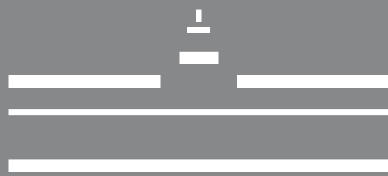

› Governing [through] Autonomy. The Moral and Legal Limits of "Soft Paternalism"

Bijan Fateh-Moghadam und Thomas Gutmann

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Introduction

Whereas previous legal-philosophical and legal discussion has been limited predominantly to critique of "hard" paternalism, it is autonomy-oriented or so-called "soft" paternalism that shall be investigated here. This kind of paternalism is designed to protect self-determination for those concerned or, at least, seems not to conflict with this protection since the addressees lack competency to decide for themselves. Conventional liberal theory of paternalism treats "soft" paternalism as basically legitimate without raising any paternalism-specific normative issues. We intend to demonstrate that this approach leads to severe normative problems which arise in concrete practical contexts, such as the medical one. These problems are posed by delineation of the boundary between "hard", "soft", and "moral" paternalism, on the one hand, and by determination of the range and limits of the concept of "soft" paternalism itself, on the other. The following text sketches the contours of a theory of legal paternalism which is sensitive to forms of governmental patronage that pretend to orient themselves on the right to self-determination by the individual. We aim at a *theory of the limits* of soft paternalism. For this, we take recourse to a rights based moral theory. Since policies of autonomy are always drawn up legally, we will illustrate some problems on the basis of (German and international) law and legal debates.

1 Differentiation between concepts

1.1 Paternalism

Paternalists mean well with us. The concept of paternalism designates intervention in a person's liberty of action which should serve that person's good, but takes place against or without her will. Our provisional working definition of paternalistic conduct – more exactly: of the reasons for paternalistic action (Grill 2007) – orientates itself on Gerald Dworkin's formulation:

> "I suggest the following conditions as an analysis of X *acting paternalistically towards* Y *by doing (omitting)* Z: (1.) Z (or its omission) interferes with the liberty or autonomy of Y; (2.) X does so without the consent of Y; (3.) X does so just because Z will improve the welfare of Y (where this includes preventing her welfare from diminishing), or, in some way, promote the interests, values, or good of Y" (Dworkin 2010, sub 2).[1]

Measures taken by institutions of the legal system (particularly legislation) which exhibit the characteristics of paternalism described above are *legal-paternalistic*. With these, legislative institutions hinder or impede a choice of action for the person concerned in order to save her from adverse effects on her welfare as a result of her decision. Legal paternalism is expressed by the principle that "the need to prevent self-inflicted harm [is] a legitimatizing reason for coercive legislation" (Feinberg 1986, p. 8). Thereby, the paternalistic character of a prohibition norm does not depend on whether it is directed directly against person A or against a third party (B) who is acting with the consent of A. The latter norm, too, through so-called *indirect* or *impure* paternalism, limits A's liberty of self-disposition (Dworkin 2010, sub 2[2]). The differentiation between hard and soft paternalism and the one between direct and indirect paternalism have to be kept separate from one another.

The problem with paternalism always becomes a practical one when the individual should be protected from self-harm or harm by a third party through mutual agreement. Here is an example from the legal sphere: May the individual be prohibited under criminal law from putting an end to her life and from having recourse to help from third parties to carry this out? What is the extent of the legal effect of consent to bodily harm? Does a doctor, for instance, make herself liable, when she removes a healthy organ from a patient for transplantation to another person or even amputates a healthy leg because the patient expresses the unappeasable and serious desire to be rid of this part of her body?[3]

1 See Dworkin 1983, p. 20: "Intervention in a person's liberty of action is justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced." It should be noted in particular that Dworkin differentiates between autonomy and liberty of action and is content with intervention in the latter, a question we will return to.

2 For example, the German transplantation law does not directly forbid citizens to donate an organ to an unrelated person, but the doctor who removes the organ with the donor's consent is punishable under law (§ 8 Abs. 1 TPG).

3 Cf. First 2005 for *Body Identity Integrity Syndrome*.

1.2 Hard paternalism as non-autonomy-oriented paternalism

In the example just mentioned above, "hard" paternalists see no problem in purely and simply outlawing the explantation or amputation of healthy bodily parts, even by means of criminal law. They hold limitations on the liberty of self-disposition to be legitimate, regardless of whether the authorizer is acting autonomously or not. An autonomous decision does not play a decisive role because for them life and bodily integrity of the individual should be protected as objective values or well-understood objective interests of the individual. In German legal discourse, e. g., "weighting models" of legally effective consent follow a classically hard paternalistic pattern of argumentation by allowing an "objective" interest in preservation of the patient's legally protected good (e. g. the integrity of her body) to outweigh her interest in self-determination.[4] It is also hard paternalism when self-disposition is prohibited on the grounds that the disposition intended by the person is incompatible with her self-dignity.

1.3 Legal moralism

Wherever there are claims in favor of hard paternalism, legal moralism is just a stone's throw away. Both hard paternalism and legal moralism share the conviction that limitations on liberty of self-disposition can be legitimate, regardless of whether the authorizer is acting autonomously or not. Legal moralism does not justify this with the welfare of the party concerned, but on the grounds that certain self-harming dispositions violate socio-moral values, lead to moral disintegration in society (i. e. damage a collective good), or that they are simply intrinsically bad (malum in se). A classic example is Lord Devlin's thesis of disintegration in the debate with H. L. A. Hart concerning the prohibition of homosexual practices between adults (Wolfenden Committee 1957; Hart 1963; Devlin 1965). Discussion in regard to the legitimacy of legal moralism is shown to still be topical and practically relevant by the decision of the German Federal Constitutional Court which upheld the criminal law prohibiting incest between siblings. The judges disputed whether this norm is illegitimate because it focuses merely on existing (or only presumed) moral values, and not on a concrete right or a legally protected good.[5] The boundary to legal moralism is also overstepped when self-disposition should be banned on the grounds that the intended disposition (for instance, in the area of human genetics) is incompatible with a certain conception of a human being or with a certain "species ethic" (Habermas 2003). Insofar as moralism focuses on individual moral welfare of the individual, it is a reason for patronage towards him and can be integrated into the concept of paternalism as moral paternalism. Thus, a differentiation can be made between "moral" and "welfare" paternalism (Dworkin 2005 and 2010 sub 2).

4 Cf. Noll 1955, 74 f.; Jescheck and Weigend 1996. See fundamentally Raz 1986, 188 ff, 191.

5 Rulings of the German Constitutional Court (BVerfGE) vol. 120 (2008), p. 224 (confirmed by the European Court of Human Rights, Ruling 43547/08, April 12, 2012). For the problematics of legal moralism, cf. particularly the dissenting opinion of Judge Hassemer, ibidem, 1142 ff., here marg. 99.

2 Soft paternalism as a liberal solution

2.1 Soft paternalism as autonomy-orientated paternalism

Conventional liberal theory of paternalism limits itself explicitly to critique of hard paternalism, i. e. when competent autonomous adults are to be protected from themselves.[6] Even the most determined antipaternalists recognize that it can be legitimate to protect persons against their own conduct, for instance, when it involves minors, people lacking critical judgment and the ability to understanding the consequences, or even competent adults who, due to information deficits, do not know exactly what they are doing. The liberal solution for these cases consists in the conception of prima facie permissible soft paternalism, which is said to differentiate itself categorically from impermissible hard paternalism. The decisive difference between hard and soft paternalism is that the latter

a) fundamentally respects autonomous decisions of competent persons

b) and, when structuring the bounds of self-disposition, orientates itself on the objective of ensuring the individual's autonomy and liberty of action.

Insofar, instead of speaking of soft paternalism, we could also speak of *autonomy-orientated or autonomy-respecting paternalism.*

2.2 Phenomenology of soft paternalistic intervention

Ideal-typically, we can differentiate between four scenarios of soft paternalistic intervention:

a) *"Classic" soft paternalism:* Intervention serves to hinder non-voluntary self-inflicted harm.[7] For example: Self-inflicted harm (or the consent to harm inflicted by a third party) by obviously incompetent minors and adults.

b) *Procedural paternalism:* This is the case "when temporary intervention is necessary to establish whether [the conduct] is voluntary or not" (Feinberg 1986, p. 12). Procedural paternalism is limited by this objective. As soon as it is known that the person is acting autonomously, an end is put to the intervention. Some examples of this are cases of possible error-related self-harm, i. e. unknowing self-harm or self-endangerment, as in Mill's famous example of a wanderer who is held back for a while because he possibly does not know that the bridge he wants to cross is rotten (Mill 1992, p. 92). In the medical area, some examples are temporary prevention of an attempted suicide for clarification of psychiatric illness, provisional reanimation in the case of an unclear advance directive, or the

6 John Stuart Mill already meant his antipaternalistic theory "to apply only to human beings in the maturity of their faculties". He exempted children, adolescents, those with defective reflective faculties, including, by the way, "those backward states of society in which the race itself may be considered in its nonage" (Mill 1992, 13). There are authors who state, as we do, that even if a person's stated preferences do not derive from a substantially autonomous choice, the act of overriding these preferences is still paternalistic (cf. Childress 1982; Kleinig 1983, pp. 6–14; VanDeVeer 1986, pp. 16–40, Schöne-Seifert 2009). There has, however, been no systematic treatment of the justifiability of these forms of 'soft' paternalism so far.

7 Cf. Feinberg 1971, 113, 116: "substantially non-voluntary conduct", also Beauchamp and Childress 2009, 210.

procedure of "living organ donation commissions" according to the German transplantation law (an organ may only be donated after a commission has declared that there is no evidence that the donation does not take place voluntarily).

c) *Endangerment-paternalism* for prevention *of possible* non-autonomously self-inflicted harm. This is a matter of generally banning acts of self-endangerment in a certain context because, although deficiency of autonomy cannot be proven in every individual case, the *risk* exists that at least some persons (unknown) do not act autonomously. A sub-case in this group is cases when legislators do not want to establish persons' cognitive faculty and judgement in every individual case, but instead introduce or raise age limits, for instance, for living organ donation, gender reassignment, or castration.[8]

d) The fourth kind of "non-hard" paternalism to be analyzed are suggestions such as the *"libertarian"* or *"nudge"* paternalism of Sunstein and Thaler, who, in view of *limited rationality and limited self-control*, attempt to urge the individual (and that means *every* individual) towards more individual rationality in the pursuit of her preferences (and insofar also of her welfare), but do not take the route of bans and other forms of legal coercion directly limiting liberty.

2.3 Is soft paternalism even paternalism at all?

The apparently prevailing opinion in the discussion of paternalism contests that soft paternalism (especially in the form described in 2.2., a to c) is conceptually paternalism at all (Beauchamp, Quante[9]) or assumes that soft paternalism of this sort is basically legitimate and thus does not pose any normative problems specific to paternalism[10], so that it should ultimately be eliminated from the concept of "paternalism" altogether (Feinberg's [1986, 15] "*soft antipaternalism*"). The following – controversial – reasons are given for this argument:

a) Soft paternalism is held morally and legally unproblematic because it supposedly would not violate the principle of respect for autonomy of persons.

b) Non-autonomous self-inflicted harm is held not to be normatively assessed any differently than harm to a third party; its prevention is therefore supposed to be justified by the *harm-to-others principle.*

c) Non-autonomous self-inflicted harm is assumed to be normatively comparable to harm arising from a natural phenomenon since it is not based on the autonomous will of the aggrieved party and insofar is not controllable. Presuming that saving persons from damaging natural events is morally and legally legitimate and necessary (principle of care), the same is supposed to be true for soft paternalism.

8 In Germany, e. g. § 8 Abs. 1 Transplantation Act (18 years); § 2 Castration Act (25 years).

9 Beauchamp 1977, 67; idem, 2009, 80, 83 ("paternalism seizes decision-making authority by overriding a person's *autonomous choice*" / "only strong paternalism qualifies as paternalism"; italics TG and BFM); Quante 2002, 308 ff.

10 Beauchamp and Childress 2009, p. 210: "soft paternalism does not involve a real conflict between the principles of respect for autonomy and beneficence".

This line of argumentation leads to a narrow definition of paternalism which includes intervention only in autonomous decisions, i. e. includes the issue of (autonomy) competence in the definition of paternalism.

We, on the contrary, consider it imperative to have a broad concept of paternalism which also includes alleged or actual autonomy-orientated (soft) paternalistic intervention. According to this, it is not until the level of *justification* for paternalistic intervention that the differentia tion between hard and soft paternalism plays a role. The reasons for this are as follows:

a) The phenomenology of soft paternalistic intervention (2.2. above) shows that the mode of justifying soft paternalism can legitimate very far-reaching governmental intervention which (in the constellations in 2.2. Nos. b to d) also pertains to persons acting fully autonomously. As will be demonstrated more closely (3. below), each of these constellations involves specific normative problems. At the same time, medico-ethical and medico-legal practice make the strategy of soft paternalism appear to be virtually the paradigm of paternalism for the 21st century. Since hard paternalism in medical ethics and medical law has largely fallen into discredit, protection of persons against themselves has been increasingly justified in a soft paternalistically way. Here, it has become evident that for almost all of the limitations on liberty of self-disposition which have previously been justified hard paternalistically or moralistically (for instance, physician-assisted suicide), a soft paternalistic alternative rationale is available. Anyone who is not only interested in the purity of liberal theory, but also in the practical range of legal and moral liberties thus has to deal with the limits of soft paternalism.

b) Soft paternalism is morally and legally problematic since it restricts the conduct of persons which does not affect the legal sphere of any third party. Non-autonomous self-inflicted harm differentiates itself from injury by a third party and thus cannot be justified by the *harm-to-others-principle*. This structural characteristic applies equally for hard and soft paternalistic intervention and thus equally requires special justification which is differentiated from the justification of prevention against injury by a third party (cf. Mayr 2010). This even poses the question of whether soft paternalism belongs to the legitimate tasks of the government and the law at all. At least from a liberal Kantian view, which holds that it is the task of the law to demarcate the spheres of liberty of different persons from one another (Kant 1902 ff., vol. VI, p. 230), the answer is negative.

c) Justification by the *harm-to-others-principle* breaks down especially in cases of procedural paternalism (2.2.b above) and of endangerment-paternalism at the mere *possibility* of the existence of an autonomy-deficiency (2.2.c above). In both case scenarios, it is accepted that even persons acting fully autonomously are limited temporarily (2.2.b) or definitively (2.2.c) in their liberty of action. For this reason alone, these cases are, from the start, not at all normatively neutral. For the persons concerned, the difference between hard and soft paternalistic intervention is not qualitative, but, at best, a question of the intensity of the intervention (2.2.b), or there is no difference at all (2.2.c).

d) An additional argument for a broad concept of paternalism is that this is the only way to show visibly that the legal attribution of autonomy itself represents a problem with paternalism. The contingent definition of age limits, prerequisites for tutelage (legal incapacitation), the definition of deficiencies in autonomy, ascertainment of grounds to believe in involuntary organ donation, etc., can themselves qualify as paternalistic measures. These processes of attribution are unavoidable, but they are not uncontrollable and require inde-

pendent justification and critique. More detailed scrutiny of "thick conceptions of autonomy" currently in progress (see 2.4.2 below) shows that the concept of autonomy itself can be used as an instrument of reinterpretation of hard paternalistic intervention into soft paternalistic intervention. A theory of paternalism which excludes these processes from its subject-matter misses the aim of the currently most powerful strategy of paternalism: governing [through] autonomy.

e) Subsequently, what speaks on behalf of our broad notion of paternalism is the conceptional differentiation between liberty of action (as underlying concepts of basic legal rights and moral rights) and personal autonomy (as used in many moral-philosophical conceptions). For legal and legal-philosophical theories of paternalism, it is advisable to follow up on intervention in liberty of action, which every person is fundamentally entitled to *regardless of her competence*. This is the only way of showing that, for instance, limitations on the liberty of incompetent persons which are imposed in their own interest (a simple example: bedrails in nursing homes) require justification and are permissible only as exceptions.

This leads to a broad definition of paternalism similar to Dworkin's: intervention in a person's liberty of action which should serve her welfare, but which takes place against or without her will is paternalistic.

2.4 Contingency of legal autonomy

2.4.1

As plausible as the differentiation between hard and soft paternalism appears at first view, it becomes all the more blurred when the decisive guiding differentiation between autonomous and non-autonomous decisions itself is taken into account. The blind spot in conventional liberal paternalism theory is found in the concept of autonomy. Legal (or moral) autonomy for decision-making is unable to be found in its essence, measured empirically, or diagnosed psychologically; instead, it designates a contingent normative construct which attributes legal (or moral) responsibility for the outcome of certain conduct. The accentuation on contingency, particularly in the legal concept of autonomy, indicates that the issues of prerequisites and of the range of personal self-determination always arise in the context of differentiated legal systems which formulate specific connecting conditions (Fateh-Moghadam 2008, 2 ff.). In the context of many legal systems, this particularly concerns the liberty of disposition over one's own body guaranteed by basic rights and its specification under criminal and civil law through the institution of informed consent.

Obviously, it is exactly the decision about assignment of legal autonomy itself that entails risks of paternalism: lack of this "basic competence" usually means that a person is considered as not being able to state her will self-consistently or to give consent effectively, and others have to decide in her place. "Incapacitation" or legal tutelage represents the most intensive form of paternalistic intervention, even when, without any doubt, it is a matter of autonomy-orientated, soft paternalism. Classification as being incompetent means fundamental exclusion in an autonomy-orientated society. "The predicate 'autonomous' is a powerful element within the social practices in which statuses, entitlements, immunities, liberties, and the like are attributed, withheld, and contested" (Joel Anderson 2013).

2.4.2

Thus, the first problem in regard to conventional liberal de-problematization of "soft" paternalism results from its variable limits. "Soft" paternalism is characterized by respect for the autonomous decisions of competent persons. As has been shown, the concept of legal (or moral) autonomy is, however, a contingent normative construct which can be "charged" almost arbitrarily. The concept of autonomy itself can be used as an instrument of reinterpretation of hard paternalistic intervention into soft paternalistic intervention by just sliding its scale.

In fact, in almost all varieties of its philosophical use, a philosophically substantial concept of personal autonomy designates an ideal which real persons can only approach, at best: autonomy in this sense is gradual – a person can be more or less autonomous. Autonomy may be understood as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth, and the capacity to accept or attempt to change these in light of higher-order preferences and values (Dworkin 1988; Quante 2011). A person understood as autonomous is someone who is responsive to a sufficiently wide range of reasons concerning her choices (Berofsky 1995, p. 182 ff, 199), who is authentic in a sense that she is able to reflectively endorse (or not be alienated from) her basic organizing values and commitments in the light of her diachronic practical identity, i.e. the historical processes that gave rise to these characteristics (Christman 2009, pp. 133 ff), or who, on the basis of an authentic interpretation of her "real" objectives, can make "strong" evaluations in regard to the success of her life and to her identity as a whole (Taylor 1985a, 1985b; Benn 1976, pp. 125 ff; 1988, pp. 9, 178 ff).

Autonomous life can be associated with a life with a high degree of biographical consistence and coherence that follows a "rational life plan" which "would be chosen … with full deliberative rationality, that is, with full awareness of the relevant facts and after careful consideration of the consequences" (Rawls 1971, § 63, 408. See also Bratman 2005). Autonomy in the sense of an ideal category of personhood can, however, also be understood as liberty or becoming free of "heterarchy" (Benn 1988, 164 ff) or of the "motivation-power" of others (Baumann 1995), as critical evaluation and formation of one's desires (Elster 1983, pp. 109 ff) or as liberation from cognitive limitations on spontaneous experience (Berofsky 1995). In Freud's psychoanalytic tradition, the concept of autonomy aims at a person who has worked through her unconscious connections of instinctual drives to a conscious liberty with which she can have her self-powers at her disposal as unimpededly as possible, without being hindered by frustrating, infantile expectations (Freud 1972a, p. 317; 1972b, 516; cf. Habermas 1973, pp. 280 ff).

In this development-orientated and thus perfectionist sense, autonomy cannot, however, be an essential condition for guaranteeing persons areas of liberty for self-responsible decision-making. On the contrary, autonomy in the sense of a moral or juristic right to self-determination in the area of protected spheres of liberty has to represent a *threshold concept* (Wikler 1983; Feinberg 1986, 29; Benn 1988a, 10; VanDeVeer 1986, 351). This kind of autonomy means that we attribute individuals *normative competency for decisions concerning their own sphere of life*. In this respect, autonomy must be independent of the extent that persons realize idealistic conceptions of autonomous life or protect their interests optimally, insofar as they fulfill certain minimum requirements in regard to rationality, self-reflection, and self-control. In order to be considered a valid decision-making body in one's own affairs, it must suffice to be sufficiently autonomous – fundamentally competent, or autonomy-competent. Otherwise, the basis assumption of our legal systems (and of conceptions of moral rights as well) that, in general, individuals have normative competency for their decisions would lose its foundation

and would refer to paternalistic tutelage of the average citizen by members of society endowed with exceptional autonomy. For this reason, the first task of *a theory of soft paternalism* is to establish that the concept of autonomy in the theory of paternalism designates a range property on the grounds of its functional purpose (Wikler 1983, p. 87; cf. Rawls 1971, p. 508) and is binary – either a person is fully autonomous, or she is not at all. The normative determination of this threshold for basis competence is the decisive element for the boundary between "soft" and "hard" paternalism. At the same time, it is only through such a low threshold concept of autonomy that the fundamentally *egalitarian*, as well as the *inclusive* character of the concept (or regime) of autonomy can be ensured. It is not until this is accomplished that it makes sense to think about *autonomy-enabling policies*, in order to address Joel Anderson's critique that the focus on low threshold conditions fails to protect less-competent groups in society because "the central fact about individual autonomy is how limited the competence of many individuals is and how vulnerable groups are significantly disadvantaged by arrangements in which benefits are distributed in part on the basis of the autonomy-competence that individuals develop 'naturally.'" (Anderson 2013).

2.4.3

Before we turn to an analysis of the limits of *"soft"* paternalism, it should be noted that there are paternalistic rationales which pretend to be autonomy-orientated, but actually intervene so emphatically in individual self-determination that they must be ranked among the "hard" forms of paternalism. These include especially approaches which think in concepts of diachronic aggregation of autonomy or maximization of it. Such theories of biographically applied "liberty-of-decision paternalism" require that each of the person's current decisions is to be overridden if it does decrease (or not increase) the sum of this person's future free decisions (Enderlein 1996, pp. 58 ff.; see also Arneson 1980, p. 473; Hurka 1993, p. 148; Raz 1986, p. 419).

The rational logic of this approach fails because it intervenes in the personal integrity of the party concerned, whose reasons for her behavior are necessarily linked in each case to her *current* self-understanding (Williams 1981, p. 13). Each individual personality is constituted through active, evaluative self-understanding which, although comprising memories, as well as anticipation (Quante 2007, pp. 158 ff), always exists in the *now*. "Liberty-of-decision paternalism" disengages a reified concept of "autonomy" from its bearers and turns it against them. It imposes upon each person currently that she may never be anything more than a trustee of her future manifestations or functions of liberty. Each individual currently is at no time respected as an individual for her own sake, but only as accident of her *future* potential for a decision. In particular, this assumption cannot be reconciled with the sense of a subjective right to liberty of decision.

3 Limits for soft paternalism

A *theory of limits for soft paternalism* proves its necessity and relevance by identifying typical case constellations of soft paternalistic intervention (2.2 above) as normatively problematic and by plausibly questioning the conditions of their justification.

3.1 "Natural will" – liberty of not (sufficiently) autonomous persons

This applies for *"classic soft"* paternalism whose liberty-limiting intervention should serve for prevention of non-autonomously self-inflicted harm.

The law is increasingly setting limits on *"classic soft" paternalism* and greatly strengthening internationally the legal positions of incompetent or limitedly competent persons, and it does so for good reasons. This is how the U. N. Convention on the Rights of the Child obliges legal systems to take into appropriate account the child's opinion according to her age and maturity,[11] thus requiring that even an incompetent or not sufficiently competent child or even an infant has a right to participation in decisions which concern her (Schmahl 2012, Art. 12 marg. 1 f., 8; Detrick 1999, 213 ff). The U. N. Convention on the Rights of Persons with Disabilities guarantees the mentally ill the capacity to act and obliges the contracting states to respect the will and preferences of such persons even when they are incompetent.[12] For similar reasons, German law requires legal guardians to respect even the non-autonomous "natural" will of the adults looked after, and not only to care for their objective best interest.[13] Fundamentally, regardless of whether the person in guardianship is legally competent or not, priority should even be given to the "natural" will of the person under guardianship.[14] Detention or physical restraint of an incompetent person must be mandated by a judge (not only in Germany), just as is the case for measures against autonomous persons.[15] In all these cases, the law maintains a concept of liberty of action which each person is fundamentally entitled to *regardless of her competence*. At the same time, it confirms that non-autonomously self-inflicted harm is structurally different from injuries by a third party and thus cannot be justified by the *harm-to-others principle.*

A dramatic example of recognition of "non-autonomous veto-rights" and change in a legal "regime of autonomy" (Joel Anderson) is found in a decision by the German Federal Constitutional Court from April 15, 2011: a man suffering from a paranoid psychosis had tried to kill his wife and daughter and had then been placed in a psychiatric hospital under judicial order. In the hospital, this man successfully resisted compulsory medical treatment with neuroleptics which had been prescribed to serve his best interests and his future autonomy – namely, the possibility of him being able to be discharged again at some point in time. The court decided that "cognitive inability on the grounds of illness [of the party concerned] does not alter […] the fact that treatment encroaching upon bodily integrity and taking place against one's *natural* will represents an intervention in the protection area of the [fundamental right to bodily integrity and the right to self-determination]. […] Insofar, and provided that the person held is, on the grounds of the illness, incapable of insight into the severity of the illness and the necessity for treatment measures or for taking action according to such insight, competence for compulsory treatment is acknowledged as an exception, this opens no 'rationality sovereignty' over the bearer of fundamental rights for governmental organs in such a way that her will may be set aside for the reason alone that she deviates from average preferences or seems irrational on the

11 UN Convention on the Rights of the Child (1989).

12 U. N. Convention on the Rights of Persons with Disabilities (2006), Art. 1 II, 12 II and 12 IV 2.

13 § 1901 BGB (Germany).

14 Motivation of the German Parliament, BT-Druck, p. 11/4528, p. 67. Advance directives prevail, though (§ 1901a BGB Germany).

15 § 1904 BGB (Germany).

surface." The court stated that, within certain limits, the mentally ill also possess the "liberty of being ill".[16] The premises of the court's decision according to which a person suffering from paranoid psychosis is, in the legal sense, not simply substantially non-autonomous, but only "rational in a different way" can be criticized because it circumvents any threshold concept of competency and thus also the significant substance of the differentiation between "soft" and "hard" paternalism. This case also shows one other thing, however: critique of paternalism aimed at bringing to light its phenomena has to follow up on a concept of liberty of action to which every person is fundamentally entitled, regardless of her competence. "Classic soft" paternalism also intervenes in this liberty and must therefore count as a normative problem. An ethical theory of paternalism also has to deal with these normative contents found in law.

3.2 Procedural paternalism

Procedural paternalism exists when temporary intervention cuts into the liberty of a person's action with the objective of determining whether or not the person's self-injury takes place autonomously. Its aim is to ensure the person's autonomy through formalities and procedural rules, as well as through institutional procedural provisons, for instance, commission models, in which the voluntariness of decisions or the existence of deficiencies in decision-making are investigated preventively in each individual case; these issues are gaining considerably in importance in law.

In general, mere procedural ensurance of individual autonomy for decision-making intervenes less intensively in the basic rights of the party concerned than a substantial paternalistic ban of certain conduct. For this reason, procedural paternalism, which is spreading out explosively in medical law, is usually preferable. It cannot, however, be said that it always represents the milder means vis-à-vis material paternalism. Procedural paternalism can intervene intensively in the basic rights of persons and requires justification (legal justification, as well). One need only consider, for instance, that a person in Germany who wants to donate an organ to someone close to her must not only allow herself to undergo a whole series of psychological or psychiatric tests to ensure the voluntariness of her action, but must also give a governmental commission set up for this purpose information concerning her extremely private motives. The issue of justification in this case depends, last but not least, on the concrete structuring of the legal procedural and commission models.[17] Moving beyond the issue of justification for the substantial limitations on liberty of self-disposition, questions concerning democratic and constitutional legitimization of the relevant boards become apparent.

16 Rulings of the German Constitutional Court (BVerfGE), vol. 128, p. 282, marg. 42 and 55.

17 In German law, for example, there are differentiated procedural solutions for open-ended consultation processes through boards of privileged consultation and decision-making bodies (such as commissions for living organ donation in transplantation law and ethics commissions in the area of clinical pharmacological testing) as well as the obligation to consult guardianship courts, cf. Saliger 2003, 1–170, Fateh-Moghadam 2003, 245–257; Fateh-Moghadam and Atzeni 2009.

3.3 Endangerment-paternalism

Endangerment-paternalism on a regular basis is even more questionable since it places a *general* ban on certain self-endangering actions although a deficiency of autonomy cannot be proven in every individual case, due to the risk that some persons (unknown), at any rate, do not act autonomously.

Proponents of endangerment-paternalism hold such bans for justifiable as a reaction to increased risk of a deficient decision. Endangerment-paternalism is supposed to be justifiable even in view of the mere possibility of a deficiency in decision-making and even to deny the effectiveness of decisions which, in truth, were not made deficiently (Murmann 2005, pp. 495 and 504; see also Husak 2003, 396 ff).[18] On this basis, intervention in liberty of self-disposition can be legitimized to a very large extent on a soft paternalistic foundation. When legislators start from the assumption of increased risk of deficient decision-making in a specific practical context, for instance, in transplantation medicine, there seems, at first, to be nothing to be said against forbidding the practice lock, stock, and barrel. Soft paternalism could thus even legitimize more comprehensive intervention in the liberty of self-disposition than some varieties of hard paternalism which are orientated on the severity of the intervention. Compared with this, the theory of soft paternalism stresses that the consequence of individual decisions being unjustly classified as deficient is no less serious than the opposite case (Buchanan and Brock 1990, p. 45; DeMarco 2002, p. 237 ff).

However, the limits of legitimate endangerment-paternalism have to be drawn by the principle of *proportionality*. In doing so, it is important to see that the point of reference for soft paternalistic intervention is not prevention of self-injury as such, but rather avoidance of *autonomy-deficient* self-disposition. For this reason, it is necessary to substantiate the appropriate functional requirements for indications of deficiency in decision-making. Concrete grounds have to be named for believing that the consenting individual lacks cognitive and judgemental ability, that she is being coerced, or that she is subject to some other relevant absence of will. For this purpose, mere information about the seriousness of the risk and the "objective" irrationality of intended act are not sufficient.

An additional special characteristic for scrutiny of proportionality results from the paradox structure of autonomy-orientated paternalistic intervention: intervention in the authorizer's right to self-determination takes place in order to protect exactly this right. For this reason, it is not a matter of assessing the value of the person's liberty of action against her objective welfare. On the contrary, it is the liberty of disposition of the person protected under law that has to be considered on both sides of the assessment: injury to the *positive dimension* of the right to self-determination (freedom to develop) against the imminent threat of injury to its *negative dimension* (protection from non-effective consented injury by a third party). In other words, what is decisive is the relationship between costs of intervention, i. e. the loss of actual liberty of action, and the potential costs of learning, i. e. the subjectively evaluable impairment of a legally protected right which is a threat to the authorizer if her decision proves to be deficient

18 Joel Feinberg is stricter in this regard: "When consent to a given kind of dangerous conduct is so rare and unlikely that it would hardly ever be given unless in ignorance, under coercive pressure, or because of impaired faculties, then a legislature might simply ban it on the basis of the harm-to-others principle, assuming for all practical purposes that consent to that kind of agreement never is voluntary enough. Such a rationale avoids (hard) paternalism and accords with the liberal's motivation" (Feinberg 1986, p. 174).

(Mayr 2010; cf. Rachlinski 2003). With high costs of intervention and/or low learning costs, the costs of intervention can thus predominate even if it is established that the authorizer is not acting autonomously or with only limited autonomy. This is the normative reason why, within certain limits, even the mentally ill enjoy the liberty to be ill.

The objective of optimal realization of the right to self-determination proposes legal models which fundamentally respect autonomous self-disposition and allow the person concerned to make the final decision insofar as possible. This means, for instance, that, in doubt, procedural (consultative) solutions are preferable to absolute material bans on actions which are potentially self-harming. Objective prohibition of disposition is, at best, in proportion when there is strong indication of deficiency in decision-making (high risk) and, simultaneously, the threat of irreversible injury to an especially high-quality legally protected right of the authorizer (high learning costs). In order to be justifiable, general prohibitions also have to provide for exceptions and procedures in order to be able to deal with individual cases where deficiencies in decision-making can be excluded (Dworkin et al. 1997).

3.4 De-biasing through procedure: safeguarding autonomy versus optimization of rationality

One of the most advanced theories for a conception of soft paternalism formulates economic analysis of law, particularly research on "behavioral law and economics" (Sunstein, ed. 2000; Parisi and Smith, eds. 2005). The American legal theorist Cass R. Sunstein, whose deliberations have been well received and developed further by Anne van Aaken, considers deliberative procedural models as prototypes of a "gentle", "soft" or "libertarian" paternalism.[19] Sunstein's deliberations are based on economic analysis and the rational-choice-model, which is modified by findings in behavioral economics in regard to bounded rationality of human beings (van Aaken 2006, p. 112 f.). Empiric studies on behavioral economics and cognitive psychology show that persons often do not act very rationally in the sense of what is understood under rationality in classic theory as a rational choice: meaning utility-maximizing orientation on *clear*, *stable*, and *well-ordered* preferences (Kahnemann, Slovic and Tversky 1982; Kahnemann and Tversky 2000). According to behavioral-economic research, this results from people suffering, on the one hand, from weaknesses of cognition and, on the other hand, from weakness of will: the formation of preferences depends strongly on the *framing-effect* of the problem, on predetermined *default rules* which prefer certain selection decisions, as well as on the way risks are conveyed. In addition, clear long-term preferences (health) can come into conflict with short-term preferences ("I'll just have a couple of puffs first"). Since, however, the heuristic assumption and also the normative objective of full rationality should not be given up, the phenomena observed by exponents of the behavioral-economic approach in legal theory are described as *deviations*, as *bias*, or as *anomalies* which can and should be counteracted by means of legal instruments, in particular, by procedural models. "Nudge"-paternalism does not rely on legal coercion, but rather on "institutional assistance for decision-making" (Trout 2005, 39), as well as on institutional design of choice-situations and *default rules* which make use of the cognitive and volitional weaknesses of the individual to increase the rationality of the resulting decisions.

19 Sunstein 2007; Van Aaken 2007; Sunstein & Thaler 2003a, 138, who insist that their version of paternalism is 'soft' paternalism, see Thaler & Sunstein 2009, p. 6.

From this perspective, the model set up by the living organ donation commissions in German transplantation law (§ 8 Abs. 3 Satz 2 TPG) could, for example, be described as an "instrument for overcoming disadvantageous behavioral anomalies", as a form of *"de-biasing through law"*, the titles of two relevant articles (Jolls and Sunstein 2006; van Aaken 2007).

From the paternalism-critical perspective, this approach raises numerous questions. What is especially problematic is the (tacit) transition from *autonomy* to *rationality* as the decisive point of orientation for soft paternalism. Legal autonomy defines a threshold concept which ensures the minimum conditions under which the individual also has the *liberty to make unreasonable decisions* (2.4.2. above). Rationality, on the other hand, is always optimizable, particularly when approached by economic analysis of law with the objective of "full rationality". As long as deficiencies in rationality do not exceed the threshold of legal deficiencies in autonomy, liberty-infringing paternalistic intervention for optimization of rationality for decision-making is not legitimate from the legal point of view. In any case, it is not a task of the law to ensure fully rational decision-making, which is a questionable enterprise anyway. Optimizing rationality in the sense of *behavioral law and economics* does not justify any standardized legal paternalistic bans or imperatives.

For the sphere of consultant processes and other forms of "assistance in making a choice" (van Aaken 2006, pp. 125 ff) which respect the competence of the individual to make the final decision, it has to be conceded that it is hardly possible to draw a distinct boundary between ensuring or enabling autonomy, on the one hand, and optimization of conditions for rationality, on the other. As rightly emphasized by *Sunstei*n and *Thaler* (Sunstein and Thaler 2003, pp. 1164, 1171, 1182), it is unavoidable that the government modifies existing frameworks, e. g. by consultation processes and by setting standard legal regulations, in order to foster certain decisions, for instance, to promote good health ("choice architecture", Thaler and Sunstein 2009, 89 ff). It is, however, a completely different question whether decisions made under soft procedural paternalism are *more rational*, which is what economic analysis assumes. Empiric data on the practices of the German commissions for living organ donation (which have the legal mandate to establish whether there are grounds to believe that donation of an organ is involuntary), e. g., indicate that skepticism is called for: these procedures change the decision-making framework for the donor and recipient substantially. Systematic confrontation of the organ donor with negative information about risks and worst-case scenarios, combined with high demands on competence in self-presentation in a test-style situation, can just as well be described as destabilizing mechanisms which distort the framework for the decision by overemphasizing small risks, triggering mechanisms of fear, etc. In this sense, the legal procedure itself generates anomalies which it pretends to be eliminating (Wagner and Fateh-Moghadam 2005).

A fundamental deficiency in the normative suggestions of behavioral economics for regulation is that these use an objective concept of rationality and always presuppose knowledge of what decision is rational for an individual in a concrete situation. Thus, Sunstein points out that it makes a difference whether information of patients emphasizes the mortality statistics or the rate of survival for a certain intervention and suggests that hospitals should present the options in a way that will lead patients to choose medical treatments "that are clearly best" (Sunstein 2005, p. 180). This aims at diverting patients from decisions which would amount to capitulation to unjustified fears. However, even for medically indicated therapeutic intervention, there are usually several alternative kinds of treatment for which no objectively compelling priority can be indicated. The choice among these always depends on the patient's subjective assessment, which makes her choice an individual and non-deputizable decision (Mayr 2010). This is all the more true for medical intervention to the benefit of a third party, for instance,

living organ donation by which only the organ donor herself can gauge what risk she is willing to take for the potential benefit of the organ recipient. It is thus necessary to give up full rationality as the point of orientation and to comprehend the legal construction of a framework for autonomous decisions as the contingent result of normative (and political) considerations which cannot be explained and evaluated through behavioral-economic analysis.

A further consideration is that the manipulative effect of "libertarian" paternalism is not neutral towards liberty (Anderson 2010, pp. 370, 374) – "systematically exploiting non-rational factors that influence human decision-making, whether on the part of the government or other agents, threatens liberty, broadly conceived, notwithstanding the fact that some nudges are justified" (Hausman and Welch 2010, p. 136).

4 Conclusion

This analysis has demonstrated that the solution presented by the conventional liberal model of soft paternalism is linked to numerous problems. If the extent of (legal) liberty of self-determination in practical contexts is a point of interest, critique of hard paternalism must be supplemented by a theory of soft paternalism which also specifies its limits.

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