

Saving Libertarian Paternalism

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## I. Introduction

Much discourse in political philosophy normally centers on a struggle between two ideals. On the one hand, good government should preserve the ability of individuals to pursue their own ends—in other words their freedom. On the other, government can create laws and rules that ensure individuals do what is good for their welfare—regardless if those same individuals would agree that what they are given is a benefit<sup>1</sup>. The Classical Liberal movement<sup>2</sup> is the primary advocate of the principle that freedom ought to be ensured. Unfortunately, human nature rarely aligns our free choices with our objective best interests due to a combination of our inferior ability to reason and our limited knowledge. Supporting free choice then normally assumes that individuals will be less well-off with regard to their welfare. Due to this, Paternalism and Libertarianism are constantly at odds<sup>3</sup>. This results in a constant dialogue between the two sides, attempting to determine the value of freedom. In many cases, limits on absolute freedom are considered appropriate (for example, Mill’s prohibition on selling oneself into slavery<sup>4</sup>). In others, the value of our welfare is considered with regard to its cost in freedom and is not found to outweigh it, all things considered.

Into this discussion enters “Libertarian Paternalism”. Described as the “Third Way” by Cass Sunstein, a leading proponent of Libertarian Paternalism, Libertarian Paternalism undertakes the ambitious project of creating policy models—known as

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<sup>1</sup> For a common example, consider laws that require motorcyclists wear helmets at all times.

<sup>2</sup> The Classical Liberal movement is commonly considered an equivalent to the political philosophy of the Libertarian Party.

<sup>3</sup> See Boaz, David, *Libertarianism: A Primer*

<sup>4</sup> Mill, *On Liberty* Chapter 4

choice architectures—where both Paternalists and Liberals can walk away happy. Further than this, Libertarian Paternalism claims the ability not only to satisfy the fundamental aims of both Libertarianism and Paternalism, but also to avoid having to compromise any of their values in order to accept the Libertarian Paternalist’s position.

To understand its claims, first I should explain what Libertarian Paternalism is. Traditional paternalism takes two forms—hard and soft. Hard paternalism is the type of paternalism most often talked about, this is where a direct ban or quota is put on a specific good or action such that individuals are not allowed to (or alternatively, are required to) pursue that good or action. Soft paternalism on the other hand does not emphasize results but rather processes. Whereas a hard paternalist is concerned with supporting the welfare of an individual regardless of their preferences, a soft paternalist is interested in ensuring that the individual is acting voluntarily. As such, soft paternalist policies do not make use of outright bans or quotas, but place checkpoints and other structures into choices that make sure that individuals are choosing things voluntarily.

Libertarian Paternalism is a distinct type of soft paternalism. Libertarian Paternalism operates by changing the structure in which individuals make choices—called a choice architecture—in order to influence the eventual outcome of that choice. The process of changing this choice architecture is referred to in the literature as “nudging<sup>5</sup>”. What makes Libertarian Paternalism a distinct approach from other methods of soft paternalism is in how choice architects determine what the eventual preferred choice should be. According to Sunstein and Thaler, the proper use of this choice

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<sup>5</sup>*Nudge*, p. 6

architecture is in cases where our regularly irrational behavior would impede on our ability to make the decisions that we *truly* wished to make<sup>6</sup>. Therefore, Libertarian Paternalists do not just look out for our objective well-being, they also seek to support our preferences by removing obstructions such as low self-control. However, Libertarian Paternalists also show that our preferences are often malleable and not set, and in those instances will use choice architecture to influence our decisions while maintaining our freedom to choose otherwise if our preferences become more distinct.

It is important to note that choice architecture and nudges are a part of both the private and public domains. Advertisements, salesmen, and those in marketing commonly use a form of nudging to convince you to buy a product, the government sets default rules on some laws to ensure individuals receive the benefits of the law's protections (such as the Age Discrimination in Employment Act or ADEA<sup>7</sup>), and some retirement plans such as the Save More Tomorrow plan utilize behavioral patterns to increase retirement savings<sup>8</sup>. Having been developed out of research in Behavioral Economics, nudges and the Libertarian Paternalism choice architecture are increasingly being studied and implemented into different agencies and corporations as an effective tool to make policy or sell product. Serious investigation needs to be conducted to determine the appropriateness of using cognitive deficiencies in consumers and citizens in order to achieve some outcome.

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<sup>6</sup> Ibid

<sup>7</sup> The ADEA states that individuals are to be protected from age discrimination in retirement decisions unless they provide explicit written consent to waive that right and

<sup>8</sup> "The Age Discrimination in Employment Act of 1967." *U.S. Equal Employment Opportunity Commission (EEOC)*

Objections to Libertarian Paternalism and nudging in the literature come in two major categories—practical and theoretical objections. Practical objections to Libertarian Paternalism have a wide literature behind them and focus on the question of whether or not Libertarian Paternalists can do what they claim to do. While interesting and somewhat important to the topic at hand, I will not be addressing these arguments in detail. Instead, I will focus on a theoretical objection to Libertarian Paternalism. This objection states that Libertarian Paternalists, if they are to give a more complete consideration to the freedom of choice—which they claim to support—would need to significantly limit the kinds of nudges and other choice architectures that are considered appropriate. Furthermore, some nudges might actually serve to enhance freedom of choice. It is my position that Libertarian Paternalists would wish to emphasize using nudges that enhance freedom of choice where appropriate, and that avoiding use of those nudges would need to be justified through arguments that are not Libertarian Paternalistic in nature.

In order to make this argument, I will first give a brief introduction to Libertarian Paternalism. This introduction will cover what Libertarian Paternalism means, what its tools such as nudging mean, and what restraints Libertarian Paternalists give themselves in order to constitute the “Third Way” between Libertarianism and Paternalism. The introduction will also cover some objections to the project of Libertarian Paternalism, and situate this paper in the literature accordingly. Included in this background will be preliminary definitions of major terms that will be used throughout the paper in order to ground discussion in shared terminology.

Next I will discuss where Libertarian Paternalists might lose the support of those who value freedom of choice highly. This will involve an evaluation of five different levels of Libertarian Paternalism and which of those levels might automatically infringe on the chooser's freedom of choice. I will also go over two major instances where Libertarian Paternalists as the literature currently supports would agree to certain nudges that do not align with the values Libertarian Paternalists claim to hold. The purpose of this will be to provide a clearer view of the kind of Libertarian Paternalism that can be defended by someone who values freedom of choice.

Next I will discuss how Autonomy interacts with Libertarian Paternalist choice architecture and nudges. This will involve both a thorough defense of the definition of autonomy given in Section II (p.7) and an exploration into why we might value autonomy with regard to freedom of choice. I will also argue that autonomy is a necessary but not sufficient condition of freedom of choice. Finally, I will evaluate based on the definition of autonomy given each level of Libertarian Paternalism and its effects on choosers.

After discussing what this impact means for choice architects, I will discuss two types of Libertarian Paternalism—coerced choices and procedural constraints—that can be used to enhance the decisional autonomy of choosers and enhance the project of Libertarian Paternalism. Finally, I will conclude with a discussion of how nudges and choice architecture can be used in both private and public domains, with a special emphasis on criteria that will help choice architects decide when nudges are both appropriate and the best option to achieve a policy or corporate goal.

## II. Background and Important Concepts

Cass Sunstein and Richard Thaler officially coined the term “Libertarian Paternalism” in a paper in the 2003 edition of the *American Economic Review*. This paper attempted to defend libertarian paternalism as an approach that “preserves freedom of choice but that authorizes both private and public institutions to steer people in directions that will promote their welfare.”<sup>9</sup> An extended paper appeared in the *University of Chicago Law Review* later that year with more details on what Libertarian Paternalism is and what its limitations are<sup>10</sup>.

Libertarian Paternalism is a policy application of research conducted by Behavioral Economists. Behavioral Economics is a branch of the discipline that recognizes that human beings don’t act in a purely rational manner as economists had previously assumed. Behavioral Economists have identified and tested several ways that individuals choose non-rationally even when the stakes are great. People suffer from biases in our thinking such as the status quo bias, a tendency to inertia, anchoring effects, framing effects, time-displaced rationality, and others. The status quo bias is the tendency of individual choosers to prefer a decision that closely mimics their current state. Inertia is the tendency to not change from a default position, even if the alternative position would be immensely beneficial (as it was in the pre and post-tax parking case enumerated in “Libertarian Paternalism is not an Oxymoron “as discussed in Section VI (p.56). When we do not know much about how to value something (such as how much money we should pay to improve safety of the road), we are susceptible to Anchoring

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<sup>9</sup>Sunstein and Thaler, *Libertarian Paternalism*, p. 179

<sup>10</sup>Sunstein, Cass R. and Richard H. Thaler. “Libertarian Paternalism Is Not an Oxymoron.” *The University of Chicago Law Review* 70, no. 4 (Fall 2003): 1159-1202

effects. If asked to place a value on safety (according to our example) by stating it is more or less valuable than X amount of money, whatever the first X is that we are shown will have a significant effect on the eventual value we place on improving safety<sup>11</sup>. That initial value is our anchor. Framing effects occur when there are discrepancies between how often individuals will choose between two courses of action that are logically equivalent. For example, if a doctor presents to a patient that they can have a surgery with a 90% chance of success, that patient will choose to have the surgery far more than if the doctor presents the chance of failure at 10%<sup>12</sup>. Finally, individuals show fluctuating valuations for values later into the future. On a rational calculus, the value of the life of someone you do not know today and the value of one life of someone you do not know 100 years from now should have an equal value. However, Sunstein and Thaler discuss that the research shows people have no preference between saving one life today or 44 lives in 100 years<sup>13</sup>. What should be logically equivalent, a life for a life, seems to not be valued consistently by choosers. If people's decisions are drastically different even in logically equivalent situations, can we really claim that preferences are well-formed or set? Can we claim that people have preferences at all? This justifies in Sunstein and Thaler's view that in some situations nudges that support chooser's welfare-maximization are permissible.

Sunstein and Thaler use this conclusion to support the argument that in some cases acting paternalistically is inevitable. While it is possible to have some qualms with their use of the term paternalistically—some nudges they suggest such as “Give More Tomorrow” are not in service to the chooser's well-being but the well-being of others as

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<sup>11</sup>Sunstein and Thaler, *Libertarian paternalism is not an Oxymoron*, p. 1178

<sup>12</sup> *Ibid.* p. 1179

<sup>13</sup> *Ibid.*

is shown below—they nevertheless make a strong argument for at least the inevitability of nudging. In cases where our preferences are not well-ordered or fully formed, the presentation of choices and information drastically changes our eventual behavior. It is impossible then to create a value-neutral presentation, especially once we know about these effects. If we are a choice architect who is determining how to structure a choice (such as an administrator of a cafeteria determining what order to present the available food), and we know that the preferences of patrons is not well-ordered or fully formed, then we know that no matter what structure we provide there will be some impact on the patron’s choice. Once knowing this, any structure that is determined will reflect the values that the choice architect determines is important. Sunstein and Thaler argue that we can try to choose pure randomness, but even that is a choice and will have an effect on choosers. Instead, Sunstein and Thaler argue that choice architects ought to set up choices that will make the choosers best off, rather than trying to track preferences that do not exist<sup>14</sup>.

Taking into consideration both the permissibility—due to lack of well-formed preferences—of framing choices in a welfare-promoting way and the opportunity to do so—due to the non-rational behavior of choosers in some circumstances—Libertarian Paternalists argue that choice architects can frame choices in such a way that individuals choose what is “best” for them almost without fail. In addition, they will choose this without being limited in their choice set—thereby preserving freedom of choice and supposedly satisfying Libertarian criticisms of paternalistic intervention. In some cases, Libertarian Paternalism choice architecture simply manifests itself in a feature of a

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<sup>14</sup> Ibid, p.1165

policy—you are required to obtain written notice that you waive your rights under the ADEA. In others, Libertarian Paternalistic choice architecture takes the form of a nudge. While the definition of a nudge is sometimes hard to extract—nudges are commonly defined by example rather than explicitly—Hausman and Welch define a nudge as “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives”<sup>15</sup>.

One example of nudging is found in the Save More Tomorrow plan. Put forward by Thaler and Benartzi, the Save More Tomorrow (or SMarT) plan uses a default enrollment strategy along with avoiding the loss-aversion heuristic to increase savings rates of employees who wish to save for retirement<sup>16</sup>. The SMarT plan enlists employees to contribute any raises they receive after a certain date set in the future into savings rather than into their take-home pay. This avoids the loss-aversion heuristic because employees never see a reduction of their nominal take-home pay (and therefore feel like they aren’t losing anything). Risk aversion is only avoided because individuals rarely acknowledge that due to inflation their real earnings will diminish in the future even if their nominal earnings do not. While it is true that individuals will not see their raise and may feel cheated out of that raise, studies show that individuals react less poorly to giving up earnings they do not already have (forgoing gains) than to giving up earnings that they already receive (receiving losses)<sup>17</sup>. This also avoids individuals succumbing to a lack of

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<sup>15</sup>Hausman, Daniel M. and Brynne Welch. “Debate: To Nudge or Not to Nudge.” *The Journal of Political Philosophy* 18, No. 1 (March 2010): 123-136.

<sup>16</sup>Thaler, Richard H. and Shlomo Benartzi. “Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving.” *Journal of Political Economy*, no. 1 (2004): 164-187. Selections (Pages 164-170 and 185-187)

<sup>17</sup>Ibid. p. 168

self-control—the decision to save is made when it has minimal impact on the chooser and at a time when self-control isn't relevant. Furthermore, this strategy co-opts two non-rationalities found in human behavior. The first is time-sensitivity for values. Money donated in the future is considered far less valuable than money you would have to part with now. The second is inertia. Once individuals have been enrolled in the SMarT plan, they are increasingly unlikely to go through the process of opting out of that retirement savings program. In some cases, these retirement plans have a 90% continuation rate<sup>18</sup>.

Nudges are possibly the most controversial of a choice architect's tools, and also the most emblematic of the Libertarian Paternalist's goals. When done properly, nudges will greatly increase the probability that individual's will be better off while still maintaining the entire choice set available to those individuals. In cases where preferences are not well-formed or even do not exist, nudges both perfectly match the goals of paternalism while refusing to impede on the libertarian value of freedom of choice.

While promising as a policy tool, many object to Libertarian Paternalism—and nudges in particular. Whitman and Rizzo argue that Libertarian Paternalism exists on a slippery slope and that the program not only can lead to corruption and misuse, the ambiguity it requires to operate make that slope much more likely to slide down<sup>19</sup>. While Whitman and Rizzo focus exclusively on Libertarian Paternalism as it effects the public sphere, their concerns about a “slippery slope” are almost more important when

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<sup>18</sup> Ibid. p. 169

<sup>19</sup> Whitman, Douglas Glen and Mario J. Rizzo. “Paternalist Slopes.” *NYU Journal of Law & Liberty* 2, No. 3 (January 2007): 411-443

considering the private sphere where the slope is much steeper. Mitchell argues that Sunstein and Thaler's assumption that paternalism is inevitable is a result of a logical error<sup>20</sup>. He further argues that the "Libertarian" portion of Libertarian Paternalism rests on a trivial definition of Libertarianism and that to maintain this title choice architects would need to abide by much stronger rules: namely that choice behavior needs to be evaluated through the quality of individual consent rather than through an objective consequentialist view as supported by Libertarian Paternalists<sup>21</sup>. Wright and Ginsburg give several objections not just to Libertarian Paternalism but to the Behavioral Economics that it rests on<sup>22</sup>. They argue that, among practical problems with adequately tracking preferences and maintaining an objective outlook of well-being, nudges interfere with the process aspect of freedom or decisional autonomy. Wright and Ginsburg define the process aspect of freedom as the value that comes from making choices rather than from the outcome of those choices. Wright and Ginsburg claim that there is developmental and symbolic value in an agent making a choice him or herself even if it results in the same outcome as another individual making that choice for the agent. Mitchell is joined by Jonathan Klicking a paper that follows up on this objection, stating that a neglect for the cost of nudges to autonomy is a moral hazard and choice architects ought to include that cost into decisions on when to nudge or not to nudge<sup>23</sup>. For Mitchell

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<sup>20</sup> Mitchell, Gregory. "Libertarian Paternalism is an Oxymoron (Review Essay)." *Northwestern University Law Review* 99, No. 3 (Spring 2005): 1245-1277

<sup>21</sup> Ibid. p. 1260

<sup>22</sup> Wright, Joshua D. and Douglas H. Ginsburg. "Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty." *Northwestern University Law Review* 106, No. 3 (Summer 2012): 1033-1090. Selections (pages 9-26, 37-57, and 71-75).

<sup>23</sup> Klick, Jonathan and Gregory Mitchell. "Government Regulation of Irrationality: Moral and Cognitive Hazards." *Minnesota Law Review* 90. (2006) p. 1620-1664

and Klick the cost of nudging to autonomy is a diminishment in the autonomy of the chooser. This cost isn't one that is easily quantifiable, but when considering a choice architecture on a broad scale one must consider that a nudge might diminish a chooser's autonomy in a meaningful way and thus must provide immense benefit elsewhere if we are to accept nudging as the proper course of action. Finally, Hausman and Welch argue that nudges, even in their best form, are a form of one agent exerting his or her will over another and therefore carry some cost to autonomy. They echo Mitchell and Klick in stating that nudges (or shaping in their words) ought to be considered only one of many tools, and that the cost of those tools' use be thoughtfully considered when designing a policy or advertisement. Specifically, Hausman and Welch specify that the justification for nudges cannot rely on the assumption that nudges have no detrimental impact on autonomy, but must be justified with a comparison of the benefits provided by the nudge with the perceived loss of autonomy. In this case autonomy is an incommensurable good that must be weighed through our beliefs that it is more or less valuable than other incommensurable goods that we would otherwise support—equity, justice, welfare, etc.

This paper will build on the objections provided by the aforementioned authors to Libertarian paternalism. While I agree with authors such as Rizzo and Hausman that Libertarian Paternalism is problematic in some instances, I believe that Libertarian Paternalism can contribute something significant if the policy suggestions they offer are constrained by a more rigorous adherence to the values Libertarian Paternalists claim to hold. I will be attempting both to strengthen the boundaries of Libertarian Paternalism such that it can justify its Libertarian title, as well as to identify when nudges might

detrimentally impact the autonomy of choosers. Finally, I will put forward that some types of nudges—ones that focus on verifying voluntariness—are not only appropriate, but should be used regularly in order to fulfill the Libertarian Paternalist’s goals.

Together, these three considerations ought to outline whether and when choice architects can reach for nudges of a Libertarian Paternalist slant in solving policy and private issues.

### **Important Concepts:**

Before diving any farther into this argument, it will be beneficial to specify what certain key terms mean so that my argumentation is understood through shared terminology. Due to the specificity and interdisciplinary nature of the literature surrounding Libertarian Paternalism, many terms are used somewhat differently than in other fields. One prominent example is that of coerced choice. Where in philosophy coerced choice would refer to an agent being forced (coerced) to choose a specific option in their choice set, coerced choice in Libertarian Paternalism focuses on the act of choosing rather than the outcome of that choice. For a Libertarian Paternalist, a coerced choice is one where an agent would prefer *not to engage in a choice making process*, but is forced to do so due to the choice architecture at work. The choice architecture doesn’t force the agent to make a specific choice out of their choice set, but it is necessary to at minimum engage with the choice set<sup>24</sup>. For many of these definitions I will be able to explain how they interact with my argument at relevant points. However there are four major concepts that

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<sup>24</sup>Another way to view coerced choice from the Libertarian Paternalist perspective would be that the coercion exists when a choice architect removes the option to “do nothing”, thereby altering the choice set in some way. While this explanation would mean that a coerced choice is decidedly non-libertarian, this type of coercion may actually be acceptable to libertarians for reasons explained later in the paper.

it will be important to outline before beginning the discussion. Those concepts are that of Paternalism, Autonomy, Freedom of Choice, and Costs.

### Paternalism

As mentioned in the introduction (p.4) paternalism takes two distinct forms—hard and soft. Both of these forms accept the fundamental premise that a state or authority has the moral responsibility to interfere in people’s own lives for their own good<sup>25</sup>. For hard paternalists, this value is the well-being of the individual. Hard paternalists believe that it is the obligation of whichever authority is acting paternalistically to ensure the well-being of the agent, and this belief justifies hard paternalists either requiring or denying options of the agent in pursuit of that well-being. One way to define hard paternalism is by stating that:

X acts paternalistically to Y in regards to action Z if<sup>26</sup>:

1. X aims to close an option that would otherwise be open to Y or X chooses for Y in the event that Y is unable to choose for herself.
2. X does so, to some extent, in order to promote Y’s good<sup>27</sup>.
3. X would do so regardless of whether Y would agree that action Z is her preferred option.

Two important things about this definition are that the paternalist X is acting by changing the choice set of agent Y, and that this action is not concerned with the permission or assent of Y. Some accounts of paternalism do not agree with the third section of this

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<sup>25</sup>The Ethics Toolkit

<sup>26</sup>Paternalism: Theory and Practice, Chapter 1

<sup>27</sup>Clarke, “A Definition of Paternalism”

definition, instead requiring that a paternalist must require or restrict an action in direct opposition to the will of the agent. However, it seems insincere to say that an authority who is restricting an action from an agent for the purpose of supporting that agent's good is not acting paternalistically. However, this is the case if we accept that the agent might have wanted to act in that way without the paternalist's restrictions according to the alternate definition. For that reason, I will be using the above definition to determine if an action is paternalistic—one half of what constitutes an action being that of a libertarian paternalist. Libertarian Paternalism acts in the form of hard paternalism when choice architectures such as minimal paternalism, substantive constraints, or denial of choice are used.

Depending on how the first section of the above definition is qualified, it is possible to arrive at the definition of soft paternalism. Soft paternalism, as stated above (p.4), is motivated not by the value of well-being but rather the value of voluntariness. Soft paternalists seek to close or require an option of agent Y if and only if that agent is acting in a way that is significantly non-voluntary<sup>28</sup>. The interference of a soft paternalist therefore acts to ensure that the actions of Y are sufficiently voluntary, but do not seek to ensure that Y is choosing that which is best for herself. Libertarian Paternalism adopts the form of soft paternalism when choice architectures such as coerced choice or procedural constraints are used.

### Autonomy

Autonomy is a complex and nebulous concept which ranges in breadth from describing how one lives their lives to describing the authenticity of the choices that we make. Very little of

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<sup>28</sup>Feinberg, "Harm to Self"

the literature made by Libertarian Paternalists directly confronts autonomy, possibly because of how varied the use of the term “autonomy” is. Many objectors to Libertarian Paternalism however do use autonomy as the basis of their objection to choice architectures. This stems from many objectors to Libertarian Paternalism being concerned with the paternalistic aspects of choice architecture, which historically have always been at odds with autonomy and therefore freedom of choice. In this argument I will be referring to autonomy based on how one autonomously makes a choice. This will ignore larger issues of how to live autonomously or when our values are autonomously our own, but will allow me to focus in on how autonomy impacts freedom of choice—the value of which Libertarian Paternalists support in order to maintain their libertarian credentials. I will define autonomously making a choice by stating that

An agent A autonomously makes a choice C when:

1. A has knowledge of all the available options within the choice set.
2. A’s capacity to act on any available option is not overcome by external (e.g. coercion, manipulation, interference) or internal (e.g. psychological problems or deficiencies in agency) hindrances.
3. A selects an option as her own based on reasons that she can either present as her own or that she would be willing to defend.

I will give a more thorough defense of this definition in Section V of this paper (p.43).

However it is important to note that section two of this definition is primarily a defeating condition. If an agent is being coerced, manipulated, or is experiencing psychological

compulsion such as through Obsessive Compulsive Disorder the agent cannot be said to be acting autonomously. When a Libertarian Paternalist is constructing a choice architecture, the choice architect is most vulnerable to providing that type of external hindrance in order to overcome our non-rational tendencies.

### Freedom of Choice

According to Sunstein and Thaler, freedom of choice is preserved when a choice architecture does not specifically deny options to choosers and does not influence their economic incentives. Using that definition, and their own understanding of how nudges and other aspects of the choice architecture work, Libertarian Paternalists are able to claim that nudges and other aspects of the choice architecture do not restrict freedom of choice and therefore should not be objectionable based on Libertarian concerns. However, this understanding of freedom of choice does not fully incorporate those libertarian concerns. Specifically, this definition of freedom of choice is consequentialist in nature—focusing entirely on the choice set available to the chooser. However, having an unadulterated choice set is not the only way to define freedom of choice. As I will defend below, a consequentialist understanding of freedom of choice doesn't address why we might value freedom of choice. That reason is largely because maintaining freedom of choice allows us to express ourselves autonomously through choosing options that reflect our own life goals. This does not mean that autonomy should be confused with freedom of choice—they are overlapping but distinct concepts. Freedom is the ability and capacity to take an action, where autonomy is the independence and authenticity of the motivations behind those actions. As I will defend in Section IV (p.35) below, freely choosing will require autonomously choosing, but one can be autonomous without having

the capacity to make the choices they desire freely. My definition of freedom of choice will be:

Agent A possesses freedom of choice when she can freely choose between two or more options where:

1. Freely means that A is not being interfered with when making this choice. In other words, A is acting autonomously.
2. Choose means that A can direct her will in such a way that she is able to act on the selection that she makes, and that the outcome of that selection is a real possibility.

Section one of this definition is our autonomy condition, and is fundamental in determining how we understand freedom. Section two of this definition is the choice condition, and includes both substantive and procedural considerations with regard to choice. Having substantial freedom of choice—where the choices we have available are truly available to us and are options that we would actually want to have—is important when determining if A has true freedom of choice.

### Costs

Throughout this paper I will be referring to the “cost” of nudges on autonomy. I will also be referring to autonomy as an incommensurable good. Therefore it is necessary for me to explain what I mean by a cost as they regard incommensurable goods, and how to interpret those costs with direct regard to nudges. A cost to autonomy refers to any time an agent’s autonomy is restricted in a significant way. In some cases, nudges will significantly restrict an agent’s autonomy, and will therefore have a “cost”—namely the

full scope of that individual's autonomy. While on many interpretations autonomy can be considered a sliding scale where an individual can have more or less autonomy depending on their circumstances, my definition of autonomy is a threshold definition. This is because for the purposes of this paper autonomy is primarily valuable as a reason to desire freedom of choice—giving a motivation for both the Libertarian and the Libertarian Paternalist to value that freedom. Furthermore I will be looking at instances where a choice architect is deciding when and how to act—in most of these cases some baseline will already be in effect. Because of this, in order to maintain the freedom of choice of the chooser, a choice architect cannot diminish his or her autonomy from that baseline. The threshold defined above allows me to evaluate when and how a choice architect is diminishing a chooser's autonomy, in other words enforcing a “cost” on that autonomy. This does not mean that nudges and other aspects of choice architecture might not be justifiable—I do not maintain that autonomy is an absolute good that must be upheld regardless of the benefits of alternatives. However, if one takes Libertarian Paternalists seriously on their claim that they value freedom of choice, then they must hold Libertarian Paternalists to the standard that there cannot be a Libertarian Paternalist justification for a nudge that provides a cost to autonomy or freedom of choice. In order to justify those nudges, one must appeal to another good—justice, welfare, equity, etc.

This does not mean that all costs are relevant to our evaluation on whether a nudge truly has a “cost” to autonomy. Trivial costs on autonomy should not count, nor should we claim that a choice architect who removes impossible options (such as permitting an individual to fly) is truly diminishing an agent's autonomy. Furthermore we cannot claim that there will always be a baseline from which an architect can work—in

many instances our preferences are neither well-ordered nor fully formed. In those instances the choice architect cannot impose a cost on our autonomy in a meaningful sense, and their nudges are therefore permissible by default. On the other end of the spectrum, Libertarian Paternalists cannot be required to expand the chooser's choice set. A Libertarian Paternalist does not impose a cost on the chooser's autonomy when she fails to expand the chooser's choice set. The Libertarian Paternalist only imposes a cost on the chooser's autonomy when the choice architecture directly diminishes that set.

### Categories of Nudges

In addition to the other important concepts included in this chapter, it may also be helpful to lay out different categories that choice architecture might fall into. These are:

- a. Choice architectures that influence choice but does not subvert autonomy
- b. Instances where there is no autonomy because of causal factors unknown to agents, and while not enhancing autonomy choice architecture has a beneficial effect
- c. Instances where there is no autonomy because of causal factors unknown to agents, and while not enhancing autonomy choice architecture has an effect not consistent with agents best interests
- d. The choice architecture usurps agents autonomy
- e. Choice architecture actually enhances autonomy.

Cases of (a) include attempts at rational persuasion and debiasing effects. These often are not included in the general discussion of choice architecture, since they attempt to engage with the rational parts of a chooser rather than dealing with the non-rational parts of the chooser. Cases of (b) include instances of minimal paternalism, where preferences are neither well-formed nor ordered. Cases of (c) include non-paternalistic nudges such as the Don't Mess With Texas campaign (explained below). Cases of (d) include substantive constraints, denial of choice, and some types of minimal paternalism such as Jake's

mirror. Finally, cases of (e) are instances of procedural constraints and coerced choices. These will be discussed in detail in Section VI.

### III. The Boundaries of *Libertarian Paternalism*

When introducing Libertarian Paternalism, Sunstein and Thaler explain it as “a form of paternalism, libertarian in spirit, that should be acceptable to those who are firmly committed to freedom of choice on grounds of either autonomy or welfare.”<sup>29</sup> This is accomplished by a few key features. For one, Sunstein and Thaler argue that in an optimal case of Libertarian Paternalism applying a nudge the choice set available to a chooser is not altered. This means that freedom of choice as understood by the number of options available hasn’t been restricted. Furthermore, Sunstein and Thaler argue that in an optimal nudge choosers are not forbidden from choosing something outside of the desired choice, and their economic incentives aren’t altered. In theory, this means that not only is formal freedom of choice not affected, but substantive freedom of choice shouldn’t be restricted from the chooser. Finally, Sunstein and Thaler note that in the optimal case choice architects have a publicity requirement. This means that choice architects need to be willing and able to disclose the fact that they are nudging others in order to justify that nudge<sup>30</sup>. Keep in mind that the ability and willingness to do something is not the same as doing that thing—this will become important below.

In addition to nudges, Sunstein and Thaler outline several levels of paternalistic interventions that might count as Libertarian Paternalism. These interventions range from Minimal Paternalism to Full Paternalism. Minimal Paternalism is the form of paternalism that is most aligned with what was presented earlier as soft paternalism—a default rule or starting point is created with the intention of influencing behavior<sup>31</sup>. Coerced Choices is

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<sup>29</sup>Sunstein and Thaler, *Libertarianism is not an Oxymoron*, p. 1160

<sup>30</sup>Citation: Nudge

<sup>31</sup>Sunstein and Thaler, *Libertarian Paternalism is not an Oxymoron*, p. 1187

the next level, and this type of paternalism occurs when a choice architect puts into place some method of forcing a chooser to choose explicitly<sup>32</sup>. This type of strategy involves such aspects as informational campaigns, lack of default options, or mandatory forms. While purely forcing choice may not seem paternalistic at first, when some individuals would prefer not to choose (as is evidenced by the success of default rules) this qualifies as paternalistic.

Beyond Coerced Choices are Procedural Constraints. This strategy involves some measure included into the choice architecture that ensures a departure from the default is fully voluntary and entirely rational<sup>33</sup>. This type of structure can be found in the Age Discrimination in Employment Act, where any request to waive your rights must be accompanied by a written suggestion to consult legal assistance and a cooling-off period, as well as a 7-day window in which the decision can be reversed with no consequences<sup>34</sup>. Were this act not in effect, individuals seeking to arrange for retirement could opt out of important retirement benefits and protections from discriminatory policies based on age without realizing the ramifications of doing so. Finally, Substantive Constraints restrict choosers from deviating from the default, but not in any way they choose<sup>35</sup>. Justification for substantive constraints normally centers around the fact that those who deviate from the default will inevitably err in doing so, and the only reason individuals would deviate are due to non-rationalities such as bounded rationality and bounded self-control. Sunstein and Thaler also consider the option to reject freedom of choice altogether, and only include the measure for those libertarian paternalists who are willing to impose very

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<sup>32</sup> Sunstein and Thaler, *Libertarian Paternalism is not an Oxymoron*, p. 1189

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

high costs on deviating from the default. They do not go into much detail regarding this option, and no other Libertarian Paternalist argues for the inclusion of denial of choice into choice architecture. This is likely because pure denial of choice runs afoul of the Libertarian Paternalist's stated value of freedom of choice and is therefore incompatible with the goals of Libertarian Paternalism as a whole. As such, I will not give it further consideration in this paper.

Insofar as the Libertarian aspect of libertarian paternalism is concerned, some of these levels of paternalism are likely to be unjustifiable. Substantive constraints will not be acceptable to a libertarian concerned about freedom of choice. Substantive constraints not only limit freedom of choice by removing options from a chooser's choice set, but also impose upon a chooser guidelines for why they are allowed to act decided on by a third party. This direct narrowing of the choice set is detrimental to freedom of choice, and the transferal of justifications for choice from the chooser to the choice architect is detrimental to the autonomy of the chooser as I will outline in Section V.

Even though substantive constraints and full rejection of freedom of choice are unacceptable to a libertarian concerned with freedom of choice, there is some justification for any of the other levels of a Libertarian Paternalist's choice architecture from their standpoint. Minimal paternalism is best conducted when some form of nudging cannot be avoided—mainly in those instances where preferences are not well-formed<sup>36</sup>. As even opponents of Libertarian Paternalism state, where nudging cannot

<sup>36</sup> Sunstein and Thaler, *Nudge*, p. 77

be avoided it must be permissible<sup>37</sup>. Coerced choices and procedural constraints will be considered in detail in Section IV, but both work not only to support the well-being of the individual but also to enhance the ability of that individual to choose what they truly wish. At no point, if done correctly, is the choice set of the chooser constrained by coerced choices or procedural constraints.

While Libertarian Paternalists can maintain freedom of choice in choice architectures that are minimally paternalistic, coerced choices, or procedural constraints, this does not mean that all nudges and other choice architectures in those areas will respect that freedom of choice. In several instances, Libertarian Paternalists have suggested nudges that run contrary to the stated values of Libertarian Paternalism and diminish freedom of choice. Those nudges can be grouped into three broad categories: nudges that are not paternalistic in nature, nudges that impose non-economic costs, and nudges that are manipulative through minimal publicity. I will attempt below to explain how each of these types of nudges runs contrary to the stated values of Libertarian Paternalism. I will then attempt to suggest guidelines for how Libertarian Paternalists can ensure that nudges used in the minimally paternalist, coerced choice, and procedural constraint space do not diminish the freedom of choice of the chooser.

An example of a nudge given in Sunstein and Thaler's book *Nudge: Improving Decisions on Health, Wealth, and Happiness* is the "Don't mess with Texas" anti-littering campaign. In this nudge, the affected choosers are being led to do something that isn't for

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<sup>37</sup> Hausman and Welch, *Debate: To Nudge or Not to Nudge*, p. 130

their own good, but for the good of those around them. Littering, while problematic in the long term for anyone's well-being, is not a problem for the person who is doing the littering necessarily. Those who are forced to clean up the litter, or those who must deal with the ecological effects are the ones who are most affected by the anti-littering campaign. This nudge isn't paternalistic because paternalism requires that the action (be it policy or regulation or requirements) be for the individual's own good (as stated in section 2 of my definition of Paternalism above). Paternalism isn't the process of making people do what is best for everyone, only what is best for themselves all things considered. This non-paternalistic type of nudge is also suggested as a compliment to the Save More Tomorrow plan as the "Give More Tomorrow" plan<sup>38</sup>. The Give More Tomorrow plan as suggested would utilize the deferred payment schedule of the SMarT plan in order to increase charitable giving. While it can be difficult to imagine a default charity that is absent of any preferences that a chooser might possess, the Give More Tomorrow plan would still be a nudge to change how individuals donated money that would either circumvent or utilize otherwise irrational or non-rational behavior.

Because of some of their examples of Libertarian Paternalism and nudges, the definition given by the literature<sup>39</sup> of a nudge does not seem to fit all cases of nudges that have been supported. In addition to the above, where Libertarian Paternalism isn't used paternalistically, several cases emerge where "appropriate" nudges significantly alter the economic incentives of those who are nudged. The most obvious example is Sunstein and Thaler's use of the cap-and-trade system as a nudge—stating that it is "compatible with

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<sup>38</sup>Sunstein and Thaler, *Libertarianism is not an Oxymoron*, p. 1185

<sup>39</sup>"any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives"

libertarian paternalism, because people can avoid paying the tax by not creating pollution”<sup>40</sup>. This is an obvious economic incentive—and the policy was designed to be an economic incentive to reduce carbon emissions. It should not therefore count as a nudge, even though some libertarian paternalists state otherwise.

For the libertarians to whom Libertarian Paternalists are attempting to appeal, only considering economic incentives when evaluating if a choice architecture diminishes freedom of choice is not sufficient. There exist important incentives to our choices that are not economic in origin, which when altered may diminish our freedom of choice. One such example is in social costs, where we may have no economic incentive not to partake in an activity but if such activity is considered disgraceful (e.g., premarital intercourse) we are incentivized to not partake in that activity regardless. If the result of a nudge was to increase those social costs to such a degree that one option is considerably more difficult to pursue—even detrimental to pursue all things considered—that nudge would seem to infringe on the freedom of choice of the individual being nudged. That chooser does not have the true ability to make a choice they would have been able to make prior to the choice architect’s involvement. An example of an appropriate nudge given by Sunstein and Thaler is the Toxic Release Inventory requirement for businesses. Sunstein and Thaler characterize this as a “nice example of a social nudge”<sup>41</sup>. The Toxic Release Inventory requires that firms disclose what hazardous chemicals they are storing, and what those chemicals are used for. While there is no (non-trivial) economic cost from the nudge itself, the effect of this nudge is that environmentalist groups are then able to

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<sup>40</sup> Nudge, p.186

<sup>41</sup> Nudge, p.191

create “blacklists”<sup>42</sup> for those companies that are storing hazardous chemicals. This raises the social cost of doing business so high that in some cases these companies are no longer able to continue production. When considering this nudge we cannot claim that the freedom of choice for the company has been kept. The nudge has effectively diminished the choice set for the company by ensuring that social pressures (which now have access to new information) will limit the type of chemicals that they are able to use in production. This may still be justifiable by appealing to the need of environmentalist groups to know how companies they choose to do business with produce their goods. The nudge may even be justifiable based on its positive impact on the environment. However, when a Libertarian Paternalist claims that their permissible nudges are both in the interest of the chooser (in this case the company) and are not detrimental to the chooser’s freedom of choice, this example stands as a nudge that fulfills neither of those criteria. In this case, the goal of the nudge wasn’t even paternalistic, it was intended to have social benefits. Therefore a Libertarian Paternalist should not—under their own stated values—support the use of the Toxic Release Inventory.

Let us consider a final case of a nudge—one that presumably fits into the structure Libertarian Paternalists recommend. In many states, individuals seeking an abortion are required to wait anywhere between 12 and 72 hours between the time of initial consultation and the procedure<sup>43</sup>. Presumably, this requirement is to ensure that individuals seeking an abortion have time to think about the consequences of their choice, and that emotions are not the leading cause of the choice. This is a common strategy in

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<sup>42</sup> Ibid

<sup>43</sup> State Policies in Brief, “Conseling and Waiting Periods for Abortion”

nudges, particularly under the mode of “coerced choices”<sup>44</sup>. However, as studies have shown<sup>45</sup> this requirement has drastic effects on the ability of some people to get the abortion that they seek. While the time requirement doesn’t have any direct economic incentive—you just have to come back however many days later—for some people the time required to meet the restriction is too much for them to afford. This generally comes from the conjunction of these laws with a limited number of abortion clinics available in some states. For those who need to maintain fairly strict work schedules with limited availability for sick leave, the 72 hour wait period between initial consultation and the actual procedure means they need to request off work for multiple days—which could result in their job being lost. Furthermore, when these clinics are far away from individuals who need an abortion the multiple trips (or hotel room for multiple days) to the clinic could be an economic impossibility—one that might not be the case if there was not a mandatory wait period. These facts are true even if the results of an unwanted pregnancy are very expensive. Individuals are left with an impossible choice—losing their job in order to get an abortion—or a difficult choice—raising a child from an unwanted pregnancy. Since the chooser cannot physically make an impossible choice, his or her choice set is diminished. If Libertarian Paternalists truly support freedom of choice, then the use of this nudge should be impermissible.

A common response to the Libertarian Paternalist position is that nudges constitute manipulation in some cases. While I will go into detail below about why this is, it is important to note that Libertarian Paternalists recognize this reaction and have

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<sup>44</sup> Libertarian Paternalism is not an Oxymoron, p. 1188

<sup>45</sup> Guttmacher Institute, “The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review”

made restrictions on nudges to assuage those fears. Specifically, Libertarian Paternalists “ban government from selecting a policy that it would not be able or willing to defend publicly to its own citizens”<sup>46</sup>. This is known as the publicity condition. While the language to ban “government” for this action is in response to the general distrust of libertarians for governments, this should be generalized to any choice architect (including private businesses who may wish to nudge people to buy their products). The common example of a nudge that violates this publicity condition is using subliminal messaging. While subliminal messaging would otherwise fit our definition of nudging, it is possible to justify the publicity condition with an appeal to the perceived choice set. Consider a shopper who enters a department store. The shopper only desires to look around, and has no interest in buying anything. However, the store takes advantage of subliminal advertising through music played throughout the store to nudge the shopper into believing that purchasing a product at this moment is imperative. When entering the department store, the shopper had in her choice set both looking and purchasing, even if the shopper’s preference was to only look at the available products. However due to the subliminal advertisements located in the store the shopper is led to believe that her choice set has been diminished—that the option to purchase is her only option. Nudges such as subliminal messaging may not change the economic incentives or the actual choice set that a chooser has access to, but can lead the chooser to believe that the choice set in front of them has diminished. This effectively puts some choices out of reach—violating

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<sup>46</sup> Sunstein and Thaler, *Nudge*, p. 244

freedom of choice<sup>47</sup>. Because of this subliminal messaging is explicitly stated to be incompatible with the Libertarian Paternalist program by Sunstein and Thaler<sup>48</sup>.

Even though this publicity requirement is a good first step, the requirement is too weak to accomplish what it intends as stated. Nowhere do Libertarian Paternalists state that along with being “willing and able” to publicly defend their use of nudging it is necessary to actually conduct that public defense. There might be some instances of subliminal messaging that a choice architect would be willing and able to defend. This would mean that subliminal messaging—the clearest form of manipulating choosers—would be permissible in the Libertarian Paternalist program. For an example, imagine that a choice architect included in a national cable news program a subliminal message to “brush your teeth”. The choice architect would be willing to defend this subliminal message, stating that brushing your teeth is important and has almost no economic impact on those that are being nudged. While the choice architect in this case would have fulfilled the publicity condition—even if she did not actually make this defense public—the choice architect would still be able to conduct a nudge in the form of a subliminal message, which should not be permissible according to Sunstein and Thaler.

This means that there is either another reason that subliminal messages—and therefore some type of nudges— are impermissible to use or that Sunstein and Thaler are again giving us an example of something that should or should not be permissible that doesn’t fit with their program (like as with the cap-and-trade policy which is a pure economic incentive). In *Nudge*, Sunstein and Thaler give us another reason why

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<sup>47</sup>Hausman and Welch, *Debate*, p. 132

<sup>48</sup> Sunstein and Thaler, *Nudge*, p. 244

subliminal advertising is inadmissible. Subliminal messaging is condemnable because it is impossible for individuals to monitor it.<sup>49</sup> This seems to fit into the general publicity requirement framework, but only if that framework is understood as a way to ensure that choosers have a full choice set. Instead, the publicity requirement should be seen as both ensuring that choosers have access to information regarding when their choices are being influenced and ensuring that choice architects are held accountable for the nudges they create. This would be an admission that the public choice problem<sup>50</sup> has some appreciable effect on choice architects and that nudges are not always benign—even if Libertarian Paternalists make explicit claims to the contrary<sup>51</sup>. One might argue that it is irrelevant to talk about whether subliminal messaging is easy to monitor, that the real reason we find subliminal messaging impermissible is because subliminal messaging is an attempt at manipulation whereby our choices are being altered without our knowledge. While I am sympathetic to that rationale, a Libertarian Paternalist would be hard-pressed to distinguish that reasoning from their own minimally paternalistic nudges. In those cases, like with subliminal messaging, our choices are being altered by a third party likely without our knowledge (unless the choice architect adheres to the strong publicity requirement I outline below). However, since any form of Libertarian Paternalism is likely impossible to defend if we accept this objection as a valid reason to reject nudges I will decline to include that objection in this argument.

These three factors—nudges being used to influence behavior towards others instead of improving your one’s own welfare, non-economic costs not being taken into

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<sup>49</sup> Nudge p. 246

<sup>50</sup> Buchanan and Tollison, *The Theory of Public Choice*

<sup>51</sup> Sunstein and Thaler, *Nudge*, p. 74

account, and the vagueness of the publicity requirement—all constitute objections that a libertarian will have to the claims of Libertarian Paternalist’s respect freedom of choice. In order for Libertarian Paternalism to live up to its name and its stated goals, these factors must be addressed, and limitations on nudges to avoid these objections be put in place. Nudges that are used in order to have the chooser help others rather than for the chooser’s own welfare are the easiest to address. A libertarian will inevitably disagree on having an outside individual force or convince through non-rational means a chooser to do something that is not for their own well-being. Because of this, any nudge that makes use of cognitive deficiencies and non-rationalities in order to effect a non-paternalistic change in principle ought not to be permissible. This does not include nudges that take advantage of debiasing strategies—which are a special case of nudge that will be discussed below. This also does not include rational persuasion. Rational persuasion is the attempt by a choice architect to introduce more information to a chooser in order to better educate that chooser on which choices are best for them. This can take the form of simply requiring information to be available<sup>52</sup>, or to make the information more salient so that choosers will be able to utilize it fully<sup>53</sup>.

The next objection to address is the non-inclusion of non-economic costs of nudges. Libertarian Paternalism claims its libertarian title due to its choice architecture—specifically nudges—not impeding on freedom of choice. In order for freedom of choice to truly be preserved in a nudge, and therefore for Libertarian Paternalism to keep its

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<sup>52</sup> Some examples are educational campaigns, warning labels on cigarettes, requirements that firms notify employees of hazards, and notices in swimming parks to apply sunscreen regularly.

<sup>53</sup> An example of this would be to create charts or quick-sheets for different retirement fund options—this would give choosers an easier way to look at what each plan offers without having to know everything about finance.

libertarian title—we will need to account for non-economic as well as economic incentives. It does no good to make someone wait 72 hours for an abortion if they are unable to afford to spend that time—the choice set will be diminished just as if the cost of an abortion had been increased monetarily as discussed above. Therefore, for a nudge to be acceptable from the libertarian point of view, the nudge must not “significantly alter [the chooser’s] incentives”. However, there should be some clarification on what “significant” means. It could be stated that a nudge which changes a default plan to the top of a page rather than including all options in alphabetical order increases the time necessary to find a plan that a chooser would want aside from the default. A libertarian should not have an issue with such a trivial “cost”. When compared to real costs—such as the cost of time in waiting for an abortion—the cost of needing to look down the line for your preferred plan seems insignificant. One of the benefits of using economic costs in the original definition of a nudge is to eliminate these sorts of trivial costs. As such, our understanding of the term significant should mean that any nudge that limits the non-trivial choice set of our chooser should be inappropriate for the term of “Libertarian Paternalist”. This should be assessed before taking into account the nudge itself—if the nudge causes a choice to eventually become unavailable, such as in the case of the abortion wait time, where the true limiting factor is the opportunity cost of time instead of the cost of waiting itself.

Finally, the publicity requirement and non-benign nudges need to be addressed in outlining how to use a nudge. A libertarian is likely to be somewhat comforted by the argument that a nudge ought to be defensible to the individuals who are being nudged. A stronger requirement that will better accomplish that goal is to mandate that a choice

architect should include that public announcement with *any* nudge that they conduct. This is not simply a requirement that you should be “willing and able” to publicly describe both the nudge and your reasoning for doing so, it is a requirement that it actually take place. This accomplishes a few things. First, this ensures that individuals can monitor the types of nudges that are being used. This type of oversight is particularly useful in the private sphere, where there might be more incentive to use nudges that are purely manipulative. If nudges are considered impermissible if they are not publicly justified, companies that use this tool to boost sales without that public justification can be censured either socially—via public opinion—or legally. Furthermore, this provides a check on government action where a choice architect working for the government cannot create a nudge that, while being helpful for citizens, the citizens would not authorize themselves. Finally, this requirement allows choosers an additional opportunity to take their choices in their own hands. This is important because an active, engaged chooser who knows both the stakes of their choice and is aware of the influences on their choice is more likely to be self-reflective and make a choice that is what they truly want. At the very least such a chooser is less justified in claiming that her choice was inappropriately influenced. In cases where preferences are not completely malleable, Libertarian Paternalists argue that choice architectures should help choosers do what they truly wish to do<sup>54</sup>. This requirement furthers that goal.

While Libertarian Paternalism does attempt to make concessions to libertarians who worry about freedom of choice, the former’s limited view on what freedom of choice means and their inconsistent examples of nudges suggests that the same

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<sup>54</sup>Sunstein and Thaler, *Nudge*, p. 5

libertarians ought to have strong objections to these elements of their program. With the minor alterations of requiring public justification of nudges, ensuring that nudges are only used for the well-being of choosers and not for the well-being of society at the expense of choosers, and including non-economic costs into the definition of nudges, Libertarian Paternalism can assuage the fears of libertarians and maintain their commitment to both the freedom of choice and the support of the chooser's own good.

#### IV. Freedom of Choice and Why it is Valuable

It is important to determine what exactly is meant by freedom of choice in this analysis. Libertarian Paternalists claim to be respecting freedom of choice in using nudges to influence decisions, but their definition of freedom of choice is almost trivially narrow. According to Sunstein and Thaler, only actions that would change economic incentives would infringe on freedom of choice. However, economic incentives are insufficient for understanding both what most theorists mean when they talk about freedom of choice and it doesn't further any understanding of *why* freedom of choice is valuable. Starting from a layman's understanding of freedom of choice, one has freedom of choice when they are free to choose between two or more options. However, many terms in this understanding need to be clarified. The first concerns how many opportunities must be available for true freedom to be realized. It seems too much to ask that a chooser have unlimited or even a near unlimited number of options to choose from. Instead, true freedom requires only that there are an "adequate range of options"<sup>55</sup> available such that one is not forced into a non-choice, such as "your money or your life". While these two conditions represent either end of a vast continuum, freedom of choice requires sufficient choices that the chooser can select between different real outcomes that might conform to different life goals. I need not be able to be a baker if my skills do not lend themselves to baking, but I need the option of many different occupations and cannot be forced into one or two. The number of choices necessary for freedom of choice seems to be linked to the importance and scope of the decision at hand. Secondly, it seems incorrect to say that all choices are valuable in seeking out freedom of choice.

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<sup>55</sup> Raz, Joseph. *The Morality of Freedom* (Oxford: Oxford University Press, 1986) pp.373-377.

Insisting on the availability of trivial choices or choices that may diminish one's capacity to choose in the future seems misguided. Furthermore, it is necessary that the options available to the chooser are different enough to count as true choices, rather than as different options that lead to the same end. It does not seem fair to claim that an individual has freedom of choice when choosing a car when all their options are between different physical units of the same make, model, and color of car.

It is also necessary to determine what "free" means in free to choose. Freedom in this case means one is not being interfered with when making their choice. This interference could be externally motivated such as in an individual physically stopping you from enacting the choice you desire, someone limiting your choice set to a smaller number of options than you would desire, a third party imposing their values on you in a way that cannot easily be overcome, or a third party removing an option from you for reasons that are not your own. Put another way, to be free when making a choice means one is autonomous in making a choice.

Finally, what does this definition mean when it says one "chooses"? One chooses when they select an option from those provided, and can direct their will such that they can act on the selection they have made. I will follow in the vein of Sen and Nussbaum and also claim that to choose one must have the resources available to pursue the selection they make. For example, living on a graduate student's salary, I cannot reasonably choose to purchase a luxury sports car—much to my dismay. Furthermore, the outcome of my selection must be a real possibility.

From these understandings, I can now outline a definition of freedom of choice as follows:

An agent (A) has freedom of choice when she freely chooses between two or more options and:

1. Freely means that A is not being interfered with when making this choice. In other words, A is acting autonomously.
2. Choose means that A can direct her will in such a way that she is able to act on the selection that she makes, and that the outcome of that selection is a real possibility.

It should also be understood that I will be evaluating situations in which a Libertarian Paternalist is determining whether or not to nudge. In those cases the subject of the nudge would already have a fixed choice set. It would be unreasonable to demand that a Libertarian Paternalist satisfy full freedom of choice in order to conform to the value they place on freedom of choice—we cannot ask for any one actor to rectify all the imbalances of society in one fell swoop. Because of this I will only understand a nudge or choice architecture to be detrimental to freedom of choice if it reduces the freedom of choice a subject has from the state that subject is in prior to the nudge.

What this definition has not done is give us adequate reasons to value freedom of choice. As Goran Duus-Otterstrom argues in his article “Freedom of Will and the Value of Choice”<sup>56</sup>, there are enough reasons to value choice to give it at least a prima facie value. One such reason is an instrumental one—when we believe that choice is valuable because it increases our chances of achieving outcomes that we would prefer. This reason relies on individuals being accurate predictors, or the least bad predictors, of their own well-being. In many cases, Libertarian Paternalists reject this assumption. They claim that

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<sup>56</sup> Duus-Otterstrom, “Freedom of Will and the Value of Choice”

in instances where we have poor learning opportunities or are under the effects of non-rational decision-making processes, individuals are not accurate predictors of their own best interests. The evidence that they cite in defense of this assertion is sound and for this reason I will consider the instrumental value of decision-making to be of little consequence here.

Another reason we might place value on freedom of choice is that choosing results in outcomes having meaning they otherwise would not have if they came about without an individual choosing them. An example of this is my purchasing a gift for my friend. It is true that my friend could pick out that same gift and tell me to get it for her, but in that instance the gift seems to mean less than if I had picked out the gift independently. In the case of my own decision on what gift to give, the gift itself has some extra semblance of who I am and carries with it some part of my own understanding. This is so even if outside constraints limit the choices I have available— say I only have \$50 to spend on a gift for a good friend. While I may not be able to get the specific thing that I would prefer to give my friend to show how I understand our friendship and appreciate my friend, I still would have enough funds to have an adequate range of options of what to get to show my own thinking. I would be able to choose something I think my friend would like, and thereby show how *I* know that person which adds sentimental value to the gift that would be absent if I simply had my friend pick out her gift in advance. Similarly, there is a symbolic importance that we give to making a choice. Individuals choosing for themselves bestows upon them a certain kind of status that they otherwise wouldn't have. Denying individuals the opportunity to choose is tantamount then to denying them this status, one we would normally accord an adult member of society. Furthermore, two less direct reasons exist for supporting choice. The first is developmental—in the vein of

Amartya Sen. Sen believes that choice is valuable because it promotes personal growth and the development of certain capabilities such as a sense of responsibility. Second, many believe that choosing is valuable because it provides the chooser with a level of pleasure from having and making those choices<sup>57</sup>. These various reasons each gives support to valuing freedom of choice. But the strongest reason to value choice is what Duus-Otterstrom calls the Self-Determination account. The Self-Determination account argues that people ought to have “a considerable degree of choice, often regardless of whether their having choice is instrumentally or developmentally valuable for them, simply because unless they live their life in accordance to their own (at times flawed) will, they will not be governing their own life, which is morally inappropriate<sup>58</sup>”. While Duus-Otterstrom goes on to argue that this reason to support freedom of choice is susceptible to determinist epistemological claims, the hypotheticals he brings to bear are significantly outside the realm of possibility<sup>59</sup>. The Self-Determination account seems to match well with common intuitions that individuals should be allowed to make decisions for themselves about their own lives.

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<sup>57</sup> While some do obtain pleasure from making choices, some may experience extreme discomfort from being forced to make those choices. In those cases the value of choice is likely nonexistent or at least minimal.

<sup>58</sup> Duus-Otterstrom, *Freedom of Will*, p.269

<sup>59</sup> Specifically, Duus-Otterstrom relies on the existence of a “perfect paternalist” who is able to know our life goals and decide exactly as we would decide to show that in some conditions we have no preference between making a decision ourselves and having a decision made for us. Since the existence of a “perfect paternalist” is well outside the realm of possibility, I argue that we have sufficient reason to value free choice over having another choose for us.

This is not to say that we should understand the freedom of choice to be an absolute right. While there are several reasons to value choice, only the most committed libertarians argue that such a freedom should be construed as a right that cannot be derogated under any circumstances. Reasonable moral restrictions can be placed on our ability to both obtain and carry out some choices. It is unreasonable to demand that freedom of choice gives me the freedom to choose to harm someone else for no reason. This is what Mill intended when he differentiated between self-regarding and other-regarding actions. It is not the case that freedom of choice means that my other-regarding actions cannot be stopped, but it does mean that any restrictions on my self-regarding actions need to fall into special categories<sup>60</sup>. One such category would be desiring to sell my own heart for monetary gain. This type of moral limitation to our choice set is supported even in libertarian literature, as John Stuart Mill argued against the liberty of an individual being granted if that individual wished to sell themselves into slavery<sup>61</sup>. Additionally, we should not assume that significant freedom of choice should be understood as any “free” choice. Some choices that we make can be manipulated, but we would still be nominally free in making that choice. Furthermore, some choices that we make are of a trivial variety and have no bearing on our life goals (e.g. what color shirt do I wear). In other cases, there is a difference between having a formal freedom of choice and a substantial freedom of choice. One can have formal freedom of choice—the technical ability to choose without limitations—without having a substantial ability to follow through on those choices. This is the case when we say that a homeless individual has the freedom to get a job. While there is no-one technically restricting their ability to

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<sup>60</sup> J.S Mill, *On Liberty*, Chapter 1

<sup>61</sup> J.S. Mill, *On Liberty* Chapter 4

get a job, they lack the resources necessary to follow through on their decision even if they whole-heartedly wished to pursue employment. At other times our choices are made without contemplation, and in those cases freedom of choice cannot be justified by an appeal to the value of self-direction. Because of these considerations, we should only accept that someone has true freedom of choice when they are able to exercise their ability to choose in order to self-consciously further their own life goals. This does not mean that an individual does not have freedom of choice in deciding trivial matters, only that the idea of substantive freedom of choice (of a type we might be concerned with promoting and protecting) doesn't apply to those types of decisions.

Finally, we cannot mean that paternalistic actions will never support freedom of choice—even if the above understanding seems to contradict this. In Section VI below I will outline how some types of paternalistic action actually serve to enhance autonomy through verifying voluntariness and consciousness of decisions. Furthermore, I would be remiss if I did not mention that parents who treat their children through paternalistic action generally do so in an effort to develop the autonomous capacities of those children for adulthood. In many cases, paternalists do not focus enough on the development of autonomy through their actions—what could be the greatest value of paternalism as recognized by Libertarian Paternalists.

These caveats have major implications in how we should understand freedom of choice as intended to be protected by Libertarian Paternalists. Libertarian Paternalists claim that their nudges and choice architecture do not infringe on freedom of choice nor do they manipulate choice by changing economic incentives. As described elsewhere in this essay, the examples that Libertarian Paternalists use to define nudges sometimes

include examples that do not follow one or more of these stipulations. However, even in some of their best cases nudges and choice architecture make use of individual chooser's non-rational decision making processes in order to achieve a specific outcome determined by a choice architect. In these cases it is uncertain if the chooser is actually making her own choices, or is being led to make those decisions. This specifically undermines the ability of the chooser to partake in self-directing activity through choices, even if that chooser nominally has "free" choice. However, as will be explained in Section VI there are some choice architectures that actually enhance the ability of individuals to be self-reflective on the choices they are making, even if otherwise their non-rational processes would control the decisions they would make. In these nudges I find both the most promising aspect of Libertarian Paternalism and the best defense of Libertarian Paternalism from critics who would claim it is no more than another form of intrusion.

Even if we do not accept the self-directing support for understanding freedom of choice, the interference of some nudges in the decision-making process seem to have implications for other reasons for which we might support freedom of choice. Choosers who are influenced to make certain choices miss out on the opportunity to develop capacities that are important to future decisions.<sup>62</sup> Those choosers may not be able to make decisions that are truly representative of their wishes—either because of outright misrepresentation or simply because they abdicate the opportunity to represent their

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<sup>62</sup> It is important to re-iterate here that for most if not all cases of minimal paternalism, these objections do not apply. In those cases preferences are neither well-formed nor ordered and as such individuals would not learn from those decisions or have those decisions represent their wishes regardless of if a choice architect was involved. The concern stated above is primarily for instances of substantive constraints or rejection of choice, but also for some instances of procedural constraints.

wishes. Those choosers also may not be accorded the type of symbolic respect we normally give to adults in our society—they are not being given the opportunity to make their own decisions and instead are being influenced to make a decision another individual believes is best. This is not to say that choice architecture and nudges should never be used. Instead, we should acknowledge that Libertarian Paternalists must maintain specific guidelines if they are to adhere to their value of freedom of choice, or that nudges must be justified outside of the Libertarian Paternalist framework.

## V. Nudges and Autonomy

While in the previous section I focused on broad objections that libertarians interested in the freedom of choice might have with choice architectures and nudges as supported by Libertarian Paternalists, this section will focus in on a theoretical objection to nudges. This objection is that some nudging, even when done with the absolute best intentions, still has a meaningful effect on autonomy. The implication of this effect is that some nudges should not be considered costless, a substantial deviation from contentions elsewhere in the literature. Choice architects who are committed to the Libertarian Paternalist value of freedom of choice therefore are restricted to a limited number of nudges that should be considered permissible. Should a choice architect view the cost of a nudge to autonomy and determine that the benefits of that nudge outweigh the loss of autonomy (a comparison of incommensurable goods), then that choice architect would not be evaluating the nudge within a Libertarian Paternalist mindset.

To understand this argument, first I will need to explain what is meant by autonomy. I will also need to show that autonomy is worth considering as a good—which will be done without prescribing to libertarian theories of negative rights as absolutes. I then will show how Libertarian Paternalists who use certain nudges would negatively impact the autonomy of those whose choices have been influenced through these nudges. Here I will not attempt to determine when such a loss of autonomy is permissible, all things considered. However, I will conclude the section by summarizing how choice architects can and should take this cost to decisional autonomy into consideration when evaluating the optimal policy to solve a problem.

While many will accept that autonomy is an important concept and is even something that should be valued, the very definition is a subject of contention. However,

as a first approach, the definition that we will begin with is that to be autonomous is to be “one’s own person, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one’s authentic self”<sup>63</sup>. Some theorists believe that this should be strongly differentiated from the concept of freedom. Generally, freedom involves the ability to act without external or internal constraints, with sufficient resources and power to make one’s desires effective<sup>64</sup>. Autonomy on the other hand involves the question of whether the desires that move you to act are authentically your own<sup>65</sup>. A classic example of this is Locke’s prisoner<sup>66</sup>. In this example a man is placed into a prison cell and told that the door is locked when in actuality the door has not been locked<sup>67</sup>. While the actual freedom to act has not been impaired—there is nothing physically stopping the man from leaving the room nor does he have an internal or mental impairment that keeps him from leaving—the prisoner’s autonomy has been undermined. This is because his action to not attempt escape is not authentically his own. Instead, the prisoner is subject to the manipulation of the guard and his “view of the alternatives open to him has been manipulated by the guards in such a fashion that he will choose not to leave”<sup>68</sup>. While autonomy and freedom are distinct on many readings, some authors have included autonomy in what it means to act freely. Amartya Sen in his paper “Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting

<sup>63</sup> Stanford Encyclopedia of Philosophy Autonomy Article

<sup>64</sup> Taken from Stanford Encyclopedia of Philosophy’s article on Autonomy in Moral and Political Philosophy—compilation of definitions by Berlin (1969), Crocker (1980), and MacCallum (1967)

<sup>65</sup> Ibid.

<sup>66</sup> While the original idea is attributed to Locke, my understanding of Locke’s prisoner comes from Dworkin’s Theory and Practice of Autonomy.

<sup>67</sup> Locke, *Essay Concerning Human Understanding*, Book II, Chapter XXI, Of Power.

<sup>68</sup> Dworkin, *The Theory and Practice of Autonomy*, p. 105.

Individual Freedoms” divides freedom into two different aspects—the opportunity aspect and the process aspect<sup>69</sup>. The opportunity aspect on Sen’s view concerns the actual capability to achieve what one desires or acts to achieve. This is akin to the definition of freedom expressed above. The process aspect on the other hand is concerned with the actual process of autonomous choice. Sen describes this as having the “levers of control in one’s own hands”<sup>70</sup>. Importantly, this is true regardless of whether having the “levers of control” actually enhances the opportunities of achieving the objectives the chooser has. Sen further subdivides the process aspect of freedom into two parts.

“The process aspect, in its turn, would include several distinct features, in particular, (i) decisional autonomy of the choices to be made, and (ii) immunity from interference by others. The former is concerned with the operative role that a person has in the process of choice, and the crucial issue here is self-decision, e.g. whether the choices are being made by the person herself—not (on her behalf) by other individuals or institutions.”<sup>71</sup>

Sen notes that it is important to determine what exactly is meant by *immunity*, and to separate this if possible from the libertarian idea of negative rights as “trumps”. Sen argues that freedom as immunity can be seen in a way other than as absolute rights; namely as the absence of “encroaching activities”<sup>72</sup>. While it is possible to argue that this is nothing more than word-craft and that Sen is implicitly accepting the idea of negative

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<sup>69</sup>Sen, “Markets and Freedoms”, p. 522

<sup>70</sup>Ibid.

<sup>71</sup>Ibid. p. 524

<sup>72</sup>Ibid.

rights in defining freedom from encroachment, Sen makes the point that it is not necessary to accept the priority of libertarian negative rights in order to believe that freedom from encroachment is, *inter alia*, important. This relies on the idea that freedom from encroachment is only one among many freedoms that are important, and that it is not always the case that individuals have a right to this particular freedom. What this means for our considerations is that if nudges in some meaningful way interfere with the decisional autonomy of choosers or constitute an infringement of the freedom from encroachment, then nudges should be considered to have some meaningful effect on the freedom of choice of that chooser.

Other thinkers have also included considerations of autonomy in their evaluations of whether an individual has freedom of choice. Sigal Ben-Porath argues that for a choice to be properly available and successfully achieved (qualifications for freedom of choice), three components are necessary. Among those components is Autonomy—defined as “the ability to discern and consider options, and the capability to act according to one’s preferences.”<sup>73</sup> Under this consideration, a nudge would impact autonomy if the nudge made it difficult for the chooser to discern and consider her options. Dworkin on the other hand argues that whether autonomy has been compromised during an action is not a question of the act itself, but rather whether the actor “minds acting for these particular reasons or not?”<sup>74</sup> On this score, an action would impede autonomy if it resulted in a person acting based on a reason that they would not agree with. In one hypothetical, an

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<sup>73</sup>Ben-Porath, *Tough Choices*, p.10

<sup>74</sup>Dworkin, *The Theory and Practice of Autonomy*, p. 155

individual named Jake is an unhealthy eater. Jake's roommate is concerned with his eating habits. In order to help Jake make good decisions regarding food, Jake's roommate installs several mirrors in their room that distort Jake's image to make him appear overweight. The result of this is that Jake now wishes to eat healthier food, even though his nominal freedom of choice hasn't been undermined—he does not have any significant barriers to continuing to eat unhealthy food. However, Jake's autonomy has been undermined here. Jake is not acting due to reasons that are his own. In fact, if Jake knew that his decision was being made due to his roommate's use of mirrors, he might be understandably upset.

We now have several possible and useful concepts of autonomy to determine if a choice has been made autonomously and therefore with no impact on freedom of choice. Locke thought that if the desire that motivates your action is not authentically yours, the action itself is not truly free. Sen argues that a person has no freedom of choice if the “levers of control” are not in their hands—specifically if they are not free from the encroachment activities of others on their decisions. Ben-Porath emphasized the capacity of a chooser to both discern and consider their options. Finally, Dworkin focused on the reasons for which a chooser might act, determining that an action is not autonomous if it is done for reasons that the chooser minds acting for. Since several of these definitions have a similar motivation, it is possible for us to combine them into one definition to evaluate nudges. This definition is as follows:

An agent A autonomously makes a choice C when:

1. A has knowledge of all the available options within the choice set.<sup>75</sup>
2. A's capacity to act on any available option is not overcome by external (e.g. coercion, manipulation, interference) or internal (e.g. psychological problems or deficiencies in agency) hindrances.
3. A selects an option as her own based on reasons that she can either present as her own or that she would be willing to defend.

It may be argued that it is unrealistic to demand autonomy meet these conditions, because outside influences are always present in our deliberations. As studies of advertisement specifically suggest, external factors and influences routinely have an impact on our decisions. While I will not contest that advertisements and other business (and government) practices act to make individuals more likely to make one decision over another, I will make the argument that nudges do the same. While it is not my goal to state that using nudges is or is not permissible in order to influence our decisions, the fact that nudges and advertisements have a cost to our autonomy must be considered in

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<sup>75</sup> An interesting question comes up when one asks if knowledge of all options within the choice set is too high of a bar for autonomous choice, and if it would be better to put the bar at all options that a reasonable person would expect. If we require knowledge of all options for autonomous choosing, then we need to claim that individuals who enthusiastically choose an option but may not have thought about an alternative are not choosing autonomously. However, if we set the bar of autonomy at knowing only those things that could be expected of a reasonable person we leave open the possibility of third parties hiding otherwise beneficial options that are remote enough that the chooser should not reasonably be assumed to understand them. Since the purpose of this definition is to evaluate choice architects who are imposing some form of nudge or choice architecture on an already existing situation, the stronger requirement of knowing all options seems appropriate. This is because the expectation will be on the choice architect to inform the chooser of all options available—thereby promoting their autonomy beyond the “reasonable person” formulation.

evaluating whether implementing a nudge is the best policy option all things considered. Furthermore, just because other factors may be diminishing our autonomy does not mean that it is therefore acceptable to ignore the cost to autonomy that our nudges might have. Instead, we should consider all factors in determining what the best policy option is, including considerations of both the costs of nudging and whether autonomy has already been compromised. Below I will evaluate how some nudges can actually enhance the autonomy of the chooser, and how these nudges can be used to counteract the effects of other limitations on our autonomy.

Autonomy can be considered valuable for two major reasons—instrumental and inherent. Instrumental valuations of autonomy focus on how possessing autonomy allows us to become better at making our own decisions and achieving what we want. The foundation for this was explained in Section IV above, as was the admission that for the purpose of evaluating Libertarian Paternalism instrumental accounts of autonomy are likely non-starters. In many of the cases where a Libertarian Paternalist would choose to nudge, the chooser is not acting autonomously in the first place. What is the more interesting question is whether or not autonomy has inherent value—such that it would be worth promoting through the Libertarian Paternalist choice architecture in instances where that is possible but not necessary. Many theorists and doctrines in areas of political and moral philosophy use autonomy as a justification. These range from the doctrine of informed consent<sup>76</sup> to business ethics condemning manipulative advertising<sup>77</sup>. Generally, autonomy is considered inherently valuable because it is a reflection of the will and self-

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<sup>76</sup>Taylor, Personal Autonomy p. 20

<sup>77</sup>Ibid.

direction of the individual holding autonomy. It is impossible for one to live a life conforming to the values they hold without acting autonomously. This is reflected in the self-determination account of the value of freedom of choice explained above.

Furthermore, many accounts of moral philosophy require individuals to be autonomous in order to have personal responsibility. If persons are not autonomously choosing to act in one way or another, it is difficult if not impossible to attribute blame for their actions to them—they were acting under another's influence. Thus autonomy is valuable because it is both a reflection of our own will and it is the foundation for our responsibility for our actions.

Autonomy of choice as defined above (p.47) can now be used to evaluate whether each level of Libertarian Paternalism has a detrimental effect on autonomy. I will evaluate each level of Libertarian Paternalism in turn from the strongest to the weakest type of Libertarian Paternalism, rejection of choice notwithstanding<sup>78</sup>. First I will consider substantive constraints on choosers. The imposition of substantive constraints on choosers does violate autonomy of choice. If done in the way that a Libertarian Paternalist would envision, the imposition of substantive constraints would limit the reasons for why a chooser is able to deviate from the default choice. This directly contradicts (2) of the autonomy of choice definition, since the chooser's capacity to act is being overcome by outside restrictions. Furthermore, this contradicts (3) from the definition of autonomy of choice, because the chooser may prefer to differ from the

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<sup>78</sup>Above I outlined how I believed that rejection of freedom of choice is contradictory to the aims of Libertarian Paternalism, and cannot be justified through their arguments.

default, but is forced to make the choice of the default because the reasons they would prefer to act on are not on the list of accepted deviations. An example of this type of Libertarian Paternalism is found in the Model Employment Termination Act<sup>79</sup>. Under this act, employees are given the right to be discharged only for cause<sup>80</sup>. However, the act permits employees the option to waive that right. This maintains the “freedom of choice” for employers and employees. This does not come as a free option, however, as there is a substantive constraint on accepting the waiver. By law, this waiver must also include the agreement of the employer to provide a severance payment in case of a discharge not resulting from poor performance. The payment must amount to one month’s salary for each year of employment. The restriction of only waiving a right in exchange for severance pay is the substantive constraint. It is substantive because the option to waive the right for other reasons—for example in negotiating a higher salary—is denied to the employee. This means that the employee may choose to keep the right not to be discharged without cause, but not because of reasons they support. Procedural constraints are difficult to assess, since the details of the constraints largely determine if the constraint imposes a cost to autonomy. For the example above regarding a mandatory waiting time between an initial consultation and obtaining an abortion, autonomy is strongly damaged. This is because the imposition of a waiting time requires individuals to make choices on whether or not to get an abortion not based on their desire to obtain an abortion but based on the practicality of spending

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<sup>79</sup> Model Employment Termination Act, reprinted in Mark A. Rothstein and Lance Liebman, *Employment Law 208-19* (3d ed. Statutory Supp. 1997)

<sup>80</sup> *Ibid.* Section 4

several days or hours waiting for the required period to end as well as, the practicality of both asking off of work and making the trip to a clinic on multiple days. While choosers still maintain the ability to consider the options before them and to evaluate those options based on their own calculations, their inevitable action may not be in line with their desires.

Furthermore, they would likely be unwilling to defend their choice based on time constraints—citing such mandatory wait times as both unfair and against their interests. On the other hand, a procedural constraint such as in the Age Discrimination and Employment Act do not have an impact on autonomy. The ADEA states that decisions to revoke your rights must be accompanied by a 7-day window in which the decision can be reversed with no consequences. The existence of the 7-day window does not make it more difficult to evaluate the choices the chooser has—it only adds to the possible choices. The existence of the 7-day window likewise does not intrude on the chooser's ability to choose for her own reasons. The 7-day window only gives that chooser more time to ensure that the decision made is in fact the one she want, and gives her an additional opportunity to justify that choice to herself. This is unlike the abortion case above, where a mandatory wait period imposes additional costs on the chooser—the employee is only being given the opportunity to change her mind rather than requiring that she reflect before performing an action.

Coerced choices will predominantly be autonomy promoting, not inhibiting. Requiring individuals to actively choose between options that are in front of them imposes neither a detriment to their ability to discern and evaluate their choices nor limits them from making a decision based on their own reasons. One could argue that coerced

choices will force individuals to make choices that they would rather not make, and as such would impose hardship on those individuals. An example would be someone who suffers from acute anxiety about the future being asked to plan for their retirement—forcing that individual to spend several hours evaluating different retirement plans and determining what they want in their post-employment years would undoubtedly be difficult for that individual. However, this does not mean that the individual's autonomy—as has been defined above—has been impeded. Section by section, the chooser knows all of the options available to her (1), she is able to consider her options without outside interference (2), and she is able to choose an outcome based on her own reasons (3). If the chooser wishes to make a choice at random, and not consider her options, that option is still available to her—she needs only to actively make a choice by checking a box or something similar. The hardship of anxiety would be an additional consideration to include in an overall evaluation of whether it is appropriate to create a nudge by the choice architect, but this does not fit into our discussion of autonomy. Furthermore, if an architect is to determine that the chooser is best served through a default or some mandatory retirement package, the choice architect would be making that determination through means that are not Libertarian Paternalistic in nature. A further investigation into the autonomy-promoting aspect of coerced choice can be found in Section VI (p.56)

Finally, the specific type of rule created will determine whether or not minimal paternalism joins procedural constraints as a level of Libertarian Paternalism that will be more or less detrimental to autonomy depending on the specific type of rule created. Some types of minimal paternalism will be relatively harmless—food in a cafeteria being set up in such a way that individuals are more likely to choose healthier options than

unhealthy options, for example. In this situation, individuals still have the freedom to consider all of the options available to them, as well as to evaluate whether those options are for their best interests or not. Furthermore, individuals can make their own reasons for choosing one option over another and defend that option to themselves or others. This harmlessness is even further emphasized if choosers are made aware that healthier options have been made more prominent and that they should consider eating healthier foods—a type of rational argumentation that Sunstein and Thaler regularly include in their definition of nudging.

Minimal paternalism becomes problematic when either the default option is set for reasons that are unacceptable to the chooser or when alternative options are not made prominent enough for consideration. One example would be in a government cafeteria. Consider the cafeteria's organizer who believes that the patrons are best served if they are eating vegetarian. The patrons have ill-formed preferences, and studies show that the organization of the cafeteria drastically influences the buying activities of the patrons. Other studies show that eating a predominantly vegetarian diet is very good for long term health. However, the patrons may not agree with the reasons why their meals are being influenced. They may prefer that their meals are decided based on taste, or enjoyment rather than on their nutritional merit. If their preference is strong enough, then the choice architect may be negatively influencing the patron's autonomy. However, due to considerations of when minimal paternalism is best used (preferences are neither well-formed nor ordered), the instances where minimal paternalism are problematic are few and far between. When these choice architectures become problematic they are most likely being used improperly or are instances of subliminal messaging/manipulation.

Nudges can fall on any level within this scale, and occasionally outside of the

scale. It would be hard to place Jake's mirror for instance on the continuum from minimal paternalism to full rejection of choice. However it is still possible to evaluate whether a nudge will be detrimental to our autonomy by asking if it violates the definition of autonomy listed above. Much like procedural constraints and minimal paternalism, nudges will either impact autonomy or have no effect on autonomy based on the context and details surrounding that particular nudge. Nudges also have the opportunity to support the autonomy of the chooser and expand their choice set as discussed below and in connection with the creation of options such as the Save More Tomorrow plan.

## VI. Enhancing Autonomy through Paternalism—Coerced Choices and Procedural Constraints

Until this point, the discussion in this paper has revolved around when nudges or other forms of Libertarian Paternalism have inhibited the autonomy of the individuals who are being asked to choose by a choice architect. In many cases—those of substantive constraints, certain types of minimal paternalism, and full rejection of freedom of choice—the subversion of autonomy is unavoidable if one chooses to nudge. If nudging is chosen, it must be justified by appealing to a higher benefit of the choice architecture than the autonomy that is lost. This cannot be done within the confines of Libertarian Paternalism, but I wish to leave open the consideration that other theorists can use nudges and choice architecture. However, two forms of Libertarian Paternalism (and the nudges that occupy that theoretical space) can actually be autonomy *promoting*. These are instances of coerced choices and procedural constraints. It should be remembered that coerced choices result when a nudge or choice architecture forces a chooser to actively participate in a choice when they otherwise would resort to abdicating that choosing responsibility. Procedural constraints do not limit the number of options available for choosers, but do require some hurdles to be passed in order to ensure that choices that deviate from the norm are active, engaged choices made by the chooser. My definition of when a chooser is acting autonomously—as first set out on page 46—is as follows:

An agent A autonomously makes a choice C when:

1. A has knowledge of all the available options within the choice set.
2. A's capacity to act on any available option is not overcome by external (e.g. coercion, manipulation, interference) or internal (e.g. psychological problems or deficiencies in agency) hindrances.

3. A selects an option as her own based on reasons that she can either present as her own or that she would be willing to defend.

As we proceed, I will be evaluating different types of coerced choices and procedural constraints based on this definition and the definition of freedom of choice listed in Section II. This definition is as follows:

Agent A possesses freedom of choice when she can freely choose between two or more options where:

1. Freely means that A is not being interfered with when making this choice. In other words, A is acting autonomously.
2. Choose means that A can direct her will in such a way that she is able to act on the selection that she makes, and that the outcome of that selection is a real possibility.

If these nudges do not inhibit, but rather promote autonomy and freedom of choice based on these definitions then Libertarian Paternalists may have a way to truly hold both a Paternalistic and a Libertarian stance. I suggest that Libertarian Paternalists who are truly committed to freedom of choice should use nudges in the form of coerced choices and procedural constraints where appropriate. Moreover, to do otherwise would mean deviating from a Libertarian Paternalist justification in favor of some other form of justification (equity, justice, welfare, etc.).

Coerced choices come in many forms. The fundamental feature of coerced choices is that a chooser who would not otherwise be engaged in making a choice is made to engage in making that choice in some fashion. One example of this is as follows.

A university currently administers parking passes based on post-tax income, and faculty are allowed to automatically deduct the cost of the pass from their take-home pay. The university wishes to change this policy such that the parking passes are deducted from pre-tax income, rather than post-tax income. This would result in savings for faculty at all income levels. However, there is some dispute on how to change over existing post-tax plans to pre-tax plans, as it would require the faculty's authorization. The university knows, based on the status quo bias, that most faculty are unlikely to comply with any mechanism that requires them to change over from their current plan, even if the savings would be substantial<sup>81</sup>. The university wishes to give their faculty the best treatment possible, and as such wants the maximum number of faculty possible to opt into the pre-tax parking pass program. The university is given two suggestions for how to accomplish this. The first is to set a default position where all faculty who do not notify the administrative office by a certain date their wish to stay on the post-tax plan will be swapped over to the pre-tax plan. This suggestion requires the main office to notify all faculty several times in the interim, with explanations of both what is occurring (the publicity requirement) and why the administration is making this move. This suggestion is one of minimal paternalism—setting a default that would maximize welfare while not inhibiting the freedom of individuals to change to non-optimal choices.

The second suggestion is the coerced choice option. The university administration is given the suggestion to remove all individuals from the parking pass list on a certain date, with the opportunity for all faculty to sign up for an automatic parking pass

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<sup>81</sup> This is the case in some Behavioral Economics studies based on the principle of status-quo bias or inertia.

withdrawal prior to that date (or beyond that date) on either the pre-tax or post-tax plan. As before, this suggestion will require the administration to send several notifications to their faculty prior to the specified date explaining both the change in policy and the reasons the administration is making this action. This option is a coerced choice because it requires individuals to actively engage in making a decision to change to a post-tax or pre-tax policy. The incentive of removing everyone from the parking pass program is important because it helps choosers overcome their non-rational tendency towards inertia. Even so, can we say that this suggestion of a coerced choice has less impact on autonomy and freedom of choice (or even enhances the two) than the minimally paternalistic suggestion of just changing a default?

The minimal paternalist position does not impede on the first two sections of our definition of autonomy. The faculty (choosers in this case) have knowledge of all the choices available to them based on the notices required to be sent by the administration informing them of the change in policy and rationale. The faculty have no outside restrictions placed on them that might affect how they are able to carry out this decision. Finally, the faculty are (presumably) rational adults who possess the capacities necessary to make this decision themselves and are free from internal constraints. The minimal paternalist suggestion likewise does not impede on the third section of our definition of autonomy, at least in the weaker sense. The faculty involved may abdicate responsibility for making the decision by ignoring the notices sent by the administration and refusing to fill out the paperwork required to stay on their own plan, but are likely to support the administration setting the default to a pre-tax plan since it is economically beneficial in almost all circumstances. This means that the decision is made based on reasons that they

would likely be willing to defend. However, in some cases (for example, abdicating responsibility for the decision) these reasons cannot be said to be the faculty's own reasons, which is a weaker form of the justification for a choice being made autonomously.

The minimal paternalist position also passes an evaluation based on its effect on freedom of choice. In our minimal paternalist suggestion, the faculty member is put in a circumstance where they are free to choose (either by action or inaction, which can constitute a response) between the options presented to them, and the faculty member has the capacity to direct their will towards a decision of their choosing which has a real possibility. However, one might argue that in a certain case—one where the faculty member abdicates her responsibility to make a decision and leaves the decision up to a default—the choice is not made freely by the faculty member, but by the administration<sup>82</sup>. For practical considerations, this won't change the outcome of the choice. However, if we are concerned with ensuring that choice architectures do not diminish the freedom of choice of our choosers as Libertarian Paternalism does is, then the ability of someone to abdicate responsibility and allow another agent to make a choice for us may result in unfavorable circumstances that can otherwise be avoided. This

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<sup>82</sup> A response to this point may be that we do not commonly view lack of choosing as abdication of choice, but rather that by choosing not to choose you make a choice. In situations that do not contain a third party changing the choice architecture around which you make a decision this might be the case. However, when discussing situations of Libertarian Paternalism we must acknowledge that there is a third actor—the choice architect—who in lieu of a decision by the chooser will be making a determination (presumably with the chooser's welfare in mind). While this may be preferential with regards to the efficacy of the choice that is made, not choosing in this case results in the chooser not having control of the outcome rather than simply a "status quo" position. An example of this would be a mother telling her child "pick out what clothes you wish to wear tomorrow or I will choose for you". We can say that the child who then decides not to choose what to wear chooses to allow his or her mother to determine what their attire for the next day will be, but we cannot say that the pastel shirt she chooses is the child's own choice.

is especially true if an alternative method would avoid this limitation while still resulting in a large number of people increasing their welfare through the choice set-up.

The coerced choice suggestion might be that alternative—that of forcing faculty to choose between the two plans. The coerced choice suggestion would not impede on the first or second part of our definition of autonomously making a choice. The faculty member has still been made aware of all choices possible. The faculty member still maintains the capabilities they possessed in the minimal paternalist case, and there is no outside influence that would impact the choice that is being made. It should be noted that the lack of outside influence on which choice is made is quite different from an outside influence that determines whether the choice to choose has been removed. However, even accounting for the outside influence restricting whether the chooser can make a choice or not there is no restrictions being placed on the individual's freedom of choice within the choice set itself—there will only be a different outcome based on the choice (or non-choice) made. Specifically, in the coerced choice scenario the option not to choose still technically exists—it would result in a loss of parking privileges rather than in a new parking status. The coerced choice will also not impede on the third section of the definition of making a choice autonomously. Not only will the faculty be able to defend the reasons that result in the choice made, the faculty member will be making the choice for her own reasons. This is a stronger affirmation of making a choice autonomously than simply being able to defend the reasons why one's choice is made if those reasons are not the individual's own—even if the practical result is the same.

The coerced choice will likewise pass muster on the definition of having freedom of choice. The faculty member is free (as in 'is able to autonomously choose') between

several options and can direct his or her will to a choice that has a real outcome.

However, this is distinct from the minimal paternalist suggestion because the opportunity to abdicate responsibility for the decision has been removed from the chooser. Not choosing does not result in a choice being made by an alternative party (which would be abdication of choosing), it results in a loss of the parking pass for the faculty member. This encourages active participation in the choice itself, and is likely a stronger affirmation of the freedom of choice for the chooser than the minimal paternalist suggestion.

While the benefits to freedom of choice and the capacity for the faculty member to autonomously make her own choices in the coerced choice suggestion are somewhat minimal with comparison to the minimally paternalist suggestion, their existence means that a Libertarian Paternalist who supports those two qualities must justify using the minimally paternalist suggestion over the coerced choice suggestion. This isn't unlikely, as the potential negative impact of the coerced choice position might be substantially larger than the amount of autonomy/freedom of choice gained by using it over the minimally paternalist position. In this case however, Libertarian Paternalists must qualify their position that freedom of choice is not infringed (both in a substantial sense of changing the actual freedom of choice and in the sense of why we might value freedom of choice due to autonomy) by saying that nudges are permissible *even when they affect freedom of choice based on the benefits of using said nudge—or the detriment caused by a status-quo position.*

While the example of the parking pass program didn't result in substantial differences in autonomy and freedom of choice between the coerced choice position and

the minimally paternalist position, this will not always be the case. Take the case of retirement benefits for employees. A choice architect may say that a default plan that everyone is enrolled in is the best and most minimally paternalist choice architecture possible. However that default plan might not be justifiable by the individuals who are automatically enrolled in the plan, and the lack of participation in the decision of what retirement package each employee has is problematic to both Section II of our autonomy definition and the first half of our definition of freedom of choice. A coerced choice position where each employee is required to either sign paperwork stating that they do not wish to have a retirement package through the employer or stating which of the retirement packages offered by the employer they wished to have would avoid the objection employees might have about lack of participation with this decision and would support both their freedom of choice and their ability to autonomously make those choices as per the definitions above. This is not to say that the coerced choice option is without drawbacks. Individual employees might be ill-equipped to make this decision themselves and would resort to picking a plan at random, or would hire another individual to make that choice for them. The cost of the coerced choice option is likely higher for the employer than the default option—since more paperwork would need to be filed. What each of these drawbacks lack is a reason to believe that coerced choice would infringe on the autonomy or freedom of choice of the chooser, based on the definitions above. Since Libertarian Paternalists claim that their methods do not infringe on freedom of choice or autonomy, advocating a position that does so (any of the above replacements for coerced choice) either means we must qualify the claims of Libertarian Paternalism's value on freedom of choice (removing what makes their system unique) or we must leave

the realm of Libertarian Paternalism to make our decision. While either option is permissible, a Libertarian Paternalist is able to keep their claim of supporting freedom of choice and by extension autonomy by using the coerced choice method in many instances.

Another form of Libertarian Paternalism worth considering is that of procedural constraints. The fundamental feature of procedural constraints is that while the number of options available to the chooser are not diminished, those options that might adversely affect the chooser's welfare (as determined by the choice architect) must be justified by the chooser through some form of procedural hoop they must jump through. This can take many forms, from a simple cooling-off period after the decision is made where there are no repercussions for reversing the decision to requiring written notice and consent by the chooser that their choice has been thought through (usually with recommendations to seek legal counsel). Unlike before, I cannot compare procedural constraints to a minimally paternalist position since procedural constraints rely on a default position (or some form of coerced choice) to exist before they can be put into place. I will therefore seek to evaluate the procedural constraints based on our definitions of autonomy and freedom of choice assuming that there is a default position selected by a choice architect and that default position is either permissible based on the chooser having preferences that are neither well-formed ordered, or otherwise on the basis of a cost-benefit analysis.

Consider a situation in which an individual is a patient at the hospital with a particularly debilitating disease. That patient has the option of several pharmaceutical medications that can help her overcome the worst of the debilitations, each with its own risks. Of the options, option A has a minimally effective impact on the debilitations, but

is the safest drug available with the least side-effects. Another option, option B, is a riskier drug that could aggravate the illness, but has the chance of significantly improving the patient's standard of living. The administrative staff of the hospital sets the default position of doctors to prescribe drug A since it has the fewest side effects. The patient is informed that they are being prescribed drug A based on these reasons, and given the information required to understand the possible benefits and drawbacks of drugs A and B (the publicity requirement). The patient is then told that if she wishes to change her prescription from drug A to drug B, she is going to be required to read and fill out a form stating that she is making this decision in full knowledge of the potential drawbacks of drug B, that she understands the reasons that drug A is the default choice, and is given a 48 hour waiting period between the time she submits this form and when the drug is actually prescribed. These constraints of switching from drug A to drug B constitute the procedural constraints that a Libertarian Paternalist might use to promote the welfare of the patient. Note that none of these constraints eliminate options (if there were drugs C, D, etc. available, they would be under similar constraints) as the patient can still choose to pursue drug B.

Do the procedural constraints outlined above diminish the patient's freedom of choice or the patient's ability to autonomously choose? Based on my definition of freedom of choice, these constraints do not diminish the patient's freedom. The patient has the freedom to choose since she is not being interfered with in making that choice (even if the hospital ensures that she is consciously and voluntarily choosing drug B), and can exert her will towards multiple real options. Procedural constraints cannot exist without some form of default or previously coerced choice, so we must assume that either

the default position here has been sufficiently justified as to not arouse objection or we alter the hypothetical to state that drugs A and B are not prescribed automatically, but the patient chooses which drug she wishes to receive after being informed of their side effects. In this case, if we continue using procedural constraints, the patient would still be under the same constraints as above should she choose drug B, but would not be required to wait or fill out paperwork if she chose drug A. In this way we can say that the patient is making her own choice, and is acting with full freedom of choice.

The procedural constraints likewise do not impede on the autonomy of the patient. The patient is aware of all of her options due to the hospital disclosing that information. The patient is presumably a rational adult who has the capacity to discern and consider her options, and is not being restricted in considering her options by outside forces. One of those options is harder to carry out, but so long as that option is both available and is not substantially impeded by the hospital's constraints it should not be considered to be removed from the patient's choice set. The procedural constraints serve to engage the patient's actual decision-making processes and give the patient more time to consider making a decision that might have grave impact on their standard of living. Furthermore, the patient is permitted to make her choice based on reasons that are entirely her own, as she is making the choice. This is supported by the procedural constraints, because the patient will have the opportunity to reflect on the reasons she is making the choice to pursue drug B and will be able to justify those choices to herself more strongly because of it. Thus these procedural constraints not only pass both the freedom of choice and the autonomous choice tests, but seek to enhance the patient's ability to make the choice autonomously by giving her the opportunity to reflect on and justify her choice to herself.

A Libertarian Paternalist who is committed to both freedom of choice and the welfare of the patient would be well-suited to using these procedural constraints in order to both fulfill their commitments and assist the patient in making the best choice possible in her own eyes.

This is not to say that all instances of procedural constraints ought to be understood as autonomy-enhancing or even that they might pass the freedom of choice test. As discussed in Section III, some types of procedural constraints can actually limit the ability of some choosers to make some choices, thereby making those constraints substantial rather than wholly procedural. If a procedural constraint significantly increases the difficulty of making a decision that is not the default position such that the decision is impossible to make for some choosers, then that procedural constraint would not be able to pass the freedom of choice test. Furthermore, if the choices available for choosers to select among are made more difficult in ways that carry social approbation—such as in requiring parental consent or a doctor’s note for basic contraception and that may dissuade individuals from choosing a non-default option—then that constraint impedes on the ability of a chooser to make an autonomous choice based on part (3) of my definition of making an autonomous choice. Because of this, Libertarian Paternalists must be careful in designing procedural constraints that they do not impose these restrictions on freedom of choice if they wish to maintain their commitment to that freedom.

In this section I discussed how both coerced choices and procedural constraints could be applied in order to fulfill the dual goals of Libertarian Paternalism. This led to both methods supporting freedom of choice, and enhancing the autonomy of the chooser

beyond what they might have done otherwise by encouraging reflection and active choosing. The purpose of both coerced choices and procedural constraints—when done charitably—is to fulfill the goals of soft paternalism: verifying the voluntariness and consciousness of a person’s actions. Neither of these methods is foolproof for fulfilling the dual goals of Libertarian Paternalism, and substantial consideration must be paid, especially to procedural constraints, to ensure that the nudge applied isn’t having adverse effects on the chooser. Furthermore, in some cases it may be entirely justifiable to avoid using coerced choices in favor of a simple default rule or procedural constraints in favor of more substantive constraints that may actually diminish freedom of choice. That decision must be made all-things-considered by the choice architect making the architecture in which the decision is made, including considerations both of the impact that moving away from freedom of choice might have on the chooser and the goals of the program the choice architect is supplying. Nevertheless, a decision made that would reduce freedom of choice in order to promote the goals of a program or the welfare of the individual does not take place wholly within a Libertarian Paternalist line of reasoning, unless that Libertarian Paternalist qualifies their (as yet unqualified) support of freedom of choice.

## **VI. Conclusion: Criteria for Libertarian Paternalists**

In this paper, I have outlined both what I understand to be Libertarian Paternalist's goals of upholding a chooser's freedom of choice and in supporting the chooser's welfare through nudges and other choice architectures. I focused in on freedom of choice, explaining that freedom of choice is valuable not only due to consequentialist rationales but for its benefit to autonomy. I argued that if Libertarian Paternalists truly value freedom of choice, they should also value autonomy and work to promote that autonomy through nudges. I separated out all five levels of Libertarian Paternalism, from minimal paternalism to full rejection of choice. I compared each of these to the Libertarian Paternalist goals and values, evaluated each on their effect on autonomy, and determined if each was compatible with freedom of choice. Finding that only minimal paternalism, coerced choices, and procedural constraints fulfilled all three requirements, I further showed that coerced choices and procedural constraints could be used to promote autonomy and not just welfare. I also showed that Libertarian Paternalists—under some of their current rules—sometimes choose to nudge for reasons that do not fall under their stated goals. Those instances are when they nudge disregarding non-economic costs, when they nudge non-paternalistically, and when they inadvertently manipulate their subjects through a failure to adhere to the strong publicity requirement. From these arguments, I have developed a list of criteria that Libertarian Paternalists can use to determine if a nudge or choice architecture they are using falls under their justifications, or would need to be justified outside of Libertarian Paternalism.

1. If the subject has neither well-formed nor ordered preferences, then nudging cannot be avoided and must therefore be permissible.

2. All nudges must take into account both the economic and non-economic costs they impose on their subjects, and nudges that impose serious economic or non-economic costs on their subjects cannot be justified through Libertarian Paternalism.
3. All nudges must be for the good of the subject who is nudged, and not using the subject as a means for the good of the community, earth, society, etc.
4. All nudges must be publicly available and defended, in an easy to understand and locatable manner. The exact nature of this publicity will vary from case to case, but those who are being nudged must be able to know (or be informed) that they are being nudged.
5. Nudges and choice architectures cannot deny freedom of choice from the subject, nor can they substantively constrain the choices available to the subject. A choice architect cannot force a subject not to make a choice—only guarantee that the subject is voluntarily and consciously making that choice.
6. Where possible, coerced choices and procedural constraints are to be used in lieu or in addition to minimally paternalistic nudges.

In many cases, the Libertarian Paternalist position will not be the most favorable or optimal position. In many cases, their as-yet unqualified support of freedom of choice will result in nudges being inefficient at promoting the welfare of their subjects. In some cases, a more paternalistic nudge would have a minimal, and at worst, detrimental effect on autonomy, but would result in massive benefits for the subject of that nudge. In other cases, the interference of a nudge would be both unwelcome and unhelpful for a subject who would prefer to act without any interference at all. Whether the value of the Libertarian Paternalist position can withstand further scrutiny is up for debate, but this

essay has illuminated exactly what that position ought to be if Libertarian Paternalists are sincere in their understanding of the value of freedom of choice.

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