Old Wine In New Casks: Libertarian Paternalism Still Violates Liberal Principles

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1. Introduction

Libertarian Paternalism purports to be a new kind of paternalism. It considers findings from behavioural research to be good reasons for influencing people's choices, the goal being to enhance their well-being. It is thus a form of paternalism. Yet, whereas standard "hard" paternalism is opposed to liberalism, Libertarian Paternalism (LP) is allegedly compatible with it. Its champions claim that it is "liberty-preserving", and that under its policies, "people should be free to do what they like" (Thaler and Sunstein 2008, 5).[1] Accordingly, they suggest that it constitutes a genuine "Third Way" between rigid paternalistic regulation and laissez-faire positions.

In this paper, I argue against this compatibility claim. I show that Libertarian Paternalism violates core liberal principles, first because it limits freedom, and secondly because it fails to justify these limitations in ways acceptable to liberal positions. In particular, I argue in section 2 that some LP policies constitute non-transparent manipulation, and hence reduce people's degree of republican liberty; and further that other LP policies interfere in choice processes, and hence reduce people's degree of negative liberty. Section 3 clarifies the LP justification of these limitations on liberty as a trade-off between liberty and welfare. Section 4 shows how the welfare notions in LP respect neither the subjectivity nor the plurality of values, and hence are not compatible with liberal positions.

2. LP limits freedom

Champions of LP argue that liberty is preserved because LP policies do not involve coercion (Thaler and Sunstein 2008, 11; Thaler and Sunstein 2003, 177). By coercion they mean actions such as bans, prohibitions and mandates. A liberal, however, will not be easily convinced that a government action is liberty-preserving just because it is not coercive in that sense. My argument in this section is that many LP policies reduce

[1] Asymmetrical Paternalism (Camerer et al. 2003) and Light Paternalism (Loewenstein and Haisley 2008) make related claims.

people's liberties, either because they increase the regulators' arbitrary power over the regulated or because they interfere with people's choice processes.[2]

LP starts from the premise that people's choices often yield results that are suboptimal by their own standards. In justifying this claim libertarian paternalists refer to "systematic biases in the way we think" (Thaler and Sunstein 2008, 19). For example, people's risk estimates are over-proportionally influenced by their recent experiences and prejudices. They detect patterns in random fluctuations, are overconfident about their abilities, and overoptimistic when it comes to their own prospects. They value losses higher than gains, tend to stick with the status quo and are influenced by the way some identical information is communicated to them. The goal in LP is to "steer people's choices in welfare-promoting directions" (Sunstein and Thaler 2003, 1159), away from such welfare-reducing biases.

Such steering policies are *manipulative*, first because the government employs them with the intention of affecting people's choices. Secondly because they deliberately circumvent people's rational reasoning and deliberating faculties, and instead seek to influence their choices through knowledge of the biases to which they are susceptible. For example, the policies "save more tomorrow" (Thaler and Sunstein 2008, 112) or "give more tomorrow" (ibid., 229) ask people whether they want to save/give a certain amount *at some point in the near future*. While some people may find the trade-off between this amount *now* and some distant benefit not attractive, the authors argue that the same people may find the trade-off between this amount *in the near future* and the same distant benefit more wholesome. Hence they suggest these policies as strategies to "nudge" people into saving or giving more. Clearly, this nudge makes use of people's hyperbolic discounting of the future, and also of their inertia. Instead of convincing them with rationally accessible arguments, the policy maker exploits their biased valuations of the future to commit them to choices they may otherwise not make.

Similarly, suggestive defaults exploit inertia. If enrolment in pension or drug plans is automatic, inertia may make many stay with this option even if it is easy for them to change the setting. The point of this policy is that many people never get around to changing what has been set (either by them or for them), and that libertarian paternalists want to make people stick with what they think is best for them.

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[2] Not all LP policies limit freedom in the ways suggested here. Some of them are implemented in companies and associations, in which case people are commonly able to avoid unwanted influences in ways that are not open to them when the government is the driving force: they can solicit another company or decline membership, for example. Other policies offer ways to improve the information available to people, providing them with better reasons to deliberate. This paper rather focuses on government policies seeking to affect deliberation in ways other than the mere provision of additional information.

Other examples of bias-exploiting policies are those that seek to counteract overconfidence. When the government mandates that all cigarette packs bear a "Smoking kills" sign, or posts anti-smoking advertisements with emotive content (such as showing repulsive images of cancer or relating smoking to suicide), it does not provide people with precise information, but addresses their visceral affects. By circumventing people's reasoning and appealing directly to their emotions the policymaker hopes to trigger an over-cautious risk-evaluation bias in the decision maker.

Not only are these policies manipulative, the extent of the manipulation cannot be fully transparent to the manipulated, for the following three reasons. First, the scientific results concerning behavioural biases are not fully transparent. In particular, the contexts in which any of these policies will be implemented are much more complicated than the experimental situations in which these regularities were observed. Thus, the *external validity* of experimental findings is in question: in this particular context, will the policy really have the influence it was designed to have? This uncertainty is compounded by the fact that behavioural science rarely offers accounts of the cognitive mechanisms underlying these behavioural regularities. It is not clear what makes people discount hyperbolically or value losses more than gains. These policies are therefore very rough tools. They manipulate choices in some way, but the extent and sometimes the direction is not transparent.

Secondly, it is not transparent when the conditions that may justify manipulative policies are satisfied. Libertarian paternalists argue that their policies act as contravening powers to existing biases (Thaler and Sunstein 2008, 37), but it is not clear when people are subject to such biases. It is only observed that they sometimes fail to choose what the policy maker considers optimal for them. It is difficult to determine the causes of this perceived failure: people may not have sufficient information to rationally choose the "optimal" option; they may have legitimate overriding reasons; or they may be biased. Although libertarian paternalists claim that the last-mentioned cause is responsible, they are hard pressed to provide evidence for the concrete cases that they seek to address. It is quite possible, therefore, that through their policies they introduce biases into deliberation processes that were not significantly subject to such influences before. This leads to a lack of transparency concerning the legitimacy of such policies.

Thirdly, the policy measures will be more effective if they are not transparent to the individuals subjected to them. If I know that you are asking me whether I want to save a certain amount in the near future *in order to manipulate* my saving behaviour, I will probably correct my bias from hyperbolic discounting, thus thwarting the manipulation attempt. Similarly, if I reflect upon the government's attempt to shock me out of smoking, it is likely that I will no longer find the drastic slogans and images shocking. Thus the effectiveness of the policies requires their being not fully transparent.

Against such criticism, Thaler and Sunstein claim that their policy suggestions are, in fact, transparent, at least in the third sense. They subscribe to the *publicity principle*, which "bans government from selecting a policy that it would not be able or willing to defend publicly to its own citizens" (Thaler and Sunstein 2008, 244). For example, they reject subliminal advertising because it does not meet this principle. What exactly, then, do they require to be publicised? They say that Save More Tomorrow meets this principle because "people are explicitly informed about the proposal" (ibid, 245), and they make similar claims about legal default rules, saying that the regulator "does not make a secret of it" (ibid.). Yet this publicity concerns, at best, the general intention to influence the achievement of a certain objective, not the specific method used. If people were informed about the reason for the Save More Tomorrow design at the time it appeared ("We hope to make you feel that this amount is not as large as you think now once the time comes to pay it") it would probably put off many. Thus, although the regulator may announce its general intention to manipulate toward this or that objective, and hence achieve *type interference transparency* (Bovens 2009, 216), it lies in the nature of LP policies that transparency about the particular instances of such policy applications (*token interference transparency* in Bovens' terminology) is often not achievable. Thaler and Sunstein's claim that LP policies are transparent in this third sense is not convincing, and they do not address the first two concerns about transparency at all.

It will therefore be hard for citizens subject to such policies to check how the government is manipulating them, as neither the effects nor the conditions of legitimacy of the policies are fully transparent, and because their application requires at least token interference intransparency. A government employing such policies therefore increases its *arbitrary power* over its citizens. An increase in arbitrary power, implying an increase in citizens' "defenceless susceptibility to interference" (Pettit 1996, 577), is a sufficient condition for a decrease in these citizens' liberty (for more details on this republican account of liberty, see Pettit 1996, 579). Thus the mere mandate to enact these policies decreases liberty, according to an influential liberal position.

LP policies not only increase the regulator's arbitrary power, however, they also increase the number of actual interferences in the process of choice, and thus constitute a kind of coercion. Thaler and Sunstein seem to favour a narrow notion of coercion that necessarily includes conditional threats or direct force, although liberal theorists often give a considerably wider definition. Berlin (1969, 122), for example, claims that coercion "implies the deliberate interference of other human beings within the area in which I could otherwise act". Many LP policies satisfy this definition. Save More Tomorrow, for example, seeks to diminish the individual's valuation of the amount to be saved in order to nudge him or her into saving it. Mandating fuel-economy stickers on the backs of cars (Thaler and Sunstein 2008, 192) affects people's valuations of some of these cars.

Cooling-off periods (such as the "civility check", ibid. 235) aims to transfer the state of a decision maker from "hot" to "cold". All these are examples of interference with a decision process by manipulating the decision maker's valuations of certain options, or manipulating these options themselves. In an otherwise non-coercive environment, therefore, the introduction of LP policies leads to an increase in interference and a decrease in personal liberty.

According to Thaler and Sunstein, governments and organisations inevitably find themselves in the role of *choice architects*, who through many of their mandated actions design the context in which people choose – even when it is not their objective to influence people's choices. Thaler and Sunstein argue that for choice architects there is no such thing as a neutral design:

> In many cases, some kind of nudge is inevitable, and so it is pointless to ask government simply to stand aside. Choice architects, whether private or public, must do something (ibid, 337).

It is thus clear that the only ethically permissible choice is to design contexts in such a way that people are best off, all things considered (ibid, 3). However, although it may be true that in many situations the government has to do something, this does not mean that all its options are similarly liberty-preserving. In particular, it does not follow that

> private and public institutions cannot possibly avoid a form of *paternalism*, so long as they establish default rules and starting points (Sunstein 2007, my emphasis).

Paternalism involves interference with the *exclusive* purpose of improving the welfare of the agent whose choice is subject to interference (Dworkin 2005). If the government decides that it has no business in improving people's welfare through its choice-architecture design, then it does not act paternalistically in this regard. Furthermore, Pettit's notion of arbitrary power requires *intentional* manipulation. Consequently, if the government does not intend to manipulate, it does not wield power over its citizens in this respect, even if the way it sets things up may (accidentally) influence people's choices. Similarly, Berlin's notion of coercion requires *deliberate* interference. If the government refrains from entertaining LP considerations it may accidentally interfere with people's choices, but it does not do so intentionally and with the purpose of nudging them. Thus, although the government has no choice but to design choice situations in some way, it may refrain from becoming a nudger - hence preserving liberties it would otherwise limit through its nudging.

Of course, people's environments are never free of interference or social manipulation. The replacement of a standard ban with an LP policy may yield an increase in liberty under a government practising hard paternalism, whereas in a convention-laden or tradition-adhering society LP policies may not change the degree of subjugation that people experience (although it may transfer the locus of power from society to government). Finally, commercial advertisement could be seen as a strong form of

manipulation, in which case LP policies could be justified as attempts to counteract these influences by manipulating people away from such temptations towards choices that are better for them. The conclusion from all these cases is that these influences have already limited people's freedom to such a degree that LP policies could only have a liberalising and liberty-increasing effect.

Three replies are relevant here. First, this paper focuses on government policies. In the spirit of comparative analysis, it investigates how the adoption of LP policies might influence the effect of government regulation on people's freedom. From that perspective, I argue, LP would worsen the liberty-preserving record of many contemporary liberal democracies. Secondly, in including non-governmental influences on liberty one would have to show that, as a matter of fact, people are in the kind of non-free state described above. Champions of LP do not offer such an argument, but rather claim that the practice is liberty-preserving in any context. I have shown in this section that this is not valid without qualification. Thirdly, with regard to overall liberty, a comparative perspective is often not enough. A policy may be part of a liberalising reform, but may still not be compatible with a liberal position. LP, however, purports to be compatible with liberalism, and not just liberalising in rather specific conditions. I investigate this compatibility claim further in the next two sections.

3. Justifying LP interference

Not every limitation on liberty constitutes a violation of liberal principles. If such limitations are appropriately justified, then they may be compatible with liberalism. The stress, however, lies on appropriate justification, according to the *Fundamental Liberal Principle*:

> freedom is normatively basic, and so the onus of justification is on those who would limit freedom, especially through coercive means. (Gaus 1996: 162-166)

What does justification mean in this context? The most common reading is that enjoying one's own liberty is limited by others' liberty (cf. "a basic liberty … can be limited only for the sake of liberty itself", Rawls 1971, 204). However, LP cannot take recourse to such a justification. Its argument to limit liberty refers not to liberty, but to welfare. Freedom is no longer normatively basic, but is derived from the consideration that granting it is a potentially good way of enhancing people's welfare:

> we believe that it would be fanatical, in the settings that we discuss, to treat autonomy, in the form of freedom of choice, as a kind of trump not to be overridden on consequentialist grounds. (Sunstein and Thaler 2003, fn. 22)

Once this trade-off is opened up, one could claim continuity between LP and "hard" paternalism: if the consequences were grave enough, freedom of choice could be legitimately curtailed. In order to counter such a continuity argument LP has to argue that the values traded for certain degrees of freedom conform to those accepted in liberal

positions. In brief, it must be shown that the persons affected consider the intervention and its results a good thing according to their own values. There are two distinct liberal positions on value.

The *subjectivist account* posits that a person's values rest on individual experiences. People's ideas about what is valuable stem from their desires or tastes, and these differ from one individual to another.

> Pleasant Tastes depend not on the things themselves, but their agreeableness to this or that particulare Palate, wherein there is great variety…(Locke 1975 [1706], 269).

According to this view, an individual's good consists in the satisfaction of preferences. A liberal policymaker would thus have to respect the subjectivity of people's values.

The *pluralist account* proposes an objective view on values, but acknowledges that there is a plurality, both in the sense that such values may not be comparable, and in the sense that they may be incompatible.

> We are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. (Berlin 1969, 169)

Because some values are incomparable it is impossible to trade the realisation of one value off against another, and because some values are incompatible it is impossible to realise them at the same time. Consequently, which of the incomparable and incompatible values an individual embraces depends on personal preference, or on an act of radical choice. According to this view, the liberal policy maker cannot refer to a uniform and general list of objective values when pursuing the good of a population. Rather, to promote the individual good is to promote the values that individuals have determined as *their* values.

The particular liberal aspect of these accounts of value is that they respect different ways of living a good life that reasonable people may pursue. Although each account takes different things as the basis of value – objective values or desires – the respect for individual judgement incorporated into each of them is based on judging value as subjective, or at least plural. Whether LP is counted as a liberal programme therefore depends on whether its notion of welfare satisfies at least one of these properties.

4. The LP notion of welfare

I will now argue that LP respects neither the subjectivity nor the plurality of people's values. This is trivially true for LP policies that are meant to promote "socially desirable

behaviour" (Thaler and Sunstein 2008, 54). Requiring a car owner to publicly display a fuel-economy sticker is presumably meant to lead people to choose not the car they really value, but the car that others think they should drive. Public shaming disregards both the subjectivity and plurality of people's values.

Furthermore, Thaler and Sunstein express scepticism about the notion of preference used in welfare economics. First, they raise doubts about the adequate measurement of welfare through revealed preferences (Thaler and Sunstein 2003, 175), but beyond the issue of measurement they also have conceptual misgivings:

> if the arrangement of the alternatives has a significant effect on the selections the customers make, then their true "preferences" do not formally exist. (ibid., 1164)

The authors consider this condition to be satisfied in many of the situations they discuss. Their argument thus seems to rule out the ability of LP to take recourse to the subjective account of value. However, as discussed above, the central tenet of LP is that people often make choices that are non-optimal *by their own standards*. To make sense of this claim, they still have to attribute some kind of welfare judgment to people by which to judge their actions as suboptimal. Without recourse to the notion of people's actual preferences, how could they do so?

The answer lies in an attempt at preference reconstruction: instead of trying to determine people's actual preferences, the authors reconstruct preferences under ideal and non-biased conditions.

> In some cases individuals make inferior decisions in terms of their own welfare—decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of self-control. (Sunstein and Thaler 2003, 1162)

This reconstructive effort could be interpreted in two ways. It could refer to efforts in refining people's *actual* preferences by providing better information, offering time to reflect, or providing training. Alternatively, it could refer to a third party's efforts to counterfactually reconstruct people's preferences. Thaler and Sunstein apparently had this second option in mind: counterfactually reconstructed preferences, they declare, are the relevant welfare judgments. This reconstruction may involve taking recourse to other people, for example those in similar situations but with fully informed preferences (in which the notions of similarity and full information need to be specified). Alternatively it could involve a kind of thought experiment concerning the preferences people would have in ideal conditions (which would require specifying this ideal and proving a theory that guides the reconstruction).

This proposal is problematic in at least three ways. First, it is conceptually shaky: it is unclear what complete information is, and what unlimited cognitive abilities and self-control means. As philosophers have argued, there is no "highest-resolution" description of the world. Instead, what counts as fully informed depends on a rationality judgment with respect to the decision maker's goals, cognitive abilities and context (Broome 1991,

107-115). Standards of complete information are as pluralistic as values are, and hence do not constitute a universal criterion for judging preferences.

Secondly, even if this conceptual hurdle could be overcome, on what theoretical basis would the thought experiment proceed? In order to preserve subjectivity, a reconstruction would presumably investigate how an individual would change his or her actual preferences if provided with full information. Yet theories about preference change are in their infancy, so that a preference reconstructor would have little more than commonsense and intuition to rely on when saying what people would prefer if they were well informed and had full cognitive capacities.

The conceptual and theoretical problems feed into the third problem, which is crucial to the present discussion. The subjectivity of value is closely linked with that person's experiences. Confronting people with novel information will inevitably change some of their preferences. Given the arbitrariness of choosing the level of information, and the uncertainty of how preference changes are to be reconstructed, the reconstructive method is likely to wash out the subjective character of people's evaluations. LP policies that use reconstructed preferences as welfare criteria are likely to violate the subjectivity property of values (cf. Rosati 1996, 307-308).

In any case, in practice LP has given up the subjectivity property, offering instead accounts of welfare based on aggregate measures, or on material payoffs. I argue that none of these welfare concepts can satisfy the plurality criterion.

Some authors link welfare judgments to aggregate data. Claiming that an increase of 401(k) participation would be highly beneficial, for example, they point out that "the U.S. aggregate saving rate is too low" (Camerer et al. 2003, 1227). This observation does not differentiate between the benefits of such a policy for different people, but just takes the judgment that the average is "too low" as an indicator that the majority would benefit from it. Similarly, Sunstein and Thaler (2003, 1194) propose selecting "the approach that the majority *would* choose if explicit choices were revealed and required". Again, the behaviour of the group supposedly indicates the welfare of individuals. In mixing people with potentially widely differing capacities and characteristics in an aggregate measure, LP policies violate the pluralism of value.

In other cases, welfare is taken to be the material payoff of an activity (or the respective expected payoff) even though these activities may have relevant non-material welfare effects for the individuals pursuing them. For example, Camerer et al. argue that lottery-ticket purchases may be based on miscalculating the effects of large gains with small probabilities, and suggest that radical information campaigns will rectify this problem (e.g., printing on the ticket: "to win on this ticket is as likely as being hit by lightening over the course of the next week"). They suggest that such a campaign will lead to a welfare gain, if welfare is measured as "the odds of winning a lottery and of the real payoffs in terms of the after-tax discounted present value of earnings" (Camerer et al. 2003, 1231).

However, it is not obvious that this is the correct way to measure welfare in this case. Many people, I suspect, do not buy lottery tickets because they hope to improve their income in this way, they rather see it as a recreational activity that gives them a feeling of adventure or a modicum of recklessness that their day-to-day lives lack. Informing them about the real odds will not help them in achieving what they desire, although a (implicitly derisive) message printed on the ticket will change the nature of the good through social stigmatisation. In these cases it seems that LP concentrates too much on material gain, to the detriment of more idiosyncratic (and more difficult to measure) values. Such a focus neglects the plurality of values.

In yet other cases, LP seems to privilege certain temporal perspectives in its account of welfare benefits. For example, it judges higher 401(k) participation beneficial because of "people's self-reports that they save less than they would like" (Camerer et al. 2003, 1227). Such self-reports may not be very surprising, as those who splash out early in life may complain about their relatively frugal means later on. This does not necessarily imply that they now truly wish they had done things differently, or that they would do things differently if they could. Talk, after all, is cheap, and people's discounting of the past may be as hyperbolic as their discounting of the future. Taking people's opinions from the time *after* the money is spent as an expression of their welfare judgments thus may lead to highly biased value judgments.

LP, however, seems to suggest that such a possible bias is not very harmful, as "the costs of having too little saved up for retirement are typically greater than the costs of having saved too much" (Thaler and Sunstein 2003, 178). Yet, by allowing such a bias in their welfare argument they do not appreciate this plurality of how people value inter-temporal distributions.

A similar case is that of impulsive decisions. LP posits that, "the potential benefit of the cooling-off period is that some irrational types might reverse a costly decision to undertake the action" (Camerer et al. 2003, 1238-9). How is costly specified here? "Living fast" and "following one's impulses" can be part of a person's individual concept of life, and as such may be central tenets of value. The attempt to prevent impulsive decisions (in purchases, in marriage, in suicide) puts a positive spin on decisions reached after long deliberation, which may not reflect some people's true values.

I therefore conclude from these examples that the notions of welfare employed do not cohere with any of the liberal approaches to value. In particular, the welfare notions of LP respect neither the plurality nor the subjectivity of people's values.

5. Conclusion

Advocates of LP argue that it is legitimate to limit people's liberties if it improves these people's welfare. A closer look at the welfare notions used reveals that they respect

neither the subjectivity nor the plurality of people's values. Thus its justification of the liberty-welfare trade-off is not compatible with liberal principles. Given that some LP policies limit liberty, Liberal Paternalism cannot justify these limitations in accordance with liberal principles. I therefore conclude that LP is not compatible with liberal positions.

This incompatibility does not necessarily imply that the LP approach has to be rejected. From a welfarist point of view, some of its policies may lead to significant improvements. Yet, in the light of the argument presented here, any justification of LP policies must appeal to traditional paternalistic principles, as there is no categorical difference between "libertarian" and other forms of paternalism. Acknowledging that it is the same old wine, merely presented in a beguiling new cask, may actually make it more palatable than it currently is.

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