

Comment on Hospers

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Professor Hospers' attempt to justify a version of legal paternalism is confusing. It is not at all clear, to begin with, that what he defends meets his own definition of legal paternalism. Furthermore, he advances no less than four separate and distinct justifications for paternalism directed toward "ordinary, normal adults" (p. 257),* the relations among which are by no means evident. I shall endeavor to show that none of Professor Hospers' proposals should be accepted as it stands.

Hospers defines legal paternalism as "the view that the law should, at least sometimes, require people to act (a) against their will (b) for their own good, in that way protecting them from the undesirable consequences of their own actions" (p. 255). Hospers rejects any form of paternalism which does not help people achieve their long-term goals, even if such action would be for their own good: "what is *for the person's good* may not be the same as *what he wants* (even in the long run)" (p. 265). Here a problem at once presents itself. If Hospers believes that one can legally act against someone's present will in order to help that person achieve his own goals, then what he is supporting counts as paternalism under his definition only if it is for the person's own good. (Hospers, of course, has explicitly rejected the view that, necessarily, a person's long-term goals are what is for his own good.) But if the action in support of the person's long-term goals over his present desires is not for his own good, what reason is there to do it? Suppose, for example that someone has a carefully constructed plan, elaborated over the course of a year, to commit suicide by jumping from the top of the Hoover Tower. (The plan, we assume, is not for his own good.) Just as he is about to leap, he has a sudden feeling of fear and steps back. (He has not abandoned his long-term goal and will try again later.) According to Hospers' principle, someone on hand who knew about his plan ought to push him over: a temporary change of heart must not be allowed to interrupt his long-range goals. Should one legally require people to act against their own good and short-term desires, simply because their long-term desires would otherwise be impeded?

Perhaps I have interpreted Hospers uncharitably, and what he actually

* This and following page references are to the paper by John Hospers, "Libertarianism and Legal Paternalism," *Journal of Libertarian Studies* 4 (Summer 1980): 255-266.

means is that, of those actions that are both contrary to someone's present desires and are for his own good, one is justified in supporting only those that agree with the person's long-term goals. Although less drastic than the previous construal, this version also is unsatisfactory. Assuming that it is for one's good not to be a chain-smoker, and that someone has a long-term goal of giving up smoking, an intervener would be justified according to the contention under examination in bringing the full force of the law down upon our hypothetical quitter if he found temptation at some point too much for him and lit up. In a Hosperian world, one imagines, the common experience of breaking one's New Year's Resolutions would have severe legal consequences, provided that the resolutions were for one's own good and were not spur-or-the-moment choices.

One could easily continue to construct *reductiones ad absurdum*, but it is already sufficiently obvious why libertarians ought to be repelled by Hospers' proposal. How one balances present desires against both long-term goals and what is good for one is a matter for the individual to decide. There is no criterion of rationality according to which acting on one's present desire can be measured and found wanting: is the smoker in the previous example who has a cigarette simply because he wants to at the time irrational? (We shall consider below whether his action is, by Hospers' standards, voluntary.) Even if there *were* such a criterion of rationality, why should people who do not wish to observe it be compelled to do so?

Furthermore, it is questionable whether the application of Professor Hospers' view can be distinguished in practice from the type of paternalism he rejects, in which one acts for someone's own good even though the person does not in the long run want his own good. The difficulty arises from the familiar fact that an action can often be referred to by different descriptions—descriptions which differ in their bearing upon the type of paternalism being practiced. For example, let us modify our example of the chain-smoker so that he is now content and would vigorously repel, even after sober consideration, any efforts to induce him to cease. One might at first sight think that forcing him to refrain from smoking would constitute an obvious case of unjustified paternalism on Hospers' view: one cannot compel people to act against their long-term goals. It might well be the case, however, that the smoker does have the long-term goal of avoiding lung cancer. If this is true, then interfering with the smoker can be described as either "thwarting the person's long-term goal of continuing to smoke" or "helping the person achieve his long-term goal of avoiding lung cancer." It seems likely that, for almost every action one could imagine, one can produce some description of it that satisfies *some* long-term goal of the person against whom the interfering action is directed. For instance, to take one of Professor Hospers' cases, suppose one is faced with someone who wishes to exist over his life-span in a state of drug-induced euphoria. The person might also want to live for more than ten years, and, if one believed that the

person's taking drugs would impede *this* goal, would one not therefore have a rationale on Hospersian grounds for paternalistic action? One might well rejoin that in cases where there are conflicting descriptions of the type adduced, the choice of which to adopt is not arbitrary but must be determined according to what seems reasonable in the given instance. But again the question arises, who is to determine this? A paternalist might be extraordinarily difficult to convince that his attentions were unwanted.

Some might argue that, although the problem of description admits of no ready solution, this offers no insuperable bar to deciding whether Hospers' criterion has been met. Why cannot one hold (whether Professor Hospers would assent to such a strict construal is another matter) that if there is *any* description of an act of interference according to which it impedes someone's long-term goals, then the act directed against the person in question is illicit by Hospers' rule? On this interpretation, however, anyone who had the long-term goal of not having paternalistic measures taken against him would be able to halt from its inception the application to himself of Hospers' principle. It seems to me that there is another respect in which Hospers' principle offers less justification for paternalistic action than he thinks it does; what he takes to be a simple corollary of his principle—which would justify, in many cases, preventing people from committing suicide—does not follow from it. He states: "we help him achieve his long-term goals—which all, of course, presuppose life—by not letting him kill himself now" (p. 264). First, instances of goals not presupposing one's continued existence, or indeed, requiring one's being dead, are readily producible—e.g., achieving fame after one's death or martyrdom for a cause. Also, it does not follow from someone's having long-term goals for which his remaining alive is a necessary condition, that staying alive is a long-term goal of that person. (Otherwise, refraining from chain-smoking would be a long-term goal of anyone not having lung cancer who wished to avoid increasing his chances of contracting it.) If Hospers cannot show that everyone does have this long-term goal, then the justification he advances for halting suicide attempts is weakened. Hospers might reply that even if someone does not have the goal of staying alive, he has other goals which presuppose that he does stay alive. It does not follow from this, however, that staying alive is a necessary condition for all long-term goals the person has, or any that are for his own good.

As the prevention of suicide forms such an important part of the examples Professor Hospers supplies, I think one is justified in considering two additional arguments for the assumption that, in stopping a suicide, one is only helping a person achieve his long-term goal of staying alive. The first is an application to the case of suicide of what Hospers says about force-feeding a hospital patient: "from the fact that he has already lived this long, . . . [we] are justified in having a presumption that he wishes to live" (p. 258). How does it follow from the fact that someone has lived for a certain

length of time, that he wanted to do so? Unless he wished to live in the past, an inductive leap to the conclusion that he probably now wishes to live cannot get off the ground. (Perhaps he really wanted to commit suicide for several years, but the time was not right to do so.) The second argument is not advanced by Hospers, but seems consistent with his line of approach. It is simply that most people do have a long-term desire of great strength to remain alive. But since most people do not attempt suicide, the force of this consideration in showing that those who attempt suicide are really acting against their long-term goals is at best problematic.

So far, Professor Hospers' position has been taken to be that a paternalistic action directed at someone is justifiable if and only if it promotes the long-term goals of that person. But it is unfortunately unclear whether this is in fact what he proposes in other sections of his article. He states at one point: "the greater the degree to which a person's action . . . is *voluntary*, the less are other persons (or institutions, especially the law) justified in behaving paternalistically toward that person" (p. 260). One would like to know, first of all, what degree of voluntariness is sufficient to render paternalism unjustifiable, a matter about which Hospers nowhere informs us. According to Hospers' criteria of voluntariness, as will be apparent even from the brief discussion of them below, almost all actions are to some extent involuntary. Exactly which ones are sufficiently so to allow paternalism? Also, what is the relation between this proposal and the principle of intervening to aid pursuit of someone's long-term goals? Someone might fulfill, at least to whatever extent actions usually classed as voluntary do, the criteria for voluntariness set forward by Hospers and yet still be acting against his long-term goals. Let us return to the example of the chain-smoker whose long-term aim is to stop smoking but who on occasion backslides. Suppose, this time, that when he does so, he acts not from some strong craving but simply because he wants to, without pressure. He is fully informed about the facts concerning the dangers of smoking and is not in the wrong psychological state. Then, his smoking is, by Hospers' criteria, voluntary. Is paternalism justified? If the long-term goal principle is considered by itself sufficient for paternalism, then the answer might be yes; but if the involuntary criterion is brought into play, action would seem to be precluded. It is also possible, though less plausible, to take Hospers to be arguing that paternalistic interference with actions of a certain degree of involuntariness is acceptable, provided that such interference does not thwart the person's long-term goals (see p. 264). That is to say, a paternalistic act would not be required to help the person achieve his long-term goals; it must, though, at least be neutral.

However this problem of interpretation is settled, Hospers' criteria of voluntariness seem to be unsatisfactory for his purpose, viz., the delineation of a sphere of action within which paternalism is justifiable. Hospers' non-coercion requirement, in particular, seems intolerably broad. Hospers

maintains that "any kind of *pressure* put on you interferes with the voluntariness of your decision" (p. 261). He appears to take pressure in a very wide sense, to include anything that induces one to decide hastily or interferes with the exercise of one's "untrammelled decision-making faculties" (p. 262). For example, he claims that laws against duelling may be justified "because if duelling were legally permitted many people would feel great pressure to preserve their 'macho' image by never turning down a challenge . . . even though they would prefer not to, and would refrain but for the pressure" (p. 261). Here one need only observe that many social practices usually taken as unproblematic would, by this standard, be candidates for legal prohibition. Some businessmen may feel under heavy pressure to match their competitors' price cuts: without the pressure they would prefer not to lower their prices. Should we therefore outlaw competition? Incidentally, why does Hospers allow a *general* prohibition of duelling on the grounds that some people would be placed under intolerable pressure? What about those who like duelling? To reply that the persons under pressure really want "a life freed of this curse" (p. 264) is not to the point.

Rather than construct parallel criticisms of Hospers' second and third requirements for voluntariness, let us turn to the third justification Hospers offers for paternalism. He allows interferences of the sort in which one ignores someone's present wishes at that person's previous request. The problems connected with these arrangements are complex (one hopes, for instance, that Hospers would not wish to make all of them legally binding) but it seems offhand that, to the extent such arrangements are acceptable, one simply has an instance of agreement between *A* and *B* that *B* is, under certain conditions, to do something to *A* in the future. Why such an understanding must be subsumed under the rubric of doing what is in accord with *A*'s long-term goals is not apparent. One would have thought that one might make an agreement of this kind that had nothing to do with, or even opposed, one's long-term goals. The validity of such agreements rests on mutual consent: if Hospers holds that consent is not necessary, he is back to all the problems of the long-term goals view.

Whatever one decides as to the acceptable scope of such arrangements, the type of consent on which they are founded should not be equated with a variety of pseudo-consent espoused by Professor Hospers. Suppose one intervenes at t_1 to prevent a suicide, and that at t_2 and following, the object of one's ministrations makes no further attempts to end his life. Has the person consented to one's intervention, thus validating it by showing that the intervener had correctly surmised his long-term goal of remaining alive? Not at all. First, it does not follow that because someone no longer attempts to commit suicide, that he has resolved to stay alive. He may simply have no present desire to kill himself but have no long-term plans about the matter or, indeed, may still wish to commit suicide but consider the time unsuitable. Second, if someone does now have the long-term goal of staying alive,

it does not follow that the person has validated the intervention. It seems quite coherent for someone to say, "Now that you have rescued me, I no longer want to kill myself. But you had no right to stop me when I did want to." Even disregarding this point, to hold that all that is required to validate paternalism is that someone *now* have a long-term goal in conformity with what the paternalist aims at still seems much too permissive. In this view, a deprogrammer who had kidnapped someone from a religious cult and compelled him to submit to a barrage of propaganda would be vindicated if his efforts were successful. Hospers ignores the effects of the intervention upon how one's long-term goals are constituted.

There is also, run together with several of the other justifications, another way Hospers attempts to support paternalism. He points out that for some acts, "the consequences . . . would be far-reaching and possibly catastrophic" (p. 260). He has in mind especially suicide, in which a successful act eliminates the opportunity for future choice, but apparently teenage marriages and unhelmeted motorcycling qualify as well. If one compels someone about to take such catastrophic acts to reconsider, then one has not damaged him. One has either saved him from death (or a worse fate, such as teenage marriage) if he now reverses his hasty decision, or left him where he was, since he is still free to reject the intervener's advice. It seems to me that to allow unrestricted freedom of choice only for those actions which do not have drastic consequences results in an etiolated notion of liberty. If one may, for example, require motorcyclists to wear crash helmets on grounds of safety, why not prohibit the dangerous sport altogether? (Incidentally, if the motorcyclist refuses to wear a crash helmet and, as a consequence, faces legal penalties, in what sense is he free to reject the "advice"?) Even more questionable is the implicit claim that in compelling someone to reconsider, one has not made him worse off. Sometimes one wishes to act at a particular time: if, for example, it was important to the teenagers to marry before they reached eighteen, an enforced waiting period beyond that point may well inflict harm upon them.

The problems Professor Hospers raises are difficult and important ones. While recognizing the importance of his provocative remarks, I cannot think that the approach he suggests is a correct one.