

PATERNALISM AND PUBLIC POLICY*

ANTAL SZERLETICS**

1. INTRODUCTION

The phenomenon of paternalism permeates public relations and private life as well. Take, for instance, the case of a benevolent father who prohibits his children to play outdoors on a freezing winter day because he is afraid that they will catch a cold. The state – analogously to a benevolent father – may prescribe the compulsory use of seat belts or prohibit the use of dangerous narcotics to protect citizens from the harmful consequences of their own poor decisions. For sure, benevolent intentions matter, but there is a strong, commonly accepted liberal presumption against someone else, including the state and its agents, determining the right course of action for a competent individual. Thus, it seems centrally important to determine relevant arguments that can be used to justify legal paternalism in democratic societies. In what follows, the study examines various aspects that need to be taken into account when justifying paternalistic public policies. The article starts with a conceptual analysis of paternalism including the identification of possible definitional elements. In the second part, the work proceeds to justificatory issues and introduces the consequentialist and the autonomy-based approaches to justification and examine why and under what circumstances the state should be seen as a better decision-maker than the individual. In the final part, it explores how policy-makers can use the non-coercive methods of libertarian paternalism to ‘nudge’ people to make better (i.e. more beneficial and less self-harming) decisions in their everyday lives.

2. CONCEPTUAL ISSUES

There have been many attempts to define paternalism.¹ Paternalism is not a ‘natural kind’² and – seeing the huge amount of complex and often conflicting definitions – one is

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** PhD, senior lecturer, National University of Public Service, Doctoral School of Public Administration Sciences, Budapest. Email: szerletics.antal@uni-nke.hu.

¹ A complex definition given by Gerald Dworkin looks like the following. “X acts paternalistically towards Y by doing (or omitting) Z if and only if: (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 doing Z will improve the welfare of Y, or in some way promote the interests, values, or good of Y.” Dworkin, Gerald: *Defining Paternalism*. In: Coons, Christian – Weber, Michael (eds.): *Paternalism – Theory and Practice*. Cambridge University Press, Cambridge, 2013, 29. The same definition appears under the “Paternalism” entry of the Stanford Encyclopedia of Philosophy. Dworkin, Gerald: *Paternalism*. In Zalta, Edward N. (ed.): *The Stanford Encyclopedia of Philosophy*. Summer 2014 Edition. Available at: <http://plato.stanford.edu/archives/sum2014/entries/paternalism/> (3 December 2014).



tempted to give a stipulative definition of the concept.³ Presumably, this would preclude possible debates over the definition's correctness because stipulative definitions are arbitrary in the sense that they assign a meaning to a word for the first time.⁴ However, the word 'paternalism' has acquired a meaning in ordinary language use and it seems necessary to test the meaning of definitions against the colloquial meaning of the word – even if this is quite vague and uncertain. This correspondence is important but a 'good' definition will have to satisfy a number of other expectations as well; a definition will be judged according to e.g. its consistency, its context and the set of problems it is used to clarify and resolve.⁵ The word 'paternalism' carries negative connotations and it is often considered to be morally wrong. People are regularly criticized for being too paternalistic and public policies are frequently attacked under the banner of anti-paternalism by political opponents. The two most common explanations given for the concept's negative normative content are the impermissible intentions behind paternalism and its coercive character.⁶ It seems to me that the violation of autonomy is implicitly associated with most paternalistic interventions⁷ and any definition that retains autonomy as a central element already implies something for the justification of the concept. Consequently, it is not merely a theoretical question how someone defines paternalism: if something qualifies as paternalism, chances are high that it will be subject to a more rigorous scrutiny. It might be easier to accept an intervention that is not labelled as 'paternalism' because it falls outside the scope of the definition.

Gerald Dworkin, in his latest contribution, gives an excellent overview of the different dimensions along which definitions of paternalism might vary (e.g. outcomes vs. motives, motives vs. reasons, acts vs. omissions, violation of autonomy, etc.).⁸ Most definitions seem to share the same fundamental concepts but place emphasis on different dimensions. My understanding is that paternalism can be conceptualized with the help of two additional concepts: autonomy and benevolence. Roughly, paternalism can be defined as interference with someone's autonomy in order to protect this person from self-induced harm and/or to promote his benefit. It is worth mentioning that we cannot and should not strive for a 'perfect' definition: a rough definition, such as this one, might be useful to circumscribe the area of examination but it cannot be complete without giving a settled definition of the other concepts (autonomy, benevolence, harm, benefit, etc.).

An important question that needs clarification is what the term 'paternalism' is predicated of: acts, people, institutions, motives, legal regulations, policies can all be paternalistic. People act paternalistically in private relations, for example a husband who hides the sleeping pills from his suicidal and depressed wife. Legal regulations that allow the sectioning of potentially self-harming mentally ill patients also have a paternalistic character. Yet, the two scenarios are quite different from each other. *John Kullgen* talks about public

² Dworkin: *op. cit.* 38. According to the Stanford Encyclopedia of Philosophy, a "kind is natural is to say that it corresponds to a grouping or ordering that does not depend on humans." Bird, Alexander – Tobin, Emma: *Natural Kinds*. In: Zalta, Edward N. (ed.): The Stanford Encyclopedia of Philosophy. Winter 2012 Edition. Available at: <http://plato.stanford.edu/archives/win2012/entries/natural-kinds/> (3 December 2014).

³ Dworkin: *op. cit.* 31.

⁴ Hurley, Patrick J.: *A Concise Introduction to Logic*, Ninth Edition. Thomson Learning Academic Resource Center – Wadsworth, Belmont, 2006, 88.

⁵ Dworkin: *op. cit.* 25.

⁶ Cornell, Nicolas: *A Third Theory of Paternalism*. In: *Michigan Law Review*, Vol. 113. (2015). Paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456419 (3 December 2014).

⁷ It is a debated question whether the violation of autonomy is a necessary element of paternalism. Dworkin: *op. cit.* 27.

⁸ *Ibid.* 26-28.

and private paternalism in this respect and warns us that justified forms of public paternalism might not exactly parallel justified cases of personal paternalism.⁹ Abstract legal regulations treat people in a standardized way and they are less responsive to individual circumstances. Thus, it seems that the justification of paternalistic public policies and legal regulations requires ‘more’ than a single act of private paternalism e.g. from the perspective of democratic accountability. In what follows, the study tries to explore elements that need to be taken into account when justifying paternalistic public policies.

3. JUSTIFYING PATERNALISTIC PUBLIC POLICIES

Due to the interference with individual autonomy, paternalism is a ‘frightening prospect’ for many.¹⁰ However, most people do not deny that paternalism might be justifiable, or even necessary in certain situations.¹¹ The two major factors that are generally taken into account when it comes to the justification of paternalism are the beneficent consequences of the intervention and the autonomy of the person subjected to paternalism. Putting it very simply, it seems that the more beneficent and the less intrusive a paternalistic intervention is, the easier it is to accept it as morally non-problematic.

Autonomy-based approaches are friendlier to ‘softer’ forms of paternalism that do not interfere with the decision-making of individuals – often because the given person is incapable of making fully autonomous decisions in the first place, either due to mental incapacity or the lack of relevant information that would be necessary to make a fully informed decision. A major distinction, from the perspective of autonomy-based justifications, is the distinction between hard and soft paternalism. In *Joel Feinberg’s* terminology, hard paternalism advocates coercion to protect competent adults against their voluntary self-harming choices. Soft paternalism, on the other hand, allows protection from self-regarding harmful conduct, if ‘the conduct is substantially non-voluntary, or when temporary intervention is necessary to establish if it is voluntary or not’.¹² Feinberg’s proposition that soft paternalism is acceptable while hard paternalism is not seems to correspond to our basic moral intuitions as an ‘ethical minimum’: there is nothing wrong with stopping a child or a mentally ill person from harming himself or herself, while the same is not necessarily true for competent adults making voluntary self-harming decisions. Thus, Feinberg’s account of paternalism roughly comes down to the question what makes a choice ‘substantially’ voluntary or non-voluntary. Voluntariness, however, seems to be an elusive concept, partly because it is tied to other complex, vague and often contested

⁹ Kultgen, John: *Autonomy and Intervention – Parentalism in the Caring Life*. Oxford University Press, New York, 1995, 161.

¹⁰ Conly, Sarah: *Against Autonomy – Justifying Coercive Paternalism*. Cambridge University Press, Cambridge, 2013, 182.

¹¹ The approach of “absolute anti-paternalism” contends that paternalism is never justified and imposes a blanket prohibition on all forms of paternalistic interventions. Kultgen: *op. cit.* 132. The author tends to agree with Conly that those who reject all forms of paternalistic constraints may have “a quite unrealistic picture of human ability” (i.e. the presumption that people are always capable of making perfect choices) and a ‘morally unjustified sense that people deserve to suffer for their own mistakes.” Conly: *op. cit.* 182. Even John Stuart Mill, often considered the “greatest enemy” of paternalism admits certain exceptions to the “harm principle”. See e.g. Mill’s example about crossing an unsafe bridge in Chapter V of *On Liberty*.

¹² Feinberg, Joel: *The Moral Limits of the Criminal Law – Harm to Self*. Oxford University Press, New York, 1986, 12.

concepts as mental capacity and human rationality.¹³ For example, seemingly irrational self-harming choices might be explained with the different values and personal preferences of people;¹⁴ they are not necessarily attributable to errors in someone's reasoning capacities.

Consequentialist justifications focus on the outcome of paternalistic interventions. This means that paternalism is morally justifiable if it leads to 'good' consequences for the paternalised person or – in other words – if it serves his or her 'best interests'. The question is how to determine what is actually 'good' for the individual: some claim that there are objective elements of well-being that every human being wants to possess (e.g. health), while others claim that these elements are essentially subjective and it is only someone's revealed preferences that should be promoted through paternalism.¹⁵

When it comes to the justification of paternalism in practice (particularly state-implemented public policies), we cannot limit ourselves to merely one of the previously mentioned models. The study hereby considers a few elements that seem to complicate the picture. (1) Consequences and respect for individual autonomy are usually both taken into account when evaluating the acceptability of paternalistic interventions. It seems to me that neither approach has a fixed priority over the other but priority varies on a case-by-case basis. Consequences often 'relativize' other considerations when it comes to public policies and legislation but autonomy can be thought of as constituting a 'deontological side-constraint' that reference to consequences cannot override.¹⁶ The question is how to strike a balance between the two values and through what kind of democratic process is it possible to persuade people about the correctness of a paternalistic state action. (2) The rationale behind a paternalistic action is often 'mixed' in the sense that the actor might have motives other than benevolent protection to act paternalistically. This is particularly true for the state that has to take multiple reasons into account multiple reasons when regulating complex social issues (e.g. protection of the individual, protection of others, public order, morals, etc.). Actually, it seems that there are very few unmixed cases of paternalism. Even in an apparently 'pure' case (e.g. prescribing motorcyclists to wear crash helmets), one can refer to the indirect harm caused to other members of society (e.g. by the additional social security expenses that incur in case of an accident).¹⁷ (3) The state as a paternalistic actor has different characteristics than an 'ordinary person' acting paternalistically in the private domain. The state, as mentioned before, is more 'distant' from the paternalistic situation and intervenes through abstract regulations that leave less space for appreciating the particularities of each case. On the other hand, there are certain factors that make the state a 'wiser' decision-maker than the individual. These are explored in the following paragraphs

¹³ The traditional view of human rationality is increasingly challenged in light of the findings of cognitive psychology and behavioural economics (*cf.* the issue of libertarian paternalism later in this article). Mental capacity is also a contested concept: the line between capacity and incapacity often seems vague and arbitrary.

¹⁴ The classical example here is the example of Jehovah's Witnesses (Christian Scientists) who reject blood transfusions for religious reasons even in life-threatening emergencies. Their choice seems irrational from an external perspective but it is questionable whether blood transfusions can be forcibly administered to them. See e.g. Dworkin, Gerald: *Paternalism*. In: *The Monist*, Vol. 56. (1972), No. 1, 66.

¹⁵ Dan Brock distinguishes between "desire" and "ideal" theories of good that roughly corresponds to the subjectivist-objectivist distinction. Brock, Dan: *Paternalism and Promoting the Good*. In: Sartorius, Rolf (ed.): *Paternalism*. University of Minnesota Press, Minneapolis, 1983, 250.

¹⁶ Similarly to Ronald Dworkin's idea that rights should be conceived as "trumps" that have priority over non-right based social objectives.

¹⁷ This issue is closely related to the distinction between self-regarding and other-regarding acts.

Bill New examines the justification of paternalistic public policies in economic terms.¹⁸ He argues that contrary to the traditional liberal theory, the state may sometimes be a better judge of welfare than the person himself.¹⁹ It is possible to identify failures in human reasoning and it seems that the state and its officials might be able to reason better in certain situations.²⁰ New distinguishes four such failures. First, individuals might make sub-optimal choices because the amount of information needed is so great or because the ‘causal connections between choice and outcome are difficult to make’.²¹ Human intellect is limited and this leads to a ‘technical inability’ to make good decisions in complex situations. Secondly, people neglect to act in accordance with their best interests (i.e. long term preferences) due to weakness of will (*akrasia*) – consider the example of a heroin addict who wants to stop using the drug but cannot do so because of his addiction. Thirdly, humans are often prone to emotional decision-making, for example ‘becoming attached to making certain choices, such as following a habitual route to work, even if it is longer or less attractive than an alternative one’.²² Finally, people sometimes lack first-hand experience with respect to the consequences of their potentially self-harming decisions; even though most smokers have an ‘abstract’ knowledge of the harmful consequences of cigarettes, they do not have experience of the pain and suffering that smoking-related illnesses will potentially cause to them.

New argues that the state is less susceptible to such failures in reasoning and a paternalistic state policy can be justified if it is shown to produce better outcome than individual choice and if the increase in welfare is sufficient to compensate for the violation of autonomy that the intervention entails.²³ The state can be considered to be more impartial (‘phlegmatic’) than an individual and therefore more resistant to temptation, weakness of will and emotional decision-making: choosing between a luxurious holiday in the present and saving for retirement in the future is obviously less difficult for the ‘impartial’ state than for the person concerned. New claims that the state and its employees also have a wider perspective when it comes to experiences related to possibly self-harming activities. Although public employees (e.g. doctors, nurses, etc.) do not directly experience the negative effects of not wearing a seat belt, they are still in a better position to make a judgment on the harmful consequences of accidents and the prudence of seat belt wearing than ordinary drivers. Finally, relating to the technical inability of individuals to make decisions in complex situations, the state has the advantage to employ experts who can devote themselves to the problem full-time. With the help of experts, the state has a better knowledge of the situation than ordinary citizens.

¹⁸ New, Bill: *Paternalism and Public Policy*. In: *Economics and Philosophy*, Vol. 15. (1999), Issue 1, 63. The article is also included in the appendix of New’s doctoral thesis available at http://etheses.lse.ac.uk/833/1/New_Justifying_state_interventions_the_case_of_paternalism.pdf (3 December 2014). Page numbers in the footnotes refer to this version of the article.

¹⁹ According to *Mill’s* assumption, the individual always knows best what is good for him, therefore any external intervention aimed at improving someone’s welfare is likely to be a failure.

²⁰ Paternalistic state policies are aimed at correcting failures in human reasoning. State policies can also be aimed at correcting market failures. Inadequate or imperfect information is a standard source of market failure; therefore New argues that state interventions aimed at correcting imperfect distribution of information are not paternalistic. This is contrary to the traditional view that considers inadequate information as a reason for paternalism. New: *op. cit.* 249-251.

²¹ *Ibid.* 251.

²² *Ibid.* 251.

²³ *Ibid.* 257.

Response to New's article further nuances the conditions of acceptable state paternalism.²⁴ Authors argue that it is important to distinguish between those who know that they suffer from a failure of reasoning and those who do not. The 'sophisticated akratic' knows that he faces weakness of will in certain situations and he will probably adopt some form of pre-commitment strategy to deal with the problem.²⁵ State intervention is necessary only for the 'myopic akratic', the person who is unaware that weakness of will constitutes a problem for him. The same stands for people's technical inability to make decisions in complex situations. Those who realise their technical inability will hire experts to help with unfamiliar or complex decisions (e.g. medical, legal or investment decisions).²⁶ State paternalism is necessary for those 'who do not know that they do not know enough' – the difficult question is how to distinguish the former group from the latter in a 'blanket' public policy regulation.

A somewhat similar requirement has been articulated by *Thomas* and *Buckmaster* when arguing that an appropriate paternalistic policy should always 'discriminate between those for whom paternalism is deemed necessary and those for whom it is not'.²⁷ This practically means that paternalism should be limited as much as possible to those who are benefited by the restriction: instances of 'impure' paternalism involving the restriction of others besides those who are benefited should be kept to a minimum.²⁸ Proportionality, accountability and efficacy are also important principles when evaluating paternalistic policies. Proportionality requires that an intervention is the minimum necessary to achieve the intended aim of the policy. Accountability means that paternalistic interventions shall be transparent to the person subjected to the intervention. This is particularly important in cases of 'libertarian paternalism' that operate by modifying choice-architecture often in a way that is not obvious to the paternalised person. Efficacy implies that the paternalistic intervention is efficient in producing the intended outcomes. Although there seems to be a general consensus that social policies must be evidence-based, it is not entirely clear what evidence shall be considered when determining the efficacy of paternalistic policies.²⁹

To sum up, paternalistic public policies can be justified on a consequentialist basis by reference to the fact that the state is sometimes in a better position to assess what is good for the individual than the individual himself. The state, being more detached ('phlegmatic') and having a wider perspective than the individual, is less vulnerable to certain reasoning-failures. It is also necessary that for the intervention to be proportionate, efficient (evidence-based) and accountable to the state. Thus, a paternalistic state policy can be justified if it is shown to produce better outcome than individual choice and if the increase in welfare is sufficient to compensate for the violation of autonomy that the intervention

²⁴ Leonard, Thomas C. – Goldfarb, Robert S. – Suranovic, Steven M.: *New on Paternalism and Public Policy*. In: *Economics and Philosophy*, Vol. 16. (2000), No. 2, 323.

²⁵ E.g. entering into a Ulysses contract in advance and making sure that the self-harming option is not available to the person when the tempting situation develops. *Ibid.* 326.

²⁶ *Ibid.* 327.

²⁷ Thomas, Matthew – Buckmaster, Luke: Paternalism in social policy – when is it justifiable? In: Parliament of Australia, Department of Parliamentary Services Research paper, No. 8. (2010-2011) 18.

²⁸ Pure and impure paternalism is also called direct and indirect paternalism. A ban on the sale of cigarettes is impure (indirect) paternalism because it limits cigarette manufacturers besides smokers whose benefit is originally intended to be promoted by the prohibition. Gerald Dworkin argues that indirect paternalism requires stronger justification because it involves third-parties 'who are losing a portion of their liberty and they do not even have the solace of having it done in their own interest'. Dworkin (1972): *op. cit.* 64.

²⁹ Thomas – Buckmaster: *op. cit.* 22-25.

entails.³⁰ However, paternalistic interventions sometimes have unintended negative consequences that complicate this picture. For example, paternalism can cause people to undertake riskier activities because they will act under the (true or false) assumption that they are protected against their own self-harming actions. This is called ‘moral hazard’ in economic literature.³¹

4. LIBERTARIAN PATERNALISM

Libertarian paternalism is a relatively ‘soft’, non-coercive form of paternalism.³² Advocates of the approach, *Cass Sunstein* and *Richard Thaler* start off from the premise that humans are not fully rational choosers and do not always act in their own best interests. Taking the findings of cognitive psychology and behavioural economics into account, it is possible to exploit individual cognitive biases and create regulations that ‘nudge’ people to make better, i.e. more beneficial and less self-harming decisions. Proponents of libertarian paternalism claim that it is an effective, relatively cheap but less intrusive method to promote people’s welfare than traditional forms of paternalism. The idea has received considerable public attention in recent years and has been endorsed by official government politics both in the United Kingdom and the United States.³³ However, libertarian paternalism has also been criticised for its alleged ineffectiveness and for the moral, political and legal risks it may carry (e.g. slippery slope to hard paternalism, lack of transparency, lack of neutrality, etc.).³⁴ Libertarian paternalist public policies are based on the idea that instead of forcibly taking away self-harming options from people, it is better to present them available choices in a way that they will make ‘better’ choices themselves. If policy-makers are aware of weaknesses of human decision-making, they can modify ‘choice-architecture’ so that results are more beneficial to individuals. One such cognitive bias, the so-called *status quo* bias refers to people’s inertia not to change the current state of affairs. This means, for example, that changing the default position from non-enrolment to automatic enrolment will have a significant impact on the number of people enrolled to a savings scheme. Another approach focuses on changing the physical environment where choices take place: removing candies and soft drinks from supermarket checkouts ensures that people do not ‘give in to temptation’ and buy sweets while waiting in the checkout line. People, however, remain free to choose in these cases – it is only that they are more likely to choose an option that is more conducive to their welfare. The efficiency of these interventions is not necessarily high but the costs of implementing such policies tend to be low as well.

³⁰ New: *op. cit.* 257.

³¹ Thomas – Buckmaster: *op. cit.* 7-8.

³² The adjective ‘libertarian’ refers to the non-coercive and liberty-preserving character of this form of paternalism. Sunstein, Cass – Thaler, Richard: *Nudge – Improving Decisions About Health, Wealth and Happiness*. Penguin, London, 2009, 5.

³³ The Behavioural Insights Team was set up in 2010 by the Cameron administration with the aim to “help Government departments think about non-regulatory means of achieving behaviour change.” See *Report on Behaviour Change* (Science and Technology Select Committee, House of Lords, 2011), 33. The Office of Information and Regulatory Affairs (OIRA), headed by Cass Sunstein, has similar functions in the US when reviewing draft regulations and overseeing the implementation of government-wide policies.

³⁴ For an overview of the most frequent objections, see Sunstein – Thaler: *op. cit.* 235-252. See also Whitman, Glen: *The Rise of the New Paternalism*. Available at <http://www.cato-unbound.org/2010/04/05/glen-whitman/rise-new-paternalism> (3 December 2014).

The welfare state is often described as having a paternalistic character. It is true that a state which is preoccupied with the welfare of its citizens will sanction policies that do not only increase welfare through redistribution (i.e. increasing someone's welfare at the expense of others) but also policies that 'compel citizens to undertake or abstain from activities that affect that citizen alone'.³⁵ Redistributive policies are not paternalistic in the strict sense of the word, although some of them can be perceived as 'insurance schemes' that will protect a person's future self from the full consequences of certain unwise or self-harming decisions in the present. Most public pension systems serve mixed purposes in the sense that they are partly based on the idea of social solidarity but also have a paternalistic character i.e. they compel people to take care about their own retirement in advance. The increasing transformation of pay-as-you-go pension schemes to defined contribution plans seems to increasingly place social solidarity in the background and paternalism in the foreground.³⁶ As we have previously seen, such paternalism might be justified by reference to the 'myopic akrasia' of decision-makers³⁷ but countries that wish to avoid hard paternalism leave it for the individual to join a pension plan.

In order to create sustainable pension systems, it seems crucial to identify methods that can non-coercively increase participation in voluntary pension schemes. This is extremely important for countries that do not require people to make mandatory pension contributions (e.g. the United States). Hybrid systems, like Hungary, can also make use of such methods in order to strengthen their non-mandatory, private savings based pillar. Libertarian paternalism has come up with possible solutions in this respect. The first one proposes changing the default rule from non-enrolment to automatic enrolment. Although such regulation does not violate autonomy (people remain free to opt-out later), it drastically increases the number of participating employees, since most of them will probably not opt-out after being enrolled.³⁸ Alternatively to automatic enrolment, participation can also be increased by making enrolment administratively easier or 'forcing' employees to actively make a choice between enrolment and non-enrolment when first hired. An additional issue – since most participants do not save enough – is how to get people increase their savings contribution. A possible solution is provided by 'The Save More Tomorrow' program developed by Richard Thaler and *Shlomo Benartzi*, which aims to increase pension contributions by asking participants to commit themselves in advance in order to raise their pension contributions whenever they get a pay rise.³⁹ Finally, offering tax deductions can also make pension savings more attractive to people. Financial

³⁵ New: *op. cit.* 244.

³⁶ Pay-as-you-go pension schemes – often characteristic to welfare states following the Bismarckian model – are funded by compulsory contributions. The contributions are not capitalized but they are spent immediately to cover payments for current pensioners. In defined contribution schemes contributions are paid into an individual account for each member. On retirement, the member is eligible to receive the accumulated capital and its returns. See, e.g. Natali, David – Rhodes, Martin: *The New Politics of the Bismarckian Welfare State: Pension Reforms in Continental Europe*. In: *EUI Working Papers* SPS No. 10. (2004), 2.

³⁷ Cf. New: *op. cit.* 253; Leonard – Goldfarb – Suranovic: *op. cit.* 325.

³⁸ Sunstein and Thaler refer to statistics according to which participation rates in one pension plan under the opt-in approach were only 20 percent after three months of employment. After switching to automatic enrolment, enrolment of new employees jumped to 90 percent immediately. See Sunstein – Thaler: *op. cit.* (2009) 117-118.

³⁹ Sunstein – Thaler: *op. cit.* (2009) 22-125. See also Thaler, Richard – Benartzi, Shlomo: *Save More Tomorrow: Using Behavioural Economics to Increase Employee Savings*. In: *Journal of Political Economy* Vol. 112. (2004), No. 1, 164. Available at <http://faculty.chicagobooth.edu/Richard.Thaler/research/pdf/SMarTJPE.pdf> (3 December 2014).

incentives are relatively soft instances of paternalism but they do not fall within the ambit of libertarian paternalism.

Sarah Conly criticizes ‘softer’ forms of paternalism for being too costly and inefficient.⁴⁰ She claims that people sometimes continue to choose the ‘wrong thing’ despite all efforts of nudging, incentives or education. In the case of smoking, for example, she argues that an outright prohibition would be desirable instead of spending money on ‘softer’ but rather ineffective measures such as advertising or education. Conly identifies four criteria that acceptable forms of coercive paternalism must satisfy.⁴¹ (1) The activity to be prevented must be opposed to our long-term ends. Applying this criterion to the question of smoking, one can say that the harmful consequences, including the possibility of serious illnesses and premature death, are at odds with the fulfilment of someone’s long-term goals. (2) Coercive measures have to be effective. Since the majority of people accept cigarettes as genuinely dangerous substances, Conly argues that the prohibition of smoking would be more effective than the prohibition of alcohol was in the 1920s in the US. (3) Benefits must be greater than costs. It might be argued that society, overall, would be better off without cigarettes; costs would reduce overtime because smokers who initially suffer from the lack of cigarettes will feel better as their addiction fades. (4) The measure in question needs to be the *most* efficient way to prevent the activity. Conly claims that ‘softer’ methods against smoking (e.g. education, raising of prices) did not work sufficiently. Although the rate of smokers has gone down, more than 20 percent of Americans continue to smoke which shows the inefficiency of ‘soft’ methods. Still, the full prohibition of smoking seems relatively controversial. However, there are other cases when coercion and prohibition seems easier to accept (e.g. ban on trans-fats).⁴²

5. CONCLUSION

The following conclusions concerning the issue of paternalism in the public sphere – can hereby be drawn. First of all, it is important to make a distinction between state paternalism (legal paternalism) and private paternalism. Although both seem to share similar basic elements (i.e. they can be understood as interventions to a person’s autonomy in order to prevent harm to that person or promote his or her benefit), the state has special characteristics that needs to be taken into account when justifying paternalistic public policies. For the sake of conceptual clarity, it should be emphasized that not all public welfare policies are paternalistic in the strict sense of the word. Redistributive policies are only ‘paternalistic’ inasmuch as they are aimed at taking care of the weak but they do not necessarily protect people from self-harming or unwise decisions.

The two major approaches to the justification of paternalism are the autonomy-based and the consequentialist models. In practice, both autonomy-based and consequentialist arguments are considered; a general understanding is that autonomy constitutes a ‘deontological side-constraint’ to consequentialist considerations. Paternalistic public policies are justifiable in situations where it is apparent that the state knows better what is good for the individual than the individual himself; such situations can be the result of different failures in human reasoning to which the state and its agents are less vulnerable to. Libertarian paternalism is also built on certain ‘irrationalities’ in human behavior. It seems

⁴⁰ Conly: *op. cit.* 149.

⁴¹ *Ibid.* 150-152.

⁴² *Ibid.* 152-155.

that these interventions are more easily accepted than traditional paternalistic interventions because they are less restrictive to individual freedom of choice.

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