

Summer 2017

Libertarian Nudges

Gregory Mitchell

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Gregory Mitchell, *Libertarian Nudges*, 82 Mo. L. REV. (2017)

Available at: <https://scholarship.law.missouri.edu/mlr/vol82/iss3/9>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Libertarian Nudges

Gregory Mitchell*

ABSTRACT

We can properly call a number of nudges libertarian nudges, but the territory of libertarian nudging is smaller than is often realized. The domain of libertarian nudges is populated by choice-independent nudges, or nudges that only assist the decision process and do not push choosers toward any particular choice. Some choice-dependent nudges pose no great concern from a libertarian perspective for rational choosers so long as there is a low-cost way to avoid the nudger's favored choice. However, choice-dependent nudges will interfere with the autonomy of irrational choosers, because the opt-out option will be meaningless for this group. Choice-independent nudges should be of no concern with respect to irrational actors and in fact should be welcomed because they can promote the decision competence fundamental to libertarianism, but choice-dependent nudges can never truly be libertarian nudges.

I. INTRODUCTION

Libertarian paternalism gave birth to the nudge.¹ Under the philosophy of libertarian paternalism, a person in power seeks to create policies that steer people toward outcomes that should promote their welfare but also allow people “to go their own way.”² The classic example of libertarian paternalism is an employee pension plan in which the employer sets the default to automatic enrollment with automatic annual contributions for all employees.³ Under this plan, employees predisposed to accept the default option, due to motivational or cognitive inertia, will be sure to accrue some retirement savings, but those

* Joseph Weintraub – Bank of America Distinguished Professor of Law and Thomas F. Bergin Teaching Professor of Law, University of Virginia School of Law, greg.mitchell@virginia.edu.

1. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

2. See Cass R. Sunstein, *Nudging: A Very Short Guide*, 37 J. CONSUMER POL'Y 583, 583 (2014). The person in power may be in a private or public institution. All one needs to be a libertarian paternalist is some power over the behavior of others and a desire to use that power in accordance with the dictates of the philosophy. Thus, the head of a school cafeteria who chooses to arrange foods on a serving line or buffet in a way that promotes healthy eating would be a libertarian paternalist. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 1–3 (2008) (using the cafeteria example to introduce the idea of nudging).

3. See Sunstein & Thaler, *supra* note 1, at 1172–73.

who want to spend time deliberating over their options can choose an alternative course. The libertarian paternalist planner does engage in some paternalistic judgments when designing the policy, but those judgments are not binding; the final choice ultimately resides with those who must live under the policy.⁴ Hence, under libertarian paternalism, the central planner “nudges” in a helpful direction rather than compels or restricts choices.⁵

The nudge, however, has outgrown its libertarian paternalist origins and now encompasses any policy that does not directly involve mandates, bans, rewards, or penalties.⁶ Under this broader conception of nudging, there is no requirement that the nudge seek to promote the interests of those directly affected by the policy nor that those affected by the policy have any choice in the matter. Thus, we find attempts to push people toward other-regarding choices through the manipulation of charitable solicitation forms,⁷ as well as placing restrictions on the number of pills that can be dispensed to reduce the risk of intentional overdose,⁸ both being labeled nudges. Even policies that involve direct payments to encourage desired behaviors have been described as nudges.⁹ A cynic might contend that the nudge label is sometimes used opportunistically, as cover for run-of-the-mill paternalism.

With the proliferation of so many different nudges, with so many different justifications and implications for welfare and freedom of choice, it is a good time to return to the origins of nudging and ask whether any nudges can really

4. Sunstein, *supra* note 2, at 584.

5. See THALER & SUNSTEIN, *supra* note 2, at 5–6 (explaining how the nudge is related to libertarian paternalism).

6. *E.g.*, Cass R. Sunstein, *Nudges, Agency, and Abstraction: A Reply to Critics*, 6 REV. PHIL. & PSYCH. 511, 513 (2015) (“Whenever a government has offices, designs highways, or maintains a court system and official websites, it will nudge.”). One is tempted to equate nudging with “choice architecture,” see Richard H. Thaler, Cass R. Sunstein & John P. Balz, *Choice Architecture*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428, 428 (Eldar Shafir ed. 2012), but some things called nudges by Sunstein, Thaler, and others seem to have little to do with the way in which choice situations are constructed.

7. See Indranil Goswami & Oleg Urminsky, *When Should the Ask Be a Nudge? The Effect of Default Amounts on Charitable Donations*, 53 J. MARKETING RES. 829, 838–39 (2016); see also Sunstein & Thaler, *supra* note 1, at 1185. Originally, Sunstein and Thaler distinguished interventions such as this, which are other-regarding, from interventions that are self-regarding. The former were deemed examples of libertarian benevolence and the latter examples of libertarian paternalism. See *id.* at 1162 (“[T]he notion of libertarian paternalism can be complemented by that of libertarian benevolence, by which plan design features such as default rules, framing effects, and starting points are enlisted in the interest of vulnerable third parties.”).

8. See DAVID HALPERN, *INSIDE THE NUDGE UNIT: HOW SMALL CHANGES CAN MAKE A BIG DIFFERENCE* 77 (2015).

9. See HALPERN, *supra* note 8, at 96 (proposing the use of lottery entries based on date of filing to incentivize earlier tax filings); THALER & SUNSTEIN, *supra* note 2, at 234 (including in their lists of nudges a program under which teenage girls receive a dollar for each day they are not pregnant).

fulfill libertarian paternalism's promise of promoting individual interests without infringing impermissibly on personal liberty.¹⁰ I argue that a number of interventions now placed under the label nudge can in fact be fairly described as libertarian nudges.¹¹ In particular, libertarians should welcome nudges that seek to promote rational choice without favoring any particular choice.¹²

Nudges that fit the definition of truly libertarian nudges are what we might call instances of *choice-independent* nudging: when a “choice architect”¹³ seeks to provide information, make the decision-making process less difficult, or make one's choice easier to implement, then the design is choice independent. So long as these designs are implemented in ways that may improve decision-making competence in general or the rationality of a particular decision, while remaining agnostic about what choice should be made, there is no reason

10. Although philosophers often distinguish liberty, personal autonomy, and freedom of choice, these terms are used more loosely here to refer to the basic idea that individuals should be free to determine how they want to live to the greatest extent possible within a society of equals. This idea is meant to capture the basic proposition of libertarianism that individuals are self-owners who cannot be treated as interchangeable objects. Thus, each individual has the right to control what she does and nothing can be done to *or for* the individual without her consent, which implies the right to be free of (most) government intrusions regardless of the intent behind the intrusion. See generally Peter Vallentyne & Bas van der Vossen, *Libertarianism*, STAN. ENCYCLOPEDIA PHIL. (2014), <http://plato.stanford.edu/entries/libertarianism/>. A consumer sovereignty perspective, borne out of skepticism about the ability of policy designers to decide what is best for consumers, or a public choice perspective that worries about nudge corruption and industry capture, could lead to similar conclusions. See, e.g., Brian F. Mannix & Susan Dudley, *The Limits of Irrationality as a Rationale for Regulation*, 34 J. POL'Y ANALYSIS & MGMT. 705 (2015). The libertarian trope, which was originally chosen by Sunstein and Thaler, primarily serves as a mechanism for focusing on when nudges should be seen as promoting individual rationality and self-determination versus imposing some external conception of welfare or good judgment on the person affected by the policy. The motivation here is empirical rather than political: are there some forms of choice architecture that can promote rational choice and that therefore avoid imposing strong assumptions about who commits what decision-making errors when? Answering this question should be useful regardless of one's political philosophy.

11. My initial discussion of libertarian paternalism recognized this possibility but did not give it extended treatment. See Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1248, 1248 n.10, 1260–69 (2005). For two alternative approaches to reconciling nudging with libertarianism, see Chris Mills, *The Heteronomy of Choice Architecture*, 6 REV. PHIL. & PSYCHOL. 495, 502–04 (2015) and T. M. Wilkinson, *Nudging and Manipulation*, 61 POL. STUD. 341, 353–54 (2013).

12. Anyone who has consequentialist reasons for infringing freedom of choice or who believes that some value other than personal freedom should take priority should have no general gripe against nudging, for it is just another tool in the regulator's toolbox. For consequentialists, the question should be whether a particular nudge is a better way to achieve the desired consequences than alternative regulatory approaches.

13. See THALER & SUNSTEIN, *supra* note 2, at 3 (“A choice architect has the responsibility for organizing the context in which people make decisions.”).

to object. The motivation behind the intervention need not be paternalistic: market forces may demand more information or the availability of commitment devices. In any event, given the lack of steering, the motivation behind the intervention should be irrelevant. Furthermore, even covert choice-independent nudging presents no special libertarian concerns so long as the effect is to encourage deliberation rather than favor a particular outcome.¹⁴

In contrast, many nudges do seek to steer choosers in particular directions.¹⁵ These *choice-dependent* nudges increase the difficulty or cost of choosing one option over another, seek to take advantage of the cognitive or motivational biases of choosers to favor one choice over another, or may even seek to change preferences in a particular direction.¹⁶ A choice-dependent nudge could still be acceptable to the libertarian if the nudge allows an easy way out of the choice that has been favored by the choice architect.¹⁷ However, as we will see, this libertarian work-around will be meaningless for people who do not have the cognitive or motivational resources needed to overcome the nudge.¹⁸ For these people, the nudger effectively makes the choice. Therefore, choice-dependent nudges cannot ever be truly libertarian nudges.

We can properly call a number of nudges libertarian nudges, but the domain of libertarian nudging is smaller than is often realized. This domain is populated by choice-independent nudges, but a number of choice-dependent nudges pose no great concern from a libertarian perspective *with respect to rational choosers* where there is an easy opt-out (e.g., this will often be the case with nudges that steer through default setting). Choice-dependent nudges will interfere with the autonomy of irrational choosers, however, because the opt-out will be meaningless for this group. Thus, most nudges, whether choice-independent or choice-dependent, should be of no concern with respect to rational actors, at least not if they do provide an easy opt-out. Choice-independent nudges should be of no concern with respect to irrational actors and in fact should be welcomed, but choice-dependent nudges can never be libertarian nudges with respect to irrational actors.

14. For instance, informing decision-makers that they will be asked to explain their decisions encourages rational deliberation, and this effect can be obtained simply by the prospect of being held accountable to another. *See generally* Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999). Thus, even insincere accountability threats can improve the quality of decision-making. So long as the nudge is aimed at promoting a careful choice that the individual deems best for herself, without favoring any particular choice, the individual remains the owner of the self and the nudge arguably promotes self-ownership. However, were the accountability manipulation used to favor a particular outcome, say, by telling an employee she would be held accountable to a boss known to favor certain outcomes, then the nudgee's choices are being manipulated.

15. *See* Sunstein, *supra* note 2, at 583.

16. *See id.*

17. *See infra* Part II.

18. *See infra* Part II.

After a fuller exposition of the argument, this Article concludes by considering whether efforts to improve decision-making competence can be reconciled with libertarianism's strong opposition to paternalistic measures.¹⁹ I argue that choice-independent nudges can satisfy the libertarian requirement that the government not interfere with private exchanges except to rectify coercive transactions. Specifically, because choice-independent nudges seek to further no policy other than promoting self-ownership through competent decision-making and because some irrational consumers may be unfairly exploited by private actors, one can justify the use of choice-independent nudges on grounds of preventing this exploitation.

II. LIBERTARIAN NUDGING

We can formulate two alternative routes for nudges to avoid treading on the personal autonomy that libertarians prize. First, if an intervention is designed to help the chooser make the choice that would be made absent mistakes or irrational influences, then the intervention has promoted rather than impeded self-ownership, with self-ownership being one of the primary rights under libertarianism.²⁰

As James Child discusses, implicit in libertarian conceptions of self-ownership is the idea that citizens possess a "general competence" or "have sufficient capacities to engage in practical reasoning and to be moral agents."²¹ "General competence" as used by Child is synonymous with the capacity for rational choice:

By relying on much recent work on the notion of general competence and the related notion of a capacity for autonomy, we can formulate the constituents of the competence to enter market transactions. They would include the following deliberative capacities: (1) to acquire, understand and appraise information, which includes considering its probability of truth or falsity and its relevance; (2) to entertain a stable set of preferences by which choice among various options with various payoffs can be made; and (3) in light of this information and these values, to consider choices and weigh the possible risks, costs, and benefits of those choices. This includes the risk and cost of acting on false in-

19. *See infra* Part III.

20. I follow Child in designating self-ownership and private ownership of property as the most basic rights under a libertarian philosophy, with the right to defend oneself and one's property from takings or attacks being second-order rights. James W. Child, *Can Libertarianism Sustain a Fraud Standard?*, 104 *ETHICS* 722, 725–28 (1994). The right to own property arguably flows from the self-ownership right, at least to the extent one needs property to achieve one's goals. *See id.* at 726. Or rather, it is difficult to think of property rights as independent of the right to self-determination.

21. *Id.* at 729.

formation. These would be combined with the broadly volitional capacities to arrive at decisions on the basis of those deliberations and act in accord with those decisions.²²

Given the importance of rational choice to self-ownership, if nudges promote rational choice without controlling how that choice is exercised, then nudges promote self-ownership.²³ One may still worry that an intervention that promotes rational choice involves some slight interference with self-determination,²⁴ but the most serious objection that someone else's reasoning and preferences have determined the choice (i.e., that the policy is paternalistic) will be met. As we will see, a number of nudges take this route and thus should not worry libertarians.

A second route to defending nudges from libertarian attack, and the route that Sunstein and Thaler favor, is to create interventions in ways that allow the chooser to opt out at little or no cost.²⁵ If an intervention allows choosers easily and inexpensively to avoid the choice preferred by someone else, then the intervention should not be seen as a serious intrusion on personal autonomy, especially because it is inevitable that choice situations will be set up in a way that favors some course of action over another.²⁶ Given the inevitability of specifying a starting point and the possible influence that starting point might have, why not frame policies in ways that promote the chooser's best interests?²⁷ So long as choosers can go their own way, no one's freedom has been taken away.²⁸ Or so the argument goes. As we will see, this argument cannot save nudges that seek to do something other than promote rational choice because the opt-out provision will be meaningless for people subject to cognitive or motivational biases. Many nudges are specifically designed to take advantage of, rather than attempt to alleviate, these biases.

22. *Id.* at 729–30 (footnote omitted).

23. *See id.* at 725–29.

24. And that the intervention removes important opportunities for learning and development. *See generally* Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620 (2006). I return in Part III to the concern that intervening to promote rational choice conflicts with libertarian commitments. *See infra* Part III.

25. *See* Sunstein & Thaler, *supra* note 1, at 1161 (“The libertarian aspect of our strategies lies in the straightforward insistence that, in general, people should be free to opt out of specified arrangements if they choose to do so.”).

26. *Id.* at 1162.

27. *Id.* at 1165 (“But governments . . . have to provide starting points of one or another kind; this is not avoidable. As we shall emphasize, they do so every day through the rules of contract and tort, in a way that inevitably affects some preferences and choices.”).

28. *Id.* at 1161.

A. *Whose Preferences?*

If an intervention moves choosers toward the choices they would make were they free of cognitive and motivational biases or leaves them free to choose as they see fit (i.e., there is no effort to steer), then the strongest libertarian objections to nudging fall away. But if an intervention seeks to impose on choosers the policymaker's objective conception of welfare or seeks to promote the policymaker's interests over those of the choosers' will, then the intervention cannot be seen as preserving the liberty of those who are subject to the nudge.²⁹

Many nudges seek to take advantage of aspects of the choice situation to steer choosers in particular directions. For instance, the most popular nudge involves setting a default option in a contract or on a government form (such as the organ donation question on a driver's license application³⁰) to the choice the nudger prefers, with the hope that many people will stick with the default either because the default contains normative information or because of cognitive or motivational inertia.³¹ The assumption is that many people will fall prey to "supposedly irrelevant factors"³² of the choice situation, such as which option has been set as the default. By definition, rational actors should not be affected by irrelevant features of the environment, but many people fail to behave as the ideal rational actor would.³³ When the nudger creates policies to try to capitalize on irrational tendencies to drive people toward a particular outcome, the nudge is choice dependent.

Although many nudges do favor a particular choice, some nudges do not. Some nudges focus on improving the decision-making process itself and are agnostic as to the "right" choice to make. These nudges are choice independent.³⁴ We can identify at least three types of choice-independent nudges.

First, many interventions seek only to educate or inform and may be defended on the ground that they promote an individual's rational choice. These nudges, such as providing consumers with nutritional information or fuel efficiency information, fit squarely within traditional economic approaches to rational choice, which assume that providing information can do no harm because individuals will only use the information they deem relevant to their choices. So long as the information is not presented in a way to persuade or

29. Klick & Mitchell, *supra* note 24, at 1642.

30. See, e.g., Richard H. Thaler, *Opting in vs. Opting Out*, N.Y. TIMES (Sept. 26, 2009), <http://www.nytimes.com/2009/09/27/business/economy/27view.html>.

31. *Id.*

32. Richard H. Thaler, *Behavioral Economics: Past, Present, and Future*, 106 AM. ECON. REV. 1577, 1595 (2016).

33. Sunstein & Thaler, *supra* note 1, at 1168–69.

34. Mills discusses three nudges that may help individuals avoid choices contrary to their "authentic will" and thus that do not infringe on personal autonomy. See Mills, *supra* note 11, at 501–02. I argue that there is a broader range of nudges that can be reconciled with personal autonomy, namely, those nudges that I call choice-independent nudges. See *infra* Part II.A.

influence choices in any particular direction, then the nudge raises no serious libertarian concern.³⁵

Second, if the nudge only involves reducing “friction” or transaction costs, without favoring a particular outcome, then the nudge should likewise be unobjectionable.³⁶ Presenting information in a way to make it more comprehensible or making it easier to obtain information that a decision-maker might desire should promote rather than interfere with free choice.

Third, nudges that involve decision procedures aimed at encouraging care when choosing, or that provide the option to put in place an aid such as e-mail reminders that may help one stick with a preferred course of action, should not be objectionable from a freedom of choice perspective.³⁷ The most prominent example of this type of nudge is active choosing, or requiring that choosers acknowledge going through the decision process and prove they have considered all of the options, such as through use of a comprehension test.³⁸

These three types of nudges – educative, simplifying, and deliberative – should be welcome even to the committed libertarian. Indeed, it is hard to see how reducing unnecessary transaction costs and providing potentially useful information and decision aids have anything to do with nudging in any common-sense use of that term (i.e., nudging implies a directionality that is missing here). If the individual remains free to choose any course of action, with no attempt to influence that course, then the choice architect is not imposing her will. Nudging in the direction of rational choice should be consistent with libertarian self-ownership.

One might try to save those nudges that go beyond educating, simplifying, or encouraging deliberation to steer people toward particular choices – that is, the choice-dependent nudges – by arguing that choice-dependent nudges, if well designed, should help people make the choices that their rational selves

35. A stricter position would be that the individuals, and not government, must decide what information is needed or desired. However, to the extent government is responding to a perceived need or desire among citizens for a particular type of information (e.g., weather forecasting, flight delay information), concerns about “informational paternalism” should be minimal. A more serious paternalistic concern arises when informational nudges are designed to take advantage of the fears of the public to push behavior in particular directions or contain normative information. *See, e.g., Lucia A. Reisch & Cass R. Sunstein, Do Europeans Like Nudges?*, 11 JUDGMENT & DECISION MAKING 310, 314 (2016) (discussing a salt labeling nudge that includes a hazardous-to-your-health statement). These nudges fall into the category of choice-dependent nudges that pose no concern with respect to rational persons, who should be able to ignore them, but they will be paternalistic for irrational persons, who cannot resist the fear appeal or dispassionately analyze their own personal risk from the product or activity.

36. For examples, see Chapter 3 in HALPERN, *supra* note 8, at 62–79.

37. Another example of a commitment nudge is the gambling self-ban, under which a person with a gambling problem can register to be banned from casino admission. *See* THALER & SUNSTEIN, *supra* note 2, at 233.

38. *See* Sunstein & Thaler, *supra* note 1, at 1194.

would have made. But that counterfactual is unknowable,³⁹ and, in any event, it is hard to imagine that every rational person would have identical preferences and thus make the same choice.⁴⁰ A fundamental tenet of libertarianism is that each individual determines how he or she chooses to live and others must respect those choices so long as they do not infringe on others.⁴¹ What looks like a mistake from an outsider's perspective may not be from an insider's perspective.⁴² Just because someone makes a choice that another would not is no reason, within the libertarian framework, for denying that person freedom of choice. Likewise, just because one person makes what looks like a good choice given common-sense assumptions, such as more pleasure is good and more pain is bad, we cannot assume that others would view this choice as a good choice for themselves.⁴³

It is no response to argue that a nudge steers choosers toward a majoritarian preference.⁴⁴ First, rarely do nudgers actually seek to determine the majority's "true" preferences.⁴⁵ Rather, they usually consult their own intuitions about what those preferences are likely to be or impose their own paternalistic views about what is best.⁴⁶ Second, even if data on the majoritarian preference is available, libertarianism focuses on the preferences of the individual, not the majority:

A libertarian who wants to respect what the 'individual really wants' cannot rely on satisfying the 'average desire of the population': as the

39. One may attempt to infer the "true" preferences of inconsistent choosers (i.e., those whose choices shift in response to seemingly irrelevant changes in a choice situation), but one will always be left only with best guesses about what those preferences are. See Jacob Goldin, *Which Way to Nudge? Uncovering Preferences in the Behavioral Age*, 125 *YALE L.J.* 226, 260–69 (2015).

40. See RICCARDO REBONATO, *TAKING LIBERTIES: A CRITICAL EXAMINATION OF LIBERTARIAN PATERNALISM* 160 (2012) ("[I]f different individuals 'truly' prefer very different things, the direction of the nudge cannot coincide with the preferences of *all* the population.").

41. Child, *supra* note 20, at 726–27.

42. See *id.* at 730–31.

43. Pleasure and pain are relative, plus, libertarianism is not hedonism. Under libertarianism, the hedonist and masochist get to make their own respective choices as they see fit. See *id.* at 726.

44. Two suggestions offered to nudgers by Sunstein and Thaler for how to choose the direction for the nudge are to look at the choice that most people make over time or to somehow determine what the majority would do under conditions of active choosing. See Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 *AM. ECON. REV.* 175, 178 (2003).

45. See Goldin, *supra* note 39, at 232–33.

46. See *id.* at 233.

respect for *individual* choices is at the root of libertarianism, it is difficult to give a precise meaning to the concept of ‘libertarianism on average’.⁴⁷

The fact that many people choose a particular course of action, even under conditions that promote rational choice, is no reason to assume all persons would rationally make the same choice.

Where the nudge leaves the nudgee free to make her own choice, then no intrusion on self-ownership occurs. Choice-independent nudges satisfy this requirement by nudging only the decision-making process and not the ultimate choice. If choice-dependent nudges ultimately leave choosers free to make their own choices, then are these nudges also consistent with self-ownership? Why can we not say the nudgee’s preferences ultimately control even where the nudger favors one choice over another?

B. Low-Cost Avoidance?

Libertarian rescue of choice-dependent nudges through provision of an easy opt-out is not successful for two reasons: (a) many interventions now labeled nudges allow no opt-out at all; (b) for those choice-dependent nudges that do seemingly have an opt-out provision, that provision will not be meaningful for irrational choosers.

First, many nudges provide no possibility for avoidance. Indeed, many nudges are designed to change the preferences of those covered by the policy, often without the conscious awareness of the nudgee. For instance, all of the following have been described as “nudges” even though they aim to change preferences or alter the relative cost of options:

- Requiring movie theaters to use subliminal advertising to discourage smoking and overeating⁴⁸ [attempt to change preferences];
- Requiring movie theaters to run public education messages designed to discourage smoking and overeating⁴⁹ [attempt to change preferences];
- Requiring that canteens in public institutions have one meat-free day per week⁵⁰ [changing the option set to favor healthier foods];
- Altering people’s affective associations with fruit and vegetables using implicit priming (i.e., pairing fruits and vegetables with subliminally presented positive words or images)⁵¹ [attempt to change preferences];

47. REBONATO, *supra* note 40, at 160.

48. Reisch & Sunstein, *supra* note 35, at 314.

49. *Id.*

50. *Id.*

51. Anneliese Arno & Steve Thomas, *The Efficacy of Nudge Theory Strategies in Influencing Adult Dietary Behaviour: A Systematic Review and Meta-Analysis*, 16 BMC PUB. HEALTH 676, 681 (2016).

- Making it more difficult to order unhealthy foods⁵² [changing accessibility];

With these nudges, the nudgee has no choice in the matter and may only avoid these nudges by avoiding the situations altogether or by incurring a higher price for the disfavored option. These nudges provide no low-cost avoidance option.⁵³

Second, choice-dependent nudges that are well designed to take advantage of irrational tendencies will “trick” many people into sticking with the nudger’s choice. Rather than seeking to promote decision-making competence, as choice-independent nudges do, choice-dependent nudges seek to take advantage of cognitive or motivational biases to push people to choices the nudger thinks they should make. With choice-dependent nudges, even when it appears that the nudgee remains free to make her own choice, many have only the illusion of choice. With well-designed nudges, the nudger does exactly what private companies have long been criticized for doing: manipulating people into making the choice the nudger prefers using psychologically-informed marketing and choice architecture.⁵⁴

Consider the example of changing the default option to participation in a retirement plan from no participation. That simple change has been found to produce much larger rates of participation than requiring active choosing whether to participate or not or providing financial education on retirement options.⁵⁵ That increase in participation rates appears primarily to be the product of simple acceptance of whatever default is specified. For at least some who stick with the default, the best explanation appears to be that they view the default as the status quo and, due to loss aversion, are reluctant to move away from it; thus, they will stick with the default, whatever it is.⁵⁶ To a fully rational actor, assuming the benefits of an active choice outweigh the costs of deliberation, the specification of the default should be an irrelevant feature of the choice setting, but with respect to some persons, this feature appears to be

52. *Id.*

53. *See id.*

54. The basic idea is that the central planner can use nudging for good, in contrast to the supposed bad nudging by private companies as they try to manipulate consumer choice. *See* THALER & SUNSTEIN, *supra* note 2, at 252 (“One of our main hopes is that an understanding of choice architecture, and the power of nudges, will lead others to think of creative ways to improve human lives in other domains.”). For examples of companies attempting to use psychology to manipulate consumers, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) and Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000).

55. *See* HALPERN, *supra* note 8, at 62–64.

56. Craig R.M. McKenzie, Michael J. Liersch & Stacey R. Finkelstein, *Recommendations Implicit in Policy Defaults*, 17 PSYCHOL. SCI. 414, 414 (2006) (discussing alternative explanations for the “stickiness” of default options, including loss aversion, decision avoidance, and perceiving the default as a recommendation from an authoritative source).

choice determinative. For this group of persons, who depart from the rational ideal, the availability of an easy way around the default set by the nudger will be meaningless.

Had this group of people been nudged to engage in rational reflection, however, we could be much more confident that their choices reflect true preferences. The fact that those in favor of nudging often reject active choosing and financial education by citing evidence of the lower rates of participation that follow these choice-independent nudges reveals that the agenda behind many nudges is not to improve self-ownership but rather to move people toward the nudger's conception of the right choice.

One might argue that we should expect the choices of these initially irrational choosers to become rational over time, and thus so long as the option to change courses exist no great harm has been done to self-determination. That is, with enough experience or passage of time, can we not treat failures to opt out as evidence of rational, self-determined choices? In this vein, Sunstein and Thaler cite low opt-out rates as one way to evaluate the acceptability of a nudge that manipulates default options.⁵⁷ However, if passive, sustained acceptance of a default option signals a true preference, then we should respect the choices of the many people who accept a no-participation default for many years and thus fail to opt *in* to retirement plans – yet Sunstein and Thaler see low participation rates under the no-participation default as problematic.⁵⁸ There is no principled reason to treat passive acceptance as normatively significant only when it favors the path chosen by the nudger. Thus, absent a theory about when passive acceptance does and does not signal “true” preferences, there is no justification for treating passive acceptance of the nudged choice as evidence of the choice that would have been rationally made absent the nudge.

Continued acceptance of a choice may signify a true preference over considered alternatives, or it may signify nothing more than lassitude, ignorance, or gullibility. When acceptance follows a choice-dependent nudge, instead of deliberation prompted by choice-independent nudging, we cannot be confident that acceptance signifies a true preference rather than an effective nudge. When the nudgee sticks with the nudged choice (as many nudgers hope will happen given their views on what would be best for the nudgees), the availability of an opt-out provision does not alter the paternalistic nature of the nudger-nudgee interaction.

57. See, e.g., Thaler & Sunstein, *supra* note 44, at 178–79. (“[T]he libertarian paternalist might select the approach *that minimizes the number of opt-outs*. For example, very few employees opt out of the 401(k) plan when they are automatically enrolled, though many opt in under the standard enrollment procedure . . . With those numbers, there is reason to think that automatic enrollment is better, if only because more people are sufficiently satisfied to leave it in place.”).

58. THALER & SUNSTEIN, *supra* note 2, at 107–08.

III. CONCLUSION: BETTER THAN SOME ALTERNATIVES

Choice-independent nudges promote rational choice, leaving each individual to determine the choice best for her. Choice-dependent nudges take advantage of irrational tendencies to steer people in particular directions chosen by the nudger. Some choice-dependent nudges provide no way around the nudge (rendering the label “nudge” misleading), but some choice-dependent nudges do provide an avoidance option. When choice-dependent nudges do provide a way to avoid the nudger’s preferred choice, that opt-out clause can be exercised by rational persons but not by irrational persons if the nudge is well designed to capitalize on cognitive or motivational biases. For the latter group, even choice-dependent nudges with opt-out clauses are really just paternalistic interventions accompanied by the illusion of choice. We can conclude therefore that choice-independent nudges qualify as libertarian nudges for all persons, but choice-dependent nudges qualify as libertarian nudges only for rational actors (i.e., those who are immune to the psychological biases exploited by the nudge).

Choice-independent nudges never involve the imposition of the government’s conception of the good onto individuals. However, the government may impose its conception of a good decision-making process with some choice-independent nudges. Active choosing, for instance, forces people to deliberate over choices that they might rather not spend any time on, and in this way active choosing can be seen as a form of “epistemic paternalism.”⁵⁹ If someone has decided to accept whatever the default is with no deliberation, then compelling a more deliberative process does interfere with the original plan for choosing. However, such epistemic paternalism does no harm to the ultimate choice that was planned: there is some imposition on process but no compulsion on ends.

And only deliberative nudges raise this epistemic paternalism concern. Educative nudges provide information that can be easily ignored, and simplifying nudges reduce transaction costs without compelling any particular process. Therefore, only a small subset of choice-independent nudges raise epistemic paternalism concerns.

For this small subset of choice-independent nudges, there is some minimal intrusion on process, but that intrusion is a small price to pay compared to other alternatives government might undertake in an effort to prevent the exploitation of citizens’ cognitive or motivational weaknesses by more sophisticated bargaining partners. Indeed, many of the choice-dependent nudges and more direct forms of paternalism, such as the banning or mandating of particular contract terms and prohibitions on fraud and deception in contract, are motivated by concerns about exploitation of the psychologically vulnerable by the sophisticated, but these interventions go beyond deliberative nudges to impose the nudger’s judgments about welfare onto the nudgee.

59. Mills, *supra* note 11, at 504.

Child argues persuasively that a fraud prohibition cannot be supported by the main propositions of libertarianism,⁶⁰ but he acknowledges that his argument depends on individuals having the competence needed to enter into free market transactions, namely, the ability to acquire and evaluate information and weigh the costs and benefits of different choices.⁶¹ “For generally competent adults, the principle of self-responsibility requires them to use their competence when entering market transactions If, while having market competence, one does not pay attention and think through problems which the market presents, the principle of self-responsibility bars moral appeal outside oneself.”⁶² Therefore, the crucial starting point for libertarianism, and its strong respect for an individual’s choices and the complementary reluctance to intervene to redistribute resources when choices go bad, is that individuals have the capacity for rational choice. From that starting point, only the minimal state becomes necessary to protect against coercion or theft.

Within this framework, the epistemic paternalism of nudging toward rational choice makes other, more intrusive forms of paternalism unnecessary, and it enables a strong form of caveat emptor. A contract accompanied by a deliberative nudge should be immune to after-the-fact claims of procedural and substantive unconscionability, and even fraud. The use of deliberative nudges thus make a fuller commitment to libertarian principles possible, and libertarians should support widespread usage of deliberative nudges for this reason.

The conclusion that deliberative nudges and other choice-independent nudges are “libertarian nudges” should not be terribly surprising. The domain of nudging is now so large that it is said to include the public dissemination of large data sets,⁶³ placing energy usage labels on appliances,⁶⁴ and trying to reduce the time and effort needed to understand government regulations and messages.⁶⁵ If nudging encompasses any information disclosure that might be of use to consumers and includes efforts aimed at reducing transaction costs and encouraging deliberation, then many economists and others who give prominence to consumer sovereignty and who seek to promote rational choice have been libertarian nudgers for a long time.

60. Some contend that a prohibition on fraud is one of the market incursions governments may make to ensure well-functioning markets, primarily by treating fraud as a form of theft. Child rejects that view and argues that libertarianism requires that a strong caveat emptor standard prevail in markets, with only threats of force or theft by stealth prohibited. *See* Child, *supra* note 20, at 723–24. To Child, “theft by stealth” is limited to taking of property by someone’s property without awareness or an opportunity to consider a transaction. *Id.* at 732–33. If one takes the view that “theft by stealth” encompasses deception in transactions, then one can justify deliberative nudges and even stronger fraud protections on traditional libertarian grounds of property protection.

61. *Id.* at 729–30.

62. *Id.* at 730.

63. *See* Sunstein, *supra* note 2, at 583.

64. *Id.*

65. HALPERN, *supra* note 8, at 69–76.