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Is there a Paradox of a Hayekian Paternalist?

by

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1. Introduction

In recent years, the issue of paternalism and especially the provocative combination “libertarian paternalism” (Sunstein/Thaler 2003) attracted the attention of some scholars still interested in the discipline of Political Economy. The basic intuition or justification of mainstream libertarian paternalism relies on behavioral scientists’ findings that individuals make “wrong” choices – choices that are not the choices they presumably would have made if they were as fully informed, internally consistent, far-sighted etc. – in short: as “rational” as mainstream economics assumes or wants its actors in its models to be.

The growing literature on this issue is mostly about *private* choices based on individual “irrationalities” or “anomalies” that lead individuals to take “wrong” decisions. The call for some sort of “paternalism” as a remedy is thus rather easily made. Still, it has to imply some father-like “third” party that would have to command some comparatively superior knowledge (information and foresight), rationality (coherence) and/or strength of will than the individual taking her individual choices without any kind of third-party involvement (be that laws, regulations, incentives, information or simply well-minded advice). Paternalism aiming beyond mere bilateral fatherly advice takes on forms of *public choice*. Public or collective choices, however, are plagued with at least equally important (but perhaps less equally often experimentally reproduced) “irrationalities”, “anomalies”, “inconsistencies” or the like.

This paper is not, however, directly on a comparison of behavioral shortcomings in the realms of private and public choices¹. And it is not about the proper role of collective “nudges” vis-à-vis private choices². It is mostly about the problem of defining or defending *limits of public choices*, about the ways and justifications of classical liberal “paternalism” in the realm of public, constitutional choice. Although this aspect has been, as far as I can see, somewhat ignored in the present debate on libertarian paternalism, it has an awe-inspiring long history in social philosophy: from Plato to Mill – and in between, and far beyond. In order to make my presentation somewhat more manageable, I here concentrate on one classical liberal thinker of recent times: Friedrich August von Hayek. And even with regard to Hayek’s enormous oeuvre, I have to be extremely selective.

¹ On this issue see, e.g., Wohlgemuth (2005), Caplan (2001) and already Schumpeter (1942/87: 256ff).

² On this issue see, e.g., recent papers by Rizzo/Whitman (2009), Grüne-Yanoff (2009) or Qizilbash (2009).

Is Hayek in some specific, perchance “paradoxical”, way a “classical liberal paternalist”?³ My answer will be an unsatisfying “yes and no” depending not only on my interpretation of Hayek, but also on the manifold interpretations one can give to the concepts of paternalism and classical liberalism (or, indeed: liberty).

The paper is organized as follows: In **part 2**, I present my interpretation of Hayek that only prepares the ground for discussing the issue of “Hayekian paternalism“ by re-constructing Hayek’s account of “modernity”. Here, I hint at a first potential paradox in the form of a “magic triangle” composed of (2a) Hayek’s praise and explanation of the evolutionary emergence of the spontaneous order of the market and civil society, (2b) Hayek’s fierce opposition to modernist thinking and the fatal conceit of rationalist constructivism and (2c) Hayek’s gloomy visions of politics, legislation, or public choice.

This “magic triangle” in Hayek’s thought would already deserve an essay on its own⁴. In this paper, I want to open new vistas on possibly interesting Public Choice and Constitutional Political Economy issues by confronting in **part 3** various dimensions of paternalism and in **part 4** Hayek’s view of classical liberalism. In **part 5**, I offer a brief account of behavioral “anomalies” of public choices that are analogous to, and even more harmful than, those used as legitimizations of “libertarian paternalism” in the private realm. In **part 6** I try to put these perspectives together and provide some hypothetical claims as to if and how Hayek might be called a (classical liberal) “paternalist”. **Part 7** concludes with a short summary.

2. Hayek and modernity: a “magic triangle”

One can distinguish three dimensions of modernity in a wider sense that Hayek addresses in his oeuvre: (a) the “extended”, “spontaneous” order of society as a result of “cultural evolution” that, according to Hayek, represents the *basic constellation of modern times*; (b) the “abuse of reason” as a consequence of “constructivist rationalism” that is also a characteristic trait of modern times – a *modernist intellectual attitude* that Hayek finds to be systematically at odds with the preconditions of a free and evolving modern society; finally (c) the *contemporary state of affairs and public choices* that is heavily criticized by Hayek – who sees wrong ideas, vested interests and constitutional shortcomings of an unrestricted democracy at work that might ultimately lead to the destruction of free civilization.

These three lines of argument are intertwined and can lead to very different readings of Hayek: at times, he appears to be an evolutionary optimist amazed at the “marvel” of modern civilization (Hayek 1945/48: 87); at the same time one can find in Hayek the cultural pessimist who sees modern society on the “road to serfdom” (Hayek 1944). At times, his views strike one as conservative and anti-rationalistic; at times as rather modernist and reformist. Before one rushes to the conclusion of some sort of inconsistency or “paradox” in Hayek’s threefold assessment of modernity, let me present a short account of the three corners in the “magic” triangle.

³ On this specific issue, see also Zintl (1983) and Wegner (2008).

⁴ Which I have tried, in German: Wohlgemuth (2010).

2.1 Hayek on the evolution of free civilizations: the basic constellation of modern times

Hayek avoids the term “modernity” and prefers terms such as “extended order”, “spontaneous order”, “abstract order”, “polycentric order”, “pluralist society”, “Great Society”, “macro society”, “cosmos” or “free civilization”. With these terms, the basic categories differentiating pre-modern and modern times are already mentioned (but not yet explained): from the small group (tribe, community) to the extended order (society); from planned orders (organization) to unplanned, spontaneous, orders; from the closed to the open society etc.

Hayek tries to explain and reconstruct this process in parts historically (or rather: by means of “conjectural history”, Hayek 1988: 69) but mostly based on his theory of cultural evolution towards more and more extended abstract social relations governed by more and more universalisable rules and norms of behavior. It is important to keep in mind that Hayek, while maintaining the abstract logic of Darwinian evolution (variation, selection and re-stabilization), sharply distances himself from central elements of “Social Darwinism”. In order to understand “cultural evolution” according to Hayek it is first necessary to know his definition of “culture”: “*Culture is neither natural nor artificial, neither genetically transmitted nor rationally designed.* It is a tradition of learnt rules of conduct which have never been ‘invented’ and whose functions the acting individuals usually do not understand” (Hayek 1979: 155)⁵. Thus, the process of cultural evolution is rather “Lamarckian” (Hayek 1988: 25) and takes place in a third dimension “between instinct and reason” (Hayek 1988, ch.1). Modern, extended, societies have “largely arisen, not by design, but by the prevailing of the more effective institutions in a process of competition” (Hayek 1979: 154f). The free, extended order is thus the “result of winnowing or sifting, directed by the differential advantages gained by groups from practices adopted for some unknown and perhaps purely accidental reasons” (ibid: 155).

For the purpose of this paper it is not needed to go much deeper into methodological details of Hayek’s sometimes ambiguous and ill-defined account of “cultural evolution”⁶. It remains more important to refer to (a) the characteristics of the practices or institutions that, according to Hayek, assisted groups and/or individuals in their development of/within extended, abstract orders of modern civilization and (b) their relation to human preferences, desires and opinions.

Cultural evolution, according to Hayek, made necessary the adoption of practices, rules, and morals that allowed more and more productive factors and partners to transactions to be integrated into a system of division of labor and of knowledge. If more individuals with different abilities, interests and beliefs were to be thus integrated, the rules governing their

⁵ All italics in quotations are originals, none have been added.

⁶ See, e.g., the debate on the methodological status and logical coherence of Hayek’s idea of “group-selection” between Vanberg (1986) and Hodgson (1991). Especially when one takes methodological individualism seriously (as Hayek does in other writings), Hayek fails to explain why individuals in Prisoner-Dilemma-like situations should adopt and comply with practices that serve the prospects of the collective group, but harm each single individual viewed as a single actor (s.a. Witt 1994). There is also debate on whether Hayek ultimately provides a tautological explanation of Panglossian worlds (e.g. Whitman 1998 versus Denis 2002).

cooperation had to become more abstract and turn from prescriptive, purpose-oriented rules of “taxis” towards “nomos” – a system of law and morality that Hayek, quite Kantian, described as “universalisable rules of just conduct” (Hayek 1976: 27ff). These rules implied a break away from the morals of pre-modern societies and of solidarity-governed small groups in at least three dimensions: (a) they are independent of concrete common purposes, (b) they apply equally to everyone (irrespective of rank or merit) and (c) they mostly take the form of proscriptions (and not prescriptions, duties or orders). Thus, “nomos” allows for the individual pursuits of increasingly pluralistic interests and purposes to be coordinated and at the same time it remains tolerant towards innovative modes of behavior under the rule of one law applicable equally to all. By disassociating property rights first from common use and then from feudal privilege and by extending the size of the market, not only “negative freedom” was granted, but also “positive”, material freedom was enhanced. The more societies were able (or: forced) to “learn” to accept and apply “more effective institutions” of “nomos”, the more they were able to nourish a growing population and satisfy growing demands on a living standard that was once either unavailable to all or remained the privilege of a few.

At this point, it becomes important to note that, according to Hayek, the beneficiary consequences of such rules were not only something that “acting individuals usually do not understand” or that they adopted them “for some unknown and perhaps purely accidental reasons” (cited above). Modern civilization was not just the result of trial and error and not human design; it was (and still is) the result of a process that was neither driven by consent nor, at first, by the present preferences of those exposed to it. Hayek (1979: 168) goes as far as assuming that: “*Man has been civilized very much against his wishes*”. This very idea will deserve some closer scrutiny later (6.1), since it might qualify as a rather “hard” version of paternalism – also since, to Hayek, this “strain of civilization” (Popper 1945/66: 199ff) is not just a thing of the past: it still lingers on in present times. Modernity might have (in large parts of the world) accepted private property, the rule of law, and the market economy as basic rules of the game. But even modern man is, presently, still “civilized against his wishes”. As Hayek (1988: 18) puts it with a great dose of empathy: “Part of our present difficulty is that we must constantly adjust our thoughts and our emotions, in order to live simultaneously within different kinds of orders according to different rules. If we were to apply the unmodified, uncurbed, rules of the micro-cosmos (i.e., of the small band or troop, or of, say, our families) to the macro-cosmos (our wider civilization), as our instincts and sentimental yearnings often make us wish to do, *we would destroy it*. Yet if we were to always to apply the rules of the extended order to our more intimate groupings, *we would crush them*. So we must learn to live in two sorts of world at once.”

Part of our inherited and present difficulty is thus to make both intellectually and emotionally quite demanding distinctions that would allow us to be at the same time a responsible citizen, a successful market participant, a good friend, a caring parent and a decent human being. Modernity demands some sensibility when addressing the critical (and floating) differences between “macro” and “micro” in order to neither “destroy” the prerequisites of the great, abstract, society – nor to “crush” the potentials of the small, concrete communities. Hayek

focuses on the former danger – that of treating the unplanned, abstract society according to the ambitions and wishes of a planned and concrete community. These “modernist attitudes” will shortly be discussed next.

2.2 Hayek on modernist attitudes: constructivist rationalism

If one defines modernity not in terms of the institutional and moral preconditions of the extended, spontaneous and abstract society just described, but in terms of post-enlightenment social and intellectual attitudes that assume that institutions and practices can only be justified if they have been consciously constructed and voluntarily adopted in the light of rational principles, Hayek is an outspoken opponent to such “modernity”. In his essays on the “errors of constructivism” (Hayek 1970/78) or the “abuse of reason” (Hayek 1952), he definitely rejects this “scientism” or “constructivist rationalism”, especially in its forms of “objectivism”, “collectivism” or “historicism”.

Again, this part of Hayek’s writings would deserve a much more careful investigation. Is Hayek an early post-modernist relativistic thinker?⁷ I think not. In principle, Hayek remains true to the Popperian research paradigm. But he demands from the social sciences that they take the limits of knowledge and rationality seriously, that they try to explain the emergence of rational practices with unplanned spontaneous evolutionary processes and that they should be able to produce at least “pattern-predictions” (Hayek 1964/67) about the comparative performance of alternative institutional problem-solutions. Only if “modernization of society” meant a constructivist act of rebuilding society according to predetermined collective purposes, Hayek tries to fend off this fatal (modernistic) error with scientific (empirical and theoretical) arguments.

The very idea that “anything that which was based merely on tradition and could not be fully justified on rational grounds appeared as an irrational superstition” was, to Hayek an intentionalist error that “found its fullest expression in the conception of the formation of society by social contract, first in Hobbes and then in Rousseau” (Hayek 1973: 10). Hayek’s critique of this rationalistic *Zeitgeist* was that it was unable to recognize and unwilling to accept the third “source of human values” (Hayek 1979: epilogue) – culture and tradition –

⁷ (Post-) Modern minds are quite split on this issue – one of the reasons might be the free-floating meaning of “post-modern”. “Anything goes” – perhaps even in interpreting Hayek. Thus Burczak (2006: 1) interprets Hayek’s theories as “applied epistemological postmodernism” in order to establish, based on a “post-Hayekian” epistemology, a market-friendly “post-Marxism”. Burczak interprets market-processes as consensus-oriented discourse and rejects central planning with its unavoidable coercion and presumption of knowledge. On capital- and labour markets, however, he sees systematic asymmetries of power that contradict notions of “positive freedom” as e.g. defined in Sen’s capability approach. Hence, Burczak recommends democratic “market-socialism” based on (post) Hayekian insights. Horwitz (2007), himself an outspoken libertarian, reviews Burczak in a very favourable way and presents Hayek as a major inspiration for a “post-modernism” characterized by a “deep skepticism about the modernist, mechanistic assumptions that dominate the field”. It may be the dominance of what, already in Hayek’s times, was regarded as “modern” in economics, that many of the most original thinkers amongst American “Austrian” economists consider themselves “post-modern”. Part of this may also be true for the “hermeneutics” or “*verstehende Methode*” that some want to have discovered in Hayek (see Caldwell 2004: 430ff for an overview and critique of this strand).

since it has “made thinkers accept as ‘good’ for a long time only what were either innate or deliberately chosen rules, and to regard all merely grown formations as mere products of accident or caprice” (Hayek 1979: 155). Such an intellectual attitude, Hayek repeatedly argues, prepares the grounds for central planning, legal positivism and totalitarianism.

This does not mean, however, that Hayek calls for quietism or reactionary mysticism – although some tensions remain (see below). He does indeed subscribe to “evolutionary rationalism” which he sees quite in line with Popper’s “critical rationalism”⁸. Not unlike Popper, Hayek issues warnings and points to the unintended but disastrous effects if one tries (with means that ultimately have to become totalitarian) to plan and enforce a “perfect” society of the future (which often means a forced return to the morals of the small community)⁹. Thus, Hayek is neither an ideologically committed progressive nor a romantic conservative¹⁰. He is a classical-liberal in the tradition of the Scottish enlightenment with a tendency towards critical rationalism who remains more skeptical than Popper with regard to the feasibility of political-rational engineering and rather optimistic with regard the potential of spontaneous self-organization and cultural evolution.

2.3. Hayek on Public Choice: the “miscarriage of the democratic ideal”

Again, a chapter on “Hayek and contemporary politics” would afford a separate paper (or: book)¹¹. His political engagements were manifold and sometimes also vacillating. The fundamental problem, as Hayek sees it, is that modern man is now in a situation where there is no longer a “given” law “out there” that has authority by ways of divine origin or tradition: a law that was “found” (and carefully applied by judges). Now, there is legislation – laws are being made and changed at will by legislative bodies that see themselves as originators of legal acts but not as administrators “under the law”. As a consequence, Hayek sees the danger that the delicate balance of unconscious moral rules and successful practices that evolved over centuries of cultural evolution will be undermined by over-ambitious legislative acts. The problem is not only that intellectual attitudes of “constructivistic rationalism” hold sway in an unlimited legislative system. Also in an unlimited democracy, Hayek argues, there are systemic reasons why politicians are forced to undermine the preconditions of free societies. Hence, it is not only wrong ideas or intentions, but also wrong institutions and incentives to which Hayek refers to when deploring the state of contemporary politics¹².

Especially in his book on “The Political Order of Free People” Hayek (1979) repeatedly offers standard Public Choice arguments, e.g., when he points out that politicians, in order to

⁸ See Hayek (1973: 5) and Hayek (1976: 157 [fn 25]) who, in principle, even accepts Popper’s “piecemeal engineering” - Hayek likes the idea of “piecemeal” experimentation but remains skeptical about the prospects of political “engineering” according to reconceived collective purposes.

⁹ See, e.g. Hayek (1976: 144ff).

¹⁰ See Hayek (1960, Postscript) on: “Why I am Not a Conservative”,

¹¹ See, e.g. Gamble (1996) or Leschke (2003).

¹² See, e.g. Hayek (1979: 15 and 1973/78: 108): “we have no right to blame the politicians for doing what they must do in the position in which we have placed themselves” ... „even a statesman wholly devoted to the common interest of all will be under the constant necessity of satisfying special interests, because only thus will he be able to retain the support of a majority which he needs to achieve what is really important to him”.

stay in power, have to please “coalitions of organized interests” (ibid: 13ff) who are mostly minority interests. Inspired by Olson (1965), he describes log-rolling within a “bargaining democracy” that has become the “playball of group interests” (Hayek 1979: 99ff). Hayek thus is not opposing democracy, but the “miscarriage of the democratic ideal” (ibid.: 98). He expresses the ideal based on rather “sober and unsentimental consideration[s]”: to Hayek, democracy is not an end in itself, but merely “a method or procedure for determining governmental decisions”. Still, democracy is “making possible a peaceful change of the holders of power” and thus might remain “our only protection (even if in its present form not a certain one) against tyranny” (ibid: 5).

The distinction between “present form” and “ideal” is also relevant for another aspect of democracy: Hayek sees the merit of democracy not as a method of aggregating “given” preferences, but rather as a “process of forming opinion” (Hayek 1960: 108). Hayek agrees with David Hume (and other proponents of the Scottish enlightenment such as Adam Ferguson) not only on the evolutionary emergence of civil society (see 2.1) or the deep-rooted skepticism towards the abilities of humans to rationally construct an ideal world (see 2.2). He also agrees with Hume’s (1777/1976: 142) verdict that “It is ... on opinion only that government is founded”. The “basic source of social order”, Hayek (1979: 33) argues, “was not a deliberate decision to adopt certain common rules, but the existence among the people of certain opinions of what is right and wrong”. Social order, Hayek claims, depends not on an amalgam of or compromise between the particular will, interests or wishes of individuals and groups, but on common opinions about values and principles. Democratic government requires consent – not about “about the particular facts which might become the object of decisions by government” (ibid: 17) but about “some general rules which guide all particular measures and by which even the majority will abide” – which implies that in many particulars, citizen-voters have to “submit to a disregard of their own wishes” (ibid.).

I will later address this problem when discussing Hayek’s crusade against the principle of “social justice” and his potentially paternalistic attempt to keep distribution largely from the realm of public choices. From the point of view of procedural democracy and critical rationalism Hayek’s views on the “mirage of social justice” (Hayek 1976) have to be acknowledged as very unpopular minority opinions and as always falsifiable theories that would have to prove their merits in competition with alternative views. Hayek was willing to take risks and stand against the tide. After all, he believes that it is, in the end, ideas (opinions, theories) and not interests that shape the future course of social development. This aspect of malleable opinions and of their “rightness” or “wrongness” when they shape collectively binding decisions will become relevant in our later discussion of “Hayekian paternalism”.

2.4 Disentangling Hayek’s “magic triangle”

Let me summarize: Hayek presents (a) a “conjectural history” of the cultural evolution of modern civilization as a “result of human action, but not of human design” (or intention); (b) a fierce rejection of modern intellectualism that aims at collective design and (c) an equally fierce critique of modern institutions of policy-making. Thus, the beneficial evolution of

social norms seems to have been based on different principles of creation and selection than those at work with the evolution of intellectual attitudes or widely shared opinions and thus the institutions and opinions that guide contemporary politics. These seemingly inconsistent or perhaps even paradoxical elements in Hayek's positive and normative views can, I think, be somewhat reconciled by taking into account the different temporal and substantive dimensions of these three aspects of modern times.

In terms of time-dimension, Hayek's theory of cultural evolution is on a very grand scale. Even if Hayek distances himself from the socio-biologists by stressing that, compared to genetic evolution, the "selective evolution of rules and practices" is a "much faster process" (Hayek 1979: 154), the latter still covers centuries if not millennia. The rise of modern civilization, the spontaneous creation and expansion of markets, of private property and of universalisable rules of just behavior has indeed hardly any specific temporal beginning (or end) or any definite location in space. The intellectual attitude of modernist "constructivist rationalism", however, can be much more concretely positioned. As Hayek (e.g. 1952) himself argued, this *Zeitgeist* aspect of modernity gained influence with the advent of French enlightenment and since Descartes (and hence the late 17th century) confuses European's (and later, although tamed, other Western) minds. Hayek's own *Zeitkritik*, again, is directed mostly at contemporary events of the 20th century: at the "Road to Serfdom" (Hayek 1944) taken not only by communist and nationalist régimes, but also by Western social welfare states that emerged after their "miscarriage of the democratic ideal".

To be sure, it does not necessarily imply some sort of "time-inconsistency" if Hayek repeatedly tries to bring these very differently calibrated time dimensions together in his political and socio-philosophical writings. But at the same time, one is often inclined to ask: has cultural evolution come to an end? And if so: why? (Why) had the "intellectuals" really so much power in framing a counter-evolutionary *Zeitgeist*? And: are we really on a "Road to Serfdom" or at least creeping socialism based on "wrong ideas" and misconceived institutions of unlimited democracy?

These are big questions that I am not able to answer. Here, I just want to re-emphasize the potential "magic" of Hayek's triangle: very long-run evolutionarily successful morals and practices; medium-term intellectually influential ideas and attitudes; and short-term politically expedient legislation and regulation: these three rather different dimensions of social life have certainly never completely been in harmony. But often enough they have been at least somewhat. The material contents and temporal horizons certainly are overlapping, but different: cultural evolution took (takes) centuries, political believes following intellectual fashions change(d) over decades¹³ and political programs have four or five years incumbency periods as their benchmark.

¹³ Not all of these intellectual tides have been unfavorable to Hayek. One could read in the Times (1978) that "The third quarter of this century has been described as the age of Keynes ... in terms of the economic problems now facing us, the current period might more accurately be termed the age of Hayek"

As a consequence, there is some problem of non-matching maturities in Hayek's classical liberalism. For some time, "wrong" policies, based on "wrong" ideologies (or just: opinions) could and still can prevail before they are being corrected or discarded by ways of institutional competition¹⁴ or "cultural evolution". But perhaps a Hayekian should not only be able to retrospectively explain the emergence of modern civilization as a "result of human action, but not human design", but also to provide at least a "explanation of the principle" of its present state and perhaps even a "pattern prediction" of its future evolution based on the very same principle of motion?¹⁵

One could try to solve this problem by simply declaring Hayek's process of cultural evolution (based on unconscious learning and mere tinkering with the products of tradition, Hayek 1979: 167) as concluded or obsolete in modern times. Pies (2001: 21, my translation) takes this stand: "This stage of cultural evolution is irrevocably over, since these rules are and can be consciously *made*. Conscious politics outmaneuvers the automatism of cultural evolution of rules. The decisive question is now, in how far politics acts as a functional equivalent for the annulled evolution of rules". Hayek asked himself the very same question – but he remained skeptical and demanded renunciation: "[Man's] continued advance may well depend on his deliberately refraining from exercising controls which are now in his power ... We are not far from the point where the deliberately organized forces of society may destroy those spontaneous forces which have made advance possible" (Hayek 1960:38).

This is just another indication that Hayek demands quite a lot of politicians and citizens: to refrain from exercising the power, the sovereignty and presumed (constructivist) rationality when taking collective choices – because that would be for their own good. A case of blatant paternalism? Before discussing this allegation, let me present a rough sketch of various dimension of paternalism.

3. Kinds of paternalism

Dworkin (2005) defines paternalism as "the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm". This is a good commonsense definition from which to start distinguishing various kinds of paternalism. One can distinguish

(a) the acting paternalist (a state, an individual parent or an individual social scientist etc.);

¹⁴ See Wohlgemuth (2008) for a Hayekian account of institutional competition as a discovery procedure and potentially collective learning device.

¹⁵ See Hayek (1964/67) on the quoted concepts relevant for an evolutionary theory of complex phenomena. Hayek was already quite old and fragile when he witnessed the fall of socialist empires. Also a look at more recent empirical data such as "the index of economic freedom (<http://www.heritage.org/index/>) might have brought him some consolation since probably never in the history of mankind has there been as much freedom and equal opportunity – with the effect of unequalled life-expectancy and quality of life for a record number of humans. The breakdown of socialism and the mostly beneficial breakthrough of globalization, although not marking an "end of history", are still remarkable recent examples for decisive events that were indeed the not the results of intentional political design but of human action taking great advantage of windows of opportunity opened by political reforms.

(b) the “other person” (a citizen as subject to the law or as sovereign voter, as a consumer, as a child, welfare-recipient or imbecile etc.).

These distinctions will become relevant for our discussion of “Hayekian Paternalism”. For the sake of brevity and Public Choice relevance we will here have to concentrate on the role of the social scientist (a1) trying to interfere with the interference of the state (a2) with its citizens in their capacities as both subjects to the law (b1) and, in a democracy, principals of legislation (b2). In order to possibly qualify this interference of an individual (Hayek) as a kind of paternalism, one has to further distinguish (as in all discussions of paternalism):

(c) meanings of “interference” (doing (perhaps even: omitting¹⁶) something such as: recommending, framing, incentivizing, prohibiting or prescribing certain actions),

(d) meanings of “against their will” (will as preferences: short-term or long-term, will as opinions: informed or ill-informed ...)

(e) meanings of “better off” (according to normative standards of the well-meaning interferer or to the normative standards of the “the other person’s will”, as multi-faceted as in (b)).

This table of 5 different dimensions of paternalism with multiple variables in each dimension already becomes somewhat unhandy for this paper’s purpose. And since I do not intend to provide even more subtle sub-categories of paternalism (except for the possibly Hayekian one), I would, at this stage, like to refer to two well-established (and related) distinctions. Dworkin (2005) uses the ends versus means distinction in order to define “weak” versus “strong” paternalism: “A weak paternalist believes that it is legitimate to interfere with the means that agents choose to achieve their ends, if those means are likely to defeat those ends. So if a person really prefers safety to convenience then it is legitimate to force them to wear seatbelts. A strong paternalist believes that people may be mistaken or confused about their ends and it is legitimate to interfere to prevent them from achieving those ends.”

Sunstein/Thaler’s (2003) “libertarian paternalism” is both very weakly and quite strongly “paternalistic” according to Dworkin’s definition. Their “libertarian paternalism” is founded on empirical findings that (a) many individuals do not act rationally when taking actions (deciding on means) that contradict their *given* ends and/or (b) many individuals take actions (means) that contradict their own (well-informed, long-term) *true* ends, interests, values or good¹⁷. Deviations from the Olympic models of revealed preference and expected utility

¹⁶ Dworkin (2005) offers a philosophically consistent, but perhaps over-specified definition of paternalism by adding (in brackets) omission as a kind of interference: “X acts paternalistically towards Y by doing (omitting) Z: Z (or its omission) interferes with the liberty or autonomy of Y. X does so without the consent of Y. X does so just because Z will improve the welfare of Y (where this includes preventing his welfare from diminishing), or in some way promote the interests, values, or good of Y”.

¹⁷ Harsanyi (1982: 55) provided a most clear definition of “a person’s true preferences” as “preferences that he *would* have if he had all the relevant factual information, always reasoned with the greatest possible care, and were in a state of mind most conducive to rational choice”. Similar hypothetical, but still Olympic states of rationality are implied when Sunstein/Thaler (2003: 1162) state that “In some cases individuals make inferior decisions in terms of their own welfare – decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of self-control”.

maximization take many forms such as the lack of clearly defined and coherent preferences, framing effects, endowment effects, weakness of will, time-inconsistency, status-quo bias, availability bias, hyperbolic discounting and many more.

These deviations, the very fact that choices are not “perfect”, provide a first justification for paternalism defined as “attempts to influence the choices of affected parties in a way that will make choosers better off” (Sunstein/Thaler 2003, 1162). In fact, some kind of paternalism becomes “inevitable” (ibid: 1171). If preferences are not fully defined, if framing, endowment, or the status quo affect choices, paternalism in the sense of “influencing choices” is part of human nature and radical anti-paternalism becomes practically impossible (ibid.: 1163). The only question that remains is about the means that the paternalist wants to apply¹⁸. Hence, there are two candidates for paternalistic intervention: (a) the formation of (orderings of) preferences and/or (b) the pursuit of these preferences. Even if I cannot, in this paper, compare all dimensions of paternalism with all dimensions of Hayek’s liberalism, I will at least be able to hint at some connections.

4. Hayek’s liberalism

The case of “Hayekian paternalism” is interesting and challenging, since it offers no easy-way-out, clear-cut ideological answers. A Hayekian stance precludes both, (a) the anarcho-libertarian defiance of any state interference with private choices by ways of universal proscription and (b) the welfare-statist “tutelage” (Hayek 1960: 78) and prescriptions of how to better live one’s life. This leaves many potentially “Hayek-proof” aspects of classical paternalism (widely conceived) in the extensive middle.

4.1 Individual choices and state coercion

When it comes to Hayek’s own definition of personal liberty as the absence of coercion and the ensuing ability to live one’s own life according to one’s own will (ability to pursue one’s own ends based on one’s own knowledge and one’s own moral compass), strong (coercive) paternalism certainly is the opposite of Hayekian liberalism. Although Hayek (1960: 145) holds that Mill’s “harm principle” based on a distinction between actions that affect only the acting person and those which also affect others “has not proved very helpful”¹⁹, he comes to a similar conclusion: “the mere dislike of what is being done by others, or even the knowledge

¹⁸ See Qizilbash (2009: 19) for a good summary of the logic of “libertarian paternalism”: “if interference in peoples’ preferences is ‘inevitable’, then we ought to favor forms of interference which promote welfare. That makes their position ‘paternalistic’. The second aspect is the claim that interference in peoples’ choices is only advocated when it does not block freedom to choose. This makes the paternalism they are discussing ‘libertarian’”.

¹⁹ The simple reason is that “there is hardly any action that may not be conceivably affect others” (ibid.). Indeed, if, e.g. negative “pecuniary externalities” that are a natural consequence of innovation and competition would legally be regarded as “harm”, Hayek’s “cosmos” would collapse. However Hayek might be somewhat unfair to Mill who clearly acknowledges that “society admits no right, either legal or moral, in the disappointed competitors, to immunity of this kind of suffering; and feels called upon to interfere, only when means of success have been employed which it is contrary to the general interest to admit – namely, fraud or treachery, and force” (Mill 1857/1994:163).

that others harm themselves by what they do, provides no legitimate ground for coercion” (ibid.). The legitimate ground is defined as follows: “freedom demands no more than that coercion and violence, fraud and deception be prevented, except for the use of coercion by government for the sole purpose of enforcing known rules intended to secure the best conditions under which the individual may give his activities a coherent, rational pattern” (ibid.: 144). Sunstein/Thaler (2003) may use this second part of the latter quote to even put Hayek on their list of “libertarian paternalists” who only want to secure better conditions that could serve the individual to overcome incoherent, irrational patterns in her activities. But that would be putting Hayek out of context.

Against even soft, libertarian, versions of paternalism one can not only bring up the rather practical aspects of the Hayekian “knowledge problem”²⁰ or specific Public Choice dynamics²¹. Hayek’s basic definition of individual freedom defies any qualification based on a comparison with a perfectly rational or coherent model of *homo oeconomicus*. Hayek is quite clear on this: “Whether he is free or not does not depend on the range of choice but on whether he can expect to shape his course of action in accordance with his present intentions, or whether somebody else has the power so to manipulate the conditions as to make him act according to that person’s will rather than his own” (Hayek 1960: 13). When discussing the issue of “inner freedom” and “freedom of the will”, Hayek does, as a Humeian scepticist has to, acknowledge that individuals are often under the “influence of temporary emotions, or moral or intellectual weaknesses” and that “ignorance or superstition prevents people from doing what they would do if there were better informed” (ibid.: 15). And he does see a connection since “‘inner freedom’” and ‘freedom’ in the sense of absence of coercion will together define how much use a person can make of his knowledge and opportunities” (ibid.). Still, Hayek insists that whether “a person is able to choose intelligently between alternatives ... is a problem distinct from whether or not other people will impose their will upon him” (ibid.).

As I read Hayek, governmental coercion has to refrain from any prescriptions on how to choose and has to be strictly confined to a “merely negative” concept of liberty which “becomes positive only through what we make of it” and “does not assure us of any particular opportunities, but leaves it to us to decide what use we shall make of the circumstances in which we find ourselves” (ibid.: 19). Even if paternalist care can thus provide no proper justification of government coercion²², other actors do play a role in individuals’ decisions on how “to make use of the circumstances”. This aspect will now be addressed.

²⁰ See Rizzo/Whitmann (2009) for a negative answer on their question “do policymakers have access to the knowledge needed to implement welfare-improving paternalist policies?” (ibid.: 104) and for a detailed and mostly convincing account of the knowledge problems involved when implementing libertarian paternalism in its own claimed areas such as sin taxes, default enrollments in savings plans, cooling-off periods, risk narratives or employer-friendly labor contracts.

²¹ See, e.g., Glaser (2006).

²² See also Hayek (1960: 21) in a very Kantian way: “Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another”

4.2 Individual choices and the attribution of responsibility

Hayek is, as libertarian paternalists seem to be, most concerned that people make the best use of their abilities. However, Hayek' seems more concerned about the *social* benefits of that use than the individual well-being of the acting individual herself. The following passage deserves to be quoted at some length:

“Though we leave people to decide for themselves because they are, as a rule, in the best position to know the circumstances that surround their action, we are also concerned that conditions should permit them to use their knowledge to the best effect. If we allow men freedom because we presume them to be reasonable beings, we also must make it worth their while to act as reasonable beings by letting them bear the consequences of their decisions. This does not mean that a man will always be the best judge of his interests; it means merely that we can never be sure who knows them better than he and that we wish to make full use of the capacities of all those who may have something to contribute to the common effort of making our environment serve human purposes” (Hayek 1960: 76).

This view seems to imply that some subtle, perhaps paternalist, concern is at least admitted and might justify some sort of intervention creating circumstances that would incentivize the actors to make best use of these very circumstances – not only (and even: not before most) for their own good, but for the good of society. In a way, this is indeed what Hayek has in mind. And he refers to two “incentivizers”: legal liability and social esteem. “Liberty not only means that the individual has both the opportunity and the burden of choice; it also means that he must bear the consequences of his actions and will receive praise or blame for them (ibid.: 71). Exactly by insisting on the necessary connection between freedom and responsibility – the assumed absence of which hard-core deniers of “freedom of will” would use as justification of their paternalism –, Hayek wants people to make the best use of their abilities.

One linkage between the use of freedom and the bearing of consequences is legally and thus coercively defined by the rules of private and common law of contract, property and liability. The other source, “praise and blame”, is definitively of another nature but at least equally important to Hayek (1960: 74): “reasoning and argument, persuasion or censure, or the expectation of praise or blame, are really among the most important factors determining the personality and through it the particular action of the individual”. Both legal obligation and social blame, according to Hayek, ought to guide a person's response to, and effective use of, circumstances by assigning personal responsibility. And both, the legal or social “statement that a person is responsible for what he does aims at making his actions different from what they would be if he did believe it to be true” (ibid.: 75) and should “on the whole, ... influence men in certain positions in a desirable direction”.

Again, the very idea that “the aim of assigning responsibility [to a person] is to make him different from what he is or might be” (ibid.: 74) could be interpreted as either a violently paternalistic disrespect of the person's “given” personality and preferences or as a vindication of “libertarian paternalists” quest to turn the person from what she is (irrational, short-sighted etc.) to what she might be (for her own good). But clearly, Hayek's discussion of liberty and

responsibility is on a very different level (also, I might add, of philosophical subtlety). And Hayek does not very much care about how X (paternalist) can help or “nudge” Y (plagued by anomalies) in order to improve the welfare of Y herself. Hayek cares about how all Ys can be induced by all Ys’ praise or blame and/or by laws applicable to all Ys to promote the welfare of all Ys. This raises the question of how (in addition and in response to the moral traditions of praise and blame), collective choices can be organized so as to promote the welfare of all Ys.

4.3 Collective choices and self-binding commitments

It has been insinuated above and will be argued below that the strongest claim for “a Hayekian paternalism” (widely defined) can be made not so much based on his definition of liberty or liberalism regarding private choices of sane adult individuals, but when it comes to *public* choices of democratic legislatures. Much of Hayek’s views in this respect have already been reported. Obviously Hayek is no “laissez-faire” libertarian. This is already true for his view of the market order of actions, the beneficial workings of which Hayek not only attributes to the “marvel” of the price mechanism (Hayek 1945/48: 87) that helps coordinate individual plans and communicate local knowledge. The collectively beneficial results of the spontaneous order of “catallaxy” crucially depend on “nomos”, the definition of universalisable rules of just behavior, the delimitation of property rights, the legal determinations of what constitutes a contract and much more.²³

At the same time, many if not most of these rules contradict both (a) the particular interests of most particular groups exposed to competition from others and (b) cherished beliefs and ideas of “right and wrong”, intrinsically informed by (possibly atavistic) notions of distributive, “social justice” (see also 2.2, 6.2 and Wegner 2008). At this stage, I want to only point at one possibly interesting view in Hayek’s “Constitution of Liberty” where he claims that self-binding commitment or “giving oneself a constitution”²⁴ is equally important in the realm of private choices as in the realm of public choice. Hayek (1960: 66) argues that “the reliance on abstract rules is a device we have learned to use because our reason is insufficient to master the full detail of complex reality. This is as true when we deliberately formulate an abstract rule for our individual guidance as when we submit to the common rules of action which have evolved by a social process”. Hence, individually as well as collectively, as a consequence of our bounded rationality, we are well advised to “lay down for ourselves some general rules to which we will adhere without reexamining their justification in every particular instance” (ibid.)²⁵. This helps (again: individuals as well as collectives) “in doing disagreeable but necessary tasks at once ... in suppressing certain impulses” or “to balance temporary desires and to make us do what we should wish to do from a long-term perspective” (ibid.). In short: “to prevent ourselves from making the wrong decision we must deliberately reduce the range

²³ The most outspoken “ordo-liberal” view stressing the need of a legal framework enforced by the state in order to create and protect a “*Wettbewerbsordnung*” can be found in Hayek’s opening statements to the first meeting of the Mont Pèlerin Society (Hayek 1947/48).

²⁴ Connoisseurs of Thomas Mann will see the connection to Hans Castorp’s attitude in the „Magic Mountain“.

²⁵ This view has, meanwhile, found many adherents who argue in favor of „rule-guided behavior“, “program-based” routines etc. both for private and public choices, see Vanberg (2006) for an overview.

of choice before us” (ibid.). This basic Hayekian view will soon be more closely discussed as I venture my major claim that Hayek is in some way a “constitutional choice classical liberal paternalist” who aims at deliberately reducing “the range of choice before us” when it comes to the range of public choice.

The following part offers a rough sketch of choice problems and anomalies that might plague public choices and might thus justify a Hayekian “public choice paternalism”.

5. Paternalism and Public Choice

It would not be difficult to compile a multi-volume fact-book on paternalism in politics. The paternalistic belief that “it is legitimate to interfere with the means that agents choose to achieve their ends” (Dworkin 2005) is undeniably present in the interference of political agents with their principals as it is with the demands of principals (voters) towards their agents. At the same time, it would not be difficult to show that public choices are plagued with exactly the same deficiencies that soft or “libertarian” paternalists want to correct in the realm of private choices: the lack of clearly defined and coherent preferences (or consistent preference aggregation), framing effects, endowment effects, weaknesses of will, time-inconsistencies, status-quo biases, availability biases, hyperbolic discounting, and many more²⁶.

All these irrationalities and “anomalies” must be expected to be quite normal, perhaps even “rational” (Caplan 2001) in the realm of public choices, especially when voter decisions are concerned. In the realm of “low cost decisions” (Kirchgässner/Pommerehne 1993) it is economically rational to disregard even easily available information (“rational ignorance”) and be guided much more by impulse and emotions (Wohlgemuth 2005). The consequences of such irrationalities or anomalies, however, do not fall on the individual engaged in collective choices; the irrational voter (or politician) does not directly inflict harm on herself. Rather, individual expressions of political preference plagued by anomalies and irrationalities add up to irrational, short-sighted, incoherent collective choices that harm others – informed or uninformed, responsible and irresponsible voters – and: non-voters – alike²⁷.

Brennan/Lomasky (1989) argue that voters (and politicians in their attempt to please voters) can afford to indulge in most short-sighted, irresponsible, ideological expressions of romantic or malicious ideas. In the aggregate they may take most costly decisions, but the individual voter faces no costs as consequences of her single decision. An anonymous voter can act in ways she would never dare to take if she were accountable for her decisions. Schumpeter

²⁶ I may be mistaken. But I know of no really comprehensive survey of “behavioral public choice” that would show that most theories and experimental findings so amply discussed in behavioral economics and finance also (and often even more strongly) apply to collective choices (one exception is partly: McCaffery/Slemrod (eds., 2006). Mainstream Public Choice seems still reluctant to abandon its core model of rational actors pursuing given preferences based on given knowledge both of which may be “rationally incomplete” but not systematically distorted by psychological anomalies.

²⁷ This “harm principle”, of course, would be able to justify some sort of intervention, but not a genuinely paternalistic one. Still, the element of acting against one’s own “true” interests can be found also here if one interprets the findings above as a *collective harming itself*.

(1942/87, 262) makes the same point when he expects that the voter, due to „the absence of effective logical control over the results he arrives at ... will relax his usual moral standards ... and occasionally give in to dark urges which the conditions in private life help him to repress“. Already at this stage – without having to introduce “policy failure” arguments from rent-seeking or bureaucracy theory – Brennan/Lomasky (1989) arrive at a strong denial of the democratic processes’ rationality. As a consequence of high arbitrariness of voting motivations, “what emerges through democratic procedures may not be the will of the majority, and may not have been desired by a single voter” (ibid., 44). Also Caplan (2001) or Akerlof (1989) argue that individual irrationality, illusions and systematically biased beliefs are just what an economic opportunity cost reasoning would lead one to expect, since democracy sets the private cost of socially costly irrationality at zero.

All this supports the early suspicion of Schumpeter (1942/87: 256, 262) that the voter’s “power of observation and interpretation of facts, and his ability to draw, clearly and promptly, rational inferences” are very limited, that his “thinking becomes associative and affective” and would “tend to yield to extrarational or irrational prejudice and impulse” (1942/87: 256 and 262). Also the “framing” issue is just another way to express the major element of Schumpeter’s theory of democracy which links “the weaker ... logical element in the process of the public mind ...” with greater “... opportunities for groups with an ax to grind” (1942/87, 263)²⁸. These groups of political entrepreneurs “are able to fashion, and, within very wide limits, even to create the will of the people” (ibid.). In modern language: if individuals in situations such as those produced by experiments and/or general elections²⁹ are susceptible to anomalies, framing and manipulations of contexts, there will be political (mis-) leaders who know the “art of manipulation” (Riker 1986) and use it.

But not all political leadership needs to be manipulative. Much of it will be genuinely “paternalistic” in rather innocent ways. An important case where political “leadership” and “framing” in a neutral meaning are active and, in fact, inevitable, is the formation of public opinion (see Wohlgemuth 2002). Just as goods (the objects of interactive price-formation) are not given in a market process, political issues (the objects of interactive opinion-formation) are not given in the political process. Issues have to be discovered or created and then pushed on the agenda. This activity entails costs and affords skills since the public’s attention is fundamentally scarce and ephemeral; it cannot deal with many issues at a time. Like competition on open markets, competition of ideas and opinions is driven by entrepreneurs. As Sunstein (1996) shows, many political movements owe the attention to their cause, often associated with a surprisingly strong and sudden change of attitudes of the general public to

²⁸ See Wohlgemuth (2000 and 2004) for attempts to introduce political entrepreneurs into Public Choice based on modernized Schumpeterian ideas.

²⁹ It has rightly been argued that one has to be careful in drawing inferences from observing anonymous decisions of isolated individuals playing experimental games in which errors are costless (e.g. Smith 1985). But peculiarities of *voter* decisions are very well reproduced by experiments with costless errors, anonymous decisions, lack of competitive selection and of a division of labour which would allocate property rights (voting rights) to those who are more specialised, experienced and knowledgeable and who may thus be less vulnerable to anomalous behaviour.

„norm entrepreneurs“ or opinion leaders who deliberately aim at inducing a swing in opinions and values³⁰.

Hence, the case for “libertarian paternalist” intervention (both weak and strong) seems much stronger in the realm of collective choice than in the realm of private choices for three reasons: (a) Anomalies and irrationalities are more likely to occur since they are “cheaper” (low costs), (b) Externalities of these decisions are inevitable since collective decisions are collectively binding (large numbers), (c) “framing”, “agenda-setting” or “issue-entrepreneurship” are inevitable due to the preconditions of political opinion formation (Wohlgemuth 2002). As a consequence, a collectivity that harms *itself* (choosing against its “true” interests) can be argued to be much more in need of and exposed to paternalist protection and advice than an individual actor harming only herself. At the same time, things become more blurred and demanding on the collective choice level. Compared to private choice paternalism, already the problem of identifying the “true” interests of a collectivity may pragmatically be more demanding. And logically, the task of identifying a competent and legitimate third party “father” is systematically most problematic if one takes the classical liberal principal (sovereign) – agent distinction seriously. One can always ask politics to remedy shortcomings of private choices. But whom can one ask to remedy shortcomings of collective choices?

The solution that most classical-liberals and constitutional economists, and for that matter: Hayek, seek, lies in some sort of inclusive, abstract, legitimate self-binding commitment of the collectivity itself. As in the case of “self-debiasing” of private actors who take it upon themselves to correct perceived anomalies of their own behavior, one would have to look for similar mechanisms on the public choice level. This is exactly the task of constitutional political economy, and, as will argue now: the very intention of Hayek³¹.

6. Hayek as a soft classical liberal paternalist on the constitutional choice level

If one wants to bring all the above mentioned strings together, the task already becomes unhandy. One would have to try to connect all three dimensions of Hayek’s (already rather complex and not totally consistent) dimensions of his account of modernity (part 2) and his multi-faceted presentation of classical liberalism (part 3) with all varieties of paternalism (part 4) and possible “anomalies” in the realm of public choices (part 5). Before I (or someone else) endeavors to write this lengthy book, let me here just sketch a few ideas that one would have

³⁰ In Kuran’s theory of “preference falsification”, a similar role is attributed to „activists“ with „extraordinarily great expressive needs“ (Kuran 1995: 49) who dare formulate dissenting views and introduce new issues even in face of an apparently hostile or indifferent public. In Boulding’s (1956) chapter on the Sociology of Knowledge, changes in private and public images come about “through the impact on society of unusually creative, charismatic, or prophetic individuals” (ibid., 75) as “bearers of viable mutant images” – they are “the true entrepreneurs of society” (ibid., 76).

³¹ See Rizzo/Whitman (2009: 137ff) on various methods of “self-debiasing” or “self-regulation” that individuals can and do use to mitigate the effects of their own acknowledged biases. See also Elster (1984; 2000) on the same issue. “Ulysses and the Sirens” is also the major theme of constitutional political economy that investigates into modes of collective self-binding commitments to common rules of political behavior that allow citizens as sovereigns to secure gains from joint commitment (see Brennan/Buchanan 1985).

to be discussed more fully. The already sketchy account of Hayek's "magic triangle" hopefully serves as a helpful heuristic, since I will now try to discuss "paternalism" in the three dimensions of "modernity": in the process of cultural evolution (6.1), in the process of the battle of ideas (6.2), and in the process of public choices or legislation (6.3).

6.1 Hayekian paternalism I: Civilized against our will: (were/are we) forced to be free?

The very idea that "*Man has been civilized very much against his wishes*" (Hayek 1979: 168) has already been mentioned as a potential candidate for some variety of "hard paternalism" since "against his wishes" implies non-consent or even coercion and "civilized" implies something that, ultimately, is in the well understood interest of "man". Hayek, in his account of cultural evolution as a process of learning, as the rather unconscious adaptation of novel practices, of winnowing and sifting, insists that this process could not have unfolded if the "wishes", the preferences, opinions, beliefs of all or most members of pre-modern societies had been respected initially (see part 2.1). Hence, one first element of "hard paternalism" – involuntariness (at least on some initial stage) – can clearly be identified. The second paternalist demand that, after all, it must (have been or still:) be for the benefit of the individuals concerned, is also clearly present in Hayek's account of cultural evolution. Both, the cultural evolution of more abstract rules of just conduct and rule-abiding behavior within these rules would lead to what Hayek (1960: 29) calls "the emergence of what we shall want when we see it". Empirically, this leaves much to be critically evaluated. For the present purpose, the main critical question that remains is: what does Hayek understand by "man" (who has been "civilized against his wishes"): mankind in a very broad sense of (the future development of) Humanity, groups existing at the time of their adopting new and successful practices, or individuals adopting these practices within the groups at some time?³²

Hayek, unfortunately, is not quite clear in distinguishing these three categories. But one can, for the present purpose, leave this tricky point aside and still distance Hayek from an accusation of "hard paternalism". Even if one assumes that "man" was in a way "forced" to be free and to adopt successful practices and adhere to moral codes "against his wishes", "man" must not have been exposed to purposeful paternalism. As a third prerequisite of paternalism, it needs, it seems to me, a paternal actor. And this element is most necessarily absent from Hayek's evolutionary account. Clearly and almost necessarily, Hayek does not have in mind any imposing paternalistic power that, by foreseeing the beneficent consequences of decreeing "nomos", designed and enforced an order against the wishes and beliefs of her subordinates. To the contrary: cultural evolution, according to Hayek, could not have been the result either of benevolent dictatorship or of voluntary consent to a social contract³³. Rather, Hayek's theory of cultural evolution as a trial-and-error-process is animated by "innovative

³² Again, this problem has been discussed at some length and with great insight by Vanberg (1986) and Witt (1994).

³³ Although Hayek's final intentions might be very close to modern constitutional economists ideas (see Vanberg 2008), on the magic triangle's corner of the evolutionary emergence of modern civilization, he quite clearly states that the idea of a social contract in the sense of "intelligent men coming together for deliberation about how to make the world anew is perhaps the most characteristic outcome of those design theories" (Hayek 1960: 57) - which Hayek finds utterly inadequate.

rule-brakers” who (consciously or unconsciously) broke existing taboos (such as: never trade with strangers, do not lend for interest, property is a common good belonging to all etc.)³⁴.

6.2 Hayekian paternalism II: the battle of ideas

Hayek himself has tried to act as a breaker of existing taboos or “bearer of mutant images” (Boulding 1956: 76) when he threw himself into the battle of ideas because, as already been shown, he believed both that (a) modernist beliefs following a constructivist rationalist attitude would, if politically enforced, destroy free civilization and (b) that ideas matter more than interests³⁵. Hayek’s most ambitious and courageous cause was most certainly his crusade against widely shared notions of “social justice”. This is not the place to judge whether Hayek’s view of social justice as a harmful and atavistic idea (Hayek 1976) is right or wrong. Suffice it to restate that, compared to what Hayek (1979: 33) defined as the “basic source of social order”, namely “the existence among the people of certain opinions of what is right and wrong”, Hayek’s own opinions differ greatly from those widely held. There *are* strong “preferences for the welfare state” and they *do* pose a serious “challenge” for a classical liberal (see Wegner 2008, ch.1).

On an abstract public choice level, Hayek might collect consent in terms of opinions against a “system which may place any small group in the position to hold a society to ransom if it happens to be the balance between opposing groups and can extort special privileges” and that this “has little to do with democracy or ‘social justice’” (ibid: 31). But when it comes to concrete sectors, firms or individuals portrayed as, or, indeed being: “innocent victims” of market competition, I expect that public opinion based on widely shared values and beliefs will instinctively demand help and protection from democratic governments. There is, and has perhaps always been, the overriding opinion of citizens (especially in Europe, the origin of cultural evolution of free societies) that social, distributive justice (however poorly defined) *is* a principle and a value and that, in a democratic society, government *has* a moral obligation (not just: political incentive) to take this widely shared opinion, value, belief “of what is right and wrong” into account.

Hayek does not share this view and wants to correct it. Is he thus a paternalist? In a certain way: of course, and: inevitably. Hayek never subscribed to an extremely narrow interpretation of Max Weber that “value judgments” could or should be completely absent from social scientists’ work³⁶. And he believes in the idea of competition of ideas (including attempts to

³⁴ See Hayek (1988: ch. VI). Hayek (1979: 166) argues in a similar vein that “*modern civilization has become largely possible by the disregard of the injunctions of those indignant moralists*” and that “*the expansion of capitalism owes its origins and raison d’être to political anarchy*”.

³⁵ In this respect Hayek (1947/48: 108) even sided with his long time opponent in the battle over fiscal policies, Lord Keynes, when he states: “But what to the politicians are fixed limits of practicability imposed by public opinion must not be similar limits to us. Public opinion ... is the work of men like ourselves, the economists and political philosophers of the past few generations, who have created the political climate in which the politicians of our time must move”

³⁶ See Hayek (1962/67: 253ff) for direct references to Weber.

persuade on normative issues), e.g. when he claims that „[t]he central belief from which all liberal postulates may be said to spring is that more successful solutions of the problems of society are to be expected if we do not rely on the application of anyone’s given knowledge, but encourage the interpersonal process of the exchange of opinion from which better knowledge can be expected to emerge ... Freedom for individual opinion was demanded precisely because every individual was regarded as fallible, and the discovery of the best knowledge was expected only from that continuous testing of all beliefs which free discussion allowed“ (Hayek 1978: 148). Hence, in the realm of the battle of (the choices of) ideas, Hayek obviously engages in “attempts to influence the choices of affected parties in a way that will make choosers better off” (Sunstein/Thaler 2003: 1162). Or rather: he engages in attempts to influence the opinions that should influence collective choices in a way that will make everyone better off.

On the level of public opinion formation oriented at public (and thus: coercive) choices, Hayek, especially in his attempt to expose “social/distributive justice” as the opposite of a consistently rational and consequentially beneficial task of legislation within an “extended order”, works hard to offer a “counter-frame” in order to correct the prevalent “frames” in public debates and thus prevent irrational, in fact, as he perceives it, fatal, public choices.³⁷ In that sense, Hayek is at least as “paternalistic” as anyone else engaged in public debates with a view of how “society” can be made better off. “Soft libertarian paternalism” carefully defined can be said to be the very task of policy advice of any constitutional political economist (or anyone elase). As Buchanan (1987: 313) put it: “Normatively, the task of the constitutional economist is to assist individuals, as citizens who ultimately control their own social order, in their continuing search for those rules of the political game that will best serve their purposes, whatever these may be.”

I would guess that Hayek might subscribe to this task in principle. But he would phrase it differently and give it a somewhat different focus. He tries to assist individuals in understanding and coping with the fact that they cannot (and should not try too hard) to “control their own social order” which in some elementary parts is beyond the reach of conscious design. Thus, Hayek does not seem to acknowledge all collective “purposes, whatever these may be”, even if they would command large support of citizens. He insists on the view that man ought to “deliberately refrain... from exercising controls which are now in his power” (Hayek 1960: 38) which includes that citizens, for some purposes would have to “submit to a disregard of their own wishes”.

One might even go as far as interpreting Hayek as a “hard” paternalist who wants to identify and rule out “mistaken” or “irrational” purposes and desires in the very sense defined by Brandt (1992: 40) as desires “which would not survive ... in the presence of vivid awareness of knowable propositions”. In this interpretation, Hayek would engage in some form of “cognitive psychotherapy” understood as “confronting desires with relevant information, by repeatedly representing it, in an ideally vivid way, and at an appropriate time” (Brandt 1979:

³⁷ Druckmann (2004: 675) claims that deliberation can have this effect of dampening „framing“ effects in collective choices.

113). Hence, what Qizilbash (2009: 18) termed the “potentially unobjectionable part” of libertarian paternalism would also somewhat be true for Hayekian paternalism: “The paternalism involved is one which can override people’s actual desires, and restrict their liberty, precisely in order to promote autonomy and welfare”. However, this would mark a certain tension with Hayek’s other views, e.g. that “believing in freedom means that we do not regard ourselves as the ultimate judges of another person’s values, that we do not feel entitled to prevent him from pursuing ends which we do disapprove of so long as he does not infringe the equally protected sphere of others” (Hayek 1960: 79).

The critical point, to me, is not that Hayek vividly defends opinions that contradict views widely held amongst both intellectuals and citizens. It is the privilege and perhaps even duty of the political philosopher to present “counter-frames” and “mutant images” (see above) of a good society and feasible ways to achieve it. The classical-liberal paradoxical problem arises if, as Zintl (1983: 22) puts it (my translation): “rules, the substantive content of which maximize individual autonomy, are being set in a paternalistic way from outside”. To this problem I will now return.

6.3 Hayekian paternalism III: Public choice and constitutional restraints

Hayek, as any other classical liberal or socialist or any otherwise politically committed thinker or activist, is, in a sense, a “public choice paternalist”.³⁸ He wants collective choices to be made in a way that, finally, would be in the best interests of all.³⁹ As has been pointed out above, Hayek’s constitutionalism is the opposite of political or legal activism that would attempt to prescribe private actors how to be moral or rational in the pursuit of their own or of others’ ends. The universalisable rules of just conduct that the state should enforce are predominantly negative proscriptions of those actions that would interfere with the equal freedom of all. The task of the “Constitution of Liberty” is not to maximize aggregate utility or happiness but to make people as free and responsible as possible under the rules of common laws.

The important and difficult point here is again Hayek’s repeated insistence that “a most important and difficult exercise of reason” is exactly “to seek appropriate limits to the uses of reason” (Hayek 1960: 69). Hayek wants to see these limits to political and intellectual hubris secured by ways of constitutional self-binding commitments and by some rather unconscious

³⁸ In a way, every voter is “paternalistic” in the sense that he or she wants others to follow their private view of what should (not) be politically-legally binding for all the rest.

³⁹ I cannot here enter the discussion of what exactly Hayek’s welfare criterion really is. Again, the “magic triangle” poses problems of dimensionality and produces many candidates for welfare criteria. In Hayek’s large picture of cultural evolution “successful practices” seem to be those that secure the survival and growth of the group’s population. The beneficial results of the market order are sometimes defined in terms similar to Pareto-optimality (Hayek 1976: 119). And as a justification of the “Good Society” Hayek even refers to Rawlsian ideas when he claims: “*The Good Society is one in which the chances of anyone selected at random are likely to be as great as possible*” ... “we should regard as the most desirable order of society one which we would choose if we knew that our initial position in it would be decided purely by chance ... the best society would be that in which we would prefer to place our children if we knew that their position in it would be determined by lot” (Hayek 1976: 132). In more legal philosophical contexts, Hayek declares individual freedom as “a value in itself”, as “a creed or presumption so strong that no consideration of expediency can be allowed to limit it” (Hayek 1960: 68).

respect for evolved traditions. The first can be collectively chosen, the second cannot. Hayek does admit that his “emphasis is on the positive task of improving institutions” but at the same time that “it would be contrary to the whole spirit of this book [The Constitution of Liberty, MW] if I were to consider myself competent to design a comprehensive program of policy” (Hayek 1960: 5)⁴⁰.

Where exactly to draw the line between the hubris of over-ambitious rationalistic institutional design and necessary institutional “improvements” aimed at avoiding collective harm, is indeed a “most difficult exercise of reason”. The equally difficult exercise for a Hayekian constitutional political economist is to where to draw the line between respecting “given” preferences, values and beliefs of the citizens also when it comes to collectively binding decisions (procedural liberalism) and paternalistic proposals for self-binding constitutional commitments that the classical liberal deems in the long-run interests of all (substantive liberalism)⁴¹. The task of the constitutional economist, as I see it⁴², is to bring these aspects to the largest possible congruence. This has to be done by ways of the least intrusive intervention: persuasion of citizens in an open discourse aimed at discovering common interests and feasible ways to satisfy them (whilst taking opportunity costs and limits of our rationality into account)⁴³.

7. Conclusion

Is Hayek, after all, a paternalist? As already indicated in the introduction, my answer is an unsatisfying but perhaps further discussion-provoking yes and no. I hope that my lengthy (and still sketchy) account of the “magic” and at least partly paradoxical “triangle” in Hayek’s assessments of “modernity” was helpful in providing some relevant background and interpretation of Hayek’s thought. To relate these ideas to the present discussion of “libertarian paternalism” may (also) have been over-ambitious and must have left many important aspects under-developed. But this should be regarded a compliment for Hayek and might be regarded an excuse for Wohlgemuth.

Public and Social Choice scholars love logical paradoxes, especially if they can be clearly defined in terms of simple logic and presented in terms of complex mathematics. I am neither willing to reduce Hayek’s thinking to simple logic nor able to convert it into complex mathematics. Hence, my short conclusion of this paper on “Hayekian paternalism” refers to a

⁴⁰ Hayek’s presentation of a “model constitution” (Hayek 1979, ch. 17) has been an easy target for critique or even derision. However, the seemingly paradoxical case of Hayekian constructivism can be seriously qualified. Hayek himself (1979: 107) states: “I certainly do not wish to suggest that any country with a firmly established constitutional tradition should replace its constitution by a new one drawn up on the lines suggested”. The only purpose was to provide suggestions for newly established states (or supra-national institutions) and to illustrate his ideal of a true division of powers.

⁴¹ Again, see Wegner (2008) for an extensive discussion of this problem and a defense of substantive liberalism that acknowledges peoples’ preferences for the welfare state but provides an “*Ideologiekritik*” “if those preferences fail to account for reactions in the market sphere ... as a response to policy programmes”.

⁴² For a much more elaborated defense of this argument from a strictly contractarian perspective, see Vanberg (2009).

⁴³ See also van Aaken (2006) on the principle of least intrusive paternalism („*Prinzip des schonendsten Paternalismus*“) based also on legal principles.

basic literary source: Mill's famous metaphor of the "person attempting to cross a bridge which has been ascertained to be unsafe" (Mill 1859/1994:165). Mill's argument (very much like Hayek's constitutional choice argument) is based on a situation like this: If (or: since) it can be taken for granted that the person (or the collective) "does not desire to fall into the river", "either a public officer or any one else ... might seize him and turn him back without any real infringement of his liberty". But: "when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore ... he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it" (ibid.). Obviously, Hayek sees danger of mischief and takes for granted that crossing the bridge towards the "road to serfdom" is not desirable for any person. Therefore, he not only offers warnings but wants to seize the public officers and turn them back by ways of constitutional limits in order to forestall real infringements of everyone's liberty.

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