

A ‘Nudge’ for Public Health Ethics: Libertarian Paternalism as a Framework for Ethical Analysis of Public Health Interventions?

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Is it possible to interfere with individual decision-making while preserving freedom of choice? The purpose of this article is to assess whether ‘libertarian paternalism’, a set of political and ethical principles derived from the observations of behavioural sciences, can form the basis of a viable framework for the ethical analysis of public health interventions. First, the article situates libertarianism within the broader context of the *law and economics* movement. The main tenets of the approach are then presented and particular attention is given to its operationalization through the notion of a ‘nudge’. Essentially, a ‘nudge’ consists in an intervention, which aims to suggest one choice over another by gently steering individual choices in welfare-enhancing directions yet without imposing any significant limit on available choices. Finally, the article concludes that, while it fails as an overreaching framework of ethical analysis, libertarian paternalism nonetheless constitutes a valuable addition to the conceptual toolbox of public health ethics.

Introduction

Is it legitimate for public health authorities to try steering individual behaviour towards their own view of individuals’ own good, especially when it comes to health? Is it possible to interfere with individual decision-making while preserving freedom of choice? Should policymakers implement mechanisms to ensure that everyday choices made without much thought become optimal for health and well-being—for instance, by making it more likely that someone will choose a fruit cup rather than a piece of cake at the cafeteria? According to two American authors, Richard Thaler and Cass Sunstein, this is not only possible, but also desirable. Individual choice can and should be steered towards better decisions (e.g., in terms of healthy choices) as long as the capacity to choose otherwise (e.g., unhealthy choices) is preserved. Thaler and Sunstein describe this new approach as ‘libertarian paternalism’, which they argue, brings together the principles of beneficence and autonomy. Indeed, propositions related to or inspired by Thaler and Sunstein’s approach are starting to appear in health promotion

and public health literature (e.g., Brownell *et al.*, 2010). For instance, an article published in 2007 in a leading medical journal (Halpern *et al.*, 2007) presents a number of initiatives, which, according to the authors, would reduce the risk of complications for many hospitalized patients. This would be done through a better understanding of the ‘power of default options’ in the decision-making process of caretakers. To illustrate their point, the authors quote a study describing the potential positive influence on levels of nosocomial infections of systematic withdrawal of in-dwelling catheter after 72 hours unless the nursing staffs specifically indicate otherwise.

Moreover, libertarian paternalism has seen increasing popularity in political circles, particularly in the USA and in the UK.¹ Thaler and Sunstein’s argue that libertarian paternalism constitutes a working compromise between the type of state interventions typically favoured by the right and the left, a true political ‘third way’ (Thaler and Sunstein, 2008: 255). In that regard, it is relevant to note that Sunstein now plays a crucial role in the Obama administration as Administrator of the White House Office of Information and Regulatory

Affairs, overseeing the revision of all draft federal regulations.

In this essay, I examine Thaler and Sunstein's approach as it relates to public health, and attempt to assess the author's claim that it constitutes a comprehensive framework for policy-design. In effect, unlike most authors who commit a large part of their work to concrete and practical usage of cognitive and behavioural sciences' empirical findings, Thaler and Sunstein go the extra mile by including an explicitly prescriptive dimension to their argument. They see libertarian paternalism as way of re-conceptualizing the state-individual relationship, and thus as a framework for reforming broad areas of both private and public law (Sunstein and Thaler, 2003: 1202). This essay will not tackle such an ambitious program. Instead, it will attempt to provide an answer to a more limited question: can Thaler and Sunstein's libertarian paternalism theory serve as a viable framework for the ethical analysis of public health interventions? In order to canvass their argument, I will briefly position Thaler and Sunstein's theory in its law and economics research context. I will then examine examples of libertarian paternalism related to public health promotion, in order to assess the suitability of this theory as a framework for the ethical analysis of public health interventions. Ultimately, this essay concludes that, notwithstanding many shortcomings that make it unsuitable to serve as a comprehensive framework for public health ethics, libertarian paternalism nonetheless contributes to enrich the perspective of public health ethics.

Theoretical Background: Law and Economics and Behavioural Economics

Thaler and Sunstein's explicitly assert the relevance of their approach to public health practice. However, before addressing its relevance to the design and justification of public health interventions, it is important to situate it within its research context. Indeed, the authors' work is undoubtedly in line with the movement born in the USA in the late 1950s promoting an economic analysis of law now known as *Law and Economics*. For the purpose of this article, it is sufficient to mention that, from a methodological point of view, the main contribution of this movement was to alter the perception of enforceable law, which had previously been conceived of as a neutral factor in economic analysis. Rather, from a *Law and Economics* perspective, legal

rules and institutions become key variables in economic systems and, as such, become choices that ought to be justified (Mackaay, 2000a).

The originality of Thaler and Sunstein's work does not rest in applying economic theories to social regulation mechanisms such as the vast range of interventions aimed at public health promotion. Rather, what makes their approach particularly interesting is the theories they choose to apply and from which they intend to derive political and ethical principles. While the main defenders of the *Law and Economics* movement draw from neoclassical economic theory, Thaler and Sunstein prefer to adopt the point of view of behavioural economics. Indeed, Thaler and Sunstein have published individually, together and with various authors, many scientific articles about libertarian paternalism and related themes such as a behavioural economics-orientated analysis of law. (e.g., Jolls *et al.*, 1998; Thaler, 1999; Sunstein, 2000; Sunstein *et al.*, 2007).

In order to better grasp the theoretical background of libertarian paternalism – and its implication for an analysis of public health policy—it is necessary to briefly illustrate the rational-choice model (the leading premise of neoclassical economics), which is being challenged by behavioural economics.

The Rational-Choice Model

Economics is, by definition and aspiration, an experimental and predictive science. It aims at modelling human behaviour to produce prospective and verifiable claims. One of the most important bases of the neoclassical approach to economics is the hypothesis of rational choice. Even though scholars do not agree on a definitive definition, the central hypothesis of rational choice theory can be succinctly summarized as follows:

Rational choice theory is defined as a theory of instrumental rationality; that is, the actor has a set of pre-established ends and then decides how these ends are to be achieved. If the actor chooses the optimal means to achieve her pre-established ends, she is rational; if she chooses suboptimal means, she is irrational. The particular claim of rational choice theory is that people are rational in this sense; that is they choose the optimal means to achieve their ends (Rubin, 2005: 1092).

Another hypothesis, which often accompanies the rationality hypothesis of rational choice theory, is the stability of individual preferences, that is, the notion that individuals have well-defined preferences, which are stable (at least in the short term). In sum, rational choice theory posits that, among available options,

human beings always make the choice that will maximize their personal satisfaction (Mackaay, 2000c).

Behavioural Economics and the Bounded Rationality Model

On the other hand, behavioural economics is a movement that became significant in the middle of the 1970s. It takes a diametrically opposite view of rationality in comparison to the rational-choice model described above. In order to contest the rational-choice model, behavioural economics founds itself on cognitive psychology's empirical findings.² More precisely, behavioural economics substitutes the rational-choice model hypothesis by models using generalizations of empirical observation of actual human behaviour in order to predict future human behaviour with increased accuracy. The rational-choice model assumes human beings possess significant intellectual and moral capacity that allows them to identify choices in their best interest and to maintain such choices in any circumstance. However, the empirical evidence of behavioural science paints a radically different picture of human rationality. Behavioural economics relies on an individual choice-based model that takes into account limits *in concreto* inherent to the decision-making process such as: bounded rationality, limited self-control and limited egoism (Jolls *et al.*, 1998).

Notions of bounded rationality and 'heuristics' underlie the most hard-hitting arguments put forward by behavioural economics against the rational-choice model. Essentially, the proponents of behavioural economics rely on experiments exploring the decision-making process and the judgment of individuals when placed in certain contexts. They then try to establish approximate rules that bias individual judgment in circumstances where not all the tools, statistics or other means to found a rational decision are available. Following one of the foundational articles of this approach, these approximate rules are designated as 'heuristics' (Tversky and Kahneman, 1974).

Since its beginnings, behavioural science has identified a large range of heuristics and cognitive biases that systematically affect the decision-making process in complex or uncertain situations. To conclude this theoretical background, three examples of heuristics and biases that can affect public health are provided here:

Framing bias—The way of presenting different options can influence the choice made by the chooser. For example, doctors are more likely to suggest a given medical intervention if they

are told that statistics show that 90% of patients undergoing a procedure are still alive after 5 years, than if they are told that statistics show that 10% of the patients did not survive within 5 years (McNeill *et al.*, 1982).

Status quo bias—The tendency is to not opt-out of default options. For example, the saving rate of employees' retirement plan is systematically higher if the employer operates a direct deposit taken from the employees' salary matched with the employer's contribution and transfers it into a retirement savings plan, than if the employees have to enrol themselves in such a savings plan (Madrian and Shea, 2001).

Present-biased preferences—There is disproportionate appreciation of immediate costs and benefits as compared to future costs and benefits. For example, eating now provides an immediate benefit, even though levels of food intake have a future cost in terms of health. This could provide the beginning of an explanation for the prevalence of obesity in western societies (Lowenstein *et al.*, 2007).

Thaler and Sunstein's Libertarian Paternalism

In conceiving libertarian paternalism, Thaler and Sunstein draw two related conclusions from the findings of behavioural science outlined above. First, they acknowledge the pitfalls and limits of human rationality as demonstrated by behavioural sciences. They write:

Drawing on some well-established findings in behavioural economics and cognitive psychology, we emphasize the possibility that in some cases individuals make inferior decisions in terms of their own welfare – decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of self-control (Sunstein and Thaler, 2003: 1162).

The second conclusion they draw from behavioural science deals with the systematic influence on people's decision-making process of the way that choices are presented. Sunstein and Thaler state:

Our emphasis is on the fact that in many domains, people lack clear, stable or well ordered preferences. What they choose is strongly influenced by the details of the context in which they make their choices, for example, default rules, framing effects (that is the wording of possible options), and starting points. These contextual influences render the very meaning of the term 'preferences' unclear (Sunstein and Thaler, 2003: 1161).

Libertarian Paternalism's Ethico-Political Premises

It is important to emphasize that libertarian paternalism is not only strictly an economic theory, but also an ethico-political theory. Not only do the authors found their analysis on a descriptive hypothesis of human behaviour, but also argue for prescriptive conclusions based on the observations of behavioural science. Thaler and Sunstein expound two ethico-political principles, which together form the libertarian paternalism matrix.

The first principle contributes to the libertarian side of the approach. In their view, people should be free to opt-out of any program designed to promote their own interest, regardless of whether these programs are governmentally or privately initiated. This libertarian view is not as such justified by the authors and is treated as obvious. To support it, they quote the famous libertarian economist Milton Friedman, who exhorts that people: 'should be free to choose' (Thaler and Sunstein, 2008: 5). They also add:

We strive to design policies that maintain or increase freedom of choice. When we use the term *libertarian* to modify the word *paternalism* we simply mean liberty-preserving. And when we say liberty preserving we really mean it. Libertarian paternalists want to make it easy for people to go their own way; they do not want to burden those who want to exercise their freedom (Thaler and Sunstein, 2008: 5).

The paternalist dimension of the approach has its roots in the second principle. According to Thaler and Sunstein, it is legitimate for private and public institutions to try and influence people's behaviour towards better decision-making, even when the behaviour being influenced has no bearing on third parties. They formulate the paternalist principle as follows:

In other words, we argue for self-conscious efforts, by public and private institutions, to steer people's choices in directions that will improve the choosers' own welfare. In our understanding, a policy therefore counts as 'paternalistic' if it attempts to influence the choices of affected parties in a way that will make choosers better off (Sunstein and Thaler, 2003: 1162).

Unlike the libertarian component, paternalism is justified in more detail. This can be explained by the American political context in which Thaler and Sunstein develop their theory. Freedom of choice is often used in the American context to justify different policies, while paternalism often gives rise to scepticism,

and even hostility. Thaler and Sunstein believe that opponents of paternalism rely too heavily on the assumption that the rational-choice model works in all circumstances. Quite the contrary, Thaler and Sunstein adopt radically different premises. In their view, people will *not*, most of the time, make choices that are in their best interest. Moreover, individuals will not even do a better job than a third party when it comes to choosing what is best for them. Hence, to the extent that individuals fail to make perfect choices for themselves, Thaler and Sunstein argue that a paternalist policy may be beneficial and justified.

The authors also attribute two 'misconceptions' to their purported opponents. The first is the idea that it is ethically possible to avoid acting paternalistically when structuring a choice. The author's refutation of this idea is based on what they consider to be a key finding of behavioural sciences, i.e., the inevitable influence of context on personal choices. Of course, one might argue that what should follow from that proposition is that any person or institution which finds itself in a position to set out different choices for individuals (a 'choice architect' in the authors' terminology) should structure the choice so that it favours the choice that the choosers would have made for themselves.

Yet, the two American authors argue that such a libertarian option, neutral in appearance, would be difficult or even impossible to implement, precisely because of the strong influential power of context on individual preferences. They go as far as to suggest that in many cases, real preferences do not formally exist and that most of the time individuals do not have a definite answer before they are presented with the choices as structured by the so-called 'choice architect'. They thus conclude that only the paternalist option is legitimate, i.e., one where the choice is structured so as to benefit the chooser (Thaler and Sunstein, 2008: 10).

The second misconception the authors address is the idea that paternalism goes hand in hand with coercion. On the contrary, Thaler and Sunstein stress the fact that libertarian paternalism would never force people to follow a particular line of conduct. They write:

Libertarian paternalism is a relatively weak and non-intrusive type of paternalism, because choices are not blocked or fenced off. In its most cautious forms, libertarian paternalism imposes trivial costs on those who seek to depart from the planner's preferred option. But the approach we recommend nonetheless counts as paternalistic, because private and public planners are not trying to track people's anticipated choices, but are self-consciously attempting to

move people in welfare promoting directions (Sunstein and Thaler, 2003: 1162).

A ‘Softer’ Paternalism

Indeed, Thaler and Sunstein promote a kind of ‘soft’ or ‘weak’ paternalism that does not aim to reverse or forbid the substantially voluntary choices of individuals nor to coerce them to act in a certain way. Rather, they argue for policies that supplement individual’s incomplete or deficient decision-making processes and steer them in a welfare-enhancing direction. However, as noted above, libertarian paternalism does not justify any policies that completely eliminate certain options or that are coercive.

In the realm of public health promotion, the legislations adopted by many jurisdictions to make protective helmets mandatory for motorcyclists are a good example of policy that libertarian paternalism would reject and that would be classified under the heading of ‘strong paternalism’ (Moser Jones and Bayer, 2007). On the other hand, numerous interventions linked to public health promotion are related to soft paternalism. The obligation to indicate nutritional value on food packaging is one such example.³ By doing so, individuals are provided with additional information they did not request and this information might influence their dietary decisions.

The Nudges of Libertarian Paternalism

Libertarian paternalism is operationalized through the notion of a nudge, a colourful expression that evokes a kind ‘pat on the back’ to remind someone of something. A nudge’s purpose is to suggest one choice over another by gently steering individual choices in welfare-enhancing directions. Thaler and Sunstein define the notion as follows:

A nudge, as we will use the term, 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. Putting the fruit at eye level counts as a nudge. Banning junk food does not (Thaler and Sunstein, 2008: 6).

The idea of the nudge is inspired by the principles of behavioural science described above. Using those principles, policy makers will try to phrase questions so the preferred answer from a public health perspective is given the most often. At the same time, choosing otherwise should be possible at no substantial cost, regardless

of the reasons for this choice. Public health interventions already widely use ‘nudges’, as for example, with health warnings displayed on cigarette packs. On the other hand, selling cigarettes to legally capable persons over 18-years old (or 21 in certain jurisdictions) is not forbidden and every capable person is free to buy and use this product. Nevertheless, the warnings of national health agencies contribute to individuals’ information-gathering processes, every time the individual sees a cigarette pack and each time the pack is opened. The warning acts as a nudge from the national health agency to urge smokers to review their choice by reminding them of tobacco’s health risks. Smokers nevertheless remain free to ignore those risks at the relatively small cost of having been ‘disturbed’ by the health warning.⁴

How can Paternalist Interventions be kept to a Minimum?

By comparing different tobacco-related policies, for example, it is easy to outline the differences between libertarian paternalism and other types of paternalism. An example of hard paternalism would be the outright prohibition of the sale of tobacco products (as is often the case for underage people). The law steps in to take away the individual’s capacity to make the choice to purchase cigarettes. Special taxes applied to tobacco products are an example of a softer paternalism. By seeking to internalize the future cost of the gratification associated with tobacco consumption at the time of the purchase, such taxes operate as an economic disincentive, yet without forbidding the sale or the use of the product. A crucial difference between prohibition and taxation is that the alternatives of the choice are modified but not eliminated since it remains possible to purchase cigarettes, albeit for a different price (O’Donoghue and Rabin, 2006: 1840). However, Thaler and Sunstein do not consider fiscal incentives (positive or negative) such as special taxes as acceptable nudges within their conception of libertarian paternalism. They consider that taxes place too great a limit on freedom of choice because of the price increase and cost burden.

Libertarian paternalism unease with fiscal incentives signals how difficult it is to draw the line between an opt-out cost small enough to comply with the criteria of libertarian paternalism and one that does not. For instance, in the UK, Julian Le Grand, president of Health England, one of the British government’s advisory bodies, proposed a new scheme where smokers would need a permit in order to have the right to purchase

cigarettes. The permit would be delivered for £10 and upon reception of a form ‘deliberately complex to fill in’ (Chapman, 2008). Clearly, the opt-out cost of £10 and the effort one has to deploy to fill in the form is not as minimal as the act of reading a simple warning on a cigarette pack. However, in contrast with the complete prohibition of the sale of cigarettes or with the constraint to buy from a few authorised retailers (as is the case for the purchase of spirits in most Canadian provinces), the cost to the individual wishing to smoke cigarettes nonetheless appears to remain small. Nevertheless, from Thaler and Sunstein’s perspective, this proposition would most likely not comply with the imperatives of libertarian paternalism, notably because it creates a cash barrier to choosing to smoke.

Thaler and Sunstein acknowledge that a possible solution to this problem of defining what counts as an acceptable opt-out cost could be found in a proportionality analysis between the opt-out cost and the risks associated with the targeted behaviour (Camerer *et al.*, 2003). Nevertheless, the authors refuse to integrate such analysis with the libertarian paternalism approach in order to keep a clear dividing line between their approach and strong, coercive paternalism. Even if they occasionally stand for more interventionist policies, they claim that the quintessential minimal opt-out cost is the possibility to opt-out with one mouse click (Thaler and Sunstein, 2008: 252 ff). Consequently, the variety of paternalism argued for by Thaler and Sunstein is perhaps more accurately described as a ‘minimal’ paternalism.

A Framework for an Ethical Analysis of Public Health Interventions?

Thaler and Sunstein are quite confident about the soundness of their approach, even though they express certain doubts, for example, by admitting that the gentle nudges they propose might not be enough when it comes to certain issues, such as the protection of the environment (Thaler and Sunstein, 2008: 159). As such, whether libertarian paternalism could provide a framework for an ethical analysis of public health promotion in general becomes an important question. Indeed, this essay is not the first to raise the question. In the UK, the Nuffield Council on Bioethics (‘NCB’) examined libertarian paternalism in its report *Public Health: ethical issues*, but rejected its inclusion within its own approach to public health ethics (Nuffield

Council on Bioethics, 2007). While the criticism of libertarian paternalism made in the report is not very developed, I come to the same conclusion that libertarian paternalism is not an appropriate framework for ethics of public health promotion. Libertarian paternalism is not sufficiently comprehensive of all the necessary variables of public health policy. It comes short of answering all the questions raised by public health ethics and thus fails to provide a meaningful assessment of public health policy. Moreover, even when it does, the answer is often unsatisfying. Consequently, it is unfit to be used as a freestanding framework for the assessment of public health interventions. Nonetheless, in the conclusion to this essay, I argue for the relevance of libertarian paternalism because of certain important observations particularly relevant to public health promotion.

Libertarian Paternalism Focuses too Narrowly on Individuals

The perspective of libertarian paternalism undoubtedly has commonalities with that adopted by public health interventions. Public health campaigns focus on a population in general, often with an emphasis on health promotion and illness prevention within that population, rather than on the treatment and recovery process for individual patients (Childress *et al.*, 2002). Libertarian paternalism’s goals are achieved through social coordination rather than only by reaching out at the individual level. It aims at protecting those who are susceptible of making harmful choices while preserving the freedom of choice for those who can take a more enlightened decision. Thus, libertarian paternalism puts forward a differentiated approach that integrates disparities in decision-making capacities at the individual level. In that regard, it could be said to share public health’s populational perspective. Moreover, the ‘nudges’ argued for by libertarian paternalism are meant to operate when people make health-influencing decisions, therefore resulting in a preventive rather than therapeutic perspective. Again, this makes the interventions argued for by libertarian paternalism appear similar to those generally argued for in the context of public health promotion.

Yet, on a closer look, libertarian paternalism fails to take into account many considerations that are essential to a meaningful ethical assessment of public health policy. One important way in which libertarian paternalism’s perspective can be said to be narrower than that of public health is with regards to the weight given to factors others than individual choice. This is largely due

to the underlying assumption of methodological individualism that behavioural economics shares with its neoclassical counterpart [i.e., the rejection of any explanations not based on individual behaviours (Mackaay, 2000b)]. Consider the proposition that certain public health challenges such as the very high obesity levels in some populations are a result of an accumulation of bad individual choices. Such a view—which stems from analysing the problem solely from an individual perspective—forms only part of the public health issues at stake and neglects crucial explaining factors, among them the biological, social and cultural determinants of health. It is one thing to understand why the average consumer will choose to buy a piece of chocolate cake instead of a fruit cup at the cafeteria and to adopt strategies to counter this tendency, but it is far more complex to grasp why certain populations are even more likely than the average consumer to make health-threatening decisions and to design public health interventions accordingly. Indeed, several authors have also noted that the invocation of individual responsibility has often constituted the main arguments of those who profit from selling harmful substances, be it tobacco or sugared drinks (e.g., Brownell *et al.*, 2010). For instance, in certain cases, such as that of *trans* fats, one might suggest that it is advisable to ban the sale of certain food items and not simply to place them on a different shelf (Gerberding, 2009). Hence, even if libertarian paternalism integrates a wide range of individual preferences, it is not close enough to a macroscopic perspective to truly adopt a population perspective, at least not in the strong sense that is generally assumed by public health practitioners and theorists. Libertarian paternalism's perspective is simply not sufficiently broad to encompass all the determinants of the phenomena it seeks to regulate.

Libertarian Paternalism is Blind to Considerations of Social Justice

Sunstein and Thaler also neglect another essential component of public health promotion, namely, social justice (Daniels *et al.*, 1999). Because of its narrow focus on individuals, libertarian paternalism only indirectly addresses the question of public goods likely to benefit a whole community. Their approach does not provide any tools to identify which such goods should be pursued and how should competing goods be preferred or prioritized. It does not either provide a justification for policies that result in an uneven distribution of benefits among the members of a population, where some

people will not benefit from certain policies as much as others or where some others will not benefit at all.

The related question of who should benefit from public health interventions also remains unanswered. Aside from their emphasis on inconsistencies in decision making, Thaler and Sunstein pay no attention to social disparities in health or any other area. They do not offer any criteria to determine which population is to be targeted by a particular public health intervention. As such, libertarian paternalism still depends on its libertarian roots and remains fundamentally individualistic when it comes to the need for interventions aimed at benefiting underprivileged segments of a targeted population.

For example, automatic enrolment into retirement savings plans is often heralded as the quintessential libertarian paternalist policy (Thaler and Sunstein, 2008: Ch. 6). As already noted above, Madiran and Shea (2001) have demonstrated convincingly that simply moving from an opt-in plan to an opt-out plan has significant impact on levels of retirement savings. It is uncontroversial that retirement savings are a good thing and that they contribute to the wellbeing of individuals once they retire. Consequently, from the strictly individualist perspective of libertarian paternalism, this is precisely the kind of policy that should be implemented as widely as possible. Yet, what this argument leaves out is the fact that numerous households do not earn enough money to be in a position to save for retirement, no matter what mechanisms are put in place to incentivize them to do so. Thus, this kind of policy, precisely because of its great efficiency, would likely have the effect of widening and reproducing into retirement the gap between the haves and the have-nots. Moreover, in the case of retirement plans that have an element of employer-sponsored contribution, the inequalities between those who can save and those who cannot would be compounded.

Libertarian Paternalism is out of Synch with Public Health Practice

Finally, largely because of the approach's narrow focus on individual behaviour and of its lack of attention to issues of social justice, a wealth of interventions aimed at the protection of public health, already in place and widely accepted by public opinion, would fail to meet libertarian paternalism justificatory criteria. This, of course, is not by itself a conclusive argument. However, it does underline the defects of libertarian paternalism with regards to public health promotion and

the values that are at its core. The exclusive enforcement of policies based on libertarian paternalism would significantly reduce the scope of public health promotion, as we know it. Concretely, it would have disastrous consequences and several well-tried initiatives would have to be abandoned. Simply, consider whether the following initiatives would pass muster under a libertarian paternalist criteria: mandatory protection helmets in organized sports like American football or ice hockey, mandatory reporting of infectious diseases, use of fiscal disincentives to regulate tobacco and alcohol consumption. Then consider whether the fact that these interventions fail to allow to opt-out appears sufficient to justify discontinuing their use.

In sum, libertarian paternalism provides a relatively sophisticated answer to the question of *how* to ethically reach for a public health objective but it is silent on the logically antecedent questions of *which* public health objectives should be pursued and to *whose* benefit. In all fairness, libertarian paternalism does not purport to provide answers to the crucial questions outlined above. However, if we accept that an adequate ethical framework for the ethical analysis of public health interventions must take these considerations into account, it follows that libertarian paternalism is not suited for that purpose.

Conclusion: What Role can Libertarian Paternalism Play in the Promotion of Public Health?

Does this mean that libertarian paternalism has no use for public health ethics? Far from it. Libertarian paternalism can play an appreciable role in the ethical analysis of public health orientated interventions. By proposing the notion of the minimal opt-out cost or ‘in a click’ opt-out, Thaler and Sunstein have brought to the fore the tipping point between paternalism and libertarianism. Their approach appears particularly promising in connection with the goal of fostering the involvement of the private sector in public health promotion. In effect, private actors have been reluctant to interfere with individual choices in order to prevent accusations of paternalism. By defining and occupying this space of minimal care, libertarian paternalism can contribute to influence certain crucial players in presenting new opt-out options or by adding information relating to certain noxious practices or choices. Consider, for

example, a restaurateur that reorganises the menu to indicate which dishes meet the guidelines of the Heart and Stroke Foundation or that would offer a green salad as a default side dish instead of fries. Similarly, it seems fair to say no one would object to a contraceptive pill manufacturer from contributing to breast cancer prevention by indicating on the packaging the day of the month which would be the most favourable for self-examination.⁵ The insights from behavioural sciences adopted by libertarian paternalism can thus make a welcome contribution to reflection on and the practice of public health promotion.

Let us picture public health interventions on a scale from the less intrusive to the most intrusive. Thaler and Sunstein’s libertarian paternalism reminds us to attend to what constitutes the least intrusive intervention. Their approach also provides tools to preserve freedom of choice, where desired. Without adopting libertarian paternalism ‘lock, stock, and barrel’, the approach nevertheless can be very useful in planning a public health intervention. It helps policy makers by getting them to ask whether it is feasible to structure an intervention to reach the lowest opt-out cost without compromising the intervention’s goal, even if by doing so, the proportionality analysis denied by Thaler and Sunstein is used. To put it in Thaler and Sunstein’s own terms, we might say that they have developed a very useful heuristics to assess the level of paternalism of a proposed policy. Thus conceived, libertarian paternalism remains a powerful analytic tool, clearly articulating an ideal of equilibrium between protection and autonomy. Yet, the chilling effect on public health promotion that would result from its wholesale adoption as a comprehensive framework for public health ethics is avoided.

Notes

1. See e.g., the letter that George Osborne, a prominent member of the UK’s Conservative Party now the Chancellor of the Exchequer, and Richard Thaler have co-written and that was published by *The Guardian*, a London newspaper: ‘We can Make you Behave’, *The Guardian* (London), January 28, 2010, available from: <http://www.guardian.co.uk/commentisfree/2010/jan/28/we-can-make-you-behave> [accessed 15 October 2010].

2. To simplify the text, behavioural economics and cognitive psychology are collectively referred to as 'behavioural sciences'.
3. See e.g., the Canadian *Food and Drug Regulations*, C.R.C. c. 870, Part B.
4. See e.g., Health Canada – Graphic Health Warnings – Tobacco Product Labelling, <http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/legislation/label-etiquette/graph/index-eng.php> [accessed 15 October 2010].
5. This was a suggestion by one of the finalists of a private health nudges contest organized by the Robert Wood Foundation and the Ashoka Foundation entitled 'Designing for Better Health', available from: <http://www.changemakers.com/designingforbetterhealth> [accessed 15 October 2010].

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