

An Ethics Framework for Analyzing Paternalism in Public Health Policies and Interventions

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This framework is an adaptation of the briefing note entitled *How Can We (and Why Should We) Analyze the Ethics of Paternalistic Policies in Public Health?* (Bellefleur & Keeling, 2018). It aims to promote practical use of the ideas from that longer document. The long version, including the full text and all references, is accessible online at:

https://www.ncchpp.ca/127/publications.ccnpps?id_article=1742

A two-page summary of this framework is also available online at:

https://www.ncchpp.ca/127/publications.ccnpps?id_article=1525

Introduction

Public health interventions are regularly accused of “paternalism,” because they tend to use the power of the state on behalf of the health of individuals to compel them to modify their behaviour. This situation is problematic for two reasons. Firstly, accusations of paternalism raise questions about the credibility of public health actors because of the strongly pejorative meaning associated with this label (Wikler, 1978, p. 307). And, more serious still, paternalism in public health interventions raises questions concerning legitimacy: what are, in fact, the reasonable limits of state intervention in the lives of citizens? Faced with these issues, public health practitioners must determine at what point a public policy that interferes with the freedom of citizens is ethically justified and at what point it represents, instead, an exaggerated infringement of their freedom, disproportionate to their right to live as they choose (Lalonde, 1974, p. 38; Childress & Bernheim, 2015, p. 4). This question presents an ethical dilemma that is difficult to resolve.

Objectives

The purpose of this document is to equip public health actors to conduct an ethical analysis of policies that are said to be paternalistic. It aims to provide the conceptual tools needed to identify paternalistic policies and assess the ethical

burden with which they may be associated. The document also offers practitioners a clear and structured approach intended to guide ethical deliberation about paternalistic policies.

Paternalism in a nutshell

On a primary level, *paternalism* refers to actions or interventions that are similar to those of parents who limit the freedom of their children or who make decisions for them, and do so for their own good. According to G. Dworkin, “**paternalism**, is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm” (2017).

The term “paternalism” refers here to actions, interventions or policies comprising an inherent conflict between respect for individual autonomy and the principle of state beneficence that has been resolved by privileging the latter principle over the former (Grill, 2013, p. 37).

Some examples of policies called paternalistic

Among the policies that have been portrayed as paternalistic are those that:

- Require motorists to buckle their seat belts;
- Require motorcyclists or cyclists to wear a helmet;
- Prohibit swimming at public beaches or swimming pools in the absence of a lifeguard;
- Limit the serving sizes of sugary drinks sold by fast food restaurants;
- Place a tax on sugary drinks, alcohol, cigarettes, etc.;
- Require the addition of fluoride to municipal drinking water.



An approach and tools for the ethical analysis of paternalistic policies

To guide ethical analysis of paternalistic policies, we propose a three-step approach:

1. Determine if a policy is actually paternalistic;
2. Identify the type or types of paternalism and assess their ethical burden;
3. Integrate paternalism into a more general ethical analysis.

Throughout the discussion of these three steps, questions, criteria and conceptual distinctions enabling a clearer understanding of the approach will be included to stimulate reflection and foster critical thinking.

It goes without saying that we all demonstrate the ability to make ethical decisions in our daily lives, without having to reflect deeply: things spontaneously appear to us to be good or bad, acceptable or unacceptable, etc. The approach proposed here is not intended to replace or override this "intuitive" moral faculty, but to shape it into an *explicit, structured and rigorous* deliberative process. The aim is also to allow the right questions to be asked, without imposing any "right" answers.

1. Determine if a policy is actually paternalistic

Paternalistic policies sometimes run the risk of being confused with other similar types of policies. This is the case, in particular, for policies based on the **harm principle** (Kymlicka, 2002). Fortunately, it is possible to submit a policy to a relatively simple test to help identify its type. The central question of the first step in the ethical analysis is this:

- Does the policy **interfere** with the population or certain groups within it?

We first try to determine whether or not there is interference with the freedom or autonomy of the persons concerned. A tool such as *Canada's Food Guide*, for example, makes dietary recommendations to Canadians, but it does not interfere with the dietary choices of the population. This type of tool may at times give some people the impression they are being treated like children unable to decide what is good for themselves, but it cannot legitimately be accused of paternalism if it does not involve interference, strictly speaking.

However, not all policies that interfere with the freedom of individuals should be labelled paternalistic. Policies aimed at protecting people **from the actions of others** (prohibiting smoking in cars in the presence of a person under the age of 16, for example) are based on what is referred to as the harm principle, which is generally accepted in society and recognized by the courts (Parmet, 2016). Such policies are therefore not considered paternalistic. Thus, to distinguish between these two types of policies the following question may be asked:

- Does the policy interfere with people **for their own good or to protect others?**

One must be careful when attempting to answer this question. On the one hand, it may be tempting to invoke the harm principle to justify interventions aimed at regulating behaviours which appear to harm only those engaging in it (junk food, tobacco, alcohol, etc.) using the pretext, for example, of the financial burdens that these behaviours impose on the health system. The imposition of a tax on tobacco is partly based on this logic. On the other hand, it is possible to challenge such a broad interpretation of the harm principle by arguing, for example, that it is difficult to prove an at-risk behaviour will automatically result in a greater burden for the health system (Wikler, 1978). We might also ask whether such an approach turns a blind eye to social inequalities of health (Wilkinson and Marmot, 2003; Buchanan, 2008, p. 17), since it is often the most disadvantaged and marginalized who are most severely affected by such restrictive policies.

When it does not seem possible to invoke the principle of harm to others; that is, when a policy aims resolutely to protect people from themselves and only themselves, we then move on to the second step in the analysis in order to determine the type or types of paternalism in question.

2. Identify the type or types of paternalism and assess their ethical burden

The typology of forms of paternalism should allow one to fulfil a simple goal: assessing the weight of the ethical burden placed on the policy; that is, the degree to which the intervention impinges on the freedom and autonomy of individuals.

Presented here are the three main distinctions proposed in the literature:

- Weak/strong paternalism;
- Coercive/non-coercive paternalism;
- Trivial/fundamental paternalism.

There are no objective quantitative criteria for judging the severity of a paternalistic policy. Weak but coercive paternalism (e.g., the arrest of all compulsive gamblers entering a casino) is not necessarily less problematic than strong but non-coercive paternalism (e.g., a large sum of money offered to smokers who quit smoking) (Wilson, 2011, p. 270). In assessing the ethical burden imposed by an intervention one should consider the relative weight of each aspect (weak/strong, coercive/non-coercive, trivial/fundamental) to characterize the general degree of severity of the paternalism in question.

The greater the ethical burden of paternalism,¹ the greater the benefits and the higher the level of justification should be for the overall ethical analysis to support the action — this is what is known as the proportionality criterion, to which we will return later.

2.1. DETERMINE IF IT IS A CASE OF WEAK OR STRONG PATERNALISM

The distinction between weak and strong paternalism is aimed at establishing whether a policy interferes with free and informed choices. In general, an intervention involves strong paternalism when it interferes with well-reasoned, voluntary decisions. The first question to ask is therefore the following:

- Does the policy interfere with **free and informed choices**?

Weak paternalism refers to instances where the conditions for informed decision making are not met. These conditions can be divided into two categories:

a. **Autonomy.** It is generally accepted that the state can interfere with people against their will if their autonomy is not sufficiently developed to enable them to make decisions about what is good for themselves, such as young children, adults with significant intellectual disabilities, etc. (Feinberg, 1986). These are considered instances of weak paternalism.

In contrast, it is considered an instance of strong paternalism when the state interferes with the free and informed will of persons whose autonomy is sufficiently developed for them to be considered morally responsible. All adults generally belong to this second group by default, unless there is proof of incapacity.

b. **Circumstances.** Certain circumstances can, however, affect the ability of an adult to make an **informed decision** (e.g., the absence of crucial information, the influence of alcohol or drugs, being subject to pressure sales, emotions, a cognitive bias that distorts our reasoning, etc.). In circumstances that are sufficiently unfavourable to the exercise of individual autonomy, an intervention aimed at helping people make good decisions or preventing them (often temporarily) from making decisions they might later regret would thus be considered weak paternalism. The difficulty, of course, lies in determining when circumstances are or have become sufficiently unfavourable to informed decision making to justify an intervention that qualifies as weak paternalism (Grill, 2011).

Similarly, we tend to classify as weak paternalism cases of interference that target actions that present a risk of **serious, imminent** and **irrevocable** harm to the health of the persons in question (Rajczi, 2016).

Here is a summary of the criteria for distinguishing weak paternalism from strong paternalism. To assess the extent of interference with free and informed decision making, we need to ask the following questions:

- Does the interference target autonomous individuals?
- Are the circumstances surrounding the action favourable to informed decision making?
- Is there a risk of imminent, serious and irrevocable harm associated with this behaviour?

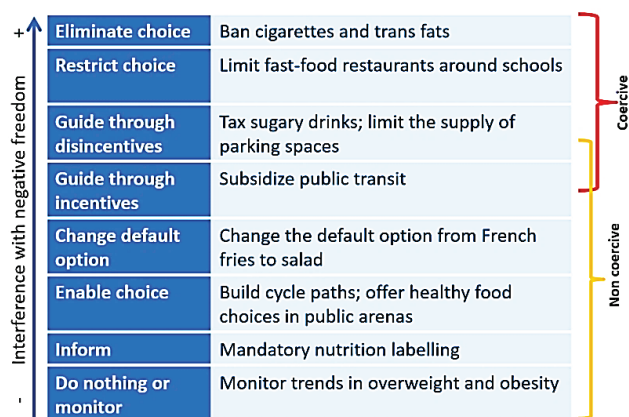
In itself, the characterization of a policy as an instance of weak or strong paternalism does not predetermine the ethical burden associated with it. However, as a general rule, strong paternalism will raise more acute ethical concerns; it may be harder to justify ethically and therefore more likely to fail the analysis test in step 3.

¹ By ethical burden, we mean the factors that render morally problematic the adoption, implementation or justification of an intervention.

2.2. DETERMINE IF IT IS A CASE OF COERCIVE OR NON-COERCIVE PATERNALISM

The distinction between coercive paternalism and non-coercive paternalism pertains to the strength of the means or the degree of constraint of the intervention — and by extension to the level of interference with individual freedom. To distinguish less coercive from more coercive means, it may be useful to refer to the Nuffield Council on Bioethics' (2007) intervention ladder presented in Figure 1.

Figure 1 Nuffield Council on Bioethics' intervention ladder (2007)²



It is important to note that implicit in the Nuffield Council on Bioethics' ladder is a questionable assumption, namely that *any* state intervention represents an infringement of freedom. This constitutes a significant a priori stance, since it can be argued that many state interventions, such as the construction of bicycle paths, for example, *increase* rather than reduce citizens' freedom of choice (in this specific case by improving the available travel options) (Griffiths & West, 2015). These interventions may be termed **beneficent** rather than paternalistic. Only the latter involve **negative** interference with the freedom or autonomy of the persons affected **without their consent**.

However, it would generally be easier to justify a less coercive policy than a more coercive policy, all other things being equal (Childress et al., 2002).

Distinguishing more coercive from less coercive

means is one of the ways to evaluate the ethical burden of a paternalistic policy.

A policy that uses means that are disproportionate to the importance of its objectives (e.g., making physical exercise mandatory under penalty of a fine) will be difficult to justify ethically. So the analysis must take into account the availability of less coercive means of obtaining the desired results.

In summary, to assist in determining whether interference represents a more or less coercive form of paternalism and in assessing the burden of this interference, it can be useful to ask the following questions:

- In which intervention category on the Nuffield Council on Bioethics' intervention ladder does the proposed policy or intervention belong?³
- Can the policy instead be viewed as having a neutral or even a positive effect on the freedom of the persons affected?
- Can the persons targeted by the interference be thought of as having consented to it?
- Is this intervention the least coercive means of achieving the desired results?

2.3. DETERMINE IF IT IS A CASE OF TRIVIAL PATERNALISM OR FUNDAMENTAL PATERNALISM

The third and final distinction characterizes the type of freedom targeted by paternalistic interference. Charters of rights and constitutions (e.g., the *Canadian Charter of Rights and Freedoms*, sections 2 and 7) define and codify a set of fundamental freedoms (of conscience and religion, of thought, belief and expression, of association) and a "right to freedom," which guarantees every individual a degree of personal autonomy over important decisions intimately affecting his or her private life (*R. v. Morgentaler*). A policy that interferes with one of these protected freedoms will be characterized as **fundamental paternalism**; it will be very difficult to justify from an ethical standpoint (Childress et al., 2002) and even more so from a legal standpoint.

But where does the individual's "right to freedom" stop? The Supreme Court of Canada clarified its scope in the judgement for *R. v. Malmo-Levine*,

² The ladder has been adapted so that the examples are relevant to the broad field of public policy.

³ Despite the limits of the scale proposed by the Nuffield Council on Bioethics, the latter remains a pragmatic and effective tool for assessing the degree of constraint imposed by an intervention. The subsequent questions allow one to also take into consideration dimensions that are neglected by the tool (consent, positive freedom).

saying that it “cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle” (*R. v. Malmo-Levine*, 2003, para. 86). It is therefore necessary to place behaviours that are considered habits, lifestyles or individual preferences in the category of “trivial” freedoms (e.g., that of not buckling your seat belt in cars). A policy that interferes with this type of freedom will be categorized as **trivial paternalism**.

However, trivial paternalism does not signify banal paternalism. In fact, just because paternalism is trivial does not mean it is automatically justifiable ethically. Several elements must be considered when assessing the ethical burden of this type of paternalism:

a. **Socio-cultural environment**. It is harder to justify interference with habits or lifestyles that are widespread and strongly anchored in the targeted population (e.g., diet, modes of transportation, etc.). This clearly indicates that an ethical analysis cannot ignore the political and socio-cultural context to which the population necessarily belongs.

b. **Social acceptability**. It is harder to justify an intervention that is unpopular with the population concerned, or about which it has not been consulted beforehand.

c. **Equity**. Even a paternalistic policy that is “popular” a priori with the majority of the population may be significantly flawed ethically. This is particularly the case when the burdens associated with a policy disproportionately affect minorities or vulnerable groups (e.g., a tax on junk food), or when a policy serves to widen social inequalities of health rather than to reduce them (e.g., a campaign promoting healthy eating habits which would primarily benefit the more wealthy) (Potvin, Ridde & Mantoura, 2008).

In summary, to distinguish between a case of trivial paternalism and one of fundamental paternalism and to evaluate the weight of the policy’s ethical burden, we can ask the following questions:

- Does the policy interfere with a freedom protected by charters of rights?
- Does the policy interfere with habits, lifestyles or individual preferences that the groups affected consider important?
- Were the persons and groups affected by the intervention consulted?

- Does the intervention avoid disproportionately targeting (directly or indirectly) marginalized, vulnerable or minority groups?

3. Integrate paternalism into a more general ethical analysis

The ethical analysis of a paternalistic intervention tends to focus on two values, namely beneficence on the one hand and autonomy or freedom on the other, since paternalism involves a conflict specifically between these values. However, to determine if a policy is justifiable from an ethical standpoint, it is necessary to extend the debate beyond the sole issue of paternalism and consider the other ethical values and issues that are raised, to arrive at a fair and informed decision. The central question of this step is therefore the following:

- What other ethical considerations, issues and values should be taken into account in the ethical analysis of the policy?

Answering this question enables, firstly, identification of the values in conflict and articulation of the ethical issues to which they may give rise. One may then proceed to arbitrate between considerations that weigh in favour of implementing the policy and those that weigh against it.

This is possibly the most difficult step in the ethical analysis, because it is not easy to assess the relative weight of an intervention’s benefits and ethical burdens, particularly if one refuses, as our approach recommends, to assign greater importance to certain values a priori. One would avoid, for example, asserting that individual freedom *always* takes precedence over state beneficence, that the end *always* justifies the means, etc. (Grill & Dawson, 2015). Fortunately, **public health ethics frameworks** provide reference points to guide one through this process (Dawson, 2010). Three questions in particular can help focus the ethical analysis:

- Are the benefits proportional to the burdens incurred? (principles of **utility**, **equity** and **efficiency**)
- Does the intervention allow the public health objectives to be met? (principle of **effectiveness**)

These three questions represent an effort to synthesize the ethical guidelines and principles that govern the main general public health ethics frameworks. If you wish to consult a general public

health ethics framework, several are referenced in the bibliography. If you already have a framework that meets your needs, we suggest using it to guide your ethical analysis.

Conclusion

This document is designed to provide an explicit and reasoned approach to conducting an ethical analysis of paternalistic public health policies. In choosing to frame the debate in terms of paternalism one risks assigning disproportionate weight to certain values within the deliberative process. The third step in our approach aims, among other things, to compensate for the effect of such framing.

A framework intended to guide the ethical assessment of public policies also risks obscuring an obvious fact: ethics is neither the only factor, nor probably the most decisive one, to be considered when deciding whether or not to implement a policy (Lomas, Culyer, McCutcheon, McAuley, & Law, 2005).

It is nevertheless true that ethical deliberation contributes to the development of more equitable and more responsible public policies. And more importantly, the integration of ethics concerns into the deliberative process supports the development of a public health culture possessed of the means to achieve its aims. We hope that the present framework can prove useful in this regard.

A selection of public health ethics frameworks

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