



Legal nudges and the harm principle

A note on libertarian paternalism

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Abstract

The work develops an analysis of Sunstein’s libertarian paternalism and his critique of Mill’s Harm Principle. It compares three standpoints: (A) the antipaternalism of Mill’s Harm Principle, (B) Sunstein’s libertarian paternalism, and (C) the nonlibertarian paternalism typically exemplified by legal prohibitions. The work claims that, with some qualifications, (B) is compatible with (A), since libertarian paternalism does not generate the obligations or prohibitions that the Harm Principle disqualifies. At the same time, the work points out some problems and ambiguities that affect Sunstein’s arguments, notably the creation of duties for the purpose of nudging (e.g. duties on producers to benefit consumers) and the extension of nudges to conduct that is legally obligatory (e.g. paying taxes).

Keywords Harm principle · Law · Mill · Nudge · Paternalism · Sunstein

1 Introduction

How can one be a paternalist and a libertarian at the same time? Richard Thaler and Cass Sunstein (2008) demonstrated how this can be the case. Their arguments consist of data provided by behavioral economics, of the propensities to certain cognitive and decisional errors that affect us, and of strategies to direct individuals toward better decisions without restricting their freedom of choice. It is the idea of using *nudges*, which I assume the reader to be familiar with and which, however, I will briefly recall for the sake of clarity.

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A classic example in the literature concerns organ donation (e.g. Viale 2022: 49, 108). Assuming that it is good for everyone to have organs available for transplants, what maximizes their availability without compromising the freedom of choice of potential donors? Not the rule that makes organs available only from those subjects who expressed themselves in favor of it (opt-in strategy), but the opposite rule that makes organs available from those who did *not* express themselves against it (opt-out strategy). Both rules operate with a default mechanism that allows those who want it to select the opposite option. But their effects are very different and the latter, namely the rule that leverages a form of tacit consent, makes many more organs available than the former. Why? Because both rely on the decisional inertia of all those who, due to lack of time, uncertainty, reluctance to deal with certain issues, or other possible reasons, do not change the default option. So, if the default option is for donation, the rule maximizes the availability of organs without compromising the freedom to decide otherwise. A form of paternalism that imposed organ donation would be different. It would be a form of hard paternalism, certainly not a libertarian one.

In a work specifically devoted to this topic, and which I will closely follow and review for my purposes, Sunstein argues that libertarian paternalism is distinct from John Stuart Mill's *Harm Principle* (Sunstein 2014; Mill 1859). Mill's position is notoriously antipaternalistic, in that it allows coercive intervention by the government *only when the agent's conduct causes (probable) harm to others*. "His own good, whether physical or moral, is not a sufficient warrant" according to Mill.¹ Preventing harm to others is a necessary condition for that, whereas for Mill harm to agents themselves does not justify coercive intervention.² In the famous formula based on a legal and political metaphor, the individual is "sovereign" over himself or herself. Sunstein intends to "challenge the Harm Principle on the ground that in certain contexts, people are prone to error, and paternalistic interventions would make their lives go better" (Sunstein 2014: 4–5).

The idea is certainly brilliant. Promoting people's well-being or welfare without curbing their freedom is a great thing. But several critics suspect that many forms of nudging are actually manipulative, or subtly coercive. I will make some reference to this discussion at the end of the work. What I intend to provide is a detailed analysis of Sunstein's text, asking in particular to what extent Mill and Sunstein diverge. Given the focus of the work, I will not engage in an extensive discussion of the literature on libertarian paternalism and the various counterarguments to Sunstein's claims (see, among others, Conly 2012; White 2013; Alemanno and Sibony 2015; Guala and Mittone 2015; Sugden 2017; Brunon-Ernst 2017; Hertwig 2017; Hertwig and Grüne-Yanoff 2017; Oliver 2018; Rizzo 2021; Viale 2022). I will rather consider the objections that Sunstein himself discusses in the text examined here. And I will focus on some problems and ambiguities that affect Sunstein's claims.

¹ Mill 1859: 22. Each individual is "the person most interested in his well-being. ... In the conduct of human beings towards one another, it is necessary that general rules should for the most part be observed, in order that people may know what they have to expect; but in each person's own concerns, his individual spontaneity is entitled to free exercise." (ibid.: 136–137).

² Notoriously, one major difficulty is how to read "harm". Cf. Feinberg 1984; Ryan 1998; Turner 2014; Saunders 2016.

It is rather clear how libertarian paternalism differs from hard (nonlibertarian) paternalism, while it is not entirely clear how Sunstein disagrees with Mill. To me the point seems to be this: libertarian paternalism is concerned with defending individuals from their own errors, while Mill's antipaternalism is concerned with defending them from prohibitionists, authoritarian moralists and zealous officials of the government in particular. The Harm Principle is a limit to coercive intervention in individual choices, while libertarian paternalism aims to influence these choices. However, to the extent that this influence is not such as to compromise the freedom of individuals, it is a form of paternalism so soft that it would probably not meet with Mill's disapproval. I believe that a revived Mill would not condemn certain forms of nudging in fact. Mill himself insisted on the importance of educating people, of making them responsible and aware of what determines their own well-being and that of others. In this sense, at least the nudges that consist of informational strategies have no reason to be rejected by a libertarian *à la* Mill. I believe the same is true for certain forms of persuasion that are comparable to the words we might say to an alcoholic to try to induce him or her to quit drinking. Which is very different from prohibiting alcohol. And even more different from putting alcoholics in prison because they are alcoholics.

In what follows I discuss the forms of paternalism that Sunstein compares (Sect. 2), the relationship between these and the costs they impose (Sect. 3), and the relationships between paternalism, welfare, and autonomy (Sects. 4–5). I conclude that Mill's antipaternalism and Sunstein's libertarian paternalism are much closer than Sunstein acknowledges (Sect. 6). I also point out that certain forms of nudging, while not modifying the legal entitlements of some agents (e.g. consumers' freedom of choice), modify those of others (producers' obligations). And I observe that other legal nudges simply add to existing obligations. In these respects it is important to examine the normative structure of nudges and the incentives on which they operate. This contributes to a better understanding of the matter.

In brief my main claims are the following: (a) some legal nudges preserve the liberty of certain agents but impose duties on others; (b) some legal nudges entirely fall outside the scope of libertarian paternalism; (c) for those that belong to it, there is no incompatibility between them and Mill's Harm Principle.³ I take these to be nonobvious points that contribute to a better understanding of nudging and its legal implications, as they are rather neglected in the existing literature. In a nutshell, I address nudging and the Harm Principle from the perspective of legal theory.

2 Forms of paternalism

There is a strong established argument in favor of the Harm Principle. It is the argument that Sunstein calls *epistemic*, according to which "individuals are in the best position to know what is good for them. In Mill's view, the problem with outsiders, including government officials, is that they lack the necessary information" (Sunstein

³ I take Sunstein's argument (2014: 19) to be too weak in this respect: "soft paternalism might be compatible with the Harm Principle".

2014: 6). Individuals have the best information about their own preferences, the satisfaction of which generates well-being (Sugden 2017: 119). It is normal to choose food for a child who lacks awareness, it is acceptable to choose it for a guest who does not know the local cuisine, but it is unacceptable to impose it on others. Why? Because, until proven otherwise and with the exception of minors and the incapacitated, individuals know what is best for themselves and know it in a privileged way. In particular, what information do public officials have about our preferences? It is true that present technologies allow us to collect much more information than in the past, but in principle there are no things that officials know better than the agents themselves, nor does it seem plausible that the former can predict better than the latter what the latter will do. Put another way, individuals are best placed to identify their goals and the best means to achieve them.

Yet, according to Sunstein, behavioral economics is challenging the epistemic argument, because it shows that people make many mistakes, some of which can be extremely harmful. People are often irrational, or have limited rationality; consumers are often manipulated and the market rewards those who exploit such limitations and errors (Sunstein 2014: 8ff).

This happens because people “are much affected by *choice architecture*, meaning the background against which choices are made” (Sunstein 2014: 14). Some background is always present. In a menu, for example, you have to start from something. In principle, very different menus can be arranged with the same contents. You can start from what has a higher cost, or on the contrary from what costs less; you can start from the lightest dishes, or from the most caloric ones; you can list everything alphabetically, or follow some other criteria. In a context in which obesity is a social problem, libertarian paternalism suggests an architecture of food choices in which the less caloric foods are indicated with greater salience; which does not prevent making different choices when the consumer wants to do so.

If there is widespread awareness of obesity as a social problem but people do not change their eating habits enough, it is possible to resort to forms of nudging, namely food presentation strategies to be adopted in shops, supermarkets, cafeterias, canteens, restaurants, etc. to make some products salient to the detriment of others, encouraging the choice of healthy, low-calorie products without preventing the purchase of less healthy, high-calorie products. A canteen in which salads are in the foreground is preferable in this sense to one that makes sweets or sausages salient. The public regulator can require that certain decision-making architectures be adopted rather than others in given contexts (e.g. school or professional canteens). If paternalistic interventions are forms of nudging, they are initiatives that maintain freedom of choice (legal entitlements) at the same time as they guide people’s decisions in the right direction, according to the preferences of those same people (Sunstein 2014: 17). In our example, this presupposes that people do not want to be obese but that they cannot give up sweets or sausages when they see them; this would be remedied at least in part by a choice architecture capable of making these products less salient. Sunstein recognizes that in examples like this there is nothing that contradicts Mill’s indications; prohibiting tiramisu or pork knuckle would instead be a form of hard paternalism, as it is true (but more reasonably so) of measures like making seatbelts compulsory (Sunstein 2014: 17–19).

To bring order to those forms of paternalism, Sunstein proposes a double categorization (Sunstein 2014: 19ff). First, he distinguishes between *means* and *ends* paternalism, where the former aims to influence choices on means while respecting individuals' preferences on ends, whereas the latter aims to influence choices on ends.⁴ Second, Sunstein distinguishes between *hard* and *soft* paternalism, where the former sacrifices freedom of choice in some contexts, while the latter (i.e. libertarian paternalism) preserves it. I find it helpful to notice that the first categorization concerns a difference in the *practical subject-matter* (means or ends), while the second points to a *deontic* difference (whether obligations and prohibitions are imposed or not). Legal entitlements and commitments, or legal rights and duties, are matter of deontic positions (Duarte d'Almeida 2016).

The two categorizations can be combined and there are four possibilities, respectively hard and soft paternalism about means, and hard and soft paternalism about ends (Sunstein 2014: 61ff, 71–72, 82ff). Imposing a certain means given a freely chosen end amounts to hard paternalism about means; making a certain end obligatory amounts to strong paternalism about ends. Nudging toward a certain means while allowing the choice of others amounts to soft paternalism about means; nudging toward a certain end while allowing others amounts to soft paternalism about ends.

Behavioral economists generally look favorably on soft paternalism, and nudges typically amount to soft paternalism about means (Sunstein 2014: 19).⁵ The distinction between hard and soft paternalism is addressed in greater detail below. For now, let me say that the distinction between means and ends paternalism is largely useless (which explains its limited use in Sunstein's own work). This is for various reasons. The first is that the paternalist rarely has sufficient knowledge of the means and ends pursued by the nudged. Is a food choice that the paternalist would like to influence a means or an end to the agent? People eat for nourishment but also for the pleasure of eating, or for cheerful company. Examples easily multiply. For instance, does the gambler gamble to become rich or for the thrill of the game itself? What does the paternalist know about this? A second reason why that distinction is largely useless is that several ends are means to other ends, which makes it difficult to classify a nudge as being of one type or the other. The same choice or the same action can be considered from various perspectives and because of this the qualification of a paternalistic intervention as addressing a means or rather an end may appear arbitrary.

To insist on the last point, consider a student attending a class: the act can be understood as a means to learn, which serves to pass exams, to then graduate, find a job, earn money, etc. But it can also be seen as the end for which the student left home, took a means of transport, went to university, etc. All of this is not surprising if we consider that in our conduct means and ends are intertwined: several ends are means to further ends, and there is a sort of continuum between them. Leaving home is a means to the end of going to class, which is a means to the end of learning, which is a means to the end of passing exams, etc. The ultimate ends, if any, are some-

⁴ Means paternalism is read differently if it amounts to the idea of giving individuals the skills and abilities to pursue their own ends (Viale 2022: 103–104, 158).

⁵ One should not forget the *descriptive* and *explanatory* nature of the behavioral approach, while such forms of paternalism are placed at the level of *practical* or *normative* intervention.

thing very indeterminate like happiness or well-being. So, if the paternalist wants to promote well-being, every form of paternalism becomes a form of end paternalism, being concerned with that ultimate end as understood by the paternalist. Or one could say that every nudge is relative to the means which promote an indeterminate end such as “living well”.⁶ This shows how puzzling can be the use of this categorization applied to nudges.

Much more useful is the distinction between hard and soft paternalism, which we will have to return to. Not before having recalled what justifies Sunstein’s assumption that individuals often make mistakes, even serious ones.

3 Paternalism and costs

The original idea of the research program promoted by Kahneman and Tversky in the 70s of the last century was to study empirically and experimentally certain aspects of human conduct such as judgments and decisions, explaining why they frequently diverge from what is predicted by the theory of rational choice based on expected utility. Cognitive limitations, biases, prejudices, preconceptions, and constraints of various sorts make many judgments and decisions different from what they should be if individuals were (fully) rational as postulated by that theory.⁷

Kahneman (2011) has famously synthesized many years of research in the idea that our mind is made up of two cognitive systems, present to a greater or lesser extent in real individuals: a fast, automatic, emotional, intuitive System 1, and a slow, reflective, calculating System 2, capable of elaborating and following plans.⁸

Now, in much philosophy of mind one can find similar ideas (see Viale 2021: 183ff). An example is Fodor’s theory of the modular mind, which features an architecture similar to Kahneman’s Systems 1 and 2.

Perception is built to detect what is right here, right now—what is available, for example, for eating or being eaten by. If this is indeed its teleology, then it is understandable that perception should be performed by fast, mandatory, encapsulated, ... etc. systems that—considered, as it were, detection-theoretically—

⁶ “If the end is “for life to go well”, then all forms of paternalism, including the most ambitious, seem to qualify as means paternalism, since they are styled as means to that most general and abstract of ends. But if the end is very specific—“To buy this product today!” or “To smoke this cigarette right now!”—then many and perhaps all forms of paternalism qualify as ends paternalism. If ends are described at a level of great specificity, there may be no such thing as means paternalism.” (Sunstein 2014: 70).

⁷ Scholars discuss the novelty of Kahneman and Tversky’s framework compared to Simon’s theory of bounded rationality, and the margins within which it is justified to qualify a judgment or decision as irrational; for some, the approach of adaptive and ecological rationality promoted by Gigerenzer and others is preferable to the approach of Kahneman and Tversky as it explains and qualifies as rational many judgments and decisions that the rival approach condemns as irrational and therefore in need of correction. It is clear that the justification of paternalistic intervention by the public regulator is also at stake. See, among others, Gigerenzer 2021 and Viale 2022.

⁸ One should not take that too literally: “the idea of two systems is a heuristic device, a simplification that is designed to distinguish between automatic, effortless processing and more complex, effortful processing.” (Sunstein 2014: 27).

are prepared to trade false positives for high gain. It is, no doubt, important to attend to the eternally beautiful and to believe the eternally true. But it is more important not to be eaten. (Fodor 1985: 4)

Here is the adaptive advantage of System 1, or of a similar cognitive processing. Next comes the need of having something that goes beyond perception and superficial cognition.

If the perceptual mechanisms are indeed local, stupid, and extremely nervous, it is teleologically sensible to have the picture of the world that they present tempered, reanalyzed, and—as Kant saw—above all *integrated* by slower, better informed, more conservative, and more holistic cognitive systems. The purposes of survival are, after all, *sometimes* subserved by knowing the truth. The world's deep regularities don't show in a snapshot, so being bullheaded, ignoring the facts that aren't visible on the surface—encapsulation in short—is not the cognitive policy that one wants to pursue *in the long run*. (ibid.)

This is why, in other words, there is a need for System 2, or a processing like it. But a distinctive aspect of Kahneman's views is the criticism of System 1 and the attribution to this system of many biases and errors that systematically affect individuals. Sunstein (2014: 34) adopts this explanatory framework and argues that many cognitive mistakes and “behavioral market failures” are “firmly rooted in the operations of System 1”. The preference for the present (“present bias”), certain forms of time inconsistency, problems of self-control, unrealistic optimism, and problems with probability are for Sunstein significant examples of that. They are mistakes that prevent people from promoting their own ends and achieving the welfare they yearn for.

In particular, System 1 is considered to be shortsighted. It sees immediate utility and does not see (or sees badly) future utility. The individual dominated by System 1 is not capable of taking a step back today to take two steps forward tomorrow, giving up immediate utility for greater future utility. Furthermore, the attention of System 1 is activated by the salience of certain attributes to the detriment of others. When buying a car, prices are more salient than other attributes (“shrouded attributes”), as are current costs compared to long-term costs and private costs compared to social ones; so it is not uncommon for a less expensive car to be preferred even when it is less efficient overall (because it is more expensive in terms of consumption) and perhaps more polluting. Informing about medium- or long-term costs opposed to short-term ones, and about social costs opposed to private ones, may not be sufficient for an improvement in choices if the information is not made salient or conveyed in the most effective way.

The paternalistic recommendation can limit itself to requesting that more information be given or that this be given in certain ways that make it salient or more persuasive by exploiting the characteristics of System 1. In doing so, the regulator remains in the field of soft paternalism, while obligations and prohibitions belong to the realm of hard paternalism, and according to Sunstein, despite his preference for libertarian paternalism, even an obligation can be justified in some cases, when it can

be demonstrated that its benefits are greater than the costs (Sunstein 2014: 38–39, 44). The case of seatbelts is exemplary.

If the paternalistic action is implemented by a private institution, it does not generate the concerns that a public intervention does.⁹ But public paternalism does not necessarily involve coercive intervention. The “paternalist’s toolbox” presented by Sunstein (2014: 51ff) includes a variety of tools such as information campaigns, awareness campaigns, persuasive tools such as graphic warnings, taxes, default rules, mandatory rules, pecuniary and non-pecuniary sanctions.

Such a varied toolbox leads Sunstein to a reformulation of the earlier distinction between hard and soft paternalism. The reformulation comes in terms of costs and envisages a paternalistic *continuum*:

In fact it might be most sensible to understand paternalistic interventions in terms of a continuum from hardest to softest, with the points marked in accordance with the magnitude of the costs (of whatever kind) imposed on choosers by choice architects. On this view, there is no sharp distinction between hard and soft paternalism; all we have are points along a continuum. But differences of degree are important. (Sunstein 2014: 56–57)

Where the costs imposed on the nudged are high, the paternalistic intervention is hard; where they are modest, paternalism is soft. But it is not just a question of monetary or “material” costs. Sunstein includes in the picture different costs such as “psychic” ones, that is, the costs suffered by the recipient of a paternalistic measure from an emotional or psychological perspective. (Psychic costs are not susceptible to cardinal measurement, in the current state of our knowledge and technology, but they can be the object of an ordinal evaluation.)

Note that the previous distinction, the one I called deontic, is categorical in that it depends on whether or not obligations and prohibitions are imposed. The jurist is certainly familiar with it. But that distinction does not allow for judgments of degree and an appreciation of costs, which the economist looks at more closely.

There are significant advantages in seeing a continuum here rather than a categorical distinction. But if a categorical distinction is what is sought, we might want to focus on whether the intervention imposes material costs. On this approach, we would understand “hard paternalism” to refer to *actions of government that attempt to improve people’s welfare by imposing material costs on their choices*. By contrast, “soft paternalism” would refer to *actions of government that attempt to improve people’s welfare by influencing their choices without imposing material costs on those choices*. (Sunstein 2014: 57–58)

⁹ However, see Ivanković and Engelen 2024 (claiming that worries about nudges circumventing the deliberative capacities or diminishing the control of targeted agents are greater when it comes to market nudges, given that these are not constrained by the principles that regulate government and come in great numbers that overwhelm agents).

I must say that this reformulation of the distinction does not seem particularly perspicuous to me. Note that Sunstein starts from clear deontic categories and moves on to a reformulation in terms of costs, to then return to a categorical distinction in terms of costs of a specific type. If a categorical distinction is sought, by distinguishing material from different costs such as psychic ones Sunstein arrives at the following claim: hard paternalism imposes material costs on choices, weak paternalism does not.

If so, there are some theoretical problems with those formulations. The formulation in terms of cost categories has the counterintuitive consequence that a small increase in material (monetary) costs makes paternalistic intervention hard, while a high psychic cost remains in the category of soft paternalism. Take the example of graphic warnings on cigarette packets: increasing the cost of a pack of cigarettes by one cent would be a form of hard paternalism while putting the image of a terminally ill patient on the packet would be a form of soft paternalism. Sunstein (2014: 56, 59–60) hints at the problem but leaves it open.¹⁰

For the jurist, the deontic distinction is clearer and easier to apply. Where there are obligations and prohibitions, paternalism is hard, otherwise it is weak. However, this way of understanding the matter neglects an important aspect. Let us take the example of graphic warnings on cigarette packets again. Since they do not modify the freedom to buy and consume cigarettes, they are interventions in line with soft paternalism, according to the deontic categorization of forms of paternalism. But not everything in the example is in terms of freedom, or liberty. As the jurist clearly sees, if on the one hand consumers are not subject to impositions on their choices, on the other hand producers are subject to the imposition of an obligation, that is, to produce packets with certain graphic warnings. In a famous case discussed by the German Federal Constitutional Court (Alexy 2003: 136–137), it was precisely the tobacco producers who complained about the interference with their freedom of economic activity that was generated by the new rules on packaging: whether in written form or by images, once the obligation of such warnings about the risks associated with smoking is imposed, the economic freedom of the producers is subject to a limitation which, in the judgment of the Court, was more than compensated by the greater (expected) benefit for the health of consumers. (One would also like to know *ex post* whether the actual benefits outweigh the costs, but this is a different point.)

In any case, it is good to remember that nudges can come and typically come with obligations or prohibitions on producers or suppliers of certain goods and services. Sunstein (2014: 58) mentions it in a passage in brackets and says he does not deal with it. But this is puzzling to say the least: a certain rhetoric of nudging as libertarian paternalism risks making us forget that in a case like that there are impositions on the supply side, namely on the producers, even if there are no impositions on the demand side.

On the other hand, monetary increases in the cost of tobacco (typically with taxes to discourage smoking and to benefit the public coffers) are not deontically relevant since they do not change the deontic status of the production and sale of tobacco,

¹⁰ Note also that, strictly speaking, a tax increase on cigarettes is not a nudge, because it changes the economic incentives (it addresses System 2, not System 1).

which remain legal activities regardless of the cost of the products. A difference in costs does not change the legal entitlements. In this sense, an increase in monetary costs for smokers does not correspond to a hard paternalistic intervention, but in fact as monetary costs increase, the difficulties of purchasing increase for at least some groups of smokers (the less well-off), with the effect of a gradual transformation of tobacco into a luxury product. Let us suppose, exaggerating, that a pack of cigarettes costs 50 euros: certainly not everyone could afford the luxury of smoking, yet there would be no form of hard paternalism according to the deontic distinction. (There would however be, warns the economist, a significant black market in tobacco, not identical but similar to that generated by a prohibitionist policy.)

In sum, in that respect, I think that the deontic distinction remains clearer and more useful for jurists but one should not forget that the freedom guaranteed to certain categories (consumers) can be accompanied by impositions on others (producers) and that a significant change in material (monetary) costs can have a profound effect on a certain phenomenon even if it does not formally affect its deontic profiles. On the other hand, again, the distinction in terms of costs along a continuum can do greater justice to the use of adjectives such as “hard” and “soft” in order to characterize the various forms of paternalism, given the gradations that the calculation of costs allows. I believe that this is more useful to the economist than to the jurist, however. And that overall it is good to keep in mind these various categorization possibilities, using those that best suit the context of discussion.

And there is more if one analyzes some alleged examples of nudging from a legal perspective. An idea adopted in some contexts (but I cannot say with what effects) is to place graphic warnings or eloquent images for drivers along the roads. Not a simple warning that there is a penalty for exceeding the limit—this falls within the traditional logic of reinforcement by legal sanctions—but a phrase that touches some emotional chord (e.g. “Don’t take risks, think of your loved ones”) or an image capable of striking the driver (it could be the face of a known person who died in an accident due to speeding, or even the corpse of an accident’s victim). Note that these nudges add to already existing obligations. Drivers are not simply free to decide how to speed. Those tools would not change the structure of the incentives already provided by the legal rules, but would hopefully induce greater caution and compliance with the rules by drivers. Naturally, if even these tools do not prove suitable for reducing violations and accidents, stronger ones could be tried (images with a stronger emotional impact, perhaps of accidents themselves) or alternatively the incentives themselves could be modified by prescribing more serious penalties or reducing the probability of getting away with it given more effective controls (more patrols, speed cameras, etc.). But regardless of the possible variations on the theme, the theoretical point is that the nudges applicable to this kind of example are inserted into an already normative fabric, where obligations, prohibitions, etc. already exist. Is it a peculiar trait of the chosen example? I would respond in the negative to the extent that other examples usually discussed in the literature present the same trait.

The obligation to pay taxes is a similar example. We all have the obligation to pay them, with the exception of the pauper. The circumstance often referred to in the literature (e.g. Thaler and Sunstein 2008: 66; Viale 2022: 53–54, 76) is that some administrations have sent taxpayers messages such as “Among your neighbors 9 out of 10

have already paid their taxes”, or letters with the public spending chapters to which the payments contribute, with the result that the rate of compliance with tax obligations has improved. Here the nudge leverages the moral feelings of the recipients and plausibly the sense of shame felt by the non-compliant subject recognized as such. The nudge does not change the structure of economic incentives, but one must note that it is activated on a pre-existing normative framework. It is not the celebration of libertarian paternalism. In this sense it is misleading to say that the nudge makes you make wiser choices without limiting any option. In such examples the recipients of the messages are subjects already burdened by an obligation, the fulfillment of which is favored by the nudge. In brief: (i) if you have an income or are the owner of certain assets, then you must pay taxes on them; (ii) if you do not pay taxes, then you must be sanctioned. The nudge of the message adds to this. Of course, nudges could be preferable to an increase in controls by public officials, if it were demonstrated that at a significantly lower cost they achieve the same benefits or even greater benefits in terms of payments. However, this is not libertarian paternalism: it is just a behavioral insight applied to preexisting duties.

4 Paternalism and welfare

To legitimate nudging interventions, Sunstein says that they will enhance the “welfare” of people. But what does this word stand for? Sunstein (2014: 72ff) appreciates it as expressing a large category which is capable of encompassing many different things. “The central idea”, as we already know, “is that some forms of paternalism can enable people to have better lives (by their own lights)” (ibid.: 87). The variability of criteria and preferences is therefore not a problem for the libertarian paternalist. Whatever individuals mean by “welfare”, some forms of paternalism can help them achieve their desired results without curtailing their freedom.

But we have already mentioned that one argument, the epistemic one, militates on the antipaternalist front, as do other arguments considered and discussed by Sunstein. Overall, he examines an “antipaternalist’s quintet” consisting of these arguments (Sunstein 2014: 91ff):

- (1) the epistemic argument,
- (2) the competition argument,
- (3) the learning argument,
- (4) the heterogeneity argument, and,
- (5) the public choice argument.

Sunstein thinks that none of these arguments justifies the Harm Principle. But let us proceed in order. I will present the arguments in a nutshell and then see how Sunstein reacts to them.

For the first argument, each individual is in the best position to know their own preferences. If not like a *sovereign*, each individual is the best *judge* of their own welfare.¹¹

¹¹ The metaphor of the sovereign is stronger, for it refers to the idea of an absolute authority; that of the judge is weaker and refers to a subordinate and fallible authority. Whoever uses the metaphor of the

With Mill, we might insist that individuals know best about what will make their lives go well and that public officials are likely to err. Such officials might be mistaken about what people's ends are; they might also be mistaken about the best means of achieving those ends. (Sunstein 2014: 91)

The central objection, applicable to any type of paternalism (soft or hard, on means or ends), is that it is more likely that mistakes come from public officials rather than from those affected by the choice in the first place. Public officials lack the information that individuals possess. The example of unhealthy nutrition is used to show the opportunity for a paternalistic intervention. In fact for someone a dish rich in fats can be a reason for satisfaction, an end and not a wrong means (Sunstein 2014: 91–92). The costs of unhealthy nutrition are paid over time and the behavioral economist explains that we do not notice them because we are prejudicially focused on the present. But the unrepentant gluttons can reply that in their order of preferences a slim and serene old age is not worth the present pleasure (also because, as we know, in the long run we will all be dead).

For the second argument, if paternalistic approaches freeze the competitive process they can compromise the market mechanism which produces a combination of goods and services capable of satisfying the most varied preferences of demand (ibid.: 92–94).

For the third argument, errors are often productive in terms of personal growth and rationality. A paternalistic public regulator treats citizens as minors and makes it less likely that they will grow up (ibid.: 94–96). In this sense, architectures that require an active choice are better tools: an explicit assent or denial, not presumed by silence or inertia, should be preferred to default rules. Mill expressed it this way:

though individuals may not do the particular thing so well, on the average, as the officers of government, it is nevertheless desirable that it should be done by them, rather than by the government, as a means to their own mental education—a mode of strengthening their active faculties, exercising their judgment, and giving them a familiar knowledge of the subjects with which they are thus left to deal. (Mill 1859: 196)

For the fourth argument the paternalist would like to impose the “same size” for all (Sunstein 2014: 96–100): habits, food, entertainment and so on. But humanity is highly differentiated “in terms of tastes and values, and many different kinds of life can be good” (ibid.: 96). Now, without taking the usual examples of dietary vices or smoking, one could consider mountaineering as a form of unjustified risk to one's life. In fact, there are few mountaineers compared to the general population. Why not implement paternalistic policies that induce this irrational minority to stay smoothly at home rather than take unnecessary risks on the peaks? Those who perceive such a proposal as absurd recognize themselves in the argument of heterogeneity and reject the paternalistic claim of dressing everyone in the same size. Mill never ceases to

sovereign wants to say something stronger, that is, that no interference is legitimate with the exercise of autonomy.

underline the importance of individuality, originality, eccentricity, against uniform flatness and passive imitation. And that, in terms of economic and technological development, means encouraging innovation.

For the fifth argument we must be realistic about not only citizens and consumers, but also public officials and bureaucrats who are entrusted with public choices. These are not an enlightened category. They are not the Platonic philosophers who work unflinchingly for the public good. Erasmus of Rotterdam ironically questioned the pretension of placing philosophers or men of letters in government: consult the historians and you will find that no man of government was more harmful to the commonwealth, than when it fell into the hands of some philosopher or some literary fanatic (*In Praise of Folly*, §XXIV). Similarly, we can doubt officials. In fact, as behavioral economics teaches, to a greater or lesser extent each of us is the victim of biases and mistakes. Public officials, Sunstein warns, have their own propensities and motivations. They are influenced by interested groups or individuals, and make mistakes like everyone else.

Sunstein offers the following replies to those arguments. With respect to the first, Sunstein (2014: 105–107) provides an extension of the “bridge exception”: if a man is about to cross a dangerous bridge without knowing that it is so and we have no way of informing him, then we are justified in blocking him (hard paternalism). This is an example from Mill himself, whose scope Sunstein wants to broaden, extending it to the public sphere with paternalistic interventions when certain information cannot be given to citizens or when they cannot understand or use it properly. Often individuals choose the wrong means to their ends; they make decisions that harm them; they make purchases that they regret, etc. Then a paternalistic intervention is justified, possibly soft but also hard if necessary. Moreover, and quite interestingly, Mill imagined the government as a collector and disseminator of information and experience.

Government operations tend to be everywhere alike. With individuals and voluntary associations, on the contrary, there are varied experiments, and endless diversity of experience. What the State can usefully do, is to make itself a central depository, and active circulator and diffuser of the experience resulting from many trials. Its business is to enable each experimentalist to benefit by the experiments of others, instead of tolerating no experiments but its own. (Mill 1859: 197–198)

On the second argument, Sunstein recalls that competing companies often take advantage of consumers’ mistakes, but notes the compatibility between competition and soft paternalism.

Competition is exceedingly important, and in many cases it can provide a corrective to behavioral market failures. But we have seen that in other cases, competitors do best if they exploit such failures. The broadest point is that good choice architecture, even if it is behaviorally informed, should promote rather than squelch competition ... If choice architects provide information or warnings about risks, or use default rules, they need not reduce the number of competitors or promote cartels. (Sunstein 2014: 113)

On the third argument, Sunstein (*ibid.*: 114) notes that, on the one hand, information and awareness campaigns are tools for knowledge and growth and that, on the other, default rules have the virtue of simplifying life. These rules are the tool of soft paternalism that comes closest to hard paternalism (in the deontic categorization), given that, for many individuals who for various reasons do not activate themselves, the default option established by the regulator becomes a sort of imposition (even if formally it is not so). In this sense, default rules are not tools for growth, as is the mechanism of active choosing that asks recipients to make an informed decision. But they are simplification tools that allow even those who dislike them to save time and resources to dedicate to other things.

On the fourth argument, Sunstein praises the possibility of a “personalized” paternalism. Technologies allow it. The idea is to use information on people’s past choices, even at the individual level, in order to figure out their behavioral profiles and provide targeted measures that correct their biases and mistakes, safeguarding active choosing where possible and appropriate (*ibid.*: 114–115). Suppose that my web browsing reveals the intention to organize a trip from Italy to Australia and that this information is available to the companies that supply me with electricity and natural gas: I could receive a bill warning me that I will not be able to buy tickets for Australia if I continue to consume so much. It sounds like Big Brother, but it is a possible scenario that could be advantageous in some respects.¹² If I really care about Australia, I have to save on some things.

On the fifth argument, finally, Sunstein argues that the limits and problems of public choice (biases and interests of officials) are insufficient to justify the refusal to respond to classical and behavioral market failures (*ibid.*: 115). Therefore, on that quintet Sunstein concludes first of all that a choice architecture is inevitable; if it is not the paternalist who structures it, past decisions and interactions will do so. “The social environment influences choices, and it is not possible to dispense with a social environment” (*ibid.*: 118). No choice architecture is completely neutral. It is then a question of seeing what improvements can be made for the welfare of people. Similarly, Sunstein argues that default rules are omnipresent (think of pension plans in many legal systems, in addition to the example of organ donation). Such rules should not be criticized as such but, beside the fact of simplifying things, they should be evaluated for their ability to promote the welfare of people, generating more benefits than costs (*ibid.*: 120). Finally, it remains true that officials are also fallible (and corruptible), and that democratically elected representatives are not always up to the task assigned to them. But this is not decisive for Sunstein, since “some kind of paternalism is inevitable” and in any case the costs and benefits of paternalistic interventions must be empirically evaluated (*ibid.*: 121).

Summing up all of that, it seems to me that Sunstein’s defense from the attacks of the antipaternalist’s quintet is not in contradiction with the Harm Principle insofar as paternalistic interventions are soft (making abstraction from the obligations imposed on some for the benefit of others, as in the case of graphic warnings on tobacco). Mill might not be happy to live in a system that makes extensive use of default rules, but,

¹² The strategies of “granular” or “personalized” legal rules go in this direction (see e.g. Ben-Shahar and Porat 2019).

to the extent that these do not impose choices and preserve the freedom to decide otherwise, they are instruments acceptable even to the antipaternalist.

Before concluding, let me consider the value argument that the antipaternalist will ultimately refer to, namely the value of autonomy and its defense.

5 Paternalism and autonomy

The antipaternalist can resort to a value argument different than welfare: that of autonomy (Enoch 2016), or liberty. In short, as presented by Sunstein (2014: 124), the argument says that “all forms of paternalism, including those that grow out of an understanding of behavioral market failures, threaten individual dignity and endanger liberty”.

I would add a further advantage of freedom of choice: it is a good that is more easily protected than welfare. Legally, the moral value of autonomy is protected by norms whose deontic modalities (Hohfeld 1913: 28ff) are the granting of rights, claims, privileges, etc. rather than the imposition of obligations or prohibitions, while the protection of welfare depends crucially on what is meant by “welfare” and on the adequacy of the means available in this regard. It is also true that the right of someone correlates to the duty of someone else (e.g. my right to enjoy a certain good correlates to your duty not to interfere with it, unless I consent to it), but again this is more easily manageable by lawmakers and public officials than the determination of welfare. In short, liberty rights are proxies for welfare. They count as approximations to it, and though they can be imperfect approximations they are more manageable tools than measures that supposedly promote welfare more directly.

In fact, Sunstein (2014: 124ff) discusses two versions of that argument, which he calls “thin” and “thick”. For the first, freedom of choice is an *ingredient* of welfare. Individuals are happier when they choose autonomously. Interference with autonomy causes a loss of welfare. But that is not threatened by soft paternalism, namely by nudges and default rules. Although in some contexts the principle of active choosing may be preferable.

True, default rules allow people to make a choice if they really want to do that.

But active choosing directly engages people, as default rules do not, and people might like it better for that very reason. (Sunstein 2014: 125)

However, “in the thin version, freedom of choice is relevant but not necessarily decisive” (ibid.: 126). For Sunstein, the increase in welfare due to paternalistic action can compensate for the loss of welfare due to the restriction of autonomy. “Especially in complex and unfamiliar domains, active choosing can be a burden, not a benefit” (ibid.: 126). The informational and deliberative costs of certain decisions can be very high. For this reason, a good choice architecture makes us better-off in terms of freedom:

All of us could, in principle, make far more decisions than we do in fact. Every hour of every day, choices are implicitly made for us, by both private and pub-

lic institutions, and we are both better off and more autonomous as a result. If we had to make all decisions that are relevant to us, without the assistance of helpful choice architecture, we would be far less free. In a literal sense, choice architecture enables us to be free. (ibid.: 130–131)

Imagine a degree course in which students are asked to decide on the subjects, the teachers, the classrooms, the exam methods, the days and hours in which to take the tests, etc. Such an amount of deliberative autonomy would be completely counterproductive. It is true that the education system is by definition paternalistic, but think of similar scenarios in other systems: imagine a similar amount of decisions made by workers regarding working conditions and objectives, by citizens regarding the myriad of administrative issues that affect them, by consumers regarding the types of products they exactly want, etc. The division of labor and the difference in skills allow us to do other things in life, counting on the fact that we will not have to decide everything that concerns us. Many decisions will be made by others and our responsibility will be to decide what response to give them: whether to accept a certain job offer, whether to vote for a certain political party, whether to buy a certain product, etc. The idea of everyone participating in all decisions (thanks to technology) is patently absurd.

In the thick version, instead, freedom of choice is not an ingredient of welfare but an end in itself (ibid.: 127). Sunstein hints at the Kantian origins of this idea. But he asks this question: Are people really sorry about the loss of freedom of choice? Possibly, there are contexts in which it is difficult and costly to choose individually. So, is soft paternalism incompatible with the defense of autonomy?

Sunstein hypothesizes that the situation is as follows (ibid.: 128ff): System 2 is interested in welfare, while autonomy is a heuristic for welfare used by System 1.¹³ That is, autonomous decision is normally the best way to achieve welfare (given the best knowledge of one's preferences), but this is not necessarily the case. Like all heuristics, it works well in many cases but not in all.

Sunstein proposes an analogy with the moral norm that prescribes not to lie: System 1 has internalized it as a simple and good rule, but System 2 “knows that lying is sometimes acceptable and even obligatory, as when it is necessary to save a life” (ibid.: 135). Sometimes its benefits outweigh the costs, and System 2 is able to identify these scenarios, while System 1 only needs a categorical prescription. In short, the guiding concept is welfare. For Sunstein nudges that promote it are welcome, and forms of hard paternalism are justified where a cost-benefit analysis recommends them: there are circumstances in which the right response to a behavioral market failure might not be a nudge, but a mandate (ibid.: 142). I do not see why Mill should oppose soft measures, but he certainly would not approve of hard ones where the obligations or prohibitions were not intended to prevent harm to others but to promote the welfare of the very recipients of the mandate.

There is actually one additional aspect that worries the antipaternalist: the lack of transparency of nudges and the risk of manipulation that accompanies their use. Let me mention it for completeness' sake. Sunstein discusses the point by observing that hard paternalism is visible, soft paternalism less so (Sunstein 2014: 144ff). In a democracy, in particular, public authorities, whenever they impose obligations or prohibitions, are subjected to public

¹³ “People speak in terms of autonomy, but what they are doing is making a rapid, intuitive judgment about welfare. ... The real question involves welfare.” (Sunstein 2014: 134).

scrutiny. But nudges are less visible than obligations and prohibitions. What democratic control is there over nudges? These measures risk remaining in the sole hands of more or less enlightened officials, bureaucrats or consultants, without a real guarantee of democratic control. Sunstein agrees with the need for publicity, which is not lacking in things such as graphic warnings on cigarette packets. Some nudges promote deliberation (especially information campaigns), others do not (default rules). Those that do not, exploit our System 1. Is this a bad thing?

We cannot avoid influences on System 1. In many contexts, it is indeed best to promote conscious deliberation, but so long as the initiatives are made public and defended on their merits, nudges should not be ruled off-limits merely because they work as a result of the operations of System 1. (Sunstein 2014: 151)

Moreover, at the end of the work I am commenting Sunstein does not fail to underline the benefits conferred by System 1. “When people enjoy their lives, it is because of System 1” (ibid.: 155). Often people make mistakes because of this System, which is however capable of giving the right importance to emotions and empathy. Furthermore, without System 1 it would be difficult to choose in complex situations and decide in urgent circumstances. Faced with dilemmas, System 2, patient and calculating, risks turning into Buridan’s ass, incapable of choosing between two piles of hay and destined to die of hunger. System 1, thanks to its emotional dimension, is able to make decisions and stimulate action when it is urgent to do so. If the floor starts shaking and a crack appears in the ceiling, System 1 dictates that you run outside, while System 2 might start calculating, based on the information available, what the probabilities are that the building will collapse and that a certain damage will be sustained as a result of the collapse. There is no need to insist on the adaptive advantages of System 1 or, differently put, the advantages of certain cognitive and decision-making processes based on fast-and-frugal heuristics.¹⁴

But Sunstein tries not to make it a question of principle: the problem is to understand whether, in given contexts, the architects of choices deserve trust (Sunstein 2014: 164–165). Answers to given questions cannot ignore empirical information and an analysis of the relevant costs and benefits, but neither can they ignore the perplexities generated by the non-transparent nature of certain forms of libertarian paternalism. If growth in terms of awareness is at least an ingredient of welfare, nudges can correct some behavioral errors but do not make the subjects for whom they are intended more mature and aware of the stakes.

6 Conclusion

In the work I have analyzed, Sunstein intends to challenge Mill’s Harm Principle, but in reality their positions are not so distant. In fact Sunstein’s and Mill’s position are compatible, in my understanding, since it is hard paternalism that Mill opposes. “The mischief

¹⁴ In various circumstances “humans can achieve their goals by relying on fast-and-frugal heuristics that may violate axiomatic rationality. These goals go beyond coherence to include predictive accuracy, frugality, and efficiency. In general terms, a heuristic is ecologically rational to the degree that it is adapted to the structure of an environment.” (Gigerenzer 2021: 3548).

begins”, Mill says, when the government “instead of calling forth the activity and powers of individuals and bodies, ... substitutes its own activity for theirs; when, instead of informing, advising, and, upon occasion, denouncing, it makes them work in fetters, or bids them stand aside and does their work instead of them” (Mill 1859: 206–207). Note that Mill-style regulators do not limit themselves to “informing”, but can also resort to “advising” and even “denouncing”.

Three positions confront each other, among which Sunstein prefers the intermediate one: (A) antipaternalism (exemplified by Mill), (B) libertarian paternalism (recommended by Sunstein), and (C) nonlibertarian paternalism (typically exemplified by legal prohibitions). The Harm Principle exemplifies (A), but on closer inspection (B) is compatible with it, since libertarian paternalism does not generate the obligations or prohibitions that the Harm Principle disqualifies. However, a double caveat is in order: first, one must remember that certain paternalistic interventions, while not modifying the deontic position of some (e.g. consumers), modify the deontic position of others (producers); second, some nudges just add to existing obligations (e.g. speed limits). Focusing on legal entitlements and commitments, or rights and duties, helps see these points more clearly.

Last but not least, the antipaternalist wishes to promote awareness and active choosing by individuals, and therefore has a justified concern regarding those measures that, despite being forms of nudging, are not much visible and risk being manipulative. The problem of transparency of nudges is a matter of great importance, which requires the scrutiny of not only economic arguments about welfare and empirical arguments about information (see e.g. Casal et al. 2024), but also or legal, political, and moral ones (see e.g. Bovens 2009). However, this discussion would take us far from the more modest objective of this work, which was to provide a critical analysis of Sunstein’s work on nudges and the Harm Principle, guided by legal insights.

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