

**Justifying state interventions:  
the case of paternalism**

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**PhD Thesis, 2000**

## **Abstract**

Justifications for state interventions which seek to influence the consumption patterns of goods, services and activities are usually based on notions of equity or efficiency: the market either fails to offer a fair outcome in distributional terms or it fails to arrive at an efficient outcome in terms of aggregate welfare. But these justifications, implicitly and unintentionally, often incorporate elements which focus on the correction of another kind of failure: that of individual reasoning. They do this either because the concepts of equity and efficiency are invoked to justify state intervention beyond the analytic competence of these principles, or because support for specific public policies or institutions require additional principles to justify the particular form these institutions take. In short, justifications from equity and efficiency are underdetermined. But in order to support interventions which are at least partly correcting individual reasoning failure, we need a defensible theory of state paternalism. Existing discussions of paternalism fail to explain why the state should know *better* than the individual what is in his or her own best interests, even if it is acknowledged that individual reasoning can be sub-optimal. The thesis concludes with a discussion of criteria which do support the superior decision-making of the state in certain circumstances: where the benefits (or costs) of consumption are likely to occur a long period into the future; where direct experience of the particular form of consumption is problematic; and where technical complexities make judgement about appropriate consumption difficult. The thesis concludes with an analysis of some applications and implications of these proposals for state intervention in consumption.

# Contents

<b>Chapter 1: Introduction.....</b>	<b>5</b>
<b>Chapter 2: Defining terms and mapping the policy field.....</b>	<b>8</b>
State intervention.....	8
Consumption of goods, services and activities .....	11
Universalism.....	15
Universal interventions in the UK.....	18
Expenditure .....	29
Conclusion.....	31
<b>Chapter 3: Universalism since the war .....</b>	<b>32</b>
The NHS .....	32
State education.....	45
Public service broadcasting.....	52
Other areas of consumption.....	57
<b>Chapter 4: Justifying state interventions: a review of the literature .....</b>	<b>65</b>
Equity .....	66
Efficiency and market failure.....	78
Counter arguments: opposition to state intervention.....	96
<b>Chapter 5: Equity and Efficiency: are they sufficient? .....</b>	<b>100</b>
Equity .....	101
Efficiency and market failure .....	118
Conclusion: the need for further justification.....	130
<b>Chapter 6: Paternalism: a neglected role .....</b>	<b>133</b>
A short history of a concept.....	136
Paternalism and merit goods in the policy literature.....	146
Defining paternalism .....	149
Types of paternalism.....	157
Paternalism and justifications based on ‘non-voluntariness’ .....	162
<b>Chapter 7: Justifying state paternalism .....</b>	<b>169</b>
The need for a theory of justifiable paternalism.....	169
Existing approaches to justifying paternalism.....	173
Justifiable paternalism .....	178
Potential objections .....	185
Conclusion.....	188
<b>Chapter 8: Applications and implications.....</b>	<b>189</b>
A new set of criteria for state interventions .....	189
Implications for ‘macro’ service areas.....	191
Implications for ‘micro’ service areas.....	195
Wider implications: other universal and means tested services.....	208
<b>Chapter 9: Conclusion.....</b>	<b>211</b>
References.....	216
Appendix: ‘Paternalism and public policy’, <i>Economics and Philosophy</i> , <b>15</b> (1999), 63-83..	242

## **Figures, Tables and Boxes**

Figure 1	<b>Demand and supply functions with and without subsidy</b>	p.9
Figure 2	<b>Demand and supply functions with subsidy and regulated prices</b>	p.10
Table 1	<b>Local government discretion over charging</b>	p.29
Table 2	<b>Government expenditure on universal subsidies, England, 1995-96</b>	p.30
Table 3	<b>Provision of long term care by ownership category (number of places)</b>	p.36
Box 1	<b>Universal consumption-specific interventions in the UK</b>	p.20
Box 2	<b>Examples of cosmetic surgery not purchased by some health authorities</b>	p.34

## Chapter 1: Introduction

The state intervenes in the lives of its citizens in an enormously wide variety of ways and with a diverse and complex range of objectives. One of the most significant objectives involves promoting individual welfare, and includes a whole raft of policies designed to improve the personal happiness, satisfaction and security of people compared with what might pertain without the coercive influence of the state. These policies include criminal laws prohibiting violence against one's fellow citizens, and the tax-based transfer of income from the better off to the less well off. In both cases, and in many others, the objective is to improve either welfare in aggregate or the welfare of those who have the most pressing claim to such improvements.

An important sub-category of policies of this kind seeks to alter the decisions of individuals in relation to personal consumption of goods and services. Thus, consumption may be increased by means of subsidy, including setting the price of particular goods or services to zero, or by compelling their consumption whether subsidised or not. Conversely, the state may tax certain items with a view to dissuading their consumption, or might prohibit that consumption outright. Furthermore, policies of compulsion and prohibition may not apply just to goods and services, but also to certain types of activity, such as speed limits on roads or restrictions on swimming in dangerous waters. Very often, although not exclusively, policies of this kind are implemented universally, that is regardless of the income of the consumer. In short, the state may intervene in consumption-specific decision-making on a universal basis.

This thesis sets out to investigate justifications for these kinds of intervention. In particular, it focuses on the role of paternalism, an underdeveloped feature of the policy literature. It will argue that paternalism constitutes a more significant element in consumption-specific state interventions than is often recognised, and that defensible forms of paternalism are therefore an important challenge to theoretical inquiry. However, it will also argue that current defences of paternalism are inadequate, and that a new theory is required for the conditions under which paternalism may be justified. The methodological approach is theoretical, in a sense that political philosophers and welfare economists would use the term. That is, it adopts a normative approach - 'what ought to be the role of the state?'. Although theoretical, the thesis focuses on specific policy issues.

Analysis of the justifications for state activity is well established, particularly for social services such as health and education, although less attention has been paid to similar interventions outside the ‘classic’ welfare state, such as public service broadcasting. It can often be useful to contrast the well-documented examples of welfare provision with those not conceived within the same analytic tradition, but nevertheless displaying similar characteristics of state involvement. Accordingly, these three services in the UK will form the principal set of exemplars in the following analysis: health and education chosen because they constitute the largest two areas of (consumption-specific) government expenditure; public service broadcasting because it is also in the public spotlight and, although consuming less of society’s resources, is subject to almost as much political controversy. However, other consumption-specific policies will also be considered in the course of the analysis, from libraries and arts subsidies to defence and policing, and from compulsory seat-belts to prohibited drug taking.

In most cases, consumption-specific policies are universal in nature; that is, they apply to everyone within certain categories regardless of their income. As a consequence, universalism will itself be considered in some depth, as will the history of this type of state intervention. However, there are some consumption-specific policies which are not universal, and which are instead dependent on means testing. Chief amongst these are housing and the personal social services. Much of the forthcoming analysis will be pertinent to these services in addition to their universal counterparts. So although means tested services do not constitute a significant proportion of the discussion, reference will be made to them at various points, as well as some implications for policy drawn out in the penultimate chapter.

The structure of the thesis is as follows. Chapter 2 analyses the concepts introduced above - state intervention, consumption, and universalism - in more depth, and reviews the range of consumption-specific policies in the UK. Chapter 3 looks at the development of these policies since the Second World War, concentrating on the National Health Service (NHS), state maintained education and public service broadcasting, but also briefly summarising other areas. It concludes with a snapshot of government spending. Chapter 4 reviews the literature on the justifications for such state intervention, classifying such attempts under equity or efficiency. It concludes with a brief review of the arguments opposed to state intervention. Chapter 5 takes the two sets of justifications and argues that they are insufficient, either because proponents of

state intervention invoke the concepts of equity and efficiency to justify state intervention beyond the analytic competence of these principles, or by supporting public policies or institutions which require additional principles to justify the particular form they take. Chapter 6 presents the missing element - paternalism. It provides a brief history of the concept, offers a definition and analysis of types, and suggests how the weak links in existing justifications relate to its central concern: the correction of individual reasoning failure. Chapter 7 presents a theory of justifiable paternalism currently absent from the literature: not just ‘why should individuals’ reasoning be sub-optimal?’ but ‘why, and in which circumstances, should the state know *better* than the individual what is in their best interests?’. Chapter 8 returns to the range of existing consumption-specific policies and analyses some of the implications of the analysis, paying particular attention to the issue of which individual services might be justified by this approach. Chapter 9 offers a brief overview and conclusion.

## Chapter 2: Defining terms and mapping the policy field

None of the terms introduced in Chapter 1 has a straightforward and unequivocal meaning, and it will be necessary to establish some clear definitions at the outset. The principal concepts - state intervention, the consumption of goods, services and 'activities', and universalism - are taken in turn. Then a review is undertaken of all the principal categories of universal consumption-specific policy in the UK, including two of the most significant non-universal services, paying particular attention to how the policies are effected in practice.

### State intervention

State intervention can take place in a number of ways (Le Grand, Propper, and Robinson, 1992). First, the state can directly *provide* the good or service in question, by owning the facilities and employing the staff involved in its production. Often this will involve replacing the market mechanism altogether, with state employees given the task of deciding how the good or service will be allocated to those who wish to consume it. The NHS provides an example of this kind of intervention and, although the state also subsidises its finance, this may not always be the case. The Post Office, for example, is a wholly state-owned enterprise operating in the private market: its finance derives from private individuals and, indeed, it makes a surplus for the exchequer (Curwen, 1988).

Second, the state can specifically influence the *finance* of a good or service, typically by means of a subsidy or tax on its production. That is, it can influence the price downwards by offering grants or other financial inducements which reduce the costs of production, or upwards by introducing taxes which increase them. There are other ways in which subsidies in particular can be effected. The development of vouchers has enabled the state to influence the consumption of a good or service without directly influencing production costs - the voucher acts as a form of subsidy mediated by the consumer, who is entitled to a fixed amount at the subsidised price (or free). The state may not have a view as to who should be involved in the production process; the objective is simply to influence patterns of consumption whilst allowing private market competition to keep costs to a minimum.



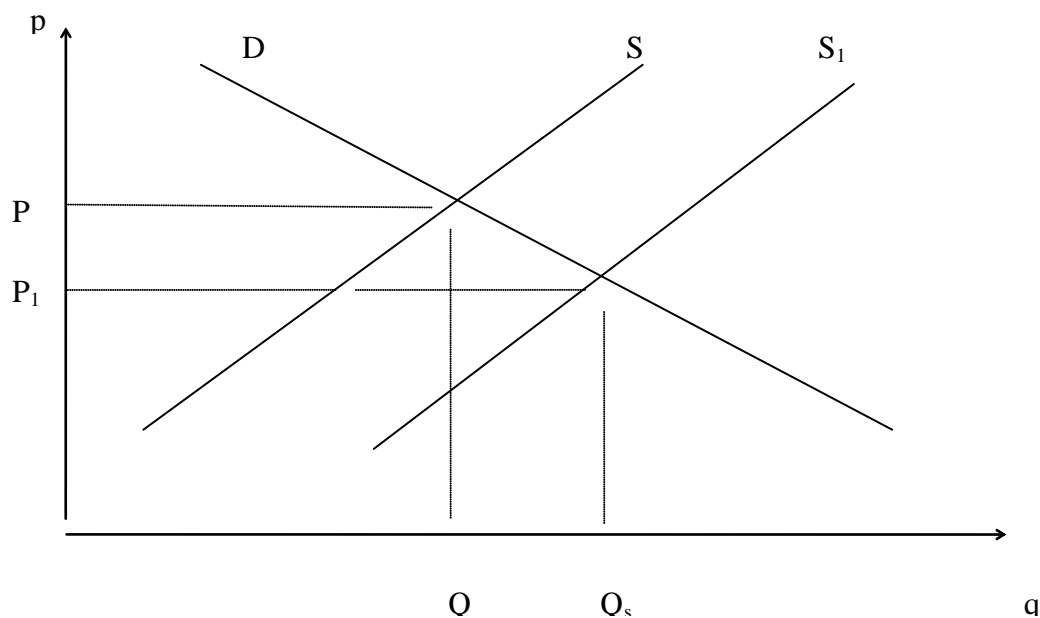
Third, the state can *regulate* the consumption of goods or services by enforcing pricing regimes or obligations to consume. For example, schooling is compulsory until the age of 16, regardless of whether a parent chooses to educate his or her child in a state or privately financed school; and prices are regulated by local government in the provision of certain municipal services such as swimming pools. Prices can also be controlled where there is no subsidy, as with the now defunct private sector rent controls and, currently, with the privatised utilities.

In practice, the state will often intervene by adopting more than one strategy at the same time: in the fields of health care, education and housing, all three forms of intervention are present within the institutions of the NHS, state schools and council housing respectively. In general, however, it is important to bear in mind that they offer distinct strategies for the state when it is thought necessary to intervene in the consumption of a good or service.

Our concern is with the state's wish to influence patterns of consumption. This will in turn have a significant impact on the way that the particular goods and services are rationed - that is, with how a balance is struck between supply and demand. Specific examples will be further considered in relation to individual services below, but it is worth outlining graphically the kinds of issues involved.

Figure 1 shows typical demand and supply functions,  $D$  and  $S$ , and a market clearing price and quantity,  $P$  and  $Q$ , with no state intervention.

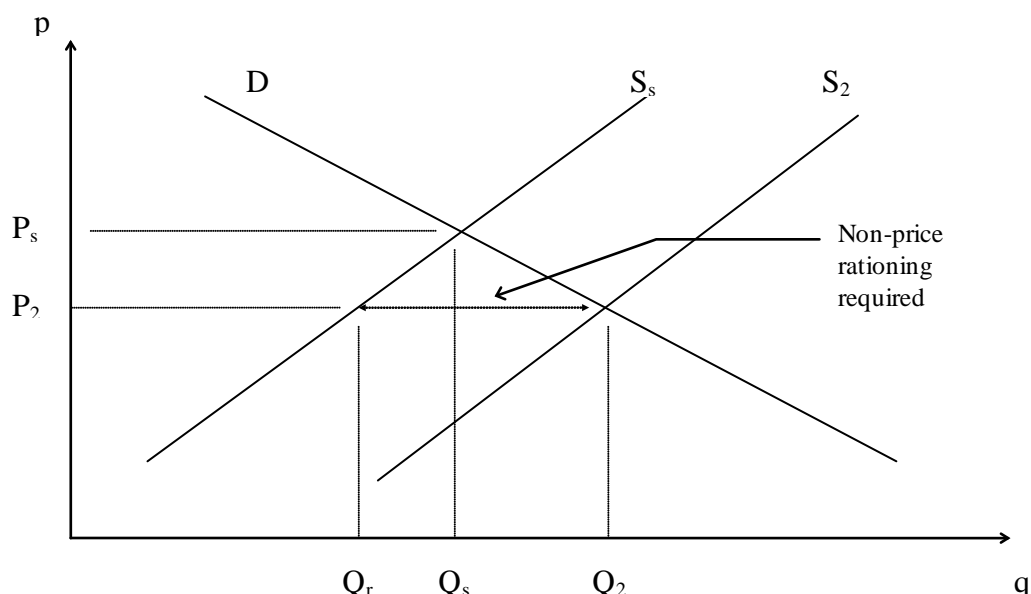
**Figure 1: Demand and supply functions with and without subsidy**



A state subsidy of this good will have the effect of shifting the supply curve to the right ( $S_1$ ) - the producer will be willing to supply a higher quantity for any given level of cost. If this takes place under competitive conditions, the subsidy will result in increased consumption to  $Q_s$ , and a fall in the price to  $P_1$ . The exact impact of such a policy will depend on the price elasticity of demand of the good or service in question. The higher the price elasticity (the 'shallower' the demand curve), the greater the effect a given subsidy will have on the total quantity consumed. Taxes obviously work in reverse, shifting supply curves to the left.

Rationing, in this example, will be entirely by price and could approximate to a situation facing theatre producers in receipt of state subsidies. The increase in  $q$  from  $Q$  to  $Q_s$  represents productions which would otherwise not be made. However, the state might also wish to regulate prices. Assume now that supply curve  $S_s$  in Figure 2 represents the position whereby a producer is *already* in receipt of a subsidy; the state cannot afford any further subsidy (to  $S_2$ ), but wishes to ensure that prices are no higher than  $P_2$ . In this case, the market clearing quantity of production will be  $Q_r$  (since this is how many units will be supplied at the highest allowable regulated price), but demand would be  $Q_2$ . There will be excess demand which cannot be rationed by price: the quantity  $Q_2 - Q_r$  will have to be rationed by *non-price means*. An approximate case in the real world might be the subsidised London Underground system; in this example, the excess demand is rationed by the deterrent effect of over-crowding and, ultimately, by simple lack of space on the trains.

**Figure 2: Demand and supply functions with subsidy and regulated prices**



In extreme cases, where no charging is allowed (as, with minor exceptions, pertains in the NHS), this non-price rationing takes on overwhelming significance, since it must do the whole job in other circumstances undertaken by price. These issues are considered further below with respect to individual areas of policy.

### **Consumption of goods, services and activities**

One can distinguish between the role of government in production and in consumption - between “how goods get produced” on the one hand, and “what gets produced” and “for whom it gets produced” on the other’ (Stiglitz, 1989 p.13). The distinction may not be as clear as it first appears, since interventions which influence the production process itself - through employment or health and safety policies - will to some extent affect the price, and this will in turn affect how much of a good is produced and who can afford to buy it. Nevertheless, the distinction is useful because from a policy point of view it separates out the objectives of policy from their incidental consequences. We are here concerned with policies which are directly concerned with the choices consumers make, ‘which people consume what’, not with policies directed at *how* goods or services are produced, even if these have incidental repercussions on consumption.

Furthermore, consumption will be interpreted broadly. We do not just consume goods such as cars and television sets, nor just services such as holidays or health care. We also ‘consume’ many activities which give us pleasure or satisfaction not provided by market exchange. So we may consume a pleasant walk, or a swim off a beach, or more risky activities such as driving fast through country lanes or climbing a mountain. Some forms of non-market consumption may involve other people: engaging in various kinds of sexual relations, for example, or requesting someone to assist in ending one’s life. Using ‘consume’ in this way may seem odd if one has the colloquial sense in mind, but the essence is the same. An individual ‘consumes’ an activity if it is conceived by that person to be *directly* beneficial to their welfare or interests (rather than *indirectly*, by engaging in paid employment, for example, or when undertaking some activity primarily devoted to other people’s ends).

Nevertheless, the distinction made above between production and consumption will mean some major areas of state intervention are not considered in this thesis. In particular, the nationalised

industries, or those ex-nationalised industries which are still subsidised through the exchequer, will be left to one side. Such state interventions have principally been concerned with sustaining particular industries or companies, originally because those industries were considered on economic terms to have ‘failed the nation’ (Morgan, 1984 p.99) or in order to avoid ‘duplication and wasteful competition’ (*ibid.*, p.107).<sup>1</sup> A similar rationale has been to secure employment for particular communities, such as the Department of Trade and Industry (DTI) grant made in 1999 to BMW to sustain production at a UK Rover car production plant. Similar grants are made regionally to support employment and local economic growth, and grants are also given to encourage scientific and technological developments.<sup>2</sup> The UK also contributes to the Common Agricultural Policy (CAP) of the European Union (EU) which subsidises the farming industry - in this case with the consequence of *increasing* prices to consumers, although this is not the direct purpose of the policy whose historic objective has been to support the industry.<sup>3</sup>

In certain cases, even if there is no subsidy there will be pricing policy which has a consumption element - the Post Office charges the same rate wherever a letter’s destination in the UK, effectively subsidising the price of long distance deliveries with short distance ones. Such a policy may be motivated by a desire to sustain levels of communication with remote areas. And many interventions in production, such as those which relate to health and safety, can never be entirely separated from consumption because they will often serve to increase production costs and thus the relative affordability of these goods. But none of these interventions is principally seeking to influence the consumption choices of consumers; the following analysis is concerned with policies *directly* intended to adjust consumption patterns.

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<sup>1</sup> Such as British Rail’s proposed integration with road haulage in the 1947 Transport Act; on the other hand, it could now be argued that rail subsidies to Railtrack are partly designed to encourage traffic off the roads on the grounds of pollution and congestion rather than ‘wasteful competition’.

<sup>2</sup> In 1995-96, according to the DTI *Departmental Report 1997*, support for industry was as follows:

Regional and other industrial support .....	£2,215 million
Trade scientific and other support .....	£2,299 million
Support for aerospace, shipbuilding, coal, steel and vehicle manufacture .....	£ 351 million

<sup>3</sup> The Ministry of Agriculture, Fisheries and Food *Departmental Report 1997* stated that ‘Market support under CAP’ amounted to £2,317 million in 1995-96.

One kind of intervention which appears at first sight to be focused on the consumption side is price regulation in the recently privatised utilities, such as BT, British Gas, and the water companies. Once privatised, companies such as these enjoyed near monopoly power in industries which had previously been solely within public ownership. This gave them both the incentive and the ability to charge higher prices than would have been possible in a competitive market. As a result, the state instituted various 'Of-bodies' (such as OfTel - The Office of Telecommunications) whose responsibility was to control the prices these companies could charge, as well as other regulatory duties, in order to counteract their monopoly power. However, such an intervention is essentially a corrective to an inefficient productive structure in the industry, rather than one designed to influence the consumption patterns of consumers directly. The policy is not concerned with why consumers decide to consume one good rather than another, or with how much they wish to consume (i.e. it does not seek to lower prices below that which would pertain in a *competitive* market); instead it focuses on how inefficiencies in production may be corrected, albeit ones which impact on consumption indirectly.

Focusing on interventions which seek to affect consumption will most commonly involve influencing their pricing. As we have seen, goods and services can be offered free, at less or more than their market price, either by means of subsidy, tax or regulation. The facilities of the NHS and much of the state education system are owned by the state, and thus these services are directly provided by the state in addition to being subsidised. However, many institutions are in the voluntary or private sector. The prices resulting from subsidies in these non-state-owned sectors are not necessarily regulated in addition: museums and opera houses will set prices taking into account the subsidy; universities have not charged 'top up' tuition fees to increase their income even when there has been no statutory regulation forbidding such charges. These institutions are non-profit making and may be assumed to operate broadly in the public interest and therefore follow through the intention of the subsidy. On the other hand, when the for-profit sector is running the subsidised service, the subsidising body may also need to regulate the price to ensure the provider does not simply pocket the subsidy without passing it on to the consumer. So, in contracting with private providers, a local authority may regulate the price of swimming baths or the prices charged by private bus companies. Central government also regulates the price of some subsidised services: NHS health care and secondary education cannot, in general,

be charged for as a matter of law, no matter how wealthy the consumer. Although such charges might seem warranted and indeed beneficial in some ways, they might damage other objectives of the service. It is precisely these other objectives which form the subject matter of this thesis.

In addition to subsidies, taxes (such as excise duty) may be charged on some specific goods in order to deter consumption, although this may also become an attractive type of revenue for the state. Indeed, some specific forms of tax, such as those on air travel and insurance policies, seem to have very little to do with deterring these specific aspects of consumption. Beer, wine, spirits, tobacco and mineral oils are goods subject to excise duty; betting and gaming services are also liable.

Finally, the state can simply prohibit, or compel, certain forms of consumption directly. Thus certain drugs - such as heroin or cannabis - are outlawed for private consumption, as are certain services, such as assisted suicide or euthanasia. Another extreme example is the prohibition of slavery contracts, even those voluntarily entered into. It could be argued that this is not a consumption decision but a production one - a particular form of productive relations is disallowed. But some people may enjoy existing in slave-like relations as a consumption end in itself; these are prohibited by the state. Other examples involve the state compelling consumption: secondary education is subsidised so that it is free at the point of use as we noted above, but furthermore children (five to sixteen year olds) *must* consume it. Other examples include motor car insurance, seat-belt and motorcycle helmet use, and (unless one brushes one's teeth with bottled water) water supplies containing fluoride.

Focusing on consumption, even broadly conceived, also allows a distinction to be drawn between policies concerned with influencing levels of income - through the provision of welfare benefits or, more generally, transfer payments - and those concerned with what that income is spent upon. A policy of transfer payments, in principle at least, is unconcerned with how the money transfer is then subsequently consumed. Another way of characterising the distinction is to refer to policies focusing on specific forms of consumption as those relating to 'in kind' provision. But this term does not capture the range of ways in which the state can influence consumption of specific goods or services, since it tends to be understood as applying only when the state actually does the *providing* and not, for example, when a subsidy lowers or eliminates the price

of privately provided goods. Neither does it capture those forms of ‘consumption’ which do not relate to a market exchange of goods or services. Thus the rather more cumbersome but accurate term for our purposes is ‘consumption-specific’.

### **Universalism**

So far we have specified that the focus of attention is on state interventions seeking to influence patterns of consumption. But what is a universal intervention in this context? Although certain services appear to be obviously universal, the concept is, in fact, rather difficult to define. It is probably most often applied to various forms of transfer payment. For example, child benefit is paid to all mothers who have children under a certain age, even if they have very large incomes. But those eligible for this ‘universal’ intervention are in fact rather a small group: clearly the majority of us do not match up to the relevant criteria.

The National Health Service (NHS) is also spoken of as a universal service, so is state education. But a moment’s reflection confirms that not *everyone* can or does use these services at any one time, and so they cannot be universal in the term’s most obvious and literal sense. Take the NHS: it offers most forms of health care free at the point of use. Surely making something ‘free’ automatically guarantees that everyone can obtain it? But such a straightforward connection cannot be sustained. In the first place, consider the meaning of ‘free at the point of use’. Even though everyone might in principle be welcome to present at some medical establishment, for some the personal costs in exercising this right (they may live a long way from the nearest doctor, for example), could preclude them from doing so. The phrase ‘free at the point of use’ gives the impression that there are no costs of any kind to be borne by the individual who seeks care, whereas these costs can, in fact, be substantial. Another example would be the earnings foregone by those who use ‘free’ state education between the ages of 16 and 18. And those who use ‘free’ public roads must bear the costs of other road users in the form of congestion and pollution.

This difficulty can be accommodated by referring to ‘subsidy’ rather than ‘free’: although there are various costs associated with the good or service, there is a subsidy which is available to everyone. But who is ‘everyone’? It is almost axiomatic that any good offered at zero price, or

high universal subsidy, will result in demand which exceeds the available supply - that is, what the political system will support in terms of public resources. Not everyone can expect to receive the service when they want it, and at the quantity or quality desired.

The consequence of this is that non-price mechanisms will be required in order to bring supply and demand into balance, often involving state employees exercising delegated authority to 'ration' resources. How this is done, and the pros and cons of various methods, is the subject of a substantial literature - particularly in the case of health care (Harrison and Hunter, 1994; Maxwell, 1995; Klein, Day, and Redmayne, 1996; New, 1997; New and Le Grand, 1996). But for current purposes it is enough to note that only a category of person - that is, those who satisfy certain criteria (those sufficiently ill, those aged 5-16, those with a motor car who can bear the traffic) - will actually receive the good or service in question.

So, if only categories of person are eligible for a particular good or service, what is left in the meaning of the term which still evokes a common sense understanding of 'universality'? Titmuss saw it this way:

*...services provided, as social rights, on the basis of the needs of certain categories, groups and territorial areas ... and not on the basis of individual means (Titmuss, 1968 p.114, emphasis in original)*

The key point is that the operation of universal state interventions is not restricted to certain *income* groups. Titmuss' focus was on social services, but this rather narrow perspective omits many other state interventions which apply to people no matter how well off they are. For example, public service broadcasting, subsidies for the arts and the provision of low cost leisure facilities are all significant policies of the state; none is limited to low income groups.

Thus we can define the *distinguishing feature of universal state interventions, is that the policy applies regardless of the level of income of the consumer*. One does not have to start paying for a good or service simply because one's income reaches a certain level. Conversely, a tax or excise duty is not removed when one's means become so low that consuming the item becomes a serious drain on personal income. Similarly, compulsion, or prohibition, takes no direct account of the affluence of the (potential) consumer. Other conditions may need to be



satisfied, such as a particular level of need or membership of a certain age group, but the subsidised goods or services cannot be withheld *purely* on the basis of affluence.

This definition refers to the decisions of state officials or professionals - including those in the criminal justice system when compulsion applies - who administer these policies, and who have to decide who is eligible or liable. When there is no compulsion, the consumer may of course decide not to avail herself of the service in question. For example, a subsidy may not tempt the consumer if she decides that the cost of accessing the subsidised service is prohibitively high. Take the case of housing mortgage interest tax relief (MIRAS). This subsidy is, until 2000, available to everyone who buys a house with a bank or building society loan, no matter how well off the purchaser. Indeed, the result of this subsidy has been to encourage the better off to take out mortgages rather than buy with cash when they could afford to do the latter. But many people will not be sufficiently well off to consider buying a house, rather than renting or utilising council or other social housing. Lenders would turn away many applicants for mortgages considered to be bad financial risks - because their income is too low, for example. Thus, in practice the universal subsidy will only apply to people above a certain income. This will also apply to a lesser extent to all goods and services where the subsidy only partly offsets the price to the consumer, such as theatre productions and municipal leisure facilities, or where the 'free' service only applies once other goods have been purchased, such as road travel or watching BBC television.<sup>4</sup> Does it still make sense to call these state interventions 'universal'?

Intuitively, it may not. But the object of a more precise definition is precisely to avoid the intuitive, and rather unclear, meanings which surround the term. Our understanding of universality relates to those administering state interventions - these individuals cannot take income into account in making their judgement. If it were a condition of universality that the consumer should never take their *own* income into account, a very narrow range of services would satisfy this condition because even when goods or services are 'free' there are costs attached to their consumption which may deter those with low incomes. Even that paradigm of universality - the NHS - often

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<sup>4</sup> In these last two cases, the earmarked taxes which contribute to public finances - road tax and the licence fee - may themselves deter people from consuming the service.

requires the user to organise his own transport: in cases of minor ailments for those living in remote areas, this can be a deciding factor not to use the service.

Thus, in most cases income does have a potential impact on consumption of subsidised services, because no service is truly free of all costs to the individual. It may be that sometimes this effect will be severe enough either to provoke a reassessment of the original policy - as with the slow removal of MIRAS - or to consider further state income transfers to counteract the particular problem, such as NHS patient transport payments. However, 'universality' is understood here to refer only to decisions made by the state and its agents, and to the fact that such decisions must not take income into account when arbitrating access to particular forms of consumption.

### **Universal interventions in the UK**

Reference has been made to various goods, services and other forms of consumption which are subject to universal interventions. In this section, the range of these interventions currently operating in the UK will be set out, illustrating the nature of the intervention (tax, subsidy etc.), and the nature of the universalism in each case. The principal non-universal consumption-specific services will also be noted.

As indicated in the discussion above, there will inevitably be limits to the resources available to satisfy the needs and demands of consumers. In the private sector the price mechanism undertakes this role but with highly subsidised interventions this mechanism for controlling demand will either be entirely absent or only partially available. Often some other means will need to be found to ration demand. As we have seen, rationing is the subject of a substantial literature within the health care field and to a much more limited extent in other areas of social policy (Judge, 1978). The reason for the special interest of health policy analysts in the subject is unclear - it may be because the delivery of health care is particularly sensitive to controversies related to 'limits' - but the same issues certainly apply to other consumption-specific policies. If a service is free at the point of use, as is the NHS and state secondary education, the need to ration by non-price means is particularly acute - with a 'free' service there will be an incentive for the user to consume as much of the service as possible, even if marginal consumption produces

only very small benefits. *In extremis*, and without rationing, this could result in the exhaustion of the nation's resources (Sheldon and Maynard, 1993).

Non-price rationing will not always, or even normally, be a simple denial of service to a particular category of person. In any event, this blunt form of rationing will not be sufficient to mitigate demand. Other mechanisms will be necessary, usefully characterised as the five 'D's' (Harrison and Hunter, 1994). Alongside denial - exercised because one does not satisfy the criteria for access, or because a consumer is considered to have consumed 'enough' - the agency concerned can exercise dilution, deflection, delay or deterrence. Dilution refers to the quality or intensity of a service: if a potential user of a subsidised service is not to be turned away, then the quantity and quality of resources available can be limited by the supplier instead. Deflection refers to the possibility of encouraging another agency to supply the service. Deterrence may include charging as a means of limiting demand, but can also involve making access costly in time or travel. Finally, imposing a delay in gaining access imposes a cost on the individual, and may act to deter or deflect others.

Box 1 provides a summary of the principal universal consumption-specific policies in the UK. Where applicable, the way in which rationing is effected will be included as part of the descriptive analysis of the operation of the policies. An understanding of rationing is not central to this thesis; nevertheless, it provides the context for the analysis of the substantive issues, and it is central to any understanding of how the policies themselves operate in practice.

### Box 1: Universal consumption-specific interventions in the UK<sup>5</sup>

*100 per cent subsidy ('free' consumption)*

National Health Service (NHS)

State primary and secondary education

BBC public service broadcasting

Police and national defence

Road networks

Various amenities and services provided by local authorities (e.g. refuse collection, libraries, parks, and road maintenance, cleaning and lighting)

*Partially subsidised consumption*

'Recreational welfare' (arts and film subsidies, sports facilities, museums and galleries<sup>6</sup>)

Public transport (underground, tram, bus and rail networks)

Higher education

MIRAS (Mortgage Interest Relief At Source)

*Taxed consumption*

Beer, wine, spirits, tobacco, mineral oils

Betting and gaming services

*Compulsory consumption (examples)*

Primary and secondary education

Motor car insurance

Car seat-belt and motorcycle helmet use

Fluoridation

*Prohibited consumption (examples)*

Some drugs (e.g. heroin, cocaine)

High speed driving

Incestuous relationships

Sex under the age of 16

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<sup>5</sup> Many of these are either administered through local authorities (such as education and many aspects of passenger transport), or jointly subsidised alongside national grant-making bodies (as with support for recreational welfare).

<sup>6</sup> Also sometimes provided free (100 per cent subsidy).

*100 per cent subsidy: 'free' consumption*

The most prominent universal service of the welfare state is the NHS. There is no formal categorisation of those eligible for NHS treatment, and thus universalism in one sense does apply to the whole population. Furthermore, there is very little charging in the NHS (prescriptions and optical and dental services are some exceptions), and thus non-price rationing is the norm. However, demand for health services is very high (partly as a result of the absence of charging and eligibility criteria) and rationing has developed in a sophisticated way using all five of the 'D's' noted above. People may be denied care if they are considered insufficiently ill, or if there is no further significant benefit to be derived from treatment. They may be delayed, by the operation of waiting lists for example, which in turn may deter some from seeking treatment. Others may be deterred by difficulties of access - travel costs or unhelpful GP receptionists. Finally, some (particularly the elderly) will be deflected toward other agencies, such as local government social services departments.

Universal education services, in contrast, have more formal eligibility criteria. For primary and secondary schooling, universal access is restricted to those within the age range 5-18 years. Indeed, such schooling is compulsory up until the age of sixteen. Rationing demand is thus principally achieved by denying access outside this age group; there is also some less formal denial to post-16 education according to ability. On the other hand, charging plays little part in education for 5-16 year olds (some charges can be made for school trips or music lessons, for example), and even with the formal restrictions just outlined, further rationing is effected principally by means of dilution. The most overt method by which this takes place is by varying the class size - the larger the average number of pupils per class the more diluted the quality of the education, with each child enjoying less attention from the teacher. Books, equipment and infrastructure will also vary in quality depending on resource levels.

The third area of free service in Box 1 is the BBC - the UK's principal public service broadcaster. Broadcasting is close to being literally 'universal' as its consumption is non-rival - one person's consumption does not preclude anyone else's and therefore as long as a broadcast signal exists in a region, everyone with reception equipment has access to it. No rationing

mechanism operates with respect to the characteristics of the individual at all. However, there are a number of complicating factors in establishing its universality under our terms. The first is that *non-state* provision partly satisfies our definition of universality. The viewer's access to the commercial 'product' does not depend on the income level of the consumer, perhaps uniquely in a private market - terrestrial (non-digital) services have always been free at the point of use. However, there is no state subsidy, and increasingly the advent of satellite and cable television services means that more traditional forms of pricing are available to commercial broadcasters, who can now discriminate the product according to the ability and willingness to pay of the viewer. Digital terrestrial broadcasts are also easily scrambled, facilitating the individual pricing of channel packages.

The second complicating factor is that the BBC is financed by a 'fee' payable by everyone capable of receiving any kind of broadcast. It is not immediately clear whether to consider the licence fee as a 'charge' - in which case we should not consider the BBC subsidised, just subject to uniform pricing - or whether it is a form of earmarked tax. In some ways, the licence fee does resemble more conventional charging, in that it is directly linked to the use, or otherwise, of a specific type of service; moreover, the revenue is hypothecated unlike most tax-based services. However, the case for calling it a tax is stronger. Most significantly, it is levied whether or not one wishes to consume the service it funds - the BBC - rather than ITV, Channels 4 and 5 and a whole range of subscription channels provided by digital, satellite and cable providers. It thus satisfies the standard test for a tax (as opposed to a charge) in that it is compulsory regardless of one's use of the service (although one can of course avoid watching television altogether). Neither is the fee related to intensity of use - another feature of charges. If conceived as a tax, then access to the BBC is clearly universal, and no category of viewer or listener is excluded from its services. The only rationing concerns the range, quality and type of broadcasting made available to the viewer, and the restrictions imposed by analogue and digital technology on the total number of channels which can be allocated to any broadcaster.

The fourth area of 100 per cent subsidy in Box 1 combines police and national defence services. To an even greater extent than for terrestrial broadcasting services, the deterrent effects of both these services are literally universal for all members of the UK. This is because they both approximate to a pure 'public good' - that is, one which is non-rival and non-excludable. We will

revisit this concept in Chapter 4 but, in short, the second of these criteria means that it is impossible to split the service up and charge it to everyone individually. As soon as one ‘private army’ was established for securing the defence of a country, it would also serve the purposes of all other individuals in a nation state who would be able to ‘free ride’ on its provision.

Similar considerations apply to the police, for which it is perhaps easier to conceive of private services, at least in theory. Indeed, private bodyguards, investigators and security forces do undertake some of the functions of the general police force. However, the deterrent effect of a large scale private police force would always accrue to those who did not contribute to its cost, lessening the incentive to organise it privately. As both these services find it impossible to deny any individual or category of individual from benefiting from their deterrent effects, rationing is entirely a matter of dilution - the service is simply provided at the level determined by politically allocated resources. However, the case of the police’s criminal investigation function is more complex, with elements of denial (when putative crimes are trivial or when there is insufficient evidence), deterrence<sup>7</sup> (suggestions to a plaintiff that there is little chance of a successful prosecution) and deflection (suggestions that mediation out of court, perhaps through solicitors, would be preferable) all playing a part. The delay experienced in police station waiting rooms may also serve to mitigate the demands on the service.<sup>8</sup>

The fifth area of consumption-specific intervention is road construction and maintenance. Most roads are provided free, with access rationed by deterrence: the availability of space - the degree to which others use the road too - and motorists’ ability to afford a car and fuel. The road tax is paid only by those who keep a car on the public highway, so road tax revenues are directly related to the number of people using road services. However, this is the tax’s only similarity to a charge: the amount raised is not directly linked to road building or maintenance, does not in any case match expenditure on roads, and is not related to usage.

Some roads and bridges are now built and maintained through private non-subsidised finance. And there have long been private residential roads, where management teams of residents

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<sup>7</sup> Here in the sense of deterring the *consumer* of police services.

<sup>8</sup> The fire brigade - the other ‘military’-style service - is not a public good but is provided free on a universal basis chiefly because of ‘external costs’, another concept we will return to in Chapter 4.

organise the upkeep. But private road financing is constrained to some degree by practical considerations - it is hard to charge for individual road journeys on all but major motorways without causing inconvenience and invoking substantial transactions costs.

The final category of 'free' universal provision is local authority amenity services: refuse collection, libraries, parks and road maintenance, cleaning and lighting. These are universal for everyone who wishes to avail themselves of the service in question. Thus access to these services is rationed by means of dilution: the local authority determines the quality and scale of the provision. For example, the number of street lamps per road, the range of items which will be collected as rubbish (and the frequency of collection), the amount of land used for, and the quality of presentation of, parks, and the number of libraries and the quality and level of their stocks. Other rationing mechanisms may have an impact too: if parks or libraries become very crowded this may deter further demand.

Refuse collection is an interesting case, because there is no practical impediment to contracting with a service provider to regularly remove household waste - it is simply not considered necessary by people given the local authority's service. Even rubbish not suitable for collection - large scale items such as a bed or cooker - are disposed of by local authorities free if delivered to a site. There may be good reasons for this, but it is noteworthy that virtually *no* private collection services exist in the UK (although they do elsewhere in the world, notably in the US), even though charging would be quite practical.

#### *Partially subsidised consumption*

Turning to partial subsidies, four principal categories are set out in Box 1. With the first, 'recreational welfare', the existence of a universal subsidy may not be obvious to the consumer. For example, subsidies to the film industry result in films being made which would otherwise not be, and those to art galleries result in exhibitions taking place which would have been considered economically unviable. Similarly, swimming pools and municipal tennis courts may also operate on this basis. But in many of these cases the consumer will still be charged a fee, often not noticeably less than what one might expect in a private market. Access to the universally subsidised service is therefore in these cases principally rationed by price.



Charging also forms a significant part of the second area of intervention: local transport services. The national railway operator, Railtrack, is still subsidised following privatisation, but it is not clear that this is a policy directed at (increasing) consumption rather than sustaining an industry which has never been run on an economically self-sufficient basis since it was nationalised. The latest government figures foresee Railtrack's subsidy being reduced over the coming years although remaining at substantial levels - £900 million in 2001-2.<sup>9</sup> On the other hand, local bus, rail, underground, and tram services are generally subsidised by local authorities or quangos (such as London Regional Transport), although authorities are not obliged to offer such subsidies (Department of the Environment, 1992). Furthermore, following deregulation in the 1980s, in urban areas outside London the universal nature of this subsidy is limited to 'socially necessary' services that 'do not compete with those that are run commercially' (Audit Commission, 1999b p.11). Authorities may also stipulate concessionary fares for certain categories of traveller, such as the elderly. For these kinds of service, there may need to be non-price rationing if supply is restricted from expanding by other regulations or technical constraints (London Underground can only operate a limited number of trains determined by, *inter alia*, safety regulations and the sophistication of the signalling system).<sup>10</sup> In such a case, the subsidy would in effect operate as a price reduction at existing levels of supply, leading to excess demand. This demand would need to be brought into line with supply, chiefly by means of deterrence and dilution of service - for example, overcrowded trains. Delay, again, may in addition serve to deter potential travellers.

Once considered 'free', charging also increasingly forms a significant element in rationing access to higher education, the third partially subsidised service area. Financial support for students in higher education no longer subsidises the whole cost of attending university for any pupil, whereas previously low income families were provided with a grant which in principle was designed to be sufficient for personal maintenance, as well as all students automatically having tuition fees paid. Students must now finance a proportion of the cost through loans which they are expected to pay back when they leave college (for details of the arrangements during the 1990s, and proposals for the future, see Barr, 1998a and Barr and Crawford, 1998). However,

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<sup>9</sup> See The Department of the Environment, Transport and the Regions *Annual Report 1999*, Cm 4204, p.159.

<sup>10</sup> There may also be formal limits on the service provider's ability to raise capital funds to address some of these supply problems.

although the amount of the contribution financed privately will vary with the income of the student and their family, there remains a subsidy for a proportion of the tuition cost for *all* those accepted for first degrees. Access to higher education subsidies is also denied formally to those who do not gain requisite A-level results (although allowances are made where capacity exists), and subsidies are denied to those who have already undertaken a first degree course.

Finally, MIRAS is technically not a subsidy but a tax allowance linked to a specific form of consumption. However, the effect is similar to a subsidy because the allowance is an exemption to an otherwise standard tax on income linked to a specific good. Tax is not payable (or payable at a reduced rate) on income used to repay part or all of a mortgage loan used for house purchase. Currently, in 1999, tax relief is at 10 per cent on the first £30,000 of the loan.

The subsidy is universal in the sense that anyone who takes out such a loan is entitled to the same level of tax relief regardless of their income. However, as indicated above, only those with high enough incomes to secure loans from banks and building societies would benefit from the relief - and considering that the average house or flat purchase is in excess of £50,000 this clearly excludes those on low incomes. Furthermore, in the past those who were able to afford more expensive homes would receive greater relief - this continues to discriminate against those who can only afford homes costing less than £30,000. The relief is due for abolition in 2000.<sup>11</sup>

### *Taxed consumption*

The state does not only wish to increase the level of consumption of certain goods and services by means of subsidy; it also wishes to decrease the level of consumption on occasion through specific taxation, or excise duties. These commodities and services - outlined in Box 1 - are clearly subject to a universal policy, although here the issue of non-price rationing is not relevant. Instead of decreasing the price and thus introducing the need to find alternative ways of managing demand, prices are *increased*. Thus the price mechanism is retained as the sole rationing instrument, but influenced so as to achieve the state's aims of reducing demand. Distinguishing

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<sup>11</sup> Other tax allowances also exist for certain types of consumption, such as pension provision, although these would be more accurately represented as deterring present consumption *in general*.

between a complete or partial tax is not meaningful: all excise duties add a proportion to the market price.

### *Compulsory and prohibited consumption*

All the preceding examples represent an attempt by central or local government to influence levels of consumption of certain goods by providing incentives or disincentives. Leaving aside education, on no occasion is the consumer prohibited from or compelled to purchase an item - although a high enough level of excise duty could in principle bar all but the 'super rich' from the opportunity of buying. An alternative strategy for the state, more seldom used, is to oblige consumption or to prohibit it outright. Some examples of these goods and services are provided in Box 1.

Most compulsory consumption, as with subsidies, is not literally universal to every member of the population. Helmet and seat-belt use are dependent on driving motorcycles or motor cars, as is the purchase of motor car insurance. On the other hand, compulsory primary and secondary education may be restricted to the 5-16 age group but nevertheless this is an age we all pass through, and so will all at one time or another become subject to the obligation.

Prohibited consumption applies to goods, services and other acts either mutually involving others or engaged alone. So, alongside illegal drugs, individuals are prohibited from engaging in sexual relations with close family members or with minors, are not allowed to drive at high speed on a highway, and may be prohibited from swimming or undertaking other recreational activities in certain dangerous environments.

### *Non-universal consumption-specific policies*

Our focus is on universal policies, both because they incorporate the theoretically challenging notion of provision without regard to income, and because they in any case include most extant consumption-specific interventions. But it is worth briefly mentioning two policy areas which are consumption-specific but which are also means tested and thus not universal: housing and the personal social services. Many of the observations and conclusions arising from the analysis in this thesis will also have a relevance to these services.

Housing policies consist in the main of housing benefit, which is paid to those renting in the private sector, and 'social' housing, which includes accommodation provided by local authorities and through housing associations. For both types of provision the subsidy is dependent on being in some financial need. Housing benefit is awarded according to formal national rules, including an assessment of a household's expenditure needs, 'eligible' housing costs and income (Harriott and Matthews, 1998). Housing can be ineligible if it is unreasonably large or expensive, whereby only a lower, administratively determined, rent will be taken into account as a housing cost. For example, from October 1996 people under the age of 25 are only eligible for housing benefit on rents based on a single room with shared facilities (Wilson and Morgan, 1998). These measures are designed to prevent people 'passing' the means test by choosing properties so expensive that they absorb even high incomes.

Local authority and housing association provision is rather more discretionary. Since the *Housing Act 1996*, central government has set out clear procedures which all 'social landlords' must follow in relation to the allocation of social housing, but this does not include a formal assessment of income levels (Harriott and Matthews, 1998 pp.155-6). Furthermore, although authorities are allowed to impose restrictions on certain categories of applicant entering waiting lists, one survey found that only 15 per cent of local authorities and 57 per cent of housing associations restricted those with high levels of income or capital (*ibid.*, p.164). Nevertheless, social housing provision cannot be classed as universal in general because social landlords are *allowed* to take income into account, and because in practice other tests - such as whether applicants have alternatives, or are already owner-occupiers - will also place a restriction on better off individuals.

Personal social services include a whole raft of services for the elderly, mentally ill and handicapped, for children and for other vulnerable people. These include residential care, day care, and domiciliary care providing help to people in their own home. Some of these services, such as residential care for the elderly, are charged for according to nationally set rules on allowable income levels (Audit Commission, 1999a). Others, such as meals on wheels and many other aspects of domiciliary care, are more discretionary, and although charging is allowed it is not compulsory, leading to the existence of *de facto* universal provision in some cases - although this universality would not be manifest across the whole UK. Table 1 sets out some of the rules regarding charges by local authorities in relation to personal social services and other areas of

provision. Yet other services, such as child protection, are effectively extensions of policing activity, and thus forms of law enforcement rather than compulsory consumption. The relationship between many of these personal social services and the universal health service is a complex one, and the shifting boundary between the two will be analysed as part of the historical review in Chapter 3.

**Table 1: Local government discretion over charging**

*Central control* ← → *Local discretion*

<b>Can't charge</b>	<b>Must charge under centrally set rules</b>	<b>Can charge under certain conditions</b>	<b>Can charge</b>
Collection and disposal of household waste	Fees for planning applications	Home care for older people as long as 'reasonably practicable to pay'	Leisure services
Urinals	Full cost of residential care for older people where they can afford to pay	'Reasonable' charge allowed for commercial waste collection	'Super-loos'
Loan of library books	Costs of 'building control' function	Costs for some pest control	Car parking
Education in schools			Cemeteries and crematoria  Loan of CDs and videos

source: Audit Commission, 1999a

### **Expenditure**

Table 2 presents a summary of government expenditure in one year on those consumption-specific services subsidised by the state.

**Table 2: Government expenditure on universal subsidies, England, 1995-96**

<b>Macro service</b>	<b>Items</b>	<b>£ million</b>
<b>Health</b>	NHS hospitals, community health, family health (cash limited) and related services	31,226
	Family health (non-cash limited)	6,915
	Central health, administration and other services	1,343
	<b>Total</b>	<b>39,484</b>
<b>Education</b>	Schools (under 5s)	1,491
	Schools (primary)	6,292
	Schools (secondary)	7,643
	Schools (other)	1,493
	Schools (capital)	895
	Further education (including capital exp.)	3,143
	Higher education (including capital exp.)	4,767
	Student support (further)	121
	Student support (higher)	1,598
	Administration etc.	1,293
	Other capital	56
	<b>Total</b>	<b>28,792</b>
<b>Defence, UK</b>	Total defence budget	<b>21,517</b>
<b>Law, order and protective services, UK</b>	Administration of justice	3,048
	Prisons and offender programmes	2,390
	Police	7,975
	Immigration and citizenship	263
	Fire	1,600
	Civil defence	43
	<b>Total</b>	<b>15,319</b>
	<b>Transport</b>	Roads (national)
Roads (local, current and capital exp.)		2,917
Roads (administration (Highways Agency))		125
Rail (National Railways)		-876
Rail (European Passenger Services External Financing Requirement (EFR))		288
Rail privatisation costs		-777
London Transport's EFR		903
Office of Passenger Rail Franchising		1,703
Revenue support for rail services in metropolitan areas (local expenditure)		218
Revenue support for bus services (local expenditure)		215
Public transport (local capital expenditure)		134
<b>Total</b>		<b>6,612</b>

<b>'Recreational welfare'</b>	BBC	1,823
	Museums and galleries	228
	Libraries	171
	Arts	200
	Sport	54
	Historic buildings etc.	170
	Tourism	45
	Broadcasting and media	98

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source: Departmental reports and expenditure plans, 1997

## **Conclusion**

This chapter has reviewed the meaning of many of the central terms used in this thesis, in particular notions of state intervention, consumption and universalism. None has emerged as a straightforward concept. In particular, universal policies aimed at consumption are rarely literally applicable to everybody, and never to the extent that resource constraints are avoided. In many cases, systems of non-price rationing have developed over time; this should not be interpreted as a malign effect of the intervention, but an inevitable consequence of bringing demand into line with supply. Policies also seek to decrease or prohibit certain types of consumption. But for all these policies, the actions of the state focus on particular items or forms of consumption and not just on adjusting levels of income in order to empower individuals to choose for themselves. In the next chapter we turn our attention to how this focus has developed and changed since the Second World War.

## Chapter 3: Universalism since the war

The pattern of a universal state intervention can change in three ways over time. First, the category of person for whom the interventions apply can change: thus, for example, the age range of children who are entitled to free secondary education can be raised or lowered. Second, the range and configuration of the individual services can also change: in education this might involve the types of lessons offered as part of the universal package. Third, where services are not offered free, or where they have been offered free but are now offered at a partial subsidy, this level of subsidy can also be varied. Often these changes happen in combination: a shift away from long term care for the elderly in the NHS toward provision on a means tested basis by social services department will involve both a narrower categorisation of person eligible for NHS care and a reduction in the range of services provided by the NHS. In this chapter, the principal changes since the war are summarised (including the pre-war context in many cases), concentrating on the NHS, state education and the BBC, but concluding with a summary of major changes in the other areas of consumption outlined in Chapter 2.

### The NHS

The NHS was instituted in 1948. As specified in the consolidating *NHS Act 1977*, it is the duty of the Secretary of State to ‘provide hospital accommodation ... medical, dental, nursing and ambulance services ... such facilities for the prevention of illness, the care of persons suffering from illness and the after care of persons who have suffered from illness as he considers appropriate’ (p.2). Whilst the NHS has steadily expanded the range of treatments available and the range of conditions - such as mental illness - considered to be treatable, the legalistic basis for universal provision has remained broadly unchanged in the fifty years since 1948.

However, the original legislation has been amended at intervals to allow charging for various items. For these services, provision changed from being ‘free’ to merely partially subsidised. For other services, the universal subsidy was removed altogether in some parts of the country, as a result of administrative decision-making about what constituted appropriate care. The following provides an overview of the key services where changes have taken place.



### *Acute services*

*The NHS and Community Care Act 1990* introduced reforms to the structure of the NHS which split responsibility for commissioning health care from that for providing services, with the former assigned to health authorities and the latter to hospital or community ‘trusts’. In practice this split was not straightforward, with providers still retaining much influence over the type of care on offer, but the reform did encourage health authorities to consider whether they should be offering all types of acute care. Some began to withdraw certain types of treatment.

*In vitro* fertilisation provides one particularly well-documented case of a service available in some health authorities but not in others (Redmayne and Klein, 1993). In Redmayne and Klein’s study, the reasons given by health authorities for not purchasing fertility treatment varied. Some took the view that the resources required by this expensive treatment would be better spent on other services; others that its ready availability in the private sector meant people could buy it for themselves. Such views, however, could equally be used for many other NHS treatments. But, in addition, underlying many of these rationalisations was an apparent assumption that money should not be spent on people who are not really ‘ill’. Predictably, other health authorities took the line that ‘the pain of childlessness is every bit as great as that of osteoarthritis of the hip’ (Klein, Day, and Redmayne, 1996 p.77). Other forms of sex-related treatment suffer from the same uncertainty. Gender reassignment - or ‘sex-changes’ - are undertaken intermittently by the NHS, as are reversals of vasectomy (a form of fertility treatment).

The other main controversial area of acute care involves those procedures which seek to alter the physical appearance of an individual for aesthetic reasons - ‘cosmetic’ surgery. Plastic surgery which has other therapeutic objectives - such as skin grafts for burns victims - does not fall into this category. Neither does reconstructive surgery to correct congenital abnormalities which impair normal physical functioning. Other examples, however, are more controversial. Tattoo removal is typical of the kind of procedure many health authorities have considered not purchasing (see Box 2). Obtaining these services in those areas which have not purchased them becomes a matter entirely for private finance.



**Box 2: Examples of cosmetic surgery not purchased by some health authorities**

Adult bat ears

Breast augmentation

Cosmetic rhinoplasty

Tattoo removal

Removal of non-genital warts

Buttock lifting

Varicose vein surgery

(Redmayne, Klein, and Day, 1993)

*Long term, continuing and social care*

In terms of expenditure, long term care is by far the most significant service area of those reviewed here. Residential and continuing care services have always been split between the NHS, local government and the private/voluntary sector. In terms of provision, rather than finance, the trends are outlined in Table 3. The basic picture is clear: NHS and local authority 'Part III' provision is in gradual decline, whereas private, and to a lesser extent voluntary, sector provision is on the increase.

**Table 3: Provision of long term care by ownership category (number of places)**

<b>Year</b>	<b>NHS beds, general patients, elderly</b>	<b>Private/voluntary nursing homes or hospitals</b>	<b>Local authority Part III residential homes</b>	<b>Voluntary residential homes</b>	<b>Private residential homes</b>
1970	52000	20300	108700	40100	23700
1976	55600		110796	32789	26412
1977	55700		112631	33022	28126
1978	55900		113574	33292	30073
1979	56000		113592	33912	31988
1980	55100		114103	34957	35764
1981	54900		114921	36881	39253
1982	55100		115493	36743	44346
1983	55600	18200	115913	37613	51760
1984	55800	22600	116430	38242	63072
1985	55600	27300	116080	37466	80041
1986	55300	33900	115609	36000	92605
1987	54600	41600	114189	34374	106108
1988	53300	57000	112422	34402	116688
1989	51000	73600	109194	34166	135369
1990	48700	89600	105380	34960	145457
1991	45900	109000	97853	36685	155315
1992	42100	124000	86676	40608	158990
1993	40300	144300	77012	43282	162172
1994	37500	148500	68899	45513	164208

source: Joseph Rowntree Foundation, 1996



Finance is not organised along the same lines as ownership, however. Ever since 1948, local authority residential care ('Part III' residential homes) has been means tested; other residential services were privately financed, either in the private or voluntary sectors. Nursing home care was for most of the post-war period privately financed (although the state was able to cover the fees of those in financial need in private residences under 'board and lodging' payments, a power seldom used before the 1980s). NHS nursing or long term care of this kind has never been means tested. This underlying financial framework remained unchanged until the 1990s, and even then the means testing of non-NHS care continued as before. Thus the recent controversies over the NHS 'withdrawing' from long term care are complex and require setting out in some detail.

The seeds of the problem were sown in 1948 with the state taking on responsibility for 'board and lodging' payments for those in private residences unable to pay their costs. In the early 1980s local DHSS offices, already entitled to pay these costs for those in independent residential and nursing homes, began to exercise this discretion more commonly, gradually increasing the demands on the DHSS budget (Audit Commission, 1986). In principle, each DHSS office locally set a single 'maximum' payment for these benefits, but these could be exceeded for those in residential and nursing homes if it was not reasonable to expect the claimant to move to cheaper accommodation. The resulting pressure on the budget led to the system being formalised: three separate local 'maximum' payments were introduced in 1983 corresponding to the 'highest reasonable charge' in the area, one each for residential, nursing and ordinary board and lodgings. In 1985, as the budget continued to rise, national limits were set corresponding to the type of home and the dependence of the individual staying there. The effect of this increasing formalisation of a previously implicit policy was effectively to advertise the availability of these payments, and to encourage providers to charge the maximum allowable fees.

From the perspective of NHS and local authorities (the latter's residents could not claim under these rules), there now existed a clear and widely known incentive to move individuals into the independent sector as a means of reducing the pressure on their budgets. Although those individuals moved out of NHS provision would now be eligible for means testing, most satisfied the criteria and so had their fees paid in full (there was a maximum savings eligibility rule in the mid-1980s of £3000 for social security payments). After the introduction of the 1993 community

care reforms,<sup>12</sup> local authorities took over responsibility for arranging and paying nursing and residential fees out of their own budgets, again according to national means testing rules, which now included an upper limit on capital savings of £16,000. Thus, both systems had financial means testing: the principal difference after 1993 being that *care* needs were assessed, and now within a capped budget - under the previous regime, the only 'test' was lack of financial means.

Over time, however, the combination of an elderly cohort who increasingly owned their own homes and the boom in house prices during the 1970s and 1980s, meant that more of those who might have previously entered residential or nursing home accommodation were no longer eligible for financial support. The result was that many were faced with 'spending down' their capital assets rather than being able to pass them on as inheritance. At the same time, the 'care needs' test had become more stringent so that fewer elderly individuals were assessed as entitled to a place, increasing the burden on carers at home. And, notwithstanding these developments, health authorities were continuing to run down long term care provision. From the point of view of the individual elderly person, the perception was that the financing of their care was being shifted from the state - either NHS or social security - onto themselves or their families. In fact no significant policy change to the financial subsidy for universal and means tested care had ever been made. The split between means tested social/residential care, and free NHS care, was effectively the same as it was in 1948. However, the financial wealth of the elderly combined with the actions of administrators and professionals *had* changed.

The result was substantial uncertainty about the role of the NHS. The service is allowed to provide nursing home care itself, or finance provision in the independent sector. In 1996 it did this for only 7 per cent of nursing home residents (3 per cent of all residents) and the provision that did exist was patchy. In March 1996, the National Audit Office published a report of a survey conducted during 1994 of all 101 health authorities existing at the time, to establish their contractual arrangements for 'continuous health care' for elderly people, such as nursing home care and community nursing (National Audit Office, 1996). The summary results were as follows:

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<sup>12</sup> Also based on the *NHS and Community Care Act 1990*

- \* 17 health authorities said they do not currently have a policy in this field;
- \* 11 health authorities have not funded any continuous health care beds for 1994-95; more specifically since 1993 in terms of funding for physically ill elderly:
  - 40 had not funded any nursing home beds
  - 14 had not funded any hospital ward beds
  - 5 had not funded any community nursing in patients' own homes
  - 4 had not funded any community nursing in residential care homes.

One case in particular - the so-called 'Leeds case' - brought these matters to a head (Harrison, 1994). A severely brain damaged man was discharged into a nursing home when he was no longer considered to be in need of acute care, and his family then presented with the prospect of being charged for this care. The Health Service Commissioner took the view that Leeds Health Authority's decision not to provide continuing care for such a patient amounted to a failure of service. The government's response was to issue guidance - to be locally implemented - on the precise responsibilities of the NHS. The crucial passage (Health Committee, 1995 p.xxxviii) indicates where a patient requires continuing inpatient care arranged and funded by the NHS:

*..[if] he or she needs ongoing and regular specialist clinical supervision (in the majority of cases this might be weekly or more frequent) on account of:*

*- the complexity, nature or intensity of his or her medical, nursing or other clinical needs;*

*- the need for frequent not easily predictable interventions;*

*- or because after acute treatment or inpatient palliative care in hospital or hospice his or her prognosis is such that he or she is likely to die in the very near future and discharge from NHS care would be inappropriate;*

### *Dentistry*

The provision of general dental services was undertaken on the same principle as all other 'medical' services when the NHS began in 1948: available to all, free at the point of delivery and



financed out of general taxation. The mechanism for remunerating dentists, on the other hand, was based on the pre-NHS fee per item system. Thus patients had a choice of dentists, and dentists could accept or reject patients, and decide whether to treat any accepted patient wholly or partly on the NHS. Priority dental care service provision for children and nursing mothers remained with local authorities until 1974.

One consequence of this was that there was immediate pressure on resources during the late 1940s, as incentives existed for dentists to undertake as many procedures as possible, particularly denture provision and extractions, in order to maximise their income. These procedures were all reimbursed through the Treasury. As a result charges were introduced in 1951, initially for half the cost of dentures up to a total of £4.50 and then the following year a flat-rate charge of £1 per course of treatment was introduced, other than for exempt groups; the free examination was retained (Taylor, 1992 p.83). Fees were set centrally, and so dentists were not able to compensate for any reduction in demand by increasing their prices (fees) within the NHS. Instead they had to undertake more procedures in order to maintain income - the so-called 'treadmill' system.

Until the mid-1980s treatment charges remained small, and for certain groups - expectant mothers, children and those on income support - there was, and remains, no charge. However, from this period on charges to the remainder of the population became more significant. From 1984, the treatment charge was £14.50 whilst the maximum chargeable for dentures rose to £110. In April 1985, the government increased the treatment charge to £17.00 plus 40 per cent of all additional fees paid to the dentist up to a maximum of £115. In April 1988 treatment charges were fixed at 75 per cent of dental fees up to a maximum of £150; in April 1991 the latter amount was raised to £200 (Taylor, 1992 p.90). By 1997, the proportion had risen to 80 per cent and the maximum to £330. Most significantly, dental examinations - which had remained free on a universal basis since the outset - became chargeable from 1<sup>st</sup> January 1989. Thus there remains a minimal universal subsidy of approximately 20 per cent of the cost, but effectively adult dentistry has been removed from the mainstream of NHS provision - as is the case in many other European countries (Mossialos and Le Grand, 1999).

### *Optical services*

Until 1984, sight-testing and examinations (which were free), and the provision of spectacles and lenses were provided by optometrists or other types of qualified optician. After this date the market for the sale of spectacles was opened up, allowing unregistered (unqualified) opticians to sell prescription spectacles to the public. But this did not in itself alter the financial subsidy which had operated previously. Some spectacles frames and lenses had been provided free on the NHS until 1950, whereafter those requiring spectacles - apart from some exempt groups - were charged all but 25p of the cost of plastic frames, and then the following year 50p per lens and the full cost of the frame (Webster, 1988). The lens charge increased twice until 1971 when the full cost was charged up to a maximum of £3.50. This maximum was increased periodically until 1985. Thereafter regulated charges were abolished and replaced with a voucher scheme for those on low incomes and children, which could be redeemed against the value of spectacles and contact lenses (Taylor, 1990). Finally, free sight tests were abolished for all but exempt groups from April 1989 - the sight test fee charged under general Ophthalmic Services is set centrally, £14.10 in 1997 (NHS Executive, 1997). This is the amount reimbursed to opticians for exempt groups only; all other patients pay an unregulated private market rate. In short, by the 1990s universal subsidies had effectively been removed from NHS optical services.

### *Pharmaceuticals*

The most significant element of primary care in terms of expenditure is the provision of drugs for which charges were famously introduced in 1951 at the same time those for dental and ophthalmic services. Total NHS expenditure on drugs in 1996-97 was £3,808 million and the amount recouped by charges was £296 million, or 6.5 per cent of the gross drug and prescribing bill.<sup>13</sup>

Prescription charges were increased by 10p to £5.90 in April 1999 (Department of Health, 1999) and there remain no charges for certain exempt groups, such as pensioners, those in receipt of income support, expectant mothers and children. For the remainder of the population,

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<sup>13</sup> Direct communication, Department of Health.

there is still a universal subsidy since the prescription fee is levied at the maximum noted above to everyone regardless of how well off they may be. The only exceptions to this are prescribable items which cost less than the fee; in these cases there is no subsidy (indeed there is a form of tax) if non-exempt groups obtain these items through the prescription process, rather than paying for them 'over the counter'.

A prescription charge is levied whatever the treatment as long as it is suitable for community prescribing by a family doctor. Some drugs, particularly those for very complex conditions, are managed within a hospital setting by specialists and no charge is made. But as far as the common GP prescription is concerned, the proportion of the cost covered by universal subsidy has generally diminished since the war.

In 1985 the Conservative government also introduced a 'selected list' of medicines which cannot be prescribed on the NHS. Inclusion on this list may be for one of two reasons. Either, first, a drug is not considered cost-effective (there are generic versions of brand-name drugs available which are identical apart from cost); or, second, the items in question are in some sense not thought to be 'medicines'. The latter includes the following examples of prohibited items: honey, mustard and coffee; evening primrose oil capsules; 'diabetic' cherry cake; pesticides; moisturising creams; suntan lotions; and infant formulae (New, 1998).

A related area is the question of 'lifestyle drugs' (Gilbert, 1999). These include items which either directly improve the person's 'well being' ('lifestyle') but are of questionable relevance to 'healthiness', such as Viagra for erectile dysfunction or Propecia for male pattern baldness; or items which seek to affect normal daily activities ('lifestyle') in order to have an indirect effect on health, such as Xenical which inhibits fat absorption and thus helps weight loss. Although not on the selected list, and therefore not entirely barred from NHS prescription (and thus public subsidy), Viagra has been subjected to specific central guidance on who can receive it under which circumstances.<sup>14</sup> And with the introduction of National Institute for Clinical Excellence, we have a new twist on what the government might do about such drugs. This agency has already

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<sup>14</sup> Department of Health Press Release (1999) 'Impotence Consultation - Dobson announces final decision' PN 1999/0274, 7 May.

recommended that Relenza, a drug with putative benefits for influenza sufferers, should not be provided on the NHS on cost-effectiveness grounds; it could in the future also make judgements on drugs such as Propecia on the grounds that this 'treatment' is not relevant to the NHS.

### *Appliances and paramedical items*

Finally, many appliances, wigs and fabric supports are charged for by the NHS. Health service guidance gives details of charging policy for these types of item.<sup>15</sup> 'Elastic hosiery' and 'other appliances and each quantity of a drug (including oxygen cylinders)' were charged at £5.65 in 1997 - equivalent to the prescription fee. There are, in addition to the normal exemption categories, conditions which exempt patients from the charge for an item specific to certain types of disease. But these are not comprehensive - for example, one exemption category includes those with a 'continuing physical disability which prevents the patient leaving home without the help of another person' but the category goes on to note 'temporary disabilities do not count even if they last for several months'.

Charges are also made for:

- \* tights supplied through the hospital service;
- \* surgical brassiere;
- \* abdominal or spinal support;
- \* various types of wig.

Some of these are clearly cosmetic, and issues of this kind were discussed above. However, an abdominal support is charged at £29.05, and in these categories there are no exempt groups as a result of medical condition (financial means, however, are taken into account). Here, once again, there seems to be a lack of clarity about whether these should be considered medical treatments - many would no doubt be surprised to find themselves charged for such items.

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<sup>15</sup> Department of Health, HSG(97)16, 1997.

## State education

Education services can be conveniently categorised into three types: primary and secondary schooling for 5-18 year olds, including compulsory education up to 16 years; higher education for post A-level students who wish to achieve advanced qualifications; and nursery and further education for those not of compulsory school age but who, for a variety of reasons, wish (or whose parents wish) to have some kind of educational provision nonetheless.

### *Primary and secondary*

The principal legislative basis for post-war education policy was the *Education Act 1944*. Prior to this date, schooling for those aged between 5 and 18 was split into three main types: elementary schools, secondary schools, and the 'old' grammar and public schools (Simon, 1991). The first two of these together comprised the local authority maintained sector; the third category included all those schools essentially outside local authority control. Elementary schools were provided free for all children for the compulsory schooling period from age 5 to 14 - amounting to 88 per cent of the maintained sector. Thereafter, secondary schools provided education for children between 13 and 18 on a fee charging basis. However, local authorities had, after 1902, powers to finance secondary education from the rates if they chose. They did indeed adopt this power with some enthusiasm, leading to the rise of a system of 'new' maintained grammar schools. By 1938, 45.8 per cent of secondary school pupils had won a 'free' or 'special' place, with the remainder paying fees.<sup>16</sup> The final sector comprised the old endowed grammar schools (increasingly known as 'direct grant' because they received a subsidy from central government to provide a proportion of free places to local children) and the public schools. Both were fee charging *and* operated outside local authority control.

The 1944 Act had a number of important consequences. First it raised the compulsory school age to 15, which meant that a greater proportion of the population were entitled to free education

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<sup>16</sup> Before 1931, 'free places' in grammar schools for the more able elementary pupils were not means tested because the vast majority of those for whom they were intended would not have been able to afford to pay the fees in any case. However, after the economy drive of 1931 they were replaced with 'special places' which were means tested, partly a recognition that education in the maintained sector was no longer the preserve of the very poorest in society (Bruce, 1968 p.286).

(in effect, compulsory education here also implied free education, since it is a nonsense to compel consumption of a non-subsidised service if the consumer cannot afford it).

Second, charging was outlawed for all local authority maintained schools, whether below or above the compulsory leaving age. These schools were also to be financed by local authorities under a single code, a provision related to the abolition of the distinction between a basic elementary education, concerned with standard literacy and numeracy and involving no formal qualifications, and secondary education of a more sophisticated type. Hereafter all children were entitled to primary education (up to the age of 12) and secondary education (compulsory until 15). The latter consisted of the tripartite system of grammar, technical and secondary modern schools - mediated by the 11+ exam. But now the single code meant that overt differences in state financing were not possible. The central point is that ability to pay was not to be a factor in deciding who was to attend which school (although of course middle class children were *de facto* to make more use of the grammar schools). Thus, a universalist policy formally applied to secondary education for the first time, albeit rationed by 'aptitude', whereas previously the opportunity to continue studying had been subject to a charge for approximately 50 per cent of families, according to a means test.

Third, the *content* of what was to be taught universally was left to the local authority, with the specific exception of religious instruction: it is 'the duty of the local education authority for every area ... to contribute to the spiritual, moral, mental and physical development of the community by securing that efficient education ... shall be available [...]' (Dent, 1968 p.12). The 'spiritual' element was specifically required elsewhere in the Act. However, apart from the implication that education should also include some physical instruction, no further specification is included, leaving the precise range of subjects - the curriculum - to local authorities and schools.

Finally, the Act made arrangements for the provision of free milk (meals were to be means tested): one-third of a pint daily to all pupils at maintained schools. This was an obligation on local authorities (only avoidable when a 'pupil avails himself so rarely or irregularly of the school meals service that waste or undue expense is involved' (Dent, 1968 p.79)). Local authorities had the power to defray many other charges - for travel, sports kit, even attendance at public fee-

charging school - if they saw fit. However, there was no obligation to do so, and given financial realities authorities would have paid for such items only where financial hardship required it.

The situation in the primary and secondary sectors did not alter fundamentally until the *Education Reform Act 1988*. The school leaving age was finally raised to 16 in 1972, a measure which had already been prepared for in the 1944 Act and which was finally implemented by an Order in Council rather than new legislation. The only other formal change to the universal element in education was the financially insignificant act of curtailment of free school milk by Margaret Thatcher in the Heath administration of 1970-74, which only saved £8 million. Politically it was much more significant, leaving Thatcher with a reputation for heartlessness (Simon, 1991 p.407).

Rather more significant, though not the result of formal government policy, were developments in the school curriculum. The foundations laid by the 1944 Act allowed a wide degree of freedom in deciding on the nature of the curriculum. As a result, the 1960 and 1970s saw significant innovations including topic work, thematic approaches to subject matter and learning through play (Hargreaves and Reynolds, 1988). These 'radical' approaches were defended as a challenge to the academic bias of the traditional school curriculum which was perceived to favour the 'able' - typically middle class children. Instead, the emphasis shifted from intellectual pursuits to those involving feeling as well as thinking. This period coincided, and to some extent was caused by, the establishment of the Schools Council for Curriculum and Examinations which effectively institutionalised the ideology of 'teacher control' and 'autonomy' of curricula matters from central control:

*This was a period when governments evidently willingly loosened the rein ... above all, teachers were now seen as responsible for the curriculum - for what went on in schools. A response to this freedom - and responsibility - was the energy, sheer hard work, and creative thinking that was voluntarily given by thousands of teachers to curriculum reform and pedagogical change (Simon, 1991 p.319).*

But subjects such as 'peace studies', 'world studies' and 'development education' were challenged by the Right as being politically biased, as not 'real subjects', and that they took time away from fundamental subjects of the school curriculum (Scruton, 1985).

In effect, what was provided was whatever teachers decided. The 1988 Act constrained teachers' freedoms in this regard by the imposition of the National Curriculum, although it did not do away with them altogether (Hargreaves and Reynolds, 1988; Morris, 1990; Tuck, 1990; David, 1989). The consequence of this provision of the Act was to remove freedom to set the whole curriculum from local education authorities and place it with the Secretary of State, whose strictures would then need to be followed by all maintained schools in the primary and secondary sectors for those of compulsory school age (that is, not the independent sector). The National Curriculum itself consisted of the following at the time the Act came into force: three core subjects which were to be introduced as a priority, and 'other foundation' subjects. The core subjects were mathematics, English and science; the foundation subjects were history, geography, technology, music, art and physical education, and for secondary pupils a modern foreign language (Department of Education and Science, 1988a). The Secretary of State was given powers to amend this list in the future, and a review is being undertaken at the time of writing. The Curriculum was also concerned with attainment targets, programmes of study ('matters, skills, processes' (*ibid.*, para. 16)) and assessment arrangements, although not with teaching methods, text books or materials. However, the terms of the National Curriculum made no attempt to constrain the total range of lessons which might be offered - schools and education authorities could teach what they wanted, as long as they at least did what the Curriculum required.

Finally, the 1988 Act made some other minor alterations to the ability of schools to charge for certain activities. Section 61 of the 1944 Act specified that: 'No fees shall be charged in respect of admission to any school maintained by a local education authority... or in respect of the education provided in any such school or college' (Dent, 1968 p.44). As local schools and local education authorities decided on the curriculum, so they were prohibited from charging for any of this education whatever it may have been. However, although the 1988 Act sustains the general principle of free education, this now only applies to education within school hours, or where education is to fulfil statutory duties with regard to the National Curriculum (whether within school hours or not), or religious education (Department of Education and Science, 1988b). One exception is made: individual tuition for a musical instrument can be charged within school hours



unless part of the National Curriculum or a prescribed public examination. However, there is no *compulsory* charging for any school related activity.

### *Higher education*

Scholarships enabling students to undertake courses of study at university-level institutions ‘had existed from the earliest times, and since the Royal Commission of 1852 the state had interested itself in the matter’ (Ministry of Education, 1950 p.100). However, it was the *Education Act 1902* which initiated the more general and widespread practice of supporting students through degree-level courses, by authorising Local Education Authorities “to provide or assist in providing scholarships for, and to pay or assist in paying the fees of, students ...” [Section 23(2)]. This assistance was not compulsory, however, and only some local authorities made use of their powers, resulting in a mere 1,400 scholarships by 1911 (Ministry of Education Working Party, 1948).

Neither these awards, nor the state scholarships offered by the central Board of Education from 1920, were universal by our definition. Although no centralised system for assessing parental contributions was developed for many years, parents were expected to contribute to the costs of their children’s education if they could afford to - and some, therefore, received no subsidy at all. In fact, the introduction of universal subsidy for higher education was some time in arriving.

The 1944 Act, which did not specifically consider the higher education sector (Simon, 1991 p.91), noted the expectation in these terms:

*Regulations shall be made by the Minister empowering local education authorities, for the purpose of enabling pupils to take advantage without hardship to themselves or their parents ... to grant scholarships .. in respect of pupils over compulsory school age [Section 81]*

Thus, if it imposed no hardship, then parents should contribute; this contribution could amount to the whole cost. By the 1950s, parental contributions were gradually standardised between the local and central award making bodies according to a common scale. The Anderson Committee summed up the system in 1960 as one whereby, if this scale demanded a parental contribution, it would be

*set off against the grant for maintenance; if it exceeds that grant, the grant for approved fees is reduced by the balance, or extinguished if the balance is large enough (Ministry of Education, 1960 p.44, emphasis added)*

Appendix 3 of the same report indicates that there was a total of 65,561 award-holders in the academic year 1958-59 (England, Wales and Scotland, LEA and state scholarships; *ibid.* pp.117-8), whereas the same report estimated that the total number of students was over 100,000 in 1959-60 (p.1). Clearly, then, a universal system did not exist prior to the 1960s, since for something approaching one third of students and their families, no proportion of the cost of their higher education was subsidised.

The turning point was the *Education Act 1962*, and subsequent regulations, which converted LEA's power of awarding grants, into an obligation to do so. However, until 1977 there was still no universal subsidy for degree-level courses. Parental contributions were expected not just towards maintenance, but also towards tuition fees (Wilson, 1997). For example, in 1976, if a student and/or family had a residual (after various considerations were taken into account) income above £9,950 the entitlement to a maintenance grant was extinguished; if that income were above £12,700 then fees would have to be paid too.

In 1977, however, the then Labour Government changed the regulations. From that date, students eligible for a mandatory awards (that is, any student accepted onto a designated, full-time first degree course or equivalent) would not be required to pay tuition fees, irrespective of parental income - they would be paid direct by the LEAs who would be automatically reimbursed 100 per cent of the cost through specific grants by the Treasury (Wilson, 1997 p.10). Finally, therefore, there was a truly universal system and this constituted the origin of future controversies of 'free' education as a 'right'.

This universal provision survived the introduction of student 'top-up' loans for maintenance under the *Education (Student Loans) Act 1990*, and it was not until the Labour Government responded to the Dearing Committee's Inquiry into Higher Education that the 100 per cent universal subsidy of fees was replaced with a partial (but still universal) subsidy. In short, the *Teaching and Higher Education Act 1998* obliges students whose families can afford it, to pay

*not more than £1,000 toward fees from 1998/99.*<sup>17</sup> The remainder of the real cost of tuition is still subsidised on a universal basis.

Thus the universal nature of higher education subsidies has perhaps always been less extensive than much of the political rhetoric has suggested. The subsidy only started in 1977, only ever applied to fees, and a little over twenty years later it applied only to a proportion rather than 100 per cent of the cost.<sup>18</sup>

### *Nursery and further education*

The 1944 Act made it a duty on local authorities that they should ‘secure the provision of *adequate* facilities’ (Dent, 1968 p.45 emphasis added) for the education of persons over the compulsory school age, and for ‘leisure-time occupation’ (p.46).<sup>19</sup> Similarly, LEAs were to ‘in particular, have regard .. to the need for securing that provision is made for pupils who have not attained the age of five years by the provision of nursery schools or... nursery classes in other schools’ (Ikin, 1944 pp.15-16). However, there was never any compulsion on education authorities for subsidised services to be provided universally in either of these educational categories, and neither did central government establish such a policy.

Further education still operates on this basis. Up until 1999, Local Education Authorities were able to grant discretionary awards, principally targeted at those undertaking further education over the age of 18. The Department for Education and Employment proposes to replace this system with one of ‘Access Funds’ administered by the further education colleges themselves. Nevertheless, they will remain strictly means tested and thus non-universal.<sup>20</sup>

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<sup>17</sup> From 1999/00, grants will be entirely replaced with loans. There is no loan specifically for those students obliged to contribute to fees, but approximately  $\frac{3}{4}$  of the full maintenance loan will be available on a universal basis, and there will be a subsidy of the repayment terms of this loan (there is effectively a zero real interest rate). Thus a universal subsidy will operate for maintenance as well as fees (DfEE website: [www.dfee.gov.uk/he99/chap4.htm](http://www.dfee.gov.uk/he99/chap4.htm); 3/12/99).

<sup>18</sup> £1,000 is estimated to be roughly  $\frac{1}{4}$  of the average cost of a university course (Wilson, 1997 p.50).

<sup>19</sup> A further element of the 1944 Act, never in fact implemented, was a provision for compulsory part-time continued education for everyone up to the age of 18.

<sup>20</sup> Information on the Labour Government’s current (1999) plans are taken from the DfEE website: ‘Financial Help in Further Education’ ([dfee.gov.uk/fhfe/contents.htm](http://dfee.gov.uk/fhfe/contents.htm)).

On the other hand, new proposals for nursery education now plan for its provision to be on a universal basis similar to that for primary and secondary education: 'Government's aim is that from September 1998 there will be a good quality free place for every 4-year-old whose parents want it'.<sup>21</sup> This will not be compulsory - compulsion remains only for 5-16 year-olds - but it will be available for all those who want it. In the past, state subsidised nursery education depended on individual local authority policy, with the number of 3-4 year-olds receiving a free place varying from 25 to over 90 per cent (Audit Commission, 1996). Although means testing was not the standard method of rationing demand, making it technically 'universal', not all children secured a publicly funded place (the Audit Commission reported that children were typically admitted from waiting lists). However, even if in the future all four year-olds will be guaranteed some provision, the quality will inevitably remain limited - a typical local authority service offered to date has been five sessions a week, each lasting 2 ½ hours.

### **Public service broadcasting**

There is just one institution in the UK which receives a public subsidy to provide broadcast services - the BBC. Furthermore, as a terrestrial free-to-air broadcaster, the service it provides is automatically universal. No-one is excluded from its services as a consequence of their income. During the 1990s this picture was complicated somewhat by the introduction of commercial BBC channels on home cable and satellite channels, and the inception of digital broadcasting which included some free BBC channels only available to those with a digital decoder. But essentially, the principal change to the universal nature of the BBC has been the programming content of its radio and television output, which grew in scope steadily over the 70 years of its existence.

The BBC's Royal Charter specifies that its task is 'to provide, as public services, sound and television broadcasting services.... and to provide sound and television programmes of information, education and entertainment for general reception in our United Kingdom of Great Britain and Northern Ireland' (Department of National Heritage, 1996b). However, rather more

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<sup>21</sup> *ibid.*: 'Types of School/education' ([dfee.gov.uk/par\\_cent/type.htm](http://dfee.gov.uk/par_cent/type.htm)).

specific obligations are outlined in the Agreement, which outlines the services and standards expected from the BBC by the Secretary of State (Department of National Heritage, 1996a). It requires that the Home Services

*are provided as a public services for disseminating information, education and entertainment;*

*stimulate, support and reflect, in drama, comedy, music and the visual and performing arts, the diversity of cultural activity in the UK;*

*contain comprehensive, authoritative and impartial coverage of news and current affairs in the UK and throughout the world to support fair and informed debate at local, regional and national level;*

*provide wide-ranging coverage of sporting and other leisure interests;*

*contain programmes of an educational nature (including specialist factual, religious and social issues programmes as well as formal education and formal vocational training programmes);*

*include a high standard of original programmes for children and young people;*

*contain programmes which reflect the lives and concerns of both local and national audiences;*

*contain a reasonable proportion and range of programmes for national audiences made in Northern Ireland, Scotland, Wales, and in the English regions outside London and the South East.*

*3.3 The Corporation shall transmit an impartial account day by day prepared by professional reporters of the proceedings in both Houses of Parliament.*

This is what was expected of the BBC in 1996. The over-riding impression is that the BBC should produce something for everyone, that universalism should not just imply that everyone has access, but that everyone has access to every kind of programme. The following briefly reviews how the current responsibilities developed, taking radio, television and commercial developments in turn.

## *Radio*

The Corporation was born on 1 January 1927 as a purely radio broadcaster, having been a company operating under regulation since 1922. It was to operate under a Royal Charter, the principal difference from a simple Act of Parliament being that it runs for only a fixed period and is granted by the Government of the day. Thus the BBC is not formally accountable directly to Parliament, rather than to a Board of Governors appointed by a minister of state - an attempt from the outset to distance the BBC from politics and political interference (Briggs, 1985 pp.89-90). However, revenues are voted through Parliament as part as the annual financial settlements, and the Annual Report and Accounts are also laid before Parliament.

From 1927 until the war, the BBC could offer listeners a choice of only two networks: the National Service and the Regional Service (Paulu, 1981). These consisted of mainly music and a few produced shows. No news was broadcast before 6 p.m. and, in general, little attention was paid to listener interests and demands. It was not until after the war that radio programming was conceived as covering a 'complete cultural spectrum' (*ibid.* p.244): the Light Programme and Home Service were joined by the Third Programme in 1946. These three radio channels became, respectively, Radios 2, 4 and 3 in the 1960s but continued with their original programme mixes: light entertainment and popular music, 'quality' speech-based programming, and classical music and 'high' culture.

In 1932 the BBC launched the Empire Service and in 1938 the foreign language services which together were eventually to become the BBC World Service in 1986. It is financed by a grant-in-aid from the Foreign Office and not from the licence fee.

In 1967, as the other radio stations were changing their names, Radio 1 started broadcasting in response to the pirate pop stations such as Radio Luxembourg. These stations had attracted a younger audience with their mix of contemporary pop music and youthful presenters. The final new radio service - Radio 5 Live - was launched in 1990 and aimed to provide a 'middle brow' news and sport service to a younger audience outside the south-east.

Finally, a local radio network was instituted in 1967, initially comprising eight stations, with programmes geared to local needs and interests, but also to encourage participation by local

people and to promote 'two-way' communication between the broadcasters and their listeners, so that broadcasting should no longer simply be the preserve of the BBC and its invited guests (Smith, 1974 p.151).

The history of BBC radio is thus a gradual expansion of programming mix to accommodate as wide a range of tastes as possible within the limits of frequency availability and resources.

### *Television*

Television was launched on 2 November 1936. If the BBC was supposed to be operating under the famous principle of 'inform, educate and entertain', for many years it did rather more of the first two than the last, at least where television was concerned. The arrival of ITV in 1955 changed things, however: until that point, the BBC had neither paid much attention to audience numbers, nor did those in charge try to find out what the audience desired (Spangenberg, 1997).

As a consequence:

*The audience was tired of preaching and cultural uplift, it wanted more light entertainment and amusement (McDonnell, 1991 p.35)*

In the wake of ITV's inception, the BBC's audience share dipped to an all time low of 28 per cent in 1957. The result of this was that entertainment, after the 1950s, was to become as much a central part of the BBC's output as programmes of education and information.

BBC2 was introduced in 1964, and from the beginning emphasised minority and experimental programming for which there was insufficient 'room' on the generalist BBC1. Indeed, at the very beginning the channel experimented with a concept known as the 'seven faces of the week', which involved devoting a whole night's viewing to one subject such as education or music, for every night of the week (Leapman, 1986 p.46). Over the years this innovative characteristic became associated with BBC2 which, although not quite adopting the tag of 'minority interest' channel, nonetheless consistently achieved lower ratings than BBC1.

Both television and radio have also increased the proportion of the day and night in which they broadcast. In the 1950s, television broadcast only about 50 hours a week (Spangenberg, 1997), but during the 1970s and 1980s with the addition of day-time and breakfast television, broadcast

hours were expanded until they ran continuously from daybreak to midnight. By the end of the 1990s, BBC television was effectively 24 hours a day, with the rolling news channel, News24, filling in the night-time slot on BBC1 (News24 itself is only freely available for those with digital receivers). Radio expanded similarly, with Radios 1, 2, 3 and 5 all 24-hour by the 1990s and Radio 4 filling-in roughly five hours every night with the World Service.

### *Commercial activities*

The BBC has always engaged in charging for some of its services, even if it has never done so for its core television and radio broadcasts to UK licence fee payers. As far back as 1923 the *Radio Times* was launched and its revenue used ever since to support its programme making; in 1947 the Royal Wedding became the first television programme to be sold abroad; and 1961 saw the publication of the corporation's first commercially available book (Currie and Siner, 1999). In the 1990s, there were two wholly owned commercial subsidiaries of the BBC: BBC Resources Limited and BBC Worldwide Limited.<sup>22</sup> The former provides facilities for programme makers, and does so both for the BBC and commercial producers (in both the 'internal' and 'external' market).

The latter operates to make the most of the BBC's programme asset base, by selling channels, engaging in co-production and programme distribution and developing BBC brands. In the 1990s the increased number of broadcast media, such as digital, satellite and cable, expanded the opportunities for this kind of commercial activity in the UK. The BBC had always marketed its programmes abroad to a certain degree, but now it began to produce channels which were no longer free-to-air in the UK. These comprised a family of archive channels provided in partnership with a private company, Flextech (under the commercial 'UKTV' brand name); furthermore, there are now a number of channels - News24, Play, Parliament and others - which operate under the BBC brand name (for which the BBC does not charge) but which are only available either as part of charged-for cable and satellite packages, or free-to-air with digital decoders. This has sparked some controversy, with commercial broadcasters in particular

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<sup>22</sup> Details from the *Annual Report and Accounts 1998/99*, pp.30-31.



arguing that the 'free' channels undermine the competitive position of commercial alternatives (such as Sky News).

The issue of commercial BBC activities is not unlike the issue of NHS charges for various services: it is defended on the basis that it allows the public service element to provide more benefit of a 'public' kind without increasing tax revenues. In fact, not to do so would be 'a scandalous act of negligence on the part of the BBC' according to one authoritative report (Currie and Siner, 1999 p.95). The possibility remains, however, that some of the profit-making enterprises become so successful and popular that people might ask why they are not provided on a 'public service' basis; what is it about them that means they no longer satisfy public subsidy criteria? Rather than suggesting that commercial activities should be abandoned, this simply points up the difficulty in establishing precisely where the line should be drawn between public and private service.

### **Other areas of consumption**

Other areas of consumption-specific policy have also undergone changes, if rather less radically than the three noted above. We will briefly review local authority provided services not covered elsewhere, road and rail transport, national arts policy, MIRAS (housing), and various types of compulsory and prohibited consumption.

#### *Local authority services*

Most changes in the range of responsibilities and functions of local authorities occurred in the first half of this century, with new responsibilities for education, housing and personal services for the poor or otherwise needy (Keith-Lucas and Richards, 1978). After the war, local government lost some of these responsibilities to new nationalised services, such as the NHS, or more recently through the 'opting-out' of some schools from local authority control. In some areas post-war provision of other subsidised services has remained fairly stable, even if the actual organisation and level of support has changed. For example, passenger transport services were some of the original local authority functions to develop at the end of the 19<sup>th</sup> century (*ibid.* p.38). They have remained supported by local government ever since (or on occasion by local

boards or quangos), although local authorities now no longer *own* transport provision, and their ability to subsidise these services has been restricted, both developments a result of the *Transport Act 1985* (Byrne, 1994 p.89; Elcock, 1994 p.293).

In other areas, provision of universal consumption-specific services was formalised. Libraries had been provided since before the war on an *ad hoc* basis, but the *Public Libraries and Museums Act 1964* gave local authorities a duty to provide a comprehensive and efficient service for all who wish to make use of it (Department of the Environment, 1992 p.87), thus formalising in law that such provision must be provided free of charge. The same piece of legislation did not oblige the free provision of museums, but formalising discretionary powers in law added to local government's authority in making such provision. Similarly, the *Local Government (Miscellaneous Provisions) Act 1976* gave local authorities the discretion to provide sport and leisure facilities, such as swimming pools, and to provide grants toward achieving their objectives.

Local authorities provide, subsidise or regulate a bewildering range of service areas which could impact on individual consumption decisions; only the most significant of these are referred to in this thesis. Most have not undergone a significant change in the nature of state financial support, beyond the vicissitudes of grant levels received from year to year.

### *Road transport*

One element of transport policy which is not subject to local authority control is the provision of major roads. Many other countries charge tolls for motorways, and some have introduced more sophisticated electronic road charging schemes - for travel into city centres, for example. But in the UK roads have, since the war at least, been free. However, there are now a number of bridges which are financed privately by means of tolling, and it may only be a matter of time before the first motorway is financed in this way. If the toll for a bridge reflects the total cost of its maintenance and construction, then clearly the universal subsidy has been entirely removed. The Labour Government's transport white paper also raised the possibility of local authorities being empowered to experiment with road pricing schemes (Department of the Environment, Transport and the Regions, 1998).

National rail transport also continues to receive substantial universal subsidy, even though ownership has now been transferred to the private sector. This subsidy has been a feature of the consumption of railway travel more or less continuously since the original nationalisation in 1948 (Reid and Allen, 1970; Ashworth, 1991). The latest Department of Environment Annual Report<sup>23</sup> does predict some falling away of the public subsidy - from £1,930m in 1994-95 to £900m in 2001-2 - although the earlier figure is somewhat higher than normal because of the costs of privatisation. Thus it is not clear whether in the long term railways are envisaged to follow other nationalised industries and operate without subsidy, or whether some subsidy will continue to be provided in order to sustain a 'strategic' economic industry, and to encourage train travel rather than road use. The 1999 Departmental Report gives little away other than to claim it is 'improving rail travel by ... subsidising train operators', amongst other policies (p.158).

#### *Arts and culture*

National policy towards the arts also underwent a significant change after the war. Before this time, the attitude of governments toward the arts was, as one commentator described it

*sympathetic statements, occasional ad hoc legislation and isolated Treasury grants, but no coherent or systematic plan of encouragement (Minihan, 1977 p.173)*

These 'isolated grants' serve either to lower the price of the production being supported, or bring into being a production which would otherwise not have existed. But this form of subsidy did not achieve a more solid footing until the incorporation of the Arts Council in August 1946 under a Royal Charter.<sup>24</sup> It was founded to continue the work of the Council for the Encouragement of Music and the Arts, and its original charter stated one of its objectives as 'in particular to increase accessibility of the fine arts to the public' (Quinn, 1998 p.103). For 'increase accessibility' we may read 'reduce the costs of' - clearly the intention was to raise consumption of the arts. But as to the meaning of 'fine arts' the original Charter neither defined or clarified the concept. In these first years the Arts Council in practice focused on support for drama, art and

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<sup>23</sup> The Department of the Environment, Transport and the Regions *Annual Report 1999*.

<sup>24</sup> Described in the introduction to Arts Council Annual Reports.

music - the latter including, in 1948, opera and ballet (Minihan, 1977 p.230). Support for theatre was consolidated by the *National Theatre Act 1949* which paved the way for the development of the South Bank complex. Outside these 'fine arts', the Attlee government increased its support for the film industry through grants to the British Film Institute, and through the National Film Finance Corporation, the latter providing loans to the industry at favourable rates. Finally, this period saw the passing of the *Local Government Act 1948* which allowed for much of the municipal support for arts and galleries described above.

The second Charter, granted in 1967, did not add any definitional specificity, nor did the current Charter in 1985. But over the years the ambit of the Arts Council widened appreciably. By 1992,<sup>25</sup> its grants to music included jazz, 'improvised music touring', recording companies (such as Virgin Classics), and 'non-western music projects'. The literature department had grown to include grants to a wide range of publishers, translators and bursaries to individual writers. Ballet had ceased to be a sub-section of 'music', and support had widened to include all kinds of dance, contemporary and traditional. A new category of award had been created to 'Multi-disciplinary arts and arts centres', which included the South Bank Board and the Notting Hill Carnival Enterprise Ltd. There was now a film, video and broadcasting department. By the 1990s it seemed that every kind of artistic endeavour, as long as it could demonstrate some degree of innovation or non-commercial benefit, could legitimately make a claim on the public purse.

The 1990s saw the first specific UK government department devoted to the support of arts and culture - the Department of National Heritage. Previously, government responsibility for expenditure had rested with a minister in the Department of Education and Science. The move had long been resisted as opening up the possibility of a minister of state imposing his or her own cultural notions and 'arts policy' on to artistic activity (Minihan, 1977 p.245). However, the experiment has been a success, judging by its survival into the new Labour administration in 1997, with only its name being changed to represent an even wider range of responsibilities: the Department of Culture, Media and Sport. The Department now has ten areas of responsibility,

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<sup>25</sup> The Arts Council of Great Britain 47<sup>th</sup> *Annual Report and Accounts 1991/92*, October 1992, London.

or ‘sectors’: museums and galleries; libraries; arts (including the Arts Council); sport and recreation; historic buildings, monuments and sites; tourism; broadcasting; media (film, music and printed); national Lottery; and the millennium.<sup>26</sup> Many of these areas have been covered elsewhere in this thesis in their own right, but this wide range of activity reflects the broadening scope of public universal subsidies for cultural activity.

One specific area has undergone a significant change in the nature of the universal subsidy. During the 1980s many museums and galleries began to charge admission, notably the Imperial War Museum, the Natural History Museum, the Science Museum and, during the 1990s, the Victoria and Albert Museum (Feist and Hutchison, 1990). Others such as the Tate pointedly request voluntary donations. The new Labour Government pledged to keep free those galleries and museums, such as the British Museum and the National Portrait Gallery, which had not yet introduced charging, indicating that the increased subsidies that were promised would depend on this condition being upheld. Nevertheless, the free provision of national cultural collections has to a large extent been turned into a partial subsidy with special concessions for certain groups. But the universal element will remain for as long as the state continues to offer grants.

### *Home ownership*

The universal subsidy of the costs of loans for house purchase has undergone some significant changes over its lifetime. In the earliest days, pre-war, this was not a consumption specific subsidy, but one which was ‘the result of one of the general principles of income tax [at the time], that costs incurred in producing income, could be set off against income in assessing liability’ (Holmans, 1987 p.83). However, this general tax relief on interest payments was ended by virtue of the fact that ‘relief on mortgage interest was left undisturbed when in 1969 tax relief on interest paid by individuals was withdrawn’ (ibid. p.275). Thus, tax relief on mortgage interest became unambiguously that of a special subsidy of (loans-based) home purchases, rather than an example of a more general principle of taxation. It was initially open-ended, but in 1974 a limit was introduced whereby just the first £25,000 of loan value qualified for relief, raised to £30,000

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<sup>26</sup> Department of Culture Media and Sport, *Annual Report 1998*.

in 1983. This did not affect the universal nature of the subsidy, which still applied to everyone who bought a house with a mortgage, but did restrict the value of the subsidy to the purchaser over time, as average house prices rose well above £30,000.

In 1983, the subsidy was changed from tax relief adjustments to PAYE liability, to one of Mortgage Interest Relief At Source (MIRAS) which involved reducing interest payments to lenders by the basic rate of tax (over the allowable portion of the loan); the lenders, who now administered the scheme, were then reimbursed by the Treasury (Balchin, 1985 p.219). The basic rate of tax was gradually reduced during the 1980s and 1990s, and relief at the higher rate of tax was ended in 1991, thus reducing the impact of the subsidy. Overall, however, its significance continued to grow in aggregate because of the general rise in interest rates, home ownership and house prices. This finally led to the reduction of the relief at source to 15 per cent in 1983, and the July budget introduced another cut to 10 per cent in 1987 (Malpas and Murie, 1999). It will finally be abolished in 2000.

### *Compulsion and prohibition*

Compulsory education has been a feature of British state activity since the 19<sup>th</sup> century; but apart from this, compulsory consumption has by degrees been introduced for a limited range of commodities and activities since the second world war. Compulsory car insurance against third-party risks was introduced in 1930 (Hardy Ivamy, 1984 p.332), legislation requiring the use of seat-belts was introduced in 1983 (Tunbridge, 1989), motorcycle helmets in 1973<sup>27</sup> and fluoridation of water supplies in most parts of the country during the 1990s.

On the other hand, some activities and commodities have been prohibited. Restrictive legislation on the use of drugs for non-medical purposes derived from international treaties and the codification of wartime regulations, particularly in relation to opium and cocaine (Lord, 1984). Possession of these was outlawed formally in the *Dangerous Drugs Act 1920*; cannabis was added in 1925. It was not until the *Drugs (Prevention of Misuse) Act 1964* that amphetamines became controlled; this Act was extended in 1966 to include LSD. A consolidating *Misuse of*

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<sup>27</sup> Direct communication, Department of the Environment, Transport and the Regions, Road Safety Division.

*Drugs Act 1971* was then passed, and this is the primary legislation which still operates today. Although some drugs, such as cocaine and heroin, were authorised for medical prescription by specially licensed doctors under this legislation, others, such as cannabis, have controversially not been.

Paying for sexual relations has also become an increasingly restricted activity. Although there has never been a specific offence of prostitution *per se* in Britain, the law has typically been concerned to limit activities in pursuit of prostitution so as to minimise its ‘nuisance’ factor (Selfe and Burke, 1998). These regulations have, if anything, become more stringent over time. The *Sexual Offences Act 1956* and the *Street Offences Act 1959*, which codified the prohibition of various acts of soliciting, living off earnings from prostitution and brothel keeping, was considered unfairly to criminalise women rather than men. The *Sexual Offences Act 1985* specifically restricted men’s ability to ‘kerb crawl’ and to engage in ‘persistent soliciting’ in a public place.

The most recent significant prohibition, following the Dunblane massacre, relates to handguns. Certain categories of small firearms possession and use were outlawed by the *Firearms (Amendment) Act 1997*.<sup>28</sup>

In some cases, activities or services previously prohibited were legalised. Commercial betting had, broadly speaking, been illegal in Britain since the *Betting Act 1853*, although bookmakers could operate in public places, including racecourses, as long as they did not establish a fixed pitch or other place to which the public could ‘resort’ (Smith and Monkcom, 1987). This allowance was then further confined to racecourses alone by the *Street Betting Act 1906* until the *Racecourse Betting Act 1928* allowed bookmakers to operate in fixed locations and an organised fashion on ‘approved’ racecourses. Finally, it became lawful for bookmakers to run off-course cash betting offices after the *Betting and Gaming Act 1960*.

Buggery had been prohibited for many centuries in Britain for both men and women, and up until the *Offences Against the Person Act 1861* was punishable by the death penalty (Selfe and Burke, 1998). However, after the Wolfenden Report 1957, homosexual acts of buggery

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<sup>28</sup> I am indebted to Jonathan Steel of Glaisyers Solicitors, Birmingham, for this item and other assistance in this section.

between two consenting men over the age of 21 in private was decriminalised by the *Sexual Offences Act 1967*. This was extended to cover women and men over the age of 18 by the *Criminal Justice and Public Order Act 1994*.

Abortion had always been an offence under the common law, but was statutorily outlawed by the *Offences Against the Person Act 1861* and only marginally amended by the *Infant Life Preservation Act 1929*. This remained the position until the *Abortion Act 1967* did away with the common law altogether, although it did not repeal the previous two named Acts. Instead, the 1967 Act allows abortion on medical or genetic grounds, specifically if continued pregnancy poses a threat to the physical or mental health of the mother, or if the child were likely to be born with substantial handicaps (Kommers, 1992).

Finally, perhaps one of the most peculiar prohibitions, that relating to the 'activity' of committing suicide, was removed by the *Suicide Act 1961* (Selfe and Burke, 1998).



## Chapter 4: Justifying state interventions: a review of the literature

The state intervenes over a wide range of consumption decisions relating to specific goods, services or activities. This kind of intervention is very often universal - that is, it applies regardless of the income of the potential consumer. And, as we have seen, it has a long if somewhat inconsistent history, with many interventions stretching back to the Second World War and beyond. But these facts, indicative as they are of a substantial and apparently popular tradition of government activity, do not by themselves support that activity. Justification is surely required.

The examples of state intervention in the preceding chapters represent a significant restriction on what individuals are freely allowed to consume and the terms on which they are allowed to do so. Such restrictions are not accepted lightly in western democracies where the notion of freedom, however vaguely understood, has much resonance. Furthermore, these restrictions on liberty are brought into particularly sharp focus by the nature of the state intervention under consideration: *everyone* within certain categories is subject and not just those who may be particularly vulnerable or helpless. Moreover, the constraint is not merely one of imposing a tax in order to transfer income, but involves, at the very least, a strong incentive towards or against *specific* types of consumption.

In support of this activity two broad categories of justification emerge from the literature, one based on considerations of equity and the other on considerations of efficiency. These are broad values or principles, relevant to many aspects of state (and private) activity beyond universal consumption-specific policies. For example, universal income transfers such as child benefit are often defended on the grounds that this is a more efficient and fair method of getting money to those who need it most than means testing, as well as doing much to 'bind' society together. Furthermore, it is perhaps not surprising that equity has often been invoked to support selective or targeted interventions aimed at meeting need in particular income groups, such as the personal social services.

Furthermore, not all of the justifications under these broad headings have been equally popular over time. State supported social services are predominantly a twentieth century phenomenon,

and in the early part of the century analysts were predominantly concerned with how the state could alleviate inequality or address perceived problems of social stratification and lack of cohesion. Certainly the Fabians were in many ways concerned with the efficient functioning of society, but it is only more recently that the technical failures of the free market have become prominent in justifying state interventions.

It is also worth noting that not everyone agrees that these values are worth pursuing.

Distributional concerns have been argued to be irrelevant, or even counter, to notions of social justice, and measures to address them harmful to incentives. Social justice has itself been described as a 'mirage' (Hayek, 1982). Much has been made of the proposition that individuals are the only appropriate judges of their own interests, and that the free market is the best means of achieving them. The state is also claimed to 'fail' to achieve its own objectives, in the same way that the market can 'fail', or that it unjustifiably infringes individual liberty. These arguments are reviewed in the concluding section of this chapter.

Nevertheless, there is a wide body of scholarly work which makes serious use of equity and efficiency in supporting the kind of state action we are concerned with in this thesis. The first two sections of this chapter review each in turn.

## **Equity**

Equity is an ethical principle, and ethics is concerned with what is good and what is right. This is an enormous subject area, and some elementary categorisation of ethical principles will be necessary to provide a structure for investigating the literature. The most common division between the various schools of ethical thought is that between consequentialists and the various strands of rights-based theorists, such as those relating to natural law, Kantian ethics of duty, and the modern contractarians (Singer, 1994 p.243). Consequentialists, of which the utilitarians form the most significant sub-class, focus their concerns on the outcome of actions and what constitutes a good or bad outcome. For the utilitarian, the 'good' is believed simply to be pleasure or the absence of pain; the ethical imperative is to organise society so as to have as much of this 'good' as possible. However, consequentialists do not have a view on whose claims to this good are greatest - on how it should be distributed between people. This is more generally

the province of the rights-based theorists; hence our association of equity with this broad school.<sup>29</sup>

Equity is a value relating to the distribution of things between people. A concern with equity implies a concern that such a distribution is, in everyday terminology, fair. Another word commonly used to signify the same idea is justice. In fact, the semantics of this subject area are far from straightforward. Different academic disciplines tend to use some terms more regularly than others. Political philosophers, for example, tend to favour justice (Daniels, 1985; Barry, 1989). However, most philosophers have recognised that this term also has other uses in both formal and colloquial language, most obviously that relating to law and punishment - retributive justice (Frankena, 1973 p.49).<sup>30</sup> Justice is also used more widely by philosophers to indicate a sense in which people receive their 'due' in terms of the benefits available from society's resources (Weale, 1988 p.22).

But receiving one's due can involve considerations which go beyond any notion of a distribution. Thus, Pettit (1980) outlines three criteria for justice in political philosophy: the proprietary, the utilitarian and the contractarian. Only the third of these is specifically concerned with distributional matters. The first views justice as the outcome of freely made (voluntary) economic exchanges. Thus, the state has no place in taxing people's income at all (or beyond an absolute minimum for security). A 'just' outcome is that which is arrived at without any coercion. This is the classic libertarian, minimal government view of justice, associated with a hard view of property rights (hence 'proprietary'), and famously propounded by Nozick (1974). The second, utilitarian, view of justice is concerned with maximising the aggregate of welfare obtainable by society, and is classically associated with Bentham and Mill, even if these philosophers did not argue straightforwardly for this end. Bentham's famous aphorism - 'the greatest amount for the greatest number' - contains within it an ambiguity about how to balance the 'number' (of people) with the

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<sup>29</sup> Of course, it would be easy to draw too firm a line between these two schools: as an individual it is quite possible to acknowledge the moral force in both. Thus, with health care we may be concerned both with the nature and quantity of the good ('improved health'), and how it should be distributed between people.

<sup>30</sup> In fact, this distinction may be more apparent than real, since some thinkers have pointed out that justice in punishment involves a judgement about the fair distribution of advantages and disadvantages resulting from laws accompanied by punishments (Hare, 1981). This also applies more colloquially to a sense in which justice is used to indicate 'fair' retribution - murders should receive capital punishment: 'an eye for an eye'.

overall benefit which can be achieved. Nevertheless, it is commonly assumed to be aggregative rather than distributive at root (Barry, 1990). So neither of these two conceptions has a particular concern with the distribution of things, other than in the sense of what finally occurs as a consequence of following their own principles of justice.

As Le Grand argues (1991), these two conceptions of justice are better thought of as arguing for optimum forms of social organisation - they are conceptions of the 'good' society, rather than the 'fair' or 'equitable' society. It is better for clarity to restrict justice to its distributive sense, hence its regular accompaniment by this epithet (Daniels, 1981), or by specifying, as Rawls does, 'justice as fairness' (Rawls, 1971). Indeed, economists have typically used equity, justice and fairness more or less synonymously, all relating to distributional concerns.

A formal definition of equity is difficult, perhaps because most 'definitions' actually incorporate elements of the author's preferred concept of the precise form equity should take. So all one can draw attention to is the concept of a distribution - of how things are shared out between people - and the idea that this distribution should accord with a sense of fairness. How we establish what constitutes fairness is the very project of an equity debate. But, as a preliminary, it is worth noting Aristotle's original conception of distributive justice (he also carefully distinguished retributive justice<sup>31</sup>) which still forms the basis of many modern day debates:

*The just, then, must be both ... equal and relative (i.e. for certain persons) ...if they [the persons] are not equal they will not have what is equal, [and] this is the origin or quarrels and complaints - when either equals have and are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be 'according to merit'; for all men agree that what is just in distribution must be according to merit in some sense (Aristotle, 1980 p.112)*

In simpler terms, equals should receive what is being distributed in equal measure (sometimes known as horizontal equity), unequals should receive it in unequal measure to the extent that their

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<sup>31</sup> Aristotle used the term 'rectificatory' according to the translation by Ross. And, as a semantic curiosity, Aristotle also outlined a distinction between 'equity' and legal justice: here the former enters in specific cases to ameliorate the rather blunt 'general' principles of law which might lead to injustices in particular cases - such as a jury acquitting of murder a doctor who killed his patient in mercy (see Aristotle, 1980 p.132-34). This acquittal could be termed 'equitable' in an Aristotelian sense.

inequalities are morally relevant (a less loaded phrase than ‘merit’ in today’s language; also known as vertical equity). One very important task for all those who believe distributive justice and equity have a role to play is to unravel the morally relevant, and irrelevant, differences between people - what Gutmann called the ‘relevant reasons’ approach (1980). And one final definitional matter will re-emerge later: although ‘a distribution’ is central to equity, we must also establish a distribution of *what*. For it is not clear that equity alone can guide us in establishing what is to be apportioned between us.

But undoubtedly equity is of primary importance as a justification for state action. For example, most analysts recognise that good health is fundamental to a ‘full’ life in some sense, and this leads to proposals that it should be distributed equitably. Indeed if one were to rank policy goals, many have argued that promoting good health amongst the population would have priority:

*Within our civic and political culture people attach considerable importance to health . . . one reason for this is that good health is considered a precondition for the enjoyment of other goods (Weale, 1988 p.13)*

Given health’s ethically important place amongst the range of individual goals which constitute a worthwhile life,<sup>32</sup> it is hardly surprising that numerous theories of equity have been developed to justify state involvement. And, as we anticipated above, all make some use of rights-based ethical theories which emphasise the claims of individuals and not just the imperative of aggregates in relation to good consequences.

Most relate these claims to some notion of ‘need’ for health care which, for various reasons, is claimed to be the proper basis for its provision - rather than, say, ability to pay or accident of birth:

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<sup>32</sup> Although health has a primacy amongst social, and individual, goals, it is not entirely distinctive and special - it is not literally ‘priceless’. We all make decisions in our life which increase (or decrease) the likelihood of death for an increased (or decreased) payoff (Jones-Lee, 1988). The payoff may be a higher income, when one does a risky job such as deep sea diving, or the thrill offered by exhilarating sports such as sky diving. The central point is that health has an ethical primacy, in that some level of good health is a necessary condition for enjoying other pleasures, but it is not ethically dominant: there is a trade-off to be made between marginal improvements in health and other pleasures. This is true both at an individual level and at a societal level.

*A right to health care based on need means a right to equitable access, based on need alone, to all effective care society can reasonably afford (Churchill, 1987 p.94)*

Such rights-based approaches are forced to acknowledge the constraints of limited resources, in this case by only accepting a right to care that improves health and, more significantly, what society can afford. Nevertheless, the state is encouraged to intervene solely on the basis of need, and whilst 'need' is a slippery concept (Culyer, 1995; Williams, 1997b), the implication is that without health we would suffer, that this is in itself unjust, and therefore health care should be made available on this basis alone. Reasoning along these lines has been made most explicitly by Bernard Williams: 'leaving aside preventive medicine, the proper ground of distribution of medical care is ill health: this is a necessary truth' (1964 p.121).

Other accounts have specified more explicitly how the distribution of care should be undertaken:

*The task is to allocate resources between competing claimants in a way that does not violate the individual's entitlement to be treated as the equal of any other individual - and that means her entitlement to have her fundamental interest and desires weighed at the same value as those of anyone else (Harris, 1987 p.122)*

In this conception, 'equality' is argued to be the relevant distributional outcome of an equitable system. For 'need' here read 'fundamental interests': these should be provided for on the same basis for everyone regardless of any other consideration, and certainly not according to the person's means. Harris in fact went on to conclude that limited resources may necessitate some form of lottery between those competing for treatment if principles of equality are to be preserved.

The point about these arguments from equity is that they all suggest that need should be the sole, or principal, criterion for distributing health care resources. There will be different conceptions of what precisely constitutes need, and how to distinguish varying degrees of it - should it be conceived in terms of severity or cost-effectiveness, for example?<sup>33</sup> But, whichever, ability to

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<sup>33</sup> One can also distinguish between equal treatment for equal need, and equal access in terms of the personal costs to the individual of presenting. The latter allows for variations in treatment due to some people in

pay should *not* be a proxy measure for need. Thus the basis for organising society's health care provision should specifically exclude ability to pay or income levels - the defining characteristic of a universal service. It is not hard to see why these theories of equitable health care lead to a call for universal policies: just because someone is well off should not alter the 'needs' basis on which they receive their care.

A different perspective to the 'needs' approach is provided by contractarian theories, which in modern day variants propose systems of equity which rational people would agree to in situations where they cannot know how they would personally benefit from it. The chief modern exponent of this view of justice is John Rawls (1971). People in what he called the 'original position', behind a 'veil of ignorance' as to their strengths and endowments, would rationally argue for a system of equity which, amongst other things, guaranteed equal opportunities for all in the pursuit of jobs, and only allowed for inequalities in income to the extent that this maximised the position of the worst off - the 'difference principle'. In relation to health care the approach has been most completely developed by Daniels (1985):

*health-care institutions and practices [are included] among the basic institutions involved in providing a fair equality of opportunity . . . health-care institutions are regulated by a fair equality of opportunity principle (Daniels, 1985 p.45)*

The reason for formulating it this way, rather than including health care itself amongst the goods governed by the difference principle, is to avoid an obligation to provide health care to the severely ill to such an extent that the impoverishment of the whole society is risked. The formulation instead puts an obligation on a health care system to protect individuals' normal opportunity range by maintaining, where possible, their normal functioning.

In another approach to equity (Le Grand, 1991), the principle which would be considered fair by people 'in general usage' (p.84) is that which asserts, broadly speaking, that an outcome is fair if it is freely chosen. This formulation is contractarian in the sense that it is claimed that this is a principle that people would choose if encouraged to consider the matter reasonably

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'need' choosing not to seek treatment. But in both cases, judgements will still be required about whose 'need' comes first.

objectively. Clearly, most health states are in some sense chosen, if only to the extent that our decisions have an influence on the likelihood of contracting an illness: by eating fatty food we are increasing our risk of heart disease. But since a significant part of the likelihood of getting heart disease - or other states of ill-health - is determined by chance and therefore not chosen, bearing the full cost of the state of ill-health would not be fair, and state intervention is justified.

In both these cases, again, the philosophical analysis leads to a justification of universal policies rather than selective ones. Daniels argues that health care access should be guaranteed to a basic tier of

*health care services that meet health care needs, or at least important health care needs - as judged by their impact on the normal opportunity range [...] however [other] tiers of the health care system are to be financed, there should be no obstacles - financial, racial, geographical, and so on - to access to the basic tier (Daniels, 1985 p.81)*

It could be argued that the very rich do not have an obstacle to care, and thus could be excluded from the state provision. However, Daniels argues that *any* financial obstacle passes some of the burden for assessing health care need onto particular groups - including the rich who, regardless of their privileged position, will still have to decide whether they wish to spend some of their hard earned wealth on a doctor's examination and tests which might amount to nothing. Thus even they might include an irrelevant consideration when deciding whether to avail themselves of care. Although Daniels never explicitly uses the term 'universal' in the context of access to health care, the implication of his exposition points clearly in this direction.

Le Grand, on the other hand, is clearer in his policy vision. Given that virtually every kind of ill health is at least partly a result of circumstances beyond the control of individuals, it is not fair to punish those who suffer 'bad luck' by obliging them to pay for care at the time of need if they have failed to take out insurance, even if they could easily afford to do so. 'A more equitable alternative would be for a government agency to offer health care free at the point of use and to finance it through a compulsory charge or tax on all individuals' (1991 p.123) - thus state subsidy would be universal, since he does not specify that this 'free' provision would exclude the wealthy.



These theoretical conclusions are reflected in the words of the legislators who anticipated the formation of the British NHS:

*Objects in view (1) To ensure that everybody in the country - irrespective of means, age, sex, or occupation - shall have equal opportunity to benefit from the best and most up-to-date medical and allied services available (Ministry of Health, 1944 p.47)*

Or as one commentator summarised the intentions of the politicians of the day, particularly Nye Bevan, to ‘universalise the best’:

*the financial barricades having been torn down, the way was open for achieving equity in the use of health services: of ensuring that the only criterion for treatment of care was need (Klein, 1995 p.224)*

Klein goes on: ‘equity of access has indeed been achieved’ (p.224), although not necessarily equity of outcome. The latter will depend on the use made of the service, and the decisions made about who to treat in which order. Nevertheless, as a justification for a universal policy designed to influence consumption (if not to compel it), equity clearly occupies a central role in the health care literature.

So it is with education. In a similar way to health, free universal education for children is justified principally on the basis that it is inequitable to organise education on the basis of ability to pay. It is common in education for the formulation of equity to be based on equality of opportunity, unlike health care where Daniels is unusual in making this the conceptual cornerstone of his particular theory. Thus, reviews of the normative basis of the 1944 Education Act emphasise that

*The overriding objective in the implementation of post-war education was greater equality ... In 1944 equality had essentially meant ‘equality of opportunity’ (the assurance that no accident of parental circumstance, place of residence or sex would prevent children from developing their talent to the full) .. (Lowe, 1999 p.208)*

Similarly, Le Grand and colleagues note that many people have argued that ‘equality of opportunity in education should be a basic right’ (Le Grand, Propper, and Robinson, 1992 p.68). The notion of equity that is relevant, therefore, is one which ensures people have the

opportunity to do well for themselves in the future, rather than one which emphasises some kind of fairness in the present. This is perhaps a reflection of the fact that education is less likely to be consumed for its immediate intrinsic pleasure - particularly for schoolchildren - than for what it offers in terms of paving the way for future pleasures. Health care, on the other hand, is valued very often for the immediate relief it provides. 'Opportunity', then, probably reflects an inherent characteristic of the product, rather than any substantive ethical approach.

How should equality of opportunity be achieved? Not necessarily by giving everyone the same quantity or type of education because needs and capabilities may vary. Rather, an equitable distribution of education 'is taken to mean that there should be universal *equality of access*' which eliminates 'irrelevant or discriminatory criteria, such as income' (Le Grand, Propper, and Robinson, 1992 p.68). People will then presumably be able to take what advantage they can from education, and those who can benefit more should be allowed to do so. However, this type of universal policy may not be adequate to achieve an acceptable form of equity if this requires

*that there is no systematic relation between a person's social origins or gender and his or her ultimate social attainments. That is, the educational system would compensate for differences in parental wealth, income, education, political power, social connections and culture ...* (Levin, 1990 p.130)

In other words, as Levin concludes, to 'move more quickly towards equality, more must be spent on the disadvantaged' (p.141, emphasis added). What does this imply for universalism? For now we have the income criterion re-entering at the back door, only not to ensure that low income groups alone receive the subsidy, but to make sure that they consume *greater* quantities of educational resources than high income groups. To illustrate why, let us assume that there is some parity in ability to benefit between groups (for there is little point in providing resources for people who can gain nothing or very little from them<sup>34</sup>). Assume also that, on average, an affluent social background provides children with an educational advantage. Under conditions of equal consumption of educational resources, these social advantages of the better off would leave them with higher attainments. If we were thinking in crude terms about potential exam success, the

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<sup>34</sup> The equivalent situation in health care is the problem of expenditure on 'hopeless' cases or ineffective treatments.

disadvantaged groups would move from E to C grades, the advantaged from C to A grades. In fact, of course, the better off could also choose to spend their own money on education, potentially advantaging them still further. If all this is so, equity seems to point toward some restriction on what the well off, advantaged groups can buy, even to the extent of ensuring they receive *less* than the disadvantaged groups.

A less severe form of this position has been seriously proposed as government policy. The idea is that to achieve the aim of equalising educational opportunity it will be necessary to outlaw the use of private finance *to gain an advantage*. Take Tawney's vision in the 1930s:

*All private schools, including those so-called 'public schools', should be required, as a condition of their continuance or establishment, to hold a licence from the Board of Education. Such a licence should only be granted to a school on condition that .. it is equally accessible to all children qualified to profit by it, irrespective of the income or social position of the parents*  
(Tawney, 1964 p.145)

If such a system were to be truly 'equally accessible' to all on the basis of ability, then this would require that ability to pay should have no place in gaining *access* to school, but it could come into play as a means of contributing to the cost once access had been achieved. Whilst not providing *greater* educational opportunities for the disadvantaged, such a system would at least avoid wealthy parents being able to buy superior education for their children - who may be no better placed to 'profit by it' than children of less well off parents.

A more fully worked out and explicit vision for extending universalism in this way was proposed by Anthony Crosland (1956). He argued that 'the school system in Britain remains the most divisive, unjust, and wasteful of all aspects of social inequality [...] The 1944 Education Act set out to make secondary education universal; and formally it has done so. Yet opportunities for advancement are still not equal' (p.258). The reasons for this injustice were partly a consequence of the continued existence of the independent (public) schools, which are 'open to the wealthier classes, but out of reach of poorer children however talented and deserving' (pp.260-261).

Rather than outlaw public schools, which would needlessly remove institutions of educational excellence, Crosland argued that they should be compelled, gradually, to accept an increasing

proportion of children purely on the basis of ability, by 'competitive entry', eventually resulting in 100 per cent of places allocated in this way. Crosland explicitly acknowledged, or accepted, that those who could afford to pay fees under this system might still be expected to do so. Thus because 'formal' universalism - a subsidised public service available to all, but not compulsory for all - was insufficient to satisfy equity objectives, a further form of universal *prohibition* would be required: viz. that no-one should be allowed to purchase secondary education of a quality not also available to others according to educational criteria, and not related to their ability to pay.

Thus an advanced form of universal policy, for Tawney and Crosland, is necessary for distributional purposes in order to ensure that no-one gains an advantage in terms of opportunity. This is similar in some ways to the system of finance for higher education as it has gradually evolved in the UK. Instead of outlawing privately financed universities, they were all gradually incorporated into a system of mixed state and private finance, and thus the opportunity to *buy* one's way to a superior service was effectively removed.<sup>35</sup>

Equity has also been a strong driving force in the development of universal higher education in its own right. The Robbins report argued that 'the good society desires equality of opportunity for its citizens to become not merely good producers but also good men and women' (Committee on Higher Education, 1963 p.8). The Dearing report argued that 'the state must .. make sure that access to higher education is socially just ..' (National Committee of Inquiry into Higher Education, 1997 p.288). However, as we have seen, universal subsidies to higher education have been weakened, partly as a result of the recommendations of this committee. Equity does not seem to require universal subsidy; partly the reverse. As the committee argued 'on grounds of equity, it is right to turn to graduates in work to contribute more of the costs of their higher education'.

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<sup>35</sup> In fact, there remains an exclusively privately financed university, Buckingham, but it seems that this represents such a small divergence from the operation of the overall system that formal legal restrictions have never been imposed. Interestingly, Crosland hoped that his scheme for avoiding unfair advantage would also be possible on a voluntary basis (p.264-5).

Not yet *all* of their costs, however. As we have seen, universalism in all its guises will not be so easily shaken off. Implicit in the reforms is the understanding that the effective prohibition of superior, privately financed higher education would continue. As with Crosland's and Tawney's vision for secondary education, equity demands some kind of universalist *restriction* on consumption, even if universalist subsidies are eventually phased out. Such a view might well also be taken with respect to private health care.<sup>36</sup>

Justifications from an equity perspective also crop up in areas of public policy where they are less expected. A key issue in the late 1990s is the notion of social exclusion as a new form of inequity - promulgated by the new Labour government as a twist on the old and rather intractable problem of eliminating poverty or inequality. Another new phenomenon is the 'information poor', people who are disadvantaged vis-à-vis the plethora of new technological media such as the Internet. These two particular issues are closely related, and it has been argued that public service broadcasters have a role to play in addressing them (Corfield, 1999). The BBC should in particular strive to secure that this new information rich world provides 'access for all' (p.149, emphasis added).

Transport is also considered by some authors to be important for reasons of equity (Le Grand, 1982). Here the rationale for universal interventions is less clear. Certainly, the provision of a basic minimum standard of transport could be supported on the grounds that in order to participate to a satisfactory level in society, it is necessary for everyone to have access to this minimum. But this may not require a universal policy: travel could be subsidised for certain low income groups, as it is in the case of pensioners' bus passes.

Non-universal services such as the personal social services and housing are also clearly driven by equity concerns. However, even here some commentators have suggested that the only way to achieve true social justice is to move from a means tested to a universal form of provision

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<sup>36</sup> In fact, such a view has been taken in the Canadian health care system, which has a publicly financed but largely privately provided structure. Those services which are publicly financed, and offered free of charge, are *not* also available by means of private finance. '[It is the] only OECD country which makes no charges for most medically necessary services. Short of crossing the US border, there is no way to "buy your way to the front of the line"' (Drache and Sullivan, 1999 p.13). Unlike Crosland's scheme for education, however, those who can afford to pay for health care are not, by and large, expected to do so.

involving nationalisation: for example, to achieve fairness in housing costs between one citizen and another, 'the nation must .. consider social ownership' (Townsend, 1975 p.104).

### **Efficiency and market failure**

Economists tend to look at social issues from a perspective of efficiency, and how market organisation achieves, or fails to achieve, this goal. Their principal model is expected utility theory which lies at the root of classical economics. Expected utility theory assumes that each individual is best able to order his or her own preferences so as to maximise utility. Under perfect competitive conditions what is known as Pareto efficiency will prevail, where it is impossible to make one person better off without making another worse off.<sup>37</sup> It is the understanding that these conditions will fail, and often fail to a significant degree, that lie behind justifications for state intervention on efficiency grounds.

Two points of clarification should be noted at the outset. First, it should be clear that these market failures are quite distinct from those relating to the inequitable distribution of resources, the subject of the previous section. Whereas one could, with a broad understanding of the term, consider it a 'failure' of the market that it results in inequity, achieving this objective has never been its function. It would be unfair, perhaps, to criticise a mechanism for failing to achieve what it does not set out to achieve. Second, it was noted above that one of the assumptions behind the theory that perfect market competition will lead to a Pareto efficient outcome is that individual consumers are best placed to assess their own preferences. In other words, consumers are considered to be rational and know their own best interests. This is a problematic assumption in its own right, but does not properly belong to the class of market failures because, again, markets exist as mechanisms for effecting in the most efficient way the wishes of consumers. They do not question whether or not the wishes were arrived at in a rational manner, and so cannot be criticised for delivering on 'irrational' desires.

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<sup>37</sup> The Hicks-Kaldor compensation test extends the range of situations which can be called Pareto efficient by including the criterion that if a change enables those who gain to compensate those who lose, and still remain better off, this is Pareto superior. However, in most practical circumstances this test remains theoretical (the compensation does not actually take place) and thus if it is used to evaluate a policy change in practice it

Markets can fail in a number of ways, but these failures can conveniently be categorised into three areas: imperfect excludability and non-rivalness, imperfect information, and problems with bargaining (Gravelle and Rees, 1992 pp.512-516).

The principal example of a problem of imperfect excludability is that of externality, and this will be used as a summary term for this class of market failures. Externalities occur when costs or benefits are incurred on those not party to a process of exchange or consumption, and are therefore outside their control. Thus a factory owner may not take account of the effects of pollution on the health of local residents; a consumer of loud music may not consider the inconvenience of the music on the wish of her neighbours to go to sleep; and a farmer may not incorporate the aesthetic benefits of attractive farmland to passing travellers when considering how best to manage his business. The problem from the point of view of economic efficiency is that those affected are 'external' to the activity or transaction leading to the cost or benefit, are not able to influence the level of production through the market and thus are not compensated for costs or able to encourage the supply of benefits. As a consequence the producers do not take these effects into account when deciding levels of production. Where external benefits are concerned, this results in the problem of 'free-riders' and undersupply - those who benefit from an output of some kind fail to contribute to its cost, and thus do not signal its increased supply through market demand. The opposite effect occurs for external costs.

Public goods can be thought of as an extreme case of externality where a benefit is both non-excludable *and* non-rival.<sup>38</sup> in addition to not being able to exclude those who benefit but do not pay, consumption of a public good's output does not affect anyone else's consumption.

Production is for everyone or no-one: in effect, the marginal cost of producing an extra unit of output is zero. In fact, non-rivalness produces problems for efficiency even if excludability has been achieved - under most assumptions resulting in undersupply, although not all analyses concur (Cornes and Sandler, 1996 pp.243-255). For our purposes, the cases of externality and public goods constitute the clearest instances of market failure.

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incorporates a value judgement that if aggregate improvements in welfare are sufficiently large for some people, the reduction in welfare for others is acceptable.

Problems with information involve a failure of a fundamental assumption of micro-economics - that individuals know what goods are available, their quality and nature, and their price. There are two principal problems with information. First, the costs of gathering the information needed to assess whether to buy a product exceed the consumer surplus that would be enjoyed if there were no information costs.<sup>39</sup> The trouble it takes to establish whether a house is in good structural condition, in a pleasant neighbourhood and with the right features probably deters many from buying a new home which would otherwise constitute a welfare gain to them. However, one must be careful before assuming that this is a market failure, because the costs of gathering information are real - it is a 'success' of markets that these costs influence the decisions of consumers in the real world. Subsidising the costs of house-searching, for example, could introduce *inefficiency* by reducing the extent to which the true costs of buying a particular good are made apparent to the consumer. On the other hand, there will be incentives for providers to minimise these costs in market systems, because they want the consumer to have every opportunity to try their product - witness the proliferation of Internet sites devoted to providing information about houses for sale.

The second, and more serious case, is when there is asymmetry of information. Thus the producer retains information which would be helpful to the consumer, or the consumer retains information required for the proper design of a product by the producer. Sometimes this may simply be a commercial supplier 'hiding' certain risk factors of their product, such as the harmful effects of smoking. But many of these situations occur where there is a principal-agent relationship: when one party is delegated to make decisions on behalf of another. Further complications arise under conditions of uncertainty when insurance markets operate, leading to moral hazard (where the insured acts in ways more likely to incur the insured-against event) and adverse selection (where insureds do not accurately reveal their risk factors, leading to circumstances in which some (low-risk) consumers are dissuaded from entering into contracts). This complex area has led to thorough and extensive theoretical research (see, for example, Barr, 1992).

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<sup>38</sup> Gravelle and Rees in fact characterise public goods simply by their non-rivalness, regardless of whether they exhibit excludability.



The final category of market failure involves problems with bargaining, when parties to a mutually beneficial exchange cannot agree to the allocation of the benefits. This principally occurs where there are few buyers and sellers - *many* buyers and sellers being one of the conditions of perfect competition which ensures that individuals or firms cannot alone alter the price of the good being traded. For example, where monopoly occurs a profit maximising firm will typically supply less of a good or service and at a higher price than they would under competitive conditions. Similarly, a trade union will bargain for wages as if there were a single supplier of labour, and push the price up to levels where some will not be employed who might otherwise have been so. In other spheres game theory has been developed (beginning with von Neumann and Morgenstern (1944)) to examine the behaviour of actors in a potentially mutually beneficial situation, who engage in strategic behaviour because of interdependence.

However, these bargaining problems are principally those of organising the *production* of benefits, rather than those relating to what, and how much, consumption individuals decide to engage in. As noted in Chapter 2, we are here concerned with policies directed at consumption rather than production. Certainly, a monopolist influences the total level of consumption of a good, including the deterrence of some from consuming at all, by pushing up prices. There is also undersupply, as we have seen, in the provision of goods and services subject to external benefits. But the difference can be best understood with reference to the objective of the state in trying to correct the failure the two types of market failure. With a monopolist the state does not (necessarily) have any view on the value of the good or service being consumed, merely with the institutional structure of the industry providing it. However, when considering externalities, the state does need to concern itself with the consumption value (or disvalue) of the traded item, and thus is a proper example of an intervention motivated by a concern with consumption choices *per se*.

In each of the other cases - externalities and imperfect information - there is a *prima facie* case for state intervention. With externalities and public goods the state can subsidise (or tax), provide free or compel (or prohibit) the commodity or activity, such that its consumption more closely

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<sup>39</sup> The costs of searching out information are a type of transaction cost.

approximates levels considered socially efficient. In the case of information asymmetry the state can either compel the provision or revelation of information, or can subsidise or tax so as to ameliorate its effects. The following review of the literature takes externalities and information problems in turn.

### *Externalities*

One of the least controversial areas of universal state intervention is in the provision of 'pure' public goods. But goods which display the characteristics of non-excludability and non-rivalness perfectly are rare. Two examples commonly cited are the deterrent effect of national defence forces<sup>40</sup> and pollution control measures (Cornes and Sandler, 1996 p.9). In both these cases, the level of provision required to achieve the benefits will probably be beyond the means of any individual consumer. But voluntary groups organised to pool resources will suffer from free-riding: the incentive for some to drop out and still enjoy the benefits from which they cannot be excluded. This will result in too few people contributing. Even if this smaller, more publicly spirited group (or some super rich individual) could afford the cost of the production, they will probably decide that it is simply not fair that they should shoulder the entire cost. Production will fall to zero. Thus the state is required to compel those benefiting to contribute to the cost, and thus ensure that a reasonable level of production is attained - although there will remain immense problems with assessing whether this is an efficient level of production. It is also worth noting that this is a purely theoretical argument because no country, in the developed world at least, has tested whether in fact private endeavour would get round some of these problems in the absence of any state provision.

In any case, there are very few 'pure' public goods; many display some of the characteristics but not perfectly. For example, Ng (1983) cites the example of broadcasting. In this industry there is clear non-rivalness in consumption but also much scope for exclusion if payment is through subscription or a licence fee - through the use of television detector vans, for example. With the advent of cable and satellite broadcasts exclusion has become still easier by means of scrambled

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<sup>40</sup> The general criminal deterrent effects of a police force have a similarly pure effect in the region in which it operates.

signals. But the broadcast itself remains non-rival, and privately financed television, though perfectly possible, is likely to lead to inefficiency because of this non-rivalry. High set-up or fixed costs are combined with zero (in the case of free-to-air commercial television) or close to zero (for cable providers) marginal costs. Since the cost of supplying an additional customer is so low, production levels will not be based on marginal valuations equalling marginal cost. Moreover, consumers, knowing this, will not have an incentive to reveal correctly their marginal valuations (Gravelle and Rees, 1992 p.528). The implications for state intervention are complex, and depend on various methods of eliciting people's true valuations. Koboldt and colleagues (1999) argue that both advertising-based and subscription services have a role to play in assessing valuations and providing programmes, but that licence-fee (tax-based) funding will also be required if certain types of programme are not to be lost - in particular 'wide appeal, high value' programmes which are watched by many but valued very highly by only a few (*ibid.*, pp.65-69).

Many 'impure' public goods are actually more like private goods with significant external effects. The principal welfare service which relies on external benefits for its theoretical justification is education.<sup>41</sup> The role of externalities in education must be carefully separated from the increased productivity which education provides, and which is reflected in increased earnings of the individual concerned - although the connection between education *per se* and this increased earning power is now often questioned (Blaug, 1984; Glennerster, 1993). These increased earnings are 'internal' benefits: someone pays for education, and benefits from the consequently higher income levels later in life. If a whole nation's production is increased in this way, there is no external effect. A true external effect must influence *others*, and with education the beneficial influence is taken to be the increased ability of people to work *together*. Social skills are of limited benefit if others, with whom one has to work and live, do not possess them.

Take two people on a desert island, one of whom enjoys literacy for his own sake, and another who does not. The one who does not calculates that there is insufficient benefit to be derived from teaching himself (or 'paying' the other to do so) when compared with other things he could

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<sup>41</sup> In a recently published review of educational economics, eleven articles were collected together under the section heading 'externalities and the role of government subsidies' (Cohn and Johnes, 1994; see also Blaug, 1970; Blaug, 1987).

spend his time doing. The literate castaway tries to reason that they would both stand to gain from literacy by being able to co-ordinate and communicate their activities in a more sophisticated manner. However, the illiterate castaway still estimates that the combination of the social benefit (which accrues to him) and his private benefit will not quite cover his time costs in achieving literacy. In doing so, though, he does not calculate that portion of the social benefit going to his companion - adding this benefit may mean that the aggregate social benefit exceeds the aggregate cost. The literate castaway may need to pay (or 'subsidise') the illiterate to learn. However, in a large complex economy the state takes the role of subsidiser because of the extreme difficulty of organising such payments.

Some authors do distinguish carefully these internal or 'private' benefits from the external or 'public' ones:

*education and training will probably increase a person's earning capacity ... If this were all there were to education it might well be left to the private market place. Yet we collectively gain from living in a well-educated and law-abiding society in which others are able to converse with us, enjoy music and the theatre, and go about their lives peaceably (Glennerster and Low, 1990 p.28)*

Outside economics, oblique and possibly accidental reference to these presumed external benefits has often been made, possibly mixing up these two distinct type of effect. The 1943 white paper which foreshadowed the following year's historic Act proclaimed that '[in] the youth of the nation we have our greatest social asset. Even on a basis of mere expediency, we cannot afford not to develop this asset to the greatest advantage' (Board of Education, 1943 p.3). And one social historian recorded the words of Churchill at about the same time: '[one] cannot conduct a modern community except with an adequate supply of persons upon whose education much time and money have been spent' (Bruce, 1968 p.320). The reports into higher education cited above, particularly Robbins and Dearing, also made repeated reference to the national interest. The latter's analysis of why the state should support higher education includes the following passages:

*society as a whole has a direct interest in ensuring the UK has the level of participation in higher education which it needs for sustained economic and social viability ... the costs of a shortfall in the numbers of those obtaining such qualifications will fall to the UK as a whole and its citizens [...]*

*Firms and individuals are most likely to engage in training specific to their immediate needs. There is therefore a danger that, if left to employers and individuals, the nature and level of higher education will not best serve the long term needs of the economy as a whole; and there will be under investment. The state alone is able to ensure that tomorrow's workforce is equipped with the widest range of skills and attributes* (National Committee of Inquiry into Higher Education, 1997 p.288, emphasis added)

Rather more straightforward examples of state intervention on the basis of external costs are those associated with the environment and pollution (Le Grand, Propper, and Robinson, 1992). These 'polluting' costs can be extremely wide-ranging, and include examples beyond the familiar factory belching smoke onto a local residential area. Classic anti-smoking propaganda plays heavily on the costs to others of exhaled smoke - both to adults in public places, but also to children at home and to the unborn baby (Secretary of State for Health *et al.*, 1998).

Environmental health departments are 'perhaps the best known and most firmly established local government function ... responsible for smoke and noise abatement, the regulation of caravan sites, the control of poisonous waste disposal ... the control of nuisances (such as waste tips, insanitary or over-crowded premises, unfenced mines or quarries) and offensive trades (such as glue-making, fat-extraction and tanning) ... refuse collection, street cleaning and the instituting of proceedings against litter offenders, ... the disposal of dead bodies where no-one else can be found to be responsible; and the control of vermin.' (Byrne, 1994 p.87-8).

The need for state subsidies for health care are also partly based on the classic externality or public good argument. In fact, there are two external consequences of ill-health identified in the literature. The first is that a failure to treat communicable diseases can become a cost on others (Logan, Green, and Woodfield, 1989). The classical utilitarian position, propounded by Jeremy Bentham, argued for state intervention as a public health function, due to the external costs of communicable disease. Fresh water and enclosed drains for sewage, for example, should be provided by the state so as to protect the spread of disease and thereby promote aggregate utility (Dinwiddy, 1989 pp.97-98). But this form of ill-health is now much less common than it was, and rationales for state intervention on this basis alone fail to address those forms of illness which affect the sufferer alone.

The second kind of external benefit from the existence of health care services has been termed the 'caring externality' (Culyer, 1980). Essentially, this justifies the provision of health care for those who need it on the basis that simply observing people suffering because they cannot or do not have the foresight to provide for themselves imposes a cost on these observers because they care about others' suffering. Thus, health care is undersupplied by individuals who might take a risk with their own health but do not take into consideration the costs they are potentially imposing on others. Other authors have termed these 'psychic costs' and have suggested that they may be used to justify the compulsory use of seat-belts or motorcycle helmets (Dworkin, 1983). Health care may also display 'option demand' (Weisbrod, 1964) characteristics, whereby individuals' derive benefit from the knowledge that a service is there and available to them, even if they never use it - another form of external benefit.

Transport is an area of major policy interest in its own right (White, 1995). There are numerous reasons why universal intervention in transport might be supported on economic grounds (Le Grand, Propper, and Robinson, 1992) but, again, externality is the principal one (Nash, 1982). Road travel in particular is considered to create external costs of three different types: first, motor vehicles use fuels which are considered to damage the environment and contribute to ill-health; second, the act of travelling by road when many others do the same imposes a cost on other travellers by slowing their travelling time (i.e. 'congestion' externalities); and third, incompetent driving can actually cause accidents, injury and death. The policy response has been twofold: first, the taxation of motor vehicle fuel and the subsidy of other types of public transport, both of which are designed to bring down road travel to more socially efficient levels; and second, the imposition of strict regulations, such as the driving test, 'traffic calming' measures and compulsory insurance, to reduce the effects of accidents. However, the need for tax and subsidy policies derives from a justification for free road provision in the first place. Roads are impure public goods, in that it would be very difficult, and costly, to exclude those who wish to avoid paying from using them. But providing them free encourages their overuse, and thus the subsequent external costs. In fact this 'unexcludability' may have been overplayed in the past: many continental motorways are funded by means of charging for use. And now that the external costs of road use are becoming ever more apparent, it may be that road pricing and other traffic

restrictions will grow in relevance as a means of correcting the ‘failure’ of the original market correction.<sup>42</sup>

A special case of an external cost is that concerning future individuals. Deriving from the philosophical theories of Parfit (1984), this theory relates to *myopia* concerning one’s future wants (Le Grand, 1995). At its simplest, the theory states that we are not precisely the same person as we grow older, and that a decision made now about our future welfare is in fact a decision which affects another individual. Thus, the state can intervene on the basis of potential external costs imposed on one’s future self. This theory has been used to justify the compulsory ‘purchase’ of old age pensions by the state, but it could just as well be used to justify compulsory provision of long term care for the elderly, or any form of benefit which we are likely to require some time in the future.

One major justification for supporting state intervention in public services may not at first sight appear to belong to the class of externalities; that is, promoting social cohesion. In some ways it seems to be related to equity concerns, particularly in the sense of ‘equality of status’ (Powell, 1995 p.170), but the attribute being equalised in such a case is vague. Furthermore, status may be a ‘positional good’ (Hirsch, 1977): since its value derives from being only available to a few, it cannot be equalised, for under such circumstances status would not exist. It may be more helpful, therefore, to think of the goal as one of promoting social harmony and cohesion, rather than an attempt to equalise an essentially non-quantifiable characteristic.

Tawney emphasised in particular that universal social services were not advocated to simply achieve a ‘quantitative alteration in the distribution of wealth’:

[The development of social services’] *most significant aspect consists in the qualitative change in the character of a society which is produced when disabilities afflicting particular classes are diminished or removed...* (Tawney, 1964 p.221)

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<sup>42</sup> Such policies were in fact proposed in a recent white paper (Department of the Environment, Transport and the Regions, 1998).

The most influential conception of the role of the state in this context is provided by T.H. Marshall and his notion of social citizenship (see, for example, Marshall, 1950; 1981). For Marshall, social rights are the natural continuation of a process which started hundreds of years ago with the development of civil rights and continued in the 19<sup>th</sup> century with the development of political rights. Social rights to various social services were not just, or even primarily, about the distribution of social benefits, but about promoting social cohesion and banishing class distinctions: ‘equalisation is not so much between classes as between individuals within a population which is now treated for this purpose as though it were one class’ (Marshall, 1950 p.56). Some have argued that this notion caught the essential spirit of the welfare state ‘better than any other’:

*The rich man and the poor man would collect the same pensions from the same post office counter, and sit next to each other in the same doctor’s waiting room. They would be no less poor for doing so, but they would be that much more full citizens of one community* (Marquand, 1988 p.29)

The specific societal ills which such a conception of the welfare state addressed were those of stigma and lack of social integration. Under non-universalist systems it was inevitable that some administrative investigation would be necessary to establish who did not have the means to purchase social services for themselves. This, in turn, meant that those who passed the means test would in some sense be classed as needing assistance and therefore as failing to provide for themselves. Thus a section of the population would be permanently stigmatised as failures or ‘lesser’ citizens. Townsend has been one of the fiercest critics of increased selectivity:

*Far from sensitively discriminating different kinds of need [selectivity] lumps the unemployed, sick, widowed, aged and others into one undifferentiated and inevitably stigmatised category* (Townsend, 1975 p.126)

A concern with stigma is often very closely tied up with a concern for equity in the distribution of resources. Townsend in particular mixes the sort of concerns articulated in the quote above with those that are simply related to poverty and deprivation in social conditions. This notion of stigmatisation is particularly well developed within the literature on transfer payments and the ‘universal versus selective’ debate therein, but it also applies to universal services (for a detailed discussion of the debate in the context of free school meals, see Davies, 1978 pp.7-15).



Furthermore, under selective social policies members of a society are increasingly separated from one another - different income groups and classes lead different lives and may rarely come into contact. This will perpetuate a lack of communication and understanding in society, encouraging strife and possibly social breakdown. Titmuss articulated the benefit to be gained from universal services in this context when describing his own experiences of the NHS toward the end of his life, when he was suffering from cancer. He shared a regular appointment for radiation therapy with a young West Indian with cancer of the rectum. What determined who got the radium treatment first, he recalled, was 'not race, religion, colour or class' but 'quite simply the vagaries of London traffic' (Titmuss, 1974 p.151; see also Titmuss, 1968). He also describes how he got to know a severely injured ex-army engineer and learned 'a great deal about other human beings and their predicaments' (1974 p.150). He referred to his experience as one of 'social growth' and believed that a service such as the NHS can contribute toward the 'texture of relationships between human beings' - a clear example of the objective of social cohesion.

Public service broadcasting in particular has been defended by some sociologists as a means of promoting a more integrated national community at a time when society, it is argued, is disaggregating into a collection of atomistic individuals. It can do this because - in the UK at least - a licence fee must be bought to watch any television broadcast. This then automatically provides five strictly regulated terrestrial channels which between them account for a significant degree of shared viewing time. There are, as yet, insufficient viewers of satellite and other channels to significantly alter this situation. At its simplest, large numbers of people share in the same activity, giving a sense of social purpose and cohesion: '[n]either education, religion, royalty, nor politics seem capable of providing that sense of participation in a national culture that a socially fragmented society requires' (Kumar, 1986 p.57). This kind of rationale has recently formed part of the BBC's defence of the licence fee (Le Grand and New, 1999).

Universal transport policies could also be supported on social cohesion grounds. Increased mobility for the majority - through the private motor car - means that the pattern of social life is changing: more out-of-town stores, entertainment complexes and other facilities; a commensurate reduction in 'high street' activity and other inner-city communities; and increasing commuting from dormitory towns and villages. All these developments may place a strain on traditional

patterns of interaction and integration, with particular problems for those without transport, but more generally on 'social contact and neighbourliness' (Cahill, 1994 p.84).

Education, too, has long been argued to contribute to social cohesion. Take the following examples of some of the benefits of education, presented, it must be acknowledged, rather sceptically by the author:

*the encouragement of lawful behaviour and the promotion of voluntary responsibility for welfare activities ... the tendency to foster political stability by developing an informed electorate ... the emergence of 'social cohesion' by the transmission of a common cultural heritage* (Blaug, 1987 p.108)

There is, however, a problem of classifying all these 'cohesion' arguments as a separate class of justification. The quote from Blaug was taken from a review of the case for 'planning' education, by which was meant state intervention. But the examples derived from an analysis of 'spill-over' benefits or externalities. In other words, the private exchange of education has, as a side-effect, certain consequences which involve promoting a more agreeable society to live in for everyone - the effect is greater than simply the sum of individual benefits. This agreeability relates to the stability and sustainability of society - aspects which all the other aspects noted above are also engaged with, to the extent that they are actually doing more than simply contributing to equity. In fact, social cohesion has been specifically defined as a special class of market failure argument - as an external benefit (Davies, 1978 p.11) - and this may in the end be the most sensible way of categorising it.

For example, policies focused on leisure, sport and entertainment - 'recreational welfare' (Coalter, Long, and Duffield, 1988) - have also been very commonly supported in terms of social cohesion, or, in Coalter *et al.*'s terms, on the basis of need or social rights, community and externalities (*ibid.*, pp.155-169). They are supported because of their external benefits in reducing boredom, frustration; in promoting healthy lifestyles thereby reducing the cost of ill-health; and in contributing to 'the vitality and imagination of the community/nation' in the case of the arts (*ibid.*, p.126). The provision of recreational facilities are argued to promote a sense of community, and to resist social breakdown, particularly in inner-city areas - again, specialised forms of external benefit.

Of course, spending on the arts in particular has been criticised for unfairly favouring the relatively well off (Le Grand, 1982 p.158), and opera subsidies have been satirised in the popular press as handouts for ‘toffs’. But to the extent that these justifications make use of their general benefit to the community, they implicitly suggest that there is an external effect. For the remainder of this thesis, then, arguments from social cohesion will be categorised alongside those explicitly citing externalities.

### *Imperfect information*

Imperfect information chiefly involves the imbalance of information between buyers and sellers or principals and agents. This form of market failure is central to formal economic justifications for universal intervention, and ultimately to support for the services such as the NHS itself. Perhaps the seminal article in the health field was Kenneth Arrow’s analysis of the economics of medical care (Arrow, 1963), and since then the economic analysis of health care delivery has grown to huge proportions (see, for example: Barr, 1992; Cullis and West, 1979; Culyer, 1971; Lees, 1976; McGuire, Henderson, and Mooney, 1988; Mooney, 1986).

Arrow argued that ‘virtually all the special features of (the medical care) industry . . . stem from the prevalence of uncertainty’. By ‘uncertainty’, Arrow was principally referring to unpredictability and information asymmetry. Unpredictability and the risk of the sudden need to expend large sums of money is a common problem for which large and successful insurance systems have developed. People are generally risk averse, which means we prefer the certainty of £5 rather than a probability distribution where the mean is £5. Thus people do not in general wish to gamble on whether they will avoid a serious car accident which leaves them facing huge medical bills, and would rather pay an insurance premium in exchange for transferring that risk to the insurer. Similarly, imperfect information is common, although it is rare for us to know so little about the expected utility to be gained from one or other health care product. We occasionally may not know that we need care, what is necessary to improve our health, whether our health has, in fact been improved, and whether this improvement was anything to do with the service rendered.

However, clinicians do have this information - or at least are assumed to have it. Because of the high costs in obtaining the information and knowledge required to assess our own need for care, we engage a clinician to do it for us. This introduces a 'principal-agent' problem because the doctor will have an incentive to withhold information which might encourage the patient to decline care (for example, if the benefits of a treatment are in fact very small). Furthermore, insurance markets in health care suffer particularly from adverse selection and moral hazard. In some of these cases, the specific formal response of economic theory is to introduce a regime of tax and subsidy (Gravelle and Rees, 1992 pp.672-688). But taking all these difficulties together has led some to argue that the only response is something which turns out to be the NHS (Donaldson, 1998).

It is worth noting that state support for education, too, has been justified using information-based arguments in standard textbooks (Barr, 1998b). Education is certainly a highly complex product, and it may be that there is simply too little information available to parents or to older students about the likely benefits from education (or it is too overwhelming in its complexity), leading to under-consumption. This does not necessarily lead to a case for universal subsidy - 'only if the information problem is regarded as major is there an argument on this account for public production and allocation' - but 'there is an efficiency argument for intervention, particularly in the form of regulation. This would embrace mandatory school attendance ..' (Barr, 1998b p.344).

Occasionally, the asymmetric information may occur because of the institutional arrangements already in place. For example, British universities are not profit maximising organisations; they do not gain all, or even most, of their income for charging the market price for their courses. To a large extent, therefore, they are operating under fixed budgets and thus must ration their intake by non-price means. However, as methods of payment change to loans and self-finance, universities might be expected to engage in more actively seeking students and thus providing more information about the benefits of higher education. But given their non-profit maximising basis, they might have insufficient incentives to do this. There may be a danger that potential students continue to lack the information necessary to allow them to make a sensible judgement about the long term costs and benefits: 'many students ... will be unused to entering into this type of credit arrangement, and are likely to be reluctant to commit themselves to long term debt' (Le Grand, Propper, and Robinson, 1992 p.72). This has been generalised in terms of a 'capital-market

imperfection' (Barr and Falkingham, 1993), which with reference to student loans manifests itself because lenders 'cannot easily assess the risk of the borrower, and generally no collateral is possible for such lending' (Barr, 1994). So the state itself may be best placed to provide the relevant information by extolling the virtues of higher education, or organising the provision of loans on terms more favourable than the private market would supply - a feature of the current arrangements.

The case for public service broadcasting also relies partly on arguments from imperfect information, but often combined with those from externalities. The information case is that with broadcasting it is very hard to know what we like in advance; furthermore, television itself may serve to shape our preferences and tastes for the future (Graham and Davies, 1997). As a consequence of both these factors the market will typically provide conservative viewing - based on past experience of what people like - rather than challenging and innovative viewing which maximises utility over time. As Graham and Davies put it:

*consumers may be unavoidably myopic about their own long term interests. Consumers cannot be other than ill-informed about effects that broadcasting may have on them [...] if all television is elicited by the market, there is a very real danger that consumers will under-invest in the development of their own tastes, their own experience, and their own capacity to comprehend (p.20, emphasis in original)*

Another information-based argument is combined with that from externalities. Democracies require the unbiased provision of information so that we can all make reasoned judgements about political matters, but a market will only service short-term 'information' wants of a more flippant and salacious kind. Whether this is a criticism of individuals' short-termism, or an assertion of external benefits of unbiased political information for the continuation of society is unclear, but the case is certainly that a non-market broadcaster will be able to correct for these deficiencies (Le Grand and New, 1999). An extension of this line of reasoning suggests that holding those to account in authority - tough political interviewing, for example - has an external benefit of deterrence to others. Again, the market would undersupply.

A final example of information imbalance is superficially straightforward. Many activities have potentially harmful side-effects - such as smoking, swimming in dangerous waters, or eating

certain kinds of food - information which could be unavailable or hidden by the suppliers. In these cases, the state might assume the role of 'rebalancing' the information relationship by compelling certain types of declarations to be made about the potential dangers. However, the policy may go further than this, and actually ban the product or at least impose severe rates of taxation, or oblige the taking of certain precautions. This kind of intervention might also be defended on externality grounds - that the activity or consumption can either directly harm someone else, or indirectly impose costs by, for example, becoming a burden on other welfare services and thus the taxpayer. As a result of these 'mixed motives' it can very often be difficult to disentangle a policy directed at information imbalances from those intended to correct externalities.

### *Practicality and incentives*

There is a final category of efficiency argument which accepts that the market needs some correction, but argues that one does not necessarily require any of the more sophisticated justifications outlined above to support universal, consumption-specific policies. Instead one has merely to accept that means tested provision has inherent failings of its own - that it involves a high degree of administration in order to establish who is entitled and therefore incurs high costs of implementation; that it may damage economic incentives by instituting high-marginal tax rates as benefits are withdrawn as income rises; and that it has a tendency to stigmatise recipients and therefore not be 'taken up' by those it is designed to target. In all these cases, therefore, problems of efficiency, if not market failure, are encountered.

These kind of arguments certainly favour universalism but not necessarily relating to specific goods and services. The response to the first and third of these problems would be to institute universal cash payments instead. That is, if the problem is one of bureaucracy or stigma and targeting, it would be simpler to have a system of cash payments than the requirement to organise direct provision, or to offer vouchers or other 'tied-in' payments. Here 'practicality' seems a peculiarly ill-equipped type of argument, since in all respects it would be easier to provide income transfers.

The provision of universal cash payments might also be supposed to account for the problem with disincentives. If universally subsidising a particular good or service is supported on the basis

that people will not be unduly hurt financially if they find a job or a better paid job, then presumably this would apply equally to universal cash benefits. However, there may remain an aspect of universal policies aimed at specific goods and services which are still less likely to adversely affect incentives. If policy-makers believe that individuals will always be willing to strive for particular forms of immediately pleasurable or hedonistic activities - such as going out for a drink, watching videos or taking a cheap package holiday - then a consumption-specific benefit may do more to promote effort. This is because free education or health care cannot be spent - or traded in for - any of these more hedonistic activities, ensuring that the recipient would still need to find some kind of employment to fulfil their other wants. Supplying a universal cash payment - especially if it included a supplement for the value of health and education, for example - would allow the recipient to spend it in any way he or she wants, including those which might otherwise have provided economic incentives. Whether this is in fact the case is an empirical question.

Although many of these practical and incentive-based issues are undoubtedly important, the main concern of this thesis is with matters of principle. It is important to undertake this approach both because principled investigation is a worthwhile endeavour in its own right, but also because issues of practical difficulty can often be overcome through technical and administrative innovation. When such advances do take place, it will still be necessary to establish the normative basis of a policy proposal which gradually achieves practical applicability.

### *Conclusion: the efficiency case*

Comprehensive analyses of the justifications for state intervention on purely efficiency grounds have been undertaken (Barr, 1998b; Le Grand, Propper, and Robinson, 1992; Glennerster, 1997; Stiglitz, 1989). In general, it is quite easy to see why market failure rationales would support universal interventions in the provision of services, rather than selective ones. In fact, perhaps surprisingly, the efficiency case for universal provision is at least as easy to make as that based on equity: markets fail, when they do fail, for everyone regardless of their income. However, even in the case of efficiency, market failure arguments may not always be sufficient to justify intervention - as we shall see in the next chapter. But before turning to an assessment of both the economic and equity justifications in more detail, we briefly review the

case against state intervention, and in particular those who believe that government failure will be at least as great as market failure.

### **Counter arguments: opposition to state intervention**

There are two quite distinct groups of opponents to universal state intervention: those who are in favour of state action to address equity concerns but consider that universal interventions are not necessarily the most appropriate means for achieving these ends, and those who oppose state interventions in general.

In the first group, much attention has been focused on transfer payments, particularly reform of universal state pensions where even those on the left support some weakening of universalism (Field, 1993 p.116). However, as noted earlier, in the social services the analysis of Le Grand (1982) is the most significant critique of universalism to achieve equity aims. More recent studies have also failed to find a systematic bias in favour of the poor (Evandrou, Falkingham, Hills, and Le Grand, 1992), although both the approach and findings of these critiques have been challenged (Powell, 1995).

Le Grand argued that public expenditure on the social services - health, education, housing and transport - 'has not achieved equality in any of its interpretations ... For several of the services there has not even been a reduction in the relevant inequalities over time' (p.137). Thus greater equality specifically in terms of public expenditure could be achieved by abolishing many of these services. One possible alternative is the extension of means tested services where universal ones were in place (although for higher education, for example, greater equality in public expenditure could be achieved without any means testing). However, whilst this would certainly promote much greater equality in terms of public expenditure, other forms of equality - of use or outcome - might suffer: for example, as we have seen, individuals may not take up a means tested service for reasons of stigma or lack of information.

Thus, Le Grand's findings may not lead to the rejection of universalism for three reasons. First, universal provision might help satisfy equity concerns that no-one ought to fall below a minimum, even if on certain measures inequality has widened. Second, as we have seen, universal



interventions can be supported for a number of reasons other than equity. And third, in some cases and on some measures, inequalities might be still worse without the state provision.

The second group, however, is a significant alliance of those who, for various reasons, oppose state action *per se*. They do so to various degrees, and certainly few oppose the intervention of government in the provision of all goods and services. However most of those who are inclined against state intervention to whatever extent would counter many of the arguments outlined above, and their views must also be reviewed. Opposition tends to fall into one of three categories: state action infringes personal freedom and property rights; state action acts as a corrosive influence on the ability of people to rely on themselves; and the state is subject to inherent failings of its own and may in practice achieve worse outcomes than the free market.

### *Freedom and property rights*

The most fundamental criticism of state intervention strikes at the very authority of governments to influence the distribution of goods and services, or the nature of their provision, in a society. The criticisms concentrate on the effects which state action (in practice, taxation) has on the ability of individuals freely to exchange goods and services. In the twentieth century the chief proponents of this kind of ‘anti-state’ view have been Frederick von Hayek (1948) and Milton Friedman (1962) and more recently Robert Nozick (1974; 1986).

Arguments for freedom and property rights are closely linked. Nozick asserts a particular conception of justice which emphasises individuals’ rights to property (holdings) which have been freely obtained (that is, without overt coercion). Thus, any distribution which so results from such exchanges is a just one. Clearly, any attempt by the state to intervene in any way (since resources will be necessary for any action) will require that some proportion of these freely exchanged goods and services are appropriated by the government. People’s property rights are thereby violated:

*a person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding; a person who acquires a holding in accordance with the principle of justice in transfer . . . is entitled to the holding (Nozick, 1986 p.213).*

The right is immutable - it should not be compromised by considerations of the distribution of those holdings. The implication for state intervention is clear: it should not happen at all, regardless of whether the intervention is universal or not, although it may be appropriate to regulate the market by enforcing contracts.

But freedom itself - in the sense of being able to exercise choice - can be valuable in its own right, 'intrinsically' (Sen, 1988). In this sense, if a government acts in a purely redistributive way and equalises purchasing power, the 'total' freedom in a society could be enhanced under certain assumptions. The government would, though, have to act coercively to achieve these arrangements (and continue to do so to avoid inequalities recurring). But in any event, our interest is with state interventions in the provision of goods and services, and in these circumstances freedom in the instrumental sense is curtailed - we are restricted in the extent to which we may exchange our labour for goods and services. Even those who are well disposed to state intervention have acknowledged that freedom might be compromised in this way (Lindbeck, 1988).

### *Self-reliance*

The notion that state action to support those who find themselves in difficulty actually imparts harm to these people, in terms of their self-esteem and ability to fend for themselves, is one that has seen something of a resurgence in recent times (Murray, 1984; Bell, Butler, Marsland, and Pirie, 1994). For these critics, the result of welfare state policies has been to promote dependency amongst a section of the population who are becoming a new form of underclass, no longer able to stand up for themselves and develop their abilities. So used to being cared for, they stop being able to care for themselves. The consequence is that they remain unskilled and inert, unable to offer value in the labour market.

These views are highly controversial, but are nevertheless an important critique of universal state intervention in the social services. They tend to concentrate on the transfer payment system - focusing, for example, on single parent benefits, and those for the young unemployed - but many of their arguments are also relevant to universal benefits in kind such as health care and education.

### *Government failure*

The final class of criticisms is probably the most significant, partly because the disagreements could in principle be resolved empirically, and partly because they are potentially the most damning. The charge is that state interventions do not succeed even on their own terms - that governments fail in the same way that markets fail. The intellectual heritage of this approach is economics applied to politics - the public choice school (McLean, 1987; Dunleavy, 1991).

The public choice critique of government action is now the subject of a vast literature, deriving from a number of key authors (Tullock, 1965; Downs, 1967; Niskanen, 1971). A useful summary can be found in McLean (1987) and a reformulation in Le Grand (1991). There are many subtle variants on the public choice critique, but the essential thrust of their argument is as follows. State bureaucracies are inherently inefficient, with tendencies to maximise their budgets beyond the point at which social efficiency is obtained. Without the discipline of the market to restrain wasteful behaviour, and with legislative bodies unable to properly monitor the use and need for appropriated funds, the state over-provides systematically, and is therefore inefficient. Liberal democratic political processes contribute to this tendency. Thus, the state is more likely to fail in its quest for efficiency than the market, which can often correct its own shortcomings (Anon, 1996). This inability to act efficiently, it is argued, also manifests itself in the state needing to absorb an increasingly large proportion of the national income, as the relative price of state provision rises in comparison to prices in the private sector. This means that welfare states are subject to a fundamental lack of sustainability, as citizens will not tolerate ever growing rates of taxation (Snower, 1993).

Although these counter-arguments to state interventions are not considered in detail in this thesis, it is important to note that, even when there is a good case for arguing that private actions do not serve to maximise welfare or promote equity, this by no means implies that a state intervention will do better. For now, however, we are engaged with an investigation into whether the existing justifications are sufficient, assuming these counter-arguments do not apply. For if *this* enterprise does not succeed, then arguments over property rights, self-reliance and government failure may be redundant.

## Chapter 5: Equity and Efficiency: are they sufficient?

So far we have seen how justifications for universal interventions in the consumption of specific goods, services and activities have relied on notions of social justice or equity on the one hand, and efficiency and the potential for market failure on the other. For those who accept that the state has a reasonable chance of doing more good than harm in addressing social ills, the case for universal intervention is made on the basis that the state's powers of compulsion allow it to correct market failures, and effect consumption-specific redistribution to ameliorate social injustice.

But are these two sets of justifications sufficient? The policy response to putative social injustice has been not just to make more equitable the distribution of income or spending power, but to specify how this income should be spent - or at least to encourage it to be spent in certain ways. Why does equity or social justice require this, specifically? The outcome seems to go beyond a simple concern with the distribution of resources, which individuals are then left to convert into utilities according to their own preferences, wants and self-assessed needs. Further principles appear to be involved which specify which wants and needs have priority and thus should be subjected to specific distributional outcomes.

Efficiency and market failure justifications also suffer from a similar, if rather more complex, tendency to include rationales which lie outside their domain. Markets are essentially mechanisms for realising wants and needs, as are many other activities which do not necessarily involve a market exchange but do involve a process of transforming a preference or want into utility, with or without the collaboration or assistance of another person. We have seen how these market mechanisms and other activities can fail to operate efficiently either because of problems with information or because they impose consumption on people not party to the original activity who are powerless to control these external effects.

But for each of these sources of market failure, analysts have on occasion apparently confused or unwittingly conflated a failure of a market mechanism with a different kind of failure. For example, in some cases it appears not to be imperfect information which is the subject of the state intervention but what people do with the information - how they 'process' it. This activity -

what we might call ‘reasoning’ - involves no process of exchange or mechanism for realising preferences. Instead it is concerned with establishing what our preferences are, how we order and prioritise them, and which courses of action we should take in order to achieve them. It is an internal and reflective process, rather than an interactive and outward-looking one. To take another example, externalities are occasionally not simply taken to be forms of consumption imposed on others, but rather *judgements* about the consumption of the original parties to an exchange or activity. If so, can this still properly be called an externality, or does it require some other framework of analysis?

In the remainder of this chapter we revisit the justifications given in Chapter 4 to investigate these propositions in more depth. First we take the various justifications based on a concern for equity, and then those from efficiency and market failure.

## **Equity**

At a general theoretical level, and leaving aside the particular focus on justifying universal interventions, equity is concerned with the distribution of things. This may sound vague and a little unscientific, but it allows an important distinction to be drawn between the type of social ill which equity seeks to address and other problems of individual welfare. For the phrase ‘distribution of things’ has two elements, one essential to the concept of equity and one which very often accompanies it but involves a different kind of judgement. A ‘distribution’ describes how some measurable - or supposedly measurable - entity is shared out between people. Equity demands that this distribution is fair: that people get what is their due. ‘Things’ relates to what the measurable entity might be. There has to be a distribution of something.

In this section we will investigate two aspects of this distinction. First, the possibility of analysing equitable distributions coherently and with analytical insight without incorporating an analysis of the ‘things’ being distributed. Sen characterised the distinction in terms of ‘combining characteristics’ (which is concerned with distributional rules<sup>43</sup>) and ‘relevant personal features’

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<sup>43</sup> Sen includes ‘sum-maximisation, lexicographic priorities and maximin, equality or one of various other combining rules’.

(which equate to the ‘things’ being distributed<sup>44</sup>) (Sen, 1992 pp.73-4). For example, one can say that an equitable distribution should be equal, or it should favour those who have the least of the things, or it should reflect freely made choices, or hard work, or whatever. Of course, one could argue that if the ‘things’ being distributed did not matter to anyone - they were rotten apples, for example - then the discussion about the ‘distribution’ is redundant. This is true; but all we need to be sure about is that the ‘things’ *could* matter to someone for the debate to have relevance, because then we are engaged in an analytical endeavour about the types of factors which are morally relevant in deciding how things that matter to people are distributed. An objection could still be made that things that matter ‘more’ than other things, or things that we ‘need’ greatly, should be distributed in a different way from one another. For example, it might be argued that the kind of ethical reasoning which suggests a form of equity in the distribution of life-saving services will be different from that relating to the distribution of recreational services. But it is the claim that the kind of ethical reasoning which comes to this conclusion is *solely* to do with equity that will be challenged in what follows.

The second proposition is that there is a crucial distinction to be made between things which are themselves objects of consumption, and things which enable a degree of choice over what is to be consumed. The former might include some phenomena not normally thought of as consumable nor purchasable, such as political liberties, but in any event is concerned with ‘final’ wants and desires. The latter approximates to money, which is essentially of instrumental value: an ‘abstract medium of exchange value [...] [which] should be regarded as a representation of the commensurability of the meanings and values of other goods, not as a good with meaning or value in itself’ (Waldron, 1995 pp.145 and 147). So, if we consider income transfers, and most social security benefits fall into this category, then a decision about an equitable distribution does not include any requirement about how the money is spent (although the level of the benefit may have been influenced by what is considered a ‘necessary’ level of consumption, a point to which we return). If the choice of which goods or services to consume is left to the individual, then a concern with equity amounts to a concern with how to adjust income levels to arrive at a fair

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<sup>44</sup> Here Sen includes ‘liberties and primary goods, rights, resources, commodity bundles and capabilities’.

distribution. This may involve *universal* income transfers, if this is felt necessary to achieve take-up rates or to guard against disincentives, but no specification of consumption.

However, much state policy is actually concerned, not with income transfers, but with consumption-specific interventions. And, as we have seen from the analysis of the preceding chapter, in many cases equity is invoked to defend such interventions. Clearly, therefore, for these policies there is a concern that goes beyond the simple distribution of benefits, to which goods and services produce those benefits. Various terms have been used to refer to this approach in the economics and political theory literature, such as ‘specific egalitarianism’ (Weale, 1983a), ‘categorical equity’ (Feldstein, 1975 p.76) and the ‘domain’ of inequality (Tobin, 1970).

But this raises a problem, as Weale points out:

*The problem is really one of trying to justify why there should be any public concern for specific aspects of individual material welfare, rather than a concern for the general level of individual welfare (Weale, 1983a p.104)*

In a purely descriptive sense there is no conceptual difficulty in talking about the distribution of particular services - it may be useful to know how consumption of various items varies throughout the population (Le Grand, 1982). But equity is concerned with normative matters: how ought society to be organised? And here there seems to be something missing from accounts which specify or try to influence consumption patterns whilst relying purely on equity justifications. Take the case of higher education. Why, and on what basis, has the choice been made that this service, specifically, requires a universal intervention by the state? No allowance seems to have been made for the possibility that certain people may consider education to be an irrelevance in their lives, and that their welfare would be better served by consuming other goods or services. In such a case, ‘educational equity’ would be an empty achievement for the person concerned - in their view. The fact that some people may consider the rejection of higher education an ill-considered, short-sighted or even stupid position for someone to adopt, does not detract from the fact that this is one person’s (or the state’s) opinion about another person’s welfare.

Thus, equity does not seem to be enough. Do we not need a principle which allows the imposition of a judgement about what constitutes relevant consumption for equity concerns? In

order to test whether such an additional principle is in fact required, we will now examine three theories of equity in detail to establish whether they can sustain such an omission (Walzer, 1983; Daniels, 1985, Le Grand, 1991). They each imply, or specifically recommend, that equity alone can determine state policy in respect to the relative importance of what should be consumed. Each considers the case of health care alongside other areas of consumption (Daniels concerns himself solely with health) and, given the generally accepted importance of this service area, it will form the chief exemplar in the following review of the theories in action.

### *Walzer*

A generalised theory of these types of consumption-specific equity is provided by Walzer's *Sphere's of Justice* (1983).<sup>45</sup> Walzer's argument is that the principles of justice are themselves pluralistic in form and that different social goods should be 'distributed for different reasons, in accordance with different procedures .. and that these differences derive from different understandings of the social goods themselves - the inevitable product of historical and cultural particularism' (p.6). So, with health care, our common understanding of the significance of health may lead to a particular distribution of its benefits - and this might involve abolishing private finance or instituting other forms of universal intervention.

Walzer argues for a concept of complex equality, which involves different distributional rules for different goods in different 'spheres'. Thus in addition to income and wealth - which constitutes the focus of 'simple' equality - there can be (in)equity in terms of 'membership, power, honor, ritual eminence, divine grace, kinship and love, knowledge .. physical security, work and leisure, rewards and punishments' (p.3). As long as those who do rather better in one category do not use this advantage to obtain similar advantages in other categories, then Walzer argues that domination - the true enemy of social justice - is avoided. In order to achieve this, boundaries must be set up between spheres, and different means of distribution will apply in each of them.

A key point from our perspective is that income and wealth has no particular significance from the point of view of equity. Walzer argues that simply concentrating on wealth, and redistributing

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<sup>45</sup> Subsequent page numbers in the text refer to *Spheres of Justice*, unless otherwise stated.



wealth in some equitable fashion, will require 'statism' and increasing political power to ensure that the redistribution takes place. He recognises that constitutional checks and balances may restrain the domination of this political power, but suspects that some form of domination will return - either 'private' and wealth-related or statist, probably alternating with each other (p.16). If, on the other hand, complex equality is attained, the influence of wealth is constrained. This may be because, for example, wealth is not allowed to influence health and education, and that domination is avoided because although one may be very rich one will not be able to bolster that position by also sustaining a superior health or educational status. The essential point is that various kinds of distribution, other than those determined by the free play of individual decisions backed by money, should operate in various spheres - including both consumption and non-consumption 'goods' such as political office. We should not be able to buy advantage in health or education, or anything else in the sphere of 'need' (p.91), or in political office or in any other of a whole range of spheres.

The decision that certain categories of 'good' should be protected from the influence of 'wealth' is familiar to us. Most developed societies protect political office from being obtained by those who are the best off financially. But the reason, for Walzer, is to prevent 'domination' - for him, the principal social evil associated with unconstrained inequity. Inequalities (and presumably inequities) will persist in each sphere, but different people will be advantaged in each.

However, claiming that boundaries ought to be constructed to prevent pernicious leakages of domination between spheres involves an implicit judgement about what is in people's interests generally. Certain goods are designated as crucial to achieve this desirable state of affairs. How are these goods chosen? Not, I would claim, by appealing to principles of equity *per se*, but by making an assessment (in Walzer's case by looking at the historical experience) about why they are 'important' for people. Establishing importance requires a judgement that goes further than one simply relating to equity, because it implies that people cannot properly assess the relative importance of consuming certain kinds of good against the potential for being dominated.<sup>46</sup> For

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<sup>46</sup> Domination resulting from non-consumption goods such as political liberties and offices raise issues that go beyond this thesis. There are probably robust principles which oppose the trading of such liberties for income, although even here they do not obviously emerge from equity *per se*. Some people, in a society with equal incomes and trade in political favours, might decide not to 'buy' political influence if they judged their

example, assume incomes alone are equalised, and there are no ‘spheres’ (outside the political) where money cannot play a part. One person might wish to go fishing and travel, whilst another may wish to buy health and education. The former person might reasonably judge that she will not become unduly dominated by those who choose the latter, in her opinion. On the other hand, she could be protected from *unfairness* in terms of how much fishing she could do when compared with how much health care other (wealthier) people could choose, by redistributing income.

But Walzer’s case rejects this by making reference to the ‘social meaning’ of individual goods themselves. Specifically, he argues that health should be allocated on the basis of need. He is not just suggesting that the wealthy should not be able to augment their position by also being more healthy; he is arguing that even if we were all equally wealthy, this restriction on buying superior health should still prevail:

*Even with equal incomes, health care delivered through the market would not be responsive to need; nor would the market provide adequately for medical research ... it may be the case that money itself, in a market economy, is one of the things that people need. And then it too should be provided in kind (p.91)*

This mixes up efficiency rationales for universalism (the research element) with a confusing notion of money being provided in kind. But, more clearly, it also implies that the individual decisions of people in the market will not result in their need for health care being satisfied - presumably because they fail to ensure themselves adequately. Thus equal wealth would still result in an inequitable distribution of health - in some observer’s (or Walzer’s) view. The general principle is that different spheres of social life require different criteria for the just distribution of the social good concerned; more precisely, ‘the meaning of each social good determines its criterion of just distribution ... In the case of medical care, for instance, the distributive criterion is need’ (Miller, 1995 p.5).

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long term interest was served better by other forms of consumption. Forbidding such activity echoes Mill’s restriction on people being able to trade themselves away into slavery: freedom, in this sense, is a responsibility we all have, and not simply a matter from personal choice (Mill, 1974 p.173). But this clearly involves a non-equity principle which, instead, might involve arguing that people’s private judgements about their long term interests are misguided in some circumstances.

But who decides when a need is medical (rather than, say, related to unhappiness or lack of physical ‘excellence’ or attractiveness); more importantly, who decides when a need is sufficiently weighty to demand medical treatment (rather than using resources on other needs), or whether the need to insure against medical costs is relevant to a particular individual at all? This is a judgement on which individuals might well differ; some people might wish, having equal incomes, to take a chance on minimal cover and consume rather more other goods (fishing and travel). By arguing that these judgements are made with respect to ‘social meanings’ begs the question: what determines that certain social meanings (assuming we can agree on them) require certain forms of distribution? For, as Barry (1995, p.72) argues, even if we accept that some goods have social meanings as ‘needed’, this is not in itself enough to determine a particular distribution. After all, food and health care are both ‘needed’ but may be subject to very different distributional rules, with the former subject to none in most societies. The only way around this is somehow to *define into* social meanings the distributional criteria. But this assumes that people generally agree with Walzer’s conclusions about social meanings (for social meanings derive from people) but, in the US at least, are quite mistaken about the implications for policy. Unfortunately, no *analytic* insight is offered to defend why these mistakes are made by people and philosophers alike; no theory of justice provided within which these criteria can be articulated and defended. To move toward this requires, for example, a different kind of justification which relies on an articulation of why there are *special types* of need. This approach is undertaken in the second of our theories.

#### *Daniels (and Rawls’ Theory of Justice)*

One of the most significant contributions to political philosophy in recent times is John Rawls’ *A Theory of Justice* (1971). Norman Daniels developed the insights of Rawls and applied them specifically to health care (1985). Rawls’ theory itself has only partial relevance to our concerns because of our specific focus on consumption-specific interventions; however, his approach to this issue is instructive for the question of how far equity alone can guide us.

Rawls' overall schema is one which avoids specifying consumption-specific provision.<sup>47</sup> This is because, simplifying his argument, equity only requires that certain primary 'goods' are the subject of distributional concerns: basic liberties, freedom of movement and choice of occupation, powers and prerogatives of office, income and wealth, and the social bases of self-respect. Now clearly these are not 'goods' in the everyday sense of the word, for a particular reason. Rawls was keen to avoid the accusation that he was suggesting that it is possible to outline a just allocation of specific consumption patterns - the 'ends' which people pursue according to their preferences and tastes, such as snowboarding, eating oysters or watching opera. Rather than attempt this he instead concentrates in his simplified version on income and wealth.<sup>48</sup> This would be distributed equally unless any inequality would benefit the least well off - the so-called 'maximin' or 'difference principle'.

Shortly after he published his theory, some commentators criticised this as inadequate precisely because it could not take account of utilities any more than traditional welfare economics approaches could (although they at least explicitly conducted their discussions in these terms), and thus left open the possibility of *prima facie* unjust outcomes in terms of final utilities. Thus, under Rawls' equitable society

*the fact that one individual was satisfied with water and soy flour, while another was desperate without pre-phylloxera clarets and plovers' eggs, would have no bearing on the interpersonal comparison; if they had the same income they would be equally well off (Arrow, 1973 p.254)*

The individuals who are supremely happy with the simple things of life would seem to do rather well in this society when compared with those of complex needs and wants.

Rawls countered this by arguing that his concept of equity specifically rejects interpersonal comparisons of utility as irrelevant: 'the share of primary goods that citizens receive is not intended as a measure of their psychological well being' (Rawls, 1982 p.169). Thus justice cannot account for preferences, which must, in turn, remain to some degree the responsibility of

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<sup>47</sup> We will adopt the term 'equity' here for consistency, although Rawls used 'justice', or 'justice as fairness'. The basic concern is the same.

<sup>48</sup> As with the discussion of Walzer's theory, political liberties and equal opportunities for jobs and offices may involve different considerations from those relating to consumption - see Rawls' own discussion (1987).

the individuals themselves. The plover's eggs obsessive should be able to moderate his needs; he should, in some sense, grow up. At any rate, these kinds of inequalities will remain, but they do not obviate the claim that a distribution of income and wealth is equitable. Rawls defends this as follows:

*primary goods are social background conditions and all-purpose means generally necessary for forming and pursuing a conception of the good ...Justice as fairness rejects the idea of comparing and maximising satisfaction in questions of justice. Nor does it try to estimate the extent to which individuals succeed in advancing their ends, or to evaluate the merits of those ends (Rawls, 1982 p.169, emphasis added)*

We quoted the case above of the gastronome and the ascetic; as we have seen, Rawls' response that these sorts of differences are beyond the call of justice seems reasonable. If anything, we mistrust people who claim special attention simply on the basis of the particular sophistication of their needs; on the other hand we rather admire those who appear happy and content with relatively little. However, harder cases present themselves: compare the novel-reader who simply requires books and a quiet room to indulge her desires, with the keen yachtsman who likes nothing remotely as much as being able to sail his dinghy single-handedly out to sea. It does seem a little 'unfair' that equal incomes (or the highest possible minimum income) would favour the bookworm so completely. But we may accept this unfairness in the name of a formal system which all in society could understand and accept as a basis of social organisation, such as Rawls claims his does.

However, the issue of final outcomes will not go away so easily. Arrow asks the following: could someone who needs \$4000 worth per annum of coagulant therapy to have a reasonable chance of staying alive reasonably be said to be treated equally with a healthy person, if both are guaranteed only the same minimum income and if all their preferences are identical (Arrow, 1973 p.254)? The sick person requires this level of income just to get to the starting gate, as it were, where preferences can then start to be satisfied. And yet, in a Rawlsian society, \$4000 might be greater than the income guaranteed to the least well off. In this case, if we do not concern ourselves with the capability to satisfy ends at all then we are left with inequitable results. The problem stems from the fact that capabilities, capacities and opportunities to satisfy preferences vary significantly between people, such that simply concentrating on how much income people

have will omit essential factors from assessing their well-being.<sup>49</sup> Thus surely we are justified in introducing health care purely on equity grounds within a Rawlsian conception of justice?

The first difficulty is that if health care is provided directly, we introduce problems of resource constraints - how much care do we allow for? Some forms of care could be so expensive, and yet so necessary to keep people alive, that they impoverish the rest of society. Striking this balance is just the sort of problem Rawls hoped to avoid. In fact, he himself acknowledged the difficulty for his theory and dodged the question as being a 'hard case' (Rawls, 1982) which may in future need to be resolved but should wait until we could be sure that the general theory had sufficient coherence to take forward easier cases - what Rawls took to be people whose physical and psychological capacities were in the normal range. In short, Arrow had introduced the slippery and yet ubiquitous concept of 'need', and Rawls, in wishing to constrain his theory to what is properly the domain of social justice, had evaded it.

Daniels did not evade it, and specifically incorporated both 'need' and health care into his theory of justice which built on Rawls' foundations (Daniels, 1981; Daniels, 1985). He argued that health care institutions should form part of the equality of opportunity 'primary' good, serving our normal opportunity range. This direct provision is simply the most straightforward way of dealing with unequal capabilities based on ill-health. He acknowledged that judgements would need to be made about the balance between how much health care was provided in relation to other productive uses of society's resources, and accepted that the clarity of the original formulation is compromised: 'the price paid is that we are less clear - in ... abstracting from the application of the theory to a particular society - just what the individual claim comes to. I believe this price is worth paying' (Daniels, 1985 p.54). He also agreed that the concept of equality of opportunity was now much broader than Rawls original conception of that relating to jobs and offices: 'To be sure, the narrower notion, whatever its problems, is far clearer than the broader one' (Daniels, 1981 p.169).

But in addressing the problem of unequal needs, Daniels went further and advocated the direct provision of health care. Whereas the problem seems squarely within the realm of equity, the

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<sup>49</sup> See Sen, 1985; Sen's capability approach is further discussed under 'Le Grand', below.

solution goes beyond it. Why not offer cash equivalents instead? This question is not directly addressed by Daniels, but the case seems to be that ill-health is such a clear need that we do not have to be concerned about people having different valuations of its importance. Life, and some reasonable level of health, is an essential prerequisite (provides the opportunity) for gaining utility. Nobody could argue differently because in this particular case it is possible to 'know' that everyone needs this minimum standard of existence before a divergence of preferences makes comparison impossible.

But this does not seem quite right. Consider a severely incapacitated individual, perhaps paralysed from the neck down. Assume this is a treatable condition, although it is extremely expensive to do so and society can only afford a partial cure. Now it does not seem likely that in Rawls' original position people would all agree that health care should be available to ensure equality of opportunity, because we cannot presume that rational people would consider the correct response to such incapacity would be the delivery of health care resources, rather than similar increases in the incapacitated person's money income. Even if there was agreement that some kind of compensation would be fair, why should this compensation necessarily be in the form of health care provision? The person concerned might in fact believe that instead of the partial cure, she would prefer to use the compensatory money income to travel the world and indulge her passion for visiting sites of historic archaeological interest. We begin to see how difficult it is to establish, even in severe cases of 'need', what the appropriate response to that need should be.

Daniels specifically argues for free access to a 'basic' tier of health care, and this includes care for the severely handicapped:

*Personal medical services have as one of their tasks the restoration of handicapping dysfunctions, for example of vision, mobility and so on ... where restoration of function is beyond the ability of medicine per se, we begin to enter another area of services: non-medical social supports ... social support services that meet health care needs have the same rationale and are equally important [as medical services] (Daniels, 1985 p.84 emphasis in original)*

But Daniels only makes reference to his equality of opportunity conception of equity, deriving from Rawlsian precepts. No other principles are invoked. But from our analysis, and from the

care with which Rawls avoided going so far as to specify what precisely should be offered to such a handicapped person, Daniels does seem to have incorporated another principle, perhaps unwittingly.

In short, the problem of extreme need does not in itself imply a consumption-specific response. Another case which gives rise to similar difficulties for pure equity justifications for this kind of state intervention is that of insuring against risk, which emerges from an analysis of our third theory of equity, and which also introduces further problems around the issue of 'equity of what?'.

*Le Grand (and Sen's capability approach)*

Le Grand's conceptualisation of equity derives from the intuitionist observation that many people denote something as unfair if it is a consequence of circumstances outside their control. More precisely and formally,

*a distribution is equitable if it is the outcome of informed individuals choosing over equal choice sets (Le Grand, 1991 p.87)*

We do not need to dwell on the merits of this, or other, arguments for particular ways of thinking about equity. But we do need to spell out briefly the content of the theory in order to establish whether it can, by itself, justify a universal consumption-specific response from the state.

In short, distributions are inequitable if people cannot control the conditions affecting their choices which result in this distribution. This could be because their physical or financial resources are greater or less than others, because the social circumstances in which they live are more or less propitious, or even because some people's *preferences* constrain their choices - in the last case, it is inequitable that two people with identical talents receive different incomes simply because one 'enjoys' mathematics and becomes an accountant, whilst another 'enjoys' (equally) working with young children and becomes a primary school teacher. Neither could help having their endowed preferences as they are, and thus the income differential is inequitable.

For Le Grand, the policy response to these inequities will often require a pragmatic judgement on matters to do with establishing precisely what is and is not outside people's control (how hard



has someone tried to get a job?), and whether people can be trusted to act with honesty in articulating preferences (isn't being a primary school teacher simply a bit less stressful?). But he also advocates a policy response which depends upon what is inequitably distributed, such as a universal health service for ill-health.

But does it make a difference *what* is unequally distributed? When the 'thing' being distributed is income, no judgement is being made about the consumption preferences of the individuals. We all have desires, wants and preferences and unjustifiable (not freely chosen) differences in our ability to satisfy them, as much as others can satisfy theirs, is inequitable. This theory does not go as far as to say that utilities should end up equal; merely that as long as we had similar choice sets any resulting distribution of utility freely chosen is equitable. In the above example, if preferences for jobs are not freely chosen, then the response would be to equalise incomes.

But not all attributes would presumably qualify for concern. Consider the number of letters in our mothers' maiden names. This is an attribute attached to us all which we have no control over, and which is unequally distributed. However, even if it at first sight offends Le Grand's test of equitable distribution, we would soon protest that it is not inequitable because it *does not matter* that the distribution is what it is. We would all, presumably, agree about this.

But let us assume that everyone has equal incomes, but not all children are provided with education by their parents. This, like the length of mother's maiden name, is completely beyond the control of the child. But now we consider that this *is* inequitable. Why? After all, the children's parents may consider that they know best what is good for their child and decide that providing them with endless foreign holidays and expensive presents is in their best interests. By making education compulsory we seem to be acknowledging another imperative beyond pure equity, involving a judgement about the nature of proper consumption.

Now consider situations in which people have to make a judgement about possible future eventualities, such as becoming unemployed or sick. As long as we assume that in part these eventualities are a matter of chance, then the cost - in both personal and financial terms - of being unemployed or becoming ill will be inequitably distributed between people. But what if everyone was provided with equal incomes on equity grounds, and thus had the opportunity to insure - to pool the financial risk of these eventualities happening? Surely if they choose not to insure, then

the final outcome could not be said to have been beyond their control? Equity having already been dealt with, to do more and provide unemployment benefit or free public health care would seem to imply that the judgement of the individual concerned was faulty and needing correction.

But for Le Grand, those who fail to sign up for insurance and take a chance on not becoming unemployed even if they could afford to do so, are said to result in inequitable outcomes because they only chose the *expected* outcome of unemployment (say a five per cent chance), not the full cost to themselves. Similarly smokers who contract lung cancer - and do not take out health insurance - did not choose this outcome, but only the chance that it should happen. In both cases, the policy response is to oblige them to contribute to the finance of the state provision of unemployment benefit and health care on an actuarial basis; and both are provided in kind, with the NHS and compulsory unemployment benefit to rectify the inequity.

But even from within this theory's own terms - that (free) choice is the key concept underlying equity - this policy response seems to import a non-equity consideration. It is true that people are not choosing the full cost of unemployment or ill-health. But to say that people are choosing the expected outcome seems also to miss something in the nature of the original choice facing people. Some might decide that insurance cover is worth the reduction in current income it implies, given the reduction in health costs - both personal and financial - if serious illness strikes. Others, however, may look at this prospect and consider it constitutes the worst of all worlds. They value very highly all their present consumption (we assume all incomes are equal in this example) and would prefer to take the risk of falling ill or becoming unemployed, than to be forced to give some part of their income on insurance. They want all or nothing, not something in between - they want a 'true' gamble. To disallow them this possibility seems to import a judgement beyond equity (see also R. Dworkin, 1981b pp.292-5).

But let us accept a situation in which *no* free choice was involved (the outcome was entirely beyond the control of the individual). In these cases Le Grand argues that the policy response is clear: for certain forms of ill-health, such as genetically inherited diseases, which are completely beyond an individual's control the response should be for the community to provide health care free at the point of use. But, even here, why not simply offer the individual the option of a cash equivalent of the care? By doing so, people could make up their own mind whether they would

prefer to live with the condition and compensate for the discomfort, pain or inconvenience by other forms of consumption. If the condition was terminal, it is still conceivable that people could differ on their preferred response - and not always by accepting care, particularly when this involves only a chance of success. A terminally ill person may prefer the certainty of seeing far flung relatives who would not otherwise be able to afford the trip before she dies, rather than the tiny chance of a cure.

We are now back to the question first raised with respect to Daniels and compensating for need. The 'cash alternative' response is yet more complex than at first sight, however, because it involves a presupposition that the actual cost of medical care is the correct amount of money income required in compensation, even if this cash is not used on medical care. In other words, to address the inequity of the disabled person vis-à-vis non-disabled people would require so much medical expenditure; but if this is offered in cash instead, and the disabled person spends it on other things, then the state has still made a judgement about need but without invoking a requirement to spend it in the way implied by that judgement. Policies of this kind may well be inevitable if the actual wishes, preferences and desires of the disabled person are to be respected and acknowledged.

However, if the objective is simply to equalise choice sets, then what the disabled person prefers is irrelevant. Subsidies, or consumption-specific provision of medical treatment, would be justified on the grounds simply that the aim was to equalise the choice sets facing people - in practice, to increase the quantity of choices facing the disabled person as much as possible. If money income was offered instead this would result in disabled and able-bodied people having different (unequal) choice sets, even if this strategy allowed the disabled person the greater scope for maximising her welfare. 'Utility' is not the point. Sen has put the issue like this, in making a distinction between utilities and freedom:

*If a disabled person, physically crippled, happens to be contented - through resignation or by coming to terms with his disability - and takes pleasure in small mercies, then in the space of utilities (i.e., happiness, or desire fulfilment, or choice), his deprivation (in the form of not being able to move about freely) will not be adequately reflected in the metric of utility (Sen, 1988 p.279)*

Thus a disabled person will have a narrower range of choices between various 'functioning bundles' - he will be disadvantaged in his 'capability' to function (Sen, 1985). Thus, we now have introduced the dimension of choice sets, functioning bundles, capabilities etc., as an important consideration for equity (or at least, for measuring inequality) *irrespective* of the final utility outcome.

Sen says little on the topic of equity *per se*, and indeed acknowledges that his conception of capabilities could be incorporated into other theories of justice (such as Rawls'), as long as the subject matter of equity was refocused on capabilities to function rather than primary goods (Sen, 1992 pp.85-87). He argues for this partly to address the issue of extreme needs which was so troublesome for Rawls. But the question remains: is final utility (or preferences, wants, or what matters to an individual person) to be completely ignored? For under resource constraints, a decision needs to be made about *which* inequalities in capabilities (or choice sets, or other freedom-related measure) are to be addressed. If this is made without any kind of reference to the welfare of the individual then it surely amounts to a highly peculiar form of equity - one which simply equalises an observable characteristic of a person (or maximises those of the disadvantaged) but refuses to acknowledge that the preferences of that person carry any weight in the judgement of which inequalities are equalised. Surely, at the very least, equity must in some sense relate to people's own conception of their welfare.

If this renders such approaches as mere 'equalitarianism', and thus unacceptable, then we are still left with the difficulty already noted, that some judgement of a person's welfare will be inevitable if a theory of equity is to have the practical ability to compensate for extreme needs or capability deficits in money terms. Dworkin suggests one way to approach this question: a 'hypothetical insurance' scheme which would compensate handicapped people to the extent that they might have been expected to insure for under certain conditions (see R. Dworkin 1981b pp.296-9).

It is important to recognise that if one wishes to avoid the worst practical outcomes of the income approach by taking need, however conceived, into account, then there still remains the possibility of maximising the opportunity of the individuals concerned to choose how to effect the

compensation offered them, by making it in money terms.<sup>50</sup> Dworkin gives one method of establishing the size of such compensation. But only by denying the relevance of the fact that different capability or needs deficits have more or less value to different people, and that the individual may be best placed to take the practical steps to make good the deficit, may one disregard this consideration. If one chooses to do so, and impose a particular consumption-specific policy, further justification is needed than offered by pure theories of equity.

*One final attempt: 'efficient' equity*

There has been one rather unusual attempt to justify consumption-specific policies by means of a mixture of equity and efficiency rationales, relating to a formal result produced by Weitzman (1977). Reference to this result has been made by both Goodin (1990) and Weale (1983a).

Weale puts the case like this

*What can we say about the comparative efficiency of satisfying needs ... by means of cash rather than in-kind transfers? ... Roughly speaking, the more variable the needs among recipients and the more equally income is distributed the greater the superiority of cash transfers; whereas the more similar the needs and the more unequal the income distribution, the greater is the superiority of in-kind transfers (p.119)*

There are two problems with this. In the first place Weitzman actually makes reference to the comparative efficiency of the 'price mechanism' and rationing, not cash transfers. In fact, he admits to leaving income considerations 'in abeyance' because 'there is no end to what could be done on the income distribution side' (p.524). But our concern is precisely with the comparative merits of income redistribution vis-à-vis consumption-specific policies ('rationing'). Second, Weitzman emphasises that his result only applies to a society where 'there is a class of commodities whose just distribution to those having the greatest need for them is viewed by society as a desirable end in itself. The current paper analyses whether rationing or the price

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<sup>50</sup> It must be assumed that people's capabilities cannot be equalised because of finite resources; thus, rejecting levelling down strategies, choices need to be made about how less than perfect compensations should be undertaken. Dworkin rejects 'welfarist' approaches partly because of their inability to provide such guidance (R. Dworkin, 1981a; R. Dworkin, 1981b p.300); the capability and choice sets approaches seem equally helpless here.

system is a better way of allocating a good of this sort' (p.518 emphasis added). But the issue here is precisely *how* goods of this sort are chosen in the first place. Clearly, if one has already established which these goods are then one has already to some extent made a judgement about relative 'needs' on behalf of consumers, and the question becomes one of technical efficiency in achieving the preordained goal. But we have not uncovered a justification from within equity as to why the state should be better placed than the individual in this regard, if income reallocations are allowed. It is to efficiency justifications proper we now turn.

### **Efficiency and market failure**

We earlier reviewed the two principal categories of market failure in relation to consumption: imperfect or asymmetric information and externalities. We now revisit each of these in relation to their use as justifications for state intervention and consider whether they successfully confine themselves to market efficiency arguments.

#### *Externalities*

The classic case of an externality in economics is that of the polluting manufacturer. The price charged by the manufacturer to the consumer does not take into account the cost imposed on others from the pollution. The state may be justified in intervening by taxing the good until the marginal cost (which now includes an estimate of the social cost) of its production equals its marginal value - the tax raised could be used to compensate the sufferers from pollution, or used in public works to clean it up. But the rationale for interference in what is ostensibly a private activity of exchange is that it is not, in fact, private and harms others without their consent.

We can consider the activities of an individual engaged in a non-traded form of consumption in a similar way: if it does harm to another individual without the consent of the person harmed then the state may be justified in intervening. A form of external cost has been imposed. An example would be a noisy neighbour - there is no economic exchange taking place, but the enjoyment of music is spilling over from a personal enjoyment and 'polluting' the environment of others.

However, one of the most significant problems with the use of the externality rationale is that virtually no activity is ever entirely free from having an impact on other people if we include

effects which simply impinge on people's consciousness. This requires only that others are aware of an activity's existence. Knowledge of it automatically assigns it as a potential externality. Thus, if 'others' claim that they are being harmed by this knowledge - or benefiting from it - then the state could claim, in intervening to encourage or discourage the activity, that it is simply correcting a form of market failure.

For example, compulsory membership of a health insurance scheme could be justified on the grounds that some members of the community are pained to see others suffering from their recklessness in not taking out insurance. Imagine someone injured in a car accident, in agony and dying, but not being treated. Most people would consider that they had suffered if they were exposed to such an incident - Dworkin (1983) referred to these as 'psychic costs'. Conversely, people may acquire a benefit from seeing others cared for - the so-called caring externality (Culyer, 1980 p.183). Weale considers this issue in terms of 'donors' - net contributors to the finance of social programmes. If these donors are only concerned with the general welfare of the recipients, then cash rather than consumption-specific provision would be appropriate. However

*if donors value specific features of the circumstances of recipients, then the position is changed. For example, donors may prefer the elderly to be assured of heating or home-help services, but not worry about their consumption of tobacco or drink (Weale, 1983a p.108)*

Maximising social welfare will, under these circumstances, require specifying the consumption of certain services so that those who provide the funds have *their* utility increased in addition to the benefit the recipients derive. The elderly may enjoy greater utility from a cash transfer which allows them to buy plenty of drink and tobacco, and minimise heating and home help services. However, when their utility levels resulting from consumption-specific policies are added to the utility derived by the donors, the result is a greater aggregate total.

But where does this kind of approach lead us? If there are very few areas of life which in no way impinge on others' consciousness, then presumably there are very few private activities which do not lend themselves to intervention on the grounds of market failure by external cost. So, any kind of sexual practice between consenting adults in private, which a segment of the population finds morally reprehensible (and the rest do not care one way or the other), could be justifiably outlawed simply with reference to a judgement that the utility of disapproving 'onlookers'

exceeded the utility of practitioners. Such policies would be most likely to pass such a test in the case of minority practices which a majority find hard to understand. Conversely, a small minority might gain the upper hand if they could demonstrate that the intensity of their feelings over-ride the milder pleasures of a majority. For example, eating a particular form of vegan diet might please one sector of the population to such an extent that, again, it could be encouraged through the tax system or, more coercively, lead to the banning of meat consumption.

In both these examples, the difficulty arises as a result of the 'illiberal' attitudes of one person towards another - the two parties do not agree about the legitimacy of a particular activity. But judgements about other people's utility can also cause problems for Pareto efficiency when liberal values are respected. Sen offers the example of a society of two people and a one book, *Lady Chatterley's Lover* (Sen, 1970). The intuitive nature of the issue is as follows. One is a prude who doesn't want to read the book, the other isn't and does. But they *both* prefer that the prude reads it rather than the other person. This is because the non-prude takes delight in the prude's discomfort, whilst the prude can't bear the thought of anyone else actually obtaining gratification from it. In short, the liberal position is that both should do what they want (prude does not read; non-prude does), but this conflicts with the Pareto efficient solution which is that the prude *does* read it and the non-prude does not. At root, the problem arises because an assessment of welfare levels has taken into account judgements about other people's consumption activities.

In other words, these externalities are of a peculiar type. Leaving aside the problems of measuring utility sufficiently accurately to make these kind of economic assessments, there is a more fundamental difficulty of principle. The issue of externalities in economics is principally concerned with the impact of certain eventualities on the utility level of third parties; here it is the utility, or nature of the utility, of one party affecting the utility of another. Thus, it is the utility itself which here constitutes the 'eventuality' affecting the third party. People are either pleased, or displeased, by what they perceive to be going on inside someone else's mind (someone else's pleasure or displeasure), rather than simply being concerned with how their own utility is affected by events around them.



The question of whether this is allowable as an economic consideration seems to ride on what exactly efficiency is concerned with; in this case, what is the appropriate range of eventualities which economics can class as an externality. To the extent that economic efficiency is a 'positive' endeavour - that is, it does not concern itself with value judgements - then it seems inconsistent to allow value judgements of one person about another to enter into its rubric. Or, if it does, then it should acknowledge them and offer an appropriate justification. For although a certain amount of judgement and uncertainty will always form a part of economic analysis, this uncertainty only involves problems of epistemology - how can we best know the preferences of people? It does not claim to know whether preferences *should* be as they are - which is the implication of taking seriously people's preferences about other people's preferences.

Some indication of this improper importing of unjustified (if not necessarily unjustifiable) value judgements is provided in the account of the caring-externality given in some texts. Barr, for example, calls this a 'consumption externality' (because, as indicated above, it involves a judgement about the rightness of someone else's consumption) but does not classify it under the heading of economic arguments when considering whether consumption should be in cash or kind, but under 'political economy arguments' (1998 p.89). This indicates that he believes that something other than a pure economic argument is going on. More forcefully, Stiglitz argues that these are forms of 'spiritual' externalities:

*There seems to me to be a fundamental difference between the externality which arises if I receive disutility simply from my knowledge of your ... smoking, and the externality which arises from my actually breathing your smoke. The appropriateness of the government using its powers of compulsion to intervene in spiritual externalities seems questionable at best (Stiglitz, 1989 p.48)*

Or, at least, it may require some other kind of justification.

Although not all externalities suffer from this difficulty, there is occasionally a suspicion that even where psychic costs are not at stake, many putative social benefits are masquerading as externalities for the convenience of policy-makers and commentators who relish an apparently uncontroversial justification. For example, although we have seen the case for higher education supported, implicitly or explicitly, in terms of the external benefits to society as a whole, one

eminent commentator has concluded that 'I am not convinced that the externalities are very important, as contrasted with elementary and secondary education where externalities are undoubtedly consequential. It is somewhat hard for me to visualise what these externalities would consist of' (Arrow, 1993 p.8). Thus research and earlier schooling might well provide external benefits (Jaffe, 1989; Haveman and Wolfe, 1984), but higher education *per se* may not. And yet, as we have seen, support for higher education often makes use of externality-type justifications. Perhaps these arguments are really trying to make the case that the state 'knows' better than the individual what would benefit them, but, for obvious reasons, would prefer to do this with reference to a market failure.

A similar scepticism was at work in Blaug's description of many of the externality arguments used in favour of state spending as more properly thought of as 'atmospheric effects' and 'little more than sociology' (Blaug, 1970 pp.108-9). The 'promotion of voluntary responsibility for welfare activities ...' or '... the emergence of "social cohesion" by the transmission of a common cultural heritage' (see p.89 above) - both of these could be viewed as simply promoting the interests of the state (in its own survival), or less cynically as 'private' benefits which when aggregated appear to reflect a 'good' society.

The central point, then, is that justifications for state action based on the promotion of market efficiency by correcting external effects, should confine itself to considering external costs and benefits only when they involve actual *consumption* by a third party, and not a *judgement* about consumption - for the latter inevitably incorporates principles at odds with those underlying the assessment of economic efficiency, and without justification.

One objection to this might be that in many cases, particularly those relating to caring externalities and psychic costs, the issue is uncontroversial. Why should anybody pass up the possibility of some assistance at a time of need? Nobody lying injured and bleeding to death in the street is going to quibble about the origins and nature of the rescuer's concern, i.e. whether it is based on an externality or not. But how typical are such extreme cases in the provision of consumption-specific services, even within the apparently uncontroversial area of health care? There are, after all, regular examples of people refusing life-saving organ or blood transfusions in hospitals for religious or other reasons; more generally, individuals may just believe that death would, in their

circumstances, come as a blessed relief. And we are still faced with the question discussed above under equity: why should we not offer a cash alternative instead? Some of the individuals just mentioned might well believe that their best interests would be served by having an elaborate funeral.<sup>51</sup> More commonly, when a healthy person is deciding whether or not to buy health insurance, the 'caring' which would compel it may be in direct opposition to the desire of some people to 'take a gamble' and go without.

A final, special case of an external cost noted in Chapter 4 was that concerning future individuals, and deriving from the philosophical theories of Parfit (1984). The general difficulty with what counts as a true external cost is also present for policies which in this context seek to prevent harm to our future selves. What if a state policy is supported on the basis that individuals fail to take into account the consequences of their present consumption decisions for others - when that 'other' is an older version of the individual in question? As we saw, the state may feel justified in intervening on the basis of the external costs imposed on another 'person' (one's future self), and compel contributions for a state pension, or ensure that provision is freely available for the long term care of the elderly.

However, the difficulty in claiming that this is a 'pure' efficiency argument is even more acute than in the case of 'spiritual externalities'. The former involves an assumption that the balance of costs to the 'future' person (who will not receive some benefit because of the myopia of the younger 'self') is greater than the benefits to the 'present' person - who presumably judges that consumption 'now' is more valuable than future consumption will be 'then'. However, this balance in favour of the future can only be an assumption because whether to have a thrifty youth and a comfortable old age - rather than a spendthrift and hedonistic youth and miserable old age - is a question on which people may reasonably disagree. It is not enough simply to ask the elderly person who is already suffering whether they are happy with their earlier decisions, because they have no incentive to do other than indicate how miserable they are and that they

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<sup>51</sup> It should also be noted that where a 'real' externality results from someone dying through lack of health care - body disposal costs, for example, and adverse public health consequences - then compulsory insurance could cover these costs, leaving insurance against health care costs to the individual.

would dearly appreciate all the state is ready to provide. One must always balance this 'reality' with the equally real pleasures enjoyed by the prodigal youth.

Thus to decide that the costs will generally, and over a lifetime, be greater than the benefits when making a decision about future welfare involves a judgement about costs which have not yet, and may never, occur. For even with 'spiritual externalities' the criticism is not that some kind of discomfort or disutility does not exist - it does, but it is not a cost deriving directly from consumption. Here, though, the (net) cost may not come to pass, either because the person does rather well financially in later life, or because they do not in fact outweigh the benefits enjoyed while young. So, the justification requires more than a normal externality argument, to include a further judgement about *whether* an externality will take place. Why, and on what basis, does the state override the judgement of the younger person on this question - that pleasures in youth are more important than hardship in old age - and insert its own judgement on this matter?

### *Imperfect information*

We have seen that if the state is interested in correcting information problems, it can either use its powers of compulsion to enforce the provision of information, or it can tax and subsidise so as to mitigate the effects of information asymmetry. Both these policies would be universal in nature. But there are a number of ways in which the state may go beyond these 'information correction' interventions and end up correcting something else.

Take a situation where a market failure involves the concealment of information about the nature of a product, particularly when this involves harmful side-effects. Self-interest would encourage suppliers to hide such information because it might harm the product's attractiveness - the obvious examples are those items of consumption which are potentially damaging to health, such as cigarettes or alcohol. The state can pass laws which oblige the manufacturers to supply information about their products, or the state can supply this information itself. But the state may do more, and introduce taxes and subsidies which forcibly change the terms of trade against the consumer who might, after all, wish to go ahead and consume the item even after all the risks were known to her. Whereas such state action can be justified formally on the basis of moral hazard (Gravelle and Rees, 1992 pp.686-688; Cornes and Sandler, 1996 pp.129-134 - i.e. to

counteract the problems of people taking less care with their health under conditions of insurance), this is not always the rationale offered by policy-makers. Take the foreword to the Labour Government's white paper on smoking which, in addition to citing the fact that smoking irritates others as one reason for action, states that

*Smoking kills [...] We want to help existing smokers quit the habit and help children and young people not to get addicted in the first place. These objectives can only be achieved by a concerted campaign to reduce smoking. That is why this White Paper spells out a package of measures each of which will add to the impact of others ... As a result of this Government taking a positive position, a Europe wide ban on tobacco advertising and sponsorship is being introduced. This will be backed by a powerful £50 million publicity campaign to shift attitudes and change behaviour (Secretary of State for Health et al., 1998 p.2)*

The Prime Minister's preface to the same document takes pains to disclaim that this is the 'nanny state' in action by invoking the concept people's 'responsibilities', not only to others and the wider community, but 'to themselves'. So increasing tax ('As incomes tend to rise significantly each year, the only way to reduce affordability is to put tobacco tax up by more' p.17) and banning information about various brands of cigarette ('We will ... ban tobacco advertising' p.15) are partly undertaken in order to make people responsible to themselves - something which, apparently, simply giving people information about harmful side-effects cannot achieve.

Problems with asymmetric information may also occur in non-market situations. Here the situation is likely to be such that it is only a single individual's interests at stake. For example, if someone plans to go swimming in the sea but does not know that the tides are particularly dangerous, she could be swept to her death. She has failed adequately to know her own interests; no-one else was affected. Under these circumstances, the state is likely to provide statutory warnings about the tides, or even to employ lifeguards to warn against swimming. However, again, this can easily go beyond simply correcting the absence of information. If we assume that there is nothing wrong with the ability of the swimmer to assess her best interests, then once she has full information about the state of the tides she should be left to make up her own mind about what to do. If she persists in wishing to continue with her activities, in spite of the danger, and is still prevented, then this would be acting on more than simply the absence of information. The public official (the lifeguard), if he prevented the swimmer, would then be

making a judgement about her mental faculties, concluding that he or she did not really know what was in her best interests.

The formal correction for moral hazard - where consumers do not reveal true information about their risk-taking activities - we have just noted. But where there is a principal-agent relationship, as with a doctor and patient, there may also be moral hazard on the part of the doctor. Where the benefits from an expensive treatment are minimal, he will have an incentive not to reveal all relevant information about the cost-effectiveness of a procedure for fear that the patient will decide against treatment (also characterised as supplier-induced-demand). Furthermore, adverse selection - where consumers conceal their risk factors - can lead to some low risks not taking out insurance where there would be welfare gains from doing so, or taking out less cover than they would like (Barr, 1992; Gravelle and Rees, 1992 pp.672-678). These difficulties imply a *prima facie* case for the state intervening - such as obliging all agents (doctors) to be paid on a salaried basis, or taxing and subsidising insurance policies - but they do not in themselves go as far as to demand a universal, free service such as the NHS (One solution is to make insurance compulsory ...' (Barr, 1992 p.754, emphasis added)). That would require further justification, and we have already seen that neither equity nor externalities adequately provide that justification.

Finally, some justifications for correcting imperfect information may not involve information at all. We have seen that some commentators have argued that education may be underconsumed because of a lack of information about future benefits, such as higher lifetime income. But very often a concern that information is lacking is accompanied by other concerns which seem more to do with how the student, or parents, might *act upon* the information:

*Children .. are not well informed. In a market system decisions are therefore left to parents ... But parental preferences can cause inefficiency in two ways: they might themselves have imperfect information; or they might not consider the child's best interests but those of the family as a whole, themselves included ... Such complexities make rational decisions difficult ... the result of these factors is inefficiency (Barr, 1998b p.328)*

Thus, there may be imperfect information; or parents may not consider the best interests of the child; and/or not make rational decisions. These are in fact three distinct types of failing, even if

superficially they appear connected. Only the first is truly a matter of inefficiency: it could be a matter of information, of simply not knowing properly the benefits of education. Otherwise, the fact that parents might not consider the best interests of the child is a matter for intra-family equity - in other words, other family members might unfairly gain from such a decision at the expense of the child. Or it could be a matter of rationality - a question of who is the 'best judge'? Rational decisions do not depend in themselves on the quality of information - one can be as rational as possible with very poor information. Poor quality information might lead to poor outcomes in terms of personal welfare, but this will not necessarily be because of irrationality.

This is also relevant in the case of higher education. Are potential students not 'used to' entering into long term loan arrangements (see p.91 above), or is there insufficient information for them to make a welfare maximising choice? If the latter, then the response from the state should be simply to provide all the relevant information, including relative earnings which might be expected from undertaking various courses, make this information readily available, and then leave the student to assess whether they consider they want or could benefit from higher education. But if the state considers that they will not *act upon* this information in a well reasoned way, maybe because they are not 'used to' taking out loans or because they are short-sighted about their long term interests, then state intervention to subsidise higher education is doing more than simply correcting a market failure. It is correcting, or intervening in, the decision-making processes and reasoning of the potential consumer.

Another possibility was also noted in Chapter 4: capital market failure (Barr, 1994). Here the argument is that private lenders will not supply loans to students on the basis of their future income at sufficiently low rates of interest to encourage take up, partly because of a lack of collateral and partly because of the difficulty in assessing risk. But this does not in itself constitute a market failure,<sup>52</sup> and thus it could be argued that this is not necessarily *inefficient*. With a high risk of default the market is reacting quite properly by charging high interest rates. It is not even clear that there is asymmetry of information about future productive capacity: educational (A-

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<sup>52</sup> A capital market failure must be as a result of some *underlying* failure in the operation of markets, such as information problems or externalities. It is not enough to cite simply the fact that the market involves capital loans.

level) qualifications and being accepted at a university give a reasonable indication of ability to both student and lender. The argument from efficiency may counter this by claiming that the state will be the most effective means of policing defaulters and extracting their payment. Whether this is so rests on the empirical question of cost-effective policing, but is not necessarily implied by high interest rates.

More generally, high rates of return on 'human capital' when compared with other factors of production can often lead commentators to argue that 'with no evidence of diminishing returns to investment in higher education, somewhat larger percentage increases ... in human capital relative to the rate of increase in investment in housing, would appear to be a socially efficient investment strategy' (McMahon, 1991 p.291). But what if people do not want these higher returns, and would prefer the easy life with less income? Difficulties such as these are occasionally alluded to in the literature but then left unanswered. For example, in comparing the choice of buying education with that of buying a complex personal good such as a computer, Le Grand and colleagues note:

*If we accept that education goes a long way towards determining subsequent job opportunities and the quality of a person's life, we may well feel that the scope for individual mistakes of judgement should be minimised beyond those considered permissible in the case of purchasing a computer. But if this view is adopted, it is important to recognise that it involves ... a restriction .. being placed on consumer choice on the grounds that consumers may not act in their own best interests (Le Grand, Propper, and Robinson, 1992 p.73)*

Broadcasting, too, makes heavy use of justifications which conflate issues of information with those of who is in the best position to judge. One of the standard cases for a public service broadcaster reviewed in Chapter 4 was that consumers might be 'myopic about their own long term interests.' They will be 'ill-informed' about the benefits from broadcasting because they cannot know what these will be in advance of experiencing them, and that they will 'under-invest in the *development* of their *own* tastes, their *own* experience, and their *own* capacity to comprehend' (see p.92 above). Why not supply this information so that consumers can make up their own mind? Because, comes the rejoinder, to do this would in fact be to make and transmit the programme - there is no way of separating out the provision of information from the item of consumption, because it is the very programmes which engage in the 'informing' process.



But surely now we are talking about a very peculiar type of ‘information’, one which essentially involves the act of consumption. For broadcasting does not simply involve the provision of information relevant to *other* types of consumption (and, at any rate, there is no obvious reason why these kinds of information could not be bought through the private market, as is the case with telephone information lines or by subscription to a teletext service). The ‘information’ specified by the market failure theorists includes the programmes themselves. This is a bit like saying that the information required to make a proper judgement about maximising welfare from the purchase of a meal is to actually eat the meal. Certainly we do not know for sure whether we will like a meal before we actually eat it (although we may have eaten many similar before), but information about ingredients, style and so on are what constitute the information on which to make a judgement; the consumption itself involves the rather different assessment of what it actually did for our welfare.

But what about programmes ‘educating us about future wants and desires’? Well, eating has a similar effect - but we seem quite able to educate ourselves in this respect. Justifying public service broadcasting on these ‘imperfect information’ lines seems rather to be importing another principle concerned with who is the best person to judge about people’s future welfare, but operating under the cloak of simply informing us about it.

References to this other principle occasionally crop up in the literature, but are neatly avoided. For example Koboldt and colleagues note that one of the issues in the production of informative or educational programming is that viewers are often in two minds about what to watch, and may simply plump for the easy option of light entertainment after a hard day at work. This they may regret later. However

*such arguments move one from objective analysis to hypothetical arguments about viewer’s states of mind, and need to be treated with caution (Koboldt, Hogg, and Robinson, 1999 p.57)*

Similarly, although with little caution, Graham and Davies argue that

*no matter how much someone tells us in advance that we need it, the evidence is that, in general, we underinvest in it. In a free market in broadcasting where each item would have to be paid for at the point of use, this tendency to underinvest in watching those programmes which did not attract us at that*

*moment would be greatly (and mistakenly) increased* (Graham and Davies, 1997 p.20)

So 'telling' (or informing) is not enough; something else seems to be required if the full force of the imperfect information case is to be successfully made.

### **Conclusion: the need for further justification**

Theories of equity which imply or require a consumption-specific policy response eventually come up against the difficulty of why the particular form of consumption should be chosen. In attempting to answer this, theorists occasionally import another concept ('domination' or 'normal opportunity range') which subtly re-introduces an assumption that people should be constrained in their consumption patterns to those areas which serve this 'higher' concept. More generally, they will introduce the concept that a certain need exists - that a certain important state or condition cannot be achieved without the need being satisfied. This is then taken to imply that the need should be satisfied if the conditions of the particular theory of equity have also been satisfied. However, justifications for consumption-specific policies do not specify why the particular decision about need satisfaction is better taken by the state than by the individual. Instead they make great play on why, empirically and conceptually, particular needs seem important. But why the 'importance assessment' cannot be left to the individual is evaded.

This aspect of needs-based theories of equity is not confined to health care. In many other areas of welfare, reference to needs are made in the course of justifying various aspects of state intervention. Sometimes their relevance is asserted bluntly, here with reference of state provision of health, education and housing: 'Furthering equity as an achievable public policy objective is based on the ability to assess needs accurately, and distribute resources accordingly' (Hendry, 1998 p.iv). Others involve general theories of need and social justice (Doyal and Gough, 1991), and the state's obligation to provide 'necessary goods' (Brock, 1998). Some distinguish wants, which are subjective, from needs which

*other people may be just as well placed, or in a much better position, to decide a specific person has a need for certain resources* (Ware and Goodin, 1990 p.1)

However, what the conditions or circumstances are which establish this superior position is left unanswered.

Needs-based theories, and those which focus on capabilities, quite reasonably emphasise the variations between people in their ability to achieve certain valued functionings - the fact that some people find themselves in highly disadvantaged circumstances through no fault of their own. This is not disputed here. For these people, some judgement about the degree of this disadvantage must be made by the state in order to avoid perverse outcomes from simple money transfers. But a further distinction is less often made: between the observation and acceptance that such variations exist, and how to correct them. The correction can either be provided in money or in kind. Doing the former allows for the fact that the state may very often misjudge what is right for any particular individual, even if on average and for most people it rightly judges which needs people most highly value; furthermore it acknowledges that even where there is agreement in general terms that a need is important (hunger, shelter, mobility), how one satisfies the need may be best undertaken by the individual through a monetary compensation. To do more than this, as is very common for health and education in particular, requires additional justifications.

For one cannot 'read straightforwardly off' that a welfare state is justified by virtue of its concern with people's needs (Goodin, 1988 p.50). Indeed, if needs are so important, then one might presume (given adequate incomes and leaving aside market failure) that people would be more than ready to satisfy the needs themselves. Food, after all, is of fundamental importance to us all and yet there is no National Food Service (New and Le Grand, 1996 p.48). And if we look to those rare theories which make no specific reference to needs, but instead refer to choice as the key variable in relation to equity, there still exists no justification for the consumption-specific policy response beyond an implicit assertion that equalising choice sets is an end in itself - regardless of the opinion of the welfare recipient.

We have also discovered that many of the arguments from efficiency and market failure go beyond the assumptions and principles underlying their analytic approaches. Externalities which take into account one person's valuation of another person's consumption violate the presumption that preference formation and realisation is best undertaken by the individual

consumer: we are the best judge of our own interests and therefore others' opinions about those interests should not 'count'. Similarly, characterising the interests of a future self as 'external' surreptitiously substitutes the judgement of the state about the interests of someone who does not yet exist, for the judgement of the younger version of that very person, who does exist.

Justifications for correcting information problems are also on occasion guilty of mixing up the correction of the problem of asymmetric or incomplete information, with that of the judgement of what action to take on the basis of that information. The latter involves a process of reasoning which classic economics presumes should be left to the individual. Even with low levels of information, rationality can function - even if this may not lead to welfare outcomes as high as if good information were present. On the other hand, if the state provides the conditions for correcting information problems, this may still result in individuals taking decisions which the state might see as misguided. However, to continue to correct such a 'mistake' would be to go beyond the confines of the justificatory principles originally invoked.

All these issues of principle, and of mixing up and importing new and unjustified principles, is compounded by the policy recommendations which are often made. For even though some economic market failure arguments are quite valid on their own terms, and may imply universal consumption-specific policies, they do not necessarily imply the specific policy response which is advocated or which exists in practice. In particular, policies which *compel* the individual to consume a good or service, or to be covered by a form of insurance, have taken a step beyond that required by principles of market failure, which often merely require some adjustment to the prices facing consumers, but who will then be left to make up their own mind about final consumption.

Nothing in this chapter is meant to suggest that state actions of the type queried here are indefensible, merely that they are underdetermined: they require more than justifications based solely on market failure and equity. We now turn to what this absent class of justifications involves.

## Chapter 6: Paternalism: a neglected role

In a much quoted text, David Braybrooke outlines a 'Principle of Precedence' which sets out those needs which are to be distinguished from, and take priority over, preferences. However, unusually for this class of theorist, Braybrooke acknowledges that when a policy attempts to meet needs which are not regarded as important by those who have them

*the Principle of Precedence leads here to paternalism ... It is paternalism to met needs when they prefer not to have them met (or met in that way); ... following the Principle of Precedence would be supplanting the judgement of the people affected with [the policy-makers'] own (Braybrooke, 1987 p.196, emphasis added)*

Braybrooke is not arguing against himself: he believes that his principled approach warrants this paternalism. But his case rests solely on an assessment of what might generally be agreed to be necessary 'in the course-of-life ... [that is] indispensable to mind or body in performing the tasks assigned a given person under a combination of basic social roles' (pp.47-48). Like other theorists, he does not specify why the state's judgement might justifiably be substituted for the individual's in meeting these needs, when the individual does not consent to the particular form of intervention. In this and subsequent chapters, we turn our attention to these paternalistic acts and their potential defence.

Paternalism can quite easily be related to the taxonomy of justifications we have identified under equity and efficiency. As we have seen, classic economic theory suggests that perfectly competitive markets - without the failures noted in previous chapters - will achieve Pareto efficiency. This condition describes an allocation of resources in an economy 'which has the property that there is no other feasible allocation which makes some individual better off and no individual worse off' (Gravelle and Rees, 1992 p.476). Pareto efficiency has one particularly important judgement associated with it. It is that individuals are the best judges of their own welfare. This assumption is usually combined with the conditions for perfectly operating markets but it does not require these conditions to be a substantive presumption in its own right. For markets could work very poorly, and yet individuals could still be the best judges about what would make them happiest. The fact that the market 'fails' indicates only that an individual will

find it difficult to realise their preferences. For example, if a piece of information is known to one person who is convinced that it is essential for another to realise their preferences, the assumption requires that we do not consider that the first person is a better judge of the welfare of the second, only that he or she might have a case for supplying the information, even if not explicitly requested.

But it is the possibility that this assumption or value judgement might not invariably hold true, and therefore on occasion result in sub-optimal welfare outcomes, which haunted our discussion of justifications in Chapter 5. Paternalism is concerned with such possibilities, and it can be located within a framework of various 'failure corrections'. The following is a standard textbook categorisation of policy options open to a government which considers the outcome of unfettered market and private individual activity to be in need of correction (Gravelle and Rees, 1992 p.534):

1. *The correction of market failure: for example ... the correction of externalities or the provision of public goods.*
2. *The adjustment of the outcomes of competitive markets in the light of value judgements which differ from those underlying the Pareto criterion ... (Note that for this to differ from the first aim, there must be an element of paternalism...) (emphasis added)*
3. *The achievement of a desirable distribution of real income*

Market failure, broadly conceived, can thus result from one of three distinct sets of deficiencies. The first of these can be thought of as a failure of a process of exchange. The third is concerned with a failure of the market to result in an equitable distribution of resources. The second involves paternalism and a failure of reasoning.

What is the exact nature of this failure? It is clearly different from the failure of a mechanism designed to facilitate the exchange of goods and services - the market. There the failure involves an institution, and the practices which go on within it, failing to reach standards necessary for it to achieve its purposes. The failures occur, for example, because of the qualitative nature of goods and services (they may only be produced for large quantities of people or not at all, they may produce external effects, and so on) or because people may act self-interestedly to the detriment

of others (for example, information may be concealed or used to gain an advantage). But reasoning failure is also different from that failure which results from the impersonal aggregate of individual decisions - the fact that millions of transactions, all voluntarily made by people acting for their good in a perfect market, can result in an outcome which appears unfair. This is a failure deriving partly from our self-interested nature and the fact that, even where we are not, conceptions about what constitutes a 'fair' distribution differ between people. Only one standard of fairness can exist in practice at any one time.

Paternalism is supremely unconcerned with inter-personal comparisons of utility; its focus is always on the potential failure of individuals to maximise their *own* level of utility. It involves a failure of individuals to assess their best interests. Sometimes failures of this kind are discussed in terms of rationality but this gives the impression that the failure is simply a matter of logic. It can be, but the issue is wider than this. Human beings can make mistakes in 'reasoning out' what is in their best interests, even if they have good information about the options. We may believe we have preferences for certain items of consumption about which we eventually change our mind (taking heroin, even if we had previously been apprised of its effects), or we can be mistaken in the decisions needed to realise our preferences (that skipping school to work on a market stall is the best way for us to make our fortune, even if we are told that school and college generally leads to higher income) or, most commonly of all, we may misjudge the priority of our preferences (that going to the pub every day is a better way of spending money than putting some of it in a pension fund). On occasion we may do ourselves harm; on other occasions we may just not do as much good as if we had taken alternative decisions.

In this chapter we first undertake a short history of the concept, including its meaning in early Victorian times. The next section reviews the limited attention paternalism has received in the policy literature. Then a definition of paternalism is presented with a detailed investigation of the various elements of the definition, before turning to the connection between this conceptualisation of paternalism and the incomplete or missing elements of justification encountered with reference to equity and market failure. The chapter concludes with an examination of a rejection of paternalism from within philosophy, and its link to policy issues raised earlier.

## **A short history of a concept**

Although the word paternalism only entered common usage in the mid-twentieth century, as a concept it has a long heritage. This long heritage has contributed to the hesitancy which modern day theorists have displayed in using it to justify state intervention. The reluctance may not relate to theoretical difficulties, which we will investigate in the following chapter, but to a general aversion to the type of justification required - namely that the individual requires some 'help', like that of a child, from the state to realise their own interests. The conceptualisation of what paternalism means to these modern theorists, many sympathetic to state activity, is likely to be influenced by the history of relations between the ordinary citizen, the owners of land and capital, the church and the state over many centuries.

The origin of these relations can be traced to feudal times and the complex relations between lords, knights, barons and villeins (Roberts, 1979). Lords, in particular, were able to act in ways which we might now conceive of as 'private' government - they were free to manipulate the customs of the time and impose burdens such as labour services, and administer discipline and punishment. But the landowners were also considered to have duties towards subordinates, a concept reinforced by the church. Canon lawyers of the time believed that landlords held their property as a 'trust', whereas once it had been held by all. This was necessary to make the land useful, but in return for the wealth that was liable to result from this, the landowners were expected to help the poor in times of need. Thus a mutual system of rights and duties developed on a parental-like basis between economic classes.

These relations developed during Tudor times with the beginnings of a true paternal state, personified by the land-owning justices of the peace. These men meddled far more effectively in the lives of the common people than their medieval counterparts, regulating prices, recreational activity, the amount one could drink and the clothes one wore. They also arrested and penalised drunkards, adulterers and non-churchgoers. But importantly they also looked after the welfare of the less well off by administering the poor law which was financed by a legal rate on property. Tudor humanists - such as Thomas More - developed these relations in written works such as *Utopia*, which advocated communal mealtimes, specifications on allowable clothing and personal possessions, no private property and guaranteed work and welfare. It has been interpreted as advocating a virtually communist social order (Turner, 1965).



However, all was not consensus on the side of the paternalists. John Locke in particular criticised the analogy of the political relationship deriving from that of the family, and particularly attacked the writings of Robert Filmer who, in *Patriarcha*, argued that the king's absolute power derived from, and was analogous to, the absolute power of the father, with society perceived as a kind of family (Parry, 1964). Locke's critique was based on the difference between a child, who has not developed the faculties of rational thought, and the grown man - the subject - who has developed this ability, and thus has the ability to both form, and attend to, their own interests. 'State paternalism' - although the phrase was not used - would destroy individualism and threaten to turn men into little more than children, or even beasts. In contrast, Locke saw the proper role of the state as that of an umpire, mediating the actions of individuals seeking their own ends.

But this rationalist theorising did not succeed in eradicating paternalist attitudes or practices. Indeed, by the nineteenth century there was a revival of paternalist thought to such an extent that the early Victorian era is considered the high-water mark of traditional conceptualisations of paternalism - that is, of the ideal of a society which is authoritarian, hierarchical, organic and pluralistic (Roberts, 1979). The word itself had still not been used - other than in phrases such as 'paternalist government'. Nor were these characteristics, it is important to note, solely, or even principally, considered to exist in relation to the central state. Paternalistic relations were mainly between property owners, the church authorities and, at most, local agents of the central state. In particular, it was the duties of the landed gentry toward their tenants, and of the clergymen toward their parishioners, which constituted the realm of paternalistic relations.

The four characteristics reflect the feudal and medieval lineage of paternalist thought. Authority reflected a belief in command and obedient relations, and often severe punishment when subordinates transgressed the strictures of their superiors. Hierarchy pervaded Victorian society, and paternalists considered this beneficial. The better off and socially superior had these benefits in order to discharge their responsibilities to the less well off. All attempts at levelling were frowned upon, not least because of its perceived effect on the third characteristic: the organic nature of society. This reflected a belief that everyone had their ordained place in society and that all depended upon everyone else, just as in a living organism. To break the hierarchical relations would be to disrupt the very relations which held society together. Finally, pluralism indicated that

the spheres within which these relations took place were local and diffuse: there was no centralised system of authority, rather one rooted in localities and geographical communities.

Paternalism for the Victorian involved ruling, guiding and assisting those at the bottom of the social scale, reflecting both the rights and duties implied by a father-child relationship. But why did this happen at this time? Roberts gives three reasons for a resurgence in the first half of the nineteenth century. The first is the massive social changes which accompanied the industrial revolution, changes which became known as ‘the-condition-of-England question’ in the 1840s. Urbanisation, unemployment, child labour, inner city squalor and over-crowding - all this led many social thinkers to fear violent revolution even if they did not feel particularly compassionate to the sufferings of the newly emerging working class. In particular, the paternalists feared the dislocation of the organic configuration of society, and their response was to argue for a return to earlier, more stable, times, and a slowing of economic progress.

The second reason for a revival of paternalist thought was an intellectual and artistic reaction to the rationalist enlightenment thinking of writers such as Locke and Bentham. This manifested itself particularly in political-philosophical writings. William Sewall, in his *Christian Politics*, attempted to systematically map out a paternalist social system. Thomas Carlyle was perhaps the archetypal Victorian paternalist: he attacked the utilitarians’ emphasis on means and ends rather than spiritual matters in *Signs of the Times*; popularised the ‘condition-of-England question’, and denounced democracy, in *Chartism*;<sup>53</sup> and harked back to a golden age of feudal relations and strong religious leadership in *Past and Present* (Shelston, 1971). Novelists and poets also contributed by romanticising a more rural, harmonious and stable past. Walter Scott’s novels, particularly *Ivanhoe*, were widely admired for their re-creation of past ages, and for their evocation of ancient institutions and ways. The more personal and human response to poverty and suffering which paternalists admired in the Baron-serf relationship, was evoked by Tory poets such as Wordsworth; and, famously, a future Tory Prime Minister, Disraeli, drew attention to the dislocation of society represented by his ‘two nations’ in *Sybil*. Such responses seemed

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<sup>53</sup> ‘Condition-of-England Question’ was the title of the opening chapter of this work.

more attractive to many than the solutions of the utilitarian philosophers or laissez-faire economists.

The third and final strand was a more general resurgence in conservative values themselves, accompanying the social retrenchment following the Napoleonic wars and the French revolution, exemplified by Edmund Burke's *Reflections on the Revolution in France* which reacted against the egalitarian ideals of democrats and revolutionaries and extolled the virtues of tradition and hierarchical relations, including the responsibility, continuity and solidity which a ruling class by birth brings to a nation (Burke, 1790).

Even the gradual expansion of voting rights during the century did not signify a retreat of the paternalist ideal. As one historian of the 'habit of authority' in British politics approvingly quotes Walter Bagehot

*"we have not enfranchised a class less needing to be guided by their betters than the old class; on the contrary, the new class need it more than the old". There was, then, still work for the paternalists. The task of governing the people had become more complex. A challenge now faced politicians, how at once to give people what was good for them, and how to get them to agree to it (Thornton, 1966 p.230)*

It is not surprising that paternalism as a creed has become synonymous with a form of anti-democracy.

One aspect of paternalism in Victorian England which is curious from our modern day vantage point is the fact that central government action did not form a prominent part of the paternalist's outlook. Grand schemes of social improvement were considered by many to pose a threat to the organic bonds in society, and to the pluralistic and local relations of authority which sustained that society. Social reformers were meddling with an organic whole which they could not possibly understand. In fact, many of the most important pieces of social legislation of the period - new poor laws, education schemes, sanitary measures, railway regulations and factory and employment laws - elicited an ambivalent response from many who might be considered paternalists. Disraeli himself opposed Bills relating to the inspection of mines and public health on the grounds of their centralising tendency (Smith, 1996 p.127).

Here, then, is another clue as to the modern attitude to paternalism: many of the most popular (in retrospect at least) pieces of social legislation were not associated with the concept - which was itself now rather linked with anti-democracy and outdated notions of social deference and 'knowing one's place'. Of course, some of these pieces of legislation, particularly those relating to sanitation and education, would come to rely principally for their modern justifications on equity and market failure rationales; nevertheless, others, such as those which restricted child labour, or the length of the working day, and which could more properly have been termed paternalistic by more modern interpretations, were not thus associated.

It was also at this time that John Stuart Mill, not without his own paternalistic attitudes, wrote the classic anti-paternalist text *On Liberty* (Mill, 1974). The details of the ways in which Mill himself may, or may not, have strayed from his own philosophy have generated a small industry of debate (Riley, 1998; Gray, 1982; Ten, 1980; Arneson, 1980; Laselva, 1988). But the text itself is probably the most important landmark in the history of paternalistic thought because it sets out the opposing case so forcefully. The essential content of Mill's position will be reviewed below when we come to expand on the precise modern definition. But even though Mill only once referred to the word 'paternal' (Mill, 1974 p.172), and then to signify despotism, he did transform the debate from one which involved politico-sociological concepts about the best means of sustaining and promoting society, to one which located the crux of the argument as a philosophical issue concerning the legitimate dividing line between the individual and the state in furthering the former's interests. In fact, Jeremy Bentham had already started this transformation from a sociological to a philosophical question with such assertions that 'prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry' (Dinwiddy, 1989 p.114).

But Mill, though less unambiguous than Bentham, contributed by far the fullest worked out exposition of a non-paternalist political theory. In his time, the realm of state activity was more limited than it is now. In particular, the notion of the state intervening to correct market failures or for reasons of social justice were less well developed, although Mill did recognise 'joint work necessary to the interest of society of which he enjoys the protection' (Mill, 1974 p.70), such as national defence or policing. He also advocated paying for the education of those too poor to do

so themselves. But he rejected the idea that these interventions were directed at activities solely confined to an individual's own concerns.

The old-style paternalism had, in any event, begun to wane. Social problems had proved intractable to its rather homely and romantic theories, and general economic prosperity after 1850 had provided the new individualist doctrines of self-help greater credence. But this prosperity was not to last, and the persistent social problems led to the evolution of another, now famous, intellectual approach - Fabianism - which although it did not specifically endorse paternalism in any of its forms has certainly become associated with a paternalistic frame of mind.

The Fabians were formed in 1883, but adopted their name in 1884 after the Roman General Quintus Fabius who was known for his strategy of patient waiting until the right moment for the main thrust of his attack (Terrins and Whitehead, 1984). The early society tried to express this with the symbol of a tortoise and the slogan "when I strike, I strike hard", but it is the anti-revolutionary doctrine of "the inevitability of gradualness" towards socialism which has become the most commonly remembered phrase (*ibid.*, p.3).

The Fabians' origins are to be found in the same 'condition-of-England question' of the mid-nineteenth century noted above (Stevenson, 1984). The contributions of the first systematic statistical analyses of social problems by people such as Charles Booth and Seebohm Rowntree towards the end of the century demonstrated that the boom in Victorian economic fortunes in the third quarter of the century had not filtered down to the bottom of society. Capitalism was not working, and the response of the Fabians, in contrast to the Marxists and other revolutionaries, was

*the gradual transformation of capitalism into a form of welfare state which, in order to ensure the mass of people a decent standard of living, would find it necessary to take into ownership and control the means of production*  
(Stevenson, 1984 p.23)

But their paternalistic tendencies are perhaps better indicated by one of their earliest attempts at summing up their goals:

*That an association be formed whose ultimate aim should be the reconstruction of Society in accordance with the highest moral possibilities*  
(Pugh, 1984 p.3)

The reference to ‘moral possibilities’ reveals the Fabians’ high-minded attitude towards this reconstruction of society. But more famously it was their conception of the state - and in particular the Webbs’ *A Constitution for the Socialist Commonwealth of Great Britain* (Webb and Webb, 1920) - that cemented the idea that paternalism lay at the root of their socialism. In short, they conceived that the state should be divided into three functions (Barker, 1984). The first is the traditional minimalist state of the nineteenth century concerned with law and order and the defence of the realm. The second was a new role which would administer public services and nationalised industries in the service of the mass of consumers. The third was a rather mysterious ‘think-tank’ function concerned with planning for the future. It was the second which constituted the main plank of Fabian thought, as it would be tasked with addressing the social condition of the people. It was also the locus for the characterisation of those who formed its personnel as experts, and their distinction from the rest of society:

*the belief in the division of society into experts and the mass, the informed and the ‘average sensual man’* (Barker, 1984 p.34)

Reference to the ‘sensual’ wants of the average man is to be contrasted with the ‘moral possibilities’ of the same in a new socialist utopia. But, more plainly, the Fabians were proposing, and have been ever since, the need for expert administration for the good of the many. The needs of the many could not simply be left to their own devices nor, it is implied, remedied by simple redistribution of income and wealth, with the market then allowed to deliver their desires.

The Fabian vision was of course a product of a mixture of motives, including a concern for social injustice, a disbelief in the efficacy of private enterprise, and an element of high-minded and technocratic paternalism. And the latter was quite different from the earlier Victorian paternalism in that it positively advocated a role for a strong central state, but also differed by accepting the need and importance for strong democratic control: the principal defence against the abuse of power by the experts and the “the unobtrusive rule of the bureaucracy” is ‘effective supervision and control by the elected representatives of the community’ (Barker, 1984 p.32).

Nevertheless, this belief in democracy has not diminished the paternalistic overtones of the Fabians. In a comparison of Fabian and utilitarian thought, Hill notes that Sydney Webb did not trust the political capacities of the working class and hoped to see them guided by experts. Furthermore, although ‘a body of expert representatives is the only force capable of coping with expert administrators’, Webb went on

*It is the business of the representative to ascertain what are the ills from which his constituents suffer, and to devise the remedy for them. The elector knows where the shoe pinches, but is not competent to advise on the best method of securing relief, and seldom desires to do so. It is the duty of a representative to teach his constituents as well as to learn from them ... (Hill, 1985 p.120)*

We should not exaggerate the paternalism of this democratic system. As a contemporary historian of the time put it, Fabianism ‘has not defended the state as it is, but has rather urged the need for a state which is based on democracy tempered by respect for the ‘expert’. In this way Socialism of the Fabian type has made representative democracy its creed’ (Pease, 1963 p.249). Representative democracy is still the creed of most mainstream political parties today; perhaps the principal difference is that the decisions of experts and representatives must be continually and more explicitly defended in terms of general political support, and where this support appears lacking, no amount of expert advice would appear to legitimate the action of the state.

Fabianism never had a coherent set of principles or analytical approaches, preferring rather to accommodate a diverse set of views about approaches to social reform. But during the twentieth century, economic theory and normative theories of social justice gradually developed a life of their own outside of particular political movements such as the Fabians. Theories of social justice in particular addressed some, at least, of the ills which Victorian paternalists were concerned, and which Fabians continued to be exercised by. But political equality left no room for the early Victorian views on the hierarchical and organic nature of society, even if some continued to bemoan the lack of traditional conservative values in twentieth century life (Scruton, 1988). Whatever, paternalism would have to re-invent itself more specifically in opposition to Millian ideas on liberty, or at least qualifications to such theories, whilst remaining tainted with the distinctly unfashionable doctrines of its intellectual heritage.

The modern academic debate developed in the latter half of the twentieth century, and took place in two separate academic disciplines. In economics, the debate was initiated by Richard Musgrave in the 1950s without any reference to the philosophical heritage of the issue. Instead, he discussed those ‘wants’ which could be provided for by private markets but become ‘public wants’ if they are

*considered so meritorious that their satisfaction is provided through the public budget, over and above what is provided through the market and paid for by private buyers. This ... type of public wants will be referred to as merit wants and public services aimed at their satisfaction as merit goods (Musgrave, 1986 p.36)*

Thus, certain kinds of good are ‘underconsumed’ in a private market where people simply make reference to their private range of preferences. Musgrave suggests that one set of reasons for subsidising certain goods such as education, or prohibiting the consumption of others such as drugs, is that democratic leadership sometimes involves the ‘informed’ making decisions on behalf of the ‘uninformed’. This suggests two issues already touched upon: first, is there really a lack of information in these matters, and second, would not the simple provision of information be the proper response (which would not be paternalistic)? But Musgrave develops the issue in another way, linking it to democracy, by suggesting that merit wants might somehow be expressed through political behaviour - that is, subsidies for the arts might be justified with reference to consumers articulating their preferences as voters, where ‘preferences may be conditioned by his image of the good society’, in this case, one which has a good range of artistic endeavour taking place within it. A private decision to consume artistic goods, based on private self-interest, would not achieve sufficient level of provision to satisfy public merit wants. Such a conceptualisation is similar to that of ‘option demand’ (Weisbrod, 1964).

The debate within economic circles rarely uses the word ‘paternalism’, even though the merit want idea is potentially paternalistic within the specific sphere of the consumption of goods and services. But the idea that these wants may be expressed within a political, rather than a private, marketplace, has continued to intrigue economists who have given the merit good idea any sustained analysis (Brennan, 1990). It seems that economists are reluctant to reject the idea completely that it is the individual’s preferences in some form of another which should be satisfied, even if these preferences cannot be expressed in ways which traditional economic



theory would expect. The merit good debate, such as it is, is loath to engage in discussing a form of paternalism which involves providing, or disallowing, consumption of some good or service *without the consent* of the individual concerned, and thus with no reference to their preferences at all. To the extent that they acknowledge there may be such provision, the merit good case is something of a curio in economic textbooks (Lipsey and Chrystal, 1995 p.423) - an acknowledgement perhaps that analysis of such provision falls outside the technical capabilities of their discipline.

This 'non-consent' aspect of paternalism has been far more prominent in the second of the two camps engaged in the contemporary debate. In philosophy, the issue is less whether or not individual preferences might not have an appropriate outlet, and more with whether those preferences might simply not be in the individual's best interests (an economist might say, maximise their utility function), either in that they are likely to harm the individual or do herself insufficient good. Further, if behaviour based on preferences does not, or is not considered to, maximise interests or utility then another question must be answered: does the state, or anyone else, have the right to intervene to direct individual behaviour so that it does? For it is not self-evident that acting foolishly or rashly in itself justifies the state in acting to correct it; we may be perceived to have a sphere of sovereignty over certain classes of action which may *never* be encroached. A final question, rarely if ever addressed, is why we should think the state *better* placed to make these decisions than the individual, even if we accept it has the moral right to interfere in individual liberty.

Unlike discussions of merit goods, the philosophical debate almost invariably starts with Mill's *On Liberty*. The late 19<sup>th</sup> century saw some sparring between various philosophers over Mill's views - most notably from James Fitzjames Stephen and his *Liberty, Equality, Fraternity* - but the specific concern with paternalism seems only to have started with the debate between H.L.A. Hart (1963) and Lord Devlin over the latter's 1959 Maccabaeian Lecture to the British Academy (Devlin, 1965). In this, Devlin argued that, as with treason, it was permissible for the law to enforce certain moral standards as a means of sustaining society, and he argued that indeed the law does often act to do this. Hart countered, as part of his rebuttal of Devlin's position, that such legal actions could be seen as paternalism, rather than as attempts to enforce

morals. He argued that certain forms of paternalism, not concerned with moral behaviour but with securing a person's welfare, were permissible.

After this, philosophers lined themselves up, either on the side of Mill, arguing that certain realms of conduct were outside anyone else's concern (Feinberg, 1986), or against him, arguing that he had been too dogmatic (Dworkin, 1979). Many of these philosophers will appear in what follows, and the gaps and controversies in the current debate elaborated. But it is worth noting two general points in the wake of this historical review. First, no philosophers (let alone economists) argue that paternalism is inherently desirable, in the way that many argue equity is, for example. Those that suggest that some degree of paternalism is warranted invariably hedge this with conditions, constraints and provisos. The second general comment is that very few of these contemporary commentaries on paternalism relate it specifically to public policy issues (beyond citing example such as seat-belt legislation) other than to use it disparagingly. This is curious, given the wealth of material available for consideration, but probably reflects a nervousness amongst social theorists of being tarred with the old Tory brush of Victorian paternalism. It is this current use of paternalism in policy debates to which we now turn.

### **Paternalism and merit goods in the policy literature**

It is clear that the malign connotation of paternalism still exists in modern day social analysis across many disciplines. For example, one Marxist critique of late twentieth century capitalism characterises the direction taken by advanced nations in their attitudes to social policy as falling into one of three categories: 'welfare state', 'neo-liberalism' and 'paternalism' - none of which offer hope for the future (MacGregor, 1999). Paternalism, in this context, is taken to indicate an attempt at compromise between the first two ideologies, involving a state which 'exhorts and intervenes into the lives of the poor and deviant'. Both the Blair and Clinton 'Third Way' administrations are offered as examples, and thus dismissed as paternalistic. In another study, the relationship between central and local government in New Zealand was examined as part of an analysis of how best to parcel out the responsibilities of government - was the attitude going to be, the author asked, one of 'paternalism or partnership?' (Sowman, 1984). It was always quite clear which approach would be the more welcome.

In contemporary party politics in the UK, a similar distrust of the perceived centralising tendencies of the Thatcher administrations led to these apparently laissez-faire governments being characterised as paternalistic by their opponents (Holme, 1992). Lord Holme is a liberal democrat, and viewed much of what the Thatcher governments had done as ‘unaccountable’, insufficiently related to what popular opinion desired, and thus paternalistic. The term has also become commonplace in describing relations outside party politics. In a geographical study of environmental conflict in a small US town, a woodpulp mill was characterised as having a malign paternalistic relationship with the townsfolk, which enabled it to deflect and contain criticism of its polluting activities (Solecki, 1996).

But it is in the field of health care that paternalism has continued to haunt policy debates to the greatest extent, and with the greatest confusion about what precisely it means. On the one hand, there are those who believe that paternalism has no place in modern health care, and are particularly outraged at obsession with prevention (Le Fanu, 1994) and the activities of those promoting ‘healthy lifestyles’:

*health fascism and state paternalism are simply a reversion to a more primitive stage of society. The similarity with the religious paternalism and persecution that deformed so much of history is striking. In a secular age, those who believe they are endowed with truth and virtue see it as their right to preserve the bodily, rather than the spiritual, welfare of others, whether the victims like it or not (Tame and Botsford, 1996 p.34)*

Rather more measured terms are used to support moves away from paternalism and toward user involvement and increased choice in both social services and the NHS (Croft and Beresford, 1990; Coulter, 1997). In the social services, the paternalism referred to is that of old people’s homes having ‘fixed toileting times’ and people offered low wages in sheltered workshops (Croft and Beresford, 1990 p.8).

On the other hand, more than in many other areas, there is a residual sense that some kind of paternalistic behaviour might, reluctantly, be necessary. This occurs in community care, where those who work with severely vulnerable adults, not all with actual mental handicaps, believe it justifiable to sometimes curtail their freedom of choice for their own good (Clark, 1998). In more mainstream clinical practice, medical philosophers have argued that some paternalism is inevitable

in circumstances - exactly those of much medical care - where the complexity of the situation makes it impossible to separate fact and judgement (Wulff, 1995). Thus, providing information to the patient, and then letting him or her decide on the course of action, is insufficient because of the need to interpret the information with reference to the skills and experience of the practitioner. Finally, public health measures, such as bans on tobacco advertising or 'high tar' brands, and punitive taxation, are supported because they seem, in the final analysis, so uncontroversial - at least after the relevant legislation has been implemented and public debate dies down (Hayry, Hayry, and Karjalainen, 1989). So it is with compulsory seat-belts and helmets for motor-cyclists; although these are often considered to be clear cases of paternalism, there is rarely a serious case made for repealing the legislation.

Nevertheless, the literature articulating even hesitant support for paternalism is sparse, and although merit goods are often mentioned in the economic literature, they are seldom cited in defence of universal state interventions. Indeed, the case *for* merit goods is not subjected to any sustained justification; instead examples of situations where such a justification would be required are presented without further analysis (Lipsey and Chrystal, 1995 p.423).

So in-depth and systematic analyses of paternalism and its possible relevance to government policy are few and far between. Two authors constitute something of an exception: Gerald Dworkin and Albert Weale have both made specific reference to paternalism in connection to public services. Dworkin (1979; 1981) makes reference to possibly paternalistic rationales for pension provision and compulsory education, and reviews arguments in favour of cash or in kind provision. Weale (1978) analyses a potential case for paternalism, whilst also noting that in kind provision need not be paternalistic, echoing many of the market failure arguments in Chapter 4 and specifically using the example of the NHS. Weale (1983b) also reviews the case of public health measures: 'the paternalist never holds a stronger position than when advocating many of [its] measures' (p.806).

Some have in the past cited paternalism in the support of public service broadcasting. The most famous of these, even if he did not use the term itself, was from John Reith, the first head of the BBC, whose language is undoubtedly paternalistic:

*It is occasionally indicated to us that we are apparently setting out to give the public what we think they need - and not what they want. But few know what they want, and very few what they need (McDonnell, 1991 p.12)*

Others have also echoed some of these sentiments, although in line with the general nervousness over the use of the word, disclaim any intention of supporting paternalism. Curran and Seaton (1991), for example, began their analysis of the theory of public service broadcasting by claiming that ‘the principle of public service .. was not .. paternalistic’ (p.295) but went on to state that public service included ‘seeking to educate, inform, and improve, and prepared to lead public opinion rather than follow it’ (p.297). Clearly, their understanding of paternalism differs from the motivations ascribed to the BBC in this statement; but the term as it is understood in this analysis would include using public money to provide programmes which ‘improve’ the watching public without providing the option for not funding such programmes.

In general, then, paternalism and merit goods are not cited in the policy literature in favourable terms, and on the occasions when they are, their defence is hedged with caution. In particular, even when cautiously sympathetic to paternalism, commentators do not specify why the state might be *better* placed than the individual in making decisions about their welfare, thereby leaving an important lacuna in paternalistic theory. Filling this gap will constitute the main task of the following chapter. Furthermore, our preceding analysis has suggested that specifically paternalistic justifications will be required to a much greater degree if many of the specific justifications, and policy recommendations, of policy commentators are to be sustainable. We now turn to a formal definition of paternalism and its distinction from efficiency justifications in particular.

### **Defining paternalism**

In general terms there is much agreement about the elements of paternalistic policies in the literature. The elements derive from, and are in opposition to, Mill’s classic articulation of the liberal position in *On Liberty*:

*the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant (p.13)*

This is known as the harm principle. In opposition to it, paternalism must seek to justify, in the interests of the individual, intervening in their decision-making whether or not they give consent. We now explore these three elements in turn.

### *Individuals' own interests*

Mill differentiated what have come to be known as 'other-regarding' actions, which involve harm to others and which do justify state intervention, from 'self-regarding' actions which do not, and which simply involve the individual herself deciding what is in her own good. This distinction establishes the particular focus of paternalism as directed at actions which are self-regarding in Mill's terms - that is, actions which do not harm others. This can take two forms: either preventing harm to self (Feinberg, 1986), or positively promoting benefit to self, the so-called 'benefit-conferring legal paternalism' (Feinberg, 1988 p.311). Unfortunately, the distinction between self- and other-regarding actions is not clear cut. As we have seen, the range of activities which have absolutely no influence on others - by giving offence or causing other types of unhappiness, for example - are few: 'In an organised society it is impossible to identify classes of actions which harm no-one but the individual who does them' (Hart, 1963 p.5). But Mill believed that we should not regard acts which we might find merely distasteful, such as fornication or gambling, as constituting harm. On the other hand, actions which are essentially self-regarding, such as getting drunk, might be viewed as potentially harmful in certain circumstances: for example, if excessive drinking were undertaken by someone predisposed to violence, the state may be justified in intervening. This distinction - actual harm and 'distaste' - is consistent with the view outlined above that the caring externality, and other such externalities which depend on one person's judgement of another's preferences, are not properly so described. Rather, such judgements should be thought of as paternalistic opinions (as long as the opinions are beneficently disposed), and thus so should actions by the state based on them and justified with reference to them.

It should also be noted that 'self-regarding' in this context can include a wide range of actions which might not be directly related to the individual's own *welfare or utility*, interpreted narrowly. One example would be a stoical action - such as the denial of material pleasures for reasons of a religious or spiritual nature. Another example would be an action which serves to

restrict a person's freedom or capability set (Sen, 1985), such as burning one's passport even if one has no plans to travel abroad. One's welfare would remain the same, but now an (unwanted) option of travelling abroad has been removed, reducing our capability to do so. Or we might 'commit' ourselves to doing something such as volunteering to go to war, even if we do not want to and know that our welfare will be reduced as a result (Sen, 1990). All of these might conceivably be considered to have an impact on factors other than utility *per se*. Nevertheless, they are also all decisions made by an individual for their own reasons *whatever these may be*. It will be assumed here that any interference in these decisions will not be discounted from the class of paternalistic actions merely because it appears to be acting in pursuit of non-welfarist outcomes; it is enough that it appears to be subverting some concept of what the individual considers right for them. What *would* be considered non-paternalistic are actions such as the outlawing of certain religious practices purely on the basis of the state fearing for its own, or society's, survival, or because of maleficent motives toward the individuals concerned. The discussion of morality between Devlin and Hart also relates to such as issue: can morality be divorced from welfare? For our purposes, if the state acts to enforce morality, as long as this morality does not require or involve the explicit and intentional harm of the interests of the individual, then it will be considered paternalistic rather than, say, merely cruel.

Paternalism must therefore be independent of (i.e. not necessarily involve) any other person's interests. It can on occasion be easy to conflate paternalism with other motivations by 'missing' the other interest. For example, one reason why mutually beneficial exchanges may not be completed is the costs of conducting the exchange itself - transactions costs. Unions and employers may take so long to reach agreement on an aspect of workers' employment, that the profitability of the firm may be threatened. In such circumstances, the state may facilitate a solution (by regulating a form of 'pendulum arbitration', for example) or it may outlaw the particular form of collective organisation which causes the problem. The state is not here acting paternalistically - the parties may be acting in their own best interest given the circumstances, but because of the strategic nature of the situation their decisions may result in undesirable consequences.

The classic example of a situation where negotiating parties are engaged in strategic behaviour involving the prediction of the actions of others is the 'prisoner's dilemma' game. Here the

rational self-interested choice for each of two parties leads to a sub-optimal outcome for them both in aggregate (McLean, 1987). The outcome is not what the people involved actually prefer - a 'wedge' has been driven between choice and preference (Sen, 1990). The state may impose a 'co-operate-co-operate' solution on them. The individuals involved are having an outcome imposed, and having their freedom restricted, but not paternalistically - it is the outcome they wish (prefer) but cannot rationally choose without external regulation. In all these circumstances, it is possible to regard the actions of the individuals or agencies concerned as, at least in part, other regarding, thereby satisfying a Millian conception of justifiable state intervention.

### *Decision-making autonomy*

This leads on to another aspect of the definition: what precisely is the paternalist seeking to influence or constrain? One of the most commonly cited definitions of paternalism is provided by Gerald Dworkin:

*interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced (Dworkin, 1979 p.78)*

This focuses on liberty of action; the definition also makes use of the term coercion. Weale develops a definition to take account of the fact that paternalism does not always involve coercion - for example, someone who is dying and who has information about their condition withheld is not being coerced. Nevertheless, withholding such information is likely to influence the kind of decisions which the dying person takes about his or her future. So Weale's definition includes the notion of 'unfreedom': 'The government, or some other authoritative body, makes a citizen unfree to perform an action ...'.<sup>54</sup>

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<sup>54</sup> Weale's full definition continues:

1. .... either by
  - a) bringing a set of sanctions against the citizen performing the action, or
  - b) deliberately misinforming the citizen so that he does not perform the action, where it is known that if he were informed he would fail to perform the action only under threat of sanction
2. The citizen is made unfree to perform the action when he wants to perform it, even though he may have a better reason, which he recognises, for wanting not to perform the action



Both Weale's and Dworkin's definitions retain a notion of restricting freedom. Other definitions in the literature follow a similar course (Beauchamp, 1984). However, it has also been noted that freedom is too narrow a term in this context (Gert and Culver, 1976). It does not allow for acts which do not restrict liberty but do seem to interfere with another's ability to make decisions in ways that seem right to them. For example, a doctor informing a patient's partner about the patient's dangerous drug use, letting an opponent win at tennis against their wishes, or the state subsidising the opera so that it becomes within reach of a larger proportion of the population, all seem intuitively paternalistic. However, none clearly interferes with an individual's liberty of action - in fact, the last seems to increase the freedom of action of those who like opera.

An alternative approach suggests that paternalism occurs whenever an action, as well as being for the good of the paternalised individual, 'involves violating a moral rule' (Gert and Culver, 1976 p.49) with regard to the paternalised person. This automatically takes care of some of the cases above: the doctor could be said to be breaking a moral rule of confidentiality; the tennis player a moral rule of personal integrity. However, one could also argue that the doctor and tennis player were *following* moral rules of beneficence and sensitivity. And, notwithstanding this objection, some paternalistic acts do not obviously break any moral rules. For example, removing all dangerous drugs from my apartment when I have a suicidal friend staying with me would be difficult to describe as immoral. The drugs are my property and I can do what I wish with them. Gert and Culver may argue that denying any opportunity of action to an individual is violating a moral rule, in which case we are back to the problem of competing moral rules. This is ultimately unresolvable and renders the approach unhelpful.

Dworkin subsequently sought to broaden the notion by suggesting that it is interference with another individual's *autonomy* which is the crucial aspect. Decision-making is 'violated' in some way

*either by preventing people from doing what they have decided or by interfering with the way in which they arrive at their decisions* (Dworkin, 1983)

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3. *The action in question is self-regarding in type, according to the modified harm principle*
  4. *The Government intends its action to be beneficial to the citizen* (Weale, 1978 p.163)

The tennis player who is being allowed to win wishes to play a hard game of tennis. He or she is capable of deciding what is in his or her interests - and this decision is being interfered with by someone else. Dworkin acknowledged that 'interfering' could include virtually any form of activity which influences behaviour, including simple robust argument. For example, some people may enjoy making decisions on the basis of impulsive, ill-considered, irrational thinking. Displaying the folly of decisions made on this basis by telling such a person what we think of their decision-making, interferes with their autonomy, and is therefore paternalistic.

However, this seems to leave paternalistic behaviour too loosely defined. Can we really accept that robust argument, or the simple provision of advice - perhaps such as that counselling travellers not to travel to certain dangerous parts of the world - are paternalistic, and therefore require special justification? These interventions are doing more than simply providing information; they are suggesting a specific course of action. Nevertheless, they are not preventing the decision-maker from assessing the situation in full knowledge of the facts; neither do they in any way affect materially the circumstances of the individual if she decides to go ahead and travel anyway. It seems, rather, that such government activities are simply engaging in an exchange of interpretations about what is in the best interests of one party, whilst allowing the final decision to be left with the individual. A better term, then, for paternalistic interference would be *intervention*, indicating that the autonomy of the decision-maker has been specifically hindered or obstructed by another agent, substituting their judgement about a decision, or its context. This might include the withholding, or supply of misleading, information, or the taxation (or subsidy) of certain goods which artificially reduces (or increases) the attractiveness of the good to a level considered more appropriate by the state. As Mill put it with respect to specific taxation: '[e]very increase of cost is a prohibition to those whose means do not come up to the augmented price; and to those who do, it is a penalty laid on them for gratifying a particular taste' (1974 p.171). These adjustments to the conditions under which choice is exercised are in addition the more obvious interventions involving prohibition and compulsion.

### *Lack of consent*

The third characteristic of a paternalistic act is that it is not directly invited by the individual whose welfare it is supposed to improve: the person 'who is being treated paternalistically does not wish

to be treated that way' (Dworkin, 1983 p.106); otherwise paternalism becomes uncontroversial. In Gert and Culver's definition the 'past, present or immediately forthcoming consent removes [an act] from the class of paternalistic acts' (1976 p.50). An action would not be paternalistic if the individual concerned invited it in order to make up for some self-confessed practical or intellectual insufficiency. Paternalists must believe that they are more likely to further the paternalised person's interests than the person herself, when that person disagrees. If someone has been requested in advance by the individual concerned to take a certain action, regardless of the opinion of the individual at the time, then this does not constitute paternalism. Thus Odysseus ordered his men to tie him to the mast of his ship to avoid the consequences of the Sirens' song, and to ignore his pleas; they would not be behaving paternalistically by doing so because it was *just that eventuality* which Odysseus had in mind when he made the original request. On occasion, an individual may genuinely regret giving such prior consent, perhaps after some time has passed and the various options can be reviewed - if the paternalistic restraint itself was worse than the outcome the restraint was seeking to avoid, for example. In such a case, the individual should consider that they had made a mistake in their original request, but not that they had been treated paternalistically.

The issue of consent is acute when the state is the paternalistic agent. Laws apply to populations rather than individuals, and an individual cannot meaningfully consent to a law *at the time of its enforcement* - the law applies whether they consent or not. On the other hand, if everyone consented to a law at all times, in the sense of never *wishing* to contravene its strictures, then the law would be redundant. So we can be reasonably sure that laws or state interventions will always fail to obtain the past, present or immediately forthcoming consent of some people at least. In a democracy this will run up against the same problem which all collective activity faces - some people will always oppose the measure, and this poses a particular challenge for the justification of paternalism.

A final issue in relation to consent. Certain acts are often considered paternalistic which appear as though they could only be welcomed by the individuals in question, or at least incur nothing worse than indifference. For example, consider a subsidy on the price of opera tickets, an example typically discussed in the context of merit goods by economists. Can such a subsidy, with the purpose of increasing consumption of a good for the sole benefit of the individual

concerned, be termed paternalistic? The state says to an individual: ‘Your income is to stay the same, and the price of all other goods are to remain the same, but I am going to reduce the price of the opera to you. Do you agree?’. Surely no rational person would refuse even if they did not personally value the good, because they would calculate that they would at least be no worse off with the subsidy.

However, this might not be the relevant question. Suppose instead the individual were asked at the conclusion of the offer ‘... or would you rather have the cash instead?’. With cash he would be free to choose how to consume these additional resources without being restricted in some way to a particular good. So, although bound to accept the offer of the subsidy in the absence of any alternative, *within the context of an attempt to encourage consumption* there is no reason for an individual to prefer being tied to a particular good than having the choice of consuming another. Such interference in decision-making in order to influence consumption patterns, even if it constitutes an unambiguous improvement in the welfare of an individual, is paternalistic because an individual’s decision-making autonomy is being usurped without any reason to suppose general consent.

This example raises again some of the issues encountered earlier with respect to cash versus consumption-specific provision to promote equity, and illustrates why direct provision of a good or service might be thought paternalistic. Whereas cash redistributions certainly coerce individuals to give up a portion of their income, against their wishes, this intervention is not undertaken in the interests of those being coerced, but in the interests of others who are considered in greater need.

#### *A definition of paternalism*

We are now in a position to summarise the three conditions which make an act paternalistic. They relate to the *imputed* intentions of policy makers or individuals, since there remains the problem of paternalists claiming that their motivations are in fact directed toward other ends. In the light of the preceding discussion, such a problem will always be difficult to resolve because interventions often have a mixture of motives. On a purely conceptual level, however, if the

following conditions are present then we can take the intervention to be paternalistic and determined to correct a failure of reason:

- \* *the intervention is made in order to further the paternalised person's interests or welfare, independently of anyone else's;*
- \* *the intervention is in the decision-making autonomy of the person concerned;*
- \* *the intervention is made without the 'past, present or immediately forthcoming consent' of the person concerned.*

### **Types of paternalism**

There are many shades and types of paternalistic intervention. The principal distinction is that between legal and other forms of paternalism, and is the easiest to establish. The term legal paternalism (Feinberg, 1983; Hart, 1963) refers to an action taken by the state, and which is backed by legal authority. Feinberg's focus was on the application of the criminal law, but acknowledged that 'some paternalistic legislation is noncoercive, for example welfare programs of "aid in kind"' (Feinberg, 1986 p.7). 'Legal' paternalism thus acquired a criminal sanction connotation which is too narrow for our concerns. On the other hand, any individual can indulge in a paternalistic act but this widens the scope of analysis too far. In this thesis the focus of our concern is with the state, and thus 'state' paternalism would be the most appropriate term. Unfortunately 'state paternalism' is avoided in the philosophy literature, perhaps because it evokes the type of despotic government which characterised the totalitarian regimes in eastern Europe and the Soviet Union in the mid-twentieth century, or even the more benevolent but still anti-democratic governments of the Victorian era. Nevertheless, state paternalism is a more direct and straightforward way of describing the philosophical questions under consideration here, and so will be preferred to legal paternalism which sounds rather judicial to a policy analyst's ear.

### *Hard and soft paternalism, and imperfect information*

The second major distinction made in the literature is that between soft and hard paternalism (Feinberg, 1986), sometimes termed weak and strong paternalism (Beauchamp, 1984). The distinction is important in paternalist analysis, and is based on the degree to which the individual concerned is considered to be acting *voluntarily*. If someone is mentally handicapped or mentally ill, under the influence of drugs, subject to extreme forms of emotional distress or tiredness, troubled by uncontrollable compulsions, or otherwise impeded in some way from calmly and reflectively exercising normal mental faculties, then those who support an anti-paternalist line will often submit that interfering in the self-regarding actions of these individuals is justified on the basis that the decision is not really their own. Hard or strong paternalism, on the other hand, relies on justifying an intervention *even though* the individual is in full control of their mental faculties.

But very often in the paternalism literature, imperfect information, ignorance, or being unaware of relevant facts are themselves considered grounds for soft paternalism. Kleinig makes reference to 'ignorance' (1983 p.48) as one element of a justification for paternalism. Archard also mixes up 'ignorance, lack of reason, psychological compulsion, or a similarly clear cognitive or volitional defect' (1993 p.341) as valid reasons for a paternalist to intervene in circumstances 'of impaired choice'. Goodin, again, cites being 'uninformed' as the first form of justification for over-riding people's preferences (1993 p.234).<sup>55</sup> Dworkin (1981) outlines a number of factors which reduce individuals' ability to make decisions which maximise their welfare, again, including ignorance.

Some authors have distinguished carefully between economic factors, including imperfect information, and other motivations for state intervention: for example, in the case of health and safety regulations (Kelman, 1981) or for benefits in kind (Weale, 1978). Here, however, we can see that, just as policy commentators have conflated market failure and equity justifications with those requiring paternalistic justifications, it is not uncommon for commentators on paternalism to

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<sup>55</sup> Although he also notes we can be uninformed about causal connections, which might be thought to be about reasoning.

mix up, or not differentiate, the conditions which might open the way to paternalistic intervention with those related to the correction of market failure.

As we have suggested, the key point is that one can have poor information about a particular set of circumstances and yet still make a decision which maximises welfare, given the information available. Having little information *in itself* does not impair our ability to reason.<sup>56</sup> We must simply make a judgement about what to do given our knowledge as it stands - including, perhaps, not taking any course of action until the level or quality of information improves. For example, an individual lost at night in the countryside could be deprived of all sight-based sensory information. He or she may wish to reach the nearest town, but believes that simply walking around in the dark is more likely to result in falling down a ditch or becoming exhausted. There is not enough information to achieve the objective of reaching the town with any confidence, and instead the lost traveller decides to stay put, preserve energy and wait until daybreak when a route should become clearer. Lack of information has not impaired the traveller's ability to reason, and government policy to make roads better lit at night (and so improve the general supply of 'information' on how to travel effectively) is not paternalistic.

One can make an analogy between human reasoning and the working of a computer. A computer can either suffer from poor data (imperfect information), or corrupted virus-ridden software (possible case for soft paternalism), or uncorrupted, but insufficiently powerful or sophisticated software (possible case for hard paternalism). The latter could be improved by upgrading the software (education). But an uncorrupted, sophisticated piece of software will *not in itself* be affected by the quality of the data, even if the usefulness of what it can produce will be. It will merely do the best it can with the information provided - including sending the message that it cannot resolve the problem being set for it. Note that this may be a perfectly 'well reasoned out' response.

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<sup>56</sup> Indeed, when an individual is in circumstances where there are very little information about what course of action to take - such as a trapped pot-holer or kidnapped hostages - it is often observed that these individuals act with extraordinary mental clarity. Their minds work extremely well with limited distractions, and maximise their chances of survival. This should be contrasted with someone overloaded with information - in the middle of a very busy and boisterous crowd, for example - where the consequence could be to panic.

It might be argued that compulsorily providing information for people is paternalistic because not everyone might consent. Providing accurate, clear information is not costless. Some individuals may object that the provision of good information has pushed up the cost of a particular good, such as the obligation to provide nutritional information on food, or the cost of providing street lighting. They would rather take their chances and pay the lower price. However, the state is faced with the difficulty of only ensuring information for those who want it (and thus willing to pay for it) and not for those who don't. Typically, it is not practical to do so because of 'free-rider' problems - those who do not pay will also get the benefit of the additional information, even those who said they did not need it. It is not possible to provide only street lighting or nutritional information to particular sections of the population.

More generally, we may justify this kind of intervention on the basis that it is devised to enable the majority 'to get what they want', not to paternalistically impose its will on a minority. Thus, the legislators have no wish to decide what is good for anyone against their will:

*the implicit rationale of the law - the account of its role, function, and motivation that most coheres with the known facts - is to enable the majority to secure its goals, not to enforce prudence on the unwilling minority*  
(Feinberg, 1986 p.21)

But why is this distinction between paternalism and correcting information problems important? In particular, why should it be important to separate information problems from soft paternalism, where there is poor cognitive control of some kind? Separating information problems from those to do with lack of cognitive control, and classing the former as nothing to do with paternalism (even if it is to do with lack of voluntariness), would not seem to assist in the consideration of hard paternalism, which assumes adequate voluntariness willy-nilly.

The reason lies in our conception of paternalism as correcting failures of reason. Separating information problems from soft-paternalism clearly indicates that it is not a failure of reason. And the advantage of *this* is to clarify the type of justification required in situations with good cognitive control. For here the choice is between the state 'knowing better' than a cognitively healthy, well-informed individual and the far less stringent test of whether the state can simply improve the conditions of factual knowledge. However, this is not a straightforward distinction, as we have seen by the number of theoretical justifications which, under the guise of information



improvement, and assuming good cognitive control, unconsciously demand too much of their justification as implicitly mending poor reasoning too. When this happens we need a different and tougher justification. So information problems should be kept separate from other forms of soft paternalism in order to clarify its additional and proper separation from hard paternalism, with which it is commonly confused in the policy literature.

Of course, if the state has information at its disposal, and did not disclose it because it felt that this information would be abused or lead to unacceptable practices, then ‘insufficient information’ in this sense may well constitute a paternalistic act. Consider the private publication of technical evidence on the causes of homosexuality. If such evidence suggested that sexual preferences of this kind were not learned but the result of ‘natural’ genetic predisposition, this might point toward a reduction in the legal age of homosexual consent. There would be no basis for discriminating against homosexuals about the age at which they can first legally engage in sexual acts. However, the state may take the view that such acts were to be discouraged for moral reasons and paternalistically withhold the information nonetheless.

#### *Other species of paternalism*

A number of other distinctions between various types of paternalism can be made. First, there are paternalistic laws which require actions, and there are those which forbid: these have been termed active and passive respectively (Kleinig, 1983). For example, compelling the purchase of motor insurance is an active policy; outlawing the consumption of certain drugs is a passive one. A second distinction is between mixed and unmixed paternalism (Feinberg, 1986). The former refers to paternalistic policies which are combined with other kinds of justification (correcting market failure or promoting social justice), the latter with those which *only* relate to self-regarding harm. The separate elements in mixed policies *may* be confused in the literature (and often are), and much of Chapter 5 was concerned with demonstrating policies which, although claiming to be nothing to do with paternalism, were in fact, at the very least, relying on mixed paternalism.

A third distinction is between negative and positive paternalism (Kleinig, 1983), also rather confusingly sometimes called weak and strong paternalism (Dworkin, 1981), the latter distinction

for other writers being what we earlier called hard and soft paternalism (Beauchamp, 1984). Negative/weak refers to actions which protect people from harming themselves while the latter refers to promoting someone's good or welfare (including merit goods). Seat-belt laws are an example of the former, whereas subsidies for leisure facilities are an example of the latter. The fourth distinction separates paternalism in a one-party case, such as prohibiting suicide and drug use, from two-party cases, such as laws prohibiting euthanasia or drug sales (Feinberg, 1986). In the latter case, a restriction is placed on a second party even though the first party has voluntarily entered into an arrangement with the second party which would only affect the first party's interests. The second party may be punished even though it is the first party's autonomy which is in question. A similar distinction has been termed pure and impure paternalism (Dworkin, 1979).

### **Paternalism and justifications based on 'non-voluntariness'**

We have seen how reluctant philosophers of paternalism are to invoke it as a means of justifying state intervention. The many who consider it a worthy subject of study usually do so as an exercise in clarifying philosophical concepts of autonomy (Scoccia, 1990) or as part of a more general reappraisal of Mill's *On Liberty* (Arneson, 1980), but rarely as a potentially valuable means of supporting state actions. In this way, they are not dissimilar to the policy analyst school: though spending more time with the subject, they invoke it as infrequently in support of state intervention. But where it is analysed specifically in relation to public policy, those who oppose it as a means of justification come up against many of the same difficulties that the policy analysts do from their perspective.

The chief proponent of anti-paternalism from within the philosophical literature is Joel Feinberg (1986),<sup>57</sup> and a more detailed examination of his position will serve to exemplify the best worked position of this kind, and how this nevertheless fails completely to satisfy the requirement for a non-paternalist public policy. His case is specifically made against hard paternalism because the soft-paternalist case is rather uncontroversial, for reasons alluded to above. In fact, he argues that soft paternalism is better described as 'soft anti-paternalism' (Feinberg, 1986 p.15) which

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<sup>57</sup> Page numbers in this section refer to Feinberg (1986), unless otherwise stated.

he prefers to view as an essentially liberal position. Others agree. Beauchamp noted that ‘weak paternalism [his term for soft paternalism] applies only to substantially nonvoluntary or uninformed persons’ (Beauchamp, 1984 p.138) and as such has in the final analysis ‘nothing to do with paternalism’ (*ibid.*, p.142). The point being that, for both authors, since the soft-paternalist only intervenes when a decision is considered not truly an actor’s own, it does not interfere with that person’s autonomy, and is thus not paternalistic. This thesis accepts the relevance of this distinction, and addresses the more challenging question of whether *hard* paternalism can be justified.

Feinberg’s case for opposing (hard) paternalism runs like this. A person’s autonomy - self-rule or self-government - should be considered as a *de jure* right, analogous with the right of a nation to govern over its own territory. Thus Feinberg introduces the notion of personal sovereignty over which one has the right to govern oneself. Autonomy does not imply the holding of other moral virtues - such as kindness or wisdom - but it is considered ‘a necessary element in any full ideal of human character’ (p.45). Although this cannot be proven, it ‘resonates with something in [our] most fundamental moral attitudes’ (p.52). He contrasts this notion of right to self-government with the notion of ‘our own good’, the typical focus of the paternalist. Feinberg’s position is that, when these two values conflict, personal right takes precedence, so that even when we certainly suspect that someone will harm themselves we should not prevent them. The rationale follows a broadly Millian line that we are best placed to know our interests and also require the exercise of ‘moral muscles’ to enable our flourishing ability to make choices on which our good depends.

However, this does not mean that people should inevitably be left to ‘go to hell in their own way’. There is a basis for intervening in people’s self regarding actions, for ‘protective interference’, which nevertheless respects *de jure* autonomy:

*Such an argument would show that the reasonableness of the restriction consists in the protection it provides the actor from dangerous choices that are not truly his own. This strategy makes critical use of the concept of voluntary choice ... (p.99)*

In other words, lack of voluntariness, or voluntariness-vitiating conditions, allow a liberty-limiting interference without offending autonomy, and thus without requiring paternalism. He cites three

broad classes of case which make choices less than adequately voluntary: compulsion, ignorance or mistake, and impaired capacity (pp.150-162).<sup>58</sup> In essence, the soft or anti-paternalist will then have to

*consider the most impressive examples of apparently reasonable paternalistic legislation, and argue, case by case, either that they are not reasonable or that they are not (hard) paternalistic (p.26)*

That is, if they cannot be justified with reference to one of the three voluntariness-vitiating principles then they should be repealed.

So far, so good. However, the approach adopts some of the same unconvincing rationalisations that the policy analysts used in avoiding the charge of paternalism. The first example involves the case of protective motorcycle helmets (pp.134-142). In this case, Feinberg is forced to conclude that insufficiently voluntariness-vitiating circumstances pertain, and that there is a need to recourse to the harm principle, on the basis that unprotected accident victims are a drain on society's resources (assuming some public health provision<sup>59</sup>). But even non-paternalistic obligations to buy actuarially fair insurance for these costs do not seem to be enough, for we dislike seeing people with terrible injuries and thus, to avoid psychic costs such as these, we oblige helmet use too.

We have already discussed why such a strategy fails to constitute a market correcting strategy in Chapter 5. By claiming this is really a type of externality, we are making the intervention to oblige helmet wearing, or under some circumstances compulsory insurance, dependent on others' potential disutility. However, there may well be many people who believe very strongly that people who are stupid enough to ride around without a helmet deserve to suffer the consequences if this is voluntarily chosen. They may well derive a certain kind of 'psychic utility'

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<sup>58</sup> These are discussed in slightly different terms - coercion, mistaken belief and incapacity - and in much more detail, in two-party cases, although this makes little difference to the line of argument in this thesis.

<sup>59</sup> It is worth bearing in mind that in a society *without* public health provision, there would be little compulsory drain on society's resources from a crash victim: they would only get treated through voluntary effort. Compulsory medical insurance justified on this basis would be paternalistic (although some compulsory insurance to ensure that public health was not endangered, or in order to arrange burial, might be justified on other-regarding grounds). Thus a pre-existing public health system would have to be justified on *other* grounds, if paternalistic justifications were not forthcoming.

from such an event. In such circumstances, the state might well feel unable to support a coercive restriction on the gamble-taking activities of individuals because of the uncertain aggregative outcome on others' utility.

However, if the intervention is solely based on the utility of the individual concerned, then others' *opinions* about this utility are irrelevant. All the state has to be sure of is that the individual is not acting in his *own* interests. The paternalist state would point out that its actions always depends directly on the utility of the paternalised person, whereas the non-paternalist state (that believed in the relevance of effects on other people's utility) would have to acknowledge that if others' utilities were *improved* by hardship for a given individual, then this would still be a relevant factor. Thus paternalist caring is not an externality, to revert to previous terminology, because it is must only take account of the individual's *own* change in utility levels.

The second example involves information, ignorance and factual 'mistakes'. Feinberg includes the following phenomena amongst those which might lead one to suppose that the state is justified in a paternalistic intervention: 'ignorance ... derangement, drugs or other voluntariness-vitiating factors' (1986 p.12). Feinberg and Beauchamp specifically cite information problems as a justification for soft (anti-) paternalism on the basis that it constitutes a voluntariness-vitiating condition. This is reasonable as far as it goes, although we noted above that there are good reasons for thinking that information problems should be separated from those factors impairing cognitive control and other forms of less than optimal reasoning ability. And as we examine Feinberg's exposition of the case of ignorance or mistake we can begin to see why. For he includes the following types of factors under this heading: mis-estimations, mistaken self-evaluations, distorted recollection of evidence and confusion in drawing inferences from what we do know (p.152). These are mixed up with simply not having information because no-one provided it, or natural ignorance.

These are dangerous conflation, because what this allows Feinberg to do is to classify many of the first group - which look suspiciously like failures of 'normal' reasoning - under the heading of non-voluntary choices. This then allows cases which the paternalist might wish to defend - such as whether people should be protected from undertaking certain very dangerous activities (pp.127-134) - to be defended also but without the inconvenience of a paternalistic tag. For

example, Feinberg argues that someone who wishes to cross an unsafe bridge, even when apprised of its unsafeness, but who responds ‘that the warning is a plain lie (perhaps a capitalist plot), and that he will not be persuaded of the bridges unsafe condition until it collapses under him and sends him to injury or death on the rock below’ (p.131) is not acting ‘voluntarily’.

Neither is a cannabis-smoker *unless*

*he has accurate knowledge, at a higher level, of the scope and limits of his first level knowledge. If he knows the little that science can tell him, and knows how little that is; if he knows that conclusive evidence of the connection between nicotine and lung cancer did not accumulate until the first heavy-smoking generation had been at it for thirty years, and that there are as yet no comparable data about the effects of prolonged marijuana usage, but that such evidence could very well turn up; if he knows that there are already suspected links, based on inconclusive studies, between some amount of pot-usage and a variety of physical ailments, from loss of male hormone to diminished brain function, and that the trend has been for the discovery of more and better confirmed connections of these kinds, then he has all the relevant information there is (p.161)*

Only then can he be said to be acting ‘voluntarily’! But is it really so non-voluntary for a potential pot-smoker (intelligent, generally aware) to simply say ‘I think I’ll just take the risk - there doesn’t seem to be obvious or immediate damage, and there’s a lot of pleasure’. This may not be the correct decision, but it seems perfectly voluntary. The difficulty can be seen again with reference to a sportsman who wishes to risk (literally) skating on thin ice because of the thrill involved: ‘on the whole one is inclined to say that since the sportsman understood exactly what risk he was taking, his taking of it was voluntary enough’ (p.161, emphasis added). But ‘understanding’ risk is exactly the judgement on which we can differ according to our different preferences and reasoning abilities; how do we decide when someone has ‘understood’ risk, beyond simply conveying some idea of factual probabilities (which may themselves be arrived at by a significant element of judgement and preference in the supplier)?

The final example of the philosophical problems relating to voluntariness-vitiation involves the concept of ‘capacity’. Some capacities are clearly grounds for interference on non- (or soft) paternalistic grounds - those relating to being not in control of one’s cognitive faculties because the ‘self’ is being somehow constrained by circumstances which limit its function (drunkenness, mental illness, neurotic compulsion, sleep deprivation, drug use ....). But Feinberg also includes

the following categories of ‘incapacity’, some of which seem to be simply types of reasoning failure, and which do not amount to non-voluntary choices:<sup>60</sup>

*Cognitive disabilities ...include ... inabilities to make correct inferences ... failures of attention or memory, failures to understand communications, and even failures to care about a belief’s grounding and implications, leading in turn to a failure grasp its full import, or adequately to appreciate its full significance (pp.317-8)*

But at this rate, all forms of mental and cognitive processing which fall below some very high-level will amount to a ‘non-voluntary’ choice and thus liable to non-paternalistic intervention. Surely such a standard would rarely apply to any of us, which in turn leads to the possibility that relatively commonplace and easily satisfied (liberal) justifications are sufficient to invade and constrain the choices of many people most of the time.

The problem with a concept such as voluntariness is that it is so elastic in situations such as these that it can simply be expanded or contracted in order to sustain the intuitive judgements of the observer about what constitutes a ‘good state of affairs’ (whether this is based on the interests of another individual, liberty, one’s own utility, or the trade-off between these values). As Arneson (1980) has pointed out, Feinberg’s position approximates to this: ‘whenever a man, even after deliberate reflection, temporarily misidentifies his most important values and acts out this mistake, his action is to that extent nonvoluntary. “Fully voluntary” has here become almost equivalent to “fully rational” (1980 p.484).

No-one is accusing Feinberg of being a paternalist; he regularly proclaims that voluntary but ‘unreasonable’ choices are to be supported, that ‘it is lack of voluntariness that justifies interference with a person’s for his own good, not lack of “rationality”’ (p.110). Indeed, in relation to motorcycle helmets, if the argument from psychic costs fails to convince

*I would have no criminally sanctioned regulation at all, restricting the state to its still quite substantial role in educating, testing, licensing, taxing, and insuring autonomous bikers, all in the public interest (p.141)*

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<sup>60</sup> Although the reasoning failure itself may not be chosen by the individual.

Note this is a hard position, because someone could sustain terrible (avoidable) injuries regardless of whether they had health insurance or not.

But if non-paternalism involves elastic concepts which simply allow the re-introduction of the very intuitive judgements (about how other people decide on their own interests) they claimed to be avoiding, including the 'hard' judgements of Feinberg's last case, then, ironically, this will be insufficient protection against wrongful infringement of liberty in self-regarding acts. Instead we should acknowledge that some hard paternalism is inevitable, that normal human reasoning can fail, but that the task is to define strictly the conditions and circumstances under which they are likely to fail *and* where the state is likely on average to do better, so that we may openly regulate its application. This is the subject of the following chapter.



## Chapter 7: Justifying state paternalism

We are now in a position to propose a theory of justifiable state paternalism. The starting point is essentially utilitarian in that it is considered an important goal of public policy to improve people's welfare; the first section reviews why we need a theory of paternalism to support that project in policy terms. Next we consider existing approaches to justifying paternalism which rely on simply citing the fact that reasoning failure can often lead people to be worse off than they would otherwise have been without that failure. This and other approaches, which rely on hypothetical consent, are argued to be insufficient. We then address this gap in the literature by outlining the conditions and types of consumption for which the state might have a good claim for making certain types of judgement *more* successfully than the individual. We conclude the chapter with a brief review of some potential objections to this approach.

### The need for a theory of justifiable paternalism

At this point we are in a position to recapitulate why we need a theory of paternalism, and revisit the various elements which seem to point to the existence of paternalism in universal consumption-specific policies as they now exist. This is not an inherently straightforward task, as 'mixed' paternalism will constitute the principal manifestation of the phenomenon in practical circumstances. It is difficult to sustain the claim that paternalism ever exists in a pure form, immediately implying a need for justification or repeal. Rather 'one has to focus on the reasons that are actually given in defence of the measure or on the most plausible justification that can be given' and argue that some, at least, of these 'are fundamentally paternalistic in character' (Dworkin, 1981 p.44). Not all the justifications need to be paternalistic, then, but only those which are necessary in combination with others for the existence of a particular policy in a particular form.

The case in this thesis is that paternalism is present, either hidden within intellectual discourse relying on non-paternalistic defences, or implied in the particular types of compulsion and obligation which existing state policies demand. Thus, arguments from equity or efficiency, or from non-voluntariness by philosophers, are *underdetermined* for one or both of two connected

reasons. Either, first, they stretch their own lines of argument and principles to conclusions which they cannot properly accommodate and which in fact require justifications not available from within their terms of reference (e.g. consumption-specific equity; information correction which actually addresses reasoning failure, or externalities incorporating 'caring' benefits and psychic costs). In short, the principles of equity and efficiency are asked to do too much. Or, second, the policy outcomes which actually exist go beyond the implications of the more tightly constrained principles, and require further justifications to support their continued existence (e.g. an NHS consisting of free, universal, and compulsory coverage). In fact, the first of these endeavours is often in pursuit of sustaining a policy which might otherwise seem shakily justified in terms of the second.

One might argue that searching for new justifications to fill these gaps or recast inappropriately over-stretched principles is not necessarily the right approach. If policies as they stand cannot be justified, then we might do just as well to abandon them or to restrict them to ones of a more limited scope. But this would be rather like abandoning a much loved pet because one has forgotten why one obtained it or because the original reason for buying it no longer seems valid. Surely the sensible response in such circumstances is to re-examine one's motives to see if the current state of affairs has justifications which had not previously been established. After all, the fact that such a family pet may provide continuing pleasure in the absence of the original motivation for its purchase, is analogous to the social scientists and philosophers straining at their disciplinary leashes to justify the existence of popular public institutions when intellectual rationales no longer seem adequate. Moreover, such re-examination is likely to reveal a clearer understanding of (a) whether continuing the policy is genuinely justified and (b) if not, where its future lies and how it may be reformed and improved.

Not least among those 'stretched' principles is equity, a ubiquitous value used to justify universal interventions. Following the analysis of Chapter 5 which suggested that another principle, which turns out to be paternalism, must inevitably accompany consumption-specific distributional policies, it seems reasonable to require that these unintentionally imported paternalistic motives should be justified. Some may say that if equity 'satisfies' people, why bother with a paternalistic justification? The problem with this is the inherent weakness in the 'satisfying' justification. If the reason for buying a much-loved pet no longer applies - perhaps young children have grown up

and left home - it might be thought that life would now be simpler without it. Similarly, in an era of growing incomes, where the wealthy can increasingly afford to supply all their needs if they so choose, the question may be asked: why continue to offer universal subsidies? The equity justification may gradually lose its relevance. Unless new and relevant arguments can be found, support for the treasured 'pet' may wane. There may still be good reasons for keeping it - for example, that people may need to be protected from their own poor judgement - but these reasons need to be developed for people to be persuaded. Indeed, paternalism - or a more politically attractive term such as 'security' - may have more relevance for high earners than arguments from equity, which they will consider do not apply to them, or from efficiency, which they might perceive to have only a marginal impact.

In a similar way, even where in a formal sense market failure rationales *can* sustain a given policy, such as with taxes on cigarettes which only serve to correct problems of moral hazard and the external effects of passive smoking, there is the question of whether we believe legislators actually have such pure motives. As Feinberg noted, the account of the law's 'role, function, and motivation that most coheres with the known facts' - such as Hansard debates, television interviews, select committee and expert submissions and the like - may well suggest to us the somewhat dry and technical economic justifications are simply not enough. Ministers regularly suggest that cigarette smoking is simply a killer, and should therefore be dissuaded by all possible means. One way of establishing state motivations is to analyse the practical means which the state employs to avoid paternalism. For example, a law to ban smoking in all public places could be defended with the harm principle: smoke upsets others' enjoyment. But whether this is entirely non-paternalistic can be tested to some extent by seeing whether the state 'takes available opportunities to avoid effects which limit self-regarding actions' (Weale, 1983b p.790). For example, non-smoking areas can in many cases be separated from smoking areas - if such opportunities are not taken, then we may strongly suspect paternalism. We may also suspect that, therefore, a tax on cigarettes which was defended on the externality grounds of defending the public purse (to pay for the greater health care costs) and dissuading people from smoking and so upsetting others, would not be as efficacious as one which also banned smoking in particular public areas. The suspicion is that, in fact, the main aim of the legislation is to protect

people from the consequences of their own choices on themselves, and that external factors are only part of the story.

Another case in which market failure as the only basis for universal consumption-specific intervention seems weak is the continued existence of the private sector. For example, if the NHS is defended on efficiency grounds alone, or at least as a potential reason for claiming that paternalism is not the reason for compulsory insurance (Weale, 1978), then it seems inconsistent that private health care should remain. For this amounts to allowing that for those who can pay, the market failure does not apply. But this does not seem plausible. Rather, there must be other motivations at work, one of which may be a form of paternalism which ensures that no-one can opt out of being insured, even if they do not actually choose to avail themselves of the public/compulsory schemes in practice. This compulsion, in general, provides a good reason for developing justifiable paternalism.

In a rather more general sense, the historically conditioned understanding of the word paternalism has left it at the mercy of all those who wish to use it to condemn the state for acting to constrain or direct the actions of citizens. This pejorative meaning has led to an automatic rejection or nervousness of paternalism even when it might have some relevance in a more narrowly defined philosophical sense. Thus a robust justification would do much for the rehabilitation of a potentially useful concept, and protect it from those who simply, and lazily, use it as a synonym for 'bad policy'.

Finally, although all these reasons for developing a robust justification for paternalism are based on the apparent existence of paternalism in public policy, there is a purer motive for seeking one. As many philosophers have noted (Dworkin, 1981; Husak, 1981; Wolfe, 1994), there is a need to develop an understanding of the conditions under which paternalism might be justified as an intellectual endeavour in its own right. These will need to acknowledge the absolutist criticisms of those like Feinberg, but they will also fill out the gaps in the arguments of those who take a more utilitarian view, and acknowledge that the welfare of people *might* be improved by intervening in self-regarding actions. What is required, though, is a justification for the state being able to do this, and in which circumstances.

## Existing approaches to justifying paternalism

The presumption in much market and liberal philosophical theory is not that individuals will necessarily maximise their welfare, but that the state is no better, and probably worse, at achieving that goal. As John Stuart Mill put it in the classic exposition of the liberal position:

*the strongest of all arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place* (Mill, 1974 p.151)

Mill was not referring to incentives which motivate state officials to act in their own interest - criticisms which have become associated with the public choice school of state theorists (McLean, 1987). Mill was concerned with even a perfectly benevolent and neutral state simply not being *capable* of knowing what is in the individual's interest better than the individual. The challenge for paternalistic theory is to identify coherent reasons for believing that in some situations this assumption does not hold. Such an endeavour involves doing more than simply outlining the circumstances in which individual decision-making ability is less than perfect.

These circumstances are well documented. Many accounts of paternalistic theory - whether from philosophy (Dworkin, 1979), political theory (Weale, 1978), law (Hart, 1963) or economics (Burrows, 1995) - provide reasons for believing that there is scope for a paternalistic policy to improve the welfare of the individual, usually by making reference to the many and varied ways in which an individual can fail to make decisions which maximise their welfare. There are four main categories in the literature.

The first category relates to *technical inability* - an inability properly to make choices which achieve preferences, principally because the quantity of information needed is so great or because the 'logical or causal connections' (Goodin, 1993) between choice and outcome are difficult to make. It is a failure to reason or 'compute' information adequately; the information itself could be perfectly adequate and complete. An example would be how best to spend two days in a large unfamiliar city, even with the best advice and guide books, or decisions about whether it is worth gambling money on the national lottery. Judgements about probabilities and likely future outcomes of actions are particularly common in this category - Tversky and Kahneman (1982) showed how people with 'perfect' information commonly displayed

inadequate reasoning power to interpret and calculate the implications of certain statistical or probabilistic situations.

The second category is *weakness of the will*. This refers to instances where people know what they prefer in the long term and what is genuinely in their best interests, but still make a choice which they accept will lead to a sub-optimal outcome (Dworkin, 1981). People acting in this way often acknowledge they are not being rational - it would include someone who does not think the inconvenience of wearing a seat-belt outweighs the benefit from improved safety, but fails to use the belt anyway. It would also include those who cannot resist spending their wages in the pub rather than putting them into a pension scheme which they know would do them more good in the long run.<sup>61</sup>

The third category is that of *emotional decision-making*: emotional decisions rather than a rational ones include becoming 'attached' to making certain choices, such as following a habitual route to work even when it takes longer, is less attractive and more expensive than an alternative, or having an emotional desire for an outcome which one knows cannot occur, such as making decisions on the basis of superstition. This category also includes decisions made under emotional stress - following a bereavement, for example (Dworkin, 1981).

The fourth category is *lack of experience*: preferences would be different if the individual had experience (rather than simply abstract knowledge or information) of the all possible outcomes of a certain activity (Burrows, 1993). For example, people might make a different judgement on whether to take up smoking if it were possible to have experience of both living through a lifetime of smoking without ill-effects and of dying through lung cancer, in addition to information about the probabilities of both eventualities taking place.

This list may not be exhaustive, and we need to delve a little deeper into the mysteries of reasoning failure before tackling their potential correction. For example, let us assume that an individual does not display evidence of reasoning failure in any of the ways outlined above. Could

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<sup>61</sup> It should be noted, however, that such individuals do not necessarily seek to be restrained from temptation. State intervention would still be paternalistic in these examples because the individuals concerned would not necessarily welcome being compelled to take the 'correct' action at the time, although in retrospect they might consent that the intervention was justified.

they not simply be ‘wrong’ in their reasoning, regardless of the absence of established explanations, perhaps on the basis that a large number of people believe them to be so? In other words, even if none of the conditions generally supposed to obstruct proper assessment of personal welfare is present, the individual concerned nevertheless fails to maximise their welfare in the view of the rest of society. In one sense, this proposition invites a response which goes to the heart of the case against paternalism. As Mill argued, an individual might well ‘just be wrong’ according to the rest of society, but this is insufficient to mount a case for interference. As indicated in the quote in the introduction to this section, the odds are that the state will interfere wrongly and in the wrong place. The starting point of this analysis is that, without further justification, it is simply not good enough to cite majority opinion in matters of personal welfare which affect no-one but the individual concerned.

But what if the individual him or herself acknowledges that they ‘made a mistake’ - again, with none of the potential criteria for reasoning failure satisfied? How are we to deal with such a possibility? Perhaps a good example involves the purchase of an expensive item of clothing. An intelligent person under no stress, who had taken many such decisions before, who spent a considerable time reflecting on the decision and who was clearly not acting under weakness of will, might still acknowledge only a few days later that the item of clothing was monstrously ill-suited to them and never wear it again.

This example illustrates that not all possible categories of reasoning failure are yet properly understood; rather, we have simply outlined those for which some kind of rationale has hitherto been established. People can ‘make mistakes’ for reasons as yet unknown, or perhaps simply as a result of the mysteries of ‘free’ will.<sup>62</sup> But classifying acknowledged sources of reasoning failure is undertaken precisely in order to make progress toward justifying state intervention on a coherent and defensible basis. The fact that other, as yet poorly understood, reasons for sub-optimal reasoning probably exist does not invalidate working toward justifications for state intervention to correct those which are already well established.

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<sup>62</sup> Another possibility is that ‘evil’ exists: that an individual’s scale of values, even when directed at him or herself, are plain wrong in some metaphysical sense. This particular possibility goes well beyond the bounds of this thesis.

In any event, when we fail to act in our best interests it is because there was a divergence between how we assessed, calculated or reasoned what we wanted or needed, and the utility this resulted in, and what level of utility might have resulted from different assessment of what was in our best interests. This 'gap' between what might have been and what was, provides the paternalist with an opening. For although we may all acknowledge that we are often mistaken in our decisions, we do not necessarily recognise that anyone else - even if they had all the information that we have - could have made the decision any better. Paternalism, however, is concerned with just this possibility.

But, to emphasise the point made above, suggesting that in principle there is *scope* for state paternalism to improve welfare does not by itself indicate that the state will succeed in so doing. Even those authors who acknowledge that failing to act in our own interests is not the same thing as justifying paternalism, merely propose schemes for limiting potential abuse of such interventions. For example, Weale suggests three criteria for constraining paternalistic interventions: the 'severity' of the interference, whether the interference is in accordance with some element of an individual's previously revealed life plan, and whether there is 'evident failure of reason' (Weale, 1978 p.170). These criteria are essentially rules for checking the over-zealous use of paternalism, the last in fact, simply re-emphasising the point that there must actually be some reasoning failure. But the approach does not explain why the state is *better* placed than the individual for achieving any given level of welfare, even under conditions which satisfy the criteria.

There is one further common category in the literature - 'self-justifying paternalism' (Archard, 1993) or 'consent-based arguments for paternalism' (Kleinig, 1983 p.55). These were not included in the taxonomy above because they *are* justifications for the state intervening in the actions of individuals, rather than simply *explanations* for the existence of poor reasoning ability in the first place. Such consent-based approaches justify state (or other) forms of paternalism on the basis that the individual did, implicitly or hypothetically, give his or her consent either before or after the intervention.

One of the most successful attempts of this kind is offered by Brennan (1990). The theory is located in the context of an attempt to solve the paradox of individual voting activity, which the



public choice school of political theorists have long argued cannot provide direct benefits to the individual which adequately cover the costs involved in voting (Downs, 1957). These theorists have suggested that there must be some positive utility in the act of voting quite apart from the expected benefits in terms of political outcomes. Brennan suggests that a single voter realises that voting for  $x$  rather than  $y$  does not mean that  $y$  will not be the outcome (because many others may vote for  $y$ ). So, the voter reasons, voting is not an activity which is useful for pursuing narrow self-interest (because it is so unlikely to make any difference). Instead, voters may vote for governments which they would not directly support if their immediate self-interest were at stake and their vote were decisive. Such governments might be those which promote merit goods - such as compulsory pensions - which in a free market an individual might forego in order to satisfy immediate hedonistic gratification. Voting, Brennan argues, is analogous to cheering at a football match - it is an expression of support rather than an act with any decisive influence. The 'support' is for paternalistic actions which the voter knows are in his best interests, but suspects he would not be able to will himself to undertake without state 'help'. Thus the theory neatly 'justifies' paternalistic interventions, whilst explaining voter behaviour within a public choice model.

This model improves on many of the so-called 'justifications' for paternalism by acknowledging that a rationale is required for state assistance. This rationale is based on the state responding to an (implicit) request by the individual through voting behaviour. The state has a monopoly of legal coercion in liberal societies, and the individual is making use of this coercion to restrain his or her own actions. The paternalism is justified because it has the 'consent' of the individual. However, the state might be thought to be a better decision-maker than the individual in some circumstances, regardless of whether consent is considered to play a part. This is not to say that consent is unimportant, but merely to emphasise that even if we believe that some form of hypothetical consent has been given, we still require good reasons as to why the state will actually succeed in superior decision-making. Moreover, the state may believe that beneficial paternalistic policies would only be supported in retrospect, rather than proactively 'proposed' through the ballot box by the voter. Brennan's scheme only justifies actions which *respond* to past (hypothetical) consent, given at the previous election. (Otherwise, how would it have *initially* justified its compulsory pensions scheme?) So we must outline further possible reasons

why the state might be thought to be a better judge of individuals' interests than the individual, which do not simply rely on hypothetical consent.

Finally, it is worth noting that failures of reasoning may be separated into two general categories: those pertaining to *judgements* about the appropriate course of action and those relating to the actual *choices* made to achieve a given objective. Another way of distinguishing the two would be to refer to the former as theoretical reasoning and the latter as practical reasoning. In terms of the categories above, 'technical inability' is an example of a failure of reasoning in relation to judgement (because the individual cannot adequately 'compute' the information available) and 'weakness of the will' is an example of a failure of reasoning in relation to choice (the individual makes a good judgement as to what is necessary to optimise his welfare but still chooses to take a different course of action). The interpretation of reasoning failure followed in this thesis is therefore broadly conceived and includes both types.

The central point of the discussion in this section is that the categories of reasoning failure listed above imply only some 'moral space' (Kleinig, 1983 p.74) for paternalism. That is, they provide some reasons for believing that the state has the *potential* for improving the welfare of individuals by virtue of the fact that left to their own devices they may fail to maximise it on their own. But evidence of reasoning failure does not by itself justify that state intervention. Establishing what *might* constitute a reasonable justification is the subject of the following section.

### **Justifiable paternalism**

As we have suggested already, a weakness of the existing literature is that there is very little discussion as to why the state should in principle make decisions better than individuals (see, for example, Hart, 1963 p.33). Occasionally some hint is made at this problem, such as Dworkin's reference to the 'resources of ignorance, ill-will, and stupidity available to the lawmakers of a society' (Dworkin, 1979 p.96). But Dworkin goes on merely to suggest utmost caution in the state acting paternalistically, arguing that the burden of proof should be with authorities to demonstrate 'the exact nature of the harmful effects (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence' (*ibid.*, p.96). This seems to leave the

question open - *why* should the state know better the appropriate balance of costs (price and personal) and benefits to impose on an individual than the individual himself?

The burden of proof falls squarely on the paternalist. Ever since Mill's classic exposition of the liberal position it has been widely accepted in western democracies (and now increasingly in the former communist states) that the individual is, in general, the best judge of his or her own welfare and that interference in individual autonomy must be subject to rigorous justification. The position is based on a two-pronged case, derived from Mill's *On Liberty* and subsequently forming the basis of the classic texts of individualism such as Friedman (1962) and Nozick (1974) on the free-market right, but also those of liberals more sympathetic to the state such as Ronald Dworkin (1989) and Hart (1963), and others who have specifically focused their attention on paternalism (VanDeVeer, 1986).

First, the utilitarian case emphasises that the individual knows best his or her preferences, how they are ranked and how to make choices so as to realise them. It is the individual's valuation of these preferences which matter (not others'), and so the best way of maximising individual satisfaction, or happiness, is to not interfere with how these choices are made. The approach is normative to the extent that it is based on a judgement that maximising utility is morally justified, and empirical to the extent that the individual is best able to achieve it.

The second case is deontological, and asserts that freedom to make choices has intrinsic as well as consequentialist elements (Sen, 1988). It is not just that the individual is best able to maximise utility, but that exercising choice is important in itself. This may be for reasons relating to fundamentalist views on property rights, as with Nozick, because making choices allows us to exercise our 'moral powers' which 'like the muscular, are improved only by being used' (Mill, 1974 p.122), because the ability to choose is essential to human dignity and the ability to be self-sufficient (Bell, Butler, Marsland, and Pirie, 1994), or because autonomy and self-rule amounts to inviolable personal sovereignty (Feinberg, 1986). Whichever, these justifications do not make direct reference to utility maximisation.

The combined force of this two-pronged case is that the state must demonstrate why it should know better than the individual his or her 'true' preferences so as to maximise welfare, and that this superior knowledge is sufficiently significant for it to compensate for the damage to

deontological concepts of individual rights and autonomy.<sup>63</sup> What follows is an attempt to outline a systematic classification of ways in which the state is inherently better able to take certain kinds of decision than the individual, building on existing work which has made passing reference to this issue (Goodin, 1982; Goodin, 1995).

First, the state could be argued to be more *impartial*, or *phlegmatic*, than an individual. This justification relates to the ‘weakness of will’ and ‘emotional’ categories of failure of reasoning listed above. Unlike individuals, the state is not swayed by immediate gratification (Goodin, 1995). The choice between a luxurious holiday now and provision for retirement in the future does not involve a difficulty of *temptation* for the state. It can consider the evidence of decisions made by a large number of individuals who do take out insurance, and on the experience of those people who may regret not doing so. Because it is not swayed by difficulties of weakness of the will, the state may be in the best position to judge that the minority who would otherwise choose to forgo the long term benefit should be compelled to provide for their future.

Clearly public officials are confronted with temptation to abuse or further their own interests. Apart from the obvious opportunity for corruption - receiving ‘kickbacks’ in return for the granting of lucrative government contracts is the clearest example - state agencies may be tempted to maximise their budgets for the sake of prestige and kudos rather than to further the public interest. However, the point in this context is that they do not suffer from temptation in relation to the particular form of immediate gratification faced by the citizen, when they make certain decisions on the citizen’s behalf. The public official may be in an advantageous position whenever the good in question involves a significantly delayed ‘payoff’, i.e. its benefits accrue at some point in the future, such as pensions, health care and education.

Second, the state could be argued to have a wider *perspective* than individuals. This relates to the ‘lack of experience’ failure of reasoning noted above. In its position of ultimate responsibility for the welfare of its citizens the state will typically respond when claims are made on it by those

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<sup>63</sup> More generally, any justification for paternalism implies a rejection of the revealed preference tradition - where individual welfare is defined in terms of choice - and instead an acceptance that the identity of the agent best able to make a judgement on welfare is an essentially empirical matter, allowing a potential role for the state.

in severe hardship. For example, people in ill-health will present to the NHS in the UK. This ill-health and death may be the result of some aspect of personal behaviour such as not wearing a seat-belt. The state and its employees are presented with the consequences of this kind of behaviour in a way that many individuals will not be (or not until it is too late). Although public employees have not necessarily *experienced* being in a car crash without a seat belt - no-one but the unfortunate crash victim can claim that - they are in a position which makes it possible to empathise more accurately with this unfortunate experience than the car driver who has never suffered an accident. The state is therefore in a better position to make a judgement on the prudence of seat belt wearing than those simply presented with information on abstract possibilities.

It is not that the costs of rescuing individuals who fail to wear seat belts fall on the state, thus providing an incentive for the state to coerce them into doing so (after all, a consistent state which opposed paternalistic policies would *not* rescue and pay for the individual's treatment). This particular justification rests on a belief that the state is actually in a better position to weigh up the costs and benefits (of not wearing a seat belt) than an individual who at any point in time will only see one side of the picture.

This type of state advantage can be related to the distinction made in the economics of information between 'search' and 'experience' goods (Nelson, 1970). The former are amenable to traditional consumer behaviour - seeking out information on price and quality before purchasing. The latter involves goods where the consumer purchases a number of brands before determining which she will prefer. For our purposes, the state may have a paternalistic advantage where aspects of consumption involve severe difficulties in both senses - such as the balance of costs and benefits from various activities where there is a small chance of a seriously harmful outcome. Because for such consumption experience is so important (to truly 'understand' the potential outcomes) and yet very unlikely to be present, the state's position may be advantageous for the reasons noted above. But this kind of consideration may also apply to services such as broadcasting where, as we have seen, experience is also impossible - once a programme has been watched it cannot be 'unbought', and yet neither is this experience of much use since one seldom wishes to watch the same programme more than once. Commercial providers are typically 'conservative', supplying programming for already established wants. The state, on the

other hand, can seek to provide innovative programming based on its perspective as a non-commercial agency observing that innovation is valued by people but not supplied through the market.<sup>64</sup>

Finally, the state is at an advantage in being able to dedicate *able people* to consider certain questions, if necessary over long periods of time. This justification relates to the ‘technical inability’ failure of reasoning noted above. Thus, where a decision is subject to particularly complex, technical or large scale information difficulties, the state has the resources to employ those best able to devote themselves to the problem full-time. For example, in the case of airline safety there may be only a few people who are technically able to assess what would be the outcome of certain standards of safety specification; the rest of us could simply never make more than a guess. Clearly, the state official will need to make a judgement which then applies to everyone - in this case on the particular level of safety which is deemed minimally acceptable. This would not be what everyone would choose, given different degrees of risk-aversion. But it seems reasonable under conditions of complex information that by removing the possibility of significantly mistaken calculation of risk, welfare will be improved by state paternalism. Note that this is not simply a matter of imperfect information and therefore a question of market failure. Simply ensuring that all the relevant details relating to safety were made public to all potential consumers, and monitoring the information for its accuracy, would not be sufficient. The ordinary consumer would simply not be able to assess the implications of this information even if he or she had unlimited time in which to scrutinise it.

Where decisions based on probabilities or statistical assessments are concerned, even when the nature of the decision appears to be of no great complexity, people very often make erroneous judgements. Again, the information provided to citizens may be ‘perfect’ - they need no extra or qualitatively improved information - but the experimental evidence suggests that individuals commonly display inadequate reasoning power to make the correct calculations (Tversky and Kahneman, 1982). Of course, one could argue that the individuals concerned should be aware of

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<sup>64</sup> An additional problem for the market provider is that once an innovative format has proved successful, it is very easy for competitors to copy it. There will be virtually no time for the innovator to profit from the risk-taking. However, this is an argument from externalities.

their incapacity, and seek to 'buy advice' on the proper course to take. However, very often people may not be aware of how limited their reasoning ability is, particularly in relation to apparently simple probabilistic calculations ('after five heads, is the sixth toss of a coin more likely to be tails?' - the experimental results show that many are quite sure the answer is 'yes'). Furthermore, seeking advice on complex decision-making invokes problems of the principal-agent relationship, with the agent using her superior understanding to her commercial advantage. When the state undertakes this role, there is perhaps less incentive to exploit the potential consumer.

So the state, via the actions of its public officials, may have an advantage over the citizen in judging what is in that individual's best interests in the following circumstances: when there is significant temptation to satisfy immediate wants above those with long term benefits; when the individual is not likely to have had first hand experience of the consequence of a decision; and where an unusual degree of technical expertise is required. The state will not be able to claim superiority over the decision-making of *all* citizens, even in these circumstances. Some will be peculiarly long-sighted and prudent; others will indeed have had the unusual first-hand experience required; and others will indeed be highly technically able (the state, after all, must hire *its* able people from the population at large). But it will have a good case for saying that, owing to the particular conditions under which the state and its officials operate, it will be able to improve on the decision-making of the average citizen<sup>65</sup> with respect to some items of consumption, and thus improve levels of welfare.

The following summarises the types of consumption which seem to be particularly problematic with reference to these conditions:

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<sup>65</sup> I.e. the average citizen amongst those who would otherwise have taken a decision at variance to the state's.

- \* goods, services or activities with long term rather than immediate effects (which require *phlegmatic* decision-making, such as providing for one's pension in old age);
- \* goods, services or activities where lack of experience is particularly problematic, such as a small chance of seriously harmful consequences occurring for any one individual (which require a wide *perspective*, such as the need to wear a seat-belt);
- \* goods, services or activities which involve complex or large quantities of information to be processed before a judgement is possible on the likely impact on welfare (which require *technical ability*, such as assessing airline safety standards).

Those types of consumption which satisfy more than one of these criteria may provide a particularly strong case for paternalistic intervention by the state. Some practical consequences of this line of reasoning are explored in the following chapter.

It is important to remember that the state has a range of paternalistic responses available to it, and does not need to act to compel or prohibit, but can also tax and subsidise. This allows it simply to shift the balance of the perceived costs and benefits in the mind of the individual, obliging them to, effectively, reassess their choice over a certain type of consumption. In many cases if the individual still wishes to consume (or desist from consuming), they can do so. Freedom of choice is not necessarily denied. But the policy would have ensured that they took the choice according to conditions which had been paternalistically altered by the state better to ensure that they minimised harm, or maximised benefit. Such policies will have unfortunately different effects on people in different income groups - for example, those on very high incomes will not be dissuaded by consumption-specific taxation. Nevertheless, the potential sensitivity of paternalistic interventions should not be forgotten.

Examining precisely which policy response would be appropriate for which type of reasoning failure requires more space than is available to us here. Nevertheless, the general approach would be to assess the range of costs and benefits to all the parties in undertaking such a policy,



and seek to minimise the liberty-restricting ‘costs’ relative to benefits. This forms the subject of the first potential objection to this general approach, reviewed in the following section.

### **Potential objections**

The first two objections relate to the twin challenges to paternalism outlined above. The first relates to the utilitarian concern that welfare should be maximised. The state might act on the criteria above, with the result that some quite extreme policies are enacted which severely diminish utility in aggregate. For example, driving a car is an activity with a small probability of a very serious consequence - crashing and suffering serious injury. But, then, should car driving be banned? Such a policy would certainly reduce costs to the individuals who would have died. But what about all the benefits it would also have reduced? Namely, everything that we all gain from motorised transport - including much productivity in the economy at large - as well as the massive infringement of liberty. The benefits to the target group (those who would have died) are outweighed by the costs to the untargeted, leading to ‘target inefficiency’. Instead, seat-belt wearing is the suggested paternalistic response because the costs (minor infringement of liberty for all, small utility reduction for those who would rather not have the discomfort of seat-belts, no utility reduction for those who would belt-up anyway) are now outweighed by the benefits (aggregate expected reduction in morbidity and mortality). Note, though, that the initial paternalistic judgement is still necessary.

The second objection involves the more absolutist rejections of any interference in personal sovereignty. We have seen how Feinberg adopted such a hard-line approach, and then ameliorated it through a flexible notion of voluntariness. But others have taken an even harder position on the inviolability of one’s personal autonomy:

*It would seem that nothing short of a lexicographic ordering of values placing autonomy first would suffice to guarantee that one’s condemnation of paternalism will not admit of exceptions (Arneson, 1980 p.481)*

Statements like this are never quite as clear-cut as they sound because they always allow some interpretation as to what kind of interference does not, in fact, compromise autonomy. But even so, the implication is that certain values cannot be traded off against one another. As Isaiah Berlin

noted in the 1950s, values are often incommensurate and achieving more of one will often involve having less of another (Berlin, 1986 fn 5). Thus, protecting someone paternalistically might require diminished autonomy on a strict reading, and this will just not do for a strict defender of the sovereignty of the human decision-maker as essential to some concept of a full human life:

*If someone's indifference to his future well-being is autonomous, then interference is not permitted, even if it would maximise his overall present and future well-being* (Scoccia, 1990 p.334)

Ultimately, such a position may not be open to further debate. If that is what someone believes about autonomy, then there is little one might say to convince them otherwise. It is questionable, however, what is being gained by such a position, because it implies that any amount of diminution of one value is acceptable, as long as the primary value survives intact. Is this a reasonable representation of how we conceive of the good life? Or is it more realistic, if not so philosophically unambiguous, to argue that we inevitably engage in trading-off the various good things that we desire, such as personal happiness against professional success? And in the same way, should we not generally find it acceptable that our own freely made, voluntary choices are on occasion constrained? We might accept this only after the event, when our accumulated wisdom alerts us to the fact that sometimes an inflexible attachment to one value ('freedom' or 'autonomy') can damage others, including those relating to our own welfare, happiness and security. But if we completely reject such a trade-off, it implies that the most appalling catastrophes which might befall a person or their family can be waved away without so much as a quiver of moral regret, simply because we are quite sure that autonomy (or some other inviolate principle) has been upheld.

There are more prosaic criticisms of this approach to justifying paternalistic state intervention. The first asks: why the state and not some other organisation or individual? Why is it that other institutions, such as unions or family members and friends, are not able to undertake this role? They certainly seem to act in a paternalistic fashion in many cases. An individual can hide the keys of his brother's car because he thinks he is too tired to drive. A health farm can withhold certain items of food from what is on offer in its restaurant. Trade unions and employers can agree that anyone who works at a firm must be a member of the union. An insurer may require that a seat-belt is worn (in the absence of a legal requirement) for the insurance to be valid. Some

of these agencies display the characteristics described above for the state. Others, particularly friends and family, may have a more intimate knowledge of the paternalised individual.

These acts of 'paternalism', however, are constrained by the need to acquire a degree of consent from the individual concerned. A visitor to the health farm can leave at any time; the driver can seek another insurer who charges a higher premium but does not require seat belt use. In these cases, an individual can place him or herself in a situation in which he or she is subject to certain constraints or inconveniences (it may be expensive to leave the health farm before one's stay is complete or to pay the higher premium), but there is no compulsion to act in a certain way. Legitimacy is also weak for the brother hiding the car keys: it may be theft to act in this way. Where there *is* real formal authority - as with the closed shop - it is questionable whether the good of a particular sectional interest constitutes paternalism. The rationale seems instead to relate to the avoidance of free-riding on benefits enjoyed at others' expense.

So in all these examples, there is either 'past, present or immediately forthcoming consent', or the action is illegitimate, or it is not true paternalism. Paternalism is possible for non-state agencies but is limited in its scope. Only the state has a monopoly of legitimate coercive power. If interference in the decision-making autonomy of an individual is necessary to increase welfare, then state action is the only means to *ensure* its application. Furthermore, since such interferences are inherently controversial it is important that they are debated publicly and that those enforcing the interference are publicly accountable. Simply allowing one individual to impose their will on another allows scope for abuse.

Another set of criticisms of the approach described above is that it paints an unrealistically sanguine picture of the motivation of the state and its agents. The state as portrayed here is an effortlessly neutral institution, with nothing other than the good of its citizens to complicate the decisions it makes. This is certainly simplistic, and ignores the criticisms of the public choice school noted in Chapter 4. Such theories, which have gained much credibility over the last twenty years, clearly throw doubt on the above model, because a paternalistic policy might simply be a means of budget maximisation, for example, rather than a genuine attempt to improve welfare. However, the objective of this chapter has been to discuss the *potential* for the state to act in a justifiably paternalistic way; the intention has been to establish why in certain circumstances the

state has particular characteristics which might enable it to make decisions better than an individual. Other problems of state intervention do, of course, remain.

## **Conclusion**

The central argument of this chapter has been that existing ‘justifications’ for paternalistic policies have not adequately established why the state should be *more* successful than the individual in promoting the individual’s welfare, even when it is accepted that reasoning ability is significantly less than optimal. A number of characteristics of the state were described which suggest that in certain circumstances the state is indeed better placed than the individual, and that for certain classes of good there is a *prima facie* case for paternalistic intervention. The aim has been to offer a more robust justification for such interventions than has been previously provided.

## Chapter 8: Applications and implications

The case presented so far has been that existing justifications for universal consumption-specific state interventions either fail adequately to deal with what are, partly, failures of reasoning ability, or they defend policy outcomes and institutions which implicitly require such additional justifications. The missing elements involve a class of theories known as paternalism. This has had a neglected role in the public policy field, partly because it is associated with what now appears to be a highly undemocratic heritage, but also because it challenges the ability of individuals always to know best their own interests - a position fundamentally at odds with classic liberal thought. In particular, there is no coherent theory which might justify even a limited form of paternalism, in the sense of outlining the circumstances wherein the state might know better than the average citizen what was in their best interests. In order to reconcile these observations - that apparently popular and welfare-improving public services have underdetermined justifications - an initial proposal for justifiable paternalism has been presented. This was not undertaken specifically to support existing policies, but instead on the merits of the state's own particular vantage point in respect to certain consumption decisions. It remains now to analyse the implications of this schema for the consumption-specific services outlined in Chapters 2 and 3.

### **A new set of criteria for state interventions**

As we have seen, equity is unable to act as a justification for consumption-specific interventions on its own. State action may involve a redistribution of benefits, and thus have an impact on various conceptions of equity. However, there is always a further requirement to justify the particular form of consumption. In fact, it is this latter requirement which comes first lexicographically: why is a *particular* good or service relevant to the state's concerns for the distribution of welfare, and subsequently, *how* should this good or service be distributed. But the nature of the equitable distribution desired does not, in itself, count toward the justification for intervention in the first place.

So, a set of criteria for *undertaking* universal consumption-specific interventions will not include any relating specifically to equity. These will enter when decisions need to be made about how

the benefits are to be distributed; alternatively, they will enter decisions about cash transfers. The full set of criteria which guide consumption-specific state interventions thus derive from efficiency and paternalistic rationales alone. These criteria are as follows, pitched at a reasonably high level of generality and described here in terms relating to the type of benefits or costs (disbenefits) derived from various goods and services. Thus goods or services which provide the following types of benefits (or costs), offer a *prima facie* case for state intervention:

\* have external consequences;<sup>66</sup>

*Efficiency justifications*

\* suffer from problems of imperfect information;

\* have long term rather than immediate effects;

*Paternalistic justifications*

\* require unusual experience for a proper assessment of their effects;

\* are technically highly complex to assess.

The first two can be seen to relate directly to the conditions for market failure; the last three to the conditions necessary for potentially justifiable hard paternalism. It should be possible to use this set of criteria to test interventions for their legitimacy. There is no obvious rigid rule about how many criteria need to be satisfied: it may be that certain forms of consumption - playing extremely loud music in the middle of the night in a built up neighbourhood (an externality) - satisfy one of the criteria so completely that no others need trouble the minds of policy makers. More generally, we may say that the more criteria are satisfied, the better the case for state intervention.

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<sup>66</sup> It should be noted that caring externalities are still disallowed even if they concern 'justified' paternalistic goods and services because it is citizens making the judgement, not the state, and these people are not in the advantageous position of the latter.

We are now in a position to revisit those areas of consumption-specific policy discussed in the course of this thesis, and assess whether this new set of criteria affect their overall justification. We do this in three sections: first, we look at the broad areas of 'macro' policy (health, education, public service broadcasting); second, we analyse how the individual 'micro' services within these broad areas might be affected; third, we briefly discuss other universal and non-universal consumption-specific services which have been alluded to in the text.

### **Implications for 'macro' service areas**

Perhaps rather surprisingly, health care passes the test for universal consumption-specific intervention just as robustly as it did under more traditional analyses which included justifications from equity. For even without this most common means of explaining why we should have a universal service, the case for intervening in consumption decisions is strong, even if we accept that true externalities are limited. Information is clearly highly asymmetrical between consumer and provider, with the former knowing about their risk factors and potentially risky behaviour, and the latter - in the form of clinicians - having the diagnostic information about the nature of ill health and the range of options for treating it. Many types of ill health will occur at some time in the future, where they will be 'out of mind' thus encouraging us to skimp on insurance now. Furthermore, we have very limited direct experience of many of the most severe forms of ill-health - experience which state employees face on a daily basis. Finally, as well as information being unevenly distributed between buyer and seller, the factual circumstances of ill-health mean that treatment is a highly complex decision which, even with perfect information, would almost certainly require a trained decision-maker (the doctor) to make a judgement about potential benefits and costs which the untrained individual could not make - here the state would have *prima facie* case for preventing the individual from trying to arrange such decisions privately because of the possibility of abuse by the private 'agent'.

Taking all these together, health scores four (possibly 4½) out of five, only failing to satisfy externalities fully (mainly because infectious diseases now only make up a small proportion of the NHS's work). This implies a strong case for universal consumption-specific intervention. Although it does not necessarily demand that 'an NHS' should be the organisational outcome, it was the observation that compulsory 'membership' of the NHS is such an important feature of its

provision that led us to suspect that there might be other (paternalistic) motivations at play. This suspicion was also fuelled by the ubiquity of equity and 'caring externality'-type justifications from policy analysts, reluctant to acknowledge that paternalism might have a role. It does now appear that the case for compulsion is much stronger, since there are specific reasons for believing that the state will better assess the cost-benefit payoff of insurance than many individuals. In short, the costs of disallowing freedom not to insure are less than the benefits from compulsion.

Turning to education, we will for now simplify the discussion by taking children's and adult's education together, and assume that the parent is the decision-maker on the child's behalf whilst they are too young to make choices for themselves. We find that the criteria are not satisfied to the same degree as for health care. Only two are clearly satisfied: externalities and benefits which have long term rather than immediate effects. Information problems seem not so severe. This is not because the content of education is not subject to information problems - clearly teachers know more about what they are teaching than the pupil (although parent's of young children may generally be expected to understand the content if not the process skills of education during early years). The reason is that, unlike health care, the consumer is in a reasonably good position to know what they are lacking. There is plentiful information on the benefits of education generally in terms of future opportunities and higher incomes, and, in addition and in contrast to being ill, we are well aware of the educational deficits we personally suffer better than the provider. Neither can education be said to require unfamiliar experiences in order to assess its benefits. In a world of no compulsory education, we (parents or potential adult students) would have plentiful close experience of those who had chosen to 'go without'. Finally, there is little technical complexity in the judgement - in fact, it is rather simple: deferred benefit with current hard work, or pleasure now and take chances with the future.

It is this which indicates where the third paternalistic criterion does come into play - clearly, future benefits are central to education, and thus there could be a case of myopia and the temptation to forego those benefits. Even where parents can generally be considered to have their children's best interests at heart, they may misjudge the importance of their education in comparison with current pleasures which might appear to comfort and give immediate pleasure to a child. Externalities, too, play a significant role - if large numbers of people were free to decide



that they did not wish to gain a basic understanding of numeracy or literacy, the potential for mutual benefit through all types of co-operation would be greatly diminished. Are two out of the five criteria enough? Probably so, because they are satisfied so thoroughly. Again, it does not necessarily imply compulsion, but the additional paternalistic element does further suggest this outcome.

Finally, we turn to broadcasting - is there a case for a 'public service' by means of a universal, tax based channel such as the BBC? Referring to our criteria again it appears that three have a claim to being satisfied (although none perhaps so clearly as the two with respect to education): externalities, long term benefits and unusual experience. Externalities may accrue for two reasons, either because of communal viewing activity, where large numbers of people join together in shared experience and strengthen social cohesion, or because of the general health to democracy through unbiased political information and journalism. Externalities may also accrue through general cultural and educational functions, although we noted in Chapter 5 that educational externalities, for adults, are questionable. Long term benefits may also result from more educational or erudite programming which, if not contributing to external benefits, provide a deeper and more lasting satisfaction to the viewer than that which derives from more immediate entertainment. Finally, unusual experience may apply to the more experimental, unusual, innovative and challenging programmes which, by definition, cannot be part of our general preference holding. Such programmes may be produced in a non-market environment by those with wide experience in the possibilities of innovation, and the potential for viewers to be receptive to new techniques, than in a market where the emphasis will always be on what has already been proved to be successful. It is this, rather than a simple information problem, which has been argued to be at stake. Furthermore, no-one could claim that deciding what to watch on television is a choice involving technical complexity beyond the issues already discussed under other headings.

It must be acknowledged that the issue of whether these criteria are satisfied sufficiently is a matter of greater equivocation than in the previous two examples. Evidence for the particular benefits claimed is more sparse than that for the similar cases of health and education. For example, in education policy a whole industry has grown up to assess the impact of the human capital model and its effect on long term incomes. Here at least, with various qualifications, we

can be sure that there really will be jam tomorrow if some current pleasures are deferred (even if quite how this jam is produced remains controversial). But for broadcasting the claims made on its behalf are rarely backed up by anything more than theoretical or hypothetical evidence, regardless of how plausible it sounds.

Thus to some extent, the support for public service broadcasting will remain a leap of faith. There may be no alternative. If we accept that benefits such as those outlined do exist, then the criteria do support state intervention. Quite what form this support should be is again open to question. A free service, analogous to the compulsory membership, is again not a logical requirement, because the BBC - or equivalent - could be funded from a subsidised subscription, with the subsidy dependent on it continuing to provide its social benefits. However, the case of broadcasting is complicated by the fact that private, advertising funded channels are also 'free at the point of use', thus posing a particularly tough challenge for a public service to do its job if it were charging a fee. Indeed, this poses a problem for the BBC even now, with no 'pay as you go' element.

Overall, then, the paternalistic element observed in the justifications for, and policy outcomes of, three major areas of state intervention have not damaged their credible claim to universal support of one sort or another, and have indeed provided a more reliable basis for them to continue in something like their present form, particularly where this involves some element of compulsion, either of entitlement or consumption. But this may strike the observer as rather a convenient outcome, one even of *post hoc* rationalisation, whereby, as with Feinberg's concept of voluntariness, the criteria have been designed with half an eye on the outcome intuitively desired. Whilst it may be argued in defence that the criteria had their own internal persuasiveness and coherence in establishing the special characteristics of the state in assessing certain types of consumption, it must be acknowledged that this review has not resulted in radical conclusions.

But in fact this may only be the case because we have missed what should be the proper focus of our analysis. As we have seen, large macro areas of consumption include a wide range of micro services. Different types of state intervention apply to some of these: higher education is subsidised in a quite different way to secondary education, and is certainly not compulsory. It

may be that the apparent conservatism of our initial conclusions masks a more radical outcome which would result from looking at individual services.

In fact, Chapter 3 revealed that the history of universalism is characterised by a high degree of uncertainty over what precisely counts as the range of universally provided services. This applies even where there is little disagreement that something - like health care - should be so provided. How might the more systematic application of these criteria help resolve that uncertainty?

### **Implications for 'micro' services areas**

In order to review this issue adequately will require something of a theoretical diversion at this point. The source of difficulties relating to micro service provision lie in a concept I will term 'qualitative heterogeneity'. It was this issue which initially prompted research in this area and, although it did not eventually form the core of this thesis, it deserves extended analysis to illuminate some of the problems of consumption-specific provision as well as demonstrating how the theoretical proposals in relation to paternalism might have policy relevance in the future.

#### *Quantitative and qualitative heterogeneity*

Heterogeneity in the provision of micro services is distinguishable as a concept into two types, quantitative and qualitative. Only the former has been the subject of much systematic analysis, the origins of which lie in the growth in the scope and complexity of state activity itself. In the UK, this growth was so marked that, during the 1960s and 1970s, concerns grew that the operation of state activity was becoming unmanageable: government departments simply did not know what they were getting for their expenditure, still less how to control it. The state was suffering from 'overload' (King, 1975) and policy makers began to seek out new tools and techniques for better managing its activities. Thus, over the years, were born various initiatives - output budgeting, the financial management initiative, performance indicators - all designed to better assess whether public money was being spent effectively, and according to the objectives of the state (Carter, Klein, and Day, 1992).

Common to these initiatives was an attempt to measure the state's output. The problem, of course, was that no readily available scale existed with which to perform such a measurement.

Furthermore, the objectives of the state are many and varied, in contrast to the 'bottom line' profit motive to be found in the private sector. Nevertheless, analysts developed measures and indicators - such as Quality Adjusted Life Years in health (Williams, 1985) - and argued that these should be used to reallocate expenditure so as to maximise outputs. There was a recognition that, in the terminology of this section, services were 'quantitatively heterogeneous' - that the amount of benefit or value to be derived from state interventions will vary from one micro service to another. The best example of this approach has occurred in the health care field where health economists and others have argued for some time that resources should be focused on the most cost-effective services - as evidenced in the burgeoning rationing literature (Williams, 1989; Culyer, 1997).

Similar developments took place in education with the use of exam-based league tables and other measures of educational output (Goldstein and Spiegelhalter, 1996). The most 'productive' schools, signified by their popularity amongst parents deciding where to send their children, were to expand and thus claim a greater portion of public finance. Furthermore, the introduction of the National Curriculum reflected policy-makers' belief that certain types of school lesson are more important than others (Her Majesty's Inspectorate, 1977; Department of Education and Science, 1989; Ball, 1990) and that central government was entitled to compel their provision (Glennerster, Power, and Travers, 1992). This included what the service should consist of: the 'matters, skills and processes which must be taught' for each subject (Department of Education and Science, 1988a).

Not everyone shares the view that government output should be maximised, however. In health, for example, there is a strong academic lobby against cost-effectiveness as the driving criterion (Harris, 1997; Doyal, 1995). And others question the wisdom of attempts to construct any algorithm for guiding administrative behaviour, when the problems of measurement are great and there is so little agreement about objectives (Klein, Day, and Redmayne, 1996). Nonetheless, it is clear that the notion of quantitative heterogeneity has long been recognised.

Qualitative heterogeneity, on the other hand, has not been the subject of academic debate. This is not because its existence has not been recognised but because the relevance to public policy has

been obscure. Heterogeneity amongst micro services of this kind is, in one sense, obvious. Take the following examples:

- \* health - acute medical treatments, GP consultations, long term nursing, domiciliary care, optical and dental services, fertility treatments;
- \* education - secondary education: mathematics, foreign languages, physical education, music lessons; university courses: philosophy, engineering, medicine, sociology;
- \* broadcasting - sport, light entertainment, popular music, classical music, films, news & current affairs, documentary, drama.

These micro services are clearly different from one another - they require different processes and skills. Qualitative heterogeneity is in this sense unremarkable. The assumption has been that decisions about which service is suitable for a particular recipient or audience, and about what the range of services should consist of, ought to be made by professionals. They best understand the nature of the various 'products', and the needs they are meant to satisfy. So the doctor must choose the treatment relevant to the particular patient, the teacher will specialise in teaching a particular subject, and the programme maker will develop new programmes to satisfy various audiences. These individuals thus exercise their professional judgement in developing a range of products, and matching the appropriate service to individual needs.

In the health ethics literature, it has been suggested on occasion that differences of a moral kind between services are relevant. For example, the moral claim of alcoholics to liver transplants, or smokers to coronary artery bypass grafts, has been challenged on the grounds that these individuals, by virtue of their 'lifestyle', have contributed to their ill-health through their own freely made choices.<sup>67</sup> It has also been claimed that, in general, the elderly have a lower priority as a result of having had a 'fair innings' (Williams, 1997a). Similar issues are rare in the education and broadcasting fields where moral discrimination between individuals is not often considered a relevant consideration, although some individuals may be restricted from free higher education

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<sup>67</sup> Such opinions are rarely defended formally in the academic literature, but are implicit in many of the surveys of public opinion in relation to rationing (Kneeshaw, 1997).

because they have already been admitted to one course, but failed to complete it - they have 'had their chance', as it were.<sup>68</sup>

It should be noted, however, that these arguments are in fact centred around the different moral claims of *individuals* and not supposed differences in the moral worth of the micro service *per se* - few suggest bypass grafting or liver transplants are morally wrong in themselves.<sup>69</sup>

Furthermore, where people do argue for the removal of services such as liver transplants it is generally on the basis of quantitative arguments - the amount of benefit derived does not justify the cost. And it often turns out that what at first sight appears to be a case based on 'lifestyle' is actually a decision on the basis of expected benefit. That is, the non-smoker would achieve greater 'health gain' from treatment than the smoker - again, an argument based on quantification.

Qualitative heterogeneity relates to the *type* of benefit being provided by various micro services, and *how this type of benefit can vary in ways which make it more or less appropriate to state intervention*. For example, should it automatically follow that everything which a health care professional is *capable* of providing, is appropriate for him or her actually to provide? The human and capital resources available to the NHS can be turned to an enormous variety of uses, all of which may well promote the well-being of people, but not all of which necessarily promote the *health-related* well-being of these people - or at least well-being-improvement which is relevant to a universal, free service. It is true that some health care researchers have begun to explore the notion that 'health benefit' is in fact be a wide concept, ranging from physiological health to general well being (Hurley, Birch, Stoddart, and Torrance, 1997). But they have not considered whether all these manifestations of 'benefit' are necessarily relevant to the objectives of state intervention. Similar observations apply to education in specifics, although an implicit recognition of the issue is revealed by the different rules for secondary and adult/higher education. Perhaps the nearest example of public, if not academic, debate on these matters takes place with regard to broadcasting, and the proper scope of BBC programming. Overall, the

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<sup>68</sup> Although of course students are discriminated on quantitative grounds - their A-level exam results - as a standard means of rationing entry to higher education.

<sup>69</sup> Although in the early days of transplantation there was opposition on the grounds that such operations were 'playing God'; similar concerns exist today with treatments involving genetic manipulation.

issue of qualitative heterogeneity, and its relevance to public policy, has not been subjected to systematic analysis.

### *Source of the problem of qualitative heterogeneity*

The source of problems relating to qualitative heterogeneity, and thus also to the uncertain and largely *ad hoc* nature of much of the policy development described in Chapter 3, lies in how we conceive of ‘health care’, ‘education’ and ‘broadcasting’, terms which existed before the state became involved in their provision and which are used regularly in everyday conversation. Our common understanding of these services did not derive from thinking about them in relation to the activities of the state, but simply from a shared experience of what these services mean to us in our private lives. When the state did intervene, it did so on the basis that the subject of that intervention was satisfactorily defined within this existing generic terminology. So, in the *National Health Service Act 1977*, it is the duty of the Secretary of State to ‘provide hospital accommodation ... medical dental, nursing and ambulance services ... such facilities for the prevention of illness, the care of persons suffering from illness and the after care of persons who have suffered from illness as he considers appropriate’ (p.2) but what is meant by illness is not further defined other than to specifically include ‘facilities for the care of expectant and nursing mothers’.

Neither, prior to 1988, was education any more specifically defined than health. In the 1944 Act it is ‘the duty of the local education authority for every area ... to contribute to the spiritual, moral, mental and physical development of the community by securing that efficient education ... shall be available [...]’ (Dent, 1968 p.12) but other than the implication that education includes some religious (also required elsewhere in the Act) and physical elements, no further specification is included. After 1988, the only specification was what must be provided, not where the boundary of provision should be. The higher and further education sectors were not considered at all.

The same applies to public service broadcasting, where the state effectively nationalised all broadcasting shortly after the development of the new technology. Since that time in the late 1920s the BBC has operated under successive Royal Charters as a public corporation, the latest

of which from 1996 states that the objects of the corporation are ‘..... to provide programmes of information, education and entertainment for general reception ...’ (Department of National Heritage, 1996b). The Agreement which accompanies the Royal Charter emphasises only the all-inclusive nature of the BBC’s remit (Department of National Heritage, 1996a).

This absence of specificity caused few problems initially. Although there were some controversies in the 1940s over the extent and rationale for charging for residential care (Judge and Matthews, 1980), by and large little concern was expressed about the particular services offered by the NHS. This was also true for education, at least for the first 25 years after the 1944 Act. And the BBC survived the advent of independent broadcasting without serious challenge to its range of its programming. However, because the precise content of what the agents of the state were to provide was only minimally defined, difficulties emerged.

These difficulties, briefly reviewed below, and deriving from the vague, ‘enabling’ legislation which characterised the post-war welfare state and broadcasting policy, are salient because they emerged in the context of *public* services. In the private sector, what is included within ‘education’, for example, would be a matter for the individual buyer and seller. If ‘English literature’ was something that a buyer wished to learn about, then he or she would shop around to find such a product. But the state is not simply there to respond to demands; it has other objectives. Whether individual ‘micro’ services are relevant to these objectives is not demonstrated merely by appearing to belong within broad definitional categories.

#### *Lack of accountability and geographical variation*

The fact that the state never clarified the precise range of activities which were relevant to its intervention did not mean that such judgements were not being taken. They were, but by the individual service providers and administrators - often professionals - who have to make decisions about what to offer to users of the service. Doctors, teachers and broadcasters were left to decide what to provide, based on their skills and abilities rather than with reference to the objectives of the state.

This situation has a number of inherent problems. The first is one of accountability. If the providers make the decisions as to the appropriate scope of state support, the ability to question



why these decisions are being made the way they are is stifled. Professionals see their role to deliver a range of services, based on their expert judgement about what people need or value. But not all needs are satisfied by the intervention of the state. Clinicians reconstructing people's appearance for aesthetic reasons, teachers offering 'citizenship' studies, and broadcasters making game shows may, or may not, be services the state wishes to finance. But with no clear specification of what is expected, accountability for these decisions will be lost. In practice the actions of providers are only accountable to their peers or, at most, to the tier of management immediately above them. Decisions on the range of health care services, school lessons or television and radio broadcasts are not considered political questions and therefore not open to public challenge.

Occasionally this can lead to the exclusion of 'micro' services by default. Where convenient and feasible, and often as a result of the pressure on resources, what 'counts' as health care has often been redefined in a covert and implicit way, so that it becomes the responsibility of another agency. This has been the case with long term care in the health sector during the 1990s (Harrison and New, 1996 pp.73-75). Some health authorities felt able to interpret the NHS legislation so as not to include care of this kind, decisions criticised by the health service commissioner. However, his judgements carry no legal weight and the courts have made *ad hoc* judgements which leave the overall position no clearer (Newdick, 1995).

However, providers do not always wish to off-load provision onto other agencies or individuals; indeed, it could be argued that the instinct of professional providers is to retain the opportunity to exercise their skills in as wide a range of ways as possible. Often, therefore, the issue can be of implicit and covert *inclusions* which may be equally controversial. Aesthetic surgery provides a case in point in the NHS, but in education the issue became central to the policy debate during the 1980s with respect to the school curriculum. Certain subjects were being included in the curriculum - such as 'peace studies' (Hargreaves and Reynolds, 1988 p.15) - as a result of local professional decisions and with local managerial compliance. Broadcasters might be less able to act in implicit ways: the results of their decisions, after all, are available for all to view. Nevertheless, there are persistent questions about why certain forms of programme such as quiz and chat shows, 'magazine' programmes, light entertainment and 'chart' music are part of public

service broadcasting. It remains the case that the broadcasters have little formal requirements of public accountability, and, for the BBC at least, few criteria to be judged against.

A further consequence of the absence of an appropriate delineation of the realm of state intervention is that, where those services are administered by local agencies - such as local education authorities or health authorities - there is considerable scope for variation in the outcome of provision. The statutory framework for the provision of welfare services is enacted at the political centre; there is only one point of ultimate legislative authority. However, the administration of massive, complex welfare services such as health and education requires local flexibility to ensure that the particular needs of individuals and communities are catered for. So central legislation has typically set up an enabling framework within which local agencies exercise the duties placed upon the Secretary of State. But the delegation of authority to these agencies, and thereafter to individual professionals, has effectively included the setting of policy regarding the range of micro services, which then varies from one region to another.

The result has been that a very visible form of inequity of availability has developed depending on one's place of residence. Such inequity may bring the nature of a *national* health service or educational system into question, and may even erode support for the state's involvement altogether. Leaving much of the decision-making to service providers is defended as a proper counter-balance to 'over-centralisation' and an appropriate way of making use of the expertise of professionals. However, these questions, as opposed to the more technical issues of service delivery or television programme making, are *political* issues which require the action of central government.

### *Policy implications*

But what can be done? The principal implication of this analysis is that the state must play a greater role in setting the parameters for what providers may do. Such an approach would change how we understand comprehensiveness in the context of universal services: it would no longer mean everything which providers are technically *capable* of providing, but everything the state *ought* to be providing.

The more difficult question is *how* to decide what constitutes this range of appropriate micro services. One approach is to return to the revised set of criteria developed above in relation to universal state intervention. The strategy would involve 'testing' micro services against these characteristics. Those micro services which satisfy the criteria at least as well as the macro service as a whole should constitute the range of appropriate micro service provision.

Taking health first, and looking at those micro services which have caused the most controversy, we can immediately see that some of them do not satisfy the criteria to the same extent as others. For example, residential care for the elderly does not involve externalities, but neither does it involve obvious information imperfections to any greater extent than many other consumer goods - the potential consumer knows best the nature of her need, and whether the provider is best placed to supply those needs. It is true that some old and infirm people might require some help in assessing their needs, but this will not be universally or even generally true. Many, perhaps with the help of friends or family, would be able to make a perfectly well-informed judgement about their consumption needs - indeed, not to acknowledge this would seem to take an unjustifiably paternalistic view of the capabilities of the old and physically infirm. Neither is such a decision necessarily technically complex, in the way that many mainstream medical treatments are. Thus the third paternalistic criteria is not satisfied. Neither is this an area where we generally have only remote or negligible first-hand experience. Most people either have or have had elderly relatives who need care - the nature of 'need' is very real to most citizens. Only the first of the three paternalistic criteria applies: residential care is a benefit which for most of us will accrue a long time in the future, and thus we are prone to neglect its provision. Much of this analysis also applies to residential nursing care, although the more intensive and complex this care becomes, the more problems of information imbalance and technical complexity (particularly where the person's mental faculties may be clouded by general ill-health) come into play.

Involving some similar issues, the recent Royal Commission into long term care seems to have made the mistake of viewing 'personal care' as if it were automatically similar to 'health care' and recommending universal free coverage for both types (Royal Commission on Long Term Care, 1999). In fact, a 'Note of Dissent' in the Commission's report by two of the committee's members were concerned by this very aspect of the majority conclusions:

*41. Health care is unusual in being largely free. Even so it is simply not true that all health care is free. Few people get osteopathy or acupuncture on the state. Many have to pay for prescriptions and dentistry.*

*42. Just because much health care is free it does not follow that personal care should be free too. There is no principle that says that because one thing is free, something else should be free. It is a matter of where the balance of advantage lies in each case (Royal Commission on Long Term Care, 1999 p.120)*

In the terms of our discussion, personal care does not match up to the criteria, with the implication that those who can afford to pay, should do so. And even those who cannot afford to do so should wherever possible be given cash to spend as they see fit, a point that has been made elsewhere with respect to provision for the disabled (Morris, 1993). However, the fact that we may need to plan a long time into the future to cover all these costs might offer a rationale for the state to compel some saving for those who can afford to - a possibility mooted by the Commission but rejected chiefly on the grounds of reluctant public opinion (Royal Commission on Long Term Care, 1999 para. 5.12). Paternalistic motivations would specifically ignore such lack of 'past, present or immediately forthcoming consent'.

Aesthetic cosmetic treatments, whether in dentistry or in the acute sector (not including those for reconstructive surgery), also fail to satisfy many of the criteria. Informational problems are again less severe than for many health care treatments: we know what we would like changed, and we can probably get a good idea of the surgeon who has performed successfully in the past. Neither is the desire for improved looks something about which we have little experience (in fact, 'having had better looks in the past' is something most of us experience as we get older!). Nor is this a benefit which necessarily accrues in the future. There may be some technical difficulty in making a decision in our best interests, linked to the unforeseen side-effects: we may not fully understand how to judge the range of probabilities of these problems and of the particular techniques which the surgeon should use in achieving our goals. Nevertheless, partial satisfaction of two of the criteria takes this a long way from a central health care service.

On the other hand some currently controversial services do seem to satisfy the criteria. Infertility is subject to severe information problems about the nature of the dysfunction and what needs to be done; we suffer from not having the relevant experience - the 'pain' of childlessness may only be recognised when suffering from it; and its possibility lies some time in the future. Technically, it

may also be difficult: under emotional stress the often low levels of probability, side-effects, dangers of multiple births, may all conspire to cloud a proper appraisal of whether the decision will be in our best interests. On these grounds, infertility treatments do seem to qualify for a place within mainstream NHS provision. A similar case-by-case approach could be used to assess various of the other controversial services in Chapter 3, such as dentistry and optical services.<sup>70</sup>

Turning to education, the criteria help to explain why secondary and higher education have quite different levels of state intervention. Whereas secondary education satisfies the two criteria noted above - externalities and long term benefits - higher education does not obviously satisfy either. We have already noted that, outside the area of academic research, higher education's external benefits are limited, if they exist at all. Benefits chiefly accrue to the consumer, in the form of higher incomes. The only possible remaining justification is that of long term benefits. Here we have at least a *prima facie* case, because students certainly have to put off paid employment now, and undergo a period of study on low income instead. But the distance into the future is not as great as for many deferred benefits such as those relating to old age. This analysis supports recent changes to the funding arrangements for higher education, with only a marginal subsidy to counteract the possibly excessive short-termism of students who would face the full interest costs of a loan. However, the implication of this analysis goes further and suggests that different degree-level courses should be subsidised to different extents, perhaps with only those which really provide productive benefits to the individual supported on a universal basis by the state. Thus courses which do not demonstrate increased earning potential might not be supported at all, although the difficulty will be isolating which courses these are, given the screening function of all higher education. But it may be possible to establish those more vocational subjects which are specifically linked to areas of productive specialisation, and concentrate subsidies here. Other students could be supported on research grounds, but otherwise students could be left to face the true cost in full.

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<sup>70</sup> On a first impression, dental check-ups, for example, do seem to satisfy the criteria: there are information problems, the benefits typically occur in the future, the assessment of what is required is complex, and, if a check-up is designed to prevent problems, we may never have any experience of toothache! Only externalities are absent.

Similar analysis might be applied to the secondary sector, where the National Curriculum could now be based on the criteria above. Thus emphasis would be placed on numeracy and literacy, as it is now, but there might be a greater restriction placed on the range of subjects which could be taught from within the free, compulsory system. More radically, if the true benefits from externalities are exhausted once good aptitude in numeracy and literacy are achieved, there may be a case for reducing the compulsory school leaving age. This is because the remaining rationale would simply involve delayed benefits, but these could be assured by subsidising further education (say 14+) through vouchers. Then, those who feel that benefits now (through entering paid employment) are preferable could test their belief whilst knowing that they could return to take exam-based qualifications if things did not work out - and when they had greater experience of the possible effects of little education.

Finally, broadcasting possibly displays the clearest case of divergent rationales for different types of programming. Those which produce externalities include news and current affairs broadcasting, by contributing to the sustenance of democracy and accountability, and the great 'set piece' events, by promoting community bonds, including general elections, some sporting events, wars and so forth, and some popular programming which regularly attracts large audiences, such as soap operas. Those which involve unfamiliarity and lack of experience include innovative and educational programming of all kinds. But it can immediately be seen that many other types of programme - from chat shows and game shows, to regular drama and sitcoms, to films and pop music - do not display any of these characteristics. They are simply responding to well established demands and preferences, which are no less in need of satisfaction just because they are well established. And it is clear that commercial television of various types can well provide these types of programme, as well as occasionally offering something more innovative. The same is true of much radio broadcasting.

The argument that everyone pays a licence fee, therefore every taste should be catered for, is fallacious if we accept the licence fee to be a form of tax rather than payment for service - taxes are not payments in return for which people expect a product, but are contributions to public ends which private exchange cannot secure. A more powerful argument for the BBC and public service broadcasters in general continuing to provide the full range of programming is that they must retain an image which encourages viewers to tune in. That is, unless they produce the type

of immediate want satisfaction demanded by people as a matter of course, they will not be able to persuade these same viewers to stay with them and try some of the more innovative programmes.

However, this argument can be overplayed. As far as the externality arguments are concerned, some of these benefits accrue even if small numbers of people watch or listen - that is the whole point. So aggressive holding to account of ministers will work to the general good as long as some small but influential group of people are listening. On the other hand, covering events of national importance, and other programmes which serve mass audiences, are justified by their very ability to attract those numbers. And as for the innovative, 'risky' programming, something of the same argument applies. For it is not that all of these types of programme are inherently unpopular - that people should be persuaded to watch them against their will - it is that people find it difficult to express certain kinds of demand which would be in their interest if only they had enough experience. If novel innovative programmes are produced by public service, they *should* garner sufficient audiences to make them reasonable competitors with commercial television, and thus be able to attract viewers without the subterfuge noted above. They should be popular. It is perhaps only those programmes, probably of an educational nature or more profound and erudite, whose benefits only become apparent after the passage of time, which cause a real problem for the achievement of public service ideals. But perhaps even for these programmes other means could be undertaken to try and encourage these to be viewed, such as more extensive publicity and marketing. Just because paternalism lies behind the justification for certain types of programme production does not mean that paternalism is required in their delivery.

It should be noted that Channel 4 achieves some of these public purposes without licence fee income. And Channel 4, like BBC2, where most of the BBC's 'true' public service broadcasting takes place, have much lower audiences than their more mainstream rivals. Part of the problem may be their highbrow image. However, the general proliferation of channels in the digital age will dilute the perception that there are 'popular' as opposed to 'unpopular' channels. Public service broadcasting will inevitably have to compete with many free (at the point of use) or relatively cheap alternatives. The BBC may do better to concentrate on those programmes which reflect the efficiency and paternalistic justifications for its public subsidy, and ensure that these attract the audiences they should, rather than try and compete on every type of programme. If they cannot

succeed, then it may have to be conceded that the case for providing these non-commercial programmes has been unproved.

### **Wider implications: other universal and means tested services**

The relevance of the approach outlined above could extend beyond the three macro service areas considered in detail. Other areas of consumption-specific policy might also find the boundaries of their domain more tightly circumscribed. For example, libraries (rather like the BBC) have a policy of holding all kinds of books. But does a universal 100 per cent subsidy of a romantic pot boiler or Agatha Christie detective novel really satisfy the criteria for state intervention as well as those for other kinds of book? Similarly, do all forms of museum and gallery deserve equal subsidy? We have already seen how this varies in an apparently incoherent way from one to another. And what precisely determines which film, theatre and opera subsidies should be granted?

We have also briefly touched on non-universal consumption-specific services in this thesis. The two principal services indicated - housing and personal social services - are both almost entirely means tested, thereby offending the essential universal criterion. After MIRAS is abolished in 2000, there will no longer exist subsidies in these two areas for those with incomes or savings above a certain level. This immediately places the central burden on equity as a justification, for market failure and paternalistic justifications do not apply to just the low income sections of the population and thus cannot be invoked to justify provision for these people alone.<sup>71</sup>

As a result, these two services are particularly prone to the claim that they require a paternalistic justification. This is because for many services there is at least in principle the possibility that 'pure' market failure arguments will suffice - public goods are the classic examples. But where means testing takes place, we know these types of rationale are not present, and yet we have also shown that any 'pure' equity justification cannot avoid some element of paternalism. Thus,

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<sup>71</sup> Although it might be possible, if even more controversial, to develop paternalistic rationales which are focused on particular sections of the populations, rather than particular types of consumption. However, this would need a radically different approach to that adopted in this thesis.



personal social services and housing subsidies for those on low incomes require a paternalistic justification.

How do they fare according to the criteria? At first sight, housing does not measure up very well. It is a familiar type of benefit, it does not accrue a long time into the future, and is, whilst not simple, not especially technically complex either. And we have already seen that externalities are limited ('eyesore' housing could be a justification for some kind of improvement grant), and information imperfections can be dealt with through either regulations or the market. So why, then, does state provision involve the specific subsidy of housing rather than simply adjusting income levels so that people could decide for themselves?

One answer is the practical difficulties of adjusting benefit levels to take account of different housing costs in different parts of the country, and to avoid fraud resulting from false claims about the region of domicile. However, technical advances and computerisation make the relevant calculations easier than in previous times, and more rigorous policing could establish that people were living where they said they were living. Whether this would involve administrative costs greater than the costs involved in administering consumption-specific housing provision is a moot point; it certainly does not seem likely with respect to local authority provided housing.

So there needs to be another reason, and the most likely candidate is health. For the probable outcome of simply providing people with a level of income sufficient to cover basic housing needs would be that some will choose not to spend their money in that way. They would either live in highly undesirable (to most of us) housing, or in no housing at all, preferring to enjoy the additional wealth they receive on other pleasures. All well and good, might argue the anti-paternalist - and indeed, the paternalist according to our schema here, for none of the criteria seem immediately satisfied. However, people choosing to live in squalor are very likely to do severe damage to their health; this cost will not manifest itself until long into the future; it does, then, satisfy one of the paternalistic criteria at least. It is probably an even more acute consideration where children are involved. Nevertheless, this perspective places rather more emphasis on the condition, cleanliness and other safety aspects of housing than previously.

Personal social services also appear to offer a rather poor case for consumption specific interventions. However, in this case the issue is complicated by the fact that many recipients are

in themselves (rather than as a result of the particular micro services in question) subject to more or less permanent reasoning problems, due perhaps to mental illness or handicap, because they are children, because they are on drugs or emotionally distressed - all these are proper grounds for 'soft' paternalism. However, where such matters are not relevant - perhaps with elderly people, or those with physical handicaps (Morris, 1993), or even to many people who, though they have various mental incapacities still may be the best people to judge their needs and how to satisfy them - payment in cash rather than kind appears preferable, because the type of goods and services in question do not satisfy the criteria of unfamiliarity, long term benefits, technical complexity, or externalities and imperfect information.

## Chapter 9: Conclusion

State intervention in the lives of its citizens is a serious undertaking. It is not long ago that John Stuart Mill noted that ‘in old times ... by liberty was meant protection against the tyranny of the political rulers. The rulers were conceived (except in some of the popular governments of Greece) as in a necessarily antagonistic position to the people whom they ruled’ (Mill, 1974 p.59). Even today, in a world in which the powers of the state are more tightly constrained and the range of its activities more widely accepted than ever before, it is still a matter of first importance that any intervention which restricts an individual from freely conducting their life as they see fit is properly justified. This justification is not simply a matter of democracy. Democratic procedures have led to despotic rule at various times, and even now the UK legislature has almost unlimited power between elections. It is not enough to argue that this power is legitimately arrived at, since decisions made by democratic processes are in themselves only slightly more likely to have normative justification than those of a benign dictator. Normative analysis must accompany democratic processes as an essential component of the accountability of the rulers.

State intervention can also take many forms. It is perhaps not difficult for people to acknowledge the protective functions of the state, both in terms of the security of the nation as a whole and for individual citizens from the threat or use of force by others. This latter function will often place a limit on certain types of activity, such as violent behaviour, and is usually understood to be in order to protect freedoms. But there is also an enormous range of state interventions which do not seem to be about protecting freedom as such, and which specifically focus on particular types of consumption, introducing various measures which either compel or forbid the consumption of certain activities goods and services, or alter the terms on which they can be consumed by means of tax and subsidy. What is more, these interventions are very often directed at everyone within a certain category, regardless of their income.

It is true to say that very often these interventions are concerned with the effects of certain kinds of activity on others; but this is not to protect other people’s liberty, even if it is to protect them from some kind of harm or discomfort. It is rather to protect other people’s ‘good’, or the good

of the individual or the community at large, that these interventions are justified, and as such they require complex rationales.

Existing justifications for these kind of state interventions have traditionally relied on one or both of two types of rationale. The first has the longest heritage, stretching back to the ancient Greeks, and involves the idea of equity or fairness. The state is justified in intervening in consumption decisions in order to redistribute the benefits individuals can expect, so as to better align them notions of social justice. The second is a more modern form of justification, stretching back only to the nineteenth century and the development of modern economic theory. It argues that aggregate welfare (that is, without placing any special emphasis on its distribution) can be improved by correcting some of the failings of market mechanisms through state action. Social efficiency can thereby be increased. The former justification is rather more amenable to political mobilisation, based as it is on readily recognisable and emotive values, although it does have the drawback of relying on moral considerations which are not readily susceptible to 'proof' or final resolution. The justification from efficiency is rather more technical and less easily convertible into political support because it does not relate to easily identifiable classes of individual. On the other hand it has the advantage of being, potentially at least, value free - the 'Pareto' criterion supports only those changes which make some people better off without making anyone else worse off.

But both suffer from a weakness of being underdetermined: neither class of justification is sufficiently comprehensive. Suspicions are aroused by thinking about why equity should be applicable to everyone regardless of income: surely any kind of fairness rationale would introduce some kind of restriction on the very richest receiving benefits? But arguments from practicality and retaining incentives go some way to mitigating these concerns; it could also be argued that equity demands that a given cash benefit should go to everyone as a bald form of equality, perhaps to sustain a sense of community bonds. But more serious than this is the fact that equity principles are used to determine the subject matter of the distribution, without justifying why particular aspects of consumption, rather than cash, should be targeted for redistributive activity. Efficiency, or market failure, justifications raise similar questions, although here at least the cause of the market failure can be traced back to the characteristics of particular goods or services, providing an immediate rationale for that focus. But the particular policy response does not always seem to relate directly to the justification, particularly when this policy involves elements

of compulsion. Alternatively, suggested market failures, and their proposed correctives, turn out on close inspection to be correcting something else, what we have called reasoning failure.

In general terms the two types of insufficiency are as follows. First, the principles invoked in the name of equity and efficiency are asked to do 'too much', specifically by seeking to resolve problems which their conceptual apparatus will not allow them to do. This is very often terminological, and involves taking a concept designed to analyse one particular social ill, such as externalities, and then using it to correct another, inequity, as a means of getting around the need to focus on a third, paternalism. It can be more direct than this, such as simply invoking imperfect information when the problem being analysed approximates more closely to one of reasoning rather than information. The second type of insufficiency follows from this: particular policy outcomes are either proposed, or existing ones defended, in terms of equity and efficiency, again when the principles either will not allow this (such as a consumption-specific response to a pure equity concern), or when this particular policy outcome is only one amongst many possibilities (such as when a compulsion or prohibition is involved, rather than taxing or subsidising, or even just providing information).

The missing element in all this was identified as paternalism, a doctrine with a long and not altogether happy history. Perhaps partly as a result of that history, there has been a dearth of policy-related analysis of paternalistic rationales for state intervention. Paternalism essentially argues that the state can intervene in individual decision-making for the promotion of those individuals' interests alone. Thus it could help to justify why consumption-specific equity should be pursued, or why particular policy outcomes should be supported. In general, it specifically acknowledges the possibility that as well as markets failing to operate efficiently in exchange, and resulting in distributional unfairness, individuals can fail to assess or act upon their own best interests - regardless of the working of the market (and other) institutions designed or utilised to realise those interests. Crucially, though, it assumes that someone other than the individual can be in a position to do this *better* than the individual. However, there has been no development of a theory which explains why, and in which circumstances, the state might achieve this. Such a theory was presented in Chapter 7.

Paternalism will remain controversial nevertheless. One of the paradoxes of any discussion of paternalism is that in a democracy all actions of the state have ultimately to be approved by the people, and yet one of the conditions of a paternalistic act is that it is not sanctioned by the individual for whom the act is supposed to benefit at the time of the intervention. This contrasts with acts to correct market failure, particularly those which provide public goods such as national defence, which may be supported with some degree of unanimity by people who clearly recognise that the only way to achieve the appropriate production of certain goods at appropriate levels is for the state to act to secure them in a collective manner. They consent to compulsion on the basis that for the benefit to be secured, a large number of people must be compelled to act in a certain way. 'True' paternalism, on the other hand, necessarily requires an absence of immediate consent. No-one within a liberal democratic framework, however, would support a despotic form of paternalism which disregards the consent of the people at all times, whether benevolently disposed or not. It is important to acknowledge that the benefits of paternalism must be accepted by the electorate, and therefore by those subject to paternalism, at some point - in other words, there has to be a form of future consent to the paternalistic action. Of course this will still only be a majority decision, and some individuals may never provide any kind of consent.

This last point reminds us of a fundamental objection to paternalism made by libertarians. The case made here has been based on an understanding that whether the state can promote welfare is a matter ultimately for empirical judgement. The outcome may well be that the state does more harm than good. However, others go further than this. To have a meddlesome state interfering merely because it can devote able people to a problem or because it has a wider perspective on the benefits to be gained from certain goods is unwarranted, regardless of the consequences. In short, the intervention of the state, simply by virtue of that intervention, causes more harm than the increase in utility instrumentally obtained. People simply *cannot* have their lives improved by state action, because state action is bad - period.

Ultimately this type of case cannot be refuted; it is a matter of belief. Most people, however, have a more pragmatic view of the sanctity or otherwise of individual decision-making. We may agree that the individual is best placed to decide on his or her welfare in most circumstances. But we also recognise that we can be mistaken, and that the freedom to be wrong and make

mistakes is not without cost. Inflexible and absolutist theoretical dogma is unhelpful in the real world. Individual citizens are fallible. On occasion, and in particular circumstances, the state may be less so.

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## Appendix

### Paternalism and public policy

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Published in *Economics and Philosophy*, **15** (1999), 63-83.

### Abstract

Most analyses of paternalism and public policy focus on categorising paternalistic behaviour, or establishing the circumstances under which an individual may make decisions which do not best promote his or her interests. But these debates are incomplete on two counts: first, they fail properly to distinguish paternalism from policies to correct market failure and, second, they do not establish why the state should be a *more* successful decision-maker than the individual, even if it is accepted that the latter is making choices which lead to sub-optimal outcomes. This paper first establishes the precise nature of a paternalistic policy in economics terms and, second, proposes the conditions under which the state may be a more successful decision-maker than the individual, thereby justifying some paternalistic acts.

## Paternalism and public policy

Wherever a government or state is concerned with the welfare of its citizens, there will probably also exist policies which compel the individual citizen to undertake or abstain from activities which affect that citizen alone. The set of theories behind such policies is collectively known as 'paternalism'.<sup>1</sup> It is not hard to understand why this term has developed strong pejorative overtones. Policies of this type appear to offend a fundamental tenet of liberal societies: namely, that the individual is best placed to know what is in his or her interests. Paternalistic policies imply, and are concerned with correcting, failures of precisely this kind of judgement. And yet, at the same time, there is a popular consensus that compelling people to wear a seat belt when driving a car is a reasonable restriction of personal liberty. Paternalism may be difficult to accept in principle, but it is equally difficult to avoid in practice.

Not surprisingly, the literature reveals a long heritage of debate in a wide range of academic disciplines. This debate reveals a failure to make progress in two areas in particular. First, analyses of paternalism often confuse policies which are actually concerned with correcting failures of market exchange - in particular, those concerned with insufficient or imperfect information - with those which are genuinely paternalistic. One objective of this paper will be to clarify the difference between these two kinds of policy.

Second, many accounts of paternalistic theory - whether from philosophy (Dworkin, 1979; Feinberg, 1986), political theory (Weale, 1978), law (Hart, 1963) or economics (Burrows, 1995) - provide reasons for believing that there is scope for a paternalistic policy to improve the welfare of the individual, usually by making reference to the many and varied ways in which an individual can fail to make decisions which maximise their welfare. But suggesting that in principle there is *scope* for state paternalism to improve welfare does not by itself indicate that the state will succeed in so doing. For example, Weale suggests three criteria for appraising appropriate conditions for paternalistic intervention: the 'severity' of the interference, whether the interference is in accordance with some element of an individual's previously revealed life plan, and whether there is 'evident failure of reason' (Weale, 1978, p.170). These criteria are essentially rules for checking the over-zealous use of paternalism. But they do not explain why the state is *better*

placed than the individual for achieving any given level of welfare, even under conditions which satisfy these criteria.

The presumption in much market and liberal philosophical theory is not that individuals will necessarily maximise their welfare, but that the state is no better, and probably worse, at achieving that goal. As John Stuart Mill put it in the classic exposition of the liberal position:

*the strongest of all arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place* (Mill, 1974, p.151)

Mill was not referring to incentives which motivate state officials to act in their own interest - criticisms which have become associated with the public choice school of state theorists (McLean, 1987). Mill was concerned with a perfectly benevolent and neutral state simply not being *capable* of knowing what is in the individual's interest better than the individual. The challenge for paternalistic theory is to identify coherent reasons for believing that in some circumstances this assumption does not hold. Such an endeavour involves doing more than simply outlining the circumstances in which individual decision-making ability is less than perfect.

The paper is organised in three sections. The first section outlines a refinement to existing definitions of paternalism in order to distinguish it clearly from other motivations for state intervention; the next section catalogues the various explanations for reasoning failure given in the literature; and the final section proposes three characteristics of the state which may, in some circumstances, make it a better judge of individual welfare than the individual.

### **Paternalism, or correcting failures of exchange?**

Defining paternalism precisely is not a straightforward matter, but the essential elements are reasonably well accepted. Combining the refinements developed by a number of authors (Gert and Culver, 1976; Weale, 1978; Dworkin, 1979; Feinberg, 1983) we can establish the basic conditions which, together, an act must satisfy in order to be termed paternalistic:

- \* there is interference in the self-regarding decision-making autonomy of one person by another person or by the state;
- \* the interference is made in order to further the paternalised person's interests or welfare;
- \* the interference is made without the 'past, present or immediately forthcoming consent' (Gert and Culver, 1976) of the individual concerned.<sup>2</sup>

These conditions establish the particular focus of paternalism. Such interventions are directed at actions which are 'self-regarding' in Mill's terms - that is, actions which do not harm others. Such a distinction is not clear cut. The range of activities which have absolutely no influence on others - by giving offence or causing other types of unhappiness, for example - are few: 'In an organised society it is impossible to identify classes of actions which harm no-one but the individual who does them' (Hart, 1963, p.5). But Mill believed that we should not regard acts which we might find merely distasteful, such as fornication or gambling, as constituting 'harm'. On the other hand, actions which are essentially self-regarding, such as getting drunk, might be viewed as potentially harmful in certain circumstances: for example, if excessive drinking were undertaken by someone predisposed to violence, the state would be justified in intervening.

It should also be noted that 'self-regarding' in this context might include actions which are not concerned with the individual's own *welfare*, but neither are they harmful to others. An example would be stoical actions - such as the denial of material pleasures for reasons of a religious or spiritual nature. Interference in actions of this type would not necessarily be paternalistic, particularly if they were directed at suppressing particular forms of religious practice, because they might not be concerned with improving the individual's welfare (indeed, they might be concerned with precisely the reverse as a means of punishing heretical religious practice, for example).

Paternalistic actions are not merely physically restrictive or obligatory. They can include withholding information, and as a consequence definitions of paternalism often make reference to

'autonomy'. Not informing someone of the true nature of their terminal illness would on this view be paternalistic. Paternalistic acts must also be in the interests of the person concerned - intended to make the person better off than if they were left to make their decisions themselves. Finally, they must be undertaken without the paternalised individual's consent. An action would not be paternalistic if the individual concerned invited it in order to make up for some self-confessed practical or intellectual insufficiency. Paternalists must believe that they are more likely to further the paternalised person's interests than the person him or herself, even when that person disagrees.<sup>3</sup>

In Mill's time, the realm of state activity was more limited than it is now. In particular, the notion of the state intervening to correct market failures or for reasons of social justice were less well developed, although Mill did recognise 'joint work necessary to the interest of society of which he enjoys the protection' (p.70), such as national defence or policing. He also advocated paying for the education of those too poor to do so themselves.

However, during the twentieth century correcting market failure and promoting social justice became key social goals whose justifications were not considered at odds with Mill's principles. For example, classic economic market theory suggests that under certain conditions perfectly competitive markets will achieve 'Pareto optimality' - an 'efficient' outcome. Underlying Pareto optimality are two value judgements: individuals are the best judges of their own welfare, and 'optimality' occurs when one individual cannot be made better off without another being made worse off. The first of these value judgements clearly echoes Mill's principal reason for rejecting state intervention in self-regarding actions. However, it is well accepted that markets can fail to operate 'perfectly', even if one accepts this value judgement. State actions to correct market failure of this kind are not paternalistic because the imperfection is not the result of an individual's inability to best assess their own interests.

Following this distinction, economics distinguishes three broad aims of government policy, as spelt out in a standard textbook (Gravelle and Rees, 1981):

- \* the correction of market failure itself (or ‘inefficiency and exchange’ (p.504)): for example, the regulation of monopolies, correction of transaction costs or ‘external’ effects, or the adjustment of information imbalances;
- \* the adjustment of the outcomes of competitive markets in the light of value judgements which differ from the first of the two underlying Pareto criteria outlined above (‘for this to differ from the first aim, there must be an element of paternalism...’ (Gravelle and Rees, 1981, p.520));
- \* the achievement of what might be regarded as a desirable distribution of real income.

Market failure, broadly conceived, can thus result from one of three distinct sets of deficiencies. The first of these can be thought of as a failures of a process of exchange (a conventional market need not, in fact, be in operation: the intervention could be to provide warnings for swimmers about dangerous tides). The second involves a failure of individual reasoning ability - that is, with an individual’s ability to adequately process the information received to assess their own interests. The third is concerned with social justice and the equitable distribution of resources.

Some authors have distinguished carefully between these motivations for state intervention: for example, in the case of health and safety regulations (Kelman, 1981) or for benefits in kind (Weale, 1978). However, it is not uncommon for paternalism as defined here to be confused with, or at least not differentiated from, justifications for intervening in decision-making which seek to correct market failures (Goodin, 1995).

For example, one reason why mutually beneficial exchanges may not be completed is the costs of conducting the exchange itself - transactions costs. The difficulty involved in drawing up a contract, or in ensuring it is honoured, may be so great that the parties involved cannot reach an agreement on what would otherwise be a welfare-increasing exchange. On occasion this may result in hierarchical patterns of economic organisation, rather than market forms, in order to mitigate the prohibitive costs involved in contractual relations (Williamson, 1985). Transaction costs may also hinder other forms of market relation such as employment negotiation. Unions and



employers may take so long to reach agreement on an aspect of workers' employment, that the profitability of the firm may be threatened. In such circumstances, the state may facilitate a solution (by regulating a form of 'pendulum arbitration', for example) or it may outlaw the particular form of collective organisation which causes the problem. The state is not here acting paternalistically - the parties may be acting in their own best interest given the circumstances, but because of the strategic nature of the situation their decisions may result in undesirable consequences.

This situation - where negotiating parties are engaged in strategic behaviour involving the prediction of the actions of others - has been described in general terms as a problem of 'small numbers' (Gravelle and Rees, 1981). The classic example is the 'prisoner's dilemma' game where the rational choice for each of two parties leads to a sub-optimal outcome for them both in aggregate (McLean, 1987). The outcome is not what the people involved preferred - a 'wedge' has been driven between choice and preference (Sen, 1977). The state may impose a 'cooperate-cooperate' solution on them. The individuals involved are having an outcome imposed, and having their freedom restricted, but not paternalistically - it is the outcome they wish (prefer) but cannot rationally choose without external regulation.

In both these sets of circumstances, it is possible to regard the actions of the individuals or agencies concerned as, at least in part, 'other regarding', thereby satisfying a Millian conception of justifiable state intervention. The decisions of one group affects not just themselves but others too. Their decisions are not simply 'self-regarding'.

However, one further form of state intervention is concerned with actions which are not 'other regarding', and is therefore particularly easy to confuse with interventions of a paternalistic nature. These are actions based on inadequate or imperfect information, a standard source of market failure in the economics literature (Gravelle and Rees, 1981, p.507). Here the situation is likely to be such that it is only a single individual's interests at stake. For example, if someone plans to go swimming in the sea but does not know that the tides are particularly dangerous, he or she could be swept to their death. They have failed adequately to assess their own interests; no-one else was affected. Under these circumstances, the state is likely to provide statutory warnings about the tides, or even to employ lifeguards to rescue those who venture too far out.

Mill used a similar example of a public official preventing someone from using an unsafe bridge when there is insufficient time to give a warning. This was a justifiable act, as the bridge-user could not be assumed to wish harm on himself.

If we accept the distinctions outlined above between deficiencies of exchange (including the non-market supply of information) and deficiencies of reasoning, we can see that the absence of adequate information clearly falls into the former category. There is nothing wrong with the ability of the swimmer or bridge-user to assess their best interests: they enjoy swimming in the sea or walking across footbridges, and both these activities may appear safe enough. The intervention by the public officials is justified on the non-paternalistic grounds that there is not enough information on which to make a proper judgement of their own interests.<sup>4</sup>

The key point is that one can have poor information about a particular set of circumstances and yet still make a decision which maximises one's welfare, given the information available. Having little information *in itself* does not impair our ability to reason.<sup>5</sup> We must simply make a judgement about what to do given our knowledge as it stands - including, perhaps, not taking any course of action until the level or quality of information improves. For example, an individual lost at night in the countryside could be deprived of all sight-based sensory information. He or she may wish to reach the nearest town, but believes that simply walking around in the dark is more likely to result in falling down a ditch or becoming exhausted. There is not enough information to achieve the objective of reaching the town with any confidence, and instead the lost traveller decides to stay put, preserve energy and wait until daybreak when a route should become clearer. Lack of information has not impaired the traveller's ability to reason, and government policy to make roads better lit at night (and so improve the general supply of 'information' on how to travel effectively) is not paternalistic.

One potential objection to these non-paternalistic justifications for state interventions to correct imperfect information is that not everyone might consent. Providing accurate, clear information is not costless. Some individuals may object that the provision of good information has pushed up the cost of a particular good, such as the obligation to provide nutritional information on food, or the cost of providing street lighting. They would rather take their chances and pay the lower price. However, the state is faced with the difficulty of only ensuring information for those who

want it (and thus willing to pay for it) and not for those who don't. Typically, it is not practical to do so because of 'free-rider' problems - those who do not pay will also get the benefit of the additional information. It is not possible to provide only street lighting or nutritional information to particular sections of the population. Practical reasons determine that information is provided for all, not paternalistic ones.

Of course, if the state has information at its disposal, and did not disclose it because it felt that this information would be abused or lead to unacceptable practices, then 'insufficient information' in this sense may well constitute a paternalistic act. Consider the private publication of technical evidence on the causes of homosexuality. If such evidence suggested that sexual preferences of this kind were not learned but the result of 'natural' genetic predisposition, this might point toward a reduction in the legal age of homosexual consent. There would be no basis for discriminating against homosexuals about the age at which they can first legally engage in sexual acts. However, the state may take the view that such acts were to be discouraged for 'moral' reasons and withhold the information nonetheless.

This distinction between imperfect or insufficient information and reasoning failure is not always made with clarity in the literature. Feinberg includes the following phenomena amongst those which might lead one to suppose that the state is justified in a paternalistic intervention: 'ignorance ... derangement, drugs or other voluntariness-vitiating factors' (1986, p.12). All these, it is argued, might reasonably be supposed to limit the extent to which it is the individual *himself or herself* who makes a decision and as such indicate that soft-paternalism - when harm is not truly willed by the individual - may be justified. Note, however, that the first ('ignorance') is a failure of information and the last two ('derangement, drugs') failures of reason, regardless of the particular type of paternalism in question. Kleinig similarly makes reference to 'ignorance' (1983, p.48) as one element of a justification for paternalism. Archard, again, mixes up 'ignorance, lack of reason, psychological compulsion, or a similarly clear cognitive or volitional defect' (1993, p.341) as valid reasons for a paternalist to intervene in circumstances 'of impaired choice'.

It is important for the remainder of this paper's analysis that a distinction is drawn between correcting reasoning failure and failures of inefficient exchange. Justifications for state paternalism, if they are to be made successfully, must be made in relation to the ability of the state and its

officials to *reason* better than the individual. This is a contentious proposition, and is more difficult to justify than, for example, correcting information shortages which the individual may acknowledge that they lack or do not have the time or facilities to gather in order to make proper judgements. It is also more difficult than simply outlining the various ways in which reasoning ability can be less than optimal, the subject of the following section.

### **Explanations for failure of reasoning**

Typically, the literature provides ‘justifications’ for paternalism which make reference to failures in rationality or reasoning which lead to, or include, choices which do not maximise welfare for the individual. We have seen how it is easy to confuse such justifications with those which relate to other failures in the process of exchange, and in particular to imperfect information. But it is also a central contention of this paper that simply demonstrating that a failure of reason has occurred, assuming non-market failure conditions, is *not* sufficient to warrant state intervention. In this section, we list the categories of explanation for failures of individual reasoning *without* assuming this provides a justification for the state to intervene. As a result, a common category in the literature - ‘self-justifying paternalism’ (Archard, 1993) or ‘consent-based arguments for paternalism’ (Kleinig, 1983, p.55) - is not included here because they are *justifications* for the state intervening in the actions of individuals. They are not *explanations* for the existence of poor reasoning ability in the first place. Such consent-based approaches justify legal (or other) forms of paternalism on the basis that the individual did, implicitly or hypothetically, give his or her consent either before or after the intervention. But there is no explanation given as to why this should be necessary. Each of the following categories, then, relate to a failure in the ability of individuals to come to judgements which maximise welfare. They simply demonstrate instances where human reasoning might be less than optimal.

The first category relates to *technical inability* - an inability properly to make choices which achieve preferences, principally because the quantity of information needed is so great or because the ‘logical or causal connections’ (Goodin, 1993) between choice and outcome are difficult to make. It is a failure to reason or ‘compute’ information adequately; the information itself could be perfectly adequate and complete. An example would be how best to spend two

days in a large unfamiliar city, even with the best advice and guide books, or decisions about whether it is worth gambling money on the national lottery. Judgements about probabilities and likely future outcomes of actions are particularly common in this category - Tversky and Kahneman (1982) showed how people with 'perfect' information commonly displayed inadequate reasoning power to interpret and calculate the implications of certain statistical or probabilistic situations.

The second category is *weakness of the will*. This refers to instances where people know what they prefer in the long term and what is genuinely in their best interests, but still make a choice which they accept will lead to a sub-optimal outcome (Dworkin, 1981). People acting in this way acknowledge they are not being rational - it would include someone who does not think the inconvenience of wearing a seat-belt outweighs the benefit from improved safety, but fails to use the belt anyway. It would also include those who cannot resist spending their wages in the pub rather than putting them into a pension scheme which they know would do them more good in the long run.<sup>6</sup>

The third category is that of *emotional decision-making*: emotional decisions rather than a rational ones include becoming 'attached' to making certain choices, such as following a habitual route to work even when it takes longer, is less attractive and more expensive than an alternative, or having an emotional desire for an outcome which one knows cannot occur, such as making decisions on the basis of superstition. This category also includes decisions made under emotional stress - following a bereavement, for example (Dworkin, 1981).

The final category is *lack of experience*: preferences would be different if the individual had experience (rather than simply abstract knowledge or information) of the all possible outcomes of a certain activity (Burrows, 1993). For example, people might make a different judgement on whether to take up smoking if it were possible to have experience of both living through a lifetime of smoking without ill-effects and of dying through lung cancer, in addition to information about the probabilities of both eventualities taking place.

Other reasons for poor reasoning or rationality are less pertinent to this paper. *Weak attachment*, for example, refers to situations in which people are undecided or vacillate in deciding on their preferences, or how to achieve them (Burrows, 1993). They make impetuous,

ill-considered decisions. This often occurs when people simply do not have enough time to consider matters in more depth or because they enjoy appearing 'raffish'. Neither of these imply a reasoning failure: the latter might simply suit the individual's preferences whilst the former could reflect optimal reasoning under time constraints. But on other occasions it may occur because they have undergone some intense and forceful persuasion, manipulation or even 'brain-washing'. This category also relates to compulsive behaviour such as addiction to drugs. In these cases we may say that the preferences and choices made reflect only a weak attachment to the individual; they derive from exogenous forces to a significant degree. As such they relate more properly to soft paternalism (see footnote 3) and therefore do not concern the discussions in the subsequent parts of this paper.

Another category of reason for poor decision-making, deriving from the philosophical theories of Parfit (1984), relates to *myopia* concerning one's future wants (Le Grand, 1995). At its simplest, the theory states that we are not precisely the same person as we grow older, and that a decision made now about our future welfare is in fact a decision which affects another individual. Thus, the state can intervene on the basis of the harm principle (because of the external costs imposed on one's future self), and not paternalistically - by compelling contributions for a state pension, for example. However, to the extent that this is indeed an intervention based on the harm principle or externalities it is not paternalism; if on the other hand these characterisations of the intervention are thought to be merely an elegant means of avoiding the criticism of illiberalism, but that they are nevertheless paternalistic, then myopia can be seen as included in the categories of 'weakness of the will' or 'lack of experience' above.

There is, however, a further possible category and one rather different from the others. Let us assume that an individual does not display evidence of reasoning failure in any of the ways outlined above. Could they not simply be 'wrong' in their reasoning, regardless of the absence of established explanations, perhaps on the basis that a large number of people believe them to be so? In other words, even if none of the conditions generally supposed to obstruct proper assessment of personal welfare is present, the individual concerned nevertheless fails to maximise their welfare in the view of the rest of society.

In one sense, this goes to the heart of the case against paternalism. As Mill argued, an individual might well ‘just be wrong’ according to the rest of society, but this is insufficient to mount a case for interference. As indicated in the quote in the introduction to this paper, the odds are that the state will interfere wrongly and in the wrong place. The starting point of this analysis is that, without further justification, it is simply not good enough to cite majority opinion in matters of personal welfare which affect no-one but the individual concerned.

But what if the individual him or herself acknowledges that they ‘made a mistake’ - again, with none of the potential criteria for reasoning failure satisfied? How are we to deal with such a possibility? Perhaps a good example involves the purchase of an expensive item of clothing. An intelligent person under no stress, who had taken many such decisions before, who spent a considerable time reflecting on the decision and who was clearly not acting under ‘weakness of will’, might still acknowledge only a few days later that the item of clothing was monstrously ill-suited to them and never wear it again.

This example illustrates that the list above is not exhaustive of possible conditions for reasoning failure, but merely outlines those for which some kind of rationale has hitherto been established. People can ‘make mistakes’ for reasons as yet unknown, or perhaps simply as a result of the mysteries of ‘free’ will.<sup>7</sup> But classifying acknowledged sources of reasoning failure is undertaken precisely in order to make progress toward justifying state intervention on a coherent and defensible basis. The fact that other, as yet poorly understood, reasons for sub-optimal reasoning probably exist, does not invalidate working toward justifications for state intervention to correct those which are already well established.

One final comment on the classification above. Failures of reasoning may also be separated into two general categories: those pertaining to *judgments* about the appropriate course of action and those relating to the actual *choices* made to achieve a given objective. Another way of distinguishing the two would be to refer to the former as theoretical reasoning and the latter as practical reasoning. In terms of the categories above, ‘technical inability’ is an example of a failure of reasoning in relation to judgment (because the individual cannot adequately ‘compute’ the information available) and ‘weakness of the will’ is an example of a failure of reasoning in relation to choice (the individual makes a good judgment as to what is necessary to optimise their

welfare but still chooses to take a different course of action). The interpretation of ‘reasoning failure’ followed in this paper is therefore broadly conceived and includes both types.

The central point of the preceding discussion is that the categories listed above imply only some ‘moral space’ (Kleinig, 1983, p.74) for paternalism. That is, they provide some reasons for believing that the state has the *potential* for improving the welfare of individuals by virtue of the fact that left to their own devices they may fail to maximise it on their own. But evidence of reasoning failure does not by itself justify that state intervention. Establishing what *might* constitute a reasonable justification is the subject of the concluding section.

### **Justifiable paternalism**

As we have suggested already, a weakness of the existing literature is that a significant amount of effort has been expended in suggesting why and how we might fail to act in a ‘rational’ manner and thereby fail to make decisions which maximise our welfare, even under perfect market exchange conditions. But there is very little discussion as to why the state should in principle make these decisions *better* than individuals.<sup>8</sup> Occasionally some hint is made at this problem, such as Dworkin’s reference to the ‘resources of ignorance, ill-will, and stupidity available to the lawmakers of a society’. But Dworkin goes on merely to suggest utmost caution in the state acting paternalistically, arguing that the burden of proof should be with authorities to demonstrate ‘the exact nature of the harmful effects (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence’ (Dworkin, 1979). This seems to leave the question open - *why* should the state know better the appropriate balance of costs (price and personal) and benefits to impose on an individual than the individual himself?

The burden of proof falls squarely on the paternalist. Ever since Mill’s classic exposition of the liberal position it has been widely accepted in western democracies (and now increasingly in the former communist states) that the individual is, in general, the best judge of his or her own welfare and that interference in individual autonomy must be subject to rigorous justification. The position is based on a two-pronged case, derived from Mill’s *On Liberty* and subsequently forming the basis of the classic texts of individualism such as Friedman (1962) and Nozick (1974) on the free-market right, but also those of liberals more sympathetic to the state such as



Dworkin (Dworkin, 1989) and Hart (Hart, 1963), and others who have specifically focused their attention on paternalism (VanDeVeer, 1986).

First, the utilitarian or consequentialist approach emphasises that the individual knows best his or her preferences, how they are ranked and how to make choices so as to realise them. It is the individual's valuation of these preferences which matter (not others'), and so the best way of maximising individual satisfaction, or happiness, is to not interfere with how these choices are made. The approach is normative to the extent that it is based on a judgement that maximising utility is morally justified, and empirical to the extent that the individual is best able to achieve it.

The second prong is deontological, and asserts that freedom to make choices has intrinsic as well as consequentialist elements (Sen, 1988). It is not just that the individual is best able to maximise utility, but that exercising choice is important in itself. This may be for reasons relating to fundamentalist views on property rights, as with Nozick, or because making choices allows us to exercise our 'moral muscles' (Feinberg, 1986), or because the ability to choose is essential to human dignity and the ability to be self-sufficient (Bell, Butler, Marsland and Pirie, 1994).

Whichever, these justifications do not make direct reference to utility maximisation. The combined force of this two-pronged case is that the state must demonstrate why it should know better than the individual what his or her 'true' preferences are so as to maximise welfare, and that this improvement is sufficiently significant that it compensates for the damage to deontological concepts of individual rights and autonomy<sup>9</sup>.

There has been at least one attempt in the literature to justify state intervention of this kind which goes some way to justifying state action (Brennan, 1990). The theory is offered in the context of an attempt to solve the paradox of individual voting activity, which the public choice school of political theorists have long argued cannot provide direct benefits to the individual which adequately cover the costs involved in voting (Downs, 1957). Public choice theorists have argued that there must be some positive utility in the act of voting quite apart from the expected benefits in terms of political outcomes. Brennan suggests that a single voter realises that voting for *x* rather than *y* does not mean that *y* will not be the outcome (because many others may vote for *y*). So, the voter reasons, voting is not an activity which is useful for pursuing narrow self-interest (because it is so unlikely to make any difference). Instead, voters may vote for governments

which they would not directly support if their immediate self-interest were at stake and their vote were decisive. Such governments might be those which promote merit goods - such as compulsory pensions - which in a free market an individual might forego in order to satisfy immediate hedonistic gratification. Voting, Brennan argues, is analogous to cheering at a football match - it is an expression of support rather than an act with any decisive influence. The 'support' is for paternalistic actions which the voter knows are in his best interests, but suspects he would not be able to will himself to undertake without state 'help'. Thus the theory neatly 'justifies' paternalistic interventions, whilst explaining voter behaviour within a public choice model.

This model improves on many of the so-called 'justifications' for paternalism by offering a rationale for the state doing better than the individual. It is based on the state responding to an (implicit) request by the individual through voting behaviour. The state has a monopoly of legal coercion in liberal societies, and the individual is making use of this coercion to restrain his or her own actions. The paternalism is justified because it has the 'consent' of the individual.

However, the state might be thought to be a better decision-maker than the individual in some circumstances, regardless of whether consent is considered to play a part. This is not to say that consent is unimportant, but merely to emphasise that even if we believe that some form of hypothetical consent has been given, we still require good reasons as to why the state will actually succeed in superior decision-making. So we must outline some further possible reasons why the state might be thought to be a better judge of individuals' interests than the individual, which do not simply rely on some form of hypothetical consent. What follows is an attempt to outline a systematic classification of ways in which the state is inherently better able to take certain kinds of decision than the individual.

First, the state could be argued to be more *impartial*, or 'phlegmatic', than an individual. This justification relates to the 'weakness of will' and 'emotional' categories of failure of rationality listed above. Unlike individuals, the state is not swayed by immediate gratification (Goodin, 1995). The choice between a luxurious holiday now and provision for retirement in the future does not involve a difficulty of *temptation* for the state. It can consider the evidence of decisions made by a large number of individuals who do take out insurance, and on the experience of those

people who may regret not doing so. Because it is not swayed by difficulties of weakness of the will, the state may be in the best position to judge that the minority who would otherwise choose to forgo the long-term benefit should be compelled to provide for their future.

Clearly public officials are confronted with temptation to abuse or further their own interests. Apart from the obvious opportunity for corruption - receiving 'kickbacks' in return for the granting of lucrative government contracts is the clearest example - state agencies may be tempted to maximise their budgets for the sake of prestige and kudos rather than to further the public interest. However, the point in this context is that they do not suffer from temptation in relation to the particular form of immediate gratification faced by the citizen, when they make certain decisions on the citizen's behalf. The public official may be in an advantageous position whenever the good in question involves a significantly delayed 'payoff', i.e. its benefits accrue at some point in the future, such as pensions, health care and education.

Second, the state could be argued to have a wider *perspective* than individuals. This relates to the 'lack of experience' failure of rationality noted above. In its position of ultimate responsibility for the welfare of its citizens the state will typically respond when claims are made on it by those in severe hardship. For example, people in ill-health will present to the NHS in the UK. This ill-health and death may be the result of some aspect of personal behaviour such as not wearing a seat-belt. The state and its employees are presented with the consequences of this kind of behaviour in a way that many individuals will not be (or not until it is too late). Although public employees have not necessarily *experienced* being in a car crash without a seat belt - no-one but the unfortunate crash victim can claim that - they are in a position which makes it possible to empathise more accurately with this unfortunate experience than the car driver who has never suffered an accident. The state is therefore in a better position to make a judgement on the prudence of seat belt wearing than those simply presented with information on abstract possibilities.

It is not that the costs of rescuing individuals who fail to wear seat belts fall on the state, thus providing an incentive for the state to coerce them into doing so (after all, a consistent state which opposed paternalistic policies would *not* rescue and pay for the individual's treatment). This particular justification rests on a belief that the state is actually in a better position to weigh up the

costs and benefits (of not wearing a seat belt) than an individual who at any point in time will only see one side of the picture.

Finally, the state is at an advantage in being able to dedicate *able people* to consider certain questions, if necessary over long periods of time. This justification relates to the ‘technical inability’ failure of rationality noted above. Thus, where a decision is subject to particularly complex, technical or large scale information difficulties, the state has the resources to employ those best able to devote themselves to the problem full-time. For example, in the case of airline safety there may be only a few people who are technically able to assess what would be the outcome of certain standards of safety specification; the rest of us could simply never make more than a guess. Clearly, the ‘state’ will need to make a judgement which then applies to everyone - in this case on the particular level of safety which is deemed a minimum acceptable. This would not be what everyone would choose, given different degrees of risk-aversion. But it seems reasonable under conditions of complex information that by removing the possibility of significantly mistaken calculation of risk, welfare will be improved by state paternalism. Note that this is not simply a matter of ‘imperfect’ information and therefore a question of market failure. Simply ensuring that all the relevant details relating to safety were made public to all potential consumers, and monitoring the information for its accuracy, would not be sufficient. The ordinary consumer would simply not be able to assess the implications of this information even if he or she had unlimited time in which to scrutinise it.

Where decisions based on probabilities or statistical assessments are concerned, even when the nature of the decision appears to be of no great complexity, people very often make erroneous judgements. Again, the information provided to citizens may be ‘perfect’ - they need no extra or qualitatively improved information - but the experimental evidence suggests that individuals commonly display inadequate reasoning power to make the correct calculations (Tversky and Kahneman, 1982).

So the state, via the actions of its public officials, may have an advantage over the ‘private’ citizen in judging what is in that individual’s best interests in the following circumstances: when there is significant temptation to satisfy immediate wants above those with long-term benefits; when the individual is not likely to have had first hand experience of the consequence of a

decision; and where an unusual degree of technical expertise is required. Some goods and services seem to be particularly problematic with reference to these conditions:

- \* goods or services with long-term rather than immediate effects (which require *phlegmatic* decision-making, such as providing for one's pension in old age);
- \* goods or services for which there is a small chance of seriously harmful consequences occurring for any one individual (which require a wide *perspective*, such as wearing a seat belt);
- \* goods or services which involve complex or large quantities of information to be processed before a judgement is possible on the likely impact on welfare (which require *technical ability*, such as assessing airline safety standards).

Goods which satisfy more than one of these characteristics may provide a particularly strong case for paternalistic intervention by the state. Providing for health care services is a case in point. The first two categories clearly apply: buying health insurance provides delayed welfare for an occurrence which is relatively unlikely but has extremely serious consequences. Thus, the state is justified in compelling some form of health insurance.<sup>10</sup>

There are at least two sets of criticisms of this approach to justifying paternalistic state intervention. The first asks: why the state and not some other organisation or individual? Why is it that other institutions, such as unions or family members and friends, are not able to undertake this role? They certainly seem to act in a paternalistic fashion in many cases. An individual can hide the keys of his brother's car because he thinks he is too tired to drive. A health farm can withhold certain items of food from what is on offer in its restaurant. Trade unions and employers can agree that anyone who works at a firm must be a member of the union. An insurer may require that a seat belt is worn (in the absence of a legal requirement) for the insurance to be valid. Some of these agencies display the characteristics described above for the state. Others, particularly friends and family, may have a more intimate knowledge of the paternalised individual.

These acts of 'paternalism', however, are constrained by the need to acquire a degree of consent from the individual concerned. A visitor to the health farm can leave at any time; the driver can seek another insurer who charges a higher premium but does not require seat belt use. In these cases, an individual can place him or herself in a situation in which he or she is subject to certain constraints or inconveniences (it may be expensive to leave the health farm before one's stay is complete or to pay the higher premium), but there is no compulsion to act in a certain way. Legitimacy is also weak for the brother hiding the car keys: it may be theft to act in this way. Where there *is* real formal authority - as with the closed shop - it is questionable whether the good of a particular sectional interest constitutes paternalism. *Other* individuals might suffer in welfare terms, because the union has bidden up real wage rates and restricted employment.

So in all these examples, there is either 'past, present or immediately forthcoming consent', or the action is illegitimate, or it is not true paternalism. Paternalism is possible for non-state agencies but is limited in its scope. Only the state has a monopoly of legitimate coercive power. If interference in the decision-making autonomy of an individual is necessary to increase welfare, then state action is the only means to *ensure* its application. Furthermore, since such interferences are inherently controversial it is important that they are debated publicly and that those enforcing the interference are publicly accountable. Simply allowing one individual to impose their will on another allows scope for abuse.

A second set of criticisms of the approach described above is that it paints an unrealistically sanguine picture of the motivation of the state and its agents. The state as portrayed here is an effortlessly neutral institution, with nothing other than the good of its citizens to complicate the decisions it makes. This is certainly simplistic, and ignores the criticisms of the public choice school (McLean, 1987) and in particular those of Niskanen (1971) who argued that the 'selfish' motivations of those who worked in the state would in general mean that state agencies over-provide services and try to maximise budgets. Such theories, which have gained much credibility over the last twenty years, clearly throw doubt on the above model, because a paternalistic policy might simply be a means of budget maximisation rather than a genuine attempt to improve welfare. However, the objective of this paper has been to discuss the *potential* for the state to act in a justifiably paternalistic way; the intention has been to establish why in certain

circumstances the state has particular characteristics which might enable it to make decisions better than an individual. Other problems of state intervention do, of course, remain.

## **Conclusion**

The central argument of this paper has been that existing 'justifications' for paternalistic policies have not adequately established why the state should be *more* successful than the individual in promoting the individual's welfare, even when it is accepted that reasoning ability is significantly less than optimal. A number of characteristics of the state were described which suggest that in certain circumstances the state is indeed better placed than the individual, and that for certain classes of good there is a *prima facie* case for paternalistic intervention. The aim has been to offer a more robust justification for such interventions than has been previously provided.

Paternalism will remain controversial nevertheless. One of the paradoxes of any discussion of paternalism is that in a democracy all actions of the state have ultimately to be approved by the people, and yet one of the conditions of a paternalistic act is that it is not sanctioned by the individual for whom the act is supposed to benefit at the time of the intervention. This contrasts with acts to correct market failure, particularly those which provide public goods such as national defence, which may be supported with some degree of unanimity by people who clearly recognise that the only way to achieve the appropriate production of certain goods at appropriate levels is for the state to act to secure them in a collective manner. They consent to compulsion on the basis that for the benefit to be secured a large number of people must be compelled to act in a certain way. 'True' paternalism, on the other hand, necessarily requires an absence of immediate consent. No-one within a liberal democratic framework, however, would support a despotic form of paternalism which disregards the consent of the people at all times, whether benevolently disposed or not. It is important to acknowledge that the benefits of paternalism must be accepted by the electorate, and therefore by those subject to paternalism, at some point - in other words, there has to be a form of 'future' (Kleinig, 1983) consent to the paternalistic action. Of course this will still only be a majority decision, and some individuals may never provide any kind of consent.

This last point reminds us of a fundamental objection to paternalism made by libertarians. To have a meddling state interfering merely because it can devote able people to a problem or because it has a wider perspective on the benefits to be gained from certain goods is unwarranted, regardless of the consequences. In short, the intervention of the state, simply by virtue of that intervention, causes more harm than the increase in utility instrumentally obtained. People simply *cannot* have their lives improved by state action, because state action is bad - period.

Ultimately this type of case cannot be refuted; it is a matter of belief. Most people, however, have a more pragmatic view of the sanctity or otherwise of individual decision-making. We may agree that the individual is best placed to decide on his or her welfare in most circumstances. But we also recognise that we can be mistaken, and that the freedom to be wrong and make mistakes is not without cost. Inflexible and absolutist theoretical dogma is unhelpful in the real world. Individual citizens are fallible. On occasion, and in particular circumstances, the state may be less so.



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<sup>1</sup> Or when specifically concerned with state action, 'legal paternalism' (Feinberg, 1983)

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<sup>2</sup> This third element may be superfluous for a definition of legal paternalism. Laws apply to populations rather than individuals, and an individual cannot meaningfully consent to a law at the time of its enforcement - the law applies whether they consent or not. On the other hand, if everyone consented to a law at all times, in the sense of never wishing to contravene its strictures, then the law would be redundant. So it is reasonable to assume that if a law is deemed necessary, and satisfies the first two criteria, then it will always satisfy the third criterion for some individuals at least.

<sup>3</sup> There are many important variants of paternalism, including 'soft' and 'hard' paternalism. The distinction is based on the degree to which the individual concerned is considered to be acting voluntarily. If someone is mentally handicapped or mentally ill, under the influence of drugs, or subject to extreme forms of coercion, then those who support the harm principle will often submit that interfering in the self-regarding actions of these 'non-voluntary' individuals is justified on the basis that the decision is not really their own. The harm is exogenous to the individual. Hard or strong paternalism, on the other hand, relies on justifying an intervention *even though* the individual is in full control of their mental faculties, has good information relating to the decision to be made, and is not being unduly pressured or coerced in any way. It is hard paternalism with which this paper is concerned. In fact, weak/soft paternalism has been argued by Feinberg as better described as 'soft anti-paternalism' and by Beauchamp as 'nothing to do with paternalism'.

<sup>4</sup> However, in both these cases there will be the opportunity to inform the swimmer and the walker, after they have been apprehended, of the unsafe nature of the tides and the bridge. If they persist in wishing to continue with their activities, in spite of the danger, and were still prevented, then this is indeed paternalistic. The public official would then be making a judgement about the walker's mental faculties, concluding that he or she did not really know what was in their best interest.

<sup>5</sup> Indeed, when an individual is in circumstances where there are very little information about what course of action to take - such as a trapped pot-holer or kidnapped hostages - it is often observed that these individuals act with extraordinary mental clarity. Their minds work extremely well with limited distractions, and maximise their chances of survival. This should be contrasted with someone overloaded with information - in the middle of a very busy and boisterous crowd, for example - where the consequence could be to panic.

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<sup>6</sup> It should be noted, however, that such individuals do not necessarily seek to be restrained from temptation. State intervention would still be paternalistic in these examples because the individuals concerned would not necessarily welcome being compelled to take the 'correct' action at the time, although in retrospect they might consent that the intervention was justified.

<sup>7</sup> Another possibility is that 'evil' exists: that an individual's scale of values, even when directed at him or herself, are plain wrong in some metaphysical sense. This particular possibility goes well beyond the bounds of this paper.

<sup>8</sup> for example, see Hart 1963, p.33

<sup>9</sup> More generally, any justification for paternalism implies a rejection of the revealed preference tradition - where individual welfare is defined in terms of choice - and instead an acceptance that the identity of the agent best able to make a judgement on welfare as an essentially empirical matter, allowing a potential role for the state.

<sup>10</sup> There is also the problem of highly technical and complex medical information, often involving probabilities, being hard to process. This requires technical 'experts' (doctors) to assist in making these decisions. Given the power this offers the doctor in controlling the consumption decision, there is a case for the state regulating the provision of medical services such that only professionally qualified and controlled clinicians are allowed to practise - thus disallowing the individual from 'taking a chance' with a cheaper doctor.