

**Luís Faria | Legal Paternalism: the case
against coercion**



Legal Paternalism: the case against coercion

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ABSTRACT

Paternalistic laws restrict individuals' behaviour for their own good: consumers may damage their health or relationships with other people; they may lose their jobs or have a less successful life. Are these adequate reasons for prohibiting or sanctioning consumption?

The arguments below seem reasonable political principles:

1. If it would be wrong to punish people for directly bringing about some result, then it would also be wrong to punish people for doing some other action on the grounds that the action has a chance of bringing about that result indirectly;
2. A person has the right to exercise control over his own body - including the right to decide how it should be used, and to exclude others from using it.

If we agree with the above principles why is legal paternalism and its perverse consequences so widespread? Why is coercion by the state and the violation of basic individual rights accepted in our society, without a powerful and clearly-stated rationale?

The legal paternalism is morally outrageous. If we respect human rights, we cannot deploy force to deprive people of their liberty and property for unreliable reasons. The exercise of such coercion requires a powerful and clearly-stated rationale.

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“He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.”¹

Introduction

Paternalistic laws restrict individuals’ behaviour for their own good: consumers may damage their health or relationships with other people; they may lose their jobs or have a less successful life. Are these adequate reasons for prohibiting or sanctioning consumption?

Prohibiting or penalizing consumption means that consumers ultimately could be forced to spend time of their lives in prison. To justify the imposition of such a large harm, the reasons for prohibition or penalisation would have to be very strong.

In general, legal paternalism is justified only in extreme circumstances. Coercion is not justified merely because another person wishes to make an unwise choice of the sort that other people frequently make in ordinary life. The desire to prevent others from harming their health in this manner hardly seems an adequate justification for coercion. However, legal paternalism is quite widespread in our society and is a slippery slope. For example, the government in Portugal announced an increase in taxes on tobacco and alcohol in 2015, and it will also raise a special tax on food with “excessive salt and sugar”.²

The arguments below seem reasonable political principles:

1. If it would be wrong to punish people for directly bringing about some result, then it would also be wrong to punish people for doing some other action on

¹ Mill, p.124

² “Saúde quer encarecer produtos com excesso de sal e açúcar já em 2015”, jornal Público: <http://www.publico.pt/sociedade/noticia/saude-quer-encarecer-produtos-com-excesso-de-sal-e-acucar-em-2015-1632565>



the grounds that the action has a chance of bringing about that result indirectly.

For example, if from today on you decide being rude to others, breaking up with your girlfriend or boyfriend, stop calling your family, pushing away all your friends, marrying a jerk, no one would believe you should be sanctioned by the government for seriously damaging your personal relationships, even if all these behaviours can cause extreme and lasting detriment to one's well-being. Suppose that I decide to quit my job and throw all my money out the window, just because I feel like. Should the government punish me?

This is clearly beyond the state's prerogatives.

2. A person has the right to exercise control over his own body - including the right to decide how it should be used, and to exclude others from using it.

For example, no rational individual disputes that others may not physically attack you or kidnap you. Also, no rational individual accepts the use of unwilling human subjects for medical experiments, even if the experiments are beneficial to society. Society may not decide to use your body for its own purposes without your permission.

If we agree with the above principles why is legal paternalism and its perverse consequences so widespread? Why is coercion by the state and the violation of basic individual rights accepted in our society, without a powerful and clearly-stated rationale?

Three arguments in the legal paternalism debate

I deliberately precluded any reference to a particular good or service from my argument, as I believe this is a general case. Consumption represents an exercise of the right over a person's own body, but not over other people's bodies. However, the



argument responds to prohibitionists and those who defend much tougher taxes (sin taxes) on tobacco, alcohol, sugary foods and drinks, gambling, etc.

According to Huemer (2004), the three most prominent arguments in the legal paternalism debate are as follows:

1. Consumption should be outlawed and sanctioned because of the harm it causes to consumers;
2. Consumption should be outlawed and sanctioned because it harms people other than the consumer; and
3. Consumption should be liberalised because prohibition and other sanctions violate consumptions' rights.

1. Harm to Consumers

The first major argument for prohibition or penalisation holds that consumption should be sanctioned because it is extremely harmful to the consumers themselves, and prohibition or penalisation decreases the rate of consumption. This argument assumes that the proper function of government includes preventing people from harming themselves. Thus, the argument goes like this:

- a. Some consumption is very harmful to consumers (for example, fatty food, fizzy drinks, tobacco, alcohol, other drugs, gambling...).
- b. The government should penalise people from doing things that harm themselves.
- c. Therefore, the government should penalise this consumption.

The second premise is essential to the argument but simultaneously extremely implausible if out of context. Consider some examples of things people do that entail a



risk of harm to themselves: eating too much too often, riding fast motorcycles, having unprotected or promiscuous sex repeatedly, maintaining relationships with inconsiderate or abusive partners, maxing out their credit cards, being rude to their bosses...Should the government punish all of these things? The government should not intervene in any of these things simply because controlling those activities is not the business of government.

What may the critics argue for government intervention?

- i. First, some consumption is generally more harmful than the other activities listed above.

These are difficult to quantify but eating too much too often or marrying a jerk, can cause extreme and lasting detriment to one's well-being. And yet no one proposes sanctions for those who eat too much or make poor marriage decisions. The idea of doing so would seem ridiculous, clearly beyond the state's prerogatives.

- ii. Second, some consumption harms consumers health in a different way than the other listed activities.

Many other activities - including unprotected sex - entail health risks and may worsen consumers' health, and yet almost no one reasonable believes those behaviours should be penalised.

- iii. Third, some consumption may damage consumers' relationships with others - particularly family, friends, and partners - and prevent one from developing more satisfying personal relationships.

It is very implausible to suppose that people should be subject to sanctions for ruining their personal relationships. Being rude to others, breaking up with your partner, stop calling your family, and pushing away all your friends can also



have this effect. Suppose you do this for no good reason. This would definitely damage your personal relationships, yet no one believes you should be penalised by the government.

If it is not part of the government's legitimate functions to punish people for directly bringing about some result (directly cutting off your relationships with others), then it would also be wrong to punish people for doing some other action on the grounds that the action has a chance of bringing about that result indirectly. This does not provide a good reason to punish consumptions.

- iv. Fourth, consumption may harm consumers' financial lives, costing them money, causing them to lose their jobs or not find jobs, and preventing them from getting promotions.

The same principle applies here. Suppose that I decide to directly harm my financials by quitting my job and throwing all my money out the window, just because I feel like. Should the government punish me?

- v. Fifth, some consumption may damage consumers' behaviour and moral character.

Again, it seems that one should not punish an activity on the grounds that it may indirectly cause some result, unless it would be appropriate to punish the direct bringing about of that result.

Would it be appropriate, and within the legitimate functions of the state, to punish people for being unsympathetic and undutiful, or for behaving like jerks? Suppose an ignoble and unpleasant individual who doesn't bother to show up for work on time, nor does take any pride in his work; doesn't donate to charity; doesn't try to improve his community. Should this person be penalised by the government? If not, then why should someone be punished merely for doing something that would have a chance of causing them to become like this individual?



2. Harm to Others

Some critics argue that some consumption must be punished because it harms the consumer's family, friends, coworkers and society in general.

I entirely agree that, for example, people should be prohibited from driving while under the influence of alcohol or drugs and I also agree that smoking in public and shared spaces is a gross intrusion on others. But critics often refer to other alleged harms. Imagine again an individual that does not value freedom, nor does embrace personal responsibility; constantly blames other people for his/her problems and tries to avoid making decisions; he/she is a terrible worker who comes to work late and takes no pride in his/her work; he/she is an inattentive and inconsiderate spouse and parent; nor does he/she make any effort to participate in the life of the community. This person does bad things to his/her family, friends, coworkers and society, that some of the critics say may result from some consumption. Should the government punish what this individual is doing?

Once again, it seems absurd to suppose that we would penalise someone for behaving in these ways, undesirable as they may be. Since consumption only has a chance of causing one to behave in each of these ways, it is even more absurd to suppose that we should punish people for consumption on the grounds that it has these potential effects.

Some critics argue that some consumption and addiction harm society in general through the health costs imposed on taxpayers. The argument goes like this: The health services are in serious trouble; the deficits are becoming economically unsustainable and life-style related illnesses are putting even more pressure on public finances.

It is unacceptable to use economic or scientific arguments as a justification to violate basic individual rights. Suppose that I have started a charity to provide health services to the poor. To collect the needed funds, I take to mugging people on the street. This seems clearly impermissible. Mugging only the obese, the smokers, the drinkers, the gamblers, the drug addicts, still seems clearly impermissible.



Now suppose that I forcibly use an unwilling human subject for medical experiments that are extremely beneficial to society. Again, it seems clearly impermissible that society uses other people's body for its own purposes without permission.

Economic and scientific arguments are not acceptable to justify the violation of basic individual rights.

The previous arguments about the alleged harms to others could also apply to the health services costs as well. However, as the economic burden on health services is an argument repeatedly used, it is important to further demystify this idea. The health services argument is used as a case for prohibition and other sanctions, but it is nothing more than a fallacious argument:

- a. Individuals have a basic right to consume derived from the idea that individuals own their own bodies. Prohibiting people from consuming is a violation of their individual rights. This is wrong.
- b. Government forces individuals to pay for health services, whether the individual thinks it is worth the price or not, as if the government has a special kind of authority to issue commands to the rest of society. When we argue about what the government's immigration policy ought to be, for example, we normally presuppose that the state has the right to control movement into and out of the country. When we argue about the best tax policy, we presuppose that the state has the right to take wealth from individuals. When we argue about health care reform, we presuppose that the state has the right to decide how health services should be provided and paid for. This is mistaken.

If we accept that:

- i. Each person owns his own body, but not other people's bodies;
- ii. If someone who forcibly prevents me from using my property as I want, when I am not using it to violate other people's right to use their property, is coercing me;



then, the legal paternalism and prohibitionist rationale is deeply flawed:

$$\begin{array}{c} \text{Violation of basic individual rights} \\ + \\ \text{Coercion} \\ = \\ \text{Prohibition or other sanctions} \end{array}$$

From the critics perspective, and admitting that they accept arguments i) and ii) as true, this is equivalent to:

$$\begin{array}{c} \text{Wrong} \\ + \\ \text{Wrong} \\ = \\ \text{Right} \end{array}$$

The logical fallacy of this argument is obvious.

Not just any way in which an action might be said to “harm” other people makes the action worthy of criminalisation. Being an incompetent worker or an apathetic citizen are sorts of harms that virtually no one would take to warrant criminal sanctions.

I agree with the critics that no one should be permitted to drive or operate heavy machinery while under the influence of drugs or alcohol that impair their ability to do those things; nor should pregnant mothers be permitted to ingest drugs, alcohol or tobacco, if it can be proven that those substances cause substantial risks to their babies. But, in the great majority of cases, consumption does not harm anyone in any relevant ways - that is, ways that we normally take to merit criminal penalties - and should neither be outlawed nor sanctioned.



3. The Injustice of Legal Paternalism

We have seen the failure of the most common proposed rationales for legal paternalism. We must conclude that critics have no rational justification for defending prohibition or other sanctions.

We have punished people for no good reason. We are punishing people for exercising their natural rights. Individuals have a right to consume. This right is neither absolute nor exceptionless. However, the idea of a right to consume derives from the idea that individuals own their own bodies: a person has the right to exercise control over his own body - including the right to decide how it should be used and to exclude others from using it:

- a. No rational individual disputes that others may not physically attack you or kidnap you.
- b. No rational individual accepts the use of unwilling human subjects for medical experiments, even if the experiments are beneficial to society. Society may not decide to use your body for its own purposes without your permission.
- c. Almost no one disputes that individuals have rights over their own bodies, but not over other people's bodies: we may not use our bodies to harm others in certain ways.

If we consider consumption as a paradigm case of a legitimate exercise of the right to control one's own body, merely as altering the consumer's own body and mind, then:

- i. It is hard to see how anyone who believes in rights could deny that individuals have rights over their own bodies and minds, and



- ii. It is hard to see how anyone who believes in such rights could deny that consumption, considered merely as altering the consumer's body and mind, is an example of the exercise of one's rights over one's own body and mind.

Some critics might argue that some sort of consumption fails to qualify as an exercise of the consumer's rights over his own body, because the individual is not truly acting freely in deciding to consume, due to some sort of psychological compulsion, or because the magnet of advertising distorts consumers' perceptions, or simply because consumers don't realize how bad these are.

The critics now face a dilemma. Suppose that consumers do not freely choose. As they are not morally responsible for their decision it is then unjust to punish them for consuming.

Conclusion

The legal paternalism is morally outrageous. If we respect human rights, we cannot deploy force to deprive people of their liberty and property for unreliable reasons. The exercise of such coercion requires a powerful and clearly-stated rationale.

Few would take seriously the suggestion that people should be punished for harming their own health, being poor workers or failing to share in a better society dream. It is still less credible that we should coerce people for an activity that only may lead to those consequences.

Critics are likewise unable to answer the argument that individuals have a right to consume. Any such answer would have to deny either that persons have rights of control over their own bodies (and property), or that consumption constitutes an exercise of those rights.

The sort of harms that some consumption allegedly causes to society does not make a strong case against its being an exercise of the consumers' rights over their own bodies.



And the claim that consumers can't control their behaviour or don't know what they are doing renders it even more mysterious why one would believe consumers deserve to be punished for what they are doing.

People should be permitted to run their own lives as they wish and must not be forcibly protected from themselves. Nobody should have a right to force his way of life upon others. If you correctly perceive a good or service to be junk, don't buy it. Tell your family and friends not to buy it. Tell the world not to buy it. But don't ask the government to ban or penalise its consumption.

“(...) a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished (...)”³

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³ Mill, p. 175