

PATERNALISM AND ANTIPATERNALISM

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RESUMO

O objetivo deste trabalho é analisar a relação entre paternalismo e Antipaternalismo no pensamento de John Stuart Mill. A intenção inicial é desativar os argumentos que procuram justificar a aceitação por parte de Mill do paternalismo moral e legal. O trabalho procurará, também, investigar a preocupação milliana com as noções de *autonomia* e *autodesenvolvimento* posicionando-se por uma leitura de Mill como um pensador que defende uma versão fraca do *paternalismo*. Esta investigação propõe, ainda, a interlocução com os intérpretes contemporâneos de Mill, o que permitirá avaliar o impacto de suas idéias sobre o diálogo atual em torno da liberdade e do paternalismo.

Palavras-Chave: John Stuart Mill. Liberdade. Paternalismo. Autonomia.

ABSTRACT

This paper aims to examine the relation between paternalism and antipaternalism. The original intention is disable the arguments seeking to justify acceptance on the part of Mill of moral and legal paternalism. The work will also investigate the concern milleans with the concepts of *autonomy* and *self-development*, positioning itself for a reading of Mill as a thinker who advocates a weak version of paternalism. This research suggests, moreover, the communication with the interpreters of contemporary Mill, which will assess the impact of their ideas on the current dialogue on the liberty and paternalism.

Keywords: John Stuart Mill. Liberty. Paternalism. Autonomy.

Immediately after the announcement of his anti-paternalistic formula² - "In the part that says about only himself, his independence is, of right, absolute. About himself, about his body and mind, the individual is sovereign"³ - Mill starts to modify it very seriously. At first, he excludes from this rule certain categories of people - children and Barbarians - who must be directed for their proper interests. The reason evoked by Mill to justify this exception is that these people are incapable of improving themselves through the free discussion between equal individuals. In second place, at the fifth chapter of *On Liberty*, he recognizes some particular circumstances in which paternalism can be tolerated. In the example "of a person trying to cross a bridge that is known as unsafe", Mill accepts the use of force to prevent what can be considered as damage to a person, and adds that this paternalism is not acceptable when there is enough time to warn and to prevent⁴. In other words, Mill designates another strictly individual class of actions, in which paternalism can be legitimately applied. He mentions the slavery contract and

affirms that the legal interdiction of these contracts, even when they are freely established, can be justified due to the fact that, from the moment of the conclusion of this sort of contract, the individual definitively abdicates from his freedom. Mill recognizes, thus, that this sort of permission can have a very wide application. And, it can be noticed that if the prevention of future restrictions of freedom of choice sufficiently justifies the intervention of the State, the field of paternalistic intervention becomes, with much effect, very vast.

From a liberal point of view there is, consequently, a problem. The *simple and very absolute* principle of Mill seems, at first sight, attractive because it defends individual freedom against what is considered an abusive extension of authority. But, at the same time, Mill recognizes that in some exceptional situations paternalism can be legitimately applied. Can these two positions be reconciled? If not, can the principle of paternalism be tolerated and its application restricted? To answer these questions, I shall initially define the principle and then explore the implications of this definition; I propose, also, that the solution of this problem has an utilitarian inspiration and is coherent with the very simple and absolute principle of freedom of Mill.

The principle of paternalism is a principle that justifies the intervention in the behavior of the individual with the purpose to prevent him from causing damages to himself or, in a more radical meaning, to make him act on its own behalf. This definition is vague, however, about the ways of intervention. The classification of possible methods is very wide. Somebody could, for example, try to stop a person from causing damages to himself by supplying advice and information or advice and "misinformation"⁵, manipulating its environment in a way that the harmful action becomes, if not impossible, at least difficult, or threatens with retaliation the individual that chooses to act, despite the harmful consequences. Under the light of these varieties of methods of possible interventions, it will be difficult to fully reject the principle of paternalism. Thus, when the information is impossible, as in the case of the person who crosses a bridge that is known to be dangerous, or in the case of children and Barbarians still incapable of progressing by discussing, Mill considers that the use of accurate forms of intervention becomes necessary and legitimate.

In fact, the discussion about paternalism, since Mill until nowadays, is not related to the validity or not of the same principle. Who, in fact, could reject it except those who are insensitive to the sufferings of others? Mill, particularly, and liberal, in general, never question even the

principle of paternalism, as long as it is narrowed by the advice, information and indication. What is being debated is about knowing if, and when, the different and stronger ways of intervention can be justified. When does the State have the right to physically control individual actions that are not directly harmful to himself? From a liberal point of view the problem is to know if, according to the paternalistic basis, the State can legitimately exceed the stage of information and orientation? If it does not have this right, how can the cases of repressive interventions be justified? And if it has this right, are there limits to prevent that this "protective" resource of the individuals from becoming tyrannical and destructive of individuality?

There are, at least, two answers to these questions. In the first place, the intervention is only justified if it respects the *autonomy* of the individual's choices or, in different words, only if the concerned subjects voluntarily agree. Where the approval is effectively evidenced, predicted or hypothetical, the intervention is legitimate. When it is not, the intervention is unjustified. This requirement of assent, according to the first version is what allows accepting the principle of the paternalism of State, as well allows limiting it. According to the second version, the majority of the examples of interventions called paternalistic are not, in fact, the cases of prevention of preliminary actions to the third party. Consequently, it will not defend any paternalism. The first reply recognizes the legitimacy of the paternalism of State, but it tries, however, to reduce its reach to acceptable limits. The second takes the point of view where Mill rejects any kind of paternalism. He uses it to establish the different restrictions of freedom of individual action, to explain the exceptions, appealing to another principle than the paternalism.

In this direction, two versions of paternalism can be distinguished: a mitigated or weak paternalism - *weak*⁶ -, and the other, radical or - *strong*. The first one considers that the *autonomy* of the individual choice must prevail, as a superior value, in every decision of intervention in the strictly individual sphere. If the authority tries to step in this private sphere, its intervention must be motivated by doubtless consideration of the immediate assent of the concerned individual. If, after stopping the accomplishment of its action (or at the same moment) the individual shows its disagreement, he recovers his whole freedom. Then the authority loses every legitimacy to continue the intervention where is engaged. For the second version, the respect of the *autonomy* is one of the conditions that must be considered in the examination of possible intervention. However, if the independent action of an individual is taken as irrational, the authority has the right of the intervention. Its intervention will be motivated not by the assent of the individual,

empirical subject of the intervention, but by the assent of this same subject if he were well informed and perfectly rational. This second version does not check, thus, the will and the empirical desires of each individual, but the will and the intellectually defined desires of the well informed rational individual and *in general*.

1 The Weak Paternalism Revisited

Joel Feinberg believes that the assent of the individual is necessary because it is the only way the authority may know it does not interfere with the individual's autonomy. However, we saw that Mill defines the *autonomy* for the choice of freedom. Consequently, even before placing the subject of knowing if the individual will assent, or not, in a way that there is intervention to modify his choice, says Feinberg, being necessary, initially, to make sure that this choice is being really free. This will let us know if it is expression of the will of its author or if he is influenced. If the choice is independent, the intervention is, in any situation, illegitimate. If, on the other hand, it is sure that it lacks the autonomy of choice or that it is seriously affected, the intervention is legitimate.

Feinberg does not forget to define the conditions of this certainty. He shows five reducing factors of the autonomy that can justify the intervention. At first he mentions the coercion from other people. The fact that an individual is obligated by someone else (its superior at work and, in general, every person who can influence his decision). The second factor is the influence of the drug, the alcohol and every other exterior factor to the person. The third one is the depression, the strong impulses and the burning hot desires, the neurotic obsessions and, what it is more common, the simple emotional excitations, as anger, which means the factors that are born inside the person. The fourth factor is the ignorance of one or several information, decisive for the accomplishment of the choice in question and that is expressed by a bad appreciation of the consequences to follow. And, at last, the last factor is the ignorance of the circumstances in which the choice will take place, or a bad understanding of the consequences to come, being a defect or a weakness of the agent in the faculty of rationalizing about gathering the elements⁷.

Not impeditive, the assent does not justify every paternalistic intervention, but only the mediations that concern people whose autonomy is one of the five reducing factors. In practice, the interpretation of these factors being related to almost all forms of intervention becomes

justifiable according to Joel Feinberg criteria. This way, is not paternalism, for definition, an altruistic act? Is not this the name of what would be called an act that prevents an individual from causing damages to himself? If the authority - Society or State - considers the fact of causing self damages as a reasonable act, would not step in to stop. If there will be an intervention, it is because considers abnormal and irrational what tries to stop. This would be sufficient to justify the intervention. It is true, however, that Feinberg considers the irrationality an insufficient act enough to justify the paternalistic intervention⁸. However, there are other ways of questioning the subject, as verifying if his choice is really independent, if he is not under the influence of another one, of the drug or the alcohol, if has good physical and moral health, if he is not depressive or with anger, if he is well informed; at last, if his choice is not modified by one of the five factors that Feinberg considers as reducer of the autonomy of the choice?

In the case of an individual who decides to commit suicide by jumping from the top of a building and that says to the policy that comes to stop him, that he chooses to die and that is perfectly conscious of the consequences of his choice. How can the police be certain of this before verifying if this person does not act under familiar difficulties, if is not depressive or, simply, if the decision of committing suicide is not due to ignorance of important information, as the possibility to change his way of life, for example?

In fact, these paternalistic interventions are not directed absolutely against the irrationality of the act itself. They simply try to make sure that the irrationality is independent. This because before coming to a conclusion, the inquiries lack of time to influence the person and to make him abdicate the decision of committing suicide. A choice that at the same moment of the intervention, can be completely independent.

The case of the suicide can be objected, it is an easy case. Because rarely somebody resigns to life without being forced or being depressive or unconscious. The authority can, then, legitimately step in to inquire about the authenticity of the freedom of choice. This objection does not touch, in fact, the bottom of the problem. What we look for is to demonstrate that the five factors that for Feinberg do not legitimize the paternalistic intervention in the not independent choices of the individual, can justify if not all the paternalistic interventions of the independent choices, at least justifies the majority of them.

To illustrate this interpretation I consider an example. The *case of Peter*, an entrepreneur millionaire who one day chooses to freely bequeath the result of a whole life of hard work to

charities. Then he decides to get isolated in a monastery, depriving himself of the pleasures of the world and devoting to the spiritual contemplation. Let's assume, still, that this way of life has been freely chosen, that the will of Peter is not affected by any of the five factors of Feinberg. Let's assume now, that the society of Peter, built by the values of capitalist modernity, considers that his choice is irrational and even dangerous for the physical and moral health of the entrepreneur who was and that, then, decides to leave this part of the world because thinks that a man raised in the capacity of love could not choose the submission and the spiritual privation and that is unconscious, depressive or under the influence of a hypnotic power or guru evildoer. If Peter protests, being this the sufficient to evidence that his choice is perfectly independent, all the interventions - even those that concern the really depressive individuals, ignorant or hypnotized - will be impossible and unjustifiable.

The paternalistic intervention would be an aid in the auto-accomplishment of diverse cases in assent terms. In other words, the consequence of an intervention could be a change of the attitudes, of the kind that the assent must necessarily be gotten. The sort of intervention is, generally, very fast in the majority of the controls that the family practices on the children. Thus, the children must be forced to frequent the school, to make their duties, in the hope, in part, that this uncomfortable situation produces in its place the desire of doing freely and that are currently carried through without attraction. Also, nobody has the right to ignore the effect of the legal restrictions on the change of the popular attitudes, the force of the law to carry through its desirable and legitimate objectives. Then, the argument of the assent in its weak version is to circulate, since the current intervention is justified in the fact of a presumption of a future assent that is the main causer.

2 The Strong Paternalism Revisited

The other version of the argument of the assent, the strong or radical version, considers that the paternalistic intervention is only justified when it can be supported rationally that the subject would authorize if he were rational or informed enough. And, this condition is valid when it is impossible to make sure of the assent at the moment of the intervention or to predict in an unequivocal form. Gerald Dworkin is one of the defenders of this version. For him, the assent notion is "the only acceptable way to delimit the domain of legitimate paternalism"⁹.

What must be looked for, he tells us, are "the conditions that allow to assume that the reasonable men could assent in limiting its freedom even when the interests of others were not affected"¹⁰. One such agreement, affirms G. Dworkin, can be rationally reached if based on the protection of general utilities, as the health or the education, from which the development must be desired by all and to be considered as necessary for the continuation of the private assets of the individuals. The difficulty, G. Dworkin is conscientious of this, appears when the general assets concur between themselves or if they go against the private property that the individuals conceive by themselves. G. Dworkin cites the example of the refusal of the *Witnesses of Jehovah* for transfusion of blood for religious reasons. Somebody can, consequently, he says, place the problem of the people who articulate "these competing irrational values ". The problem is to know how to define the rational scale of evaluation. Will Paternalism be justified according to what it is, or not, as to this rational scale of values?

Although G. Dworkin sees the assent as an essential element for all justifications of paternalism, he goes beyond the examples where the effective agreements of the empirical individual could be predicted, but waits to extend the argument of the assent until the point where somebody could only affirm that the reasonable individual would assent.

There are two objections that jeopardize this argument. The first one is about the notion of irrational action and, we believe, there is confusion in the use of the concept between two different directions. The irrational actions are, in a way, those that do not reach the desired goal or, if allowed, will produce bad effects for the authors, and not the expected result. This way, the irrational decisions may occur when the people cannot conceive the reality of the consequences of the action or when they act under the effect of emotions, under a psychological influence that deprives them of full consciousness of the effect of the action. One such irrationality fully justifies paternalism, conditioned, however, that there is advice and information. It is precisely this situation that Mill had in mind when evoked the example of the dangerous bridge.

The second interpretation of the irrational actions has different consequences. It justifies, for example, the action of the Health Department in informing or warning about the dangers of tobaccos better than prohibiting the cigarette consumption. These strong interventions would increase the possibility of the individuals to act rationally, but leaves the individual with the freedom to choose which action is preferable. The only exception to this rule is when there is

urgency, when there is not enough time to warn, or when it is impossible to make corrections, when it is clear that the individual does not love knowledge of the consequences of its action.

The interpretation that is made by Gerald Dworkin about the irrational subjects is, for us, unacceptable. He initially affirms that it could be a general agreement that health and education are not only good, but equally basic and superior goods. Then he considers as irrational the people who do not agree with this priority classification of the values and declares them irrational, legitimate object of the paternalistic intervention. The danger is evident. Paternalism has as mission the reinforcement of priority choices that all individuals must respect. No matter how hard somebody says that some primitive needs exist, such as physical well-being, that the majority of the men consider as important, and even though there is leveling of these values on top of preferences, this will certainly mean that the paternalistic intervention to protect the basic values would reach its goal in the majority of the intervention cases that aim to stop individuals from causing damages to themselves. However, it does not restrict nor exclude from the field of rationality the not-in agreement individual actions to the scale of established values, neither legitimizes the paternalistic intervention in these actions.

About this, Richard J. Arneson is correct when he argues that the paternalistic intervention in the voluntary, but not completely rational, choice violates the autonomy of the agent by imposing values that are not his. "The rationality – concerned about the economic prudence (efficient adaptation of ways and means) - is not a value that somebody has the right to impose on an adult against his will and for his own good, not even the right to impose no matter what other value over paternalistic basis"¹¹.

Richard Arneson considers that the respect for autonomy demands a respect according to the values of others because both state their own conceptions of good. This rationality, that Arneson calls "economic rationality", is completely neutral. It is a purely formal principle of the practical reason that does not privilege any value over another.

The impetuous or spontaneous choices of a person who adopts a style of reckless and imprudent life can be irrational. However, they are not less voluntary. According to Arneson, the rationality precedes the will. For Richard Arneson, and with him many others share the same idea, this is different. "The economic rationality" does not define the impetuous choice as being irrational. For some, impetuosity is a character that the calculation does not help to succeed, and that prefers to act quickly. Others calculate everything, what demands time before making their

mind. The majority of us stay between these extremities. Instead of saying that the impetuses are irrational, they develop a type of inconsistent spontaneity with the deliberation and the calculation. Feinberg and Arneson would say that it is not necessary to justify the impetuous choices to hinder paternalism, and that it is necessary to simply say that the impetuosity is a personal character as any other, a right derived from the right to the autonomy that Mill, moreover, insistently demands along the chapter III of *On Liberty*.

The second main objection to the radical or strong version of the argument of the assent is that the fact of requiring the assent to justify the paternalistic intervention is not necessary. Arneson thinks that the paternalistic intervention is justified by the assent, and that this can be deductible of a reasonable agent who accepts it, with what could really promote interests or help carry through the current desires because they are rational or correct them in order to place them in compliance with the rational scale of the preferences. The assent comes, consequently, from the rationality of the intervention, and the justification of the intervention is essentially established in the principle of stopping the individual from causing damages to himself. It is certainly difficult to see which force brings to the assent and adds it as first justification.

For these reasons, in these two versions, the argument of the assent does not allow to decide the liberal dilemma of paternalism. The first version excludes from the field of the paternalistic intervention the individuals that have more necessity of this protection. Besides, it is based on the prediction of a future assent of the agent; a prediction that could be too dangerous or a self-realizable prophecy. The second version, when projecting a standard objective scale with which the individual preferences will be evaluated and judged, claims a tacit consent, deduced intellectually and without relation with the concrete desires of the individuals. Moreover, the two versions attenuate the weight of the assent because what both ask for is to demonstrate that the intervention will effectively agree to prevent the individual from harm himself.

The two versions put in prominence three essential points of the debate on paternalism. First, the most important one is that the paternalistic intervention must allow the effective impediment of the agent to cause damages to himself. Second, it is that the weak version of the argument of the assent suggests adding that it is necessary to respect the autonomy of the individual choice. In other words, it is necessary to mention the empirical desires of the individual and that the only fact that can justify the paternalistic intervention is that the evil that this intervention tries to eliminate must be considered as one evil for the author. When

underlining the importance of the express consent, the weak version enhances the necessity to relate the intervention with the necessities and the real preferences of the individual. At last, the third argument distinguishes between the choices that make use of information to those that do not make use. The informed choices are those in which the consequences are understood, calculated, while the choices badly informed are those in which the consequences are unexpected or, by any reason, had not been examined enough by the agent. One of the most important consequences of this argument is that the only legitimate intervention is that one concerned to the non-voluntary choices and badly informed ones. Thus, if the choice is non-voluntary simply because of the ignorance of the agent, the intervention must use the information and the warning. However, if the non-voluntary of the choice is motivated by other reasons, the forms of harder interventions become, then, recommendable and legitimate.

We would like to return now, very briefly, to the second way of approach of the liberal dilemma of the paternalistic intervention. More necessarily, to the interventions that concern harmful actions to the third party.

One of the ways of constructing this argument is as old as the essay *On Liberty*¹². It starts with a critic of the distinction of Mill between self-regarding and those other-regarding, at last, affirm that the self-regarding conduct is a "empty class". There is not in this argument any particular action, or certainly very few, that do not affect in a way or another, third parties (or the interests of third parties, if somebody considers that this expression is very restrictive). More clearly, even from a utilitarian point of view, there would be not a category of actions that do not affect third parties or the interests of others.

In the bottom of this argument, all the examples of paternalistic interventions can be defended in terms of protection of third parties or their interests. We will use the example of the seat belt in vehicles, example frequently used in the debate on paternalism. The argument will be formulated this way: assuming that the refusal in using the seat belt does not affect the agent and does not cause damages to others, it includes a great probability of the passenger to harm himself and to affect the interests of third parties. It can, for example, raise the price of the insurances. It would present, also, an overload for the budget of the public health, and would deprive the community as a whole of the social contribution that this individual could have brought if he had avoided his harmful choice. The compulsions use of the seat belt can be, thus, defended as a way

to hinder the individual from harming himself as well as a way to prevent considerable, but indirect damages, to others.

This reasoning is, certainly, dangerous. Because when we try to justify the paternalistic interventions in the cases of individual behaviors, where the use of the freedom seems extreme, it is likely that a door is left open to a limitless extension of interventions of the State in the private sphere, which the absolute principle of *On Liberty* is in charge to defend. That is also a solution that can be excluded by a more strict definition of the same principle of paternalism. Mill does not suggest this definition when insistently affirms that the acts referred to themselves are those concerning to the agent "straight and priority"¹³, even when they cause "casual" damages for others¹⁴. This redefinition answers, certainly, to the accusation according to which the class of actions that is related to others is a "empty class".

Another objection to this solution is that most of the prices that the society pays to repair the consequences of harmful individual choices and, that some use to justify paternalism, is, in fact, in the burdens that the society voluntarily supports. If some States prohibit a solitary sailor to sail freely under the excuse that this represents a very high financial load for the maritime services of insurance, he can, for example, warn that those who are put conscientiously in danger would have to pay the costs of the insurance. Or, somebody could warn that in case of danger the insurance services would be cancelled. I am not saying that these harsh measures are praiseworthy. It seems to us, however, that the altruism feelings that possess the souls full of charity to help those that are in danger are not the sufficient to prohibit anyone to make the examination of the risks that is being exposed to.

Another way to present the argument, according to which the apparently paternalistic intervention can be rearranged under the principle of not harming third party, is elaborated by Donald Regan. For him, a person can cause damage to his "self future" and, at the moment your future self can be considered as somebody else, apparently the paternalistic intervention can be defended as impeachment of damages to others¹⁵. A motorcyclist that chooses to ride without the security helmet is different, according to Regan, from the motorcyclist that regrets about the dangerous consequences of its choices right after he becomes a victim of a traffic accident. In the book *Mill on Liberty*, C.L. Ten¹⁶ makes a radical criticism by this thesis. If somebody must punish the "current self" under the excuse that will make a harmful choice for the "future self" is also obliged to punish the same person "because it will be attached to the current self". Besides,

in the same person there are the sides of the pleasures, the good and the bad one. A person can act adequately, in his following behavior, when using the security helmet. However, if somebody punishes the second character because he is harmful, will punish at the same time, unfairly, the first one. Another objection of Ten, the most important one, is that the thesis of Regan cannot be applied in the cases of seriously harmful choices. It does not apply, for example, to the case where the accident of the motorcyclist is deadly. Because there will not be damage to the future self in the case. Terry S. Kogan¹⁷, that shares the thesis of Donald H. Regan, recognizes the relevance of this objection and considers, consequently, that the intervention of the State in the suicide case is unjustified. Regan and Kogan also recognize that the accidents that cause acute cerebral injuries (loss of consciousness or knowledge) do not allow damage to one "future I", they are actions that do not refer to themselves. Consequently, they are not punishable. Therefore, the very logical critical conclusion of C. L. Ten: "For when the harm caused is death or severe brain damage, the victim is the present self and not a later self. Accidents which result in these types of harm do not therefore cause harm to others, but are purely self-harming. If the wearing of seat belts and helmets reduces the number of deaths and cases of severe brain damage, then it increases the harm caused to others by reducing the number of self-harming actions. This is a surprising but inescapable implication of an appeal to the idea of harm to later selves"¹⁸.

We do not think that the thesis of Regan will make the debate succeed, neither that there is any kind of interest in regarding the individual as multiple selves. Because, if the argument has some merit, we simply should formulate the anti-paternalistic principle and say that it stops a person to harm its "future self", not justifying the paternalistic intervention, not more than the prevention of any one against its will to cause damages to its "current self".

This second general reply to the liberal dilemma that intends to demonstrate that there is not really any apparent dilemma, then, fails. Or even better, it allows clarifying the anti-paternalistic position. However, the dilemma still remains. The total acceptance of the paternalism of State would lead to intolerable interferences in the individual freedom. And, the total rejection of paternalism would imply in the rejection of an essential part of the legislation that is generally useful and acceptable, as much for the individual as for the social body.

Another way of observing the justification of the intervention must be strictly utilitarian: the prevention of the bad. The dilemma that we cautiously will propose requires a principle from which somebody can limit the utilitarian intervention, a principle that several contemporary

critics find in the argument of the assent. The alternative that we will consider is that the limits of paternalism are inherent to utilitarianism.

The first question placed is to know if there is or not a utilitarian justification to be able to legitimately forbid all the interventions that are not concerning the own agent. We said that it is difficult to see because the auto-inflicted damages must be isolated from the utilitarian calculation of the well-being. Rolf E. Sartorius tries to explain the way Mill conceives this exclusion¹⁹. Sartorius demonstrates that if there is a class of actions in which the majority of actions is bad and some of them are good from a utilitarian point of view, and that is difficult to correctly distinguish the good ones from the bad ones, the utilitarian would have to be justified in prohibiting all the actions of this class. Mill's position, says Sartorius, is that the legal interventions that are not referred to themselves are examples of this class. And, thus, the total interdiction of these interventions is, from a utilitarian point of view, legitimate. If this is a correct description of Mill's position, his conclusion can be criticized from a utilitarian point of view, as even Sartorius assumes. If the distinction of the cases of paternalistic interventions is really impossible on utilitarian basis, then, there cannot be a utilitarian solution for the liberal dilemma. It is not impossible, however, as Mill believes, to distinguish the good and the bad paternalistic actions, at least to trace the limits, in terms of utility, of the legitimate interventions.

Some conditions are inherent in all the types of utilitarian interventions, being paternalistic or not, and they are very important to be known. In the first place, the intervention must really carry through its objective. It may be justified only if it makes whatever is possible to stop the harmful action from happening. If the government must forbid cigarettes, strengthen the warning related to the harms of tobacco in the cigarette packages or forbid the advertising of tobacco, then it must establish the causal connection between the act of smoking and the consequences of lung cancer, for example, or with another damage to the human body. In the second place, all utilitarian intervention must have advantageous consequences in the utilitarian balance sheet. At least the price of the intervention should not exceed the benefit gained, the prevented damage. It is important to establish this calculation in the cases of paternalistic interventions to know the probability of damages of the individual action and the degree of risk to the agent. Equally, the consideration of the price of the intervention must lead to the preference for the advice, for the warning and information to other ways of manipulation or coercion.

These general utilitarian limits cover, we believe, much more than the principle of the assent previously argued. There is no doubt, as long as the argument of the assent is based in the demonstration that what is in the long term is of the individual's interest, the utilitarian principle limits more, or with the same degree, the intervention than the principle of the assent.

I would like to go further and claim that there are utilitarian limits to every paternalistic intervention. Precisely, the argument is that, in a certain way, the individual knows better than anybody else his own interests, not because he is well informed of the consequences of his action, but because he is the only one to know his necessities, the order of priorities and preferences²⁰.

To continue in this direction, I appeal to John Stuart Mill. He uses arguments to defend the anti-paternalistic principle that questions the efficiency, in terms of utility, of the majority of the paternalistic interventions.

(...) But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it. He is person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by one else. The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions: which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without²¹.

This citation contains two very relevant elements. The first one is that the individual is more concerned about his own interests than anybody else, and more especially than the society as a whole. If this is true and considering that the altruism is the reason of paternalism, the individuals would be the first to avoid actions with harmful consequences for themselves, and would compel others (also the State) of this mission that inevitably generates a bad use of the power.

The second element is that individuals know their own interests better than anyone else. Consequently, if somebody accepts this affirmation, several professions must, then, disappear, like doctors or guards, for example, all those which advice is, for us, of our own concern and that somebody must, consequently, apply. In a similar way, the paternalistic interferences, even

through the advice and in limited cases that Mill tolerates, would be all illegitimate ones since they are *necessarily* badly informed.

But, it is also clear that there is the risk of individuals acting in an unconscious way - or because they are ignorant, or because they are in a state of psychological disorder, or for another reason - and leave behind the undesired consequences. In this case, the others would be in a better position to judge what concerns the interest of these individuals, and it is only in these cases that the intervention is legitimate. However, Mill also speaks about the goals of the judgments, and his argument seems to be very solid. This is because the individual knows better than anyone his own necessities and preferences and is the one in better position to calculate and to define interests. And if his ignorance or lack of understanding of the consequences of his action may justify the intervention, the relative ignorance from others about his goals justify, in utility terms, the interdiction of the intervention.

What is of interest to a person is related to the satisfaction of the necessities and his current preferences. Consequently, nobody can know nor define the real nature of the interests if he ignores the objectives, the necessities and the preferences of the person in question. Brian Barry contests this thesis by identifying what it is in the interest of the person with what will increase his chances to carry through whatever desires, not importing the nature of desire. This is because – says Barry – there is a number of general sources, with wealth as a paradigm, which will increase these chances, being possible to define the interests of the individual, without having to consult his real necessities²².

There are, briefly, three main objections to this thesis. First, it implies that it is no longer in the interest of the individual to deplete the resources, nor to satisfy his necessities, as long as it diminishes his future chances to possess what he wants. Secondly, it is not always true that the general sources, as health, education, wealth or power increases, necessarily, the chances for a person to have what he desires, no matter the nature of the desire. An individual can follow ideals that require, in contrast, poverty and obedience. Thirdly, to increase the opportunities for the individual to get what he desires will demand the transformation of general sources into particular sources. The nature of these particular sources of the individual cannot be defined in the absence of knowledge of his goals and preferences.

In this direction, Mill is right to say that "the most common man or woman own immeasurable superior ways of knowledge than all the others can possess". Because, if the others

can be better informed about what will be the consequences of the individual actions, the individual is more capable to know what is bad for his own. This particularity of the interests is what justifies the limitation of the paternalistic interventions over the unconscious and misinformed actions of the individuals. If the interests of an individual are, this way, auto-definable, the paternalistic intervention over the complete conscious actions is simply contradictory. If an individual is conscious of the consequences of his action, then it cannot be said that he acts against his own interests, and that the intervention is justified as a precaution to prevent him from cause damage to himself.

These considerations must, you can say, create doubts in the spirit of the utilitarian over the effectiveness and the legitimacy of the paternalism of State. The State must always ignore the reality of the interests of the individuals. If he must obligatorily act according to general rules, must act in a paternalistic way, when claiming the existence (chimerical) of a universal order of individual preferences. This is what Mill thinks when he writes that "the interference of the society in the progression of these values and intentions related to the person melts into general presuppositions, which can be entirely wrong". The argument of Mill seems, then, to have the following shape: once the paternalistic legislation seems to assume a scale of values and, since this scale is chimerical, no paternalistic intervention is legitimate.

Somebody could try to justify the paternalistic intervention when consulting the utilitarian calculation of the advantages. To examine the example of the use of seat belt in automobiles, there could be drivers to who taking the risk exam would be the main aspect of the pleasure of driving and that, consequently, conscientiously decide not to use the seat belt. But, it can be that the majority of the drivers who do not use the seat belt act-out of ignorance, lapse of memory, or habitual not-attention to the consequences of the action. In this case, the utilitarian legislator could legitimately decide that the protection from damages for those who inadvertently omit to use the seat belt, is more important than the harmful effect of protection for those that conscientiously refuse to use do it. However, it is very important to underline, the intention of the legislator should not be to punish the conscious decisions. If this is the case, his decision will be utilitarian speaking, harm. His intention should be, preferentially - only - to correct and to protect the unconscious choices.

Two other restrictions to the paternalism of State can be found in what I call the *particularity of interests*. Firstly, when the intervention is necessary, the information and the

advice are preferable, as ways, to the manipulation and the coercion. Because, by definition, the information and the advice affect the only non-voluntary choices and the paternalism of State cannot be extended to the choices conscientiously calculated or even influence them. Secondly, the *particularity of the interests* suggests that it is preferable, whenever it is possible, to authorize any exception to the paternalistic orientations. I particularly believe that, back to the situation of the motorcyclists (frequently used in the debate about paternalism) that they refuse to use the helmet. Here we have a group of well determined individuals that seem to make a conscious choice. They prefer to believe that they will be prejudiced than abandoning this habit. In this in case, it will be preferable, from a utilitarian point of view, that the legislator considers certain specificities and preserve them, exceptionally, from the application of the law.

The objective and the justification of paternalism must have a utilitarian character: the prevention from the bad. I suggest that the utilitarian considerations have very hard limits to the extension and the application of the paternalism of State, which I summarize in five main conditions. First, the relation between the action that is necessary to forbid and supposedly harmful consequences must be clearly demonstrated. Where there is not a necessary causal relation, the risk of harm is not enough to step in or to forbid the action. Second, the intervention must have beneficial consequences from a utilitarian point of view. It does not imply only that the price of the intervention must not exceed the damage that the harmful action may cause, but also that the consequences of the intervention must not be more harmful for the agent than the consequences of his own decision if it were carried through. Third, the harm to be prevented must be noticed as such, and even as an absolute harm by the majority of the individuals affected by this intervention. It is clearly that the considered harmful actions must be non-voluntary actions. Fourth, whenever it is possible, the State must privilege the information and the advice to the manipulation and the coercion. Initially because the cost is, from a utilitarian point of view, of the advice and of information, in most of the cases, less important than the price of the coercive intervention. This way, the informative intervention does not extend over those whose choices are conscientious. Finally, whenever possible, the legislator will have to preserve the individuals or the groups of individuals that show a stronger affection with values and objectives of their actions, than with the damages of these same actions and, that are happier doing what they do instead of not doing.

Notes

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¹ Pós-Doutor em Filosofia pela National University of Singapore; Pós-Doutorando em Filosofia pela University of Cambridge; Doutor em Filosofia pela UNICAMP.

² According John GRAY, “The anti-paternalist implication of Mill’s principle stipulates that no one (state or society) can legitimately interfere with the fully voluntary choice of a nature of a nature rational agent concerning matters which affect only or primarily his own interests”, *Mill on Liberty: a defence*, p. 91.

³ MILL. *On Liberty*. Edited by Stefan Collini. Cambridge: Cambridge Texts in the History of Political Thought, 2005, p. 13.: “In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign”.

⁴ MILL. *On Liberty*. p. 99.

⁵ I use this modern term in a very determined way, because even if John Stuart Mill considers the detour of truth “one of the worst foes” of the human being, tolerates the misinformation to preserve the others “from a great and not deserved disgrace”. “(...) all the moralists admit that even if this rule [to tell the truth], sacred as it is, sluces likely exceptions. The main ones are verified when the omission of a fact (as, for example, of information about an evil person, or about bad news from a seriously sick person) would save the individual (above all someone else besides himself) from a great and not deserved disgrace and when the omission comes from the denial of the fact”. Cf. MILL. *Utilitarianism*. Edited by Roger Crisp. Oxford: Oxford University Press, 2004. p. 69.

⁶ Cf. Joel FEINBERG. Legal Paternalism, In: *Canadian Journal of Philosophy*, n°. 1, 1971, pp. 105-124; *Harm to self: the moral limits of the criminal law*. New York: Oxford University Press, 1986, and Gerald DWORKIN. Paternalism. In: *Morality, and law*. (Edited by Richard WASSERSTROM). Belmont, California, Wadsworth, 1971, pp. 107-126; see too C.L.TEN. *Mill on Liberty*. pp.109-117 and *Was Mill a Liberal?* pp. 99-102.

⁷ Cf. Joel FEINBERG. *Harm to self: the moral limits of the criminal law*, p. 113-117.

⁸ Joel FEINBERG. *Harm to self: the moral limits of the criminal law*. p. 109.

⁹ Gerald DWORKIN. Paternalism. In: *Philosophy, politics and society*, Oxford: Basil Blackwell, pp. 78-79.

¹⁰ Gerald DWORKIN. Paternalism. In: *Philosophy, politics and society*, Oxford: Basil Blackwell, pp. 78-79.

¹¹ Richard ARNESON. Mill vs Paternalism. In: *Ethics*, 1980, n° 90, p. 474.

¹² Cf. J.C. REES. *Mill and his early critics*. Leicester: University College, 1956, pp. 17-20.

¹³ MILL. *On Liberty*. p. 78.

¹⁴ Cf. MILL. *On Liberty*. Chapter on Applications.

¹⁵ Donald REGAN. Justification for paternalism. In: *The limits of law*. J. Rowland Pennock and John W. Chapman (ed.) New York: Liber-Atheton, 1974, pp. 201-206.

¹⁶ C. L. TEN. *Mill on Liberty*. Oxford: Clarendon Press, 1980, pp. 119-123.

¹⁷ Terry S. KOGAN. The limits of state intervention: personal identity and ultra-risky actions. In: *The Yale Law Journal*, 1976, p. 85.

¹⁸ C.L.TEN. *Mill on Liberty*. pp. 112-123.

¹⁹ Rolf E. SARTORIUS. *Individual conduct and social norms*. Belmont Dickenson, 1975, Chap. 8, section 3.

²⁰ “As Coleridge observes: man creates the reason, and not the opposite. What is interesting or not for him to do depends less than any exterior circumstance that of the kind of man that is. If we want to know what is exactly a man’s interest, we will have to know about the disposition of his thoughts and habitual thoughts. Everybody has two kinds of interests, those you take care and those you do not”. MILL. Consideration on representative government. In: *The Collected Works of John Stuart Mill*. p. 444.

²¹ MILL. *On Liberty*. p. 76-77.

²² Brian BARRY. *Political argument*. London: Routledge and Kegan Paul, 1965, pp. 176-186.