Public Health Paternalism: Continuing the Dialogue

Thomas Nys*, University of Amsterdam

*Corresponding author: University of Amsterdam, Department of Philosophy, Nieuwe Doelenstraat 15, 1012 CP Amsterdam, The Netherlands.
Email: T.R.V.Nys@uva.nl.

According to Stephen Holland, the challenges I mention in my original paper can be met, so that, in a way, the problem of paternalism in public health care—which I intended to put into perspective by drawing out some possible justifications for it—returns in all its might and glory. But of course, as Holland observes, I never suggested that my challenges could *never* be met. I only wanted to point out that for each and every particular public health policy that should come to our attention we should reflect upon these challenges and see whether they could provide reasons for justification. I believe that the discussion is often stalled because these measures—in the absence of individual consent and in their aim to benefit the public's 'best interests'—seem to be paternalist by default. In my paper, I wanted to call this assumption into question, but never intended to prove that there is no such thing as unjustified paternalism in public health care. Nevertheless, Holland's criticism is very insightful and he has done a lot to clarify my position. However, he also puts me on the spot by urging me to argue to what extent I can meet his rebuttal, and I am very grateful for that opportunity.

Broad and Deep Autonomy

First, as Holland acknowledges, it is indeed true that I did not intend to come up with a general justification of paternalism on grounds of broad or deep autonomy. There are indeed counter-examples in which the violation of autonomy in particular choices (e.g., vaccination while being unconscious) is so severe that it cannot be justified by claiming that someone is still able to be the author of his life. Still, I maintain that when public health measures are concerned, the violation is often not that strong while a concern for people's broad or deep autonomy counts as a possible and relevant justification. On my account, it is not that narrow (shallow) autonomy should be trumped by broad (deep) autonomy in all cases, but that minor infringements of the first can be justified by an appeal to the second. Admittedly, this is a balancing exercise but I don't see why that would be less interesting. Most importantly, my key point is that the benefits in terms of health can be further unpacked in terms of broad and deep autonomy. What justifies the emphasis on health is not just that it avoids the pain and agony of illness, but that it furthers your autonomy, i.e. the capability to conduct your life in ways you think fit.

Of course, and I only mentioned this in passing in my original article, since this is indeed a balancing exercise with the burden on those who want to do without the health-improving measures, people should be able to opt out, but the default—that is, public health care's paternalism—lies in the fact that opting-out is the exception and therefore ought to be more difficult.[1] Since health is so important, and decisions often have an irreversible effect, the evidence of autonomy on part of those who want to deviate needs to be stronger.

What I have in mind is something along the lines of Richard Thaler and Cass Sunstein's *libertarian paternalism* (Thaler & Sunstein, 2009). What they show is that humans—in contrast to what they refer to as hyper-rational 'econs'—often go against their own best interests. People are quite irrational when it comes to maintaining or improving their 'health, wealth, and happiness'. Therefore, what people need is a paternalistic 'nudge', a little push in the right direction. This push, however, preserves freedom of choice (which explains its libertarian character) while, at the same time, it involves changing the architecture of those choices with the goal of improving their true interests (which accounts for its paternalist character). If, for example, the apples in high school cafeterias are placed *after* the donuts and brownies, then we know that people will consume more of these fatty and unhealthy foods. Therefore, we should reverse the order to stimulate public health. Likewise, by setting the default of health care coverage to approximate the

doi: 10.1093/phe/php028
Advance Access publication on 26 October 2009

actual needs of individuals we prevent people from making bad decisions (often by making no decisions at all).

Sometimes a nudge also involves an economic incentive.[2] Our options are framed differently when we know that there are costs involved if we choose option B over A, because it then becomes more rational—ceteris paribus—to choose A. Yet, freedom of choice is maintained because you are still free to choose B as long as you are willing to pay the price. What matters, however, is that people should have the ability to opt out at relatively low costs. For instance, people can still choose donuts instead of apples if they put their minds to it. Likewise, they can choose to drive without wearing helmets or seatbelts if they are willing to bear the consequences. And there are many public health measures that follow this logic. In Belgium, for example, people are obliged to pay regular visits to the dentist's (which nobody especially looks forward to) because, if they do not, then their insurance will not (fully) cover their dental bills. But no-one is actually forced to go to the dentist's. It still only involves a nudge.[3]

One of the central ideas of Thaler and Sunstein is that such nudges can improve self-control and by that, we could say, people's autonomy[4] —not by giving them a gamut of choices and letting them figure it out for themselves, but by presenting these choices in such a way that they will choose what they really want. Note that health is then perceived as something that people indeed really want, and therefore as something that is perfectly in line with a concern for autonomy.[5] On this reading, we would not really interfere with people's autonomy, because we would only secure their 'true interests'. But we need not make this bold assumption. Autonomy could just be respected in the freedom of choice condition (i.e., we don't need to judge which choices are autonomous and which are not), but we raise the bar just a little bit for those who deny that health is what they really want. The triviality of the infringement then corresponds to the low costs of exit.

I concede then that when push comes to shove, narrow and shallow autonomy trump the broad and deep alternatives (that is, Holland criticism holds true). But they do so on the negative side, so to speak: as people's refusal or dissent to certain public health measures. Nudge paternalism doesn't interfere with one's choices as it reframes these choices themselves. It sets the stage in a different way. People can object that in this new scenario their autonomy is hindered because they now have to withstand these nudges whereas in their preferred scenario they wouldn't have to (that is, there is indeed an infringement of autonomy). Still, such paternalism is justified when (a) opting-out is possible at fairly low costs, and (b) on grounds of health and its relation to broad and deep autonomy.

When it comes to deep autonomy, another of Holland's concerns is that people may think that there are more important, more valuable things in life than health. Putting up obstacles and barriers in the form of incentives would prevent these people from committing themselves to what they think is important. They would be trapped in a boring safety zone. Nevertheless, the examples of the old-school rock-and-roller trying to make 'a beautiful corpse' and the nihilist philosopher are particularly bad examples, I believe, for I fail to see how public health measures would interfere with their anarchist or nihilist life styles. Sure, it makes their projects more difficult, yet at the same time, such difficulty is exactly what they need in order to make a statement. One cannot be a rebel without having any enemies.

According to Holland, however, I would be committed to paternalism toward such individuals because deep autonomy would be more important than shallow autonomy. But again, no such general principle follows from my challenge. What matters is that people can still opt out, and I do think that the current measures we know of do not prevent us from taking any health risks. More importantly, lawyers, adventurers and Muslims alike can commit to their values *within* the framework of public health care (that is, while complying with its rules and regulations). Holland's most convincing example of forcible vaccination, mentioned in a footnote, is objectionable to the extent that it is indeed genuinely enforced and that it involves more than just a nudge. However, and this is very important, what we want to know is *why* people object to vaccination. Is it because it says something about what they truly care about and are committed to? Or are they just afraid?[6] And finally, although such refusals should be accepted on grounds of respect for autonomy, perhaps there are other reasons (justice, solidarity) that make such interference justifiable.[7]

It is indeed somewhat overstated that we review and revise our entire 'conception of the good' in autonomous reflection, sitting on stones or in dusty attics. Things often just happen to us, and we try to adapt or cope with these changes. Therefore, Holland holds that we should not focus on the outlandish and exotic ability of deep autonomy at the expense of something that is very common and valuable, i.e., being truly engaged and committed to our values. Our shallow autonomy is often more important than our deep autonomy.

Nevertheless, I think that reflection and revision is actually quite common, often as a *result* of changing external circumstances. Becoming a grandfather or facing retirement often prompts such evaluation and reassessment. Now, the point with regard to deep autonomy is that being deprived of health (to any serious degree) also deprives one of numerous opportunities that life has to offer. Our health is something we best take care off so that, when certain opportunities turn out to be unsuccessful (or disappointing, or futile, etc.), we maintain our flexibility. And this is why we should be nudged toward our health, even if it interferes (in what I believe is a relatively mild way) with our current path in life. And again, *within* the course set out by various public health measures there is ample room for risk, rebellion and different life-styles; and, as I mentioned before, the true 'dissidents' should be allowed to steer their own course. Yet, the speed bump that they have to take, the nudge that they should withstand, is justified by an appeal to deep autonomy: be careful what you sacrifice, because your health is a precious thing.

Also, I fail to see why current public health measures would turn 'dashing young Cavaliers' into something like boring middle-aged accountants. Instead, I guess that a society that provides in good health care precisely allows for such colorful lifestyles to blossom. Therefore, I do not think that I qualify as a 'killjoy health fascist', not even a sophisticated one.

Democracy and Public Health Care

I intend to be more brief when it comes to Holland's comments on the second and third challenge. With regard to the second, it is of course absurd to maintain that an appeal to democracy would drain all accusations of paternalism of their validity, but it is equally absurd to hold that the democratic consent by which public health measures are supported is simply irrelevant to the question of paternalism.

In fact, on the most important issue, Holland seems to agree with me, namely that under certain conditions, even those on the losing side of democracy, so to speak, cannot complain that there was no respect for their autonomy. However, according to Holland, this only holds as long as democratic decision-making bears some relevant features, to wit, 'a very manageable issue; a very well informed electorate; a fair, transparent and very sensitive electoral mechanism, such as a referendum'. I take it that Holland, because respect for autonomy is so important, supports better democratic mechanisms (and so do I). *The real question, however, is whether the charges of paternalism are fueled by the imperfection of democracy, or by the confusion between disappointment and disrespect for autonomy.*

Holland seems to say that we should strive for better (more transparent, etc.) democracy in order to establish the legitimacy of health care regulations that would respect the autonomy of both winners and losers. The losers, so it seems, can now rightly complain that they are kept 'healthy' against their will. But this complaint will of course remain. And if so, then what will distinguish between the democratic deficit and Holland's acknowledgement that to lose in elections is not necessarily to have one's autonomy violated? Put differently, the charges of paternalism can be a symptom that is justified on grounds of a larger malaise (which we should address by improving democracy), but it could also be a misunderstanding of the democratic process itself.

The difficulty, I believe, is that both these interpretations are true. As Charles Taylor observes, there is a vicious circle at work here: people have the impression of being powerless and impotent on the level of political decision-making, and so they retreat into their private cocoons and become 'prisoners of their own heart'. Yet the result is of course that they become even more powerless (more discontented, more alienated, etc.), and a vicious downward spiral is set in motion. Taylor's hope, however, is that this vicious circle could be turned into a virtuous one by encouraging participation and making people aware that they do have a voice and are able to make a difference (Taylor, 1992, pp. 118). My intention, in pointing out that public health care measures are the upshot of democratic procedures, is to prompt such awareness. Public health measures are the result of political decisions that *we* make, and in order to have them respect your individual autonomy, you should voice your criticism as part of that 'we'.

No doubt, the question of whether group decisions may legitimately override the interests of the non-consenters is a difficult matter. In a recent contribution to this journal, Kalle Grill has tried to shed some light on this topic. His conclusion is that, even within a liberal, anti-paternalist framework, such option-restricting policies can indeed sometimes be justified, but that the rules or principles that would allow us to differentiate between the justified and unjustified cases would be rather complex (Grill, 2009: 11). This overwhelming complexity, Grill says, may prompt us to opt for a libertarian, Nozickian model that rejects the legitimacy of option-restricting group decisions altogether or, alternatively, it could encourage us to look for other justifications. With my first and third challenge, although very

tentatively, I have tried to provide such different sources of justification.

Solidarity and Justice

Finally, there is the solidarity and 'harm to others' issue. Here, I fully acknowledge that this part, as Holland observes, fits a bit oddly into my general story as we leave the topic of justified paternalism and start looking for other justifications for interference with individual freedom and autonomy. Yet, as I mention in my paper, the reason for my challenge is that charges of paternalism are precisely misguided *because* of this confusion. People say that they don't want to be interfered with for their own good, while in fact this is not the reason why such policies are adopted. Sure, it is about their own good as well, but also about the good, interests and—as I have argued above—the autonomy of others.

Also, what Holland ignores in his final remarks is the issue of *justice*. In the example of the mandatory insurance fees, it is not that the rich are morally praiseworthy for paying for others (e.g., through acts of charity) but that they *should* indeed foot a larger part of the bill. The dilemma as Holland presents it—although I agree with him that the terms allow for more complexity than is usually assumed—is between a rugged individualism and a heartfelt communitarianism. But this is a false dilemma. It is not that I long for a society in which warm feelings of solidarity would thrive, but that some interference with individual liberty and autonomy is what the demands of justice require. For example, it is not question-begging to say that, in order to provide an equal right to health care, the rich should give up some of their wealth; it is only question-begging if one believes there is no such right. It is true that I have not provided any independent arguments for this claim, but I do no think that it is a remarkable position as it is firmly established within a large body of literature.[8] However, I do not deny that there are different conceptions or even theories of justice on offer. Therefore, if Holland really wants to answer this third challenge he should confess to which of these conceptions he adheres.

Notes

1. It could very well be that Holland just wants to secure this possibility to opt out. I then fully agree with him, and our critical exchange is then based on a misunderstanding (for which I bear full responsibility).
2. Sunstein and Thaler mention this possibility in their chapter on 'saving the planet' where they say that 'despite its coercive features, this basic approach is in a sense a cousin of libertarian paternalism because people can avoid paying the tax by not creating pollution' (Thaler and Sunstein, 2009: 196). Nevertheless, I do not think that these authors would support my stronger version of paternalism. In any case, I just use Sunstein and Thaler as illustration of what (justified) paternalism in public health care could imply.
3. I readily acknowledge that the incentives can be so high that it almost becomes impossible to defer. This is indeed a balancing exercise – no matter how uninteresting this may seem from a philosophical perspective.
4. Note that Sunstein and Thaler do not mention the term 'autonomy.'
5. This could then be added as a fourth challenge: the choice to avoid health is a non-autonomous choice, which we should ignore in the name of autonomy. However, claiming that what people want is to preserve their health is a bit presumptuous (in fact, such 'filling in' of people's 'true' wishes, is the road to totalitarianism, if we may believe Isaiah Berlin). Nevertheless, I think we should reflect on the fact that most people indeed want to be healthy, and that, although they may have more exciting or passionate desires, they do consider a general concern for their health to be in their best interests. The beauty of libertarian paternalism is that it takes this 'fact' seriously while, at the same time, providing options for autonomous refusal and deviation. It provides scaffolding (I owe this term to Joel Anderson) for autonomy on part of those who really want to be healthy, and still leaves a way out for those who want to dissent.
6. Holland thinks that it can be a matter of commitment when he presents us with the example of religious people wanting to suffer whatever disease the Lord has in store for them. First, I think that this position itself can be contested (for instance, on ground of the mind-boggling consequences of such a position – would it still be alright to rescue people from earthquakes?). Secondly, and this is a personal note, I think that such a total surrender to the will of an omnipotent being is in tension with what it means to be autonomous. This relates to a point I made earlier: respect for autonomy means that one is taken seriously, that one's reason for action receive due attention. This is not to say that every reason is a *good* reason and that we should therefore, on grounds of such a humble, relativist position, allow the individual to do whatever she wants. If there

are indeed, as I maintain, good reasons to take care of our general health, then these should be countered by equally strong reasons to override these reasons. And indeed, I think that such overriding reasons exist.

7. Suppose there is an outbreak, a large scale pandemic of Mexican Flu. Then forcible vaccination may be justified on grounds of harm to others.
8. I think of the vast literature that arose in the wake of John Rawls, most notably perhaps the work of Norman Daniels. Also, there are writers of a more egalitarian bend that would certainly hold this position.

Acknowledgements

The author receives a grant from NWO, The Netherlands.

References

Grill, K. (2009). Liberalism, Altruism, and Group Consent. *Public Health Ethics*, **2**, 1–12.

Taylor, C. (1992). *The Ethics of Authenticity*. Cambridge, MA: Harvard University Press.

Thaler, R. H. and Sunstein, C. R. (2009). *Nudge: Improving Decisions about Health, Wealth, and Happiness*. London: Penguin Books.