New Paternalism

A Libertarian Treatment, But Not a Cure

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**I. Introduction**

As a guiding principle for governance, paternalism is nothing new. Paternalism is the policy of restricting the freedom and responsibilities of people in their own supposed best interest, like parents do with children. Libertarians directly oppose paternalism, emphasizing that subjects know their own best interests better than any government possibly could, and that paternalism unjustly infringes on their liberty. Recent academic work, however, has suggested that these two frameworks can be reconciled, and the resulting theory is coined “libertarian paternalism” or “new paternalism.” This theory suggests that governments can set up rules to “nudge” citizens for their own good without restricting their liberty.

The new paternalism is very enticing. At first blush, it successfully captures all the alluring benefits of paternalism, where government can play an active role in improving lives, and all the benefits of liberty, where citizens can still make their own decisions. One of the main proponents, Cass Sunstein, served as the Administrator of the White House Office of Information and Regulatory Affairs in the Obama administration. The theory is taken seriously, and it deserves and requires close and thoughtful analysis to see how well it can deliver on its promises.

The new paternalism has arisen out of the field of Law and Economics, a field that both analyzes how legal frameworks affect economic activity and analyzes legal institutions according to economic theory. Traditionally, Law and Economics has utilized Neo-Classical economic theory, with its distinctive assumptions of rational actors, stable preferences, and utility maximization models. However, in the mainstream economic field, the assumptions of Neo-Classical economic theory have been challenged by behavioral economics. The behavioral economic field was pioneered by psychologists Daniel Kahneman and Amos Tversky (1973; and 1979), who demonstrated that humans are not “rational” in the Neo-Classical sense, but are instead subject to a range of cognitive biases that lead to irrational decision-making.

The new paternalism is in a sense “Behavioral Law and Economics,” as it applies economic theory to legal topics, but utilizes findings from behavioral economics specifically. The old paternalism generally tried to force citizens to overcome moral failures, but the new paternalism seeks to help citizens overcome cognitive biases to lead better lives. However, the new paternalism also seeks to protect citizens’ freedom in the process, a concern that was generally absent in the old paternalism. There are a variety of ways proposed to achieve this libertarian paternalism, but in its simplest form it sets up rules that encourage a specific behavior while allowing citizens to “opt-out” of the default. However, although preferable to the stronger forms of old paternalism and central planning, the new paternalism does not fully escape all of the pitfalls of the old paternalism. From an Austrian understanding of economics, the theoretical background is flawed. Furthermore, the application of new paternalism is often either limited or problematic.

**II. Libertarian Paternalism: An Overview**

The primary proponents of the new paternalism are Cass Sunstein and Richard Thaler. In 2008 they published a book titled *Nudge* that laid out their theory of libertarian paternalism, but they have been developing their theories with other academics for some time (Jolls, Sunstein, and Thaler, 1998). Their thesis recognizes that human decisions are not made by omnipotent computers, but instead are affected by the context of the situation. Whether due to framing, anchoring, default settings, or other cognitive biases, humans are prone to misunderstandings and poor decision-making. When crafting a rule or regulation, the policy maker should account for these cognitive biases to encourage people to act in their own best interest. They can do this primarily through changing the default setting, anchors, or framing of the policy. A common proposal is to set up a “favorable” default and then allow for an opt-out for those who would rather not abide by the default.

A favored example to illustrate the new paternalism is a cafeteria manager at a school (Sunstein and Thaler 2003, pp. 1164-1166; and Thaler and Sunstein 2008, pp. 1-6). The manager can affect consumer decision-making based on the layout of the cafeteria. Using this information, the goal of the manager could be to try to improve the students’ well-being, to arrange food randomly, to arrange food to reflect students’ own preferences, to prioritize favored suppliers’ offerings, or to maximize profits. The new paternalist conclusion is that the manager should seek to improve the students’ well-being by making the consumer go out of the way for the junk food, but placing the fruit next to the check-out. The consumers will then buy more fruit and less junk food. The new paternalists assert that this makes the consumer better off according to the consumer’s own judgment. This principle is then applied to many areas of the law, including saving, investing, lending, social security, health care, the environment, education, and more.

The applications suggested by the new paternalism paradigm include both private applications and public applications. The proponents recognize that libertarians do not have issues with the “nudging” in a private context, as these arrangements are contractual and agreed upon by all parties, but will look sideways at the government choosing to do the “nudging.” To that end, they address the skeptical, “dogmatic anti-paternalism” of these libertarians (Sunstein and Thaler, 2003, pp. 1162-1163). In their view, this anti-paternalist dogma rests on a false assumption and two misconceptions. The false assumption is that people make decisions in their own best interest. According to the new paternalists, this is demonstrated to be false by work in the behavioral economics field. Next, the anti-paternalists’ first misconception is that there are alternatives to paternalism that avoid influencing choices altogether. As the new paternalists see it, somebody must set up a framework, in both private and government contexts, and that not choosing to design a framework is still a choice of framework. Therefore, the argument claims, the anti-paternalists are wrong to say there is a path besides paternalism. Finally, the anti-paternalists’ second misconception is that paternalism always involves coercion. In the new paternalist theory, the opt-out from the government preserves liberty and is not coercive because the less optimal choice is still allowed to be made.

Sunstein and Thaler coin the term “choice architect” to describe the person who is responsible for designing the framework for decision-making and implementing the nudges. They provide a series of guidelines for the choice architects to operate by (Sunstein and Thaler, 2003, pp. 1190-1195). The first guideline is to examine the full costs and benefits of the possible design frameworks. However, in many cases a cost-benefit analysis will not be warranted or possible, and there are several rules of thumb that can be applied instead. The first rule of thumb is to set as the default the choice that the majority would select if all explicit choices were required and revealed. Contract law already operates along these principles in many respects, as contracts that do not make express provisions for certain circumstances are filled in with default provisions that attempt to match the provisions that would generally be selected if the parties explicitly negotiated them. This rule of thumb is a good starting point, but the majority might also be choosing something against its own best interest, or its choice might itself be a function of some other default. Additionally, just as the choice architect might be incapable of a cost-benefit analysis, he or she might also be incapable of discerning what the majority would choose. Therefore, a second rule of thumb is proposed, where people are forced to actively make an explicit choice. One way of doing this, in contract law, is to set up “penalty defaults” which penalize the party in the best position to make all implicit choices explicit. However, this rule of thumb might also fail to produce the “optimal” choice. The authors note that in the case of retirement plans, a choice architecture with forced choices produced higher participation rates than a choice architecture requiring opt-ins, but less participation than a choice architecture with a retirement plan default and an option to opt out. Although the authors think this is proof that people are still choosing poorly, it could also be seen as proof that a default leads to people stuck with retirement plans who would not actually choose them if they had to make a clear decision, which itself could be seen as sub-optimal. Regardless, in light of the potential pitfalls here, a third rule of thumb is proposed, which seeks to minimize the number of opt-outs. If the choice is binary, and one choice as default leads to few opt-outs, but the other choice as default leads to many opt-outs, the choice that fewer people opt out of should be selected as default. The difficulty with this rule of thumb is that it is an ex-post analysis, where both defaults have to be experimented with, rather than an ex-ante analysis that provides guidance at the beginning of the process.

In addition to providing specific guidelines, the authors also provide six broader principles for the choice architect to abide by (Thaler and Sunstein, 2008, pp. 81-100). These principles include the importance of defaults, an expectation of error by the users, a provision of feedback for users, an understanding of “mappings” from choices to welfare outcomes, structuring complex choices in manageable ways, and keeping an eye on incentives. If the choice architects can design decision frameworks in accordance with these guidelines and principles, people can be “nudged” into better lifestyles.

With all of those guidelines and principles in mind, the authors declare that libertarian paternalism operates along a spectrum. The *libertarian* paternalist would implement relatively costless opt-outs, while the libertarian *paternalist* who is “especially confident of his welfare judgments” would offer an opt-out, but at a real cost (Sunstein and Thaler, 2003, pp. 1185-1186). Of course, not far down the spectrum is the old paternalist, who simply imposes a stiff fine or penalty on the non-compliant person. The spectrum is a dangerous concession to old paternalism, especially for a new paternalism that claims to be libertarian.

Thaler and Sunstein (2008) also propose several specific areas to target, including financial decisions, health decisions, and social freedoms. In the financial realm, the proposed nudges encourage increased saving, smarter investing and borrowing decisions, and a plan for implementing the privatization of social security. The health nudges include a better design for Medicare Part D’s prescription drug coverage, encouraging organ donations, and a tax or cap-and-trade approach to greenhouse gases and pollution of the environment. The social freedoms targeted are increased school choice, increased freedom for contracting in health care, and privatized marriage.

**III. Discussion of Economic Theory Underpinnings**

As the new paternalism draws so much on behavioral economics, an examination of the discipline is necessary. The field of behavioral economics owes a lot to Kahneman and Tversky, two psychologists who began testing assumptions of Neo-Classical economics and game theory with real participants. They found that real human behavior does not comply with Neo-Classical utility theory, and humans do not act in a hyper-rational manner (Kahneman, 2011). Behavioral economists have identified many cognitive biases that affect real human decision making. The list of cognitive biases is extensive, but it includes confirmation bias, anchoring, framing, availability, overconfidence, and loss aversion. Kahneman (2011) has proposed a model for understanding why humans can sometimes think in highly mathematical, logical, and statistical terms but are still so often prone to cognitive biases. His model suggests that we have two mental systems, System 1 and System 2. System 1 is fast, automatic, and frequent, and includes our emotions and subconscious. This system utilizes instinct and heuristics to make decisions quickly and easily. System 2, on the other hand, is slow and requires a lot of effort. This is the system that is logical and calculating, and most closely resembles the rational actor in Neo-Classical economics. Humans use both systems, and nobody could operate solely off System 2.

In order to demonstrate the existence of these biases and the failings of Neo-Classical rationality, behavioral economists rely on empirical data, collected through cleverly designed experiments and surveys. Field studies and statistical or econometric work are also utilized. These methods give rise to certain criticisms from other mainstream economists. One criticism is that findings that reflect a “behavioral” response sometimes disappear in a longer time frame. A recent NBER working paper found that an Indian tea plantation that changed its contract structure saw an increase in output at odds with the standard model, attributable to a “behavioral” response. However, after four months, the increase had entirely reversed, and the output now matched the standard model, absent any behavioral or dynamic features (© Jayaraman, Ray, and Vericourt, 2014). The authors suggest the possibility that some findings of behavioral economics are ephemeral.

Similarly, it is likely that the influence of cognitive biases tends to disappear as the stakes rise and the frequency of the decision in question is made. For example, in the financial markets, a regular person managing their own 401(k) is very likely to make mistakes due to cognitive biases, but the professional trader is more likely to learn about the biases and profit by correcting them (Epstein, 2003, p. 194). While this still leaves plenty of real-world examples of infrequent or small-stake interactions, it suggests that as stakes rise and people learn from their mistakes through experience, the biases lose their influence.

Another related criticism it that findings in a laboratory setting are stronger than in real interactions. Economists Steven D. Levitt and John A. List (2007 highlight five factors that affect laboratory behavior: moral and ethical considerations, scrutiny of actions by others, context in which the decision is embedded, self-selection of individuals involved, and the stakes of the game (p. 154). Interestingly, these are some of the same factors, especially decision making context and the stakes involved, that the libertarian paternalists point to as justification for their interventions and nudges. However, it poses a problem if the experiments that their economic theory is based on are themselves prone to these issues.

Austrian economists agree with behavioral economists about many of the Neo-Classical shortcomings, but provide different remedies. From an Austrian perspective, it is crucial to note that Neo-Classical utility theory is not in accordance with the praxeological causal-realist approach of the Austrians, and Austrian economic theory does not presuppose that humans are hyper-rational decision makers. However, from the mainstream viewpoint, because some Neo-Classical and Austrian economic conclusions and many policy suggestions overlap, Austrian theory often gets mistakenly lumped in with the Neo-Classical paradigm. Nevertheless, the Austrians would side with the behavioral economists in criticizing the Neo-Classical assumptions that humans are hyper-rational actors who solely maximize utility according to stable preferences. Therefore, Austrians are not the slightest bit surprised when real human beings do not have perfectly stable preferences or act like computers maximizing utility.

However, Austrian economists develop economic theory according to entirely different methods than both Neo-Classical and behavioral economics. Instead of a reliance on hyper-rational utility maximization, Austrians maintain that humans act rationally, but they provide a different meaning. To the Austrian, rational behavior simply means that humans act by using means according to ideas to achieve ends (Mises 1949). Therefore, Austrian theory does not expect human actors to behave like omniscient computers. Austrian theory also rejects the utility modeling of Neo-Classical economics, as it does not believe that the subjective preferences of the individual can be measured in terms of utility, but instead alternatives can only ranked. Economic theory is built up in what Ludwig von Mises (1949) coined the *praxeological* method, where the above definition of rational behavior and human action serves as a beginning axiom, and economic theory is deduced logically instead of relying on empirical findings in the world. All empirical findings in human behavior must be interpreted according to some framework, and because Austrians build their framework separately from their empirical work, they do not risk making ad hoc inferences that are circular in logic.

So while the Austrians agree with the behavioral economics on the shortcomings of Neo-Classical assumptions, they do not try to fix them with more empirical work, as the behavioral economists do. The behavioral economists try to test and measure why humans make decisions and how they form preferences, instead of accepting preferences as they find them and explaining how their actions give rise to regularities in the social-economy. Austrians would consider this an interesting inquiry, but one that is properly classified as psychology instead of economics because it focuses on the mental processes and psychological motives of humans. Perhaps this is not surprising, as the behavioral economics field has relied so heavily on the work of psychologists in the first place. Austrians are also not put off by the behavioral economists’ insight that preferences are not “stable” (Rizzo, 2009b). Although Neo-Classical models rely on stable preferences, Austrians allow that preferences are dynamic and constantly prone to change, and thus can only be revealed and demonstrated through an action. Furthermore, many of the behavioral economics’ insights are interesting and illuminating, but often unoriginal. As Peter Klein (2010b) has noted, the empirical findings reveal nothing groundbreaking, but only seem groundbreaking in response to Neo-Classical theory. For example, the “breakthroughs” regarding the pitfalls of emotion in investing were long ago addressed by Benjamin Graham (1949).

Despite several insightful criticisms of Neo-Classical economics, behavioral economists do not entirely escape its mistakes. By relying on empirical data, which can never be perfectly extrapolated across time and space to everybody, behavioral economics does not provide a foundation for economic theory, but simply draws on psychology to patch up and smooth over Neo-Classical theory.

**IV. Libertarian Paternalism: A Critique**

Neo-Classical economics declares that humans are hyper-rational and know all relevant information, and can thus make better decisions regarding their own welfare than the government can. Austrians believe that humans are rational, and that due to the decentralized nature of knowledge, will have better information about their own preferences and circumstances than the government, and thus will make better decisions. However, behavioral economics stresses that humans are not hyper-rational and do not always process information correctly. This conclusion opens the way for the government to step in and nudge people towards better decisions. The old government paternalism had no qualms with telling people how to live their lives for moral reasons, even against people’s own preferences, but the new paternalism seeks to help people make decisions that will lead to better satisfaction of preferences according to the people themselves (Thaler and Sunstein, 2008, p. 10)*.* This new libertarian paternalism also suggests a variety of methods for the choice architect to nudge citizens, allowing for a variety of rules of thumb and principles to choose from, and leaving a good deal of wiggle room on just how “libertarian” the libertarian paternalism has to be.

The most effective aspect of the new paternalism’s rhetoric is the introduction of the concepts in a private or quasi-public context. The example of a cafeteria manager trying to influence children’s decisions applies equally to a private school or company cafeteria as it does to a public school cafeteria. In fact, the whole theory of nudging is entirely justifiable in a private context, and the authors should be given credit for suggesting many real private examples of nudges (Thaler and Sunstein, 2008, pp. 229-235). Any arrangement that is based on voluntary exchange or mutual agreement, such as a cafeteria, business saving plan, or a friendship, can benefit from nudges. Positive peer pressure, parental discipline, and a concern for reputation can all lead people to try and nudge their friends, children, or employees into decisions that serve both parties better according to their own judgment.

However, government paternalism is different. Government operates, ultimately, by force, and thus cannot be said to be non-coercive (Rothbard, 2004). The new paternalists claim that their paternalism can be non-coercive, and that it is a misconception to believe that paternalism is always coercive. No matter how convincing this argument is, they ultimately undermine their own argument by allowing for a spectrum of freedom for the government choice architect, ranging from a costless opt-out to a high cost opt-out. In other words, the choice architect will avoid coercion as long as the people fall in line; if people still do the “wrong” thing, the choice architect should turn up the heat.

The new paternalists also maintain that there is no alternative to paternalism, and that it is a misconception to think such an alternative exists. Somebody has to create the opening framework, and in doing so will affect decision-making, and the new paternalists are not satisfied with private property and freedom of contract as the opening framework. The new paternalist argument presupposes that the government has to be in the business of education (the cafeteria example), healthcare, and savings. David R. Henderson (2008) points out how disappointing the new paternalists’ approach to Social Security is. Instead of considering abolishing Social Security, or allowing citizens to opt-out of Social Security, the authors simply try to offer the best choice architecture within Social Security. Or to take another example, the authors try to improve companies’ 401(k) policies, without allowing for the possibility that the government need not try and influence companies’ and individuals’ savings practices with laws that provide certain tax benefits as incentives in the first place. Furthermore, Gregory Mitchell (2005) points out that paternalism is only “inevitable” if individuals are unable to overcome cognitive biases. Fortunately, however, humans *can* overcome cognitive biases, and paternalism need not be inevitable.

Libertarians differ in their exact prescription for the role of government, but because of its coercive nature that interferes with people’s preferred actions, its broadest conception is limited to the “night watchman” state, tasked with protecting citizens from violence, protecting private property, enforcing contracts, and providing for the national defense (Nozick, 1974). Under this conception of the government, paternalism is not inevitable, and private property and voluntary association can regulate people’s behavior without any need for nudges.

However, the new paternalism is aimed at the contemporary policy environment, so the authors start with the fact that voters in the United States and elsewhere have consistently demonstrated their desire for the government to be paternalistic. Democracy’s track record demonstrates a rejection of libertarian principles (Hoppe, 2001). Yet because there is still a portion of the voting public that desires smaller government, the libertarian paternalism is an attempt to reconcile the libertarians with the paternalists. In the face of “inevitable paternalism,” as dictated by voters, the question the new paternalists are really seeking to answer is how best to implement paternalist regulations. Coming back to Thaler and Sunstein’s cafeteria manager, if the government is put in charge of public schools, and those schools operate cafeterias, what is the best way to manage those cafeterias? As Mises (1949) wrote,

The confusion and lack of judgment displayed in dealing with the problems of interventionism are amazing indeed. There are, for instance, people who argue thus: it is obvious that traffic regulations on the public roads are necessary. Nobody objects to the government's interference with the car driver's conduct. The advocates of laissez faire contradict themselves in fighting government interference with market prices and yet not advocating the abolition of government traffic regulation. The fallacy of this argument is manifest. The regulation of traffic on a road is one of the tasks incumbent upon the agency that operates the road. If this agency is the government or the municipality, it is bound to attend to this task. It is the task of a railroad's management to fix the timetable of the trains and it is the task of a hotel's management to decide whether or not there should be music in the dining room. If the government operates a railroad or a hotel, it is the government's task to regulate these things … With a state opera the government decides which operas should be produced and which not; it is a non sequitur to deduce from this fact that it is also a task of the government to decide these things for a nongovernmental opera (p. 718-719).

Clearly, Austrian economists can concede the point that government agents and policy makers should seek the most effective way to administer those duties placed under its ownership and control. Yet in doing so, they should point out the flaws of the paternalist schemes with a sober eye and carefully guard against encroachments on other spheres, the “nongovernmental opera” in Mises’ example. In doing so, they can engage positively with the modern policy discussion while continuing to advocate for their own vision of government. In this instance, this form of analysis is quite revealing. Even if the new paternalists’ are granted their assumptions of inevitable paternalism and the possibility of non-coercive paternalism, their theories still fall short in several ways. The libertarian paternalism is less broadly applicable than it might seem and is not subject to any rational limitations on application or unbiased guidance.

The new paternalism is packaged and sold as a brilliant new legal paradigm, but it is not so much a general theory of law as a technique for regulation. The new paternalism still requires the foundations of property, contract, tort, and criminal law. Nudges do not replace any of these foundations. For example, imagine a criminal law paradigm that relied on “nudging” criminals away from theft or assault of others, but leaving opt-outs in place. Clearly such a framework is not an appropriate starting place for these foundations of law. Instead, new paternalism is limited to moderating the government’s regulatory interventions on top of these foundations.

New paternalism also faces no rational limitations on application from within its theory. How does the choice architect choose between a low-cost *libertarian* opt-out and a high-cost *paternalist* opt-out? When should “nudges” be implemented instead of “shoves” or imprisonment? The new paternalist can only offer guidelines, but the danger is that the libertarians accept the lip service paid to their concerns, while in practice the choice architect starts shoving to make citizens comply. Because the choice architect is also subject to cognitive biases, the new paternalism has great potential for falling down the “slippery slope” (Rizzo and Whitman 2007, 2009a). Proponents of new paternalism address this objection, but their response is simply to say that the slippery slope argument ducks the question of the merits of the proposed choice architecture, and that the libertarian opt-out reduces the steepness of the slope (Thaler and Sunstein, 2008, pp. 236-238). However, there is no restraint, even within their paradigm, on exactly how “libertarian” the choice architect has to be, and they recognize that there are “no hard-and-fast stopping points” and that “when mandates are involved and opt-outs are unavailable, the slippery-slope argument can begin to have some merit” (Thaler and Sunstein, 2008, pp. 251). Ultimately, their only real answer to this objection is that the new paternalism shows a preference for liberty and that citizens will have trust that the choice architect respects this. Unfortunately for the libertarian, the new paternalists “do not share the view that all redistribution is illegitimate” and that freedom itself is a value to protect (Thaler and Sunstein, 2008, p. 242). They may be “libertarian paternalists,” but the libertarian side agrees a lot less with other libertarians than the paternalist side agrees with other paternalists.

Another lack of a rational limitation within their paradigm arises with their discussion of split-selves. Kahneman (2011) discusses System 1, the short term emotional side of human brains, and System 2, the long term logical side. The new paternalists use the terms “Econ” and “Humans,” or “Doers” and “Planners,” to describe this duality of human decision making (Thaler and Sunstein, 2008, pp. 6-8, 19-22). This duality goes hand in hand with the behavioral economics’ rejection of stable preferences, as temptations and changing circumstances lead to “dynamically inconsistent” preferences (Thaler and Sunstein, 2008, p. 41). However, on what basis are the new paternalists choosing to support the long-term planner over the short-term doer? As Thomas Leonard (2008) asks, “are workaholics, anorexics and misers—what happens with a dictatorship of the Planner—any less immoderate than slackers, the overweight, and the profligate?” The policies of the new paternalists always support the “Econ” over the “Human.” Thus, the irony arises that although behavioral economics has rejected the hyper-rational actor of the Neo-Classical model, the new paternalists turn around and set this hyper-rational actor up as the model to nudge people towards (Leonard, 2008). The response from new paternalists is that their nudges will make the nudged citizens happier *according to their own standards*, but can misers not regret their penny-pinching just as much as the spendthrift can regret their lack of saving?

Of course, without a rational limitation on the goal of the nudges, it falls to the choice architect to make the call. And as much as the new paternalists try to prove the benefits of their chosen defaults and ground them in empirical data, ultimately the prescriptions tend to align with the advocates’ own values. For example, the new paternalists celebrate how “mandatory messages about risks from cigarette smoking” reduced smoking habits, an example of a “disclosure policy” (Thaler and Sunstein, 2008, p. 189). However, citizens are just as capable of falling victim to cognitive biases in response to nudges as to any other piece of information. As an example of the availability heuristic at work, Leonard (2008) points out that both “smokers and non-smokers overestimate the health risks of smoking, an error that likely derives from anti-smoking campaigns” but that “most paternalists, nudgers included, would be reluctant to publicize the truth.” As Mises (1949) said long ago, government planners claim that what they are “advocating is good interventionism, not bad interventionism; and, of course, good interventionism is the professor’s own brand” (p. 727). The new paternalists are no different.

A central aspect of the new paternalism is that nudges improve decisions as judged by people’s own preferences, “not those of some bureaucrat” (Thaler and Sunstein, 2008, p. 10). They seek to accomplish this by nudging people toward long-term thinking over short-term thinking, so that down the road, the people will be happier with their circumstances. The new paternalists acknowledge that people’s preferences are subjective, hence the inclusion of an opt-out, but they also regard people’s preferences as often half-baked, hence the need for the nudge. Now, how does the choice architect actually discover everybody’s subjective preferences and nudge them toward better decisions? The new paternalists suggest that behavioral economics provides an objective insight into people’s preferences. However, this claim is weak, as behavioral economics findings in laboratories often fail to manifest in real life, and findings in one field study may not transfer to others. Ultimately, the choice architect still falls prey to the false notion that the central planner is capable of knowing people’s preferences better than they themselves know them.

Friedrich Hayek (1945; 1948) and other Austrian economists have emphasized that due to the decentralized nature of knowledge and information, the central planner can never obtain the necessary information to satisfy individual subjective preferences. The new paternalists are unable to fulfill their promise of making people better off according to their own preferences because they are unable to comprehend these preferences, regardless of their behavioral economics research. Mario Rizzo (2009b) demonstrates the enormity of the task ahead of the choice architect seeking to satisfy people’s own preferences through nudges. The choice architect policy maker must:

(1) identify agents’ “true” preferences that are to be maximally satisfied; (2) determine the extent of each cognitive bias or decision-making problem; (3) properly account for privately adopted self-debiasing measures, as well as how paternalist policies would affect such measures; (4) deal with the problem of interdependent biases; (5) anticipate unraveling and unlearning effects; and (6) account for heterogeneity in the population with respect to all of these factors (p. 910).

These challenges are simply impossible for the choice architect to deal with, and no amount of behavioral economics studies are dynamic enough to handle them. The new paternalists do provide rules of thumb and advise the choice architect to expect error, but they simply cannot deliver on the promise that people will be better off according to their own preferences. To their credit, the new paternalists do recognize that one-size-fits-all solutions may not fit, and hence have included an opt-out solution (Thaler and Sunstein, 2008, pp. 252-253). Unfortunately, the specific choice architecture still becomes itself a one-size-fits-all solution, and when combined with the possible higher-cost opt-outs or mandates and choice architect’s own biases and preferences, the libertarian foundation starts showing its cracks.

For all of the concerns highlighted, there are several bright spots in the new paternalist theory, even to the “dogmatic” libertarian. First of all, when compared to the status quo of regulation, the inclusion of opt-outs to preserve freedom is an improvement, even if not an entirely satisfactory one. Moreover, on the discussion of health care, the authors pleasantly advocate greater liberty of contract. Currently, patients cannot waive their right to sue their doctor for negligence. This constant threat of huge settlements is a cost that is implicitly included in all patients’ health care expenses. The authors propose removing this restraint on contract, instead allowing patients to waive their right to sue their doctor if they prefer (Thaler and Sunstein, 2008, pp. 207-214). The nudge involved in this proposal sets the default as including the right to sue and making the consumer opt-out with the waiver if they want to reduce their costs.

Another bright spot is their discussion of marriage. Their proposal is to restrict the institution of marriage to a private or religious institution (Thaler and Sunstein, 2008, pp. 215-226). All mentions of the word “marriage” would be removed from laws, and in its place would be a “civil union,” a legal status relating to domestic partnership agreements between any two people. Thus, religious organizations would be free to treat marriage according to their consciences, and all of the associated legal benefits given to civil unions would not have to face the prevalent religious objections that non-traditional marriages currently face. Here again, the nudges involve setting the default provisions, similar to contract law, in ways that protect the most vulnerable parties, generally the women and especially children. Furthermore, guidelines about the divorce settlement process could serve as anchors for expectations, reducing the uncertainty that drives the long and intense disputes. It may be optimistic of the authors to hope their nudges will reduce the contentious process of divorce, but again, these are simply nudges. Overall, this proposal provides much greater freedom by eliminating the dual meaning of “marriage” in our current framework.

**V. An Alternative Government Framework**

Again, setting aside the question of whether the government should be involved in areas like savings, employment law, and healthcare in the first place, the question arises as to which style of government can provide the best results. Hoppe (2001) proposes that the best style of government is one that mimics private property. To an extent, this is what the new paternalism attempts to do by allowing for the freedom to opt-out, but the new paternalism is still subject to all the old paternalist dangers of over-regulation. Today’s regulatory climate is already so complicated, and every social problem is “fixed” with more and more rules (Epstein, 1995). It is unlikely that the new paternalism, which includes even more complicated statutes and regulations and the associated paperwork burden, would reduce the inefficiency of this strategy. A better strategy for dealing with today’s complex social problems, including healthcare and the environment, is to simplify the legal principles that govern them. Epstein (1995) proposes that a return to a common law foundation would *more efficiently* provide for resource allocation and remedies of harm. One of the failings of paternalist regulation is that it creates laws that try to deal with every possible scenario. Instead, applying the basic rules of autonomy, property, contract, torts, just compensation, and take and pay to labor law, environmental law, and health care would result in better outcomes while still respecting rights, as libertarians prefer. However, in this framework, the room for paternalism, old or new, is much more limited, thus avoiding the knowledge problem and biases on the part of the choice architect.

**VI. Conclusion**

If we allow that government should shoulder the responsibility for decision-making and long-term planning that individuals sometimes abdicate or abuse, libertarian paternalism offers an intriguing and rather appealing approach. Our democratic system has assigned these duties to the government, and it is worthwhile to explore the most liberty-preserving approaches for executing those duties. The new paternalism may be an improvement over the old paternalism so often practiced. However, there are alternative legal frameworks for addressing these issues that are better equipped for addressing these problems. Furthermore, this libertarian paternalist approach does not trump traditional libertarian thought, and voters who are concerned about personal liberty should still seek to advance a framework that removes the government from being the ultimate solution to all possible problems.

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