

Debate: To Nudge or Not to Nudge*

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ONE of the hottest ideas in current policy debates is “libertarian paternalism,” the design of policies that push individuals toward better choices without limiting their liberty. In their recent book, *Nudge*,¹ Richard Thaler and then Obama advisor (now head of the White House’s Office of Information and Regulatory Affairs), Cass Sunstein, suggest several ways in which government agencies and private organizations might “nudge” individuals toward actions that are better for them.² They hope to promote libertarian paternalism as “a promising foundation for bipartisanship—a way of maintaining our firm commitment to freedom of choice while also helping people make better decisions for themselves” (p. 14). They suggest “that libertarian paternalism offers a real Third Way—one that can break through some of the least tractable debates in contemporary democracies” (p. 252/255).

In this article, we address questions both about paternalism—what is it, and could there be a variety that does not limit freedom?—and about nudges—what are they, and should those who value freedom find them unobjectionable? We deny libertarian paternalism is both libertarian and paternalist and that it is as benign as Thaler and Sunstein maintain.³ We argue that some of their proposals constitute a

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¹(New Haven: Yale University Press, 2008). Page references in the text refer to this book; where pagination differs between the original hard-cover edition and the revised paperback edition, the second number (after the slash) refers to the paperback edition.

²See also three other pieces by Thaler and Sunstein, “Libertarian paternalism,” *American Economic Review*, 93 (2003), 175–9; “Libertarian paternalism is not an oxymoron,” *University of Chicago Law Review*, 70 (2003), 1159–202; and “Preferences, paternalism, and liberty,” *Preferences and Well-Being*, ed. Serena Olsaretti (Cambridge: Cambridge University Press, 2006), pp. 233–64. See also Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, and Matthew Rabin, “Regulation for conservatives: behavioral economics and the case for asymmetric paternalism,” *University of Pennsylvania Law Review*, 151 (2003), 1211–54, who at p. 1212 define asymmetric paternalism in a more expansive way: “A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.” Many of the paradigm cases of old-fashioned paternalistic laws, such as laws requiring the use of seat belts, are (contrary, we believe to the author’s intentions) instances of asymmetric paternalism.

³Unlike Gregory Mitchell’s critique in “Libertarian paternalism is an oxymoron,” *Northwestern University Law Review*, 99 (2005), 1245–77, our concern is not with whether a libertarian would favor Thaler and Sunstein’s proposals.

distinctive variety of paternalism, whose libertarian credentials are dubious, even though their implementation would not be coercive⁴ and would not significantly limit freedom of choice. Our focus is on their concepts, not their policies.

After a first section that clarifies what Thaler and Sunstein take libertarian paternalism to be, section II addresses the question of what constitutes paternalism. In our view, what makes some of the policies Thaler and Sunstein call “libertarian paternalism” paternalistic is that they push people to make choices that are good for themselves by taking advantage of imperfections in human decision-making abilities. Section III then addresses the broader question concerning what limits there ought to be on nudges—that is, the use of flaws in human judgment and choice to influence people’s behavior.

I. NUDGES AND LIBERTARIAN PATERNALISM

Thaler and Sunstein define nudges mainly by example. Consider their first illustration, involving Carolyn, who has the responsibility of determining how foods are displayed in school cafeterias. Carolyn knows that the placement of food influences what children choose.⁵ She has several options. For example, she can arrange the items randomly or to maximize profits. She can also arrange the dishes so that the students are likely to make the most nutritious choices.

Carolyn is what Thaler and Sunstein term a “choice architect:” she has the “responsibility for organizing the context in which people make decisions” (p. 3). Choice architects set the background against which people make choices, whether or not their influence is recognized. Choice architecture is often unavoidable.

In the cafeteria example, Carolyn has an opportunity to act as a libertarian paternalist by arranging the food in the way that makes the children best off. In Thaler and Sunstein’s view, the decision to arrange the food to encourage nutritious choices is paternalistic because “it tries to influence choices in a way that will make the choosers better off, *as judged by themselves*” (p. 5, [their emphasis]). They maintain that this “libertarian paternalism” does not threaten liberty, because it does not hinder individuals from choosing what they prefer. They take liberty or freedom to be the absence of obstacles that close off possible choices or make them more costly in time, inconvenience, unpleasantness, and so forth. “Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off.”⁶ Except when otherwise noted, we shall use liberty and freedom in the narrow way that Thaler and Sunstein do.

⁴In this article, we shall identify coercing someone with intentionally influencing someone’s choices by restricting the choice set or deceiving them concerning the choice set.

⁵As Thaler and Sunstein note (*Nudge*, p. 11), similar issues arise with respect to adults, whose food choices are also influenced by the order in which foods are laid out in a cafeteria line.

⁶“Preferences, paternalism, and liberty,” p. 234.

In Thaler and Sunstein's view, a nudge is "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives" (p. 6).⁷ Notice that nudges are not necessarily intended to benefit those whom they nudge, and Thaler and Sunstein give examples of nudges, such as the "Don't mess with Texas" anti-littering campaign (p. 60) that have other aims. Thus, some nudges are paternalistic; others are not.

Thaler and Sunstein demand that nudges involve such minimal costs to choosers that they should never be troublesome to libertarians. Unfortunately, some of their examples belie this characterization. For example, Thaler and Sunstein write that the requirement that firms publish "Toxic Release Inventories" "is a nice example of a social nudge" (p. 191/193), which enables the media and environmental groups to produce an "environmental blacklist" (p. 191/193). Although the government is not coercing firms to do anything except disclose what hazardous chemicals they are storing or releasing into the environment, the requirement makes possible heavy social sanctions for polluting. Requiring the publication of Toxic Release Inventories was effective precisely because it significantly increased the costs of polluting. An even more egregious example of mislabeling a coercive policy as a nudge appears when Thaler and Sunstein write that a cap and trade system restricting pollution "is compatible with libertarian paternalism, because people can avoid paying the tax by not creating pollution" (p. 186/188). On that reasoning, libertarians should have no objection to paternalistic "sin taxes." Despite these examples, we shall take Thaler and Sunstein at their word—that a policy or practice is only supposed to count as a nudge if it leaves the choice set essentially unchanged.

Thaler and Sunstein document important applications. The best known involve retirement plans, in which employee participation depends significantly on whether the default is to be enrolled, with a costless option to opt out, or not to be enrolled, with an option to enroll. On the assumption that those designing the plans can judge what is better for employees, they can choose the default so as to benefit the employees without any non-trivial cost to their freedom.

Thaler and Sunstein are enthusiastic about libertarian paternalist nudges, because they are impressed by the imperfections in individual decision-making illustrated by the extent to which people's choices to save for retirement are influenced by details concerning enrollment that ought to be of negligible importance. They catalogue many factors that can lead to mistakes in human judgment and decision-making such as optimism and overconfidence (p. 31), loss aversion (p. 33), a status quo bias (p. 34), framing (p. 36), akrasia and myopia (p. 40), inertia (p. 43), inattention and error (p. 87), as well as heuristics such as

⁷The word, "economic" here is a slip on their part. Thaler and Sunstein are not concerned only with economic incentives.

anchoring (p. 23), availability (p. 24), and representativeness (p. 26). People may also deliberate badly because of social pressure.⁸

Why shouldn't these factors influence preferences? Why should these factors be regarded as *interferences* with rational choice rather than as rational determinants of choice? Addressing this question comprehensively is beyond the scope of this article. Instead, we shall assume that it is possible to draw a relatively uncontroversial, though not perfectly sharp line between rational persuasion and other methods of influencing beliefs, preferences, and choices. We are not otherwise concerned to defend Thaler and Sunstein's views of which factors interfere with rational deliberation, though they are generally plausible. How many people believe that the setting of the default ought to be relevant to how much they should save for retirement?

To sum up: Nudges are ways of influencing choice without limiting the choice set or making alternatives appreciably more costly in terms of time, trouble, social sanctions, and so forth. They are called for because of flaws in individual decision-making, and they work by making use of those flaws. When intended to benefit the person who is nudged, they constitute instances of what Thaler and Sunstein call "libertarian paternalism."

II. WHAT IS PATERNALISM?

Thaler and Sunstein define a policy as paternalistic "if it tries to influence choices in a way that will make choosers better off, *as judged by themselves*" (p. 5).⁹ According to this definition, the only things that distinguish paternalism from beneficence in general are (a) that paternalism aims to benefit people by getting them to make choices that are good for themselves rather than by providing benefits in some other way and (b) that the choosers would agree with this evaluation of their choice.

This definition of paternalism is unsatisfactory. Whether agents agree that some intervention benefits them has nothing to do with whether the intervention is paternalistic. More importantly, paternalism does not always aim to influence choice. For example, consider a doctor who gives a life-saving blood transfusion

⁸We are grateful here to Harry Brighouse. Chapter 3 of *Nudge* is concerned with peer pressure and so touches on these influences, but its focus is on the psychological foibles that facilitate the influence of others on our choices.

⁹See also "Libertarian paternalism," p. 175 and "Preferences, paternalism, and liberty," p. 134. Thaler and Sunstein maintain that a similar definition can be found in Donald Van de Veer, *Paternalistic Intervention: The Moral Bounds on Benevolence* (Princeton: Princeton University Press, 1986), but in fact Van de Veer defines paternalism as follows: "A's doing or omitting some act X to, or toward, S is paternalistic behavior if and only if 1) A deliberately does (or omits) X, and 2) A believes that his (her) doing (or omitting) X is contrary to S's operative preference, intention, or disposition at the time A does (or omits) X [or when X affects S—or would have affected S if X had been done (or omitted)], and 3) A does (or omits) X with the primary or sole aim of promoting a benefit for S [a benefit which, A believes, would not accrue to S in the absence of A's doing (or omitting) X] or preventing a harm to S [a harm which, A believes, would accrue to S in the absence of A's doing (or omitting) X]" (p. 22).

to an unconscious Jehovah's Witness, who has asked not to be transfused. We agree with Bernard Gert and Charles Culver that the doctor acts paternalistically.¹⁰ The doctor aims to benefit the Jehovah's Witness against his will, but obviously not by influencing his choice.

At the same time, Thaler and Sunstein's characterization of paternalism mistakenly counts giving advice and rational persuasion that aims at the good of the advisee as paternalistic. So Thaler and Sunstein regard the following as nudges: educational campaigns (p. 68/69), warning labels on cigarettes (p. 189/191), requirements that firms notify employees of hazards (p. 189/191), and signs warning people on a hot day to drink more water (p. 244/247).¹¹ Unlike constraining someone or substituting your judgment for theirs, providing information and giving advice treats individuals as fully competent decision makers.¹² In his classic critique of paternalism in *On Liberty*, John Stuart Mill is as emphatic in his approval of attempts by individuals and the government to inform and rationally to persuade as he is in his condemnation of what he calls "the system of despotic, or what is called paternal, government."¹³ What Mill objects to in paternalism is interference with individual liberty. Typical contemporary philosophical treatments of paternalism treat a limitation on freedom as a defining feature and the reason why paternalism is morally problematic.¹⁴ Unlike Sunstein and Thaler, the philosophers mentioned in the last footnote have seen coercion as the crucial feature that distinguishes specifically paternalistic actions and policies from the wider class of actions and policies that merely aim at making people better off. Informing workers of hazards or warning people to drink water in hot weather is accordingly not paternalistic. Thaler and Sunstein disagree. They deny that paternalism must limit freedom in the sense of closing off alternatives or making them more costly,¹⁵ but their argument for this denial consists largely of describing nudges that do not limit choices and asserting that they are nevertheless paternalistic.

¹⁰"Paternalistic behavior," *Philosophy and Public Affairs*, 6 (1976), 45–57 at p. 46. Presumably, the Jehovah's Witness is also unlikely to agree that the intervention was beneficial.

¹¹There are many other examples. Nearly half of the nudges listed in the "bonus chapter" in the revised paperback edition consist of proposals to provide people with more easily accessible information via "smart" energy meters, feedback on energy use while driving, glowing power cords or carbon labels. The RECAP program (Record, Evaluate, and Compare Alternative Prices), which Thaler and Sunstein would apply to credit cards (p. 93/95), cell phones (p. 93/95), mortgages (137–8/139–40), student loans (141/142), and Medicare Part D (173–4/175–6) is designed only to provide more salient information.

¹²Posting a sign does not mean that people will read it, and people do not automatically process what they do read. Some of the information-giving nudges that Thaler and Sunstein discuss such as the Texas anti-littering campaign (p. 60) exploit limits to rational evaluation to make information salient and might after all count as the paternalistic "shaping" of evaluation and choice which we discuss later. But most of the information-giving nudges discussed by Thaler and Sunstein are not instances of paternalism.

¹³John Stuart Mill, *On Liberty* (Indianapolis: Hackett, [1859] 1978), ch. 5.

¹⁴See for example: Joel Feinberg, "Legal paternalism," *Canadian Journal of Philosophy*, 1 (1971), 106–24; Gerald Dworkin, "Paternalism," *Monist*, 56 (1972), 64–84; or Peter de Marneffe, "Avoiding paternalism," *Philosophy and Public Affairs*, 34 (2006), 68–94.

¹⁵"The second misconception is that paternalism always involves coercion" (p. 11).

Have Thaler and Sunstein discovered that paternalism can be reconciled with respect for individual liberty after all, or are they merely pointing out in misleading language that beneficence need not conflict with freedom? Their nudges do not limit what alternatives people can choose, except in trivial ways. Perhaps students in the cafeteria line now cannot get cake without having to reach over the fruit, but the cake is still there. Nudges leave the “choice set,” the set of alternatives among which agents can choose, essentially unchanged. So if a policy is paternalistic only if it limits what people can choose, none of Thaler and Sunstein’s nudges are paternalistic.

Yet those who have been worried about the ways in which government action and social pressure limit liberty have been concerned about liberty in a wider sense than closing off alternatives or rendering them more costly. Let us call the other aspects of this wider sense of liberty, “autonomy,”¹⁶—the control an individual has over his or her own evaluations and choices. If one is concerned with autonomy as well as freedom, narrowly conceived, then there does seem to be something paternalistic, not merely beneficent, in designing policies so as to take advantage of people’s psychological foibles for their own benefit. There is an important difference between what an employer does when she sets up a voluntary retirement plan, in which employees can choose to participate, and what she does when, owing to her understanding of limits to her employees’ decision-making abilities, she devises a plan for increasing future employee contributions to retirement. Although setting up a voluntary retirement plan may be especially beneficial to employees because of psychological flaws that have prevented them from saving on their own, the employer is expanding their choice set, and the effect of the new plan on employee savings comes mainly as a result of the provision of this new alternative. The reason why nudges such as setting defaults seem, in contrast, to be paternalist, is that in addition to or apart from rational persuasion, they may “push” individuals to make one choice rather than another.¹⁷ Their freedom, in the sense of what alternatives can be chosen, is virtually unaffected, but when this “pushing” does not take the form of rational persuasion, their autonomy—the extent to which they have control over their own evaluations and deliberation—is diminished. Their actions reflect the tactics of the choice architect rather than exclusively their own evaluation of alternatives.

We shall call the use of flaws in human decision-making to get individuals to choose one alternative rather than another “shaping” their choices. We intend “shaping” to exclude rational persuasion. “Manipulation” would be a more

¹⁶Autonomy is, of course, also used in the sense of what Isaiah Berlin calls “positive freedom”—that is as conformity to standards of a substantive objective rationality—in “Two concepts of liberty,” *Four Essays on Liberty* (Oxford: Oxford University Press, 1990). We are using the term “autonomy” only to refer to the control an individual has over her own evaluation, deliberation and choice.

¹⁷Thaler and Sunstein, “Preferences, paternalism, and liberty,” pp. 234–5.

natural label, but since we are concerned with whether shaping people's choices is justified, we have avoided using a word with such pejorative connotations. Employing this stipulative definition of "shaping" choices, one can then say that what makes some of the nudges Thaler and Sunstein discuss instances of paternalism is that they involve shaping people's choices for their own benefit.

One straightforward way to define paternalism would accordingly be to maintain that:

A policy is paternalistic if and only if it aims to advance the interests of some person P either (a) via influencing P's choices by shaping how P chooses or limiting what P can choose or (b) by some means that will take effect regardless of what P does and against P's will.¹⁸

What characterizes paternalism are the aims with which one acts and the means one employs, not whether one is successful. According to (a), which is the only clause that is relevant to Thaler and Sunstein's position, a paternalist aims to influence P's choices through means other than rational persuasion. Paternalistic policy aims to affect choice either by changing the set of available alternatives among which an agent can choose or by employing non-rational means to influence how the agent chooses among an unchanged set of alternatives. Paternalistic actions either coerce people or use imperfections in their deliberative abilities to shape their choices. In Seana Shiffrin's suggestive terminology, paternalistic policies attempt to substitute the policy-maker's judgment of what is good for the agent for that of the agent.¹⁹

Carolyn's food arrangement satisfies the first part of this definition and thus counts as paternalistic. If instead she placed placards by the various dishes with nutritional information, then she would not be aiming to shape how the children choose or to limit what can be chosen, and her actions would not in our view (as opposed to Thaler and Sunstein's) count as paternalistic. If the placards contained false information designed to deceive the students into making the right choices for the wrong reasons, then she would be behaving paternalistically again. Similarly, policies setting participation as the default in a retirement scheme aim to advance the interests of the employees by shaping how they choose, unlike setting up a voluntary retirement scheme which influences employee's choices mainly via their knowledge of the enlarged choice set. Our definition will count as paternalistic everything that traditional definitions count. But some actions that are not coercive, such as Carolyn's food arrangements, will also count as paternalistic.

¹⁸Clause (b) might be too broad. For example, are gifts that recipients would refuse to purchase for themselves paternalistic, as (b) suggests? It is not clear that this is so. Furthermore, most gifts can be refused or returned and so are not likely to "take effect regardless of what P does." Clause (b) does not figure in our discussion of Thaler and Sunstein's views.

¹⁹"Paternalism, unconscionability doctrine, and accommodation," *Philosophy & Public Affairs*, 29 (2000), 205–50.

Why draw the line between paternalistic and non-paternalistic attempts to influence people's choices for their own benefit at limiting what people can choose or shaping their choices? What connection is there between such a line and the possibility that there is something morally troubling about paternalism? The answer is that rational persuasion respects both individual liberty and the agent's control over her own decision-making, while, in contrast, deception, limiting what choices are available or shaping choices risks circumventing the individual's will. What matters is whether the policy-maker is attempting to bring about something against the beneficiary's will.²⁰

When attempting to persuade people rationally, we may be kidding ourselves. Our efforts to persuade may succeed because of the softness of our smile or our aura of authority rather than the soundness of our argument, but a huge difference in aim and attitude remains. Even if purely rational persuasion were completely impossible—that is, if rational persuasion in fact always involved some shaping of choices as well—there would be an important difference between attempting to persuade by means of facts and valid arguments and attempting to take advantage of loss aversion or inattention to get someone to make a choice that they do not judge to be best. Like actions that get people to choose alternatives by means of force, threats, or false information, exploitation of imperfections in human judgment and decision-making aims to substitute the nudger's judgment of what should be done for the nudgee's own judgment. When such interference aims at the individual's own good, it is paternalistic. The paternalistic policies espoused by Thaler and Sunstein and others, which involve negligible interferences with freedom (in the sense of the range of alternatives that can be chosen), may threaten the individual's control over her own choosing. To the extent that they are attempts to undermine that individual's control over her own deliberation, as well as her ability to assess for herself her alternatives, they are *prima facie* as threatening to liberty, broadly understood, as is overt coercion. Insofar as it is genuinely paternalistic, libertarian paternalism will count as "libertarian" only for those whose concerns about liberty are limited to questions about the contents of the choice set.

III. USING DECISION-MAKING FOIBLES TO INFLUENCE CHOICES

Is paternalism that plays on flaws in human judgment and decision-making to shape people's choices for their own benefit defensible? If one believes, as we do, that paternalistic policies (such as requiring the use of seat belts) that limit liberty are sometimes justified, then it might seem that milder nudges would *a fortiori* be unproblematic.

But there may be something more insidious about shaping choices than about open constraint. For example, suppose, for the purposes of argument, that

²⁰Shiffrin, *op. cit.*, p. 213.

subliminal messages were highly effective in influencing behavior.²¹ So the government might, for example, be able to increase the frequency with which people brush their teeth by requiring that the message, “Brush your teeth!” be flashed briefly during prime-time television programs. Influencing behavior in this way may be a greater threat to liberty, broadly conceived, than punishing drivers who do not wear seat belts, because it threatens people’s control over their own evaluations and deliberation and is so open to abuse. The unhappily coerced driver wearing her seat belt has chosen to do so, albeit from a limited choice set, unlike the hypothetical case of a person who brushes his teeth under the influence of a subliminal message. In contrast to Thaler and Sunstein, who maintain that “Libertarian paternalism is a relatively weak and nonintrusive type of paternalism,”²² to the extent that it lessens the control agents have over their own evaluations, shaping people’s choices for their own benefit seems to us to be alarmingly intrusive.

Influencing behavior in such ways is troubling, and we propose in this section to comment on the general question of what limits there should be on the exploitation of decision-making flaws to influence behavior. There is obviously a huge range of techniques that people use to influence the behavior of others without limiting what alternatives they can choose. In addition to shaping behavior—exploiting the flaws in rational deliberation with which Thaler and Sunstein are concerned—advertisers attempt to influence consumer choices by suggesting associations between products and valued traits such as masculinity or femininity or wealth or health. Charities attempt to draw on people’s emotions. Pictures or music can change people’s perception of the value of alternatives. There is also often some element of informing and rationally persuading in the complex and rich panoply of ways in which people influence the choices of others. Assessing these techniques is a complex task, and we can only scratch the surface.

In particular, we shall focus on the limits that ought to be imposed specifically on government action, in part because it is difficult to see how to implement limits on persuasive techniques employed by non-governmental agents. What makes the cacophony of invocations of irrational responses by non-governmental agents tolerable (to the extent that it is tolerable) are, we suggest, the limits to its effectiveness and the extent to which these invocations conflict with one another and cancel one another out.

Despite their suggestion that protecting freedom of choice is sufficient to allay libertarian concerns about methods of influencing choices, Thaler and Sunstein

²¹Luc Bovens considers the same thought experiment and argues that what distinguishes nudges from subliminal messages is the requirement that people be informed in each instance in which someone attempts to shape their choices. But he does not justify this requirement, and he concedes that such transparency is a matter of degree. See “The ethics of nudge,” *Preference Change: Approaches from Philosophy, Economics and Psychology*, ed. Till Grüne-Yanoff and S. O. Hansson (Berlin: Springer, 2008), pp. 207–219, esp. pp. 216ff.

²²“Preferences, Paternalism, and Liberty,” p. 234.

show some awareness of the risks that shaping poses to people's control over their own choices. They argue that subverting people's control over their own actions by means such as subliminal messages is morally objectionable, because, unlike the nudges they favor, subliminal messages violate a publicity condition that "bans government from selecting a policy that it would not be able or willing to defend publicly to its own citizens" (244/247).²³ One way to rationalize their imposition of a publicity condition would be to attribute to them the recognition that, while not changing what individuals can in fact choose, deception can make it appear to the individual that the choice set has changed and thereby limit freedom.

Thaler and Sunstein's publicity principle is however insufficient to rule out the use of subliminal advertising. For example, it seems possible that the government might be able and willing to defend the use of subliminal messages such as "Brush your teeth!" and thus satisfy the publicity condition. But Thaler and Sunstein would condemn subliminal advertising, on the ground that it is impossible for individuals to monitor it (pp. 246, 249). They go on to question whether subliminal advertisements (if they worked) would count as nudges, on the grounds that they would make it appreciably more difficult to choose some alternatives. But Thaler and Sunstein cannot consistently maintain that subliminal advertising counts as an infringement of freedom, because it does not rule out alternatives or make them more costly. It seems to us that what bothers Thaler and Sunstein about the hypothetical case of efficacious subliminal advertising is the efficacy itself. In other words, we suspect that despite their explicit claims to the contrary, they agree that nudges are not always benign.

What limits should there be on the government's use of nudges that shape choices? Three distinctions may be helpful. First, in many cases, regardless of whether there is a nudge or not, people's choices will be shaped by factors such as framing, a status quo bias, myopia and so forth. Although shaping still raises a flag because of the possibility of one agent controlling another, it arguably renders the action no less the agent's own, when the agent would have been subject to similar foibles in the absence of nudges. When choice shaping is not avoidable,²⁴ then it must be permissible.

Second, although informed by an understanding of human decision-making foibles, some nudges such as "cooling off periods" (p. 250/253) and "mandated choice" (pp. 86–7/88) merely counteract foibles in decision-making without in any way pushing individuals to choose one alternative rather than another.²⁵ In

²³Thaler and Sunstein offer this principle and say that they endorse John Rawls's publicity condition in *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 48. However, Rawls' principle requires that principles be known and understood by the public, not merely that they be publicly defensible.

²⁴Thaler and Sunstein argue that choice architecture is unavoidable. See pp. 239–53 of "Preferences, Paternalism, and Liberty" and especially p. 250.

²⁵For an example of a cooling-off period, buyers of goods from door-to-door salesmen have three days in which to rescind the purchase. Thaler and Sunstein do not regard cooling-off periods as

this way, shaping apparently enhances rather than threatens an individual's ability to choose rationally. Allowing people voluntarily to place themselves on a list that bans them from casinos (p. 233/235) shifts the decision about whether to gamble to a moment when temptation is weaker and thereby shapes the choice that results, but it does not threaten people's control over their own choices.²⁶

Third, one should distinguish between cases in which shaping increases the extent to which a person's decision-making is distorted by flaws in deliberation, and cases in which decision-making would be at least as distorted without any intentionally designed choice architecture.²⁷ In some circumstances, such as (hypothetical) subliminal advertising, the foibles that make people care less about brushing their teeth are less of a threat to their ability to choose well for themselves than the nudging. In other cases, such as Carolyn's, the choices of some of the students passing through the cafeteria line would have been affected by the location of different dishes, regardless of how the food is displayed.

There remains an important difference between choices that are intentionally shaped and choices that are not. Even when unshaped choices would have been just as strongly influenced by deliberative flaws, calculated shaping of choices still imposes the will of one agent on another. Suppose, for example, that, with the help of a consulting behavioral economist, an employer is able to structure the defaults, the contribution timing, and the framing of a retirement plan so as to achieve a very high contribution rate from a large majority of employees. When the employer and the consultant get together to congratulate themselves on engineering the situation so that the employees chose in just the way that the employer had planned for them to choose, they are celebrating their power over the employees. Even if the employees would have chosen to structure the choice architecture in this way if they had been able to choose, the employer and the consultant were knowingly choice architects, and their shaping partly controlled what the employees take to be their independent choices.

Having drawn these distinctions, let us focus on the use of shaping that is avoidable and not designed exclusively to facilitate rational choice. Should we be

nudges, on the grounds that they are substantial infringements on freedom. An example of mandated choice would be a requirement that prospective employees decide on what contribution they will make to the company's retirement plan as a condition of employment. It is not clear whether Thaler and Sunstein regard mandated choice as a nudge, but whether they do or not, it is paternalistic only insofar as it coerces people into choosing.

²⁶A related distinction between hard and soft paternalism is important to the justification of openly coercive paternalistic policies such as seat belt laws. This is the distinction between on the one hand limits on freedom of choice that aim to benefit people by counteracting their irrationality and on the other hand limits that aim to benefit people by correcting rational but mistaken choices. According to hard paternalism, the fact that interference will prevent harm to the actor is a good reason to interfere, regardless of why the actor chooses as he or she does. Soft paternalism maintains that such interference is justified only when the choice the actor makes is largely non-voluntary. See Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), pp. 12–16.

²⁷Although some comparisons seem to be possible, there is no obvious metric of how seriously compromised someone's deliberative capacities are.

troubled by efforts to nudge people in this way, whether for their own good or for the good of others? One reason to be troubled, which Thaler and Sunstein to some extent acknowledge (p. 246/249), is that such nudges on the part of the government may be inconsistent with the respect toward citizens that a representative government ought to show. If a government is supposed to treat its citizens as agents who, within the limits that derive from the rights and interests of others, determine the direction of their own lives, then it should be reluctant to use means to influence them other than rational persuasion. Even if, as seems to us obviously the case, the decision-making abilities of citizens are flawed and might not be significantly diminished by concerted efforts to exploit these flaws, an organized effort to shape choices still appears to be a form of disrespectful social control.

We think that it is nevertheless sometimes acceptable for the government to shape people's choices. Not only is there no bright line between the use of shaping to influence choice and its use to facilitate autonomous decision-making by freeing individuals from other irrelevant influences, but when there are strong reasons (paternalistic or otherwise) to get citizens to behave in a certain way, shaping people's choices may be more efficient and less constraining than limiting what they can choose. Public service announcements often make use of our foibles, rather than simply using rational persuasion to influence our behavior. They may thereby promote the desired behavior at a lower cost with a smaller infringement of freedom than passing a law requiring the behavior. Although the "Don't mess with Texas" campaign was informational and complemented rather than replaced laws against littering, both in its formulation and in the advertising campaign, it attempted to create a machismo image for those who don't litter (p. 60) and to influence behavior via that association. The campaign was not a significant threat to freedom, and in any event, coercion to prevent littering is clearly permissible. By playing on emotions that ought to be irrelevant to littering, it attempted some very mild shaping and thereby influenced behavior at a much lower cost than harsher penalties for littering or expanded enforcement of anti-littering laws.²⁸ The justification for such shaping, like the justification of openly coercive policies, rests on a comparison of benefits to the loss of autonomy, not, as Thaler and Sunstein suggest, on the view that nudges are costless.

We do not defend any wholesale conclusions justifying or condemning policies such as nudges that make use of limitations of individual decision-making. But we would defend the following four claims:

²⁸In addition, whether via coercion or shaping, limitations on freedom can benefit people not only by making them better off but by making them in the future better able to choose for themselves. For example, government interference, whether by requiring enrollment in social security or setting defaults to encourage participation in a retirement savings plan, might indirectly help protect the autonomy of individuals in the future by providing them with greater financial security when they are retired.

1. Government action to shape people's choices is subject to abuse: it is possible by means of shaping to get people to make choices that are at odds with their stated preferences and with the preferences they would express if their deliberation were not flawed. Furthermore, it might be more difficult to monitor attempts to shape choices than it would be to monitor openly coercive policies. The main protections against abuse seem to us to be our limited proficiency at exploiting flaws in human decision making and the extent to which efforts at shaping choices on the part of different agents undercut one another. The most serious risks of abuse seem to us to lie in the exploitation of people's fears and hatreds, some of which surely counts as shaping choices.
2. As Thaler and Sunstein wisely but somewhat inconsistently maintain, publicity is important. One important way to protect against abuse and to respect autonomy is to make sure that the government actually inform people of efforts to shape their choices, not merely that it be able and willing to do so. People should be informed of government efforts to exploit their decision-making foibles, even if doing so undercuts their effectiveness.²⁹
3. The findings of psychologists and behavioral economists concerning the character and significance of flaws in our deliberative capacities remind us of their fragility and of the need to nurture them. No matter how well intentioned government efforts to shape choices may be, one should be concerned about the risk that exploiting decision-making foibles will ultimately diminish people's autonomous decision-making capacities.³⁰ When the government intentionally employs non-rational means of persuasion, it should take care not to undermine its capacity to persuade people rationally.
4. Coercion is often justified, and shaping sometimes a better alternative than coercion, but rational persuasion is the ideal way for government to influence the behavior of citizens. Although the force of rational persuasion is limited, and actual persuasion is rarely purely rational, only rational persuasion fully respects the sovereignty of the individual over his or her own choices.³¹

²⁹Thaler and Sunstein defend their publicity condition on two grounds. First, they say, "If a government adopts a policy that it could not defend publicly, it stands to face considerable embarrassment, and perhaps much worse, if the policy and its grounds are disclosed." Second, they think the publicity condition reflects respect: "The government should respect the people whom it governs, and if it adopts policies that it could not defend in public, it fails to manifest that respect. Instead, it treats its citizens as tools for its own manipulation" (p. 245). Although necessary to show respect, the ability of the government to defend policies publicly is not sufficient. We maintain that publicity must be actual, not merely counterfactual.

³⁰As Bovens notes, "*Nudging* may not create sustainable effects on people's behaviour" *op. cit.*, p. 11.

³¹A systematic account of rational persuasion is needed here. We do not mean to suggest that rational persuasion is emotionless cold calculation. Clarifying the role of emotions in rational persuasion is a difficult task for another occasion.

IV. CONCLUSIONS

Libertarian paternalistic nudges are in many cases not paternalistic at all, but instead largely cases of rational persuasion. When they are paternalistic and in our terminology “shape” choices, their libertarian credentials are questionable, even though they do not close off alternatives or render them appreciably more costly. Those nudges that Thaler and Sunstein discuss that are actually paternalistic seem to us in most cases nevertheless unobjectionable, but not merely on the grounds that they do not change the choice set. Systematically exploiting non-rational factors that influence human decision-making, whether on the part of the government or other agents, threatens liberty, broadly conceived, notwithstanding the fact that some nudges are justified. Publicity, competition and limits to human abilities to influence choices limit the threat. But once the character of the paternalism in Thaler and Sunstein’s “libertarian paternalism” has been clarified, its risks to an agent’s control over her own deliberation are evident.³²

³²Though not of philosophical importance, Thaler and Sunstein’s hope “that the general approach might serve as a viable middle ground in our unnecessarily polarized society” (p. 252/255) strikes us as implausible. Their major policy proposals—school choice, cap and trade markets to limit pollution, and privatizing marriage and limiting legal recognition to domestic partnerships open to gays and lesbians—have little connection to libertarian paternalism or nudges, and they are hardly middle ground. There are many insights in *Nudge* for the nitty-gritty business of designing policies, but no path toward reconciling disagreements concerning major issues.