

The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism

Christopher McCrudden & Jeff King*

Abstract

Libertarian paternalism, as advanced by Cass Sunstein, is seriously flawed, but not primarily for the reasons that most commentators suggest. Libertarian paternalism and its attendant regulatory implications are too libertarian, not too paternalistic, and as a result are in considerable tension with 'thick' conceptions of human dignity.

We make four arguments. The first is that there is no justification for a presumption in favor of nudging as a default regulatory strategy, as Sunstein asserts. It is ordinarily less effective than mandates; such

* This chapter brings together the gist of our two separate papers at the *Verfassungsblog* Conference that generated this volume. A draft of the joint paper we wrote following the Conference was discussed at the Berlin Seminar *Recht im Kontext* and at a workshop at the Max Planck Institute for Human Development in Berlin. We are grateful to all the participants at these discussions. We are particularly grateful to the following for commenting on previous versions of the chapter or for discussing aspects of our work with us that were relevant for the chapter: Bruce Ackerman, Sabrina Artinger, Sabino Cassese, Gerd Gigerenzer, Dieter Grimm, Philipp Hacker, Hans Michael Heinig, Christoph Möllers, Susan Rose-Ackerman, Uwe Volkmann, Jonathan White, and Lea Ypi. Jan-Hendrik Hofmeyer generously translated a Dutch text for us. Bryan Thomas made exceptionally helpful contributions in extended discussions and written comments. Work on the chapter took place whilst Christopher McCrudden was a Fellow of the *Wissenschaftskolleg zu Berlin* and Jeff King was an Alexander von Humboldt Foundation Fellow at the Humboldt University of Berlin.

Christopher McCrudden & Jeff King

mandates rarely offend personal autonomy; and the central reliance on cognitive failures in the nudging program is more likely to offend human dignity than the mandates it seeks to replace.

Secondly, we argue that nudging as a regulatory strategy fits both overtly and covertly, often insidiously, into a more general libertarian program of political economy.

*Thirdly, while we are on the whole more concerned to reject the libertarian than the paternalistic elements of this philosophy, Sunstein's work, both in *Why Nudge?*, and earlier, fails to appreciate how nudging may be manipulative if not designed with more care than he acknowledges.*

*Lastly, because of these characteristics, nudging might even be subject to legal challenges that would give us the worst of all possible regulatory worlds: a weak regulatory intervention that is liable to be challenged in the courts by well-resourced interest groups. In such a scenario, and contrary to the 'common sense' ethos contended for in *Why Nudge?*, nudges might not even clear the excessively low bar of doing something rather than nothing.*

Those seeking to pursue a progressive politics, under law, should reject nudging in favor of regulation that is more congruent with principles of legality, more transparent, more effective, more democratic, and allows us more fully to act as moral agents. Such a system may have a place for (some) nudging, but not one that departs significantly from how labeling, warnings and the like already function, and nothing that compares with Sunstein's apparent ambitions for his new movement.

Introduction

'Nudging' is a term coined by Richard Thaler and Cass Sunstein. It has been presented by them in numerous papers and in two books. The first book, by Thaler and Sunstein jointly, was published in 2008 and is called *Nudge*.¹ Our principal focus in this article is on the second book by Cass

1 RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, CT, Yale University Press, 2008).

Sunstein alone, entitled *Why Nudge? The Politics of Libertarian Paternalism*.² It is a revised version of the prestigious Storrs Lectures he presented at Yale Law School. Among other things, the book is in praise of warning labels on suspect products, like cigarettes. So let's begin with one of our own:³ Cass Sunstein can seriously damage your human dignity (and weaken your state while doing so)! Our aim in this review is to convince you that this is the case.

'Nudging' is the new buzzword in regulation. 'A nudge', say Sunstein and Thaler, '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. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates.'⁴ Sunstein's *Why Nudge?* deepens Sunstein and Thaler's earlier defense of libertarian paternalism, a philosophy of regulation that favors using choice-preserving 'nudging' as a regulatory intervention. Nudging is sometimes an addition to, but is often in competition with, traditional regulatory mandates (such as legal prohibitions on smoking in restaurants), and economic incentive-based regulation (such as reducing the tax on 'green' electricity to increase demand).

In this article, we explain why this philosophy is seriously flawed. We make four arguments. The first is that there is no justification for a presumption in favor of nudging as a default regulatory strategy, as Sunstein asserts. It is ordinarily less effective than mandates; such mandates rarely offend personal autonomy; and the central reliance on cognitive failures in the nudging program is more likely to offend human dignity than the mandates it seeks to replace. Secondly, we argue that nudging as a regulatory strategy fits both overtly and covertly, often insidiously, into a more general libertarian program of political economy. It is noteworthy that, so far as we are aware, this criticism has been largely ignored by Sunstein in his response to critics of *Why Nudge?*, including in his contribution to this volume. Thirdly, while we are on the whole more concerned to reject the libertarian than the paternalistic elements of this

2 CR Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (New Haven, CT, Yale University Press, 2014).

3 This introduction adapts RH Thaler's opening line in 'Mortgages Made Simple' (2009) *New York Times* July 4.

4 Thaler and Sunstein, *Nudge* (2008) 6.

philosophy, Sunstein's work, both in *Why Nudge?*, and earlier, fails to appreciate how nudging may be manipulative if not designed with more care than he acknowledges. Lastly, because of these characteristics, nudging might even be subject to legal challenges that would give us the worst of all possible regulatory worlds: a weak regulatory intervention that is liable to be challenged in the courts by well-resourced interest groups. In such a scenario, and contrary to the 'common sense' ethos contended for in *Why Nudge?*, nudges might not even clear the excessively low bar of doing something rather than nothing.

On the whole, we suggest that libertarian paternalism and its attendant regulatory implications are in considerable tension with 'thick' conceptions of human dignity, the meaning of which we consider later. Those seeking to pursue a progressive politics, under law, should reject nudging in favor of regulation that is more congruent with principles of legality, more transparent, more effective, more democratic, and allows us more fully to act as moral agents. Such a system may have a place for (some) nudging, but not one that departs significantly from how labeling, warnings and the like already function, and nothing that compares with Sunstein's apparent ambitions for his new movement.

Although we shall attempt to set out as clearly as we can, in a moment, the basic argument of Sunstein's book, we should acknowledge that there is a difficulty in doing so. There appear to be two Sunsteins. The first Sunstein sees nudging merely as an extra tool in the regulatory toolbox, one that is fairly straightforward, non-ideological, commonsense, and uncontroversial – this Sunstein is part tinkerer, part nerd, part policy-wonk. The first Sunstein is worthy, and fascinated by flies in urinals, but is otherwise not very interesting. As an approach to the problem of regulation in an increasingly complex world, this Sunstein will sound admirably moderate and evidence-based by comparison with the libertarianism of, say, Robert Nozick. This is the Sunstein that often presents nudging to conferences of politicians, policy makers and bureaucrats. It is the Sunstein that resists theorizing about nudging.

For the second Sunstein, however, nudging is quite radical, not at all straightforward, deeply ideological, and grounded in a controversial understanding of human reasoning. The second Sunstein is *very* interesting, but much more worrying. Even though there are some contra-

indications elsewhere, we consider that it is the second Sunstein that is to be found in ‘*Why Nudge?*’, and this was presaged by the 2008 book. Thaler and Sunstein open that book with the striking greeting: ‘welcome ... to our new movement.’⁵ This new movement they term ‘libertarian paternalism.’ They subsequently claim for their new ‘movement’ the title ‘the real third way.’⁶ We learn that ‘Milton Friedman was right,’⁷ and Friedrich Hayek is dropped casually into the conversation at critical points.⁸ They talk of ‘strategies’, and in the second book Sunstein claims to establish a ‘general principle’ that applies to regulation in general.⁹ Most critically, Sunstein’s book is grounded in the emerging discipline of behavioral economics, which is loaded with theoretical assumptions and controversial moves.

Our argument is that we should be deeply suspicious of the current enthusiasm for nudging in government. In part I, we will set out our understanding of the argument that Sunstein develops in *Why Nudge?* Then, in part II, we set nudging in the context of behavioral economics more generally. Following this, in part III, we expand on our principal ethical concerns about Sunstein’s new movement, focusing on the acceptability of libertarian paternalism in terms of social welfare, autonomy, and human dignity. Building on this, a brief description of the current political economy of nudging is introduced in part IV, before concluding with a preliminary examination, in part V, of the legal problems nudging may face.

An Outline of Why Nudge?

Nudging is offered by Sunstein as a common sense, middle ground between a meddling Nanny State, where we are told what to do ‘for our own good,’ and a regulation-free Wild West, where anything goes. In supporting nudging, Sunstein claims to be both libertarian and paternalist. His libertarianism is grounded primarily in John Stuart Mill’s argument

- 5 Thaler and Sunstein, *Nudge* (2008) 8.
- 6 Thaler and Sunstein, *Nudge* (2008) 252.
- 7 Thaler and Sunstein, *Nudge* (2008) 206.
- 8 Sunstein, *Why Nudge?* (2014) 93, 146.
- 9 Sunstein, *Why Nudge?* (2014) 17.

that individuals themselves are best positioned to identify their own ends and the optimal means to their realization. He considers this to be Mill's best argument in favor of the harm principle: the principle that society should not interfere with choice unless it prevents harm to others. Mill's 'epistemic argument', Sunstein considers, nevertheless rests on shaky empirical assumptions that people behave rationally, assumptions that are belied by modern psychology and behavioral economics: as a species, Sunstein thinks, we humans are impulsive, short sighted, and given to false optimism.¹⁰

These behavioral characteristics lead to 'behavioral market failures'.¹¹ As a result, Sunstein argues, the state may and ought to act paternalistically, at least to a degree. He claims that regulators should use these emerging insights from the social sciences to identify and 'counteract'¹² likely errors, and nudge people into adopting beneficial courses of action. Like it or not, he argues, our decisions on everything from lunch choices to retirement planning are already influenced by underlying 'choice architectures.'¹³ Given this, why not adapt choice architectures to help people make choices that are to their benefit, by making important information salient (e.g., calorie counts on menus), or by bringing default options into line with what people would, on reflection, prefer (e.g., opt-out enrolment for pension plans)? But this 'paternalism' is, he insists, paternalism of a weak variety, which he describes as 'soft paternalism.'¹⁴ The essential character of nudges in Sunstein's view is that they are choice preserving. They include 'initiatives that maintain freedom of choice while also steering people's decisions in the right direction (as judged by people themselves).' He

10 Though Sunstein credits this insight to modern behavioural psychology, he does not acknowledge that this same point was a contemporary criticism of Mill's thesis. G Dworkin (1972) 'Paternalism' 56 *Monist* 64, 72, quoting JF Stephen, *Liberty, Equality, Fraternity* (New York, Henry Holt & Co., 1874) 24.

11 Sunstein, *Why Nudge?* (2014) 4-5, 16

12 Sunstein objects to the use of the term 'exploit biases,' preferring 'counteract': *Why Nudge?* (2014) 59. We take no view on the propriety of the term and leave to the reader's judgement whether this is a euphemism.

13 Sunstein, *Why Nudge?* (2014) 13-19. Thaler and Sunstein *Nudge* (2008) 3. By 'choice architecture' they mean 'the context in which people make decisions.'

14 Sunstein, *Why Nudge?* (2014) 33.

adds: ‘Nudges include disclosure of information, warnings and appropriate default rules, which establish what happens if people do nothing at all.’¹⁵

In advocating his ‘libertarian paternalism’, Sunstein seeks to avoid appearing to be doctrinaire. Thus, his ‘First (and only) Law of Behaviorally Informed Regulation’ states that, ‘[i]n the face of behavioral market failures, nudges are usually the best response, at least when there is no harm to others.’¹⁶ This illustrates his *prima facie* commitment to two ethical dimensions of some importance. One is the commitment to using ‘social welfare’ as the ultimate ‘master concept’ that he claims guides his approach, something to be judged on the basis of empirical evidence.¹⁷ The ‘usually best response’, in other words, means that evidence may support a different approach. The other is his acknowledgment that Mill’s harm principle counsels state restraint only in respect of actions that harm ourselves rather than others. He claims to accept, consistently with his earlier work, the importance of the regulatory state and mandates in particular for curbing harm to others.

In Chapter One, Sunstein argues that the central occasion for introducing libertarian paternalism is where there is likely to be a ‘behavioral market failure’ caused by well-recognised cognitive biases (e.g. lack of self-control, time inconsistency, ignoring important, but sometimes shrouded characteristics of products or outcomes, as well as simple undue optimism). He explores how research into decision-making, which we discuss below, reveals a wide range of systematic biases that may unknowingly work to the detriment of the decision-maker’s own conception of her welfare or even her desires. He continues in the subsequent chapter to explore nuances in our understanding of paternalism. He claims a government acts paternalistically when ‘it is taking steps to influence or alter people’s choices for their own good.’¹⁸ He claims libertarian paternalism is ‘soft’ rather than ‘hard’ paternalism because it leaves choice open, and it is ‘means’ rather than ‘ends’ paternalism because it only assists people to reach their own self-chosen ends. He offers an array of regulatory policies addressing cigarette smoking to illustrate the difference between hard and soft paternalism –

15 Sunstein, *Why Nudge?* (2014) 17.

16 Sunstein, *Why Nudge?* (2014) 17.

17 Sunstein, *Why Nudge?* (2014) 18.

18 Sunstein, *Why Nudge?* (2014) 54.

the essence being that whenever the intervention imposes a ‘material cost’¹⁹ it is hard paternalism. Every other intervention – including the ones we have seen for decades, such as labels, warnings, and education programs, are soft paternalism and thus nudges.²⁰

In the chapters on welfare (Chapter Three) and autonomy (Chapter Four), Sunstein is almost entirely concerned with deflecting the charge that his theory is too paternalistic. Thus, he addresses five welfarist critiques of government intervention in choice, including that unfettered competition fosters more choice, that we learn from failed choices, that we should be experimental about choice rather than guided unthinkingly, and especially that government bureaucracy and legislatures are likely to be taken over by interest groups. His replies to these arguments are largely untroubling, in our view. Two powerful, and we believe valid, claims are that (1) nudging may promote or improve choice and (2) that our choices are in reality already determined by market actors: ‘*choice architecture is inevitable*’.²¹ By this claim he means that there is no neutral territory for decisions in complex markets, no neutrally presented range of options from which rational actors may choose.

He thus sees government-led libertarian paternalism as counteracting, in favour of consumers, both market dominated choice architectures, as well as insidious cognitive biases. If one believes that the regulatory state exists to assist citizens to make choices in complex fields without succumbing to undue exploitation from advertising, complexity, time pressure (‘Buy now!’), and the necessity for commodity selection in a welfare capitalist economy, then one should find this basic point convincing. Deftly, he also acknowledges the cumulative force of the welfarist objections mentioned above, which may seem to militate in favor of a presumption against nudging. He argues, however, that such objections have an abstract air about them: ‘Would we really be better off if government did not inform people of the risks of smoking and of driving without seatbelts? Of the nutritional content of food? Of texting while driving? Should government blind itself to what it knows about behavioural market failures?’²²

19 Formally defined as such, Sunstein, *Why Nudge?* (2014) 57-59.

20 Sunstein, *Why Nudge?* (2014) 82-86.

21 Sunstein, *Why Nudge?* (2014) 118, (emphasis in original). See further 119-122.

22 Sunstein, *Why Nudge?* (2014) 120.

Chapter Four continues to address libertarian objections based on the concept of autonomy.²³ He separates the idea of autonomy into ‘thick and thin’ conceptions, the former being a robust and libertarian ideal of liberty from intrusion, whilst the latter conception of autonomy is an ‘ingredient’ of welfare, one that is added to the scales of the welfarist cost-benefit analysis. Having dispatched the thin conception in Chapter Three, he considers the thick conception before concluding that it ‘does not turn on empirical questions’ and is ‘a show-stopper,’²⁴ by which he means that it resists powerful empirical evidence. Importantly, he shows how disclosure, default rules and fuel economy mandates can improve autonomy by facilitating real, autonomous choice in complex market interactions. Food and cigarette labelling tells us what is at stake before we buy them. His chief response to those who invoke autonomy, then, is that ‘reasonable responses to behavioural market failures ought not to raise concerns, certainly not if they respect the First Law of Behaviourally Informed Regulation and take the form of nudges.’²⁵

The final chapter (Chapter Five) considers further criticisms. He acknowledges that mandates may often be more transparent, but adds that they are occasions for greater governmental overreaching. In any event, nudges too may often be, and indeed normally are, devised and implemented in transparent ways.²⁶ He considers the charge that opt-outs or ‘easy reversibility’ is illusory, because people are often guided by unthinking inertia (as the cognitive science he relies on appears to establish). Here too, however, ‘insofar as it maintains freedom of choice, soft paternalism is less dangerous than mandates or bans’ and in the face of bad or harmful defaults, ‘a number of people will in fact opt out.’²⁷ The state may conceivably employ ‘impermissible motivations’ to extend paternalism into areas where even soft paternalism has no role (e.g.

23 Here, the only liberal thinker of any note that Sunstein mentions in this chapter is Ludwig von Mises, a libertarian thinker who is marginal in political philosophy. Compare our discussion of the liberal tradition, below. He also addresses the noted utilitarian philosopher Henry Sidgwick at 136, but not in connection with what autonomy is.

24 Sunstein, *Why Nudge?* (2014) 133.

25 Sunstein, *Why Nudge?* (2014) 138.

26 Sunstein, *Why Nudge?* (2014) 144-151.

27 Sunstein, *Why Nudge?* (2014) 153.

electoral and religious choices), but he considers this to be a problem with permissible government motivations, not with soft paternalism as such.²⁸

Context: the Rise and Rise of Behavioural Economics

Heuristics and Biases

Sunstein and Thaler's book *Nudge*, and Sunstein's later book, need to be situated in the context of an intense set of debates between traditional economic analysis and behavioural economics, and within behavioural economics itself. *Why Nudge?* is the latest in an increasingly long line of books and articles that flow from the rich relationship between cognitive psychology and economic analysis that emerged in the middle of the last century, leading to the development of what came to be called 'behavioral economics.' This work presented a significant challenge to the then dominant understanding of how individuals acted in the economic context. Rather than individuals behaving as 'rational actors', behavioral economists pointed to the growing empirical evidence from cognitive psychology that appeared to show that the rationality of individuals was often 'bounded,'²⁹ meaning that individuals are influenced in their economic decision making by emotions and distractions. As Richard Thaler later pithily described it, rational actors in orthodox economic thinking were thought to act like Mr Spock from *Star Trek*, whereas behavioural economists considered real humans to act 'more like Homer Simpson than Mr. Spock.'³⁰ The Homer Simpson-understanding of how

28 Sunstein, *Why Nudge?* (2014) 159-161.

29 H A Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization*, 4th edn (New York, Collier Macmillan, 1997). The first edition was published in 1947. For a more recent review of the idea, see R Selten, 'What is Bounded Rationality?' in G Gigerenzer and R Selten (eds), *Bounded Rationality: The Adaptive Toolbox* (Cambridge, Mass., MIT Press, 2001) 13. See also T Gilovich, D Griffin and D Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge, Cambridge University Press, 2002) 1-19. Of historical interest but worth reading, see C Barnard, *The Functions of the Executive* (Cambridge, Harvard University Press, 1956) (see especially the appendix, including his essay 'The Mind in Everyday Matter').

30 Thaler, 'Mortgages Made Simpler' (2014).

humans behave was given a significant boost by the development of a program of work, particularly in the United States, that grew out of an understanding of ‘bounded rationality,’ with decision makers being revealed to act on ‘heuristics and biases.’

The work of Amos Tversky and Daniel Kahneman in the early 1970s was particularly influential in this regard. Heuristics are cognitive rules-of-thumb, or techniques of reasoning ‘not regarded as final and strict but as provisional and plausible only, whose purpose is to discover the solution of the present problem.’³¹ The use of heuristics leads to the problem that errors (termed ‘cognitive biases’) will systematically result, leading to decisions that deviate from what logic or probability would suggest. Daniel Kahneman later developed this theory by positing that the brain consists of two ‘systems’: System 1 processes information intuitively, with speed, and almost automatically, and is particularly prone to make decisions influenced by heuristics and biases; System 2, on the other hand, processes information more slowly, with more deliberation, and more ‘rationally’ – and is less influenced by heuristics and biases.³² Richard Thaler was among the most influential of a group of economists who sought to incorporate these insights into economics, developing the field of ‘behavioral economics’; Cass Sunstein has long been associated with seeking to do the same in the developing field of ‘law-and-economics’, helping to develop the field of ‘behavioral law-and-economics’.³³

31 The quotation is by the originator of the term, G Polya, *How to Solve It* (Princeton, Princeton University Press, 1945), quoted with explanation in J Baron *Thinking and Deciding*, 3rd edn (Cambridge, Cambridge University Press, 2000) 49-50. See also T Gilovich and D Griffin, ‘Introduction – Heuristics and Biases: Then and Now’ in Gilovich et.al. (eds), *Heuristics and Biases* (2002), 1-18.

32 D Kahneman, *Thinking Fast and Slow* (London, Penguin, 2011). For earlier studies, see D Kahneman and S Frederick, ‘Representativeness Revisited: Attribute Substitution in Intuitive Judgment’ in Gilovich et al. (eds), *Heuristics and Biases* (2002) 49 and SA Sloman, ‘Two Systems of Reasoning’ in Gilovich et al., *Heuristics and Biases* (2002) 379 (on associative and rule based reasoning).

33 C Jolls, CR Sunstein and RH Thaler, ‘A Behavioural Approach to Law and Economics’ (1998) 50 *Stanford Law Review* 1471; C Jolls and CR Sunstein, ‘Debiasing through Law’ (2006) 35 *Journal of Legal Studies* 199.

Controversies

Within the fields of psychology and economics, the ‘heuristics and biases’ approach has remained highly controversial, but a reader of *Why Nudge?* would be largely unaware of this. One particularly influential challenge has come from those who consider that Kahneman and Thaler have exaggerated the supposed ‘irrationality’ of decision-making in two respects. First, their critics argue that the research supporting Kahneman and Thaler’s conclusions is itself biased, overemphasizing errors in reasoning and projecting them as the norm rather than the exception. The evidence of consistent mistakes derives particularly from the results of laboratory experiments in which such mistakes are what are focused on, rather than basic everyday decisions. ‘Mistakes’ may be much less frequent in everyday life than those produced in the lab would suggest.

Second, critics of Kahneman and Thaler argue that the heuristics we use are good enough in most cases, assessing rapidly what needs to be done in the absence of full information. They are rational rather than irrational, and can produce results that are as accurate as more fully reasoned decisions. Should we even regard the ‘mistakes’ observed in the laboratory as ‘mistakes’ in this sense – maybe the decisions made in the lab are in fact the right decisions in that context? Is our system of cognition so flawed that it consistently makes mistakes and only occasionally produces good decisions, or do we possess a mostly intelligent decision making process that occasionally produces mistakes? These challenges to the ‘heuristics and biases’ approach are particularly associated with Gerd Gigerenzer’s work,³⁴ and that of the Max-Planck Institute for Human Development in Berlin, which he heads.

We shall argue that, if taken seriously, Sunstein’s philosophy of regulation may have several insidious effects, which we shall expand upon in this review. These criticisms should not be seen as an attack on behavioral economics as a tool of analysis.³⁵ Using it as a tool of scholarly

34 G Gigerenzer, *Risk Savvy: How to Make Good Decisions* (New York, Viking, 2014).

35 Sunstein, *Why Nudge?* (2014) 44-46. Its benefits are clear in at least one respect. Sunstein points to the insight that proponents of policies are apt to be wildly optimistic about the benefits of policies they support, and significantly downplay

analysis is a far cry, however, from using nudging as a tool of government, and an even further distance for justifying the centrality that Sunstein seems to want to accord it. In particular, Sunstein fails to address problematic aspects of the ‘heuristics and biases’ approach to public policy, which we shall now consider

There is significant disagreement about what public policy should do when ‘heuristics and biases’ play a role in individual decision-making. This disagreement hinges on three particular issues. First, to what extent, if at all, should public policy seek to ‘remedy’ the situation? For orthodox economists, basing themselves on a rational actor model of behavior, the principal role of public policy is to ensure the provision of sufficient information on which the rational actor can make informed decisions. However, those who rate highly the research produced by the ‘heuristics and biases’ program sometimes see a deeper role for public policy because they see these as producing a much broader array of ‘market failures’ that justify government intervention.

Arguments that government *should* intervene presuppose, however, that government *can* intervene effectively, and this is the second area of disagreement. To what extent is it *possible* for government to ‘de-bias’ individuals? Some in the ‘heuristics and biases’ program appear to suggest that it is not possible to ‘de-bias’ except at the margins, and that all that government can do to counteract such biases is to substitute different biases in their place, or to engineer outcomes that rely on or exploit pre-existing biases.³⁶ Others have seen this as effectively condemning the bulk of the population to being viewed as irredeemably stupid, a perception confirmed for some by Thaler’s reference to individuals being more Homer Simpson than Mr. Spock. Surprising as this criticism might seem, applied to supporters of a libertarian, choice-preserving agenda, it is not the first time economic libertarians have stirred up controversy by advocating demeaning forms of paternalism as part of their policy packages.³⁷ In *Nudge*, Thaler and Sunstein appear to approve of the

the likely problems. This insight is all too evident in Sunstein’s own work on nudging.

36 See our discussion of the problem of manipulation in section III F, below.

37 See LM Mead (ed), *The New Paternalism: Supervisory Approaches to Poverty* (Washington, Brookings Institution Press, 1997). This book is generally regarded as in step with the neoliberal strategy of regulation and emphasis on ‘personal

strategy of ‘asymmetric paternalism’, whose ‘guiding principle is that we should design policies that help the least sophisticated people in society while imposing the smallest possible costs on the most sophisticated.’³⁸

This dispute has significant public policy implications not only in the context of traditional government regulation, but also in considering the role of education. For those who consider it is possible to ‘de-bias’ effectively, education is likely to play a major role, in enabling individuals to spot biases that are damaging, and in providing the tools to avoid falling into cognitive traps. For those who are skeptical of de-biasing, education is likely to prove ineffective. People are seen as consistently making these types of cognitive mistakes and experts consistently make these mistakes as well.³⁹ So, given this, education will not rid people of these biases and irrational heuristics because the cognitive system itself is flawed.

The third significant area of disagreement concerns the result that such intervention should aim to produce. Here, there is a significant difference between those who consider that the desired result is a ‘rational’ decision, and those who consider that the desired result is what they call a ‘fully autonomous’ decision. The difference lies in how one decides what preferences individuals have, how far there is thought to be a significant difference between an ‘autonomous decision’ and a ‘rational decision’, and which should have priority where they produce different results.

Sunstein argues that libertarian paternalism is paternalism that promotes people’s own self-chosen ends or preferences. But the matter is not so straightforward. One approach to deciding what preference a person has is to observe the choices that the individual actually makes – so called ‘revealed preferences’. Some supporters of this approach may even consider that this is the only acceptable indication of a person’s actual preferences. There is, however, another approach that regards ‘rational decisions’ as presumptively indicating what an individual’s preferences are, and the question is how much evidence (and of what type) it takes to rebut that presumption. The temptation is to regard any evidence that an

responsibility’ evident in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L 104–193, 110 Stat. 2105, which among other things instituted Temporary Assistance for Needy Families 42 USC § 601 et seq.

38 Thaler and Sunstein, *Nudge* (2008) 252.

39 Sunstein, *Why Nudge?* (2014) 94–96 and Thaler and Sunstein, *Nudge* (2008) 121–122.

individual's preference is other than what the behavioral economist considers to be 'rational' as evidence of the operation of a bias, rather than an expression of a 'true preference', and thus to dismiss it, leaving the 'rational' decision as the best indication of the individual's 'real' preference. Putting it crudely, we want what is 'best' for us, determined economically. It is not entirely clear which approach Sunstein favors in *Why Nudge?* but we suspect it is closer to the latter than the former.⁴⁰

The Ethics of Nudging: Welfare, Autonomy and Dignity

We have seen that Sunstein is particularly keen to defend libertarian paternalism against objections rooted in laissez-faire understandings of welfarism and autonomy. However, our principal objection to nudging does not come from this direction. We will now show from a different direction that Sunstein's presumption for nudging is misguided.

Nudging towards nudging

Our starting point, and a major part of our argument, is that *Why Nudge?*, consistently with Thaler and Sunstein's *Nudge*, creates a regulatory presumption in favour of nudging and against mandatory forms of regulation. Sunstein and his more progressive supporters might object to this reading in two ways. One is to say that nudging is a complement to mandatory regulation, rather than a replacement or competitor. They may argue, for instance, that labeling and taxes to regulate cigarette consumption work well together (which is true). And they may add that Sunstein is quick to point out that hard paternalism can, in some circumstances, be justified on consequentialist grounds.⁴¹ Another objection to our view that nudging is the default option is to say that Sunstein respects the original harm principle and is strong on regulation of

40 See C Jolls, CR Sunstein and RH Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471, 1475, 1488 (footnote 46). See more generally, GS Becker, *The Economic Approach to Human Behavior* (Chicago, University of Chicago Press, 1976).

41 Sunstein, *Why Nudge?* (2014) 142.

harm to others and is only libertarian about harm to self. We will test the last of these responses further below but it is important to establish clearly our claim that nudging is in fact in competition with mandates, and that in that competition Sunstein stacks the deck against mandates.

Our starting point is that Sunstein's First and Only Law of Behaviorally-informed Regulation provides that nudges are usually best. In *Why Nudge?* this Law is introduced immediately after Sunstein sets out his view that '[i]n light of the pervasive risk of government error and the inescapable fact of human diversity, it is usually best to use the mildest and most choice-preserving intervention.'⁴² This squarely establishes the presumption in our view. In discussing the occasions when mandates (hard paternalism) may be superior to nudges, when this presumption might be overcome, Sunstein outlines the following test: '[i]f the benefits of the mandate plainly outweigh the costs, it would seem justified, at least if that assessment can be trusted, and if there is no real problem from the standpoint of autonomy.'⁴³ First, this type of test imposes a special burden of proof for regulatory mandates: the default is nudging, to be overcome only when the evidence 'plainly' supports mandates. Second, and notably, he fortifies doubts about trusting the state, both in *Why Nudge?* and elsewhere.⁴⁴ Mandates should be supported only if we can trust government that employs 'dangerous' mandates. Third, for Sunstein, hard paternalism is always *prima facie* a problem from the standpoint of autonomy.⁴⁵ At best, the implications of this last hurdle are unclear, and at worst Sunstein is evasive about the extensive treatment the issue has already received by writers in the liberal tradition, as we shall see.

Our conclusion about Sunstein's position on mandates is consistent with what is found in his previous book with Thaler. After observing that occupational health and safety laws, mandatory social security pension programs, and even mandatory anti-discrimination laws are not libertarian, they add 'but perhaps some of them [sic!] can be defended by reference to

42 Both citations are on Sunstein, *Why Nudge?* (2014) 17.

43 Sunstein, *Why Nudge?* (2014) 142.

44 CR Sunstein, 'Nudges v. Shoves' (2014) 127 *Harv L Rev Forum* 210.

45 G Dworkin, *Theory and Practice of Autonomy* (Cambridge, Cambridge University Press, 1988) 18: 'being a chooser.... must be the standard case from which exceptions are precisely that – exceptions.'

the kinds of human errors that we have explored here.’⁴⁶ Their ultimate conclusion seems clear: It is worth quoting the relevant statement in full:

Neither do we personally oppose all mandates. But deciding where to stop, and when to call nudge a shove (much less a prison), is tricky. Where mandates are involved and opt-outs are unavailable, the slippery-slope argument can begin to have some merit, especially if regulators are heavy-handed. We agree that flat bans are justified in some contexts, but they raise distinctive concerns, and, in general, we prefer interventions that are more libertarian and less intrusive.⁴⁷

All told, we suggest that when combined with the absence of concern over whether mandates are more effective, and with the frequent and generally approving references to libertarian thinkers, the use of the word ‘libertarian’ was meant to mean what it says and was not merely a gambit to win over neoliberals to a regulatory agenda. Given this presumption, how should we view Sunstein’s proposals?

Social welfare

Although we consider that ‘social welfarism’ should not be the only basis on which Sunstein’s proposals should be judged, as Sunstein seems to prefer, even when so judged, the empirical evidence of the efficacy of nudges, compared with other regulatory approaches, is neither offered nor apparent. Sunstein is apparently committed to evidence-based policy-making. At several points in the book, he stresses the need to test criticisms of nudging against empirical results of nudging in practice.⁴⁸ Sunstein’s book, however, is remarkably *unempirical* in underreporting available evidence about the inefficacy of nudging. The absence of any reference to the British empirical evidence of the effects of nudging is particularly noteworthy.⁴⁹ Sunstein has consistently said, for example, that

46 Thaler and Sunstein, *Nudge* (2008) 251.

47 Thaler and Sunstein, *Nudge* (2008) 251-52. This is true of flat bans, but there is nothing in the logic of the position that would not apply to taxes.

48 E.g. Sunstein, *Why Nudge?* (2014) 114: ‘the best approach is to examine concrete proposals;’ and 165: ‘[e]verything depends on the context.’

49 The work of the UK Behavioural Insights Team is discussed in *Why Nudge?* (2014) 12, but with no mention of the criticism to which it has been subjected. As Jeremy Waldron wrote in his sober New York Review of Books review of *Why Nudge?*: ‘More reassuring, I think, would be a candid assessment of what might

there is ‘no evidence’ that regulators will pursue nudging instead of mandates.⁵⁰ But that is simply incorrect: a detailed investigation was carried out by the Science and Technology Select Committee of the Upper House of the United Kingdom Parliament (the House of Lords) in 2010 and 2011.⁵¹ This Report makes sobering reading for those contemplating introducing nudging as a central element in government regulation. It found that, *as practiced*, nudging diverts government from its responsibility to use other, more effective, instruments.⁵² The Committee also found that the use of nudging reduces opportunities for public deliberation and democratic discourse in favour of non-transparent, technocratic manipulation.⁵³

go wrong with nudging.’ J Waldron, ‘It’s All For Your Own Good’ (2014) *New York Review of Books* Oct 9.

50 Sunstein made this point with particular emphasis during a conference in Berlin, ‘Choice Architectures in Democracies’, Berlin, January 12 2015, a recording of which is available at <https://youtu.be/Ilrqp9NJUCA>.

51 House of Lords, Science and Technology Select Committee Behaviour Change, Report (2011) *HL Paper* 179.

52 Here is the Select Committee’s conclusion on this point, based on the evidence it received (‘non-regulatory measures’ refers to what Sunstein refer to as ‘nudges’):

‘5.13 In general, the evidence supports the conclusion that non-regulatory or regulatory measures used in isolation are often not likely to be effective and that usually the most effective means of changing behaviour at a population level is to use a range of policy tools, both regulatory and non-regulatory. Given that many factors may influence behaviour, this conclusion is perhaps unsurprising.

5.14. We welcome efforts by the Government to raise awareness within departments of the importance of understanding behaviour, and the potential this has for the development of more effective and efficient policies. We are concerned, however, that emphasising non-regulatory interventions will lead to policy decisions where the evidence for the effectiveness of other interventions in changing behaviour has not been considered. This would jeopardise the development of evidence-based, effective and cost-effective policies.

5.15. We therefore urge ministers to ensure that policy makers are made aware of the evidence that non-regulatory measures are often not likely to be effective if used in isolation and that evidence regarding the whole range of policy interventions should be considered before they commit to using non-regulatory measures alone.’

See also the Evidence provided to the Committee by Professor Susan Mitchie, et al., paras 17, 25.

53 The Committee considered, para 2.13, that the measures in question “involve altering behaviour through mechanisms of which people are not obviously aware.

From the welfarist perspective, we can note from the outset just what is at stake. If we remove taxation and civil fines from our regulatory toolbox, or make it significantly more difficult in practice to adopt such measures, then our ability to regulate smoking, alcohol, drugs, helmets and seat belts would be radically constrained, as would the use of non-waivable rules in consumer protection law. If we look at these areas up close, we can often see not only that mandates are more effective than nudging, but they can be *vastly* superior. And there is nothing in a pro-mandate strategy that precludes the use of labeling, for example, as an additional instrument. Indeed, mandates are *normally* used alongside several of the familiar policies Sunstein refers to as nudges, whether in the form of taxes (e.g. taxes on cigarettes, combined with cigarette labeling) or even flat bans (e.g. prohibition of illicit drugs, combined with ‘say no to drugs’-type educational campaigns). The same is not true of libertarian paternalism.

The regulation of cigarette smoking provides a dramatic example of the comparative efficacy of nudges *versus* mandates. The International Tobacco Control Policy Evaluation Project reports on the comparative efficacy of health warning labels and of taxation. It has made amply clear that taxes are ‘the most effective tobacco control method,’ over and above their revenue generation (which can be used to offset the smoking-related harms to the public purse).⁵⁴ Labels and warnings are useful, but it has led to an average of between 10-15 percent of smokers in wealthy countries giving up a cigarette ‘*at least once*.’⁵⁵ By contrast, the American Lung Association reports⁵⁶ that a ten percent increase in the price of cigarettes reduces consumption among adults by 4 percent and among youth by 7 percent, a far more significant overall result. It also confirms that 47 states

This raises an interesting question about the extent to which nudging is compatible with the Government’s commitment to ‘extend transparency to every area of public life.’

- 54 ITC Project, ‘Tobacco Price and Taxation: ITC Cross-Country Comparison Report’ (Waterloo, Ontario, University of Waterloo, 2012) 3.
- 55 ITC Project, ‘Health Warnings on Tobacco Packages: ITC Cross-Country Comparison Report’ (Waterloo, Ontario, University of Waterloo, 2012) 12.
- 56 American Lung Association ‘Fact Sheet on State Cigarette Taxes’ (2014) (available at <http://www.lungusa2.org/slati/reports/cigarette-tax-factsheet-092014.pdf>). See further, JA Tauras, PM O’Malley, and LD Johnston, ‘Effects of Price and Access Laws on Teenage Smoking Initiation: A National Longitudinal Analysis, Bridging the Gap Research’ *NBER Working Paper* No. 8331 (2001).

have increased their cigarette taxes since 2002, confirming how widespread the trend is. Sunstein in fact reviews the tools available to regulate smoking, and while he avoids taking a clear position, and indeed even equivocates,⁵⁷ he does use the span of regulatory tools to show that the less effective means of regulation (i.e. the soft ones) are those that are compatible with his general approach.⁵⁸

Pensions policy is another apt case study for the efficacy of nudging, both because it is an issue of enormous social importance and because it is here that advocates of nudging can claim their greatest impact on public policy. The idea that workers should be automatically enrolled in a private saving scheme, with the right of (sometimes penalized) opt-out, has been implemented recently in legislation in the United States and the United Kingdom, and variants have been adopted in New Zealand and Italy in 2007.⁵⁹ The issue thus bears careful scrutiny, even if Sunstein's *Why Nudge?* does not dwell on the matter. Admittedly, automatic enrollment is probably much better than the *status quo ante* in both the United States and Britain. But assuming that the *status quo* was flawed, with massive working age populations clearly having inadequate coverage, what were the policy options available to these two countries for increasing coverage? We can assume, following internationally recognized studies, that the metric for an effective pensions policy is the participation rate (scope of coverage among the relevant population) and the adequacy rate (the extent to which there is an adequate replacement of former income).

To ensure high participation and adequate income replacement, two of the most widely used policy tools are practical alternatives and indeed competitors with automatic enrollment; both, in essence, are contrary to the philosophy of libertarian paternalism. The first policy option is to increase taxes or social security contributions to deal with the increasing problem of how to finance the public pensions system in the future, and,

57 He notes, *Why Nudge?* (2014) 111, that cigarette taxes may make people happier. He does not take a view on cigarettes but illustrates, 112, his 'broadest' point 'that in some cases, there is real space between anticipated welfare and actual experience.'

58 Sunstein, *Why Nudge?* (2014) 82-86.

59 It has been legally mandated in the United States in the Pensions Protection Act of 2006 and in the United Kingdom under the Pensions Acts 2008 and 2012 respectively, as well as discussed and promoted by the OECD and the Commission of the European Union.

where necessary, increase benefit levels. There are several features of the system in the United Kingdom and the United States that are important in order to understand the strategy adopted. The United States and the United Kingdom have a very low tax rate (combining income taxes with social security/national insurance contributions) in comparison with most OECD countries.⁶⁰ The reduction in effective taxation rates for individuals and corporations is comparatively recent, as is the conversion of the occupational pensions systems in both countries to defined contribution schemes rather than defined benefit schemes, under terms that have considerably lower employer contribution rates. Given that the tax rate is as much as ten percent lower in the Anglo-American systems, the room to raise both worker and employer contributions is a policy option that squarely deserves consideration, even if politically difficult. In dealing with the pensions crisis, some countries (notably Sweden)⁶¹ have raised contribution levels, but this has been a less commonly chosen option.

If one option is better financing of the public system of pensions, the second option is incorporating a greater role for private pensions, and given the squeeze on public financing, we can assume that increasing the role for private pensions is likely to be on the table for most national pension systems. Crudely, there are two alternatives available for increasing the uptake of private pensions. One is Sunstein's preferred approach, which is to automatically enroll employees in a private saving scheme but give them the right to opt out. The second option for increasing private saving is *mandatory* private saving. To describe it as an option is an understatement. Fully 18 of 34 OECD nations make private

60 OECD Stat, 'Taxing Wages – Comparative Tables' 2014 (extracted 2 March 2015). The OECD average in 2013 was 35.85% of the worker's wages, whereas for the United Kingdom it was 31.83% and the US it was 31.33%. The average figure, it should be noted, includes a range of far less wealthy countries, however, including Mexico (19.22%), Korea (21.41%) and Chile (7%). By contrast, Austria, Belgium, France, Germany, Italy, Hungary, Portugal, Spain and Sweden all had tax wedges higher than 40%.

61 J Palme, 'Features of the Swedish Pension Reform' (2005) 4 *The Japanese Journal of Social Security Policy* 46. Although Thaler and Sunstein, *Nudge* (2008) ch. 9, compare the US plan for social security privatization with the Swedish experiment, they omit the fact that contribution rates in the Swedish system were increased and that this increase was part of the political compromise that allowed the left to agree to allocating 2.5% of the mandatorily collected contributions to personalized accounts.

saving either mandatory or quasi-mandatory (often through regulations on the binding sectoral collective agreements).⁶² Automatic enrollment is both much newer, and where it has been tried, the OECD reports that ‘the results have been mixed.’⁶³ One area of mixed results is in participation rates. The mandatory systems have much higher rates (approximately 70% or more of the workforce, compared with 13-50% for those nations using automatic enrollment).⁶⁴ Thus the OECD concludes that ‘making enrollment into private pensions compulsory is ultimately the most effective policy in raising coverage levels.’⁶⁵ In the United States and the United Kingdom, the figures for the Sunstein approach are also troubling. In a wide ranging critique of nudging and pensions, Ryan Bubb and Richard Pildes point to the fact that there has been considerable opting out and early withdrawal from the system, amounting to about 13.3% of the total.⁶⁶ Rates are similar in the United Kingdom, at 14%.⁶⁷ In systems with several million participants, these are hardly marginal numbers.

In terms of adequacy, too, the mandatory private system has fared much better. Bubb and Pildes show how automatic enrollment in the United States in fact functions like poorly designed mandates, because people tend to stick with the default options.⁶⁸ To remain effective, the choices must be basically micromanaged (contrary to the philosophy of choice) in order to ensure adequacy. Remarkably, these authors also show that aggregate saving was in fact *lower* after mandatory automatic enrollment was rolled out despite the much higher participation rates.⁶⁹ The reason is that those who used to join actively rather than passively chose a higher

62 ‘OECD Pensions Outlook 2012’, 105-106.

63 ‘OECD Pensions at a Glance 2013’, 188.

64 ‘OECD Pensions Outlook 2012’, 124.

65 ‘OECD Pensions Outlook 2012’, 115.

66 R Argento et al., ‘Early Withdrawals from Retirement Accounts During the Great Recession’ (2013) 8 *Finance and Economics Discussion Series Working Paper* No. 22, 22; R Bubb and RH Pildes, ‘How Behavioral Economics Trims Its Sails and Why’ (2014) 127 *Harvard Law Review* 1393, 1626-27. Notably, the financial crisis did not affect the figures for early withdrawal substantially, the key finding in the report.

67 Department of Works and Pensions, ‘Automatic enrolment opt out rates: Findings from qualitative research with employers staging’ (*DWP Ad Hoc Research Report* No. 9, 2014).

68 Bubb and Pildes, ‘How Behavioral’ (2014) 1616 ff.

69 Bubb and Pildes, ‘How Behavioral’ (2014) 1618-1619.

contribution rate but, post automatic enrollment, people stuck with the lower default option.

In the United Kingdom, the minimum contribution rates are even lower. The statutory minimum for employer-matching contributions to private schemes is being phased in, with levels at 1% in 2015, rising to 3% by 2018, in all cases with the minimum worker contribution being at least twice that of the employer contribution.⁷⁰ To put this in perspective, we should recognize that, under the British occupational pension plans, automatic enrollment may gradually replace defined-benefit plan contributions that averaged 16-20% (11-14% employer and 5-6% employee). It will also likely replace even the drastically curtailed, more recent defined contribution plan contributions that have averaged around 7-11% (4-7% employer and 3-4% employee).⁷¹ Comparing various OECD states, one can see that under mandatory private saving schemes, by contrast, the employer contribution rates are much higher than the voluntary private saving schemes. In most mandatory or quasi-mandatory systems, employer contributions are closer to 9%, but at the very least are matching.⁷² The reasons for these lower contribution rates for automatic enrollment are not entirely clear, but it seems likely that the libertarian, voluntary ethos underpinning the automatic enrollment system gravitates towards lower rates. If the rates were higher, more would opt out, and employers would (rightly) consider it a tax embedded into the so-called voluntary system.

Sunstein replies to Bubb and Pildes in a way that reveals further weaknesses in his argument.⁷³ He suggests that the solution to the problem

70 The Pensions Regulator, 'Detailed Guidance for Employers: Appendix A: The phasing in of contribution levels' (available at: www.thepensionsregulator.gov.uk/docs/detailed-guidance-4.pdf).

71 Pensions Commission, *Pensions: Challenges and Choices: The First Report of the Pensions Commission* (TSO, 2004), 88: 'Total DB contributions are broadly in the 16-20% range (11-14% employer and 5-6% employee), while total DC contributions are around 7-11% (4-7% employer and 3-4% employee).'

72 'OECD Private Pensions Outlook 2008' (OECD Publishing, 2009). For example, the country profiles produced at 155 ff. indicate the following contribution rates/policies: Australia (9%), Finland, minimum is 21.4%, but higher for larger firms; Iceland (8%); Netherlands (9%); Poland (9.26%, mandatory personal plan); and Switzerland (employer must match employee contributions).

73 CR Sunstein, 'Nudges v. Shoves' (2014) 127 *Harv L Rev Forum* 210.

of low saving rates is to raise the default contribution rate and stick with libertarian paternalism, because it is choice preserving in the face of heterogeneous choices and because it keeps the meddling state a bit further away. He adds that automatic enrollment is not in competition with the public system, because he thinks nudging should be used for private saving only. But the research shows clearly that the default rate in most cases determines the contribution rate and replaces active choice. And this is unsurprising, because the difficulty for people to choose effectively, due to complexity and shortsightedness, was the original problem. More importantly, however, the reply fails to acknowledge that private saving is, around the world, offered precisely in order to compensate for inadequate public pensions, which fail to deliver adequate retirement income.⁷⁴ They are, and have been for some time, in direct competition. At any rate, voluntary private saving is a clear alternative to mandatory private saving, and the evidence favors the efficacy of the latter. The mildest way to put the point, we suppose, is that there is absolutely no evidence at all of the superior efficacy of a voluntary system of nudged private pension saving over its rivals.

The two examples we have just considered - cigarette smoking and pensions policy - are examples of where the evidence cuts against the presumption for nudging. But what about where there is a paucity of evidence? Recall that Sunstein's presumption (nudges are usually best) together with his test for the justified use of hard paternalism, sets a high burden of proof: '[mandates are justified only] if [i] the benefits of the mandate plainly outweigh the costs...[ii] at least if that assessment can be trusted, and [iii] if there is no real problem from the standpoint of autonomy.'⁷⁵ Where the harm at issue is relatively new, there will have been few opportunities to establish the evidential base that this test calls for.

Obesity taxes represent a potential example. Sunstein criticises the former New York City Mayor Michael Bloomberg's initiative in banning

74 Among other acknowledgments of this trend, see Commission of the European Union, *Private Pension Schemes: Their Role in Adequate and Sustainable Pensions* (European Union, 2010) 25.

75 Sunstein, *Why Nudge?* (2014) 142.

the sale of soda drinks in containers larger than 16 ounces.⁷⁶ He also refers, in passing, to the experiment in Denmark with the ‘fat tax’ on certain high calorie foods, which he claims ‘failed miserably.’⁷⁷ He also offers thoughts on how to analyze policies in such a situation:

Was [Bloomberg’s] initiative defensible? In brief, the answer should turn on its costs and benefits. Its costs appear real but low, both to choosers and providers. With respect to benefits, the question is whether it would have a significant impact on the obesity problem – a question on which we appear to lack much data. For these reasons, it is not obvious whether the initiative was a good one, and strong views either way are not easy to defend.

The equivocation here is symptomatic of Sunstein’s lack of clarity on mandates. We simply disagree that a strong view on the initiative is hard to defend. It is our view that taxes or restrictions on super-sized modes of high calorie products, in a context where the obesity epidemic imposes huge costs on public health,⁷⁸ are plainly justified. Where evidence exists by way of analogy (e.g., by looking to studies of other ‘vice’ taxes and their effects on consumption) the justification is stronger still. The case is further strengthened when regulators have used a suite of nudges in the past, but these have failed to deliver the necessary results. Food labeling, advertising campaigns, school education, and similar initiatives have grown in rough proportion with the average Anglo-American waistline.

Sunstein’s various claims in his discussions of the soda ban and the fatty-food taxes reveal what he must assume to be a subtle position that is non-doctrinaire. He is not overtly against the ban or against these taxes. He concludes, for example, that obesity taxes *may* be justified, but adding ‘that there is an intelligible argument for them.’⁷⁹ These conclusions are too timid, if not evasive. The case for obesity taxes is more than

76 Sunstein, *Why Nudge?* (2014) 52 (where the benefits of the scheme are described by Sunstein as ‘pretty speculative’).

77 Sunstein, *Why Nudge?* (2014) 112.

78 Also even in the wholly implausible scenario where the tax would work only to the benefit of the ‘consumer’. We note too that lack of self-control leading to obesity is a major cause of depression, increase of stress, and loss of self-esteem, as well as posing complex challenges for social interaction. Unlike the not entirely uncommon carefree but reckless cigarette smoker or helmetless motorcycle rider, there are extremely few persons, if any, who are obese and content with it.

79 Sunstein, *Why Nudge?* (2014) 112.

‘intelligible’. They are not exotic modes of regulation. Their most renowned advocate is Kelly D. Brownell, Dean of the Sanford School of Public Policy at Duke University, formerly Director of the Rudd Centre for Food Policy and Obesity at Yale University.⁸⁰ Brownell’s often co-authored work goes far to prove that, in his words, ‘[t]he [soda] tax is one of the smartest ways to confront the obesity epidemic confronting the state and country.’⁸¹ He also supports banning artificial trans fats, saying it would be a ‘public health victory’ and that the experience in New York has shown that the fears over the ban were not borne out.⁸² But his work goes beyond establishing the efficacy of such taxes and bans, exposing the misleading simplicity of the libertarian way of framing the issue. It shows that personal choice is not at all the clear cause of rising obesity,⁸³ that the food and beverage industry is extremely active in lobbying government to oppose health initiatives (especially mandates), as well as generating the problem in the first place.⁸⁴ Similar observations have been made by philosophers supporting paternalistic regulation for many years.⁸⁵

80 And once listed by Time Magazine as one of ‘The World’s 100 Most Influential People.’

81 KD Brownell, ‘Want a Healthier State? Save the gov’s tax on sugar soda’ (2009) *New York Daily News* Feb 18, 29. For the evidence itself, see KD Brownell et al., ‘The public health and economic benefits of taxing sugar-sweetened beverages’ 316 (2009) *N Engl J Med*. 1599-1605.

82 KD Brownell and JL Pomeranz, ‘The Trans-Fat Ban – Food Regulation and Long Term Health’ 370 (2014) *New England Journal of Medicine* 1773.

83 KD Brownell et al., ‘Personal responsibility and obesity: a constructive approach to a controversial issue’ (2010) 29 *Health Affairs* 379.

84 KD Brownell, *Food Fight: The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It* (New York, McGraw-Hill Education, 2004).

85 R Goodin, ‘In defence of the Nanny State’ in A Etzioni (ed), *Rights and the Common Good: communitarian perspectives* (New York, St Martin’s Press, 1995) (examining cigarette smoking and setting out a test for approving paternalistic legislation, one element of which is that the choices the policy allows should be ‘one’s own’).

Libertarian Paternalism, Autonomy, and Harm to Others

The three key areas of public policy just considered have prepared us for a closer look at whether nudging is in reality concerned with paternalistic intervention at all. Mill's harm principle is properly concerned with proscribing state interference with self-regarding activity. Despite claiming to adhere to this line between self- and other-regarding behavior, Sunstein and Thaler's examples are plainly out of line with the prescription. In *Why Nudge?*, Sunstein repeatedly refers to 'texting while driving' and 'fuel standards' as areas where nudging is appropriate. But these are plainly concerned with harm to others. In *Nudge*, one chapter of the book, on environmental regulation, is entitled 'Saving the Planet.'⁸⁶ While Thaler and Sunstein are admirably candid in that chapter about the 'ridiculous' inadequacy of gentle nudges alone, they also use libertarian paternalism to argue for a cap-and-trade system of emissions trading (market friendly, a 'cousin of libertarian paternalism'⁸⁷) instead of a carbon tax (command and control).⁸⁸ Without taking a position on the comparative efficacy of these two policies, one can see how far we have moved from a philosophy of concern with 'paternalistic' regulation. Yet while the paternalism is gone, the libertarianism remains. After reviewing a variety of quite successful national emissions limitations used in many countries, they add that '[p]hilosophically, however, such limitations look uncomfortably similar to Soviet-style five-year plans...'⁸⁹

As a matter of theory, it has long been recognized that most areas that Sunstein uses as examples of 'paternalistic' regulation are not, in reality, exclusively concerned with harm to self. When cigarettes or fatty foods are taxed, this is often to reduce the costs to national health services (where such exist), rather than for the benefit of the individual. When seatbelt laws are required, it is at least in part due to the extensive costs imposed on public services that dealt with the gruesome fallout. With

86 Thaler and Sunstein, *Nudge* (2008) ch. 12.

87 Thaler and Sunstein, *Nudge* (2008) 196.

88 They also make clear that the most important step is getting the prices right at the pump, but add that while we 'wait for the political courage to get the prices right' we can adopt nudges along the way. This type of candor is more welcome but is rare.

89 Thaler and Sunstein, *Nudge* (2008) 194.

respect to pensions' policy, the foolhardy worker who invests his lifesavings in the latest Ponzi scheme is thrown back on the public system to avoid poverty in old age. Philosophers may develop thought experiments in order to strip away these complexities and address the theoretical point about whether the state is ever properly justified in imposing hard paternalism for pure harm to self,⁹⁰ but it is important to keep the real regulatory situation in mind. *Extremely few* of the examples Sunstein provides concern pure harm to self.⁹¹ And from what we can tell of the policies advocated by Britain's Nudge Unit (aka the Behavioural Insights Team), advised by Richard Thaler, all of them concern the development of nudges in regulatory areas that involve harm or duties to others, rather than harm to self.

With pensions, cigarettes and obesity, the only policy approach that would make the issues at stake ones of pure paternalism would be one under which the state were willing to turn its back on those who had at some point 'chosen' to harm themselves. Most people believe we should rescue even those who have acted recklessly or made poor choices, for it is brutal and inhumane to do otherwise.⁹² If so, then such allegedly self-regarding risk-taking is in reality free-riding on the generosity of those who pick up the pieces after the gamble is lost. Sunstein himself adopts

90 One such example is the discussion of whether laws requiring the wearing of seatbelts and motorcycle helmets might be designed such that exemptions can be applied for on request, subject to the payment of a higher insurance premium to pay the costs of rescue. See the discussion in G Dworkin, *Theory and Practice of Autonomy* (1988) 126-127, and J Feinberg, *Harm to Self* (New York et al, Oxford University Press) 127. Both argue against such an opt out. Thaler and Sunstein, *Nudge* (2008) 231 endorse a proposal for such an opt out, though in that case the rider must also take a special driving course (though there is no justification for this additional material cost).

91 This is true of Sunstein, *Why Nudge?* (2014) and largely true of Thaler and Sunstein, *Nudge* (2008). All the big ticket items covered in parts II (Money) and III (Society) plainly concern harm to others as well as self. And in the 'dozen nudges' discussed in chapter 14, there are a few trivial examples (self-binding techniques to improve personal commitments, unpleasant tasting nail-polish to avoid biting nails) that might concern harm to self but are hardly the basis for a 'new movement' (5). One exception is motorcycle helmet laws, which they appear to believe should be relaxed considerably (231).

92 This point is powerfully made by ES Anderson, 'What Is the Point of Equality?' (1999) 109 *Ethics* 287.

just such a ‘non-paternalistic’ free-rider argument to justify the individual health care mandate on the Affordable Care Act, without appearing to understand the radical implications this defense has for libertarian paternalism in the real world.⁹³

Another crucial aspect of the reality of regulation is that traditional regulation is usually based on preventing harms resulting from *producers*. Regulation that is targeted by government at commercial organizations can hardly be regarded as raising any concerns about paternalism.⁹⁴ In Sunstein’s view of the world, however, producers sometimes simply drop out of the picture, and with them the harm that they can cause, leaving only the ostensibly paternalistic relationship between government and consumer to be worried over.⁹⁵ In prominent examples, Sunstein largely sets to one side the *triangular* relationship of government, producer and consumer.⁹⁶ For example, rather than seeing the soda cup ban⁹⁷ as restricting the harms caused by soda *manufacturers*, the issue is reframed as one of government paternalism towards soda *consumers*.⁹⁸ In none of the list of fourteen regulatory possibilities he considers in getting people to stop smoking, is there any mention of the option that the *manufacture* of cigarettes might simply be banned because of the harm they cause. It is true and noticed by scholars of paternalism that regulation of manufacturers solely for the purported benefit of the consumer may be regarded as a form of ‘impure paternalism.’⁹⁹ Yet it is equally true that

93 Sunstein, *Why Nudge?* (2014) 167, n. 5.

94 Following the approach taken by the House of Lords Committee, see note 51, above, at para 15: ‘different considerations should apply to interventions which affect individuals directly than those which affect commercial organisations directly.’

95 In a key move, *Why Nudge?* (2014) 81, Sunstein considers that regulating in those context in which ‘paternalism’ towards consumers is considered to be operating ‘might turn out to involve harm to others’, but he does not consider that it is the manufacturers or producers that may be causing the harm, and in any event he simply puts such arguments ‘entirely to one side,’ in order ‘to keep the focus on paternalism.’

96 Sunstein, *Why Nudge?* (2014) 82-84.

97 See, e.g. CA Lyssiotis and LC Cantley, ‘F Stands for Fructose and Fat’ (2013) 502 *Nature* 181. We are grateful to Caroline Pannell for this reference. See also Brownell, *Food Fight* (2004).

98 Sunstein, *Why Nudge?* (2014) 54.

99 G Dworkin, ‘Paternalism’ *Stanford Encyclopedia of Philosophy* (2005).

production by manufacturers is often regulated because such manufacturers promote harmful products and use advertising to induce people to consume them. This was, indeed, the view of John Stuart Mill himself.¹⁰⁰

Autonomy and Hard Paternalism

As we have seen, Sunstein's defense of nudging is extensively based on it being autonomy-supporting, but what does he mean by 'autonomy'? It is odd that only twenty pages of a libertarian paternalist manifesto are devoted to exploring the relationship between paternalism and the idea of autonomy.¹⁰¹ Not only is his inclusion within 'paternalistic' regulation of a large swath of other-regarding interventions peculiar, so too is his way of conceptualizing 'autonomy' itself. Sunstein appears to adopt a narrow view of 'autonomy.' We suspect that what he means by autonomy is closer to 'liberty' or 'freedom,' or 'choice' in the narrow, negative sense – simply the absence of coercion. One effect of this is that in those areas that we could all agree *do* constitute hard paternalism (although they are far fewer in number than he supposes), there will almost always be a 'problem from the standpoint of autonomy' under his conception.¹⁰²

However, Sunstein's notion of autonomy, whether consistent with Mill's understanding or not, is certainly at odds with much of the more recent, and now dominant, understandings of the concept of autonomy.¹⁰³ The idea has figured prominently in much important political philosophy in the last decades. It figures, for example, in the work of John Rawls, Joseph Raz, Joel Feinberg, Ronald Dworkin, and especially of Gerald Dworkin. All these advocates of liberalism accept that what Sunstein calls

100 JS Mill, *On Liberty*, 4th edn (London, Longman, Roberts & Green, 1869) ch. 5. He recognized that it is distinctly possible that the state 'cannot be acting wrongly in endeavoring to exclude the influence of solicitations which are not disinterested, of instigators who cannot possibly be impartial – who have a direct personal interest on one side, and that side the one which the State believes to be wrong, and who confessedly promote it for personal objects only.' Mill recognizes the tension with his harm principle, but refuses to rule this out.

101 Sunstein, *Why Nudge?* (2014) ch. 4.

102 We borrow these words from Sunstein, *Why Nudge?* (2014) 142.

103 Most notably by G Dworkin, *Theory and Practice of Autonomy* (1988) 20.

hard paternalism can be justified in the traditional paternalistic areas (e.g. seatbelts, smoking, helmets, compulsory pensions, etc),¹⁰⁴ and all are far more careful than Sunstein about respecting the implications of the elusive line between harm to self and others.

Rawls believed that rationally autonomous persons would choose ‘principles of paternalism ... that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society.’¹⁰⁵ Joseph Raz sets out a liberal perfectionist version of the harm principle that would permit forms of hard paternalism provided they do not criminalize the self-harm at issue.¹⁰⁶ Raz, indeed, recognizes affirmative state duties to create meaningful options for people and eliminate negative ones, and envisages raising taxes to facilitate this. The harm principle, in his theory, primarily regulates the use of criminal law coercion, and forbids its direct application in regulating harm to self.¹⁰⁷ Ronald Dworkin, who offered a prominent non-perfectionist account of liberal equality, not only accepted but supported the kinds of ‘openly paternalistic’ mandates under consideration here, such as seatbelt laws and compulsory insurance.¹⁰⁸ He distinguished between using coercion for volitional paternalism, which helps us achieve our own desired ends, and critical paternalism, which supplants our own understanding of where our good lies.¹⁰⁹ He only opposed the latter. Joel Feinberg’s four-volume magnum opus is generally regarded as the most faithful restatement of Mill’s ideal. Richard Arneson argues that Feinberg makes ‘the best, most sophisticated case against hard paternalism.’¹¹⁰ Yet even Feinberg was clearly willing to accept most of

104 G Dworkin, *Theory and Practice of Autonomy* (1988) 76 (pensions), 127 (safety cases); J Feinberg, *Harm to Others* (Oxford, Oxford University Press, 1984) 6 (taxes on smoking) 11 (pensions, not about ‘harm to self’ but rather about collective goods); and 13 (helmets). Each author tends to impose some conditions on what is acceptable paternalism, though each also accepts the basic role of the state in regulating in these areas.

105 J Rawls, *Theory of Justice* (Oxford, Oxford University Press, 1971) 249.

106 In J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986).

107 Raz, *Morality of Freedom* (1986) ch. 15, and on paternalism, in particular, 422-423.

108 See R Dworkin, ‘Sovereign Virtue Revisited’ (2002) 113 *Ethics* 106, 113-115.

109 R Dworkin, ‘Liberal Community’ (1989) 77 *Cal. L. Rev.* 479, 485.

110 RJ Arneson, ‘Joel Feinberg and the Justification of Hard Paternalism’ (2005) 11 *Legal Theory* 259, 259-260. Arneson adds that ‘[t]he failure of these arguments

what Sunstein's arguments (if not clearly stated view) would call into question on grounds of autonomy, including seatbelt and helmet laws, compulsory pensions and, especially, taxes on cigarettes and other self-harming behavior.

Gerald Dworkin identified the problem of non-rational decision-making and lack of self-control, and what both meant for autonomy and paternalism, long before the behavioural law and economics movement was born.¹¹¹ He observed something crucial and relevant about the nature of actions, desires and preferences. 'To consider only,' he wrote, 'the promotion or hindrance of first-order desires – which is what we focus upon in considering [only] the voluntariness of action – is to ignore a crucial feature of persons, their ability to reflect upon and adopt attitudes toward their first-order desires, wishes, intention.'¹¹² Dworkin illustrates this issue by reference to the common experience among cigarette smokers, of choosing to smoke while wanting to quit. Building on this insight, Dworkin defines the core of autonomy to be the second-order capacity to reflect critically upon these first order preferences and desires, and the ability to either accept or try to change them.¹¹³ This appears at first congenial both to libertarian paternalism and to the philosophical tradition which focuses chiefly on the use of one's own critical reason to engage in self-authorship. Yet it also enables Dworkin to explain his acceptance of hard paternalism in all the (actually paternalistic) policy areas Sunstein discusses, because most are areas where first order desires are suspect on rationally reflective grounds and are likely to change over time.¹¹⁴

shows ... about as definitively as argument ever comes in moral philosophy, that there is no successful case against hard paternalism to be made.'

111 G Dworkin, 'Paternalism' (1972) 56 *Monist* 64.

112 Dworkin, *Theory and Practice of Autonomy* (1988) 15.

113 *Theory and Practice of Autonomy* (1988) 20. This conception is linked as well to freedom of action and procedural independence to decide for oneself, 18.

114 Notably, his quite nuanced discussion of 'safety cases' (hunting vests, life preservers, helmets) leads him to accept that such mandates might ultimately conflict with autonomy. Yet that is in the rare cases where the subjects have thought the issue through and decide carefully, and have self-insured against the social costs of rescue and future care. He concludes that such measures would still be justified because they 'minimize the risk of harm ... at the cost of a trivial interference with their freedom.' Dworkin, *Theory and Practice of Autonomy* (1988) 127. This is consistent with his idea that despite being fundamental,

Simply put, these philosophers¹¹⁵ do not accept that the idea of autonomy justifies making a person's immediate desires sovereign, come what may for their own wellbeing. They explore how such choices might be regulated (e.g. coercion *versus* taxation *versus* discouragement), whether a short term preference is compatible with the person's own deeper goals and beliefs, whether such beliefs change over time, whether the choices actually promote the person's own autonomy by expanding their range of options, and so on. In short, liberal theorists generally take no great issue with the use of traditional regulation, especially when it takes the form of civil mandates and taxes.¹¹⁶ None of these other writers in this tradition – a *liberal* tradition we emphasise, in the European and original sense of that word – are so concerned with the spectre of *state power* as is Sunstein in *Why Nudge?*.

For our part, we believe in a general moral right to respect for personal autonomy, but in line with the philosophical tradition we have just outlined, we think it does not preclude the use of mandates in the areas under discussion.¹¹⁷ Indeed, the concept of autonomy raises a more profound challenge for nudging than it does for these types of mandates. The very notion of rational self-authorship outlined by Dworkin but accepted as central to the concept of autonomy puts the problem of manipulation front and center. For if nudging sometimes employs techniques that bypass rational thought processes, then one may argue that it 'perverts the way that person reaches decisions, forms preferences or adopts goals' and can usurp a person's decision making process 'by

autonomy has no claim to exclude other important and fundamental concepts: ch.2, esp. 8, 32.

115 We relied on these philosophers, we may add, partly to convey mainstream views. The concept of relational autonomy, building on the feminist critique of liberal autonomy, recognises affirmative obligations to promote autonomy and offers a less atomistic conception of personhood, one which by its nature is apt to recognize a slim line between harm to self and others: see e.g. C Mackenzie, 'Relational Autonomy, Normative Authority, and Perfectionism' (2008) 39 *Journal of Social Philosophy* 512.

116 Criminal law coercion is slightly different but that is not our concern here.

117 We agree with the basic point of Peter de Marneffe, that certain core areas of self-authorship ought to be immune from paternalistic intervention (of any sort): P Marneffe, 'Avoiding Paternalism' (2006) 34 *Philosophy and Public Affairs* 84.

interfering with the way in which they arrive at their decision.’¹¹⁸ We shall consider the problem of manipulation in a moment, but first we need to introduce the idea of dignity, to which Sunstein also adverts.

Dignity

As we said at the beginning, an overarching concern of ours is with human dignity. Both supporters and opponents of nudging invoke the concept of ‘human dignity’ in support of their respective positions.¹¹⁹ Given that the concept of human dignity is a foundation of international and European human rights, as well as for many systems of national constitutional rights, and that human dignity is extensively resorted to in contemporary political discourse, disagreement over nudging’s conformity with human dignity is critical.¹²⁰

It would seem that Sunstein has become much more sensitive to the charge that nudging is contrary to human dignity between the publication of his first book on nudging with Richard Thaler in 2008, and the second book that came out in 2014. One of the principal differences between the two books (and perhaps the main reason for reviewing the second book, which is otherwise very similar to the first¹²¹) lies in the considerably greater amount of effort and space devoted to the dignity issue in *Why Nudge?*

Sunstein adopts a somewhat confusing position regarding the relationship between human dignity and nudging. His baseline position is

118 Raz, *Morality of Freedom* (1986) 377-378, and Dworkin, *Theory and Practice of Autonomy* (1988) 123 respectively, both speaking to the problem of why manipulation impugns autonomy.

119 Cass Sunstein argues that nudges ‘are meant to promote autonomy and dignity,’ Letter to the *New York Review of Books*, 23 October 2014. Jeremy Waldron, a critic, argues that nudging compromises human dignity because it is manipulative, ‘It’s All For Your Own Good’ (2014).

120 C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655.

121 Another difference between Thaler and Sunstein *Nudge* (2008) and *Why Nudge?* (2014) is that the latter is less comparative, and more based on experience in practice in the United States. We consider these aspects at greater length subsequently.

that nudging is *not incompatible* with human dignity,¹²² but he also goes further, seeing nudging as itself *supporting* the idea of human dignity.¹²³ His understanding of human dignity is complex, not to say confusing. He adopts, at various points, at least three different substantive conceptions of human dignity. Each of these formulations has advocates who distinguish their favoured approach as fundamentally different from the other.¹²⁴ For Sunstein, however, they are *all* adopted, *at the same time*, without any apparent recognition that they constitute different (and potentially conflicting) understandings of human dignity.

His first understanding of human dignity is that it involves respecting human agency and furthering autonomous decision-making (dignity-as-autonomy).¹²⁵ We disagree that autonomy is, by itself, an adequate understanding of dignity. Dignity as freedom or autonomy is a popular conception of dignity, particularly in the United States. A prominent philosophical version of this has been advanced by Griffin,¹²⁶ who argues that human dignity consists in one particular interest, an interest in freedom. John Tasioulas outlines several difficulties with Griffin's approach, but two in particular apply to Sunstein's understanding of dignity-as-autonomy.¹²⁷ First, Tasioulas argues, a focus exclusively on freedom means that human dignity does not protect human beings incapable of agency. At the extreme, some of the most vulnerable, such as those in a permanent vegetative state, lack any capacity for agency and would thus not attract the protection of Griffin's (or Sunstein's) dignity.

A second concern with making 'autonomy' central to 'dignity' is the extent to which it reduces the importance of relationality to a fully developed understanding of 'dignity.' Socio-economic rights can be seen, for example, as protecting *relational* aspects of human flourishing in order to maximize the recognition and protection of our dignity, rather than as

122 Sunstein, *Why Nudge?* (2014) 161.

123 See reference at note 119, above.

124 See C McCrudden, 'In Pursuit of Human Dignity' in C McCrudden (ed), *Understanding Human Dignity* (Oxford, Oxford University Press, 2013).

125 He writes in the NYRB, note 119 above, that 'the whole idea of nudging is designed to preserve freedom of choice, and in that sense both autonomy and dignity.' See also *Why Nudge?* (2014) 127.

126 J Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008).

127 J Tasioulas, 'Human Dignity as a Foundation for Human Rights' in C McCrudden (ed), *Understanding Human Dignity* (2013) 302-304.

protecting the exercise of autonomy. This is not to say that a relational approach is incapable of coexisting with all understandings of autonomy. A focus on autonomy does not have to adopt a conception of the individual as ruggedly individualistic. Indeed, one can argue that autonomy often results from the existence of certain kinds of supportive relationships, but if this understanding of 'autonomy' is what is thought to be important, then this needs to be made clearer than it is at the moment. We shall return to this in a moment.

Sunstein's second understanding of human dignity is that it requires respect for others in the sense that others should not be treated in such a way as to insult or demean them (dignity-as-non-humiliation), citing Avishai Margalit.¹²⁸ Ultimately, he seems to plump for dignity-as-non-humiliation as his principal understanding of dignity. Does the idea of humiliation come closer to the core sense of what dignity involves? Notice two important implications of the move to consider humiliation as a key to understanding dignity, both of which bring potential problems. The first is that we have moved from a positive understanding of dignity towards a negative understanding of dignity: those, such as Sunstein, who support humiliation as the key stress the importance of considering what constitutes *indignity*, rather than trying to understand what constitutes dignity. The state's duty then becomes the narrow one of not itself actively humiliating another, rather than the positive duty of *promoting* the dignity of others. The second implication is that there is a strong emphasis in the humiliation approach of considering what duty requires. This raises the further question of *why* we owe that duty to other human beings. Why do we have a duty not to humiliate them? In particular, do those who believe in this or other forms of what is called 'attributed' dignity have to believe also in some notion of 'intrinsic' dignity in order to identify to whom the duty not to humiliate is owed? Is it possible to believe in attributed dignity without also accepting intrinsic dignity?

The third approach identified by Sunstein shifts to an intrinsic approach, and understands human dignity as treating persons as ends rather than merely as means.¹²⁹ Unfortunately, because his approach is essentially one of 'dignity-as-humiliation', Sunstein does not unpack the

128 Sunstein, *Why Nudge?* (2014) 133.

129 Sunstein, *Why Nudge?* (2014) 127.

implications of this third approach for his project. He interprets this approach in an off-handed way that refers briefly to Kant, and then moves on. Had he considered the rich literature on dignity that has emerged in the last ten years, he would have realized, we suggest, that nudging has the potential to undermine dignity, understood as the value that persons have by virtue of the fact that they are persons. This is what we earlier described as a ‘thick’ conception of dignity.

This is the understanding of dignity that underpins our approach to the issue. One implication of this thick conception is a healthy respect for Kant’s maxim that people be treated as ends and not merely as means, which in our view forbids ‘using’ them even if the ends promoted are those of the used person. Such a conception resists being shoehorned into a welfarist paradigm. Dignity is in principle a constraint on cost-benefit analysis, not merely another ‘ingredient’ added to the scales. In making this point, we mean neither to denigrate the importance of cost-benefit analysis, nor to raise a meta-ethical quarrel that has no practical import. We believe that respect for dignity in this Kantian form entails a degree of caution and respect for persons that the institutional practice of nudging is liable to overlook. We shall consider two particularly important aspects of this understanding that are relevant to assessing the ethics of nudging.

Using a phrase borrowed from Margaret Farley, one could call specific requirements of respect for dignity ‘obligating features of personhood’.¹³⁰ These are dimensions of personal dignity that indicate not only *that* we should show respect toward one another but *what* it will mean to show such respect. Farley, critically, includes relationality as a feature of dignity (the fact that persons cannot survive, thrive or even exist as persons without some fundamental relatedness to other persons). In Sunstein’s discussion of dignity, there is no consideration of relationality, in this sense. Farley’s inclusion of relationality as an obligatory feature of personhood is of particular importance when we consider the current political economy of nudging, and Sunstein’s near-obsession with warding off accusations of paternalism. For Sunstein, concern for the good of others is reduced to paternalism, leaving no space for other values, such as solidarity and fraternity, values that derive from relationality. It is a

130 MA Farley, ‘A feminist version of respect for persons’ (1993) 9 *Journal of Feminist Studies in Religion* 183-198.

noticeable feature of American electoral politics that such values are in short supply. They are also notably absent from Sunstein's understanding of dignity.

Roger Brownsword's reflections on human dignity are also useful at this point.¹³¹ For Brownsword, 'the moral' (whether as in a 'moral community' or a 'moral way of life') commits its adherents to trying to do the right thing for the right reason. For moral persons, the focal virtue, we might say, is to try to do the right thing for the right reason. The demand that human dignity be respected can be equated with the 'moral' in this sense. For Brownsword, this moral command is unlikely to have any real chance of being followed in practice unless there is a supportive societal context. He considers that the context in which we try to do the right thing for the right reason is currently unsupportive in several respects, only one of which need detain us. This is the fact, as he sees it, that new technologies present regulators with huge opportunities to manage environments that fundamentally change the way in which individuals are directed and channeled, so that even if we do the right thing, we are no longer doing it for the right reason. This brings us squarely to the issue of manipulation.

Manipulation

One of the more persistent criticisms of nudging of this type is that it is 'manipulative'. The subject has been of concern for writers on autonomy for some while, but it is also, of course, a central concern where the dignitarian idea of respect for persons is concerned. It thus bears consideration as a separate issue.

In defining manipulation, we can adopt the definition of Allan Wood. 'What is characteristic of manipulative behavior,' he argues, 'is that it influences people's choices in ways that circumvent or subvert their rational decision-making processes, and that undermine or disrupt the ways of choosing that they themselves would critically endorse if they

131 R Brownsword, 'Human Dignity, Human Rights, and Simply Trying to Do the Right Thing' in McCrudden (ed), *Understanding Human Dignity* (2012), 347.

considered the matter in a way that is lucid and free of error.¹³² Wood draws on the work of Marcia Baron¹³³ to identify three core types of manipulation: pressure to acquiesce; playing upon emotions, emotional needs or weakness of character; and deception. The idea of rationality plays a central role in Baron and Wood's positions, as it did also in Gerald Dworkin and Joseph Raz's less developed discussions of this same idea.¹³⁴ Wood takes no position on whether manipulation is inherently immoral.

Nudging at its very core engages directly with cognitive failures ('behavioral market failures'). It operates precisely where people act either unthinkingly or are prone to subtle biases that work to their disadvantage. But nudging may take either of two radically different paths. Nudging may encourage more discussion, more debate, more rational discourse, and more participation in the political system. In this sense it would facilitate rational choice rather than impose insidious manipulation. Much of what Sunstein describes as nudging is meant to be facilitative in this type of way, and in that sense he could justifiably claim that much of the nudge program is not manipulative. However, regulatory use of labeling and warnings is not new in any way, nor is the requirement of careful dispensation for medicines for example. On the other hand, if we emphasise the tendency to 'counteract' biases, then we see that some forms of nudging seem to *rely* on psychological insights to try to ensure 'good' results. They 'attempt to harness cognitive irrationalities in aid of desired social policy outcomes.'¹³⁵ Our concerns in this context relate particularly to this form of nudging.

Certainly many believe that certain types of nudging may, or plainly do, involve manipulation. Most are concerned with what has been termed

132 A Wood, 'Coercion, Manipulation, Exploitation' in C Coons and M Weber (eds) *Manipulation* (Oxford, Oxford University Press, 2014) 17, 35. The editors of the book adopt a similar definition at 11.

133 M Baron, 'Manipulativeness' (2003) 77 *Proceedings and Addresses of the American Philosophical Association* 37.

134 Dworkin, *Theory and Practice of Autonomy* (1988) 123, defining paternalism as the 'usurpation of decision-making, either by preventing people from doing what they have decided or by interfering with the way in which they arrive at their decision.' See also Raz, *The Morality of Freedom* (1986) 377-378, 420.

135 K Yeung, 'Nudge as a Fudge' (2012) 75 *Modern Law Rev.* 122, 137.

‘non-argumentative influence.’¹³⁶ Daniel Hausman and Brynn Welch put it as follows, referring to those targeted by nudging: ‘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.’¹³⁷ ‘We find this more insidious than straightforward coercion,’ they continue, because the ‘target is ... responsible for choosing to do what the manipulator intends him to do and, as such, is a party to his own victimization.’¹³⁸ In other words, though the nudge may operate at a sub-conscious or at any rate non-rational level, the fact of *de facto* choice seems to imply that the nudged person is in fact responsible for the outcome, when in fact the outcome is the product of another’s choices.

For our own part, we feel that the point about manipulation can be taken too far, and has certainly received a disproportionate amount of attention by comparison with the points we have emphasized earlier. We have also noticed that much of the criticism is abstract rather than concrete, and our experience at conferences has only confirmed our view that the manipulation critique is more about ‘uneasiness’ about future uses of nudging than it is about proof of current practice.¹³⁹ Yet the manipulation point nevertheless does remain important. We think there is an ethical problem with nudging as manipulation, and that Sunstein underestimates the dangers. We propose to consider the issue more concretely by considering actual examples in light of Wood and Baron’s three categories of manipulation.

Is pressure to acquiesce a feature of nudging? Pressure to acquiesce is a familiar marketing strategy, especially in selling real estate but also in ordinary marketing (‘Buy now while stocks last!’). Do nudgers employ this strategy? Their advocacy of ‘cooling off periods’ is an example of

136 JS Blumenthal-Barby, ‘A Framework for Assessing the Moral Status of ‘Manipulation’’ in Coons and Weber (eds), *Manipulation* (2014) 121, 123.

137 D Hausman and B Welch, ‘Debate: To Nudge or Not to Nudge’ (2010) 18 *Journal of Political Philosophy* 123, 128.

138 Coons and Weber, ‘Introduction: Manipulation’ (2014) 16.

139 E.g. Waldron, in NYRB, above note 49.

where they seek to *counteract* this unethical business practice,¹⁴⁰ and we support that (old) policy prescription. Yet on another view, the use of switching default rules, a central and new nudging strategy, may well be understood as just such a form of manipulation. It relies on indecision (due to whatever ‘bias’ exists or, and more plausibly, time limitations, procrastination, and excusable ignorance).

Automatic enrollment in private pension schemes might be best, or at least reasonably, understood as relying on indecision in this way. The right to opt-out from the system is not as choice-friendly as one first supposes. After the initial period expires, opt-outs from 401(k) savings are normally penalized at a 10% rate over and above applicable taxation.¹⁴¹ The presentation of the option to the worker and indeed of the policy to the legislature as purely voluntary is a misrepresentation and from a policy point of view it obscures relevant information, such as how such ‘voluntary’ programs in fact function like poorly designed mandates precisely because it is *indecision* that is dominant.

Let us make clear again – we do not oppose automatic enrollment. And nor do we think that the policy is necessarily manipulative. In our view, the worker cannot be said to be accepting the details of the program they are in fact bound to thereafter. What actually occurs is that the worker accepts the authority of either the state or her employer (depending on who sets the default) to promote one available option on their behalf, and the worker does so on trust that this actor is properly informed and is acting in the worker’s best interest. Those assumptions are hardly irrational, even if they are at times unwarranted. In other words, the worker is allowing someone else to make the decision, and she adopts that other person’s decision as authoritative on the matter. Doing so is not to accept manipulation any more than accepting a doctor’s decision about whether surgery is indicated.

However, the situation can be contrasted quite sharply with mandatory calorie counts on menus or health warnings. The worker is in most cases

140 Thaler and Sunstein, *Nudge* (2008) 250, 252.

141 Bubb and Pildes, ‘How Behavioral’ (2014) 1626. New Zealand’s Kiwi Saver scheme removed the right of opt out altogether after eight weeks have expired, barring exceptional circumstances. See <http://www.kiwisaver.govt.nz/new/opt-out/>. In the UK, the opt out period is presently one calendar month with no right of withdrawal thereafter.

accepting to defer rather than making a choice. The manipulation (as well as misrepresentation) arises from the pressure generated by the short time-frame for opting out and, where late withdrawal is permitted, from the fines levied thereon. The worker is in effect pressured to acquiesce in a rule the merits of which most do not understand and on a theory that it is actually their choice.

We move on to the second category, of appeals to emotions. This is a difficult issue. Wood for example believes advertising is a particularly odious form of manipulation, because it plays on our emotions and seeks to subvert our rational thoughts. He also thinks that advertising aimed at promoting our own good is manipulative, and gives the example of advertising that promotes quitting smoking in particular. On this view, graphic labels on cigarette packages, which promote fear, would be forms of manipulation. We must confess, we find this not only counter-intuitive but a problematic counter-example for the conception of manipulation that emphasizes the role of rationality. Surely it cannot be the case that appeals to emotions are manipulative for that reason alone. Such a conception would insist on making ordinary modes of communication in close relationships barren and mechanical. The action that appeals to emotions and is manipulative for doing so must go further than merely being non-rational.

In our view, the choice architecture must (borrowing Allan's own definition again) 'subvert' rationality when doing so. The proto-typical example is subliminal messaging, where the message is not detected cognitively. In our view, appeals to emotions that are recognized by our rational selves, and distinctly recognized in the very role they are playing, are acceptable and not forms of manipulation. They are on the rational radar. We can illustrate with an example. Suppose that an attractive man flirts with a friend in order to get her to join him for dinner. He is aware that in using charm, she is more likely to join him. In our view, there is nothing manipulative in this exchange provided that the woman is aware of the ploy – she sees it and (perhaps) delights in acquiescence. This is very common in social interaction. To consider this manipulative would also condemn light-hearted attempts to cheer a friend up, humorous attempts to 'get a rise' out of someone, and collegial attempts to smooth over differences at work.

Suppose by contrast, the man flirts with the woman for an end that he conceals from her. In such a case, this *would* be manipulation because he uses her to obtain an end in a manner that subverts and is non-cognizable by her own rational thought processes. (It is also arguably wrong simply

because he is *using* her). If we consider social advertising, our view is that graphic images use fear to convey *messages* that very much are on the rational radar. The images of starving children, for example, drive home the human dimension of the problem. The appeals to patriotism ('Uncle Sam Wants You!') are appeals to national solidarity and community spirit. In all these cases, the endgame is clear and above board, just as is polemical writing in academic exchange. They are not manipulation, because our rational selves remain in a controlling position. In our view, it is not for those like Baron and Wood, still less for champions of autonomy, to affirm the great role of reason in human affairs and at the same time treat it as so precious that it is offended or subverted by any non-rational mode of persuasion.

On the other hand, there are clear examples of what should be considered unfair manipulation, using the consumer's inertia bias against the best interests of that consumer. A good example of the private sector using such tactics is provided in a recent case,¹⁴² in which the Office of Fair Trading, a British government consumer protection agency, challenged a standard form contract for gym membership on the grounds that it was unfair to the consumer. The contract provided for a minimum membership period; having entered into the agreement, the consumer is 'locked into paying monthly subscriptions for the full minimum period.'¹⁴³ The High Court accepted the evidence presented by the OFT that the average consumer 'tends to overestimate how often he will use the gym once he has become a member.'¹⁴⁴ It was 'a notorious fact that many people join such gym clubs having resolved to exercise regularly but fail to attend at all after two or three months,'¹⁴⁵ that the defendant knew this to be the case, and relied on it to the detriment of the consumer.¹⁴⁶

We come now to the principal form of manipulation – outright deception. We suggest that nudging is not ordinarily deceptive. However,

142 *The Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch).

143 Para 164.

144 Para 164.

145 Para 164.

146 A somewhat similar use of inertia bias can be seen in Microsoft's bundling policy, as described in the Commission's decision against Microsoft, Microsoft (Case COMP/C-3/37.792).

the ethos of the United Kingdom Behavioural Insights Teams is that they are able to diagnose and counteract irrational behavior, and no doubt this orientation encourages a paternalistic attitude that may ultimately lead quite logically to the view that if people's welfare can be improved by deception, then why not? Such was the experience in an experiment run at a JobCentrePlus in Loughton, in the South East of England.¹⁴⁷ The BIT hypothesized that better self-esteem would lead to greater success in finding work. They thus adapted a skills test and administered it to a group of unemployed persons. The test, which was not validated for this purpose, produced consistently high results that were only tenuously related to the answers given by test-takers, apparently in order to boost their confidence. This has been viewed as outright deception,¹⁴⁸ and perhaps the worst part of the experiment was that it appeared to 'work.' An increased proportion of those who took the test subsequently gained employment, as compared with those who didn't. This example not only illustrates the potential for manipulation, but the arrogance that can result from an unduly welfarist view of the moral universe, where considerations of dignity and autonomy are treated as sentimental and negotiable rather than fundamental.

Another example of nudging employing deception can be found in the general category of 'framing' information. 'Framing effects' are noticed in the literature on heuristics and biases as a standard problem: '90 percent fat free!' sounds much better than '10 percent fat!' This insight finds its way into the nudging program, as does the use of salience, in ways that result in deliberate misrepresentation. One example involves the use of choice architecture in encouraging women to go for more mammogram tests in Denmark, where an invitation to women aged between 50 and 69 was accompanied by a leaflet issued by the Danish National Board of Health, a government body. This framed the information for the women in such a way that the recipients overestimated the extent to which refusing

147 The following account is taken from S Malik, 'Jobseekers' psychometric test 'is a failure' *Guardian* 6 May 2013; J Knott, 'The behavioural insight hothouse' *Impact* 1 October 2013; J Cromby and M EH Willis, 'Nudging into subjectification: Governmentality and psychometrics' (2013) 34 *Critical Social Policy* 241.

148 R Dean, 'There should be greater public involvement in deciding what is a legitimate "nudge"' *British Politics and Policy blog*, <http://blogs.lse.ac.uk>.

mammography was associated with ‘an increased risk of suffering and dying from breast cancer.’¹⁴⁹ Crudely, the information can be presented in one of two ways: either it can be presented in the form of relative statistical likelihood, or in the form of absolute statistical likelihood. The behavioral insight is that when information of this type is presented as relative risk, then women will overestimate the likelihood and will, as a result, be more likely to have a mammogram. Governments that wish women to have a mammogram present the information in the way that will lead to the result that the regulator wishes, by manipulating the heuristics. Essentially, the information provider is choosing to frame the information so as to induce people to overestimate the likelihood of the risk. It is thus a form of deception. Is there an alternative? Yes, address the cognitive issue, without trying to take advantage of it, or (even better) educate women to be able to better understand the difference between the two sets of statistics, so that they can make their own judgment as to what is better for them – education rather than manipulation.

The Ethics of Experimentation

The empirical studies about nudging raise an additional ethical problem for introducing nudging into government. This ethical concern relates to the scientific method upon which much of the empirical foundations of nudging rely, at least in part. This concern goes beyond the previous concern, in that it affects the whole project of nudging rather than simply manipulative nudging. Our concern relates to the issue of informed consent and ethical review of experiments on human subjects, a key element in devising much nudging policy in practice.

Supporters and critics alike view ‘nudging’ as still in a largely experimental stage of development. In several countries in which governments have become interested in this instrument, there have been attempts to develop ways of identifying what works and what doesn’t. The UK’s Behavioural Insights Team (BIT), in particular, has identified a particular method (natural field experiments, using randomized controlled

149 T Ploug, S Holm, and J Brodersen, ‘To nudge or not to nudge: cancer screening programmes and the limits of libertarian paternalism’ (2012) 66 *J Epidemiol Community Health* 1193, 1193.

trials) as highly suited to this task.¹⁵⁰ A considerable number of studies have been carried out by government, and by academics, using this method to test various different forms of nudges.¹⁵¹ For example, a natural field experiment was recently conducted to test whether including social norms and public good messages in standard tax payment reminder letters enhanced tax compliance.¹⁵² Different messages were trialed across 100,000 individual taxpayers. This was carried out by a member of the BIT and several academics. The published paper makes clear that ‘the trials presented ... would not have happened without the concerted efforts of officials within the UK Government.’¹⁵³ This method has been exported by the UK’s BIT to other settings in other countries. In 2012, the Obama Administration also called for increased use of randomized controlled trials.¹⁵⁴ This method is properly classed as experimental. The BIT has referred to their methods as based on ‘pragmatic experimentation.’¹⁵⁵ In the tax compliance study, for example, the trials are consistently described as ‘experiments.’

There is growing concern about the circumstances in which such research is ethically acceptable.¹⁵⁶ The experiments are carried out using live human subjects. One coauthor of the tax compliance study mentioned earlier has described how ‘in a natural field experiment, the analyst

150 Cabinet Office, Behavioural Insights Team, *Test, Learn, Adapt: Developing Public Policy with Randomised Controlled Trials*. See also P John, ‘Policy entrepreneurship in UK central government: The behavioural insights team and the use of randomized controlled trials’ (2013) *Public Policy and Administration* 1.

151 In addition to those mentioned in the text, see also LC Haynes et al., ‘Collection of Delinquent Fines: An Adaptive Randomized Trial to Assess the Effectiveness of Alternative Text Messages’ (2013) 32 *Journal of Policy Analysis and Management* 718, 729 (involving the ‘cooperation of Her Majesty’s Courts and Tribunals Service (HMCTS), which made this experiment possible ...’).

152 M Hallsworth et al., ‘The Behaviorist as Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance’ (2014) *NBER Working Paper* No. 20007.

153 *Ibid.* 4.

154 Office of Management and Budget, Memorandum-12-14, Use of Evidence and Evaluation in the 2014 Budget (May 18, 2012).

155 *Behaviour Change and Energy Use* (2011) 31.

156 MR Hyman and GC Aguirre, ‘Libertrian Paternalism and Ethically Problematic Naturalistic Inquiry’ (2015) 13 *NM State University Business Outlook* 1.

manipulates experimental conditions in a natural manner, whereby the experimental subjects are unaware that they are participating in an experiment.¹⁵⁷ A recent review concluded that ‘anyone who engages in human subjects research has a responsibility to proceed according to certain ethical guidelines, and this includes economists pursuing such research in the field or the laboratory.’¹⁵⁸

Among the most famous of such guidelines is the Nuremberg Code of 1947.¹⁵⁹ In the United States, the famous Belmont Report, which reported in 1978, regarded the protection of human subjects of both biomedical as well as behavioural research as necessary, leading to the adoption of United States federal regulations by the Department of Health, Education and Welfare.¹⁶⁰ These Regulations now establish a common core of principles accepted by many other US Departments. These, and all of the other most important codes of ethical practice apply to the types of experiments that test ‘nudges’. Although less developed than in the United States, there are also equivalent standards that apply in several of the jurisdictions in which nudging is currently being considered or is in operation, including the United Kingdom,¹⁶¹ Canada,¹⁶² Germany, and Australia. Often these standards are incorporated into guidelines laid down for academics by their university, and by funding bodies for those in receipt of research grants. The other method of attempting to ensure compliance with ethical standards is through the exercise of editorial control by journals publishing in the field, enforcing professional codes of ethics.

It is a noteworthy feature of the profession of economics, however, that it is one of the few professions that, until recently, had no Code of Ethics

157 JA List, ‘Homo Experimentalis Evolves’ *Science* 11 July 2008, 207.

158 M Blomfield, ‘Ethics in economics: lessons from human subjects research’ (2012) 5 *Erasmus Journal for Philosophy and Economics* 24, 27.

159 The Nuremberg Code specifies in Article 1: ‘The voluntary consent of the human subject is absolutely essential.’

160 45 CFR, part 46.

161 The regulatory system for informed consent up to 2004 is set out in R Wiles et al., ‘Informed Consent in Social Research: A Literature Review’ (2005) 1 *NCRM Methods Paper Series*.

162 See Tri-Council Policy Statement, Ethical Conduct for Research Involving Humans (2010), especially at 27-45, Chapter 3: ‘The Consent Process’.

guiding the conduct of members of the profession.¹⁶³ After a campaign in 2011 by a group of members of the American Economic Association (AEA) focusing on the appearance of bias created by economists involved in public policy debates having undisclosed financial affiliations with interests affected by the policy issues concerned,¹⁶⁴ the AEA adopted a limited Code of Practice that required disclosure of conflicts of interest. Separately, the AEA adopted a policy that its scholarly economics journals would henceforth require authors, ‘for any paper involving the collection of data on human subjects,’ to disclose whether or not they ‘have obtained Institutional Review Board (IRB) approval,’ and if no such approval was obtained, for example ‘because their institutions do not have IRBs,’ ‘the reason should be stated.’ This disclosure statement would henceforth be included in the ‘acknowledgements’ footnote. Other journals in which behaviorally related research is published have adopted somewhat stronger requirements.¹⁶⁵

From this brief survey, we can see that there are two particularly important elements in good practice in the conduct of behavioural experiments involving human subjects. The first is that the human subjects involved in these experiments should be asked to consent to the experiment before it occurs. The second is that such experiments should be assessed by an independent ‘ethical review committee’ (or similarly named). In some, exceptional, cases a waiver of the requirement of ‘informed consent’ may be available, but only after scrutiny by such a body. Such bodies provide a second important element therefore, and will be asked to ‘sign off’ on such experiments.

Some of the experiments that have been conducted to test nudging have, indeed, sought and obtained informed consent, or been scrutinized

163 For a detailed exploration of the need and content such a code might take, see GF DeMartino, *The Economist’s Oath* (Oxford, Oxford University Press, 2011).

164 Letter from G Epstein et al. to RE Hall, President of the American Economic Association, 3 January 2011. For the background, see ‘An intensifying debate about the case for a professional code of ethics for economists’ *The Economist*, January 6th 2011.

165 So, for example, the editor of the Proceedings of the American Academy of Science has adopted the ‘Common Rule’ as PNAS policy, see 111 (no 29) PNAS (2014), ‘Editorial Expression of Concern’ (online).

by such a committee, or both.¹⁶⁶ In other cases, there is a vague statement included in the published account of the research that the ‘research has been conducted within the ethical standards’ of the university to which the author is attached, without any indication of whether this included an ethics committee review or informed consent being required.¹⁶⁷ More concerning, however, is that although no complete analysis of all experiments by *governments* testing nudges has been carried out, in those experiments that we have assessed, *none* has disclosed that informed consent was obtained, and *none* has identified any scrutiny by an independent ethical review body. This includes the tax compliance experiment conducted by BIT. So far as is known, there is no Ethics Review Board within the BIT to approve such experiments.

Somewhat surprisingly, perhaps, neither Thaler and Sunstein, nor Sunstein alone, appear to advocate that informed consent should be obtained, nor that an independent ethical scrutiny be conducted, when nudging experiments are conducted. The absence of such a warning is all the more worrying given that there has been extensive debate in certain sections of the scholarly literature about the role that informed consent

166 P Allmark and AM Tod, ‘Can a nudge keep you warm? Using nudges to reduce excess winter deaths: insight from the Keeping Warm in Later Life Project (KWILLT)’ (2014) 36 *Journal of Public Health* 111, 112; AM Tod et al., ‘Understanding factors influencing vulnerable older people keeping warm and well in winter: a qualitative study using social marketing techniques’ (2012) 2 *BMJ Open* 1, 12. Even when a piece of behavioral research has been scrutinized by an IRB, ethical controversies arise. The authors of a paper in PNAS, A DI Kramer et al., ‘Experimental evidence of massive-scale contagion through social networks’ (2014) 111 *PNAS* 8788 were found to have used data supplied by Facebook that involved an experiment conducted by Facebook without informed consent. An editorial expression of concern by PNAS was subsequently issued by the editor in chief, see 111 (no 29) *PNAS* (2014), ‘Editorial Expression of Concern’ (online). For a detailed account of the background, see the following articles on the Forbes website, www.forbes.com: K Hill, ‘Facebook Added ‘Research’ to User Agreement 4 Months After Emotion Manipulation Study’ 6/30/2014; GS McNeal, ‘Controversy Over Facebook Emotional Manipulation Study Grows As Timeline Becomes More Clear’ 6/30/2014; GS McNeal, ‘Facebook Manipulated User News Feeds to Create Emotional Responses’ 6/28/2014.

167 P Dolan and R Metcalfe, ‘Neighbours, Knowledge, and Nuggets: Two Natural Field Experiment on the Role of Incentives on Energy Conservation’ (2013) *CEP Discussion Paper* No 1222 (Acknowledgements).

may have to play.¹⁶⁸ It is well known, of course, that there is considerable unease among some social scientists conducting such experiments that these regulatory requirements are overly draconian and unnecessary because they are said to involve only minimal interference and no risk, and that these requirements are likely to slow down the push for more evidence-based social and economic policy,¹⁶⁹ but until these requirements are altered, economists are bound by them as much as ordinary mortals, including those conducting experiments on ‘nudging’ in government.¹⁷⁰ Yet few appear to do so. Carrying out human subject experimentation,

168 There is a separate literature on the use of nudging to obtain ‘informed consent’ in a clinical setting; this is not the issue we are concerned with here, raising separate ethical issues, see S Cohen, ‘Nudging and Informed Consent’ (2013) 13 *American Journal of Bioethics* 3.

169 See MN Meyer, ‘From Evidence-Based Medicine to Evidence-Based Practice’ (2011) *Hastings Center Report* January-February 1-2. The argument that has been advanced by Steven Levitt and John List (the latter was a coauthor of the tax compliance study already mentioned) that there is a difference between clinical studies and field experiments of the type we have discussed. ‘In medical trials,’ they write, ‘it is sensible to have informed consent as the default because of the serious risk potential in most clinical studies.’ SD Levitt and JA List, ‘Field experiments in economics: The past, the present, and the future’ (2009) 53 *European Economic Review* 1, 15. See also JA List, ‘Informed Consent in Social Science’ *Science* 31 October 2008, 672. By implication, field experiments do not have such potential risks associated with them, but given that a previous well-known study using similar techniques had upset some participants, S Coleman ‘The Minnesota Income Tax Compliance Experiment State Tax Results’ *Minnesota Department of Revenue* April 1996, that justification is questionable. In addition, they suggest, ‘there are certain cases within the area of field experiments in economics in which seeking informed consent directly interferes with the ability to conduct the research.’ Even they, however, recognize that in such contexts, ‘Local Research Ethics Committees and Institutional Review Boards (IRBs) in the USA serve an important role in weighing’ whether the research is ethical.

170 Economists have been involved with others for some time in attempting to dilute the Federal Code requirements, see the Advance Notice of Proposed Rulemaking, 26 July 2011. Surrounding this attempt, there has been a flurry of books and articles considering the issue, see, e.g., R De Vries, DA DeBruin, and A Goodgame, ‘Ethics review of social, behavioral, and economic research: where should we go from here?’ (2004) 14 *Ethics Behav* 351; IG Cohen and HL Fernandez (eds), *Human Subjects Research Regulation: Perspectives on the Future* (Boston, MIT Press, 2014).

which nudging often involves, brings government into fraught, and largely uncharted, ethical waters.

Nudging's Political Economy

Despite its subtitle ('The *Politics* of Libertarian Paternalism'), there is practically no discussion in *Why Nudge?* of the current political economy of nudging. How does nudging get into the political process, and why? There seem to be different sources within governments from which nudging is being advocated and this complicates trying to identify a coherent ideology of nudging because the different sources appear to have different reasons for pushing it. So, for example, in some countries where the push for nudging arises from lower levels of the civil service rather than from the political level, nudging is seen as a practical response to a practical problem of ensuring compliance (sometimes with existing regulation or incentives, such as getting people to pay their income tax). In other countries, the initiative comes from the top but a relatively narrow role for nudging appears to be envisaged. Angela Merkel's government in Germany has shown some interest in the idea,¹⁷¹ but the German use of nudging seems more about the internal reform of the German civil service administration, than any grander scheme of reforming regulation root and branch.

In other cases, however, nudging seems to fit much more squarely into a neoliberal agenda, where it is being advocated as the default position for the regulatory system as a whole, leaving aside whether this is Sunstein's intention. It is no coincidence that the three governments world-wide that have shown most interest in nudging are all center-right governments (the Obama administration in the United States,¹⁷² David Cameron's Coalition government in Britain,¹⁷³ and the Liberal Party Premier of the Australian state of New South Wales, Mike Baird, a former investment banker and

171 P Plickert and H Beck, 'Kanzlerin Angela Merkel sucht Verhaltensforscher' *Frankfurter Allgemeine Zeitung* 26 August 2014.

172 Sunstein was Administrator in the Office of Information and Regulatory Affairs, in the Office of Management and Budget between 2009 and 2012.

173 A Behavioural Insights Team was established within the Cabinet Office in 2010.

‘fiscally conservative Christian premier’¹⁷⁴). The reason to note the popularity of nudging among these governments is because it situates the current practice of much high-profile nudging centrally within economic liberalism and deregulation.¹⁷⁵

Whether this is Sunstein’s own political agenda is unclear, but we suspect that it may be. As we have seen, he argues consistently that nudging, rather than traditional regulation, should be the default approach, and that traditional regulation can only be justified if supported by much stronger evidence than that presented in favour of nudging itself. But in Sunstein’s case, as well as in the case of each of the three governments with which nudging is most popular, it is an economic liberalism that still wants to achieve some betterment of the human condition, provided it is without significant political or economic costs, and that means doing it below the political radar. We should expect, therefore, that methods of nudging are more likely to be adopted that aim to achieve results manipulatively rather than transparently, in spite of Sunstein’s rather optimistic view that nudging is consistent with openness.¹⁷⁶ This is because, as we have seen, at least some of the types of nudges advocated depend on the use of choice architecture that ‘is intended to work deliberately ... to by-pass the individual’s rational decision-making processes in order to channel behavior in the direction preferred by choice architect.’¹⁷⁷ It takes advantage ‘of the human tendency to act

174 The Government of New South Wales has established a ‘Behavioral Insights Community of Practice,’ see <http://bi.dpc.nsw.gov.au/>

175 The Director of the UK Behaviour Insights Team has been quoted as saying that it was the impact of the financial crash and the incoming Conservative-led Government in 2010 that led to the introduction of nudging in UK government: “Their instincts were generally, we’ve got no money and we’re going to constrain the size of the state and deregulate”. So now you are using these approaches as a softer alternative to regulation.’ *The Independent* 9 February 2014.

176 *Why Nudge?* (2014) 147. We should note, however, the highly qualified nature of Sunstein’s support of openness. The visibility of government decisions is only ‘in general, an important and desirable safeguard,’ 145. Practices that embody soft paternalism ‘should be subject to public scrutiny in advance’, but only ‘[t]o the extent feasible,’ 148. He considers it is ‘hard to see why’ nudges that operate ‘subconsciously’ and ‘do not promote deliberation’ should be seen as ‘objectionable, as a matter of principle,’ 150-151.

177 Yeung, ‘Nudge as a Fudge’, (2012) 75 *Modern Law Rev.* 122, 136.

unreflectively.¹⁷⁸ It would also be unsurprising if an approach to nudging were taken that emphasized technocratic, as opposed to democratic, legitimacy, given that the latter is so much more open than the former to the ‘emotions’ of which Sunstein is so suspicious.¹⁷⁹

There is a tone of barely disguised skepticism of, and frustration with, democratic decision-making in the book.¹⁸⁰ This is particularly noteworthy in the way in which those benefitting from regulation are described. Rather than being ‘citizens’, a description that emphasizes their political status and their active participation in choosing and controlling those they elect, they are primarily regarded as ‘consumers,’¹⁸¹ emphasizing their role as market actors (and somewhat passive ones at that).¹⁸² Thus, one of the principal arguments traditionally used in support of a non-paternalistic justification for regulation, that we *as citizens* impose constraints on *ourselves* through electing officials who will regulate in our collective interests, is simply set to one side.¹⁸³

The emphasis on ‘consumers’ as the targets also brings to the fore the ‘Madison Avenue’ feel of *Why Nudge?*. The use of ‘nudges’ has been most prevalent not in government but in business, which has long taken advantage of non-cognitive methods in order to shape our consumer preferences. We have seen earlier that one of the functions of traditional regulation has been to try to ensure that such methods are kept under

178 *Id.*

179 See, e.g. *Why Nudge?* (2014) 30.

180 See, e.g. *Why Nudge?* (2014) 144: ‘One person’s political safeguard will be another person’s interest-group power.’ Or at 121, where the idea that ‘in at least some cases, [elected officials’] own intuitive reactions, and those of their constituents, drive judgments about policy and even legislation’, appears as a problem to be overcome, an aspect of an ‘imperfect’ system. These are implicit, or perhaps uncredited, references to public choice theory, such as JM Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, University of Michigan Press, 1962).

181 In *Why Nudge?* there are 33 references to ‘consumers’ and 2 to ‘citizens.’

182 See S Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (Chicago, University of Chicago Press, 2011). In contrast with Sunstein’s own earlier work in which a much more Republican conception of the individual in a polity was in evidence, see, e.g. CR Sunstein *Republic.com* (Princeton N.J., Princeton University Press, 2001).

183 *Why Nudge?* (2014) 112, and 179, note 23. Even this is characterized by Sunstein as ‘autopaternalism.’

control. Now, we are told, it is the government that should be using these methods, rather than regulating them. But we have traditionally thought that there are separate spheres of activity, in which methods that are appropriate in one sphere are not necessarily appropriate in another sphere. We buy milk, but not votes. We may sell paintings by auction but not judgeships. We would be uneasy if the techniques of Harvard Business School were simply adopted into government. We are not against government social marketing approaches in some cases, but the use of nudging that seeks to re-bias rather than de-bias, borrowing heavily from dubious advertising methods and insights, sits uneasily in a governmental process that is supposed to be democratic. Nor does it sit well in a state committed to the promotion of human dignity, as we saw earlier.

Sunstein's reading down of key values that we hold dear may be strategic. Our fear is that the progressive element in Sunstein's psyche and earlier work has become so disillusioned by the inability of progressive liberals to retain, let alone advance, basic aspects of American progressive politics that he sees nudging as simply the best way of achieving aspects of this agenda, given the current rather bleak circumstances in the United States, and therefore he needs to produce exceedingly thin versions of any value that stands in the way of implementing this strategy. *Why Nudge?* reads to us, in other words, as an admission of defeat, an analysis driven by despair: the only way of furthering a progressive liberal agenda in the current context of American politics is seen to be through nudging, because progressive politics stands no chance of success with its above-board mandates and taxes. And, in the American context, that analysis may well be correct. But if that is what is driving Sunstein, it would be much more honest to come out and say this directly,¹⁸⁴ rather than to dress it up in language that implies that it is not situated in a particularly American political moment.

Those of us with a less bleak view of the possibilities of democratic politics should be anxious to resist the import of a method of regulation so imbued with the current set of American values and context. That may, of course, be an over-optimistic assessment. Perhaps, those in favor of progressive politics in the United States and in other countries, such as those in Europe, are now in a situation where, as a result of economic

184 As Thaler and Sunstein (sort of) do in *Nudge* (2008) 194, 200.

globalization, they must accept that they are unable to regulate multinationals and other powerful interests, and that they are reduced to having to view the world through disillusioned American liberal eyes. The recent dabbling by the Commission of the European Union with nudging may well be an indication of the popularity of this view within European institutions that are subject to a similar paralysis that affects government in Washington DC. But other national governments should not simply *assume* this pessimistic viewpoint, and they certainly should not structure significant and important parts of their regulatory system around this assumption.

In other words, we suggest that the question of whether to introduce nudging always has to be set within the particular political economy context in which it is to operate. Whether or not there is a hard regulatory alternative to nudging will depend on that political economy context. What is worrying is that the more nudging is seen as a default option, the more it begins to frame what is acceptable within the political process. By making nudging a default position, we are being nudged away from other approaches to regulation – they become more difficult to justify.

Nudging and the Law

Given that the description of the book on the jacket cover says the book ‘combines *legal theory* with behavioral economics,’ and given Sunstein’s position as a professor in one of the leading American law schools (Harvard), and given that the book derives from lectures presented at Yale Law School, readers might be forgiven for thinking that there would be some discussion of the legalities involved in nudging. When they find no such discussion, they might be further forgiven for thinking that there are no outstanding legal issues raised by nudging. And the extent to which the issue of the legality of nudging has often been displaced by discussion of the *ethics* of nudging, even by lawyers and legal scholars, might strengthen this view. In most cases, supporters of nudging who touch on legal issues point to situations in which regulators’ imposition of *limits* on

the use of nudging by *private* sector actors has been upheld in courts.¹⁸⁵ The legality of nudging by *government* is seldom discussed.

Only recently have scholars, mostly based in Europe, begun to consider in any detail whether the use of nudges by government might, in certain circumstances, be contrary to the law.¹⁸⁶ Whether a nudge might run foul of legal requirements will, of course, depend on the relevant law in any particular jurisdiction, and the particular type of nudge that is under challenge, and therefore assessments of the legality of nudging is necessarily somewhat speculative and uncertain at this time. Potential users need, nevertheless, to be aware of the legal risks, at least in general terms.

There are several legal concerns that nudging gives rise to: concerns linked to broad constitutional questions of authority, accountability and democratic control (who has approved the use of nudges?); concerns that specific constitutional and human rights of those subject to being nudged may be breached (particularly freedom of expression, and privacy); and concerns that specific administrative law doctrines that keep executives in check may be undermined (don't fetter your discretion; don't act *ultra vires*). In each case, the legal concerns mirror several of the ethical concerns considered earlier. In most respects, these likely challenges relate to the method by which the nudging is devised, tested and operationalized. We suggest that each of these areas of legal uncertainty should lead regulators to be risk-averse when deciding whether or not to adopt nudging strategies, and that the absence of discussion about these issues by Sunstein is apt to lull regulators into a false sense of security.

185 Examples include the use of behavioral insights by the European Commission in enforcement actions in the anti-trust field, note 146 above, and their use by the Office of Fair Trading in arguing successfully that certain trading practices were unfair, note 142 above.

186 The two most prominent articles discussing the legality of nudging carried out by government are: A Alemanno and A Spina, 'Nudging legally: On the checks and balances of behavioral regulation' (2014) 12 *International Journal of Constitutional Law* 429; and A van Aaken, 'Judge the Nudge: In Search of Legal Limits of Paternalistic Nudging in the EU' in A Alemanno and A-L Sibony (eds), *Nudging and the Law: What Can EU Law Learn from the Behavioural Sciences* (Oxford, Hart Publishing, 2015) 83 ff.

Constitutional and Administrative Law

The first legal issue relates to the principle of the separation of powers. What institution in government is charged with approving the use of such methods? Nudges can, of course, go through a legislative process; a good example of where nudges are included in parliamentary legislation was the 1991 Netherlands road traffic reforms, which introduced nudges as part of a regulatory package that was passed in the usual way. So, too, in the United States, the Pensions Act of 2008 that we discussed earlier was passed by Congress, and nudging in fuel standards regulation was introduced as delegated legislation. However, in practice, the use of nudges has proven to be significantly thought of as a tool for the *executive* to use, since the choice of what regulatory approach to use is often centrally in the hands of administrators. Whilst several uses of behavioral techniques in the United States have had formal, legal, authorization, if only from the executive,¹⁸⁷ in several other countries the use of nudging does not seem to have gone through formal rule-making procedure of any kind, let alone one approved by the legislature. Whether this is the appropriate place for approval depends on the constitutional position in each country, but in some jurisdictions it would be legally appropriate for the legislature, rather than the Executive alone, to approve the use of such measures.

Outside the United States federal government, the approval for nudging has generally come from the Executive Branch of government, rather than from legislature. Thus, for example, in the United Kingdom, the establishment of the Behavioural Insights Team, initially within the Cabinet Office, was approved by the Prime Minister without any apparent formalization of this permission in any type of rule-making; we are left uncertain as a result as to what the role and functions of the body are, and

187 Executive Order No. 13563, 3 CFR 13563 (2011) ('Improving Regulation and Regulatory Review') is one of the key provisions that authorized the use of behavioral insights in policy making in the US federal government. This states, under section 3, that 'where relevant, feasible, and consistent with regulatory objectives ... each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.'

what are the legal limits of its authority. (Indeed, this body dealing with regulatory policy-making at the heart of government (in the Cabinet Office) has itself been privatized.)¹⁸⁸ Outside the United States, nudges appear more likely not to be adopted under formal mechanisms such as delegated legislation, but under ‘soft law’ type approaches. There appears to be a strong correlation between nudging and ‘soft law’, which may be seen to be legally problematic. Of course, it cannot always be a knock-down legal argument against nudges that they are unlegislated by the legislature, because many powers exercised by governments are also unlegislated by the legislature and we do not object. Yet it should send a warning signal that we need to be cautious, because the formal democratic methods of approval have not been invoked, and the regulatory intervention is both more novel and more problematic than is often noticed to be the case.

The second issue is related to this, but raises even more profound questions. Irrespective of which institution has authority to approve nudging measures, how far is nudging consistent with the ideal of government according to law, an ideal that, in one form or another, is incorporated into many of the legal systems in which nudging is currently considered? As the European Court of Justice put it: ‘...any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law.’¹⁸⁹ One of the critical functions of the rule of law is to allow the citizen to understand the form and limits of the government’s actions so that the citizen can decide how to react to that action. The rule of law is often thought to provide at a basic level for government action to be open, prospective, and clear. If the government’s action changes without clear notification, that makes it impossible for the citizen to know enough in order to be able to decide what to do, thus potentially breaching the rule of law. Yet this is precisely a central feature of nudging techniques: ‘The process by which behaviorally informed strategies are generated cannot be predefined or circumscribed. It rests on adaptation and flexibility, and ... on increasing use of personalized

188 *BBC News*, ‘Nudge unit’ sold off to charity and employees (5 February 2014), available at: www.bbc.com/news/uk-politics-26030205.

189 *Hoehst* [1989] ECR 2859, para 19.

measures.¹⁹⁰ The high levels of discretion that effective use of nudging seems to require to be effective, means that the rule of law is clearly under pressure.

But does the use of behaviorally inspired measures constitute the use of public power of such a type that they *need* to be compliant with the rule of law? We generally think that the rule of law applies when government is exercising some public power, and the classic use of such government power is when government is coercing us, in order to achieve a particular result. Alemanno and Spira point, correctly, to the fact that those, such as Sunstein, who support nudges do so because they are a different type of instrument, one not involving coercion. Indeed, they go so far as to say that the underlying argument of those adopting such an argument, ‘is that nudging, and the other behaviorally informed techniques, cannot be considered a manifestation of the exercise of public power.’ Anne van Aaken also argues that ‘Whereas coercive or mandated action can be legally challenged, persuasive or invisible measures are much harder to contest legally ... Soft means (social norms, ‘naming and shaming’, playing on emotions, etc) ... are more difficult to control legally than hard paternalistic measures, such as prohibitions, which can always be legally challenged by the nudgee.’¹⁹¹ If the governmental use of nudges is not seen as an exercise of public power, then nudges pose a challenge to the type of traditional checks and balances that control the exercise of public power through administrative law. The reason this is such a critical question is because it raises the question, as Alemanno and Spira suggest, as to how far such measures are capable of being effectively policed by the courts under the existing administrative law of those jurisdictions in which nudging operates.

We are skeptical of these arguments, and would want to resist this conclusion. Any positive exercise of discretion, or even a failure to exercise discretion can be challenged in several jurisdictions, whilst in the same jurisdictions statutes and regulations are harder to challenge in practice. Nevertheless, the fact that the argument has been seriously considered by distinguished lawyers should give us a strong added reason to be risk averse in introducing nudging.

190 Alemanno and Spina, ‘Nudging legally’ (2014) 450.

191 Van Aaken, ‘Judge the Nudge’ (2015).

The fourth legal question that arises is how the use of nudging as a method of governance relates to other forms of regulation in a particular area of activity, such as policing financial services, or consumer protection. In President Obama's Executive Order No. 13563, this question is addressed, if not answered, by providing that 'where relevant, feasible, and consistent with regulatory objectives ... each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.' In other words, the use of behaviorally inspired methods must be *consistent* with 'regulatory objectives' that are already provided in legislation. So, if an agency adopts such methods in circumstances where they do not fit in with existing regulatory approaches, the agency would be acting beyond its legal powers. For example, if an agency has no discretion over which regulatory method it is to adopt in enforcing a particular requirement, then the agency cannot simply introduce a behaviorally inspired alternative. Where that is the case, the agency would be likely to have breached an important principle of administrative law: that public bodies should act within their legal powers.

Assuming, however, that the agency has sufficient discretion to allow it to introduce behaviorally inspired approaches, the fifth critical question then becomes how far such approaches shall or may trump any of the other permitted regulatory methods that the agency has the discretion to adopt. The approach taken in the Executive Order is to specify that 'each agency *shall identify and consider* regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.' This is carefully framed in order not to allow these approaches to trump other approaches but only to require that they be considered alongside other approaches. As we have seen, Sunstein is less cautious in his advocacy of nudging, and the language he uses appears to suggest that nudging should be the presumptive option for regulation. He has denied that this is his intention, but his followers may be misled into thinking that this is legally permissible, where it may not be, thus giving rise to legal challenges, on the ground that the regulator has unlawfully fettered its discretion.

Human and Constitutional Rights

None of these issues is considered in *Why Nudge?*. Sunstein is, however, much more conscious that nudging may come into conflict with rights

claims, based on constitutional or human rights law, and he is careful to seek to rebut such claims, in general terms. The question is whether he has succeeded in setting out sufficient justification to convince potential users that rights challenges do not pose a significant risk of succeeding. The rights most in contention are the right to freedom of expression, and the right to privacy, with the principle of human dignity hovering in the background. Before considering these in any detail, however, we need to pause to note one significant difference in the legal landscape between Europe and the United States that is of critical importance. In the United States, such rights are typically considered to be ‘negative’ rights, requiring the state to refrain from breaching them, whereas in much of Europe and the rest of the world, such rights are also ‘positive’ rights, requiring the state to act in certain circumstances to further these rights and promote them. How the right is interpreted is critical to the issue of how far ‘nudging’ may breach the protections guaranteed.

So, for example, under the European Convention on Human Rights (‘ECHR’), there is a positive obligation on the state, arising from the right to freedom of expression, to provide information that is complete, accurate and reliable.¹⁹² In the context of the use of behavioral methods by government, how far does that obligation restrict the ability of public administrations ‘to manipulate the cognitive framework in which citizens receive information.’¹⁹³ In particular, the use of ‘framing’, suggest Alemanno and Spina, ‘may conflict openly with the idea that public administration should provide reliable and impartial information to citizens.’¹⁹⁴ So too, the right to private life and privacy may be adversely impacted by behaviorally informed interventions. Alemanno and Spina identify this relationship as particularly problematic where manipulative nudging is involved. In such cases, they write, ‘the core of behaviorally informed regulatory interventions is to change the inner decision-making process of individuals Based on invisible design-based interventions aimed at interfering with the private space of individuals,’¹⁹⁵ and thus

192 See, in particular, Alemanno and Spina, ‘Nudging legally’ (2014) 446, identifying such a right, based on *Youth Initiative for Human Rights v Serbia*, application no. 48135/06, 25 June 2013.

193 Ibid 446.

194 Ibid 450.

195 Ibid 448.

prima facie contrary to protection of privacy, such as is provided in Article 8 of the ECHR.

The European Court of Human Rights' approach to the interpretation of Article 8 is particularly helpful in addressing the earlier issue noted above of how far courts will be willing to scrutinize the activities of government that do not consist of coercion – the issue of whether nudging involves the use of 'public power'. As van Aaken argues, rights under the Convention 'not only protect against visible command-and-control measures ... but also against the manipulation and targeted influence on choice.' She continues, drawing on decisions challenging secret surveillance of communications, that the ECtHR 'has held that particularly strict standards must be met when the interferences concerned take place in secret' and she explicitly draws a parallel with invisible nudges: 'Because the affected persons do not have the possibility to challenge the measure, very strong safeguards against abuse are called for.'¹⁹⁶

Merely establishing that actions taken by government fall within the scope of particular rights does not mean that these rights have necessarily been breached. In the European context, in particular, the government has the opportunity to 'justify' the action taken, usually on the basis that it was 'prescribed by law', and was 'necessary in a democratic society.' We have already considered the gist of the first issue previously. Where there is a *prima facie* breach of Article 10 (freedom of expression) or Article 8 (protection of private life), if the state is to defend itself successfully, the state must show that some form of legal authorization has been given; this constitutes the idea of 'legality' or the rule of law discussed earlier. We have already seen that the form that nudging takes has had the effect that few jurisdictions (other than the United States) have given any formal legal approval for such measures.

The second limb of the justification ('necessary in a democratic society') is as important, and this essentially amounts to an application of a proportionality test. This takes various forms in different jurisdictions but there are, in essence, four major elements to the test. Were the *aims* of the contested measure legitimate? Was there sufficient *nexus* between the aims that the state seeks to achieve and the measures adopted? Even if that is the case, could the aim have been achieved with *less adverse impact* on

196 Citing *Weber and Saravia v Germany*, application no 54934/00 (2006) para 94.

the protected rights involved by the use of other measures? Is the measure proportionate in the *strict* sense? If proportionality has any central idea behind it, it is that the means adopted are critical to any analysis of the acceptability of the measure. In the context of a proportionality analysis, few courts are likely to accept that all that should be applied is a welfare analysis that focuses on ends, rather than means.

Anne van Aaken has raised significant questions as to whether various forms of nudging would be able to satisfy these tests. It is at this point that many of the issues raised in the previous sections of this review become *legally* salient. First, she suggests that articulating and justifying the aim of the nudges in question may be problematic.¹⁹⁷ We shall confine our consideration of this issue to manipulative nudges. Is the aim of the nudge to enable the individual nudged to make the decisions that the individual actually prefers; or is it the aim of the nudge to try to ensure that the individual arrives at a 'rational' decision? Which way the aim is presented to the reviewing court will then be critical in determining whether the aim is acceptable or not. If the aim is one of furthering the autonomous decision-making capacities of the individual, then it is likely to be found to be an acceptable aim, and the first limb of the proportionality test will be satisfied. If the aim of the nudge is seen to be the furthering of 'rational' decisions, then more questions are likely to be asked. Whose rationality? Defined how, and by whom?

The application of the second element of the proportionality test may also spell considerable difficulty for some nudges. If the aim of the nudge is found to be one of increasing the autonomy of the individual, then whether the nudge is likely to contribute to that result, and how the state can show whether autonomy has been furthered by its intervention, are significant questions. These questions get close to litigating the extraordinarily difficult question of how one determines the preference function of an individual, in ways other than simply observing their 'revealed preferences', that is the choices made by the individual in practice. More particularly, where the nudge in question was one that was operating below the cognitive radar, then serious questions would need to be answered by the state as to how, exactly, such nudges would further autonomous decision-making by the individual rather than seek to replace

¹⁹⁷ Van Aaken, 'Judge the Nudge' (2015).

it: as we have seen, what these measures appear to do is to ‘re-bias’ the individual rather than ‘de-bias’ the individual. Rather than adopting a measure that supports an individual to make a decision after having been shown that certain biases may have been operating, we have seen that some nudges substitute one set of biases for another, in order to achieve a particular result. In such a situation, the ‘re-biasing’ measure would have a hard time being upheld as furthering autonomy, and would therefore fail to pass the second limb.

The third element of the proportionality test raises the critical issue of comparison between the nudge adopted and other measures that may achieve the stated aim without the adverse effect on the protected right in issue. Assuming that the stated aim is one of furthering autonomy, and that the nudge under challenge was one that relied on certain cognitive biases, then the state will be faced with having to establish that a nudge that attempted to de-bias rather than re-bias would be any less effective. As importantly, in some cases, the issue will be whether the end sought to be achieved would be better achieved through the use of alternative regulatory approaches entirely. At this point, the evidence presented earlier concerning the comparative ineffectiveness of nudges as compared with traditional regulatory measures will come to the fore.

We do not assert that legal challenges to nudging would be advisable in any particular case, or that they would necessarily be successful. We do argue, however, that successful legal challenges are a real risk, and that they could produce the worst of all possible regulatory worlds: a weak regulatory intervention that is liable to be challenged in the courts by well-resourced interest groups. That is why we suggested earlier that nudges might not even in some cases clear the excessively low bar of doing something rather than nothing.

Conclusion

Whilst nudging may be compatible with a narrow idea of autonomy as uncoerced liberty, and some nudges may enhance autonomy in the empire of *caveat emptor*, we challenge Sunstein’s thin and reductionist

understanding of human dignity.¹⁹⁸ We espouse a thicker understanding, adopting a more complex conception of the person and of the role of government in furthering the common good. Judged against this understanding, nudging is problematic in several respects. Indeed, we go further. Our analysis of nudging illustrates precisely why a thick conception of dignity is necessary, because without it we would be left defenseless against a strategy that passes many other tests of acceptability. The gnawing unease that many have felt about his proposals, an unease that often seems to be unnamed and unexplained, is best conceptualized as a concern with dignity.

We suggested that altering the ‘choice architecture’ of the regulatory state, in the way that Sunstein proposes, is likely, in practice, to make nudging increasingly looked upon as a default option, to the detriment of good and efficient regulation. If one values current regulations on seatbelts, bicycle and motorcycle helmets, smoking, gambling, compulsory pension contributions, employment law, consumer protection, as well as those on alcohol, drugs and medicines, then one ought to be very suspicious of how the nudging idea and its supporting arguments are deployed in public policy. To the extent these measures reflect our concern with the dignity of our fellow citizens, ineffective enforcement will undermine human dignity. By allowing producers to escape scrutiny, Government is let off the hook of having to satisfy what is surely one of its principal tasks in securing human dignity: to provide the conditions for individuals to be able to exercise free choices, by regulating harms caused by powerful interests. Our concern is, therefore, that Sunstein’s ‘libertarian paternalism’ is often too libertarian, not too paternalistic. We suggest that this derives from a current American disillusioned-liberal view of what it is possible to achieve in the present conservative mood of that country. It is not suitable for export beyond the United States, where a different politics (so far) prevails; nor, we suggest, is it a defensible policy position in the United States itself, where its widespread adoption would further entrench a libertarian political agenda that is hostile to regulation in the common good.

198 Waldron, ‘It’s All For Your Own Good’ (2014).

Christopher McCrudden & Jeff King

We have argued that those seeking to pursue progressive politics should reject nudging in favor of regulation that is more transparent, more effective, more democratic, and allows us more fully to act as moral agents. *Why Nudge?* is unconvincing in arguing otherwise. Given its flaws, the reader of this review may be left with a question. If it is so flawed, why should we bother with it? Wouldn't it be better just to ignore it? Unfortunately, however, nudging has taken some governments by storm and we see the potential for real damage if it were to be adopted more extensively. Sunstein's book is at the cutting edge of the promotion of nudging and *because* it is so flawed, it needs serious attention. Let's (mostly) reject nudging. The dignity we preserve may be our own.