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Requiring choice is a form of paternalism

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Abstract
Many people insist on drawing a line between active choosing and paternalism, but that line is often illusory. Whenever private or public institutions override people's desire not to choose, and insist on active choosing, they are likely to be behaving paternalistically, through a kind of choice-requiring paternalism. Active choosing can be seen as a form of libertarian paternalism if people are permitted to opt out of choosing in favor of a default (and in that sense not to choose). This is a distinctive approach –"simplified active choosing"– and in many contexts, it has considerable appeal. By contrast, active choosing is a form of nonlibertarian paternalism insofar as people are required to choose. These points have implications for a range of issues in law and policy, suggesting that those who favor active choosing, or insist on it, may well be overriding people's preferences (for better or for worse).

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Choices and default rules

Consider the following problems:

1. A private company is deciding among three options: to enroll people automatically in a health insurance plan; to make them opt in if they like; or to say that as a condition for starting work, they must indicate whether they want health insurance, and if so, which plan they want.

2. 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.

3. A social network site is deciding whether to adopt a system of default settings for privacy, or whether to require first-time users to say, as a condition for access to the site, what privacy settings they would prefer.

In these cases, and countless others, an institution is deciding whether to use some kind of default rule or instead to require some kind of active choice. 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.

In recent years, there have been vigorous debates about freedom of choice, paternalism, behavioral economics, individual autonomy, and the use of defaults (see, e.g., Conly (2012); Thaler and Sunstein (2008); Bubb and Pildes (2014); Wright and Ginsburg (2012); Rebonato (2012)). Invoking recent behavioral findings, some people 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 "libertarian paternalism" (see Camerer (2003) and Sunstein and Thaler (2003)). Others contend that because of those very errors, some form of coercion is required to promote people's welfare, and that the argument for choice-denying or nonlibertarian paternalism is much strengthene (see Conly (2012) and Bubb and Pildes (2014)).

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 (see Glaeser (2006)). The "knowledge problem" potentially affects all decisions by government (Hayek (1945)), and behavioral findings seem to compound that problem, because they suggest that identifiable biases will accompany sheer ignorance. The emerging field of "behavioral public choice" draws attention to that possibility (see Schnellenbach and Schubert (2014)). 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. 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. In many contexts, an insistence

on active choosing is a form of paternalism, not an alternative to it. The central reason is that some people choose not to choose. Sometimes they make that choice explicitly (and indeed are willing to pay a considerable amount to people who will choose for them). They have actively chosen not to choose.

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. To this extent, active choosing counts as paternalistic. To be sure, nanny states forbid choosing, but they also forbid the choice not to choose. *Choice-requiring paternalism* might be an attractive form of paternalism, but it is no oxymoron, and it is paternalistic nonetheless.

Paternalism, welfare, autonomy

Is active choosing paternalistic, when people would prefer not to choose? To answer that question, we have to start by defining paternalism. There is of course an immensely large literature on that question (see Coons and Weber (2013) and Dworkin (1988)). 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*[1].

What is wrong with paternalism, thus defined? Those who reject paternalism typically invoke welfare, autonomy, or both[2]. 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 they lack crucial information (Hayek (2013)). 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"– Mill (2002)– and the "ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else". 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".

There is an independent argument from autonomy, 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.

[1] For a valuable and relevant discussion, bearing particularly on means paternalism, *see* Bernheim and Rangel (2009).

[2] Rebonato (2012), is an especially helpful discussion.

Whether or not these objections to paternalism are convincing, they apply to people whose choice is not to choose. People might decline to choose for multiple reasons. They might believe that 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 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, or even fun, to delegate. They might not want to take responsibility. They might be too busy. They might not want to pay the psychic costs associated with regretting their choice. Active choosing saddles the chooser with responsibility for the choice, and reduces the chooser's welfare for that reason.

Suppose, for example, that Jones believes that he is not likely to make a good choice about his retirement plan, 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? 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? In such cases, the welfarist arguments seem to argue in favor of 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, then that very argument should support respect for people when they freely choose not to choose.

Or suppose that Winston, exercising his or 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. That view seems especially reasonable in view 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.

Justified paternalism?

It is important to acknowledge that the choice not to choose may not be in the chooser's interest (as the chooser would define it). For that reason, 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 suffers from some form of bounded rationality. A behavioral market failure (understood as a nonstandard market failure

that comes from human error[3]) 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[4]. 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. A form of "present bias"[5] 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, 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. In these respects, the welfarist objections to paternalism seem to apply as well to those who insist on active choosing. Of course welfarists might be wrong to object to paternalism. 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. In light of people's tendency to overconfidence, the choice not to choose might even be peculiarly likely to be right, which would create serious problems for choice-requiring paternalism.

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, vs. less, choice freedom on task performance and task-induced affect"[6]. 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.

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. The central 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. And from the standpoint of autonomy, interference with the choice not to choose seems objectionable as well, unless it is fairly urged that that choice counts as some kind of alienation of freedom.

[3] See Bar-Gill (2012); Sunstein (2014)
[4] A good overview is Reber (2012).
[5] For a summary, see Sunstein and Thaler (2003).
[6] See Botti and Hsee (2010), at 161.

Conclusion

Choice can be either a great benefit, a kind of gift, or instead an immense burden, a kind of curse. 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 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 in many contexts, 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. To be sure, 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.

If choice architects are overriding that particular choice, they may well be acting paternalistically –at least if they are motivated by the belief that active choosing is good, 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.

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