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Harm to Self or Others: On Central Non-paternalistic Arguments

Viki Møller Lyngby Pedersen

Abstract Opponents of paternalism have sought to formulate non-paternalistic arguments for some seemingly reasonable but apparently paternalistic policies. This article addresses two such non-paternalistic arguments – *the public charge argument* and *the psychic harm argument*. The gist of both arguments is that a person's imprudent or risky behavior often affects the interests of others adversely, and that this justifies restricting his or her behavior in various ways. The article shows that both arguments face important problems. It thus throws serious doubt on the prospect of holding on to apparently sound and well-founded policies whilst at the same time avoiding paternalism.

Keywords: paternalism; public charge; psychic harm; project of reconciliation; externality arguments

1. Introduction

Paternalistic policies restrict people's freedom for their own good. Examples of such policies include laws stipulating that the use of seatbelts or motorcycle helmets in traffic is obligatory.¹ These initiatives seem reasonable and legitimate, although apparently in conflict with the traditional liberal opposition to paternalism.² Partly motivated by this tension, some liberal theorists have sought to formulate *non-paternalistic* arguments for certain initiatives that seek to prevent the individual from incurring excessive risks. The core of these arguments is that a person

¹ Cf. Jessica Flanigan, "Seat Belt Mandates and Paternalism," *Journal of Moral Philosophy* (2016): 1-24. DOI: 10.1163/17455243-46810050.

² Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), p. 135, 142; Gerald Dworkin, "Paternalism: Some Second Thoughts," in G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988): 121-129, at p 125; Peter de Marneffe, "Avoiding Paternalism," *Philosophy & Public Affairs* 34 (2006): 68-94, p. 68.

who acts in a potentially self-harming way will often affect the interests of others negatively. A frequently used example is the imprudent biker riding uninsured and without a helmet. If he crashes, significant other-regarding costs may be involved (e.g., in terms of an expensive rescue and hospital treatment). Even if the motorcyclist is denied assistance, his behavior will still affect others' interests adversely since people will then have to live with not having aided someone in need.³ Externalities directly linked to the need for costly assistance are instances of what John Kleinig terms 'public charges'.⁴ Other externalities arise solely because people are emotionally affected by the suffering of others; the sight or awareness of extreme suffering may in itself be harmful to third parties. This harm is, presumably, especially significant to first-hand witnesses or relatives, but may also affect a society's moral environment in general.⁵ Such emotional impacts are instances of what Gerald Dworkin calls 'psychic costs'.⁶

The public charge and psychic harm arguments have been proposed by various authors and have attracted much attention. However, the two types of externality arguments are often not clearly distinguished in the literature and a systematic assessment of their plausibility has been neglected. Distinguishing the arguments and scrutinizing their underlying rationales are the

³ Paul Bou-Habib, "Compulsory Insurance without Paternalism," *Utilitas* 18 (2006): 243-263, p. 252; Julian Le Grand and Bill New, *Government Paternalism* (Princeton: Princeton University Press, 2015), pp. 60-62; Feinberg, *Harm to Self*, pp. 139-140; Donald VanDeVeer, *Paternalistic Intervention: The Moral Bounds on Benevolence* (Princeton: Princeton University Press, 1986); Dworkin, "Paternalism: Some Second Thoughts," p. 126-127.

⁴ John Kleinig, *Paternalism* (Manchester: Manchester University Press, 1983), p. 82.

⁵ Paula Casal, "Why Sufficiency Is Not Enough," *Ethics* 117 (2007): 296-326, pp. 322-323; Le Grand and New, *Government Paternalism*, pp. 62-63; Feinberg, *Harm to Self*, p. 141; Dworkin, "Paternalism: Some Second Thoughts," p. 127.

⁶ Dworkin, "Paternalism: Some Second Thoughts," p. 127.

tasks that I set myself in this article. I contend that the arguments are flawed as they are vulnerable to compelling counterexamples. Appealing to the public charge and psychic harm arguments are probably the most common and developed strategies for supporting an apparently paternalistic policy in non-paternalistic terms.⁷ Accordingly, if I am right that the arguments are problematic, this would arguably constitute a profound blow to this project.

In a nutshell, my argument is as follows. The public charge argument has force only as long as imprudent conduct triggers others' duty to help. This implies, however, that the argument is either inapplicable or insufficient in a variety of situations in which, many agree, preventive actions are called for. Furthermore, the argument has implausible implications in terms of the incentives it generates. The psychic harm argument does not depend on duties of assistance being triggered. Therefore, it is applicable to cases that fall outside the scope of the public charge argument. However, if we value individual autonomy, we should be wary of limiting people's liberty to engage in various activities solely on grounds that these activities might affect the feelings of others.

The article proceeds as follows. First, I set the stage by elaborating on the strategy of reconciliation within which the two arguments scrutinized here fall. I also present the understanding of paternalism relied upon in this paper, which is due to Peter de Marneffe and accommodates nicely the project of reconciliation. I then elaborate on the distinction between public charge and psychic harm arguments. Second, I recast the public charge argument and argue

⁷ For paradigmatic examples of this, see Feinberg, *Harm to Self*, pp. 139-141; Le Grand and New, *Government Paternalism*, pp. 60-63; Bou-Habib, "Compulsory Insurance without Paternalism"; Dworkin, "Paternalism: Some Second Thoughts," pp. 126-127; Casal, "Why Sufficiency is Not Enough," pp. 322-323; Richard Arneson, "Joel Feinberg and the Justification of Hard Paternalism," *Legal Theory* 11 (2005): 259-284, pp. 272-273.

that it is limited in scope, meaning that it fails to justify some of the policies it is supposed to. In addition, the argument backfires in the sense that it warrants restrictions that incentivize imprudent conduct. Third, I rehearse the psychic harm argument and argue that liberals should be extremely cautious in making use of it. Finally, I conclude that neither of the two arguments succeeds in establishing a stable non-paternalistic ground for preventive interference.

2. The Project of Reconciliation, Paternalism and Externality Arguments

The central tenet of ‘the project of reconciliation’ is to produce compelling non-paternalistic justification for apparently paternalistic and seemingly sound policies.⁸ As mentioned in the introduction, a specific and often considered example is helmet mandates. Few deny that such legislation is reasonable. Therefore, unless laws enforcing the use of motorcycle helmets in traffic can be fully justified on non-paternalistic grounds, this policy arguably represents a problem for anti-paternalists.⁹ Below, I point to various cases, including hypothetical ones, in which both the public charge and the psychic harm arguments fail to justify the policies for which they are commonly offered. The policies, however, remain intuitively compelling under these circumstances, which indicates that other factors, plausibly paternalistic such, are doing the justificatory work. This challenges the reconciliatory strategy at its foundation.¹⁰

⁸ De Marneffe, “Avoiding Paternalism,” p. 70; Feinberg, *Harm to Self*, pp. 25-26; Arneson, “Joel Feinberg and the Justification of Hard Paternalism,” pp. 272.

⁹ Feinberg, *Harm to Self*, p. 135; see also Kleinig, *Paternalism*, pp. 82-83; Dworkin, “Paternalism: Some Second Thoughts,” p. 125.

¹⁰ In support of this, see Arneson, “Joel Feinberg and the Justification of Hard Paternalism,” pp. 273-274.

In response to the examples, anti-paternalists may resort to non-paternalistic justifications different from the public charge and psychic harm arguments, and I cannot, of course, rule out that some of these might be compelling. However, I do believe that I succeed in throwing serious doubt on two central arguments that liberal reconciliation theorists have traditionally appealed to. It is of course open to anti-paternalists to conclude that the policies in question cannot in the final analysis be justified and need to be repealed. However, it would constitute a misunderstanding of the dialectical context of this article to regard this as a strategy that would be relatively costless to anti-paternalists, and to submit that they should in fact be inclined to take such a course. It is crucial to anti-paternalists engaging with the project of reconciliation to show that the policies in question can in fact be accounted for on non-paternalistic grounds.¹¹ Therefore, if my argument against the two main anti-paternalistic arguments is sound, the blow I deal to the liberal reconciliatory strategy is profound.

The understanding of paternalism relied upon in this article is due to Peter de Marneffe. Acting paternalistically is usually understood as interfering with a person's freedom, against her will, and for her own good. However, to account for non-paternalistic justifications and make sense of the reconciliation strategy, de Marneffe adds a further condition to the above three-pronged understanding of paternalism. He suggests that a policy is paternalistic toward A if, and only if, (i) it interferes with A's freedom, (ii) against A's will, (iii) for A's own sake, and (iv) 'this policy

¹¹ De Marneffe, "Avoiding Paternalism," p. 68; Feinberg, *Harm to Self*, p. 135; Arneson, "Joel Feinberg and the Justification of Hard Paternalism," pp. 271-272; Dworkin, "Paternalism: Some Second Thoughts," p. 126; Seana Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy & Public Affairs* 29 (2000), part I.; Bou-Habib, "Compulsory insurance without paternalism."

cannot be fully justified without counting its benefits to A in its favor'¹² (i.e., it cannot be sufficiently justified on non-paternalistic grounds).¹³ Thus, even if a given policy limits A's freedom, in A's interest, but against A's will, this policy is not paternalistic if a sufficient non-paternalistic justification is present. Hence, this understanding of paternalism leaves room for the project of reconciliation seeking to identify sufficient non-paternalistic reasons for certain policies that seem paternalistic.¹⁴

A standard reconciliatory argument is that the policies examined not only make self-regarding harm less likely, they also protect the interests of third parties. Following the terminology of Julian Le Grand and Bill New, the non-paternalistic arguments in question are externality arguments.¹⁵ An externality is a burden that falls on people who are not involved in the activity generating the burden.¹⁶ The public charge and psychic harm arguments that I examine below constitute important examples of such externality arguments.

¹² De Marneffe, "Avoiding Paternalism," p. 74.

¹³ Søren Flinch Midtgaard, "Non-Renounceable Rights, Paternalism and Autonomy," *Utilitas* 27 (2015): 347-364, p. 349.

¹⁴ De Marneffe, "Avoiding paternalism," p. 74. Although de Marneffe's definition of paternalism accounts for non-paternalistic reasons, certain problems seem attached to it. See e.g., Kalle Grill, "Antipaternalism as a Filter on Reasons," in T. Schramme (ed.), *New Perspectives on Paternalism and Health Care*, Library of Ethics and Applied Philosophy 35 (2015): 47-63; Kalle Grill, "The Normative Core of Paternalism," *Res Publica* 13 (2007): 441-458. However, I leave these problems aside and focus mainly on whether certain policies are justifiable on non-paternalistic grounds.

¹⁵ Le Grand and New, *Government Paternalism*, p. 60.

¹⁶ Robert Frank, *Microeconomics and Behavior* (New York: McGraw-Hill/Irwin, 2010, eighth edition), p. 16.

It remains in this preliminary section to elaborate on the distinction between the public charge and psychic harm arguments – a distinction that is often not clearly drawn, or not drawn at all. However, drawing a clear distinction between the two arguments is necessary to illuminate the distinct objections and considerations pertaining to each of them.

According to ‘the public charge argument’, if A harms himself, B will often have a moral duty of assistance, and performing this moral duty to aid is onerous for B.¹⁷ Therefore, if A acts in such a way that he will probably cause harm to himself, B will with a significant probability incur or have to bear some costs. For example, if she fulfills her moral duty to aid A, the costs for B may be financial. Alternatively, if B does not live up to the duty in question, this can give rise to certain emotional costs for her.¹⁸ Thereby, A’s imprudent behavior has an adverse effect on B’s interests. According to the public charge argument, the burdensome nature of the moral duty to aid is such as to justify restrictions that reduce the frequency of A imposing on B costs related to this duty.¹⁹

‘The psychic harm argument’ is an alternative argument for circumscribing imprudent behavior. It involves appeal to costs that are unrelated to B’s duty of assistance and which persist

¹⁷ Bou-Habib, “Compulsory Insurance without Paternalism,” p. 253; Peter Jones, “Toleration, Harm and Moral Effect,” in J. Horton and S. Mendus (ed.), *Aspects of Toleration: Philosophical studies* (London: Methuen, 1985): 136-157, p. 143; Michael Blake, “Immigration, Jurisdiction, and Exclusion,” *Philosophy & Public Affairs* 41 (2013): 103-130.

¹⁸ This is a point where the public charge and psychic harm arguments have been confused. I.e., the emotional costs associated with failing to meet one’s duties of aid have often been linked to the psychic harm argument. See e.g., Le Grand and New, *Government Paternalism*, pp. 61-62; Kleinig, *Paternalism*, p. 92-93; Dworkin, “Paternalism: Some Second Thoughts,” p. 127.

¹⁹ Bou-Habib, “Compulsory Insurance without Paternalism,” p. 255; Jones, “Toleration, Harm, and Moral Effect,” p. 143.

even in the case that internalizing measures are adopted. Thus, even if B will not incur costs associated with B's duty to aid A in an emergency, A's imprudent behavior may still harm B because the sight or awareness of extreme suffering is in itself painful for B.²⁰ According to the psychic harm argument, these burdens (i.e., the sight or awareness of certain actions or outcomes) warrant A being prevented from causing them. I will return to the psychic harm argument later. Meanwhile, I present the public charge argument and raise some objections to it: the narrow scope objection and the insufficient costs objection.

3. The Public Charge Argument

I take this argument to be the most plausible in the anti-paternalist arsenal, which is why I dedicate the bulk of my discussion to it. Peter Jones explains the public charge argument by the use of Mill's famous example of the unsafe bridge.²¹ We may not, for his own sake, restrict a man from entering an unsafe bridge if the man is competent and well informed about the condition of the bridge. However, it is plausible that we have duties of assistance if he falls into the cold water (as is likely to happen). If so, the consequences of the imprudent action are not only self-regarding, but also other-regarding. All things equal, duties are burdensome. Accordingly, for our own sake, we may restrict the liberty of imprudent agents to make it less likely that they foist burdensome duties on us.²²

²⁰ Feinberg, *Harm to Self*, pp. 140-141; Le Grand and New, *Government Paternalism*, pp. 61-62; Casal, "Why Sufficiency is Not Enough," pp. 322-323; Dworkin, "Paternalism: Some Second Thoughts," p. 127.

²¹ John Stuart Mill, *On Liberty* (Northampton: White Crane Publishing, 1859/2011), pp. 93-94.

²² Cf. Jones, "Toleration, Harm, and Moral Effect," p. 138.

Likewise, Paul Bou-Habib argues that A may seek to prevent B from imposing on A the costs that arise in the wake of B's deliberate risky behavior (costs arising because A is morally required to aid B in an emergency).²³ It should be noted that the duty to aid depends on the magnitude of costs involved.²⁴ In relation to the above bridge example, B has a moral duty to assist A if this involves no more than discomfort and wet clothes, but if the assistance implies a serious risk of drowning it is not obvious in the same way that B is obliged to help.²⁵ Moreover, the moral duty to aid in an emergency is not necessarily enforceable.

The public charge argument can be recast as follows:

1. If A engages in non-cost-internalized, risky behavior x, then A ends up in, or with significant probability will end up in, desperate situation y.
2. If A ends up in, or with significant probability will end up in, desperate situation y, then B will incur costs, or with significant probability will end up having to bear costs, due to his duty to aid A.
3. If 1) and 2), then it is morally justified for B to seek to prevent A from engaging in non-cost-internalized risky behavior x.
4. Thus, it is morally justified for B to seek to prevent A from engaging in non-cost-internalized risky behavior x.²⁶

²³ Bou-Habib, "Compulsory Insurance without Paternalism," p. 255.

²⁴ Ibid., p 253.

²⁵ Ibid., p 254.

²⁶ I am indebted here to Kasper-Lippert Rasmussen.

B may deter A from engaging in non-cost-internalized risky behavior in different ways. For example, B may: (i) seek to prevent A's risky behavior by means of outright prohibition, (ii) charge A once the duty to aid him or her has been discharged, or (iii) compel A to insure himself.²⁷

The scheme of compulsory insurance may seem superior to the two other alternatives for the following reasons. Compared to outright prohibition, compulsory insurance may be more attractive in terms of freedom because it seems that it is less restrictive to prohibit uninsured risky behavior than to forbid the behavior outright.²⁸ Moreover, the second approach of charging the imprudent after the fact is problematic, as it does not ensure funds for, e.g., medical care in cases where people are not able to pay the costs of their treatment. In such cases, third parties would still end up having to bear costs due to their duties of aid.²⁹

A fourth policy merits attention. In view of Feinberg's explicit aim of reconciling the apparently reasonable helmet regulations with anti-paternalism, this important and widespread way of reducing the frequency of desperate situations should be taken seriously. Helmet regulations are part of a wider group of restrictions that Dworkin terms 'safety cases'. Common to the restrictions in this group is that they all require the use of certain safety measures. For example, they may require the use of crash helmets, life jackets, reflective vests and seat-belts.³⁰ Such

²⁷ Ibid., p 255.

²⁸ Ibid.; see also Feinberg, *Harm to Self*, p. 139.

²⁹ Bou-Habib, "Compulsory Insurance without Paternalism," p. 255.

³⁰ Dworkin, "Paternalism: Some Second Thoughts," p. 125.

measures can be of profound benefit to people's safety and seem to involve limited costs to their liberty.³¹

3.1. The Narrow Scope Objection

In this section, I point to some clearly relevant situations in which the second premise in the above representation of the public charge argument is false. Roughly, the premise says that when A ends up in a desperate situation, B is highly likely to incur costs due to his duty to aid A. The public charge argument is only available in cases where self-regarding behavior triggers other people's moral duty to help. Moreover, the argument only justifies policies that aim to prevent these duties from being elicited or ensure funds to compensate assisting persons. This spells trouble for the public charge argument, which may not justify the above-mentioned safety cases. As Dworkin aptly points out, the aim to avoid or reduce burdensome duties may not warrant requiring risk-takers to use safety gear:

'When the costs are economic, such as the costs of medical care, the obvious reply is that this might show that we can require such individuals to purchase medical insurance, but it does not show that we can require them to actually wear safety helmets. Note that in purely economic terms it is quite likely that the effect of requiring motorcycle helmets is to cause badly injured persons to survive (requiring costly medical care) who otherwise might have died from head injuries!'³²

The mentioned costs may, however, as suggested by Dworkin, justify making it obligatory for risk-takers to take out insurance. This, however, is also open to challenge. Being concerned

³¹ In support of this, see e.g., Casal, "Why Sufficiency is Not Enough," p. 322; Dworkin, "Paternalism: Some Second Thoughts," p. 127; Viki Pedersen and Søren Flinch Midtgaard, "Is Anti-Paternalism Enough?" *Political Studies* 66 (2018): 771-785, p. 775.

³² Dworkin, "Paternalism: Some Second Thoughts," pp. 126-127.

only with imprudent conduct that gives rise to burdensome duties of assistance on the part of others, the public charge argument for compulsory insurance is strangely insensitive to or silent regarding imprudent conduct that carries a high likelihood of a cost-free (to others) fatal ending (cf. the case of the helmetless motorcyclist in the citation above). In fact, extremely dangerous or suicidal activities slip through the net, reflecting the scope of the argument. To illustrate this, I now introduce the example of Gutsy Gilbert.³³

Gutsy Gilbert is about to embark on an extremely dangerous rope gliding ride across the Grand Canyon on a homemade ropeway, simply because he gets a kick out of thrilling adventures. Following the public charge argument, we are entitled to compel Gilbert to insure himself since we would otherwise have to pay the costs of rescuing him in case of an emergency. It is implicit in this reasoning that Gilbert's imprudent behavior gives rise to others' moral duty to help in the event of bad option luck. Yet this may not necessarily be the case. If Gilbert's rope gliding mission fails, there is a high probability that he will not survive his fall. Now, suppose that the probability of surviving a fall from a homemade ropeway into the Grand Canyon is zero. If this is the case, the rope gliding mission across the canyon has two possible outcomes: Gilbert succeeds or Gilbert dies. Whatever the outcome, the moral duty to aid seems to be limited.

If Gilbert dies, there will be no need for an expensive rescue operation nor subsequent treatment. As Brian Barry puts it, 'Deaths – provided they occur before arrival at the hospital – are cheap, involving only the costs of transport to mortuary; in comparison, the last months of people

³³ The case is inspired by Bou-Habib's Grand Canyon case. See Bou-Habib, "Compulsory Insurance without Paternalism," p. 257.

who die of natural causes are often very expensive'.³⁴ Thus, when focusing on onerous duties of aid, Gilbert's behavior may be less burdensome if he dies compared to the situation in which he gets hurt and needs treatment but survives after all. If this is the case, the *only* insurance we can require Gilbert to buy is one that covers *extra costs* associated with transportation to the mortuary. Sooner or later, we all have to be transported thereto; however, it may be extra costly to be transported from the floor of the Grand Canyon.³⁵

The problem for the public charge argument I am driving at is this. Given that the argument is put forward to justify in a non-paternalistic manner seemingly paternalistic policies, it is striking that it appears completely unconcerned with the plight of at least one group of imprudent people, namely those who are, so to say, profoundly imprudent. An additional concern, which I will express below, is that a remarkable consequence of the argument seems to be that sometimes we ought to introduce restrictions (e.g., compulsory insurance) only in cases where people decide to make use of potentially life-saving equipment. In further illustration of these points, consider the following case of Prudie and Gilbert.³⁶

³⁴ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), pp. 47-48.

³⁵ This point is of course strongest if we presume that Gilbert has no relatives who are deeply affected by his death. For example, if Gilbert has children whom others will now have to raise, or if the crash affects Gilbert's children psychologically, the imprudent behavior may cause a need for costly psychological care. In that sense, Gilbert's death may trigger others' moral duty to assist his children – and therefore, if Gilbert is a parent, the insurance should probably be more expensive than if he is not. That said, one can easily imagine that these new 'upbringers' will not find the duty to assist burdensome but rather rewarding, in the overall picture.

³⁶ I am indebted to an anonymous referee for this suggestion.

Prudie wants to join Gilbert on his gliding mission but, in contrast to Gilbert, prefers to use a parachute. This precaution will ensure that if Prudie crashes, the parachute will slow down her fall enough so that she will not die immediately, but instead will merely break her legs. Accordingly, there might now be need for an expensive rescue operation as well as further treatment (hospital treatment, rehabilitation, psychological care, etc.). These costs arise only because Prudie uses a parachute. And because of the moral duty to aid a person in distress, we are morally obliged to provide this treatment.

Therefore, compared to Gilbert's lethal accident, Prudie's crash involves higher costs for others in the event of an emergency. For the same reason, the public charge argument implies that we can e.g. require her to buy insurance which is much more expensive than Gilbert's, and thus make the activity more difficult and costly to perform when using safety equipment. Obviously, neither of these initiatives strengthens the incentive to use the parachute; rather, they seem to incentivize imprudent behavior. In fact, the message sent by defenders of the public charge argument here is that if you are going to be a little reckless, you must buy expensive insurance. But if you go all in and behave like there is no tomorrow, then be our guest.

It may not be obvious that the public charge argument expresses indifference in this way. Maybe other-regarding costs associated with wearing preventive safety equipment (and thus surviving, and being in need of help) are not reasonably avoidable, i.e., are not among the other-regarding costs that people should finance themselves. Still, the ropeway trip across the Grand Canyon seems reasonably avoidable in the first place (and the costs associated with this trip are readily avoidable by *not* using safety gear). If the safety equipment changes the behavior from being outside the scope of others' obligations to becoming a burden to third parties, then the public

charge argument prescribes that the use of such equipment makes the conduct open to cost-internalizing measures.

While these implications of the public charge argument seem counterintuitive, there might be some countervailing considerations. For example, it may sometimes be acceptable (and sometimes mutually advantageous)³⁷ to incentivize risky decision-making. Consider e.g. an approach of unconditional redistribution, according to which third parties always fund rescue operations and hospital treatment free of charge. Preservation of liberty might be an important reason to opt for such a strategy. The knowledge that one will always receive such assistance may, to be sure, make the individual less inclined to act prudently. Still, proponents of this strategy would maintain that we ought to assist (or at least offer assistance to) people in emergencies nonetheless.

The relevance of the above consideration for the cases being examined here is, however, unclear. First, there is a relevant difference between the incentives to imprudent conduct created by an approach of unconditional redistribution and the incentives that the public charge argument gives rise to. Being aware that she will be offered assistance and hospital treatment no matter what, Prudie may be inclined repeatedly to perform gliding missions *using a parachute*.³⁸ The public charge argument, by contrast, tells her to relinquish this life-saving measure. Second, incentivizing extremely dangerous or near-suicidal activities contradicts the purpose of the public charge

³⁷ See e.g., Peter Vallentyne, “Brute Luck, Option Luck and Equality of Initial Opportunities,” *Ethics* 112 (2002): 529–557, pp. 549ff.

³⁸ This implication may, however, also be problematic and speak against an approach of unconditional redistribution. See e.g., Stemplowska, “Making Justice Sensitive to Responsibility,” *Political Studies* 57 (2009): 237-259, pp. 251-254.

argument.³⁹ It is supposed to replace paternalistic arguments for policies that seem to be both sound and paternalistic.

However, defenders of the public charge argument may argue that the public charge argument only gives us a *prima facie* reason for restricting certain conduct. Consider in this context Stephen Wilkinson's examination and objection to the 'restoration argument'. The restoration argument says that we should prioritize health care to non-smokers because smokers are expensive in terms of health care and so decrease the resources available to meet the needs of non-smokers.⁴⁰ In case smokers' health care needs turn out to be lower than the needs of non-smokers, Wilkinson argues that consistent defenders of the restoration argument would have to reach the opposite (and unwanted) conclusion that we should prioritize the health care needs of smokers.⁴¹ One implication of a policy prioritizing the needs of smokers is that such a policy would incentivize an unhealthy lifestyle.⁴² However, according to Wilkinson, it is possible to accept that the high health care costs of non-smokers give us a *prima facie* reason for prioritizing smokers' needs, and that this reason is outweighed by other considerations suggesting that we should not incentivize imprudence.⁴³

Likewise, we may argue that, in situations like the one of Prudie above, the public charge argument gives us a *prima facie* reason for policies restricting prudent rather than imprudent behavior, *and* that such policies should not be adopted because this adoption would incentivize

³⁹ Feinberg, *Harm to Self*, p. 140; Bou-Habib, "Compulsory Insurance without Paternalism," p. 250.

⁴⁰ Stephen Wilkinson, "Smokers' Right to Health Care: Why the Restoration Argument is a Moralizing Wolf in a Liberal Sheep's Clothing," *Journal of Applied Philosophy* 16 (1999): 255-269, p. 256.

⁴¹ *Ibid.*, pp. 257-259.

⁴² *Ibid.*, p. 259.

⁴³ *Ibid.*, p. 260.

imprudent behavior. For example, we may have a *prima facie* reason to increase Prudie's insurance premium, which is nonetheless outweighed by other considerations. Nevertheless, these other considerations would have to involve no appeal to the harms or benefits to the person interfered with; this readily available reason is not available to defenders of the public charge argument. To avoid incentivizing imprudent behavior, defenders of the public charge argument would have to offer a *non*-paternalistic reason why only restrictions on imprudent conduct are justified. The prospect for this seems to me pretty dim. If Prudie *does not* use a parachute, her imprudent behavior is cost-free in terms of onerous duties of assistance. The isolated public charge argument provides no reason not to avoid third-party costs by incentivizing this behavior. There could be moralistic reasons to the effect that we should not incentivize imprudent behavior because doing so would be morally wrong. It is, however, dubious whether it is actually morally wrong to protect oneself from Prudie's other-regarding costly and deliberate conduct in this apparently least intrusive way – and questionable whether such moralistic reasons fit into the liberal spirit of the public charge argument.

The upshot of the above discussion is that the scope of the public charge argument is limited in two ways: First, it does not justify certain relevant cases in which people run extreme risks. Second, the argument evinces an attitude of very limited concern with the plight of people who engage in conduct characterized by a great level of imprudence. As we have seen, these limitations lead to some additional concerns in the form of some implausible and reasonably unwanted implications of the public charge argument such as the incentives it generates. Some may consider the force of the arguments offered limited in that the argument seems to work in standard cases of less extreme risk-taking. After all, extreme risk-taking is the marginal case. This, however, is an invalid rejoinder. Showing as I have done here that the public charge argument for seemingly

paternalistic policies is vulnerable to compelling counterexamples (be they marginal or not, perhaps purely hypothetical) suffices to discredit the argument and its reconciliatory potential.

3.2. The Insufficient Costs Objection

In this section, I raise some concerns about the third premise of the public charge argument. According to this premise, other-regarding costs resulting from a person's self-regarding harm justify restrictions on that person's behavior. I argue that the plausibility of this premise depends on the amount of costs for others.

In order to illustrate the public charge argument, Bou-Habib asks the reader to consider the helmetless motorcyclist, Helmut, who is about to speed off on his motorbike. The short version of the example is as follows: Helmut refuses to wear a motorcycle helmet, since he rides for the wind in his hair. Now, '[s]uppose Helmut is your friend. Knowing that you will be there to pick up the costs, Helmut always carries a card naming you at the end of the following sentence, "in the event of an emergency all bills will be paid for by— . . .".'⁴⁴ Thus, being Helmut's friend involves having major concerns and incurring costs, but alternatively ending the friendship with Helmut – i.e., refusing to aid him in case of an emergency – is also a huge burden to bear.

While the example illustrates the public charge argument well, I shall use it to draw attention to some situations in which the public charge argument does not seem to have the same traction. In Bou-Habib's example, there is no forced redistribution in order to ensure hospital treatment for all regardless of how any precarious condition occurred. One person incurs the costs resulting from Helmut's imprudent behavior, and therefore the potential costs of Helmut's medical care are significant, especially to Helmut's friend, who is faced with a dilemma of being harsh or

⁴⁴ Bou-Habib, "Compulsory Insurance without Paternalism," p. 252.

paying for Helmut's treatment.⁴⁵ Nevertheless, we can easily imagine relevant situations involving more than two people in which many people share a common obligation to assist Helmut. In such cases, the costs incurred by each individual will naturally be less.

With respect to justifying restrictions requiring motorcyclists to wear helmets or take out insurance, the difference between these two examples seems to affect the strength of the public charge argument. If several people in a society share the performance of the duty to transfer resources, the reason to find effective means of protecting oneself seems weaker than if one person carries the duty in question. Therefore, a growing number of people sharing the burden plausibly decreases the size of the burden for each individual and thus the strength of the public charge argument. Moreover, in cases like the one above, it is not certain that the isolated public charge argument has force enough to justify the involved interference with freedom. Considerations of individual autonomy are important; in particular, they are important to anti-paternalists. For the same reason, it is at least questionable whether low costs to others constitute a *sufficient* non-paternalistic reason to compromise such respect for autonomy.⁴⁶

It may be objected that we should not focus on the burden to each individual but rather the aggregate burden to society as a whole. Although the extent of costs to each of us arguably mediates the strength of the public charge argument, aggregate costs may tip the balance in favor of a restrictive policy. A restrictive policy which only prevents a marginal burden from being imposed on each citizen in a society may prevent a considerable aggregated burden. The costs to

⁴⁵ Ibid.

⁴⁶ In this context, de Marneffe argues that the costs of healthcare to helmetless motorcyclists are so small to any one of us that this reason 'to require motorcyclists to wear helmets is relatively weak', if not too weak to justify the policy. See de Marneffe, "Avoiding Paternalism," p. 82, 91.

society of carrying this aggregated burden could plausibly be spent on something other than subsidizing imprudent behavior (e.g., they could be spent on medical equipment for hospitals). Therefore, even if the costs to any one of us are minimal, the public charge argument might still have some weight.

In spite of this, we have reason to believe that the public charge argument should incorporate a minimum threshold of third-party costs below which the argument does not justify restrictions. According to Mill, if self-regarding behavior has other-regarding consequences, sometimes ‘the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom’.⁴⁷ Because different interests are at stake, the premise that society may be financially affected by the consequences of imprudent conduct does not automatically give cause for implementing cost-internalizing policies.⁴⁸

In support of this, we should not always, as pointed out by Seana Shiffrin, internalize costs. As Shiffrin argues, pricing each and every conscious action will certainly *not* maximize individual autonomy. Tolerating others’ burdensome activities may sometimes be necessary to preserve domains within which autonomous agents can act freely both physically and mentally.⁴⁹ In general, there are advantages to being a part of an interdependent society in which members are morally obligated to help each other. One such essential benefit is the mutual protection against disadvantages due to bad luck. Conversely, a weakness of this constellation is that, to some extent,

⁴⁷ Mill, *On Liberty*, p. 80, see also pp. 91-92.

⁴⁸ Shiffrin, “Paternalism, Unconscionability Doctrine, and Accommodation,” part II; Daniel Wikler, “Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles,” *The Milbank Memorial Fund Quarterly: Health and Society* 56 (1978): 303-338, p. 330.

⁴⁹ Shiffrin, “Paternalism, Unconscionability Doctrine, and Accommodation,” p. 239.

a person who is in no way causally related to the relevant harm must incur costs associated with other people's bad choices. However, imprudent people are also disadvantaged by this interdependence because it makes seemingly self-regarding conduct at the same time other-regarding. According to Shiffrin, this interconnection 'may pose a threat to the existence of arenas in which people can freely make and exercise choices without interference or vulnerability to interference'.⁵⁰ The cost-internalizing strategy is one approach to this problem.⁵¹ However, as Shiffrin argues, if everything becomes subject to accounting this may encumber individual autonomy.⁵² Therefore, if a given policy only saves each one of us a minimal expense, respect for individual autonomy may indeed outweigh the need to prevent other-regarding harm.

The implication of the above objections is that the scope of the public charge argument is restricted to situations in which others' moral duty to aid is actually triggered, and the costs are sufficient to justify infringement with individual freedom. Considering that the moral duty to aid occurs only where the involved costs are not unacceptably high, the public charge argument is not only downwardly but also upwardly restricted by the magnitude of costs. Consequently, the argument is available only if the costs to third parties strike a level that is neither insufficient nor prohibitively high. As we have seen, this span may not match the policies sought to be reconciled with anti-paternalism.

⁵⁰ Ibid., p. 238.

⁵¹ One may argue, as does Alexander Brown, that freedom carries a price and giving people the opportunity to pay this price will actually make it possible for individuals to choose as they wish without pressure from others. See Alexander Brown, "If We Value Individual Responsibility, Which Policies Should We Favour?" *Journal of Applied Philosophy* 22 (2005): 23-44, p. 30.

⁵² Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," p. 238.

4. *The Psychic Harm Argument*

The psychic harm argument does not appeal to the costs of discharging duties of assistance. Therefore, it may fill in the arguably important gaps that the public charge argument leaves open. As indicated above, even if B does not incur costs associated with the duty to aid A in an emergency, A's imprudent behavior may still harm B because the sight or awareness of extreme suffering is in itself painful for B.⁵³ Such emotional impacts seem most prominent to firsthand-witnesses or relatives, but may also disturb a society's moral environment.⁵⁴ There is a close relationship between the imprudent person's suffering and this psychic harm to others. Reducing the frequency of injury or death is thus a plausible means by which third parties are protected from such harm. Hence, referring to psychic harm seems to be an effective way to justify policies that prevent harm to imprudent people (such as for example the obligation to wear a helmet). For the same reason, the argument is highly relevant to reconciliation theorists. However, there are good reasons for being very cautious in limiting individual freedom with reference to this psychic harm argument.

I want to raise two problems in particular associated with the psychic harm argument. First, since effectively no activity is innocent of having an impact on others' consciousness, there is a risk that the scope of the psychic harm argument is too wide. Second, the reasonableness of the policies sought justified with reference to the psychic harm argument does not seem to be

⁵³ Feinberg, *Harm to Self*, pp. 140-141; Le Grand and New, *Government Paternalism*, pp. 61-62; Casal, "Why Sufficiency is Not Enough," pp. 322-323; Dworkin, "Paternalism: Some Second Thoughts," p. 127.

⁵⁴ Paula Casal, "Why Sufficiency Is Not Enough," pp. 322-323; Le Grand and New, *Government Paternalism*, pp. 62-63; Feinberg, *Harm to Self*, p. 141; Dworkin, "Paternalism: Some Second Thoughts," p. 127.

conditional on the presence of psychic harm to others. I will return to this point later. Before then, I will focus on the first of the two objections.

As argued in Section 3.2, when every choice becomes subject to assessment this may jeopardize individual autonomy. To be autonomous and able to make calculated decisions, one needs some space and independence from others.⁵⁵ If we are concerned about individual autonomy, we should be careful not to limit this space and independence unreasonably. The psychic harm argument implies that every action is evaluated and potentially regulated based on its tendency to affect others mentally. And if very few actions are irrelevant to the emotional state of others, then accordingly very few actions are immune to intervention.⁵⁶ It seems clear, however, that the law should not restrict every action that can upset others. Therefore, if a person's self-regarding harm causes psychic harm to others, this may not in itself justify interfering with such action.

While one should be reluctant to interfere with seemingly self-regarding behavior with reference to psychic harm to others, it seems clear that psychic harm sometimes justifies liberty-limiting restrictions. For example, few would agree that psychic harm due to stalking and harassment should be tolerated for the above reasons. This suggests that there might be some standards of application that should be met before psychic harm to others warrants restrictions. Of course, I cannot here formulate and vindicate a specific set of criteria. However, below I offer some preliminary reflections involving the standards from another liberty-limiting principle, namely 'the offense principle' formulated by Feinberg. Based on these considerations, I argue that

⁵⁵ George Tsai, "Rational Persuasion as Paternalism," *Philosophy & Public Affairs* 42 (2014): 78-112, p. 93.

⁵⁶ Le Grand and New, "Government Paternalism," p. 63; Russ Shafer-Landau, "Liberalism and Paternalism," *Legal Theory* 11 (2005): 169-191, p. 180; Mill, *On Liberty*, pp. 78-80; Feinberg, *Harm to Self*, p. 25.

it is doubtful whether the psychic harm argument justifies the policies of relevance to the project of reconciliation.

According to Feinberg, limitations of individual liberty may possibly be justified in order to avoid serious offense to others. The term ‘offense’ covers all possible disliked mental states such as annoyance, disappointment, disgust, embarrassment, fear, anxiety, pain, etc. Common to these examples of offense is that they are not necessarily harmful, and if these mental states do not involve harm, they are outside the scope of the harm principle.⁵⁷ According to Feinberg, this does not preclude restrictions on offensive behavior, although he maintains that certain rigorous standards should be satisfied before the concerned offense warrants restriction. Offenses are by and large less serious than harms, even though continued severe offense can develop into harm.⁵⁸ In this context, however, it should be noted that harm to others is also a matter of degree,⁵⁹ which the discussion in Section 3.2 illustrates. Still, one should be more cautious in applying the offense principle as this involves a predominant risk that the ‘offender’s’ interests are overridden in an unacceptable way.⁶⁰ As shown above, the same risk occurs when applying the psychic harm argument.⁶¹

Feinberg introduces the following standards that guide whether offense to others justifies interference with individual freedom. On one side of the scale (the offender’s side), one must

⁵⁷ Joel Feinberg, *Offense to Others* (New York: Oxford University Press, 1985), p. 1.

⁵⁸ Although Feinberg stresses that the two concepts should not be considered on the same scale. See Feinberg, *Offense to Others*, p. 3.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, pp. 25-26.

⁶¹ See also Feinberg, *Harm to Others*, p. 141; Shafer-Landau, “Liberalism and Paternalism,” p. 179; Dworkin, “Paternalism: Some Second Thoughts,” p. 127.

consider the conduct's personal importance, its social value, the timing (i.e., the possibility of performing the action at other times and places that would lead to less offense), and the motives behind it.⁶² On the other side (the offended's side), the seriousness of offense is determined by how intense, durable and widespread the offense is, how difficult it is to avoid, whether it is voluntarily experienced, and whether the offended person seems particularly susceptible to offense.⁶³

Of course, the standards involve some inaccuracy, but applied to psychic harm cases, they may contribute to explaining why certain laws protecting individuals from psychic harm are justifiable. For example, stalking can be extremely intense, difficult to avoid and in no way voluntarily experienced. These points also seem to apply to victims of harassment. Furthermore, harassment does not seem to have any social value, and it is plausibly caused by hateful motives. Still, such instances of psychic harm differ from the policies that the project of reconciliation is dealing with.

In my view, given the standards in question, we are not justified in requiring, for example, motorcycle helmets or medical insurance solely on the basis of psychic harm to others. Regarding compulsory helmet statutes, consider Feinberg's emphasis on psychic harm to the driver at fault in a collision with a helmetless motorcyclist who lost his life or incurred a serious brain damage in the incident.⁶⁴ According to de Marneffe, this psychic harm is relatively easy to avoid because it is within the control of each motorist how carefully they drive in the vicinity of helmetless

⁶² Feinberg, *Offense to Others*, p. 26.

⁶³ *Ibid.*, p. 35.

⁶⁴ Feinberg, *Harm to Self*, p. 141.

motorcyclists.⁶⁵ If the psychic harm in question is easily avoidable, this basis for enforcing crash helmets seems fairly weak. To this, one may object that people are often involved in accidents they really could not have done much to avoid. However, if the driver could not have done much to avoid the bad outcome for the motorcyclist, this may in fact be a consoling factor. Moreover, the acknowledgement that the motorcyclist did not take certain precautions to avoid the harm in question may be a mitigating circumstance which diminishes the experience of psychic harm. In light of such considerations, it is at least unclear that the above standards are satisfied.

At any rate, and this is my section objection to the argument, the psychic harm argument for motorcycle helmet laws is vulnerable to the hypothetical case in which other people are unresponsive to the misery of helmetless motorcyclists (that is, they will not feel psychic harm if the imprudent behavior of the biker materializes). In fact, they might be responsive in the sense that they find joy in the misery of the helmetless motorcyclist.⁶⁶ In this case, I think it is fair to say that our reasons for being in favor of helmet mandates do not seem to hinge on such information about the attitudes of e.g. the other road users.⁶⁷ This suggests that other factors are doing the justificatory work in the case of helmet mandates – factors that plausibly concern the harm incurred by the motorcyclist himself.

⁶⁵ De Marneffe, “Avoiding Paternalism,” p. 91.

⁶⁶ What Nicholas Dixon refers to as ‘schadenfreude—pleasure derived from another person’s misfortune’. See, Nicholas Dixon, ‘Boxing, Paternalism, and Legal Moralism’, *Social Theory and Practice* 27 (2001): 323-344, p. 338.

⁶⁷ I owe this point to Søren Flinch Midtgaard.

As regards medical insurance, it is sometimes argued that the feeling we would have if some people were left to die because they lack insurance constitutes significant psychic harm.⁶⁸ When imprudent and uninsured people run certain risks, and the risks materialize, third parties are left with the unpalatable options of either paying up or closing their eyes to significant suffering. Both types of costs are directly linked to moral duty of aid; they arise when this duty is triggered (whether or not it is in fact discharged). Again, I find this argument for compulsory insurance inadequate. First, this particular harm is the central factor figuring in the public charge argument and to the extent it warrants restrictive measures such are justified by this argument.⁶⁹ As we have seen above, though, this argument for insurance is open to serious objections. Second, the “psychic harm” that the argument in question appeals to arises only if other people know what their duties are and if they are conscientious. However, in line with the point just made by the use of a hypothetical case, it is doubtful that the case for medical insurance is dependent upon the satisfaction of such assumptions. For example, we can easily imagine situations in which third parties are unscrupulous and therefore feel no regret when the imprudent person is left to his or her suffering without assistance. Despite this information, insurance schemes remain plausible and are thus independent of such facts about people’s mental states.

I have shown that the psychic harm argument is unlikely to deliver what anti-paternalists expect of it: a compelling and solid justification for policies such as helmet mandates. Note that in my argument I have granted that appeal to psychic harm is sometimes capable of warranting liberty restrictions. One might of course question whether arguments appealing to psychic harm can

⁶⁸ Dworkin, “Paternalism: Some Second Thoughts,” p. 127.

⁶⁹ This is not to say that the psychic harm argument always collapses back into the public charge argument. It only does so in situations in which the psychic harm in question derives from people not fulfilling their moral duty to aid.

justify any liberty restrictions at all. However, my case against the psychic harm argument for helmet mandates and similar policies need not assume the success of such challenges.

5. Conclusion

The aim of the liberal reconciliation strategy is to fully justify certain seemingly paternalistic policies on non-paternalistic grounds; in this context, the public charge argument and the psychic harm argument play a central role. The public charge argument relies on duties of aid in fact being triggered. In certain cases they are not, and this makes the argument strangely insensitive to clear cases in which people act in ways that jeopardize their own safety in profound ways. In addition, the strength of the argument hinges on the extent of costs to third parties; if these are low, the argument is arguably insufficient to fully justify the policies in question. In contrast, the argument justifies certain unintended restrictions incentivizing imprudent behavior. The psychic harm argument implies that the spheres in which people can act autonomously are potentially limited in implausible ways. For the same reason, anti-paternalists who care about individual autonomy should be cautious in applying the psychic harm argument. When we introduce some plausible standards that should be satisfied in order for psychic harm to warrant liberty restrictions, the psychic harm argument arguably fails to justify the restrictions calling for preventive action. Moreover, the argument appeals to facts about people's mental states that do not seem to determine the justification of the relevant policies. In consequence, neither of the two arguments successfully justifies the policies they are carried forward to defend. This is an important problem

for anti-paternalists in that they are faced with the unpalatable option of either giving up the policies sought justified on non-paternalistic grounds or embracing paternalism.⁷⁰

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