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## Keynote: Forcing People to Choose is Paternalistic

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# Forcing People to Choose Is Paternalistic

Cass R. Sunstein<sup>\*</sup>

## ABSTRACT

*It can be paternalistic to force people to choose. Often people do not wish to choose, but both private and public institutions ask or force them to do so, thus overriding their wishes. As a result, people's autonomy may be badly compromised and their welfare may be greatly reduced. These points have implications for a range of issues in law and policy, suggesting that those who favor active choosing, and insist on it, may well be overriding people's preferences and values, and thus running afoul of John Stuart Mill's Harm Principle (for better or for worse). People have limited mental bandwidth, and forcing choices can impose a hedonic or cognitive tax. Sometimes that tax is high.*

## I. INTRODUCTION

When you enter a taxicab in a large city, and ask to go to the airport, you might well be asked this question: “What route would you like me to take?”

If you are like many people, you will not welcome that question. You might even hate it. After all, it is the business of the driver to know how to get to the airport, and in any case the driver almost certainly has access to a GPS device. For you, the question – asking you to choose – is a kind of mental tax, cognitive for sure (because of the need to think) and possibly

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<sup>\*</sup> Robert Walmsley University Professor, Harvard University. I am grateful to Thomas Lambert and the editors of the *Missouri Law Review* for hosting a superb conference on nudging and libertarian paternalism in October 2016; the discussions much informed my treatment here. Special thanks to Bruce Ackerman, a terrific commentator and colleague for several decades, for suggesting, back in 2014, that I produce this essay. It took a while.

Thanks too to Elizabeth Emens, Eric Johnson, George Loewenstein, Eric Posner, Riccardo Rebonato, Lucia Reisch, and Adrian Vermeule for valuable comments on a previous draft. I am also grateful to participants in a legal theory workshop at Yale Law School and to audiences at Dartmouth College for excellent suggestions and to Matthew Lipka for superb comments and research assistance. I have drawn on previous presentations and some of the material presented here appears, in earlier form, in CASS R. SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE (2015); the goal of this essay is to present a simple, significantly clarified and revised, expanded, self-contained version of one argument in that book.

hedonic as well (because it is not exactly pleasant to ponder how to get to the airport). To be sure, the tax is likely to be small. But it might well be unwelcome.

Whenever a doctor or a lawyer asks a battery of questions to a patient or a client, a possible reaction might be: “On some of these questions, why don’t you decide for me?” If the emotional stakes are high, and if the issues are difficult, the hedonic and cognitive tax might be very high. And whenever public officials require people to fill out complex forms to qualify for training or for benefits, the tax might turn out to be prohibitive, at least for some people. It might lead them not to apply at all. It is for this result that complex form-filling requirements are not merely a paperwork burden; they can undermine and even undo the underlying programs. Form-filling can be a curse.

In this light, consider three problems:

1. An online clothing company is deciding whether to adopt a system of default settings for privacy, or whether to require first-time users to specify, as a condition for access to the site, what privacy settings they would prefer.
2. A large employer is deciding among three options: (1) to enroll employees automatically in a health insurance plan; (2) to ask them to opt in if they like; or (3) to say that as a condition for starting work, they must indicate whether they want health insurance, and if so, which plan they want.
3. A utility company is deciding whether to adopt for consumers a “green default,” with a somewhat more expensive but environmentally preferable energy source, or instead a “gray default,” with a somewhat less expensive but environmentally less desirable energy source – or alternatively, to ask consumers which energy source they prefer.

In these cases, and countless others, a public or private institution, or an individual, is deciding whether to use some kind of default rule or instead to require people to make some kind of active choice. (I shall say a good deal about what the word “require” might mean in this setting.) For those who reject paternalism and who prize freedom of choice, active choosing has evident appeal. Indeed, it might seem far preferable to any kind of default rule. It respects personal agency; it promotes responsibility; it calls for an exercise of individual liberty. It seems to reflect a commitment to human dignity.

In light of these considerations, many people might argue that active choosing deserves some kind of pride of place, especially if it is accompanied by efforts to improve or “boost” people’s capacities, perhaps by providing

them with information, perhaps by increasing their statistical literacy.<sup>1</sup> In social science parlance, the best approach might be to strengthen System 2, the deliberative system of the mind, rather than to ignore it, or to exploit or enlist System 1, the automatic or intuitive system.<sup>2</sup>

In recent years, there have been vigorous debates about freedom of choice, paternalism, behavioral economics, individual autonomy, and the use of default rules and choice architecture.<sup>3</sup> Invoking recent behavioral findings, some people (including the present author) have argued that because human beings err in predictable ways, and cause serious problems for themselves, some kind of paternalism is newly justified, especially if it preserves freedom of choice, as captured in the idea of “nudging” or “libertarian paternalism.”<sup>4</sup> Consider a GPS device, which nudges; perhaps we need GPS devices everywhere. Others contend that because of those very errors, some form of coercion is needed to promote people’s welfare. They believe that as a result, the argument for choice-denying or nonlibertarian paternalism is strengthened.<sup>5</sup>

These claims have been sharply contested. A possible response is that public officials are prone to error as well, and hence an understanding of behavioral biases argues against paternalism, not in favor of it.<sup>6</sup> If government makes mistakes, it might nudge people in the wrong direction; it might also have an insufficient appreciation of diversity within the relevant population. The “knowledge problem,” rightly emphasized by Hayek, potentially affects all decisions by government,<sup>7</sup> and behavioral findings seem to compound that

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1. See Till Grüne-Yanoff & Ralph Hertwig, *Nudge Versus Boost: How Coherent Are Policy and Theory?*, 26 MIND & MACHINES 149, 156–59 (2016).

2. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011). The idea of two “systems” is controversial in some circles and nothing here depends on accepting that idea.

3. See, e.g., NUDGE THEORY IN ACTION: BEHAVIORAL DESIGN IN POLICY AND MARKETS (Sherzod Abdukadirov ed., 2016); SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM (2013); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); Ryan Bubba & Richard Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”*, 151 U. PA. L. REV. 1211 (2003); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033 (2012); Riccardo Rebonato, *A Critical Assessment of Libertarian Paternalism* (Oct. 28, 2013) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2346212](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346212).

4. See Camerer et al., *supra* note 3, at 1214; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

5. See CONLY, *supra* note 3; Bubba & Pildes, *supra* note 3, at 1659.

6. See NUDGE THEORY IN ACTION: BEHAVIORAL DESIGN IN POLICY AND MARKETS, *supra* note 3, and Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133 (2006), for a variety of arguments to this effect.

7. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

problem because they suggest that identifiable biases will accompany sheer ignorance.<sup>8</sup> The emerging field of “behavioral public choice” draws attention to that possibility.<sup>9</sup> Consider the problem of *behavioral bureaucrats*: public officials who are not only adversely affected by the standard behavioral biases (such as present bias and availability bias) but also subjected to the pressure imposed by well-organized private groups with a significant stake in the outcome.<sup>10</sup> If behavioral bureaucrats suffer from the knowledge problem, it is all the more important to constrain them.

It might also be objected that on grounds of both welfare and autonomy, active choosing is desirable *even if people have a tendency to err*.<sup>11</sup> People can learn from their own mistakes, and that might be quite important. On this view, people should be asked or allowed to choose, whether or not they would choose rightly. For all sides, the opposition between paternalism and active choosing seems stark and plain, and indeed it helps to define all of the existing divisions.

My central goal here is to unsettle that opposition and to suggest that it is often illusory. The central reason is that people often choose not to choose,<sup>12</sup> and forcing them to choose is a kind of tax. In many contexts, *insisting on active choosing, or forcing people to choose, is a form of paternalism*, not an alternative to it. Under imaginable assumptions, any effort to require active choosing easily fits within the standard definition of paternalism and runs afoul of the most conventional objections to paternalism. Many people believe, in many contexts, that choosing is burdensome and costly. Sometimes they choose not to choose explicitly (and indeed are willing to pay a considerable amount to people who will choose for them). They have actively chosen not to choose.

Sometimes people have made no explicit choice; they have not actively chosen anything. But it is nonetheless reasonable to infer that in particular contexts, their preference is not to choose, and they would say so if they were

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8. See Jan Schnellenbach & Christian Schubert, *Behavioral Public Choice: A Survey* 18 (Freiburg Discussion Papers on Constitutional Economics, No. 14/03, 2014), <https://www.econstor.eu/bitstream/10419/92975/1/777865785.pdf>.

9. See *id.* at 2.

10. An early discussion is Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

11. See Wright & Ginsburg, *supra* note 3.

12. An important clarification: My focus throughout is not on “not choosing,” which involves no choice at all, and which is different from choosing not to choose, in the sense of choosing someone else to choose on one’s behalf. One might not choose because (for example) of procrastination or because one wants to retain option value. See Ziv Carmon, Klaus Wertenbroch & Marcel Zeelenberg, *Option Attachment: When Deliberating Makes Choosing Feel Like Losing*, 30 J. CONSUMER RES. 15, 25–26 (2003). There is, of course, an overlap between the two phenomena: People might decline to choose because they are busy, do not want to take responsibility, or think that they might err. But choosing not to choose is a form of choice, and those who want to avoid choosing might be as averse to that choice as any other.

asked. (Recall the case of the cab ride to the airport, or the interaction with a doctor or a lawyer.) They might fear that they will err. They might be busy and lack “bandwidth,”<sup>13</sup> and so they have limited cognitive resources and do not want them to be taxed. They might want to focus on some concerns but not others; they might think that choosing would deny them that freedom. They might be aware of their own lack of information<sup>14</sup> or perhaps their own behavioral biases (such as unrealistic optimism<sup>15</sup>). They might find the underlying questions confusing, difficult, painful, and troublesome – empirically, morally, or otherwise. They might not enjoy choosing. They might not want to take responsibility for potentially bad outcomes for themselves (and at least indirectly for others).<sup>16</sup> They might anticipate their own regret and seek to avoid it.<sup>17</sup>

But even when people prefer not to choose, many private and public institutions favor and promote active choosing on the ground that it is good for people to choose. They may have sufficient reasons for that belief. Sometimes active choosing is required as a way of overcoming a collective action problem (people cannot delegate the right to vote), but sometimes it is a means of *protecting those who choose not to choose against their own mistake(s)*. The central idea is that people should be choosing whether or not they want to do so. An institution might think that choice-making builds some kind of muscle; it might think that it helps people to learn. To the extent that the institution’s preference for choice-making overrides that of the

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13. See SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 39–66 (2013).

14. On the effects of lack of information in producing abstention, see Tom Coupé & Abdul G. Noury, *Choosing Not to Choose: On the Link Between Information and Abstention*, 84 ECON. LETTERS 261 (2004).

15. See TALİ SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN 16–17 (2011).

16. For a demonstration, see Björn Bartling & Urs Fischbacher, *Shifting the Blame: On Delegation and Responsibility*, 79 REV. ECON. STUD. 67 (2012). On people’s preference for flipping a coin, as a way of avoiding responsibility, see Nadja Dwenger, Dorothea Kübler & Georg Weizsäcker, *Flipping a Coin: Theory and Evidence* (2013) (unpublished manuscript), [https://www.wzb.eu/sites/default/files/%2Bwzb/mp/vam/flipping\\_2014-01-21.pdf](https://www.wzb.eu/sites/default/files/%2Bwzb/mp/vam/flipping_2014-01-21.pdf). Consider this suggestion:

[The] cognitive or emotional cost of deciding may outweigh the benefits that arise from making the optimal choice. For example, the decision-maker may prefer not to make a choice without having sufficient time and energy to think it through. Or, she may not feel entitled to make it. Or, she may anticipate a possible disappointment about her choice that can arise after a subsequent resolution of uncertainty. Waiving some or all of the decision right may seem desirable in such circumstances even though it typically increases the chance of a suboptimal outcome.

*Id.* at 1

17. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 51–54 (1980).

chooser (who prefers not to choose), active choosing counts as paternalistic. It overrides people's own judgments about what is good or what best promotes welfare or freedom.

To be sure, nanny states forbid choosing, but they also forbid the choice not to choose. *Choice-promoting* or *choice-requiring paternalism* might be attractive forms of paternalism, but neither is an oxymoron, and they are paternalistic nonetheless.

If people are *required* to choose even when they would prefer not to do so, active choosing counts as a species of nonlibertarian paternalism in the sense that people's own choice is being rejected. We shall see that in many cases, those who favor active choosing are actually mandating it, and may therefore be overriding (on paternalistic grounds) people's choice not to choose.<sup>18</sup> When people prefer not to choose, required choosing is a form of coercion – though it may be a justified form, at least where active choosing does not impose high taxes, when it does not increase the likelihood and magnitude of errors, and when it is important to enable people to learn and to develop their own preferences. One strand of the liberal political tradition emphasizes the importance of self-development; forcing people to choose can be counted as perfectionist (in the liberal sense) and in a sense as unabashedly paternalistic.<sup>19</sup>

If, by contrast, people are *asked whether they want to choose* and can opt out of active choosing (in favor of, say, a default rule), active choosing counts as a form of libertarian paternalism. In some cases, it is an especially attractive form. A company might ask people whether they want to choose the privacy settings on their computer, or instead rely on the default, or whether they want to choose their electricity supplier, or instead rely on the default.

With such an approach, people are being asked to make an active choice between the default and their own preference, and in that sense, their liberty is fully preserved. Call this *simplified active choosing*. Simplified active choosing has the advantage of avoiding the kinds of pressure that come from a default rule,<sup>20</sup> while also allowing people to rely on such a rule if they like. In the future, we should see, and we should hope to see, adoption of this approach by a large number of institutions, both public and private.

But that approach is no panacea. It imposes a tax of its own, even if the tax is small. It is important to acknowledge that whenever a private or public institution asks people to choose, it might be overriding their preference not

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18. There is an irony here in light of evidence that people sometimes place an excessive value on choice, in the sense that their preference for choice leads to welfare losses. See Simona Botti & Christopher K. Hsee, *Dazed and Confused by Choice: How the Temporal Costs of Choice Freedom Lead to Undesirable Outcomes*, 112 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 161 (2010).

19. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

20. See Eric J. Johnson & Daniel G. Goldstein, *Decisions by Default*, in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* 417, 417–27 (Eldar Shafir ed., 2013) (discussing impact of defaults).

to do so, and in that sense engaging in choice-requiring paternalism. This point applies *even when people are being asked whether they want to choose to choose*. (The passenger must focus her attention even if a cab driver merely asks, “Do you want to tell me how to go, or would you like it better if I choose the route on my own?”) After all, they might not want to make that second-order choice (and might therefore prefer a simple default rule). If the point is not obvious, consider the fact that any question – in person, by email, by regular mail – that demands an answer is in effect a tax on people’s scarce cognitive resources.

In this sense, there is a strong nonlibertarian dimension to apparently liberty-preserving approaches that ask people to choose between active choosing and a default rule. If these claims do not seem self-evident, or if they appear a bit jarring, it is because the idea of active choosing is so familiar, and so obviously appealing, that it may not be seen for what it is: a form of choice architecture, and one that many choosers may dislike, at least in settings that are unfamiliar or difficult.<sup>21</sup>

The remainder of this Article is organized as follows. Part II explores how, and in what settings, active choosing might be required. Part III, the heart of the Article, discusses choice-requiring paternalism and shows that it can be a serious problem and that it is not a contradiction in terms. It explains that when people choose not to choose, active choosing counts as a form of paternalism, one that runs into both welfare-based and autonomy-based arguments in favor of freedom of choice (including the choice not to choose). This point holds even for simplified active choosing, though the standard objections to paternalism are weakened as applied to that approach. Part IV concludes.

## II. VARIETIES OF CHOICE

Is government untrustworthy? Always? Many of those who embrace active choosing believe that consumers of goods and services, and indeed choosers of all sorts, should be free from government influence.<sup>22</sup> Of course they recognize that in markets, producers will impose influences of multiple kinds, but they contend that when third parties are not affected, and when force and fraud are not involved, the government itself should remain neutral. They reject paternalism on government’s part.<sup>23</sup> Perhaps it is legitimate for public officials to require the provision of accurate information, so as to ensure that consumers’ choices are adequately informed. Perhaps reminders

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21. A valuable discussion is presented in Barbara H. Fried, *But Seriously, Folks, What Do People Want?*, 65 STAN. L. REV. 1249 (2013). For discussion that bears on whether choice-promoting or choice-requiring paternalism is justified, see Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1 (2013), and in particular the discussion of learning over time. *Id.* at 44–45, 49–52.

22. This is the general thrust of Rebonato, *supra* note 3, at 5–6.

23. *Id.*; Wright & Ginsburg, *supra* note 3, at 1063–66.



are justified as well. But some people think that if government seeks to “nudge”<sup>24</sup> people in its preferred directions in other ways – by imposing default rules or embracing paternalism of any kind – it is exceeding its appropriate bounds. In particular, they prefer active choosing, and they want to encourage it. And even if their focus is on the public sector, they might say the same thing for the private sector as well.

### A. Three Possibilities

But what does active choosing entail?<sup>25</sup> What does it mean to “require” people to indicate their preferences? The question is more difficult than it might seem. Those who insist on the inevitability of default rules will object that it has no clear answer. Even if choice architects seek to promote active choosing, they have to specify what happens if *people simply refuse to choose*. Isn’t the answer some kind of default rule?

The question is a good one, because some kind of default rule is ultimately necessary. Choice architects have to establish what happens if people decline to choose – a point that critics of nudging often miss. Choice architecture itself is inevitable. But this point should not be taken to collapse the distinction between active choosing and default rules. To see why, consider three possibilities.

(1) *Criminal or civil punishment for those who refuse to make an active choice*. In most contexts, no one contends that if people fail to make a choice, they should be killed, imprisoned, fined, or otherwise punished. The sanction for that failure is that they do not receive a good or service (see (2) and (3) below). But there are exceptions. In some nations, including Australia, Belgium, and (before 1970) the Netherlands, people have been subject to civil sanctions if they fail to vote,<sup>26</sup> and in that sense they may be punished for refusing to make an active choice. So too, a provision of the Affordable Care Act requires people to obtain health insurance, subject to punishment (in the form of a tax penalty) if they fail to do so.<sup>27</sup> If people are required to obtain health insurance, they will normally be required to choose which plan to obtain.

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24. See THALER & SUNSTEIN, *supra* note 3.

25. I am understanding the term in a purely formal sense, to capture a response to a question about what one prefers. It would be possible to understand “choosing” in a more functional sense, to capture deciding for reasons, as distinguished from simply “picking,” which is akin to tossing a coin. For an important discussion, see Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RES. 757, 757–58 (1977). As I understand it here, active choosing includes “picking” and can occur even when people lack an antecedent preference. See *id.* at 758.

26. Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?*, 18 J. THEORETICAL POL. 207, 208 (2006).

27. 26 U.S.C. § 5000A (2012).

With respect to active choosing, both of these cases do have a wrinkle: People are being forced to choose along one dimension (for whom to vote and which health insurance plan to obtain), but are being prohibited from choosing along another dimension (whether to vote or to obtain health insurance). But insofar as one kind of choice is being required, we may fairly speak of coerced choosing. In both of these cases, coerced choosing can be justified as a means of overcoming a collective action problem: The democratic system might be jeopardized unless most or all adults are voting, and perhaps a health insurance system requires very broad participation.

But we could easily imagine an effort to defend both forms of coercion on simple paternalistic grounds. For example: To protect themselves against disaster, people should be required to purchase health insurance. And to ensure that people have the right health insurance plan, people should be required to make a personal choice about what plan they should have. (To be sure, the second form of paternalism reflects a form of respect for individual agency that the first form of paternalism does not display. But on plausible assumptions, both forms make sense, and they do not really contradict each other.)

We could also imagine other contexts in which people would face sanctions if they do not choose, though admittedly some such cases look more like science fiction than the real world. For realistic examples, consider cases in which people must decide whether to become organ donors (or face criminal penalties) or must choose privacy settings on their computers (subject to civil sanctions if they do not). The fact that sanctions are rarely imposed on people who choose not to choose seems to suggest an implicit recognition that in a free society, such choices are generally acceptable and indeed a legitimate part of consumer sovereignty. One reason involves information: People know best what they want, and others should not choose for them, even if the choice is not to choose.<sup>28</sup> I will press this point, which has been insufficiently emphasized by those who claim to prize individual choice.

(2) *Active choosing with respect to a related or ancillary matter as a condition for obtaining a good or a service (or a job).* Sometimes active choosing is mandatory in a distinctive sense: *Unless people make an active choice on some matter, they cannot obtain a good or service, even though that good or service, narrowly defined, is not the specific topic of the choice that they are being asked to make.* We can imagine a continuum of connections between the matter in question, for which an active choice is being required, and the specific good that has already been chosen. There would be a close connection if, for example, people were told that unless they indicate their preferences with respect to car insurance, they cannot lease a car. So too, there would be a close connection if people were told that unless they

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28. For a powerful demonstration, see JOEL WALDFOGEL, *SCROOGENOMICS: WHY YOU SHOULDN'T BUY PRESENTS FOR THE HOLIDAYS* (2009), which shows that even family members and close friends make large mistakes in choosing gifts for people during the holiday season.

create a password, or indicate their preferences with respect to privacy settings, they cannot use their computer. And indeed, both of these cases are standard. In markets, sellers sometimes insist that purchasers must make an active choice on some related matter in order to obtain or use a product.

By contrast, there would be a somewhat weaker connection if people were informed that they could not work with a particular employer until they have indicated their preferences with respect to their retirement plan. The connection would be weaker still if people were told that they could not obtain a driver's license unless they indicate their preferences with respect to organ donation. The connection would be even weaker if people were told that they could not register to vote unless they have made a choice about their preferred privacy settings on their computer.

In the final example, there is no connection between the matter on which people are being asked to make a choice and the good that they are specifically seeking.<sup>29</sup> In some cases, the choice architect is requiring an active choice on a matter that is genuinely ancillary. Note that in imaginable cases that fall in this category, the requirement of active choosing has a strongly coercive dimension insofar as the good in question is one that people cannot easily reject (such as a driver's license, a job, or a right to vote). The choice architect is, in effect, leveraging that good to ensure an active choice on some other matter.

From the normative point of view, we might want to distinguish between public and private institutions here. Perhaps private institutions, disciplined as they are by market forces, should freely compete along this dimension as along others, and perhaps public institutions should hesitate before requiring people to choose, unless there is a close connection between the good or service in question and the object of active choice.

(3) *Active choosing among goods, services, or jobs as a condition for obtaining a good, a service, or a job.* For most consumption decisions, people are given a wide range of options, and they can choose one or more of them, or none at all. Unless they make a choice, they will not obtain the relevant good or service. They are not defaulted into purchasing sodas, tablets, cell phones, shoes, or fishing poles. Indeed, this is the standard pattern in free markets. When people visit a website, a restaurant, or a grocery or appliance store, they are generally asked to make an active choice. The default – understood as what happens if they do nothing – is that no product will be purchased. People do not receive goods or services unless they have actively chosen them. The same point holds for the employment market. People are not typically defaulted into particular jobs, at least not in any formal sense. They have a range of options, and unless they take one, they will

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29. The case of organ donations is different. In 2007, for example, motor vehicle accidents accounted for about twenty percent of all organ donations. See Stacy Dickert-Conlin, Todd Elder & Brian Moore, *Donorcycles: Motorcycle Helmet Laws and the Supply of Organ Donors*, 54 J.L. & ECON. 907, 912 (2011).

be unemployed. In this respect, free markets generally require active choosing.

There is nothing inevitable about this situation. We could imagine a situation in which sellers assume, or presume, that people want certain products, and in which buyers obtain them, and have to pay for them, passively. Imagine, for example, that a bookseller has sufficient information to know, for a fact, that Johnson would want to buy any new book by Harlan Coben, Richard Thaler, or Joyce Carol Oates, or that Smith would like to purchase a new version of a particular tablet, or that Smith would want to buy a certain pair of sneakers, or that Ullmann would like to purchase a particular product for his dog, or that when Williams runs out of toothpaste, he would like new toothpaste of exactly the same kind. If the sellers' judgments are unerring, or even nearly so, would it be troublesome and intrusive, or instead a great benefit, for them to arrange the relevant purchases by default? Existing technology is increasingly raising this question.<sup>30</sup>

There is a good argument that the strongest reason to require active choosing is that sufficiently reliable predictive shopping algorithms do not (yet) exist, and hence active choosing is an indispensable safeguard against erroneous purchases, and so use of algorithms are not (yet) in the interest of those who might be denominated purchasers (by default). On this view, the argument for active choosing is rooted in the view that affirmative consent protects against mistakes – which leaves open the possibility of “passive purchases” if and when a reliable technology becomes available. We are getting there, and for some things we may already be there, but so long as such technology does not exist, passive purchases would be unacceptable. A hypothesis: Once reliable algorithms are indeed in place, we will see far more support for their use in cases like those of Johnson, Smith, Ullmann, and Williams.

It is true that markets require a background set of entitlements, establishing what people have and do not have, before they begin to choose; the background entitlements are given rather than chosen, and they might reflect a form of paternalism.<sup>31</sup> For example, people might have some kind of “default entitlement” to be free from age discrimination, which they can waive for a price;<sup>32</sup> some entitlements of this kind (such as the right to be free from discrimination on the basis of race and sex) are not waivable.<sup>33</sup> Because peo-

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30. See Greg Bensinger, *Amazon Wants to Ship Your Package Before You Buy It*, WALL ST. J. (Jan. 17, 2014, 3:12 PM), <http://blogs.wsj.com/digits/2014/01/17/amazon-wants-to-ship-your-package-before-you-buy-it/?mod=e2tw>.

31. Cass R. Sunstein, *Choosing Not to Choose*, 64 DUKE L.J. 1, 16 (2014).

32. 29 U.S.C. § 626(f)(1) (2012).

33. See, e.g., *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (holding that employees may not waive their rights to the minimum wage or overtime pay under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19).

ple's preferences may be affected by decisions about background entitlements,<sup>34</sup> a form of paternalism may be difficult or perhaps impossible to avoid insofar as some person or institution is making those decisions.<sup>35</sup> If people's preferences are an artifact of entitlements, we cannot select entitlements by asking about those preferences. But with background entitlements in place, people usually do not obtain goods or services unless they have actively chosen them (putting gifts to one side).

### *B. What Choosers Choose*

As the examples suggest, both private and public institutions might choose (2) or (3), though of course only government can choose (1). It should be clear that active choosing is far from inevitable. Instead of imposing active choosing, an institution might select some kind of default rule, specifying what happens if people do nothing. Of course (2) and (3) also come with a kind of default rule: Unless people make an active choice, they will have no good, no service, and no employment. But other approaches are possible.

For example, those who obtain driver's licenses might be defaulted into being organ donors, or those who start work with a particular employer might be defaulted into a specific retirement or health care plan. These examples are not hypothetical. Alternatively, those who make an active choice to purchase a particular product – say, a book or a subscription to a magazine – might be enrolled into a program by which they continue to receive a similar product on a periodic basis, whether or not they have made an active choice to do that. The Book of the Month Club famously employs a strategy of this sort.<sup>36</sup>

An active choice to purchase a product might also produce a default rule that is unrelated to the product – as, for example, where purchase of a particular book created default enrollment in a health care plan, or where an active choice to enroll in a health care plan created default enrollment in a book club. In extreme cases, where disclosure is insufficiently clear, an approach of this kind might be a form of fraud, though we could also imagine cases in which such an approach would actually track people's preferences.

Suppose, for example, that a private institution knows that people who purchase product X (say, certain kinds of music) also tend to like product Y (say, certain kinds of books). Suggestions of various kinds, default advertisements, default presentations of political views, and perhaps even default purchases could be welcome and in people's interests, unfamiliar though the

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34. See Keith M. Marzilli Ericson & Andreas Fuster, *The Endowment Effect* (Nat'l Bureau of Econ. Research, Working Paper No. 19384, 2013), [www.nber.org/papers/w19384](http://www.nber.org/papers/w19384).

35. I am bracketing the possibility that entitlements are a product of a "spontaneous order" of some sort, rather than of any kind of decision. See generally Edna Ullmann-Margalit, *Invisible-Hand Explanations*, 39 *SYNTHESE* 263 (1978).

36. See Peter Bowal, *Reluctance to Regulate: The Case of Negative Option Marketing*, 36 *AM. BUS. L.J.* 377, 378–79 (1999).

link might seem. For example, the website Pandora tracks people's music preferences, from which it can make some inferences about likely tastes and judgments about other matters, including politics.<sup>37</sup>

We could also imagine cases in which people are explicitly asked to choose whether they want to choose.<sup>38</sup> Consumers might be asked: Do you want to choose your cell phone settings, or do you want to be defaulted into settings that seem to work best for most people, or for people like you? Do you want to choose your own health insurance plan, or do you want to be defaulted into the plan that seems best for people in your demographic category? In such cases, many people may well decide in favor of a default rule, and thus decline to choose, because of a second-order desire not to do so. They might not trust their own judgment; they might not want to learn. The topic might make them anxious. They might have better things to do.

Simplified active choosing – active choosing, with the option of using a default – has considerable promise and appeal, not least because it avoids at least many of the influences contained in a default rule,<sup>39</sup> and might therefore seem highly respectful of autonomy while also giving people the ability to select the default. For cell phone settings or health insurance plans, active choosers can choose actively if they like, while others can (actively) choose the default.

Note, however, that this kind of question is also an intrusion and a kind of tax. For that reason, it is not a perfect solution, at least for those people who genuinely do not want to choose. After all, they are being asked to do exactly that. (One more time: “Do you want to choose your route to the airport?” asked the taxi driver.) At least some of those people likely do not want to have to choose between active choosing and a default rule, and hence they would prefer a default rule to an active choice between active choosing and a default rule. Even that active choice takes time and effort, and imposes costs, and some or many people might not want to bother. In this respect, supposedly libertarian paternalism, in the form of an active choice between

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37. For evidence to this effect, see Natasha Singer, *Listen to Pandora, and It Listens Back*, N.Y. TIMES (Jan. 5, 2014), [http://www.nytimes.com/2014/01/05/technology/pandora-mines-users-data-to-better-target-ads.html?hpw&rref=technology&\\_r=2&](http://www.nytimes.com/2014/01/05/technology/pandora-mines-users-data-to-better-target-ads.html?hpw&rref=technology&_r=2&), and consider in particular: “During the next federal election cycle, for instance, Pandora users tuning into country music acts, stand-up comedians or Christian bands might hear or see ads for Republican candidates for Congress. Others listening to hip-hop tunes, or to classical acts like the Berlin Philharmonic, might hear ads for Democrats.”

38. See Bartling & Fischbacher, *supra* note 16, at 84, which shows that people will often say “yes,” other things being equal, thus supporting the conclusion that decision rights have intrinsic value. We can agree with that conclusion while also asserting that in some cases, the intrinsic value will be outweighed by the instrumental value of delegation (as, for example, where people believe they will err or where people are busy).

39. See Rebonato, *supra* note 3, at 5–6.

active choosing and a default, itself has a strong nonlibertarian dimension – a conclusion that brings us directly to the next topic.

### III. CHOICE-PROMOTING PATERNALISM

I now turn to the heart of my argument, which is very simple: Those who favor active choosing, and who force people to choose, are often acting paternalistically, at least if they are requiring choices in circumstances in which people would prefer not to choose.<sup>40</sup> Because those circumstances are pervasive, those who require choices are, in the relevant sense, acting as paternalists. Paternalism might be justified, here as elsewhere; but choice-promoting paternalism may intrude on autonomy, welfare, or both. It may run into the same objections that are made against paternalism of the more familiar kinds. As we shall see, however, choice-promoting paternalism also has a distinctive defense.

#### A. *Paternalism, Welfare, Autonomy*

Is active choosing paternalistic when people would prefer not to choose? To answer that question, we should start by defining paternalism. There is of course an immensely large literature on that question.<sup>41</sup> Let us bracket the hardest questions and note that while diverse definitions have been given, it seems clear that the unifying theme of paternalistic approaches is that *a private or public institution does not believe that people's choices will promote their welfare, and it is taking steps to influence or alter people's choices for their own good*.<sup>42</sup>

What is wrong with paternalism, thus defined? Those who reject paternalism typically invoke welfare, autonomy, or both.<sup>43</sup> They tend to believe that individuals are the best judges of what is in their interests, and of what would promote their welfare, and that outsiders should decline to intervene because

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40. Recall here a qualification noted in the text: If choice architects are seeking to solve a collective action problem, and requiring a choice for that reason, they are not acting paternalistically. Paternalism is involved if and when the goal is to force people to choose because choosing is in people's best interests, even if they do not see things that way.

41. See, e.g., PATERNALISM: THEORY AND PRACTICE (Christian Coons & Michael Weber eds., 2013); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988).

42. For a valuable and relevant discussion, bearing particularly on means paternalism, see B. Douglas Bernheim & Antonio Rangel, *Beyond Revealed Preference: Choice-Theoretic Foundations for Behavioral Welfare Economics*, 124 Q.J. ECON. 51 (2009). For an illuminating discussion of what is wrong with paternalism, see Nicolas Cornell, *A Third Theory of Paternalism*, 113 MICH. L. REV. 1295 (2015).

43. Rebonato, *supra* note 3, is an especially helpful discussion.

they lack crucial information.<sup>44</sup> Placing a bright spotlight on welfare, John Stuart Mill himself emphasized that this is the essential problem with outsiders, including government officials. Mill insisted that the individual “is the person most interested in his own well-being,”<sup>45</sup> and the “ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.”<sup>46</sup> When society seeks to overrule the individual’s judgment, it does so on the basis of “general presumptions,” and these “may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases.”<sup>47</sup> Mill’s goal was to ensure that people’s lives go well, and he contended that the best solution is for public officials to allow people to find their own paths.<sup>48</sup>

Mill offered an argument about welfare, grounded in a claim about the superior information held by individuals. But there is an independent argument from autonomy,<sup>49</sup> which emphasizes that even if people do not know what is best for them, and even if they would choose poorly, they are entitled to do as they see fit (at least so long as harm to others, or some kind of collective action problem, is not involved). On this view, freedom of choice has intrinsic and not merely instrumental value. It is an insult to individual dignity, and a form of infantilization, to eliminate people’s ability to go their own way.<sup>50</sup>

### *B. Paternalists Who Force People to Choose*

Whether or not these objections to paternalism are fully convincing,<sup>51</sup> they have considerable force in many situations. But there might seem to be legitimate questions about whether and how they apply to efforts to override the choices of people whose choice is not to choose. Perhaps those who want people to choose are not acting paternalistically at all; perhaps they are seeking to promote self-determination and showing people a high level of respect.

That is probably what they believe they are doing. Recall the case of the taxi driver, who may be doing just that, and who may have passenger rage (“why did you choose that crazy route?”) and tips in mind. Doctors and law-

44. See F. A. HAYEK, *THE MARKET AND OTHER ORDERS* 384–86 (Bruce Caldwell ed., 2014).

45. John Stuart Mill, *On Liberty*, in *ON LIBERTY* 5, 76 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

46. *Id.*

47. *Id.* at 77.

48. See *id.* at 76–77; see also HAYEK, *supra* note 44, at 384–86.

49. For a recent version, see Wright & Ginsburg, *supra* note 3.

50. See Cornell, *supra* note 42, at 1314–18, for a valuable elaboration of this view. For an illuminating and skeptical discussion, suggesting that overriding choices need not entail a lack of respect, see CONLY, *supra* note 3, at 33–36.

51. For a detailed discussion, see CONLY, *supra* note 3; Cornell, *supra* note 42; and CASS R. SUNSTEIN, *WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM* (2014).



yers, asking patients and clients to choose, might be analogous. If public officials promote or require choices, they might think that their own goal is to avoid any kind of paternalism. Focusing on Mill's concerns, or some variation on them, they might insist that respect for individual agency calls for a two-word proclamation: *You choose*. What is paternalistic about that?

On reflection, however, the objections to paternalism apply quite well, and so choice-promoting paternalism and choice-requiring paternalism are not oxymorons. If an outsider tells people that they must choose, she is rejecting their own conception of what they should be doing, and so endangering their welfare (on Mill's premises) and refusing to respect their autonomy. People might decline to choose for multiple reasons. Their choice not to choose is, in their view, the best way to promote their welfare, and they want that choice to be treated with respect. They might have a kind of intuitive framework: They want to minimize decision costs and error costs. When choosing would impose high decision costs (and in the sense amount to a cognitive or hedonic tax), they might not want to do it, except if incurring those costs is a good way to reduce error costs. And if they think that someone (a cab driver, an employer, a public official<sup>52</sup>) would be more likely to make the right decision, they might think that the best way to reduce error costs is not to choose. They might effectively appoint someone else as their agent; they might see themselves as the principal and delegate a choice to that agent with conviction, contentment, or pleasure.

More particularly, they might believe that in the context at hand, they lack information or expertise. They might fear that they will err. They might not enjoy the act of choosing; they might like it better if someone else decides for them. They might be too busy.<sup>53</sup> They might not want to incur the emotional costs of choosing, especially for situations that are painful or difficult to contemplate (such as organ donation or end-of-life care). They might find it a relief,<sup>54</sup> or even fun, to delegate. They might not want to take responsibility.<sup>55</sup> They might not want to pay the psychic costs associated with regretting their choice.<sup>56</sup> Active choosing saddles the chooser with responsibility for the choice and reduces the chooser's welfare for that reason.

In daily life, people defer to others, including friends and family members, on countless matters, and they are often better off as a result. In ordinary

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52. See Oren Bar-Gill & Cass R. Sunstein, *Regulation as Delegation*, 7 J. LEGAL ANALYSIS 1, 10 (2015).

53. See generally MULLAINATHAN & SHAFIR, *supra* note 13.

54. For related discussion, see Edna Ullmann-Margalit, *On Not Wanting to Know*, in REASONING PRACTICALLY 72, 78–79 (Edna Ullmann-Margalit ed., 2000).

55. See Dwenger, Kübler & Weizsäcker, *supra* note 16, for an emphasis on delegation to a randomized process.

56. Thaler, *supra* note 17. But see Jeffrey R. Brown, Anne M. Farrell & Scott J. Weisbenner, *The Downside of Defaults* 19–20 (Nat'l Bureau Econ. Research, Working Paper No. 12-05, 2012), <http://www.nber.org/aging/rrc/papers/orrc12-05.pdf> (finding higher levels of regret in cases in which people went with a default rather than making an active choice).

relationships, people benefit from the functional equivalent of default rules, some explicitly articulated, others not. Within a marriage, for example, certain decisions (such as managing finances or planning vacations) might be made by the husband or wife by default, subject to opt-out in particular circumstances. That practice has close analogues in many contexts in which people are dealing with private or public institutions and choose not to choose. They might want their rental car company, their health care provider, or their employer to make certain choices for them. Indeed, people are often willing to pay others a great deal to make such choices. But even when there is no explicit payment or grant of the power of agency, people might well prefer a situation in which they are relieved of the obligation to choose, because such relief will reduce decision costs, error costs, or both.

Suppose, for example, that Jones believes that he is not likely to make a good choice about his retirement plan, that he does not want to be educated in order to be able to do so, and that he would therefore prefer a default rule, chosen by someone who is a specialist in the subject at hand. In Mill's terms: Doesn't Jones know best? Recall Mill's insistence that the individual "is the person most interested in his own well-being,"<sup>57</sup> and the "ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else."<sup>58</sup>

Or suppose that Smith is exceedingly busy and wants to focus on her most important concerns, not on a question about the right health insurance plan for her, or even about the right privacy setting on her computer. Doesn't Mill's argument support respect for Smith's choice? Recall Mill's claim that when society seeks to overrule the individual's judgment, it does so on the basis of "general presumptions," and these "may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases."<sup>59</sup> Whatever the chooser chooses, the welfarist arguments seem to call for deference to the chooser's choice, even if that choice is not to choose. If we believe in freedom of choice on the ground that people are uniquely situated to know what is best for them,<sup>60</sup> then that very argument should support respect for people when they freely choose not to choose.

Or turn from welfare to considerations of autonomy and dignity. Suppose that Winston, exercising her autonomy, decides to delegate decision-making authority to someone else, and thus to relinquish the power to choose, in a context that involves health insurance, energy providers, privacy, or credit card plans. Is it an insult to Winston's dignity, or instead a way of honoring it, if a private or public institution refuses to respect that choice? It is at least plausible to suppose that respect for autonomy requires respect for people's decisions about whether and when to choose.<sup>61</sup> That view is especially reasonable in

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57. Mill, *supra* note 45, at 76.

58. *Id.*

59. *Id.* at 77.

60. See HAYEK, *supra* note 44, at 386.

61. See Cornell, *supra* note 42.

light of the fact that people are in a position to make countless decisions, and they might well decide that they would like to exercise their autonomy by focusing on their foremost concerns, not on what seems trivial, boring, or difficult.<sup>62</sup>

But are people genuinely bothered by the existence of default rules, or would they be bothered if they were made aware that such rules had been chosen for them? We do not have a full answer to this question;<sup>63</sup> the setting and the level of trust undoubtedly matter. But note in this regard the empirical finding, in the context of end-of-life care, that even when they are explicitly informed that a default rule is in place, and that it has been chosen because it affects people's decisions, there is essentially no effect on what people do.<sup>64</sup> This finding suggests that people are not uncomfortable with defaults, even when they are made aware both that choice architects have selected them and that they were selected because of their significant effect.<sup>65</sup> There is increasing evidence that transparency about defaults does not decrease their effects.<sup>66</sup>

### *C. Freedom and Its Alienation*

To be sure, we could imagine hard cases in which a choice not to choose seems to be an alienation of freedom. In the most extreme cases, people might choose to be slaves or otherwise to relinquish their liberty in some fundamental way.<sup>67</sup> In a less extreme case, people might choose not to vote, not in the sense of failing to show up at the polls, but in the sense of (formally) delegating their vote to others. Such delegations are impermissible,<sup>68</sup> perhaps because they would undo the internal logic of a system of voting (in part by creating a collective action problem that a prohibition on vote-selling solves<sup>69</sup>), but perhaps

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62. See Esther Duflo, Tanner Lectures on Human Values and the Design of the Fight Against Poverty (May 2, 2012) (available at <http://economics.mit.edu/files/7904>).

63. For relevant discussion, see Bar-Gill and Sunstein, *supra* note 52.

64. See George Loewenstein et al., *Warning: You Are About To Be Nudged*, 1 BEHAV. SCI. & POL'Y 35, 37, 40 (2015).

65. *Id.*

66. See Hendrik Bruns et al., *Can Nudges Be Transparent and Yet Effective?* 16–17 (WiSo-HH Working Paper Series, Working Paper No. 33, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2816227](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816227); Mary Steffel, Elanor F. Williams & Ruth Pogacar, *Ethically Deployed Defaults: Transparency and Consumer Protection Through Disclosure and Preference Articulation*, 53 J. MARKETING RES. 865, 872 (2016).

67. For an overview, see Andrew Sneddon, *What's Wrong with Selling Yourself into Slavery? Paternalism and Deep Autonomy*, 33 CRÍTICA: REVISTA HISPANOAMERICANA DE FILOSOFÍA 97 (2001).

68. See Steven Rieber, *Vote Selling and Self-Interested Voting*, 15 PUB. AFF. Q. 35, 35 (2001).

69. The basic idea is that if vote-selling were permitted, voting power could be concentrated in individuals or individual entities, and while decisions to sell might be

also because individuals would be relinquishing their own freedom. Or perhaps people might choose not to make choices with respect to their religious convictions, or their future spouse,<sup>70</sup> and they might delegate those choices to others. In cases that involve central features of people's lives, we might conclude that freedom of choice cannot be alienated and that the relevant decisions must be made by the individuals themselves.

We cannot easily specify which cases fall in this category.<sup>71</sup> People can have nice debates on that question. But even if the category is fairly large, it cannot easily be taken as a *general* objection to the proposition that on autonomy grounds, people should be allowed not to choose in multiple domains.

#### *D. Asymmetries*

Choice-promoting paternalism is no oxymoron, but it might have a distinctive appeal, and along some dimensions, it is quite different from forms of paternalism that (1) do not promote choosing, (2) actively discourage choosing, and (3) forbid choice. As a familiar example of (1), consider a default rule; as an example of (2), consider a warning or a reminder designed to persuade people to delegate authority and not to choose on their own. Examples of (2) are admittedly rare, but we could certainly imagine them in the domain of financial or medical choices. Examples of (1) are, of course, common. Examples of (3) are also common and are the most standard target of those who reject paternalism.

Those who favor choice-promoting paternalism might acknowledge the plausibility of the phrase but object that we are really dealing here with a debater's point, even a kind of pun. They might contend that their motivations are distinctly attractive, and that so long as choices are being promoted, the standard concerns about paternalism are weakened or even eliminated. I have argued that those concerns are very much in play. But those who favor active choosing might argue that they are not, in fact, showing disrespect to choosers or insulting them in any way;<sup>72</sup> on the contrary, they are honoring them.

They might add that their real concern is the welfare of choosers. Alert to the risks of mistakes on the part of choice architects, who may be ignorant or biased, or neglectful of the importance of individual circumstances, they might claim to be the most faithful followers of Mill. They might make that claim even as they acknowledge that some people choose not to choose. To be sure, a decision to delegate the route to the airport to the cab driver might not

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individually rational, the result would be bad from the standpoint of a large group of vote-sellers. *See id.* at 39.

70. For relevant discussion, see Amitrajeet Batabyal, *On the Likelihood of Finding the Right Partner in an Arranged Marriage*, 30 J. SOCIO-ECON. 273 (2001), and CONLY, *supra* note 3, at 183–84.

71. *See* CONLY, *supra* note 3, at 19–20.

72. *See* Cornell, *supra* note 42, at 1314–18.

be a mistake; but what about a decision involving one's own medical care or financial situation?

There are some fair points here. No one doubts that those who do not want to choose might object to outsiders (intermeddlers?) who seek to influence or override their desire. But it is true that choice-promoters do have distinctive motivations, associated with respect for choosers – which leads us to the question of justification.

### *E. Justified Paternalism? Of Welfare and Autonomy*

(1) *Welfare.* It is important to acknowledge that even if a chooser freely chooses not to choose, that particular choice might turn out not to be in the chooser's interest (as the chooser would define it). For that reason, choice-promoting or even choice-requiring paternalism might have a welfarist justification. Perhaps the chooser chooses not to choose only because he lacks important information, which would reveal that the default rule might be harmful or that the choice architect is ignorant or untrustworthy. Perhaps he suffers from some form of bounded rationality. A behavioral market failure (understood as a nonstandard market failure that comes from human error<sup>73</sup>) might infect a choice not to choose, just as it might infect a choice about what to choose.

A non-chooser might, for example, be unduly affected by “availability bias” because of an overreaction to a recent situation in which his own choice went wrong.<sup>74</sup> Or perhaps the chooser is myopic and is excessively influenced by the short-term costs of choosing, which might require some learning (and hence some investment), while underestimating the long-term benefits, which might be very large.<sup>75</sup> A form of “present bias”<sup>76</sup> might infect the decision not to choose. People might face a kind of intrapersonal collective action problem, in which such a decision by Jones, at Time 1, turns out to be welfare-reducing for Jones at Times 2, 3, 4, and 5.

But for those who reject paternalism on welfarist grounds, these kinds of concerns are usually a justification for providing more and better information – not for blocking people's choices, including their choices not to choose. Perhaps choosers should be nudged to choose. Choice-promoting paternalism, as a form of libertarian paternalism, might be preferred to choice-requiring paternalism.

On welfare grounds, the argument in favor of promoting or requiring choice-making is the same, in broad outline, as the argument for promoting or requiring any kind of behavior. Of course, welfarists might be wrong to object

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73. See Bar-Gill & Sunstein, *supra* note 52, at 4.

74. A good overview is Rolf Reber, *Availability*, in COGNITIVE ILLUSIONS: INTRIGUING PHENOMENA IN THINKING, JUDGMENT AND MEMORY 185, 185–203 (Rüdiger F. Pohl ed., 2017).

75. See Grüne-Yanoff & Hertwig, *supra* note 1.

76. For a summary, see SUNSTEIN, *supra* note 51, at 35–36.

to paternalism; we can easily imagine contexts in which paternalism is amply justified on welfare grounds.<sup>77</sup> But with respect to their objections, the question is whether the choice not to choose is, in general or in particular contexts, likely to go wrong, and in the abstract, there is no reason to think that that particular choice would be especially error-prone. On the contrary: In light of people's tendency to fall prey to overconfidence, the choice not to choose might even be peculiarly likely to be right, which would create serious problems for choice-requiring paternalism.<sup>78</sup> At most, concerns about individual error would seem to support choice-promoting paternalism, not a more aggressive variety.

Consider in this regard evidence that people spend too much time trying to make precisely the right choice, in a way that leads to significant welfare losses. In many situations, people underestimate the temporal costs of choosing, and exaggerate the benefits, producing "systematic mistakes in predicting the effect of having more, versus less, choice freedom on task performance and task-induced affect."<sup>79</sup> If people make such systematic mistakes, it stands to reason that they might well choose to choose in circumstances in which they ought not to do so on welfare grounds. And if choosing has intrinsic value, then people will choose in circumstances in which they would do better, at least in material terms, to make some kind of delegation.<sup>80</sup>

My aim is not to endorse the welfarist rejection of paternalism; it is only to say that the underlying arguments apply to all forms of paternalism, including those that would interfere with the decision not to choose. To be sure, some welfarists are willing to interfere with people's choices; they may well be libertarian or nonlibertarian paternalists.<sup>81</sup> The simplest points are that the standard welfarist arguments on behalf of freedom of choice apply to those who (freely) choose not to choose and that those who want to interfere with such choices might well be paternalists. Whether their paternalism is justified, on welfare grounds, depends on the context.

(2) *Autonomy.* We have seen that from the standpoint of autonomy, interference with the choice not to choose is presumptively objectionable. When cab drivers ask passengers to choose, they might be intruding on their passengers' autonomy; and when a passenger says, "you decide," he is exercising his

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77. See CONLY, *supra* note 3, at 100.

78. See Ulrich Hoffrage, *Overconfidence*, in COGNITIVE ILLUSIONS: INTRIGUING PHENOMENA IN THINKING, JUDGMENT AND MEMORY, *supra* note 74, at 291–314. For evidence that people like to choose even when they do not suffer from overconfidence, see Sebastian Bobadilla-Suarez, Cass R. Sunstein & Tali Sharot, *The Intrinsic Value of Choice: The Propensity to Under-Delegate in the Face of Potential Gains and Losses*, 54 J. RISK & UNCERTAINTY 187, 187–202 (2017). The intrinsic value of choice will lead people to choose on their own, and not to delegate, even in circumstances in which delegation, and so not choosing, is economically preferable. Choosers can be losers. *Id.* at 200.

79. Botti & Hsee, *supra* note 18, at 161.

80. See Bobadilla-Suarez, Sunstein & Sharot, *supra* note 78.

81. See CONLY, *supra* note 3.

autonomy. It is respectful of choosers, and a recognition of their dignity, to allow them to devote their attention to those topics to which they want to devote their attention.

As we have seen, the most obvious exceptions are those in which the choice counts as some kind of alienation of freedom. But perhaps there are other exceptions, raising the question whether choice-promoting or choice-requiring paternalism might often be justified on autonomy grounds. An employer might believe that employees should choose their own health insurance plan so that their own capacity for agency is exercised and increased – not only with respect to health insurance plans, but with respect to a wide range of choices that call for statistical literacy. For medical matters generally, it might be best to try to boost people's capacities, perhaps by providing simple information, perhaps by teaching statistical competence, with the thought that a successful effort on that count will increase people's autonomy in multiple domains. Similar considerations might support active choosing in the context of retirement plans. The examples could easily be multiplied.<sup>82</sup>

These points show that if the goal is to respect or promote autonomy, it is not always clear whether we should embrace or reject choice-promoting paternalism. On the one hand, people do exercise their autonomy by deciding when and whether to choose. In fact, that is a fundamental way that autonomy is exercised. That is a strong reason to reject choice-preserving paternalism. On the other hand, choice-making is like a muscle, and it can be strengthened through use. For choice architects, the most general suggestion is that on autonomy grounds, people should be able to choose, or not choose, as they see fit, but that in some circumstances, the promotion of autonomy can itself justify influencing or overriding the choice not to choose – with the strength of the argument depending on the value, for autonomy, of promoting choice-making in the particular context.

### *F. Cases*

In which cases would it count as paternalistic to reject a choice not to choose? Begin with (1), above.<sup>83</sup> Suppose that people are subjected to criminal punishment if they do not choose (for example to vote or to purchase health care) and that they wish not to choose. To know whether paternalism is involved, we need to specify the reason that people are being forced to choose. If people face some kind of collective action problem and if coercion is meant to solve that problem, paternalism is not involved. But if public officials believe that it is best for people if they choose, and if they are punishing people in order to ensure that they do what is best for them, then we do have a case of paternalism. Everything turns on the reason for the punishment.

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82. See GERD GIGERENZER, *RISK SAVVY: HOW TO MAKE GOOD DECISIONS* (2014).

83. See *supra* Part II.A.

Whether or not people should be forced to vote or to purchase health care, there is a plausible argument that in both contexts, the goal of coercion is to solve a collective action problem. But we could easily imagine cases in which no such problem is involved and in which people are being forced to choose on the ground that it is good for them to do so, even if they think otherwise. Some of those who support both compulsory voting and the “individual mandate” for health insurance believe exactly that. In the latter context, the idea might be that people suffer from inertia<sup>84</sup> or fail to make a choice that will protect them in the event that things go unexpectedly wrong. Paternalism might be justified, but we should call it what it is.

Now turn to (2), which seems to involve many of the most interesting cases. In those cases, some choosers undoubtedly have a second-order preference not to choose, and active choosing interferes with or overrides that preference. Nonetheless, choice architects are imposing a requirement of active choosing in circumstances in which some or many people, faced with the option, would choose not to choose. Is active choosing paternalistic for that reason?

As before, the answer turns on *why* choice architects are insisting on active choice. In the case of organ donation, paternalism is not involved. The goal is to protect third parties, not choosers. So too with a case in which a choice architect favors a default rule that reduces environmental harms; in such cases, third parties are at risk.<sup>85</sup> But suppose that as a condition for entering into an employment relationship, people are asked or required to make an active choice with respect to their retirement plan; suppose too that choice architects believe that it is good for them to do so, even though prospective employees disagree (and would prefer to be defaulted). If so, then choice architects are acting paternalistically. In such cases, those who insist on active choosing are hardly avoiding paternalism; they are engaging in it.

It might seem puzzling to suggest that paternalism might be involved in (3). How can it be paternalistic to say that you do not own a pair of shoes, a tablet, an automobile, or a fish sandwich unless you have actively chosen it? The question is a good one, but it should not be taken as rhetorical; everything depends on the reasons that underlie the creation of a particular system of choice architecture.<sup>86</sup> To be sure, there are many justifications for free markets and active choosing, and most of the familiar ones have nothing at all to do with paternalism. Some of those justifications speak of efficiency, others of welfare, and others of autonomy. But suppose that we think that active choosing is a way to ensure that people develop certain characteristics and

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84. See Punam Anand Keller et al., *Enhanced Active Choice: A New Method to Motivate Behavior Change*, 21 J. CONSUMER PSYCHOL. 376, 377–78 (2011).

85. See Cass E. Sunstein & Lucia A. Reisch, *Automatically Green: Behavioral Economics and Environmental Protection*, 38 HARV. ENVTL. L. REV. 127, 148–50 (2014).

86. For a valuable discussion, see Ullmann-Margalit, *supra* note 35 and accompanying text.



tastes. Choosers may gain independence, self-sufficiency, and a sense of initiative, and a system of active choosing (subject to background entitlements) may be desirable for exactly that reason. That justification has some paternalistic features insofar as it is based on the choice architect's judgment about the kinds of characteristics that people should have, regardless of what people now want.

This view is not exactly standard, but it is hardly foreign to those who emphasize the importance of freedom of choice; it plays a significant role in Mill's own defense of liberty.<sup>87</sup> It is also a cousin of an early defense of free markets, memorably sketched by Albert Hirschman, which emphasizes that free commerce creates a certain kind of culture, in which traditional social antagonisms, based on religion and ethnicity, are softened as people pursue their economic interests.<sup>88</sup> For at least some of those who prize active choosing, the concern is not softening of social divisions, but the development of engaged, spirited, informed people. Those who favor active choosing often embrace a form of liberal perfectionism, embodied in the idea that the government legitimately promotes certain desirable characteristics, on the ground that it is best for people to have those characteristics.<sup>89</sup> To the extent active choosing promotes independence, self-sufficiency, and a sense of initiative, it might be preferred on perfectionist grounds, even if people would choose not to choose.

I have said that it is not exactly usual to see those who embrace free markets as favoring any kind of paternalism, and it is often wrong to see them in that way, because other justifications are available, and because people often do in fact have a first-order desire to choose, certainly in cases that fall in category (3).<sup>90</sup> But suppose that private or public institutions favor active choosing, and reject mandates or default rules, because they want to influence people for their own good. Recall our working definition, which suggests that paternalism is involved when a private or public institution does not believe that people's choices will promote their welfare, and it is taking steps to influence or alter people's choices for their own good. If people have a second-order desire not to choose, and if active choosing overrides that choice, then paternalism is indeed involved, even in cases that fall in category (3).

#### IV. CONCLUSION

Choice can be either a great benefit, a kind of gift, or instead an immense burden, a kind of curse. It is reasonable for people not to be pleased when a

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87. See Mill, *supra* note 45.

88. See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977).

89. See RAZ, *supra* note 19. Liberal perfectionism is criticized by JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

90. See Ernst Fehr, Holger Herz & Tom Wilkening, *The Lure of Authority: Motivation and Incentive Effects of Powers*, 103 AM. ECON. REV. 1325 (2013).

cab driver asks them to specify their preferred route to the airport; it is also reasonable for people to want a delegate to make choices with respect to computer settings, medical tests and treatments, health insurance plans, and retirement plans. In evaluating private and public institutions, and people's diverse attitudes toward freedom of choice, it is crucially important to appreciate their frequent desire to choose<sup>91</sup> and also their frequent antipathy toward choosing. If either is neglected, there is a risk that both low-level policy judgments and high-level theoretical claims will go badly wrong.

Many people have insisted on an opposition between active choosing and paternalism, but the opposition is illusory, even a logical error. The reason is that some people choose not to choose, or would do so if they were asked. It is true that the power to choose may well have intrinsic value, but people often exercise that power by delegating authority to others. Nanny states forbid people from choosing, but they also forbid people from choosing not to choose.<sup>92</sup>

If choice architects are overriding the choice not to choose, they are acting paternalistically – at least if they are motivated by the belief that active choosing is good, and that people should be choosing, notwithstanding the fact that people reject that belief. Insistence on active choosing may simultaneously reduce people's welfare and insult their autonomy. The same concerns that motivate objections to paternalism in general can be applied to paternalistic interferences with people's choice not to choose. At least as a presumption, that choice deserves respect, even if outsiders wish that it were otherwise.

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91. For data, see Bobadilla-Suarez, Sunstein & Sharot, *supra* note 78, at 193–97.

92. On their reasons for doing so, see Sunstein, *supra* note 21, at 52, and in particular the discussion of learning over time. *Id.* at 44–45, 49–52.

