



ANTI-ANTI-ANTI-PATERNALISM

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1. Anti-Anti-Paternalism

Is government justified in being paternalistic? To some, the answer is yes—government sometimes knows better than people do what is best for them. If people are allowed unfettered free choice, they will not always be acting in their own best interests. Others, with a more libertarian bent, object that people know what is best for them and, in any event, should be able to do what they choose to do.

Recent scholarship has offered a new defense of paternalism, ostensibly consistent with libertarianism. One scholar, Cass Sunstein, characterizes the position as anti-anti-paternalism.¹ As psychologists have demonstrated, people sometimes make ‘mistakes’ about themselves and about the world. And they sometimes lack self-control, doing things they later come to regret. Their true (or more correct) views might be in accord with what government would push them to do, as might their more disciplined future-looking personas. Thus, the argument goes, paternalism can be consistent with libertarianism—especially soft paternalism, where the

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¹ Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AMER. ECON. REV. 175 (2003).

aim is to give people more information, or otherwise to put them in a position to make more informed, and presumably better, choices.²

2. Anti-Anti-Anti-Paternalism

Does the fact that people make mistakes and sometimes lack self-control properly serve as a basis for anti-anti-paternalism? In my view, the answer is no. The anti-anti-paternalist argument turns on the idea that people are not (always) doing what they really want. But how do we know what people really want? It cannot just be on account of the mistake or the choice that favors the present at the expense of the future. We surely do not want to say, for instance, that nobody choosing to eat trans fats is doing what they really want. Nor does somebody reporting at time T+1, after doing something at time T that they wish they had not done (eaten that dessert; bought that fancy new flat-screen TV; joined the health club with the high initiation fee), provide the needed evidence. Nor does somebody underestimating the probability of dying from smoking and smoking anyway, or trading lots of stocks not knowing that statistics show that for most people, trading costs exceed any gains they might make even if they are as savvy at trading as they think they are. People are often of two minds, wanting, as it were, to have their cake and eat it too. So, as evidence, we are left with the existence of 'mistakes' and self-control problems in the abstract, and our own introspection about ourselves (which may, for all we know, be cheap sentiment). Importantly, at some deep level, we probably think a short life spent partying and departed with unpaid debts is normatively less desirable than a longer more abstemious and financially responsible life; this makes us imbue

² For a broad critique of Sunstein and Thaler's position, and particularly, the potential conflict between encouraging 'more' choice vs. 'better' choice, see Gregory Mitchell, *Libertarian Paternalism is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005) (responding to Cass Sunstein and Richard Thaler, *Libertarian Paternalism Is Not An Oxymoron*, 70 U. CHI. L. REV. 1159 (2003)).

our evidence as to the existence of mistakes and self-control problems with more strength than it has.

The paradigmatic cases at issue involve behaviors such as smoking, drinking, overeating, drug use, riding a motorcycle without a helmet, and riding in a car without a seatbelt; they also involve poor money management, such as saving too little, or borrowing too much. As pleasant as it might be to believe that people with the 'right information' would do 'the right thing,' intuition and evidence argue strongly to the contrary. At this point, who does not know of the dangers of smoking? Even if a person's knowledge is not complete and exhaustive, it is hard to imagine that more knowledge would make a difference in her behavior.

Moreover, is wanting to do something at time T, doing it, and later regretting it, a 'mistake'? A failing in self-control? Neither? If a person acts now in a way he later regrets, has he made a mistake as to what he wants?

The answer isn't obvious. Anti-paternalists note correctly that there is no a priori reason, from a libertarian perspective, to privilege the future self over the present self. Anti-anti-paternalists could respond that engaging in activities now which will limit options later effectively limits autonomy. But this argument assumes without justification that autonomy is measured by the future, rather than present, self. It also assumes that autonomy consists importantly of the physical and mental ability to make choices at a particular point in time.

What about regret? Regret might seem to provide an argument for privileging the future. But how can we know whether what feels like regret is not as much a 'mistake' as whatever led to the action being regretted? Regret could also be cheap sentiment: I want to think that I am not a wholehearted hedonist – that I have some regard for my health – even though yesterday I ate lots of rich cheese and did not go to the gym.

Even if we somehow know that the regret is real, is it enough to justify privileging the future? Here, too, the argument is shaky. A recent article argues that immediately after people make a choice favoring the present over the future, they regret it. However,

once enough time has passed, those who regret are those who made the future-preferring choice. Ran Kivetz, one of the authors of the article, says: "In the long run...we inevitably regret being virtuous and wish we had been bigger hedonists."³ Consider, in this regard, the oft-repeated platitude that "nobody has ever regretted at the end of his life that he worked too little and spent too much time with his family." What do people really want? Apparently, they think different things depending on when they are asked.

What of the finding of behavioral law and economics that preferences are constructed? Does it justify paternalism on libertarian grounds? Again, my answer is no.

That preferences are constructed means that (contrary to what traditional economic theory admittedly unrealistically hypothesizes) they do not exist to be discovered and revealed by a person's choice—and that they could have been otherwise.⁴ Indeed, in many and perhaps most cases, preferences are formulated as part of the process by which the choice is made.⁵ It is certainly possible that people can be influenced to choose something they do not really want. Anti-anti-paternalists would like to argue that paternalism here could play the libertarian role of helping people choose what they really want. But even if people are not choosing what they really want, it does not follow that we (or the government) know what they do really want, such that pushing them in that direction would be consistent with libertarianism. Preference construction, taken seriously, means something much more, and fundamentally quite different, than people choosing something other than what they really want. It suggests that what people really want often does not exist in any prior unmediated form. There is one set

³ Clive Thompson, *Hyperopia*, N.Y. TIMES MAG., Dec. 10, 2006. The paper discussed in the article is Ran Kivetz & Anat Keinan, *Repenting Hyperopia: An Analysis of Self-Control Regrets*, J. OF CONSUMER RES., September, 2006, at 273-282.

⁴ This is not to say that all preferences are constructed. If I'm quite thirsty, I will have a preference to sate my thirst somehow.

⁵ See Claire A. Hill, *The Rationality of Preference Construction (and the Irrationality of Rational Choice)* (March 2007) (draft on file with author) (discussing preference construction in detail).

of cases—the paradigmatic framing cases—in which one could make the kind of argument the anti-anti-paternalists want. People ought to prefer vaccine A, which does not cure 25% of people, to vaccine B, which cures 70% of people. Libertarianism is surely not offended by government's recognition that there are some systematic errors of this sort that people make, and government's acting to prevent people from making those errors by, for instance, requiring them to read a booklet before choosing one vaccine or the other.

But most cases of preference construction are not about making mistakes. The frame matters—but not because it is a trick that causes people to make a logical or arithmetic mistake. Depending on how the alternatives are framed, I might think charity A, a producer of low-tech toilets and glasses for Africa, is more or less worthy than charity B, a developer of alternative energy technologies. Both are worthy; I may decide using some sort of decision rule, where the decision could easily have been otherwise.

The anti-anti-paternalists are surely right that because people are influenced by presentation—by a frame—we cannot say with certainty that what people choose is what they really want. But we cannot then purport to know what they really want and say it is consistent with libertarianism for the government to frame choices so as to get people to do what they really want.

In sum, the anti-anti-paternalists sometimes speak as though they have access to the knowledge of what people really want apart from what they choose. This position is ultimately untenable. Behavioral law and economics can tell us that people sometimes make mistakes, and that they sometimes do at time T what they will report at some time T+1 that they wish they had not done. But it cannot tell us what they really want, and hence cannot provide a principled basis for paternalistic law-making consistent with libertarianism, hard or soft. As convenient and tempting as it may be to extrapolate from our own introspection that others want what we do, or should, want, we simply have no access to others' beliefs and desires.

3. The Anti-Paternalist View

Where are the anti-paternalists in all this? Not surprisingly, they find much to object to in anti-anti-paternalism. They argue that governmental actors are people too—if people subject to law make mistakes, so, too, do people who make the law.⁶ Indeed, one scholar argues that rather than offering a rationale for paternalism (or at least, anti-anti-paternalism), “recognizing the limits of human cognition pushes us away [from], not towards, paternalism,”⁷ especially given that people have more incentive to correct their mistakes than does government. There are also critiques that soft paternalism can be more pernicious than hard paternalism. Contrast shaming with a legal prohibition, where the “undesirable” behavior at issue is homosexuality.⁸ There is also the slippery slope argument: soft paternalism, designed and justified as a means to help people do what they actually want, will quickly become harder paternalism, government imposing its views on what people should do more broadly.⁹ Finally, the anti-paternalists argue that what seem like mistakes or failures of self-control may be nothing of the kind. A person who overeats or eats unhealthy food now is choosing his present pleasure over a possible diminution of his future longevity. According to Edward Glaeser, in consuming trans fats, a person is “making a trade-off between flavor and longevity.”¹⁰ Anti-paternalists seem ready to concede, at least for argument’s sake,

⁶ Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 133-4 (2006). See Cass Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 255 (2006).

⁷ Glaeser, *supra* note 6, at 134.

⁸ Glaeser, *supra* note 6, at 135.

⁹ See Douglas Glen Whitman & Mario Rizzo, *Paternalist Slopes*, 2 NYU J.L. & Liberty 411 (2007). See also Sunstein, *supra* note 6, at 258. On slippery slopes generally, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

¹⁰ Dan Halpern, *Dr. Do-Gooder; First smoking, now trans fats. Health czar Thomas Frieden is determined to save our lives, whether it’s good for us or not*, N. Y. MAG., Dec. 25, 2006, available at <http://nymag.com/health/features/25642/index.html>. That the new paternalists accord the long-run self a privileged position without having any principled reason to do so is argued in Whitman & Rizzo, *supra* note 9 at 418. See also Glen Whitman, *Against the New Paternalism: Internalities and the Economics of Self-Control*, 563 POLICY ANALYSIS, Feb. 22, 2006 (CATO INSTITUTE).

that people might make mistakes and lack self-control. But they think what people choose still offers the best guide to what they really want, so that their choices should be respected.

4. What should we do?

Behavioral law and economics does indeed demonstrate that what people want is not necessarily what they choose—that the choice process is a complex one, and that people have complicated and interesting processes by which they arrive at choice X at a particular time, processes that may reflect features of the comparison, conclusions that they have come to in the short term, etc. We then see that it is legitimate to sometimes not completely respect people's choices. Many anti-paternalists do not have a coherent notion of what people want apart from what they choose. But common sense dictates the contrary: As O'Donoghue and Rabin note, "[e]conomists will and should be ignored if we continue to insist that it is axiomatic that constantly trading stocks or accumulated consumer debt or becoming a heroin addict must be optimal for the people doing these things merely because they have chosen to do it."¹¹

But of course, even if this is correct, what is a better guide than people's choices? Even if people may really want something else, what might that be, and on what grounds can we claim we have access to it that gives us a better claim on what they are going to do than what they otherwise would choose?

In my view, the anti-anti-paternalists ultimately have it right as to what should be done. But they are right for the wrong reason. They are ultimately hard pressed to justify paternalistic intervention either on grounds that it furthers autonomy or on grounds that it improves welfare.¹² The anti-anti-paternalists ac-

¹¹ Ted O'Donoghue & Matthew Rabin, *Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes*, 93 AMER. ECON. REV. 186 (2003).

¹² In this regard, Mitchell, *supra* note 2, argues that Sunstein and Thaler seem to use welfarist criteria to determine whether people are better off when libertarians would

knowledge that preferences are constructed. Thus, as an initial matter, it is hard to see how we can say that something that might very well affect *the preferences themselves* furthers autonomy in choice. And, going further, I have argued that ‘what people really want’ is not an intelligible concept. Thus, what would it mean to help people choose what they really want? Finally, even if we assume that we do know what some people really want – for instance, to do a future-preferring act notwithstanding that they are instead doing a present-preferring act - we do not know that all people are like this. Indeed, as the anti-anti-paternalists acknowledge, some people might very well be making their ‘real’ choices. To the extent we have paternalistic policies that encourage future-preferring behavior we have perhaps hindered the autonomy of the present-preferring contingent. Consider a requirement that full nutritional information be included on all restaurant menus: what if I would like (as I do) to make the choice knowing in general terms that the food is more caloric than nutritious but without knowing that the specifics are close at hand? Giving information is not a neutral meta-act; showing photos of mangled fetuses outside an abortion clinic or dead bodies outside a gun shop is not just ‘providing information’ that helps people choose ‘what they really want.’

Welfare, too, can scarcely be deemed to be furthered without a pre-existing sense of what constitutes welfare enhancement. Again, the (unwarranted) presumption that people would be better off and more true to themselves if they made more future-regarding decisions seems to dictate the anti-anti-paternalists’ conclusion. While the anti-anti-paternalists recognize that some people would and do freely make incorrect choices, their starting point—that people make mistakes and lack self-control—probably leads them to believe that but for the mistakes and self-control problems, people would more often make the ‘correct’ choice – that is, as I have

look to autonomy: The libertarian aim is best advanced when people are put in the position to make their own choices, not necessarily correct choices on some normative metric.

argued, the one that is correct as judged by some implicit normative metric.¹³

Still, the overall policy thrust, in broad brush, seems right. As the anti-anti-paternalists argue, there is no way to be wholly libertarian and truly and completely respect people's pure and pre-existing unmediated choices. There need to be default rules, and these will clearly influence behavior. As Cass Sunstein notes, default rules must be chosen: they do not come from nature or drop from the sky.¹⁴

Furthermore, in most paternalistic interventions, there are externalities, and necessarily so. Presumably, people whose short-term decisions might result in long-term costs—say, motorcycle riders who do not wear helmets—cannot feasibly commit to not taking state money for their care. And it seems clear that there is a normative inclination, stemming from what can be characterized as shared values: that investment in the future, broadly construed, is somehow preferable to consuming all in the moment. Finally, common sense and introspection suggest that there does exist something on the order of temptation that we may for ourselves want government to help us resist; we may believe, although we cannot know, that a not-insignificant number of others also are like us in this regard. All this suffices to warrant carefully conceived and crafted policy prescriptions.

None of this is to suggest that paternalism does not warrant considerable wariness, or that devising appropriate policies will be

¹³ Indeed, that 'helping' people get it right using information or debiasing or other like means is more justifiable than forcing them suggests an odd confusion as to the rationale justifying any intervention. What ostensibly justifies intervention is that people are making mistakes, behaving 'irrationally.' But what is the relationship between providing information or debiasing, on the one hand, and helping people behave more rationally? If people who smoke in the face of information indicating that smoking is harmful are irrational, presumably the more information they have, the more irrational they must be. Our intuitive alternative, concluding that once people have enough information, if they continue to smoke they are truly choosing to do so, doesn't help us to distinguish between people who are irrational and people who are really making a choice.

easy. Imagine a policy prompted by the types of arguments made in Robert Frank's *Luxury Fever*:¹⁵ that there is an arms race as to status-seeking. People spend money and effort acquiring positional goods such as fancy cars; their neighbors get even fancier cars, and they have to get even fancier cars to compete. Frank proposes that this problem be addressed with steeply progressive consumption taxes. But the fact that some people like fancy cars because they want to be fancier than their neighbors does not mean all people do. There are people who like some positional goods for those goods' inherent attributes; those people might very well be hurt, and, it would seem, only because of others' status-seeking.

Another example: Imagine that we are trying to tax activities we think people do not really want to engage in, such as consumption of cigarettes or unhealthy foods. Uncontroversially, the tax should be high enough to force people to internalize the externality associated with the activities. But how about the internality—that is, the cost to the future self? It is hard even in principle to imagine how to make this computation.

All this being said, ultimately I think Ted O'Donoghue and Matthew Rabin are correct. Despite their reservations, including "fears of regulatory capture or transactions costs implementation" and the difficulty of correctly identifying "all the plausible mistakes people can make" they "are even more hesitant to continue to make policy prescriptions based solely on the axiom of 100-percent rationality. The possibilities that 15-year-olds err in becoming tobacco addicts or that 25-year-olds err in borrowing heavily on their credit cards or that 35-year olds err in too wildly playing the stock market with their retirement savings all strike us as profoundly plausible and of real policy relevance."¹⁶ They conclude as follows: "It therefore seems to us that policy analysis that incorporates the substantive insights and methodological rigors of economics, while being more realistic about the nature of errors people make, should be

¹⁴ Sunstein, *supra* note 6, at 259.

¹⁵ ROBERT FRANK, *LUXURY FEVER* (2000).

¹⁶ See O'Donoghue & Rabin, *supra* note 11, at 191.

enthusiastically and quickly embraced.”¹⁷ One need not use the language of rationality and error—people can, and do, have conflicting goals. Law can appropriately help them choose between those goals, especially if law has other reasons to do so.

¹⁷ *Id.*