will make their lives better, without forbidding any options or substantially changing their economic incentives).

81. The subtle difference between this and the claim that requiring motorcycle helmets isn't paternalism is that this is done to reduce public health expenses. See *supra* Section II.A. The difference, though, is that in the collective action example, the available response can be, "We don't distrust your judgment at all. You just can't do it on your own." Whereas the available response in the motorcycle case doesn't actually seem to cancel the implication that the parties will make bad choices—it seems to be saying, "We only care about your bad choices because they affect the rest of us," which is quite a bit more abrasive. This contrast illuminates the difference between an express account and an intent-based account. The motorcycle policy may not be based on a paternalistic intention, but it is still paternalism because of its outward character.

82. Whatever that would mean. See *supra* Section II.C.

An expressive account of paternalism will sometimes have to ask why a particular action or policy is pursued. But it asks that question to interpret the meaning of an action, not as an inquiry into intent. This is the difference between objective and subjective justification. In many cases of paternalism, the objective justification for the action will be that someone is not able to judge what is best for herself. In cases of objectionable paternalism, an action may be insulting because no noninsulting justification is readily available.⁸³

C. Humility and Permissible Paternalism

The expressive theory of paternalism descriptively categorizes certain actions and policies as paternalistic based on what they express. Because this expressive content is potentially insulting, the theory explains why paternalism is a *prima facie* reason against pursuing an action or policy. But this will be true only in general. The expressive theory of paternalism explains how some instances of paternalism are permissible. The answer is that some expressions of our limitations as agents need not be insulting.

One of the powerful elements of Thaler and Sunstein's argument is the use of behavioral economics to convincingly cast aside John Stuart Mill's bizarre libertarian premise that we are always the best judges of our own well-being.⁸⁴ Although we probably didn't need behavioral economics to see it, there can be little doubt that we are all routinely mistaken in our judgments about what is good for us.

On the basis of this humility, we should be willing to accept some implicit questioning or criticisms of our judgment. If my friend gives me a CD of music that I profess to dislike and tells me that I will enjoy it if I try, I should be willing to think that maybe my judgment was clouded. If my wife starts forcing me to eat healthier foods now and then, I need not immediately object that I know what's best for me.⁸⁵ Although in both cases the

83. For example, Justice Stevens argued against restrictions on truthful commercial speech. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality opinion) ("Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."). When Justice Stevens says that the bans rest on the "offensive assumption" about the public, he is making a point about what justifications are available for the law, not about what in fact motivated its adoption. His point is that no nonoffensive justification is available. Of course, this is not to say that Stevens is right in saying that the existing justification is offensive. Denying that more information is always better for consumers might not be all that offensive, especially in light of the behavioral weaknesses like those Thaler and Sunstein highlight. *See supra* Section I.A.

84. *See, e.g.*, THALER & SUNSTEIN, *supra* note 9, at 19 ("[The fact of systematic error] does not mean something is wrong with us as humans, but it does mean that our understanding of human behavior can be improved by appreciating how people systematically go wrong. . . . Knowing something about the cognitive system has allowed others to discover systematic biases in the way we think.").

85. This example has many similarities to Husak's argument that paternalistic intervention may be acceptable if a vice is shared and that, as a result, "it would be peculiar to say that . . . paternalistic treatment betrayed a lack of respect for me, or was evidence of [an]

action calls into question my judgment about my own well-being in a particular matter, the implication does not seem offensive in either case. It would, of course, be totally different if a stranger approached me on the street and informed me that I would look so much better if I refrained from wearing pleated pants. Or if a customer next to me at the café were to suggest that I eat healthier foods. But many, if not most, criticisms of our judgment will not be so offensive.

For this reason, the standard libertarian's categorical objection to paternalism *per se* strikes me as a bit arrogant. It is as though every instance of paternalism were an impertinent stranger on the street. If some person or institution prods you in ways that are thought to make you better off, it indicates a lack of humility to respond immediately in knee-jerk fashion. Perhaps I can benefit from the government telling me to wear a motorcycle helmet, just as I can benefit from my wife telling me to eat some vegetables. Of course, if my wife or the government is persistently nagging me about all sorts of things, then I have every right to object. But humility, I think, counsels against thinking that every single instance of paternalism is objectionable.⁸⁶

In a way, this argument for paternalism is a variation on the problematic but frequently pursued argument from consent. A number of scholars have argued in favor of some degree of paternalism on the grounds that individuals would, or should, consent to it.⁸⁷ One can see the appeal of this argument. The classic example is Odysseus instructing his sailors to bind him to the mast of the ship so that he would not succumb to the calls of the Sirens. The constraint doesn't really seem objectionable because Odysseus requested that he be constrained. If other forms of paternalism have this

attitude of moral superiority." Husak, *supra* note 38, at 45. I share Husak's intuitions. But Husak defends only the weaker position that paternalism may be permissible where there is no implication of superiority or shortcoming. I think this line of thought goes further. In my view, permissible paternalism may imply superiority of judgment or a shortcoming on the part of the subject. This is because limited assertions of superiority ("I have less of a sweet tooth than you") or limited assertions of shortcomings ("Baked goods are your great vice") are still compatible with overall respect and equality. Paternalism becomes objectionable not when it implies superiority, but when it begins to imply wholesale superiority.

86. See de Marneffe, *supra* note 8, at 80 ("Errors in practical judgment are normal, though, whether they are about what is best for oneself or about what is best all things considered. So the supposition that someone is wrong about what is best for him with respect to a particular decision does not imply that he is stupid. It implies only that his rationality is imperfect, and so is open to the kinds of error we all are."). In this regard, I am in total solidarity with de Marneffe; de Marneffe, however, focuses only on the type of liberty involved.

87. E.g., JOHN RAWLS, A THEORY OF JUSTICE 219 (rev. ed. 1999) ("It is also rational for [the parties] to protect themselves against their own irrational inclinations by consenting to a scheme of penalties that may give them a sufficient motive to avoid foolish actions and by accepting certain impositions designed to undo the unfortunate consequences of their imprudent behavior."); Dworkin, *supra* note 40, at 119 ("Parental paternalism may be thought of as a wager by the parent on the child's subsequent recognition of the wisdom of the restrictions. There is an emphasis on what could be called future-oriented consent—on what the child will come to welcome, rather than on what he does welcome.").

character, then they might be permissible. The trick, then, is to show how typical cases of paternalism are justified based on consent.

The difficulty for such accounts is that they inevitably rely on some notion of quasi or implied consent. But part of what makes typical paternalism coercive is that we don't consent to it. Perhaps we should, or perhaps we would under more ideal conditions, but it's not clear that this is enough to generate permissibility.

The argument from humility, as I will call it, does not try to argue that parties should or would consent to the paternalism. Rather, the argument claims that parties cannot reasonably reject the paternalism. If some party makes me do something because it will be in my own interest and this interference is relatively benign—i.e., it doesn't impugn my judgment or threaten my autonomy more generally—then it may be arrogant for me to object that I know what's best for myself.⁸⁸ That is, if the paternalism is appropriately benign, then what makes it permissible is not that I consent to it—which I do not—but rather that I cannot reasonably complain about it. It's not that some instances of paternalism are consented to, but rather that some instances of paternalism are unobjectionable.⁸⁹

I don't want to overstate the point. Many examples of paternalism are objectionable. They are objectionable because they are insulting. And they are insulting because they imply that we cannot judge for ourselves what is in our own interests. The point that I am making, however, is that not every implied criticism of our judgment should be taken as an insult. Sometimes

88. It is worth contrasting this argument with the argument that Duncan Kennedy makes for paternalism. See 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 (1982). Kennedy argues that paternalism may be justified by appealing to the Marxist idea of false consciousness. *Id.* at 572. While the recognition that we may be systematically mistaken about our own interests is an important aspect of any defense of paternalism—the present account, Thaler and Sunstein, and Kennedy all share that characteristic—the appeal to false consciousness seems like the wrong tactic. By focusing on the capacities of the chooser, Kennedy makes the same mistake as the antipaternalist. What is important is not whether the chooser actually is suffering from false consciousness. What is important is that our general recognition of the possibility of false consciousness means that intervention is not per se insulting. Kennedy seems to think that whether paternalism is permissible depends on whether the person actually is suffering from false consciousness—whether an intervention will make things better for that person. See, e.g., *id.* at 641. In my view, this is not true and the focus on capacity is mistaken. Even if an intervention does not make things better, even if the person did know what was best, the possibility that they didn't know should keep them from necessarily objecting to any intervention. And, on the flipside, the expressive account leaves room that one might be objectionably paternalistic toward someone who definitely lacks the capacity to choose—for example, when one assists a mentally handicapped person or a child in a manner that is overly condescending or stigmatizing.

89. Recent empirical work by Sunita Sah, Dena Gromet, and Richard Larrick suggests that, in fact, people are less likely to find nudges objectionable if their own weaknesses are made salient to them. Sunita Sah et al., *Transparent Nudges: How Knowledge of a Nudge Can Increase Its Acceptability* (unpublished manuscript) (on file with author). That is, when we recognize our own failings, we are more likely to tolerate instances of paternalism.

we should acknowledge that perhaps we don't know best.⁹⁰ As Thaler and Sunstein, like so many others, point out, the evidence is pretty good that we're not great at making judgments for ourselves in a whole range of contexts.⁹¹ For this reason, raising the libertarian battle cry against any instance of paternalism is a sort of blind overconfidence.

D. *Truth and Insults*

In the previous section, I drew on the expressive understanding of paternalism to suggest that the appropriateness of humility eliminates the objection to some cases of paternalism. In the next three Sections, I turn to the opposite thought, namely that the expressive account can explain objections to paternalism that might otherwise seem perplexing.

First, the expressive approach explains why even empirically well-supported paternalism may be objectionable. I have suggested that paternalism is impermissible if it insultingly expresses the idea that the paternalist knows better than the subject. At this point, the libertarian paternalist might be tempted to respond by simply saying, "But we (or some other policymakers) *do* know better than you do. You are irrational—just like the rest of us." And this may be true. One might point to the vast array of psychology studies that show our systematic irrationalities. Saying that detached policymakers know better might just be honest.

Honesty, however, does not immunize one from having committed an insult. Unlike in libel law, truth is not a complete defense. This is not hard to see. If a stranger on the street blurts out that I dress poorly or that I am overweight, I need not dispute the truth of the statement in order to have an objection to it. Even truthful statements can still be insults.

This might sound a bit irrational. Uncharitably, it seems like the only objection would involve saying, "It's true, but don't say it out loud." Put this way, the objection does seem odd. But it doesn't need to be put quite like that. One might say that showing respect for someone requires looking past his or her failings or imperfections, or at least not publicly asserting them.

90. I think the argument from humility relates to another argument for paternalism that I find somewhat convincing. This argument points out that there is a distributive aspect of paternalism—that some people, through no fault of their own, are more apt to make poor choices. Arneson, *supra* note 8, at 274–75. When this distributive dimension is considered, I think a blanket objection to paternalism looks even less persuasive. That is, I should be humble about the fact that I may be a bad decisionmaker in this context, and even if I am a good decisionmaker, I should be reticent to object to a policy that may help others. I disagree here with Kennedy, who claims that "[f]or an intervention to be paternalist, the distributive effects have to be 'side effects' rather than the purpose of the initiative." Kennedy, *supra* note 88, at 625. The claim that Kennedy makes here is representative of the problems with intent-based theories of paternalism.

91. Ryan Bubb & Richard Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1595 (2014) (pointing out that there is a significant tension between the evidence from behavioral economics and the emphasis placed on noncoercive policy proposals). "[I]t would be surprising if the main policy implication of the mounting evidence documenting the failure of individual choice was a turn toward regulatory instruments that preserve individual choice." *Id.*

One wouldn't dare, for example, tell the Queen of England that she has a stain on her clothes. It might be true, but to express it would be disrespectful. Similarly, the truth-telling stranger is being disrespectful.

The objection to paternalism may be similar. After all, the antipaternalist may not object to the truth of the statement that others know better, but rather to its expression through the policy. That the paternalist does, in fact, know better may not matter. The antipaternalist, we might analogously imagine, knows that he is irrational like any other human being, but finds it disrespectful when other people (or the government) thrust this fact back in his face.

But cast this way, as has already been suggested, the antipaternalist will sometimes seem a bit too proud. This is where the argument from humility kicks in. "You make mistakes" should not always be taken as an insulting assertion of superiority. Sometimes it's just honest, and that shouldn't bother us. But not because honesty is always unobjectionable. And thus even empirically grounded paternalism may be problematic.

E. *Inevitability and Expression*

Some argue that paternalism is a more pervasive aspect of life than we generally appreciate, and that this is a reason to favor it.⁹² Thaler and Sunstein repeatedly assert that affecting choice architecture is inevitable.⁹³ Because a cafeteria must arrange the foods one way or another, it will unavoidably influence its customers' food choices. As a result, genuinely neutral noninterference is impossible. And if shaping the choice architecture is inevitable, then, the argument goes, shaping it in the best interests of the chooser should be unobjectionable. No matter what we do, we're going to influence people's choices, so why not do it in a way that is in their best interests?

The problem with this argument is that it assumes that the potentially objectionable feature of paternalism is that decisions are being influenced. From Thaler and Sunstein's perspective, the potential objection has the form: "You're trying to influence what choices I make." And to this objection, they imagine the response, "We can't help but influence what choices you make, so we're trying to do so in as helpful a way as we can."⁹⁴ In a

92. *E.g.*, Kennedy, *supra* note 88, at 645–46 ("The single most important piece in the quilt of arguments in favor of ad hoc paternalism is the pervasiveness of compulsory terms, in contract, in tort and in statutory schemes. . . . Paternalism everywhere, coming out of the woodwork, suggests that the satisfying clarity of one's initial anti-paternalist reaction is made possible only by excluding most of the problem from consideration.").

93. *E.g.*, Sunstein & Thaler, *supra* note 8, at 1164 ("The first misconception is that there are viable alternatives to paternalism. In many situations, some organization or agent *must* make a choice that will affect the behavior of some other people. There is, in those situations, no alternative to a kind of paternalism—at least in the form of an intervention that affects what people choose.").

94. This argument is based on the famous ought-implies-can principle. The imagined objector says, "You ought not affect my choices." Thaler and Sunstein respond, "We cannot

sense, they reject the possibility of the idealized libertarian fantasy of complete noninterference.

But this is not persuasive if the actual objection to paternalism is of a different bent. If the objector isn't concerned with the interference itself, but rather with what is expressed by the interference, then it's a whole different ball game. If the critic objects not to the fact that choices are being influenced, but rather to the way that choices are being influenced, then the inevitability of influencing choices is relatively insignificant.⁹⁵

For example, suppose the antipaternalist objects to the cafeteria's effort to get people to eat healthier foods. Thaler and Sunstein respond by noting that there is no "neutral" option available—no matter how the cafeteria arranges the food, it will affect what choices people make. But, drawing on the expressive approach, the antipaternalist may respond, "That's fine. I understand that my choices will be affected one way or another. But don't go around making it seem like you know what's best for me. Arrange the foods in the way that is easiest for you. Or randomly. What I object to is your saying that you know better than I do." We should take this objection seriously.

Understanding paternalism in terms of expressive content offers the tools to make objections like this seem intelligible. Framed in this way, the antipaternalist has a reasonable objection that withstands the inevitability of interfering with parties' choices. The complaint about paternalism is not that it interferes with our lives per se, but that it expresses disrespect for us as decisionmakers.

F. *Singling Out*

As I have already argued, the expressive theory of paternalism explains why certain instances of paternalism are not objectionable and why other instances are objectionable. In this way, I believe the theory is better equipped to account for the ways in which the concept of paternalism is deployed in actual discourse. The expressive theory does justice to our actual use of the concept. To further support this claim, I explore how the expressive theory of paternalism makes sense of our heightened sensitivity to paternalism that singles out particular individuals or groups.

Recall the nudge puzzle: how can a *less* restrictive policy be *more* objectionable? In George Eliot's *Middlemarch*, Edward Casaubon leaves his estate to his wife, Dorothea, with the unique provision that she loses her entire inheritance if she marries Will Ladislaw.⁹⁶ This provision proves to be a

not affect you choices." With the implicit ought-implies-can premise, this is taken to refute the imagined objector.

95. Cf. Jamie Kelly, *Libertarian Paternalism, Utilitarianism, and Justice*, in *PATERNALISM: THEORY AND PRACTICE*, *supra* note 31, at 216, 219 ("[Thaler and Sunstein] appear to be running together two claims here: The first is the claim that some sort of influence is inevitable; the second is that the appropriate response must be paternalistic.").

96. 3 GEORGE ELIOT, *MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE* 113 (1872).

source of great injury to both Dorothea and Ladislaw.⁹⁷ But it is, one will note, simply a strong nudge. There was nothing requiring Casaubon to leave his estate to his wife, regardless of future remarriage.⁹⁸ It is a benefit contingent on certain conduct. The provision is a biting injury, however, because it singles out only a future union with Ladislaw. What might not have been insulting as a general paternalistic nudge becomes deeply insulting when it singles out a particular individual. The singling out creates an altogether different expressive content.

I have suggested that a government's policy expressing the inferiority of individual decisionmaking might be objectionably paternalistic, even if the policy is not directly coercive. One way that this may occur is when a government policy singles out a particular set of citizens. That is, one consequence of the view I am defending—one that I think matches our intuitions—is that government paternalism that picks out a particular subset of the citizenry (for example, the poor or the Native American) is more apt to be objectionably paternalistic. When a democratic government enacts a general paternalistic policy—for example, seatbelt laws—then at least all citizens are treated the same. And if the government generally respects the autonomy of its citizens, then one or another discrete exceptions may be seen as simply a recognition of certain limited failings that we all have. But when a government policy singles out a certain group for regulation, then the risk of expressing an objectionable lack of respect is significantly higher. This is especially true when the group is already disadvantaged⁹⁹ or marginalized.¹⁰⁰ Attempted protection can, in this way, become

97. *Id.* at 207–24.

98. It is perhaps noteworthy that Dorothea does have a sufficient fortune to live on, albeit more modest than Casaubon's. See 1 ELIOT, *supra* note 96, at 5.

99. See DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 150–51 (1987) (“Inequalities that are initially quite independent of the paternalistic intervention may come to affect its character, and it may in turn reinforce the inequalities. Even if itself isolated or sporadic, the intervention can generate paternalistic effects that persist in time and spread in social space . . .”).

100. While traditionally disadvantaged groups like women, the poor, or racial minorities are especially likely to be relevant, other groups may also feel the sting of paternalism in this way. Consider a penetrating exchange in NBC's *The West Wing*:

Sam Seaborn: “I am so off-the-charts tired of the gun lobby tossing around words like personal freedom and nobody calling them on it. It's not about personal freedom and it certainly has nothing to do with public safety; it's just that some people like guns.”

Ainsley Hayes: “Yes, they do. But you know what's more insidious than that? Your gun control position doesn't have anything to do with public safety, and it's certainly not about personal freedom. It's about, you don't like people who *do* like guns. You don't like *the people*. Think about that the next time you make a joke about the South.”

The West Wing: In This White House (NBC television broadcast Oct. 25, 2000). Gun safety and control is, I think, an example in which those who object on grounds of paternalism are not especially worried that, e.g., mandatory safety locks or waiting periods are especially burdensome to their personal freedom, but rather are concerned that the policy is insulting to their values, judgment, and way of life generally.

injury.¹⁰¹

This is true whether the paternalism is coercive or not. Like their coercive counterparts, nudges are more likely to be objectionably paternalistic when they target a particular minority, especially a minority group that may already think that the government does not adequately respect it. If poor or minority families find themselves targeted by an array of nudges, they may reasonably come to view this attention as alienating or disrespectful. For example, it may be more objectionably paternalistic to target disadvantaged parents with information about school choice¹⁰² than it would be to adopt the more directly paternalistic policy of increasing the per child expenditures in disadvantaged neighborhoods. The former implies that poor parents don't know how to make good choices for their children, whereas the latter implies only that the poor need more resources.

The expressive theory of paternalism is equipped to make the charge of paternalism against such targeted policies intelligible. This concern animates the arguments against the so-called "new paternalism" exemplified in welfare reform policies.¹⁰³ For example, government nudges have been charged with objectionable paternalism due to the requirements associated with the welfare reform movement. When Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"),¹⁰⁴ the major shift was to require welfare recipients to work in order to receive benefits. Among other provisions, adults receiving Temporary Assistance for Needy Families ("TANF") benefits are required to participate in work activities within two years after they start receiving assistance under the block grant.¹⁰⁵ Nonexempt adult recipients who are not working must participate

101. Cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." (footnote omitted)).

102. THALER & SUNSTEIN, *supra* note 9, at 204–05 (noting that low-income parents made "[m]uch better" school choices when provided with a fact sheet with information about test scores and acceptance rates at available schools).

103. See generally THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY (Lawrence M. Mead ed., 1997) [hereinafter THE NEW PATERNALISM] (discussing the trend in welfare policy toward requiring individuals receiving assistance to work or stay in school in exchange for government aid).

104. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

105. 42 U.S.C. § 602(a)(1)(A)(ii) (2012).

in community service two months after they start receiving TANF benefits.¹⁰⁶ And able-bodied working-age individuals with no dependents must be working or in work programs to be eligible for food stamps.¹⁰⁷ As states have implemented the law, even more subtle nudges have arisen to discourage reliance on welfare—demanding a job search before enrollment, photographing, fingerprinting, and interrogation.¹⁰⁸

While these requirements were at least in part based on a desire to reduce public costs, another major rationale was that the work requirements would actually benefit welfare recipients by channeling them toward employment and personal responsibility. President Clinton, for example, signed the bill because it provided a significant benefit to poor Americans: “It gives us a chance we haven’t had before to break the cycle of dependency that has existed for millions and millions of our fellow citizens, exiling them from the world of work [which] gives structure, meaning and dignity to most of our lives.”¹⁰⁹ Newt Gingrich similarly described the reform as an effort to help welfare recipients:

We were determined to lift the “artificial weights” of a bureaucratic system of welfare that drained individual initiative and energy and hurt the very people it was designed to help. In its place, we were determined to clear a path of work and opportunity that would develop the habits of success that would lead to self-sufficiency.¹¹⁰

The idea was to create an incentive for needy individuals to do what some thought would benefit them—namely, enter the workforce.¹¹¹

Although some leading proponents of welfare reform embraced the term paternalism,¹¹² one of the major criticisms of the reforms was that they

106. *Id.* § 602(a)(1)(B)(iv).

107. 7 U.S.C. § 2015(o)(2) (2012).

108. See Peter Edelman & Barbara Ehrenreich, Opinion, *Why Welfare Reform Fails Its Recession Test*, WASH. POST, Dec. 6, 2009, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120402604.html> (“The Urban Institute’s analysis showed that 42 states have rules that discourage enrollment, such as requiring an extensive job search, even when there are obviously no jobs to be found. For a person without a car or access to public transportation, a requirement to apply for dozens of jobs before an application for welfare will even be considered, as some states and counties mandate, can be a deal-breaker. In some states, according to Kaaryn Gustafson of the University of Connecticut law school, ‘applying for welfare is a lot like being booked for a crime.’ There may be a mug shot, fingerprinting and lengthy interrogations as to the true paternity of one’s children. Word gets around, and, even in the face of destitution, many people will not undergo such indignities.”).

109. President William Clinton, Announcement on Welfare Legislation (July 31, 1996), available at <http://www.nytimes.com/1996/08/01/us/text-of-president-clinton-s-announcement-on-welfare-legislation.html>.

110. *To Review Outcomes of 1996 Welfare Reforms: Hearing Before the H. Comm. On Ways & Means*, 109th Cong. 20 (2006) (statement of Newt Gingrich, Founder, Gingrich Group, and Former Speaker, U.S. House of Representatives.).

111. Gingrich viewed the use of incentives rather than coercion to be an important feature of the legislation’s appeal. See *id.* at 23 (“Americans are very responsive to incentives and very hostile to penalties or punishments.”).

112. See THE NEW PATERNALISM, *supra* note 103.

were objectionably paternalistic.¹¹³ From a perspective that focuses on coercion or intent, this criticism may appear unintelligible. The paternalism involved in the government attempting to encourage employment among its citizens is not, I think, per se objectionable. Only the most zealous anti-paternalist would, for example, claim that general tax subsidies for adult education and job training are an impermissible imposition on individual autonomy. So if the government can generally use incentives to encourage work, how can one make sense of the charge that welfare reform was objectionably paternalistic?¹¹⁴

The best answer is found in the implicit message that was expressed by singling out particular groups. Although facially neutral, the implicit message of the reform, at least to many ears, was not that we think everyone should be encouraged to work, but that we think the poor—in particular blacks and unwed mothers—should be encouraged to work. This singling out was viewed as insulting because it implied that adequate low-wage work was available,¹¹⁵ that blacks and single mothers were choosing not to pursue it,¹¹⁶ and that promiscuity or a lack of family values was the source of this

113. See, e.g., 142 CONG. REC. 20, 901–02 (1996) (statement of Sen. Moynihan) (“[I]t is not easy to change human behavior. Notwithstanding this fact, the premise of this legislation is that the behavior of certain adults can be changed by making the lives of their children as wretched as possible. This is a fearsome assumption. . . . I have pointed out that the principal—and most principled—opponents of this legislation were conservative social scientists who for years have argued against liberal nostrums for changing society with the argument that no one knows enough to mechanistically change society. Typically liberals think otherwise; to the extent that liberals can be said to think at all.”).

114. This not to say that there might not be some avenue to explain the objection, but it would have to involve some explanation. Professor Thompson suggests that autonomy concerns generate something like conditional paternalism constraints: if one is to have paternalistic welfare policies, then they should be the least restrictive policies available. THOMPSON, *supra* note 99, at 172 (“Any welfare system based on a paternalistic rationale should begin with the least restrictive policy on the continuum, and move to more restrictive ones only if they are necessary to make the system just, and only if they are consistent with the other criteria for justifiable paternalism.”). Thompson leverages this argument to suggest that paternalism concerns press against in-kind welfare. *Id.* at 170–72. Perhaps a similar argument could be made against work requirements.

115. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *THE BREAKING OF THE AMERICAN SOCIAL COMPACT* 170 (1997) (“Logically, but not in the heated and vitriolic politics created by the attack on welfare, a concern with the relationship of welfare to dependency should have directed attention to the deteriorating conditions of the low-wage labor market. After all, if there were jobs that paid living wages, and if health care and child care were available, a great many women on [AFDC] would leap at the chance of a better income and a little social respect.”); MICHAEL D. TANNER, *ENDING WELFARE AS WE KNOW IT* (Cato Inst. Policy Analysis No. 212, 1994), available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa212.pdf> (“As for providing an incentive for recipients to get off welfare, the conservative idea is based on the stereotyped belief that welfare recipients are essentially lazy, looking for a free ride. But as seen earlier, the decision to go on welfare is more likely a result of a logical conclusion that welfare pays better than low-wage work.”).

116. See, e.g., KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* 139 (2001) (“This welfare ‘dependency’ notion was built around the racist stereotype that lazy African Americans used welfare to avoid work. . . .

failure to work.¹¹⁷ In this light, the government wasn't saying that everyone should be encouraged to work, but that a discrete group of shirkers should be encouraged to work. This impression is only heightened by a background in which middle- and upper-class Americans receive billions of dollars in government subsidies for mortgage interest, nonprofit endeavors, marriage, tax-deferred savings, and so on, that do not come with any requirement that individuals be part of the workforce or engaged in productive activity. Welfare reform singled out a particular group as in need of a strong push toward the workforce, and it was this singling out that made the paternalism appear objectionable to critics.

The expressive understanding of paternalism makes clear how the charge of paternalism harmonizes with the related assertions that welfare reform was based on hostility toward the poor. If one views paternalism as simply a matter of intent, then these claims will appear to be polar opposites. Either the motive was to help the poor, or the motive was one of disgust for the poor. Professors Jordan and McCarty, for example, write that they seek to “distinguish true paternalistic justifications [for welfare reform] . . . against alternative explanations based on racial and gender bias [or] animus towards the poor.”¹¹⁸ The expressive account of paternalism, however, suggests that this is a false dichotomy—these are not mutually exclusive ways of understanding government policy. A policy may be “truly paternalistic,” in the sense that it genuinely aims to improve the well-being of those affected, and yet still be objectionable because it expresses insulting attitudes toward racial minorities, women, or the poor. This is the case, at least in part, because a genuine offer to help can still be insulting when it singles out a particular group as uniquely in need of that help.

My claim is not that these welfare reform policies were in fact impermissibly paternalistic—far more argument would be required to reach that

This stereotype was often linked with yet another racist stereotype, which held that poor African-American women bore children to gain or increase their welfare benefits.”).

117. See, e.g., Barbara Ehrenreich, *TANF, or “Torture and Abuse of Needy Families”*: *Top Ten Misconceptions About TANF*, 1 SEATTLE J. SOC. JUST. 419, 423–24 (2002) (“Many saw (and still do see) welfare reform as part of a moral crusade; a moral crusade against those evils of promiscuity, ‘illegitimacy,’ single-mother households, and so on. When you carry out a moral crusade against female sexuality and female-headed households, you are carrying on a crusade not just against poor women, but against *all* single mothers, ultimately against all single women, and against any woman who happens to be independent-minded. More affluent women must understand this. The rhetoric that denounces poor women, as the rhetoric against welfare has continually done, is an attack also on the rights and freedom of *all* women.”). Notice how the objection here is framed in terms of the policy’s rhetoric.

118. Stu Jordan & Nolan McCarty, *Welfare and Paternalism* 4 (Mar. 2, 2010) (work in progress), available at <http://www.princeton.edu/~nmcarty/paternalism9.pdf>. For what it’s worth, it’s not clear that Jordan and McCarty’s model actually tracks genuine paternalism at all. What it tracks is the benefit each person receives from the fact that other poor people are working. *Id.* at 11 (“ μ reflects a paternalistic benefit that the individual derives from having the poor participate in the work requirements and/or submit to other forms of behavioral regulation.”). In other words, it tracks the way in which increased work among the poor may be a public good, which has only a tangential relationship with the paternalistic reasons for endorsing a work requirement.

conclusion. My claim is simply that the expressive theory of paternalism provides the resources to understand the charge of paternalism, while other theories of paternalism do not. Those who find work requirements objectionably paternalistic are reacting not to coercion or to actual legislative intent, but more bluntly to the implicit insult and stigmatization.

G. *Unique Aspects of Government Paternalism*

Throughout this Article, I have basically treated paternalism as uniform—whether it is performed by one’s friend or by the government. But one might wonder: Isn’t the government different?¹¹⁹ In this Section, I reject three potential differences between individual and state paternalism, but acknowledge some ways in which government paternalism raises distinctive concerns.

On some views, there will be an obvious reason to be especially concerned about the government: its coercive power. Following a playoff game, then Denver Nuggets star Carmelo Anthony remarked, “I’m so much bigger than my opponent, any nudge, shove, anything like that—I get penalized for it.”¹²⁰ The soccer (or here, basketball) theory of paternalism might have a similar attitude about the government—the sheer amount of force it can bring to bear means that it is more apt to run us over. That is, if the concern with paternalism is that it can be coercive, then government paternalism may seem particularly concerning because the government has so much capacity for coercion.

But I have argued that what is objectionable about paternalism is not coercion. If paternalism from the government is more objectionable than paternalism from a friend, it’s not because the former simply has more coercive power. That would be like thinking that paternalism from powerful friends is somehow more objectionable than paternalism from weak or ineffective friends. Certainly there are general concerns about limiting the role of government in order to protect individual liberties, but these are not concerns about paternalism—they are concerns about totalitarianism.

A second way that the government might be different is the generality in which it acts. Because it is bigger, it is also clumsier. When a friend or a family member acts paternalistically, the intervention may be adapted to the needs of the person intervened upon. Professor Thompson, for example, suggests that this is one of the important differences between individual and government paternalism: “Paternalistic legislation, which applies to an entire society, cannot easily be tailored to the settled preferences or life plans of

119. Thompson, for example, suggests that the individual model of paternalism can be misleading when applied to government policies. See THOMPSON, *supra* note 99, at 149 (“The liberal paradigm of paternalism usually presents a relationship between two individuals, who interact personally for a specific purpose. . . . What the paradigm obscures are two features of the power that inheres in paternalism—its contestable and systematic character.”).

120. Benjamin Hochman, *Jazz Doing Oscar Proud: By Hook or by Crook, Utah’s Players Are Adept at Drawing Calls for Offensive Fouls*, DENVER POST, Apr. 23, 2010, at C1, available at http://www.denverpost.com/sports/ci_14941562 (internal quotation marks omitted).

particular individuals.¹²¹ Because legislation is necessarily general, it cannot possibly be as targeted to specific individuals.¹²²

The generality of government policies is admittedly an important distinction from private acts of paternalism, but it is not necessarily one that makes government policy more problematic. In reality, the distinction cuts both ways. The concern for tailoring is based on a sense that it is important to adopt the least restrictive alternative.¹²³ Such a concern is warranted if one maintains that the normatively significant feature of paternalism is the restriction of liberty. If, however, the normatively significant feature of paternalism is the expressed respect for those subject to interference, then generality may actually make an intervention *less* problematic. A policy that singles out an individual or group as requiring interference may be substantially more insulting to the singled-out group than would a generalized policy. If we're all in it together, then no one is alienated.¹²⁴

This last observation, however, suggests a third way in which one might think that government paternalism is necessarily unlike individual paternalism—namely, it lacks the solidarity or reciprocity of individual relationships.¹²⁵ One might agree that isolated acts of paternalism are permissible in marriages or friendships, as several of my examples illustrate, but insist that this is because it goes both ways. I accept that my wife sometimes knows better what's good for me in part because I sometimes know better what's good for her. Our care for each other and history with each other have, in a

121. THOMPSON, *supra* note 99, at 159.

122. See Arneson, *supra* note 8, at 271 (“To be administratable [sic], laws must be coarse-grained. The social planner designing laws for a society must reckon with possibilities of maladministration and corruption in the implementation of any proposed law by government agency and with possibilities that the effect of the law on the operation of a society filled with imperfectly rational, not well-informed, and generally self-interested people will be bad in ways hard to anticipate. For these familiar reasons, argument about legal paternalism by example and counterexample is almost bound to end up uncertain and tentative. Decisive victory on this terrain is hard to win.”).

123. Thompson explicitly endorses something like this view. See THOMPSON, *supra* note 99, at 157 (“[T]he requirement that the constraint on liberty be limited at least entails that society should choose the least restrictive alternative consistent with the purposes of the intervention.”).

124. To emphasize a point that has already been made several times, I do deny that restricting citizens' liberty is a pro tanto reason against a particular policy. All things being equal, a state should adopt a less restrictive policy. But failure to do so does not, contra Thompson and other coercion-focused views, necessarily make a policy more objectionably paternalistic. The individually tailored policy may be *less* restrictive, and yet *more* paternalistic.

It is also worth noting that the generality of government policy raises distributive concerns. See Arneson, *supra* note 8, at 274–76. If any paternalistic government policy were objectionable because it applied to someone who did not need the help, then that would handcuff the government from providing help to those who do need it. This distributive complexion provides another reason why generality may make government paternalism less objectionable. An interference should be less insulting if one knows that it is helping some people who need it.

125. Cf. WHITE, *supra* note 34, at 113–19 (arguing that government paternalism is unlike paternalism among intimates because government cannot care for citizens in the same way).

sense, built an agreement to trade little bits of paternalism back and forth. But, the argument goes, our relationship with the government isn't like that. The government is paternalistic toward me and I never get to return the favor. This is why government paternalism is uniquely objectionable—it comes with an inherent sense of superiority, a unique power dynamic.¹²⁶

Although this is how many people view their relationship with the government—as a separate authoritarian institution reigning over them—it probably ought not be that way. If one conceives of a clean divide between the governing and the governed,¹²⁷ then there does not appear to be any reciprocity. If, however, one views the government as a democratic collection of citizens to which one belongs, then the reciprocity is restored. Sometimes my fellow citizens will band together to advocate and adopt policies that are paternalistic toward me, and, reciprocally, I too will sometimes join others in supporting policies that are paternalistic toward other citizens. In fact, I may even have a hand in being paternalistic toward myself.¹²⁸ Since the rules are, in this sense, self-imposed, it may actually be a bit paternalistic to reject them on grounds of paternalism.¹²⁹

On this democratic conception, there is a plausible case, I think, that government paternalism is typically *less* objectionable than the paternalism of a friend. There are two reasons why this may be true. First, typical democratic paternalism will apply to those adopting the policy. A mandatory seatbelt policy, for example, applies to the very voters and legislators who adopt it. In this way, democratic paternalism has built into it an important mitigating factor—the creator of the policy is also subject to the policy.¹³⁰ Second, the argument from humility is even stronger when one is faced with a collective judgment. If one person thinks I am making a mistake, I can more easily dismiss that judgment than if a group of people thinks I am making a mistake. If an entire social group who I find generally respectful of my aims and autonomy decides, in a limited circumstance, to act toward me in a way that implies I do not know what is best for me, it need not be insulting at all. I'm not infallible. If a whole lot of people think that I'm

126. Cf. Kennedy, *supra* note 88, at 647 (“State action is not intrinsically more violent than private. But what makes it seem at least conceivable that the state official should be more chary of paternalism than the private actor is that the state official acts on people he doesn't know, which is just a euphemistic way of saying that he acts on people who belong to class, racial and sexual groups different from his own.”).

127. See THOMPSON, *supra* note 99, at 148, 150 (“Like parents, public officials sometimes make us act against our own will for our own good. . . . The locus of paternalism refers to the relationship between those whose liberty is restricted and those who impose the restriction.”).

128. Cf. Husak, *supra* note 38, at 43–45 (describing paternalism toward oneself as a less problematic form of paternalism).

129. Cf. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment) (“I also share Justice Stevens's aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them. On the other hand, it would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them.”).

130. This mitigating factor is clearly at work in the first smoking example, *supra* note 37.

making a mistake, then I should consider taking that seriously. For this reason, discrete policies of even coercive paternalism may be even more likely to be permissible than acts of interpersonal paternalism, but only if the government generally shows respect for the autonomy of its citizens. Context is key—mere nudges in Stalinist Russia may be objectionably paternalistic, whereas rare strong pushes in otherwise libertarian Montana might not be.

In other words, the permissibility of a policy will often depend on whether it coheres with a democratic state-citizen relationship or a hierarchical power dynamic between the governing and the governed. If a government's policies express the wholesale inferiority of individual decisionmaking, then even policies that are not directly coercive may be objectionably paternalistic. When government policy slides over into expressing a general disrespect for its citizens' judgment, then it may become objectionable regardless of whether it is carried out through prohibitions or nudges. This can happen in a number of ways. One way that this can occur is through ubiquity. This is why reading *Nudge* produces a faint suggestion of Big Brother. The broad suggestion that the government knows best, not just with regard to a few things, but with regard to practically everything, can start to feel alienating. Second, even when paternalism is not pervasive, it may still be objectionable if it touches upon particularly fundamental liberties.¹³¹ For example, just nudging people to make particular choices about things like marriage or pregnancy may seem insulting. Third, as was discussed in the previous section, paternalism that singles out a particular group of citizens is particularly liable to be objectionable. Finally, otherwise reasonable paternalism may seem objectionable when the political process is opaque and distant from the citizen. Where failures in the political process undermine the democratic conception of the state, government policy will start to lack citizen-to-citizen reciprocity.

The broad lesson is that we cannot determine whether any government policy is objectionably paternalistic in a vacuum. It is likely to depend on an array of factors: how genuinely democratic the lawmaking process is, how many other paternalistic policies there are, how universal the application of the policy is, how those affected by the policy are generally treated, and so on. Just as determining whether an utterance is insulting requires knowledge of context, so too will determining whether a particular policy is objectionably paternalistic. As a result, it may be hard to say if any particular law or policy is objectionably paternalistic. Although this may be frustrating to those of us who yearn for theoretical simplicity, I think this more accurately reflects the reality of disputes about government paternalism. The variability based on general and extrinsic factors helps explain why debates about paternalism can seem so intractable, and why different people, faced with the same law or policy proposal, can have such widely divergent views about whether it is impermissibly paternalistic.

131. *E.g.*, de Marneffe, *supra* note 8, at 68 (“Some liberties have a special value in symbolizing the status of adulthood within our society, the freedom to marry, for example.”).

CONCLUSION

In recent years, the academic literature has seen a microburst of pro-paternalism arguments.¹³² This position is considered interesting or innovative (when it is) because we generally assume that paternalism is a bad thing. But, in order to have a meaningful debate about when paternalism is and is not appropriate, we need to begin with an understanding of what gives paternalism its normative character.

I argue that current discussions of paternalism have generally misunderstood the answer to this question. Current debates either argue over whether certain actions are impermissibly coercive or argue over whether it would be permissible to act with certain intentions. Neither of these questions, I suggest, captures the real concern of those accusing a policy of paternalism. The focus on coercion is incorrect because more coercive policies can be less paternalistic, and vice versa. The focus on the reasons for enacting a policy is incorrect because, in general and especially in the case of paternalism, permissibility does not seem to depend on subjective intentions.

I have begun to sketch a third account of when paternalism is permissible. This account focuses on what is implicitly expressed by an action or policy. It starts from the idea that paternalistic actions or policies implicitly express something about the other party, and that this expression can be disrespectful. In general, being told that one doesn't know best with regard to a matter traditionally within one's control is offensive. The normative valence of a particular instance of paternalism, however, turns on the same complex contextual factors that influence whether a particular statement is wrong or offensive. Thus, paternalism is not always wrong, just as the sentence "I know better than you" is not always an insult. This third way of thinking about paternalism allows us to make sense of both the *de facto* presumption that paternalism is disrespectful and wrong and also the idea that, in many contexts, paternalism is actually unobjectionable.

Still, this paper admittedly leaves many questions open. I have not attempted to provide precise or complete criteria for when paternalism will be permissible. My aim instead has merely been to refocus contemporary conversations about paternalism. My hope is that, by better understanding what is wrong with paternalism, we can prevent pro- and antipaternalists from simply talking past one another.

132. See, e.g., SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* (2013); Jeremy A. Blumenthal, *A Psychological Defense of Paternalism*, in *PATERNALISM: THEORY AND PRACTICE*, *supra* note 31, at 197; Kalle Grill, *Anti-paternalism and Invalidation of Reasons*, *PUB. REASON*, Dec. 2010, at 3; Sunstein, *supra* note 8.