

# Rescuing Paternalism: An Egalitarian Defense of Motorcycle Laws

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## Abstract

THE PRESENT PAPER is concerned with egalitarian justice and paternalism. I mount a twofold egalitarian defense on paternalistic and non-paternalistic grounds for the state to require motorcyclists to wear helmets. First, paternalism is justifiable and appropriate in order to maintain equality of opportunity for welfare to the motorcyclist. I challenge the soft paternalist's response to this claim; for if I succeed in showing that the soft paternalist fails to provide equality of opportunity for welfare where hard paternalism does not, I will *ipso facto* have shown anti-paternalism suffers in the same regard. Second, there exist non-paternalistic grounds

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for legal enforcement with respect to the harms and undue economic costs and emotional distress placed on third parties if helmet laws are not enacted. Further, I contend that if our egalitarian account seeks to preserve a more equal distribution, this gives rise to an economic cost that may not otherwise be present; for as a matter of justice there exists a duty to not abandon imprudent choosers who motorcycle without a helmet and result in a state of need, even if such an outcome is due to option luck.

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## **1 PATERNALISM AND EGALITARIAN JUSTICE**

Perhaps the most recognizable name and text associated with, but against, paternalism is John Stuart Mill's *On Liberty*. To clarify at the outset, I operate throughout this paper on a simple Millian definition of paternalism; that is, forcing, or preventing, choices for the individual's own good. In *On Liberty*, Mill puts forward a utilitarian case against paternalism arguing that utility will be maximized if there are not paternalistic laws. This provides the foundation for Mill's harm principle, which holds that the state may properly restrain someone's liberty only to prevent his harming others, not himself. The harm principle though can be detached from its utilitarian roots, and it has been. It has become a central instrument in

the toolbox of liberalism, and the principle has been justified on different grounds, such as self-determination. While I believe the merits for liberal tolerance and self-determination provide better justification than Mill's utilitarian case against paternalism, I believe there is an egalitarian case for paternalism.

It will be the focus of this section, then, as indicated by the title of the paper, to attempt an egalitarian rescue of paternalism from the liberal position. The primary claim being that if egalitarian justice with respect to equality of opportunity for welfare is to be preserved for the acting agent, then certain forms of paternalism, like motorcycle helmet laws, are necessary. In presenting my case, I challenge Joel Feinberg's soft paternalism because he has pointed out, what I take to be, some valid exceptions to the harm principle, and if I overcome the higher hurdle of soft paternalism, I will likewise have overcome the lower hurdle of anti-paternalism.

## **A. FEINBERG'S SOFT PATERNALIST CLAIM**

To endorse a strict version the harm principle is an untenable extreme. At face value, the harm principle would forego an enormous good to the individual if paternalistic interference was against the actor's choice (assuming the actor is "warned of the danger"), even if such interference were markedly minimal (Mill 1859). Joel Feinberg highlights this problematic interpretation of the harm principle by calling to mind an individual who pours arsenic on their food

believing it to be table salt. Even if the actor ardently refuses to heed the warning that she has in fact poured arsenic and not table salt, she should still be forcibly prevented from consuming the food as the mistake is purely a factual misunderstanding, and thus the choice is “involuntary” (Feinberg 1986). To take an absolutist stance on self-determination and allow the actor, even if warned, to proceed with arsenic consumption is at least morally dull, if not morally meshuga. To shelter the harm principle from such outcomes, Feinberg canvasses a reasoned amendment, proposing standards of voluntariness to which the actor must meet, where the degree of risk an action carries correlates with a higher standard of voluntariness in order to avoid paternalistic interference (Feinberg 1986). If such standard is met, the actor may proceed without interference and either reap the reward or pay the price with respect to the outcome of her choice. For the hard paternalistic egalitarian to discharge this soft paternalist claim, she must answer to the following: On what paternalistic egalitarian grounds should one be forced to comply with helmet legislation, if they wish to voluntarily forego a helmet, and are appropriately apprised of the risk.<sup>12</sup>

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<sup>1</sup> The soft paternalism presented in this paper appeals to voluntariness, where intervention is permis-sible to determine whether the act is voluntary. A hard paternalist following this formulation allows in-tervention even when the act is voluntary.

<sup>2</sup> The anti-paternalist gives less leeway with regard to voluntary choice, and therefore my argument holds stronger on such grounds.

## **B. MY HARD PATERNALIST CLAIM**

Liberals assert, plausibly, that liberty is a good thing, but they contend that it is not the only good thing. Liberals hold that it is wrong to sacrifice other good things in too total defense of the one good that is liberty. If it is determined that equality of opportunity for welfare is amongst these good things that should not be sacrificed, then there are ample grounds for certain forms of paternalism. This is because in any given society, there will be persons predisposed with varying degrees of decision making capabilities as a result of random genetic endowment, or advantageous upbringing (Arneson 2005). As a result, on any given occasion where the soft paternalist sets the acceptable voluntary standard, there will be prudent and imprudent choosers who will and won't satisfy their end, and thereby attain differing net degrees of welfare. Over the course of an individual's life, this can have substantial consequences. If one is to be egalitarian and maintain equality of opportunity for welfare over a lifetime, it doesn't suffice to claim that voluntariness amounts to justice as each individual holds different opportunity for welfare contingent upon their decision making capability. For equal opportunity for welfare to obtain, according to Arneson, "each must face an array of options that is equivalent to every other person's in terms of the prospects for preference satisfaction it offers" (emphasis added) (Arneson 1989). Thus, if there is a recognizable end that a person would like to satisfy, it can be appropriate for the state to reasonably force people to take measures within their pref-

erences so as to equalize prospects to achieve that end, and attain a higher overall welfare.<sup>3</sup> A helpful, though not perfect, analogy that captures this may be blackjack. Suppose a set of card players have all met the voluntary standard to play blackjack, and share the end goal of wanting to collect the most chips. Each player might have different prospects for collecting chips contingent upon their decision making capability of when to hit or stand. Some might know how to count cards and determine the probabilities more effectively, and therefore each player lacks equality of opportunity to collect chips, and chips can be analogous to welfare.

In his discussion of paternalism, Ronald Dworkin draws a necessary distinction between volitional interests and critical interests, which likewise produce two strains of paternalism. I am concerned with the former. Dworkin characterizes volitional welfare to be improved when the person attains their desired wants; thus, volitional paternalism is interference, possibly coercively, that aids a person to “achieve what they already want to achieve” (Dworkin 2000). This form of paternalism can safely be regarded as a means-related paternalism, as advanced by Dan Brock (1988) and Joseph Raz (1986), since the ends are not questioned. Compulsory helmet legislation is a volitional interest as it coerces persons to strap on a helmet

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<sup>3</sup> One could instead equalize opportunity for welfare via transfer payments from the more capable to the less capable, to compensate the latter for their lower opportunity, rather than increasing the latter’s opportunity for welfare via paternalistic coercion. However, as I will show in the final section of this paper, ex post equalizations are less attractive than ex ante coercion that preserves equality of opportunity for welfare.

as means to avoid severe or fatal head injury, which the state presumes motorcyclists want to avoid. It may be an inconvenience or against the will of the motorcyclist to forego the helmet, but it is not against their conviction of wanting to ride and survive. Therefore, an egalitarian political community should recognize this end that each person wants, and should coerce reasonable means toward the attainment of that goal. A failure to do so, would not provide equality of opportunity for welfare because it would prevent individuals from attaining an important desired end due to their misevaluation (deviation from rational choice) or behavioral bias of the proper means.

The liberal may concede that most motorcyclists want to ride and survive, and when they forego wearing a helmet it is often out of akratic neglect or miscalculation of the danger, and thus paternalism for the vast majority is in line with welfare they want to achieve. However, the liberal may part company with my assessment by noting that there are a handful that find a lifestyle of courting danger as a more (or equally) important end goal, and therefore should be allowed, if aware of the risk, to pursue it via helmetless riding. To not do so, so the liberal would claim, would deprive them of equality of opportunity for welfare (e.g. the satisfaction of a dangerous lifestyle). This claim can be rebuked.

It is critical to separate foundational interests from those that are not. Foundational interests can not be justifiably abridged by paternalistic laws because this would require questioning one's ends.

Or as Dworkin puts it, it would “deny people power to make their own decisions about matters of ethical foundation about the basis and character of the objective importance of human life” (Dworkin 2011). Denying foundational interests is crucial for Dworkin because it violates ethical independence, but it is crucial for my claim because it would constitute forcing, or preventing, one from satisfying their ends, which are of the most central importance to one’s welfare. It is precisely not to deny one’s ends, but to achieve them that I ground my paternalistic claim. That being said, helmet laws don’t jeopardize anyone’s foundational interest. In fact, it is one’s conviction to ride and survive, and this end can be foundationally disrupted if one foregoes a helmet. The same can not be said of the person who is coerced to wear a helmet; for helmet convictions are not foundational to any lifestyle, goal, or expression of oneself (e.g. a sense of freedom, dangerous lifestyle, etc.). That is to say, it doesn’t require the state to constrain foundational independence. The individual still retains such independence and equal opportunity for welfare because she can still express her lifestyle through other mediums. For instance, if courting danger is foundational to her, merely the danger that comes with riding the motorcycle alone is a means to welfare, let alone the various other ways one can carry out a dangerous life. Moreover, it is important to concern the whole life, not individual acts, with respect to equality of opportunity to welfare; the imposition of helmet laws do not dictate or suppress access to welfare in any real manner. In sum, a person should have liberty to choose and have equal access to welfare ends, not necessarily means, and the state acts justly in securing those ends via

paternalism.

## **2 A NON-PATERNALISTIC HARM CLAIM, AND ITS EGALITARIAN COUNTERPART**

If I have proved unconvincing to liberal advocates of the harm principle to sometimes subordinate liberty to equality, I will now briefly pivot to an argument on their own Millian turf. That is, the state is also permitted to require motorcyclists to wear helmets on non-paternalistic grounds with respect to the harms, in the form of economic cost and emotional distress, imposed on third parties. I do not detail these harms extensively because they have already been expressed readily in the literature, and adjudicated. Instead, my interest is the last subsection where I argue that if our conception of egalitarian justice is concerned with preserving a more equal distribution, then this gives rise to an economic cost that may not otherwise be present.

### **2.1 A. ECONOMIC COST**

A compelling non-paternalistic claim for the state to require motorcyclists to wear helmets must begin with the costly economic consequences that would be incurred by the state if helmetless motorcycling were permitted. And there are many, including but not limited to, the use of scarce medical resources, salaries paid to public ser-

vants involved, and the possible welfare payments to the individual and dependents. The ethos of this economic argument is captured in *Simon v. Sargent* where the decision of the District Court, in relation to economic costs, bluntly reads, “We do not understand a state of mind that permits [the motorcyclist] to think that only he himself is concerned” (*Simon v. Sargent* 1972). The rejoinder, put forth by Gerald Dworkin, to this claim is that the state can require the option of wearing a helmet or purchasing additional medical insurance to cover the previously stated costs (Dworkin 1972). However, even with such an insurance scheme covering all the direct costs there still exist externalities such as possible emergency room resources that could have been better allocated or allocated elsewhere; and indirect costs of diverted welfare payments, or lost productivity of the injured. Further, though economically related, it can also increase the damages and criminal sentencing for the defendant as the severity of the injury to the motorcyclist could increase even up to the point of unintentional vehicular manslaughter. Some costs are unavoidable even with an apt insurance scheme.<sup>4</sup>

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<sup>4</sup> One could charge helmetless motorcycle riders insurance premiums which collectively cover all of these costs. But, as Michael Otsuka pointed out to me, the egalitarian could offer the following reply: Given how extensive these costs are, such premiums would be so high as to effectively amount to a ban on helmetless riding, except for the very wealthy. So this is effectively hard paternalistic, and also inequalitarian to boot.

## 2.2 B. EMOTIONAL DISTRESS

A motorcyclist riding without a helmet can also impose emotional distress or “psychic costs”, as Gerald Dworkin puts it, that others—relatives, friends, witnesses, actors involved, etc.—have to bear. Feinberg contends that this non-paternalistic claim carries the most weight because it aligns candidly with the paternalistic aim of preventing injury or death to the motorcyclist; it appeals to the direct physical injury of those involved, and not merely costs that ensue (Feinberg 1986). The liberal might canvass one of two arguments against emotional distress. First, society would become more inured to motorcycle injury, possibly in the same regard that many have become inured to bloodshed in regions of the world because of readily exposed imagery (Kleinig 1983). Though, there seems to be something strikingly different with respect to the proximity of harm and its degree of emotional distress, and merely having to inure could be enlisted as a harm in itself. Second, that biker’s interests simply outweigh such forms of emotional distress. This argument, however, points to a fundamental problem with the harm principle, which is: The harm principle, as a mere limiting principle, is ineffective at arbitrating between competing harm claims, and thus requires alternative principles to assess the merits of claims produced. Emotional distress is by no means a non-trivial harm, and thus the harm principle alone becomes ineffectual at dismissing it.

### **2.3 C. EGALITARIAN REJOINDER**

Suppose a fictitious society did in fact permit helmetless riding (or not so fictitious as it is the case in Illinois, Iowa and New Hampshire). Perhaps, the society was not convinced of my arguments in Section 1B; when it comes to self-regarding acts they believe that everyone should be left to fare regardless of their ability to choose. Suppose further that this society endorsed an egalitarian conception of justice. Suppose even further there was an affordable insurance scheme available to all that properly accounted for the additional costs of helmetless riding, and the society made clear that it would not cover the additional costs for those who choose not to buy into the insurance scheme. Would this egalitarian society be acting justly to leave an uninsured motorcyclist in dire straits (assuming the accident was a purely self-regarding fault of her own)?

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G.A. Cohen distinguishes two “different kinds of justice” that comprise unqualified justice, which are fairness justice and legitimacy justice. Fairness justice, to put it simply, requires “an equal distribution,” whereas legitimacy justice endorses inequality due to option luck, or an outcome that no one has a right to complain about (Cohen 2011). If it helps, we can imagine fairness and legitimacy as opposite arms on the fulcrum of justice. The motorcyclist’s condition may be legitimately just, but to leave the motorcyclist in such a condition would be to not give any weight to fairness justice. Therefore, if unfairness implies injustice, then the upshot, while legitimate, is still in one manner unjust. It need not be a contradiction, says Cohen for the “outcome [to be] unjust, but nobody can complain about it” (Cohen 2011). The procedure of choice does not necessarily confer unqualified (legitimate and fair) justice on the outcome. If we find Cohen’s dual luck egalitarian conception of justice of merit (which I do), then we will try to balance (the best we can) both legitimacy and fairness. This is not to say that legitimacy should never take priority, but rather to argue against that it always should; “for she might sometimes put [other] justice before [that special justice that is] legitimacy (Cohen 2011). Determining whether outcomes should be preserved requires balancing legitimacy and fairness, and giving due priority where necessary. At the very least, such instances where fairness justice seems to merit priority are those that involve catastrophic harm. Thus, some form of additional compensation is

due to the motorcyclist. But, in doing so, this egalitarian account of justice gives rise to economic costs upon society. The egalitarian, however, can either compensate for such outcomes ex post or correct for them ex ante. Ex post compensation would be untenable as it would unreasonably require society at large to consistently be confronted with the cost of bailing out those who take risky gambles, possibly even creating an issue of moral hazard. To avoid the economic costs to others, it is more egalitarian for the state to correct ex ante by reasonably restricting such choice from the start by enacting helmet laws.

## CONCLUSION

This paper raised an egalitarian objection to the liberal advocates of Mill's harm principle, and in so doing, provided countenance for hard legal paternalism with respect to motorcycle helmet legislation. It also furnished non-paternalistic harms, economic cost and emotional distress, placed on others if helmetless riding is permitted, and provided egalitarian grounds that further solidify state interference with respect to economic harms. While the focus of the paper has been helmet laws, I hope I have begun to provide a framework that can have its application applied to other comparable legal restrictions that are often called into question by liberal advocates who appeal to the harm principle.

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