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LIBERTARIAN PATERNALISM AND THE AUTHORITY OF THE AUTONOMOUS PERSON

by

CAMI E. KOEPKE

Under the Direction of Andrew Altman

ABSTRACT

Cass Sunstein and Richard Thaler (2003, 2006, 2009) contend that the government is justified in shaping certain choices of individuals to advance their well-being. In this paper, I argue that those who are committed to a robust notion of autonomy, which I call autonomy as authority, have good reason to reject the Sunstein-Thaler (S/T) argument for libertarian paternalism. I draw from Joseph Raz's (1990) idea of exclusionary reasons and Daniel Groll's (2012) conception of autonomy to argue that the S/T argument for libertarian paternalism fails to respect autonomy. I consider if soft paternalism could be called upon as a foundation for libertarian paternalism, but argue against this possibility. I conclude that an adequate defense of libertarian paternalism would need to directly attack the notion of autonomy as authority, but such an attack has yet to be mounted by the defenders of libertarian paternalism.

INDEX WORDS: Soft paternalism, Libertarian paternalism, Autonomy, Nudge, Well-being

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DEDICATION

This thesis is dedicated to my mother.

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1 INTRODUCTION

Contemporary liberals who identify with Mill's anti-paternalism in *On Liberty* tend to think that paternalism practiced by the state in relation to competent adults is unjustifiable. Cass Sunstein and Richard Thaler (2003, 2006, 2009), however, contend that there is good reason to embrace some types of paternalism to promote the welfare of individuals. In light of recent research revealing ubiquitous and seemingly unshakable cognitive biases in individual decision-making, Sunstein and Thaler contend that the government is justified in shaping certain choices of individuals to advance their well-being. Sunstein and Thaler think that their position, which they call "libertarian paternalism," is defensible even to those who value autonomy. In this thesis, I argue that those who are committed to a robust notion of autonomy, which I call "autonomy as authority," have good reason to reject the Sunstein-Thaler (S/T) argument for libertarian paternalist policies, though their policy recommendations might still be defensible.

There are many possible avenues for defending the S/T policy recommendations. One such route might be to utilize Joel Feinberg's concept of soft paternalism. According to Feinberg, the soft paternalism position allows that it is morally permissible for the government to interfere with an individual's self-regarding action if that the action is substantially nonvoluntary (Feinberg, 1986, p. 12). Building on Feinberg's position, one might argue that because cognitive biases compromise the voluntariness of certain actions, it is permissible for the government to interfere with individual self-regarding actions when these actions result from a cognitive bias. However, as with the S/T argument for libertarian paternalism, I argue that those who value autonomy have good reason to reject the soft paternalism argument for government institutional remedies for cognitive biases. Like the S/T argument, the soft paternalist does not give autonomy the sort of respect it intuitively deserves. Ultimately, I allow that while the libertarian

paternalism policy recommendations might still be defensible, an adequate defense of the policies would require a direct attack on autonomy as authority, and such an attack has yet to be mounted by the defenders of libertarian paternalism.

The thesis will proceed as follows. In Chapter Two, I will explain some of the current debates surrounding the topic of government paternalism, specifically the discourse surrounding the definition of paternalism and the distinction between hard and soft paternalism, which will lay a foundation for the other chapters. I will also survey some of the recent responses to libertarian paternalism. In Chapter Three, I will present the S/T argument for libertarian paternalism and present one worry about Sunstein and Thaler notion of well-being. Chapter Four is devoted to my argument that the S/T treatment of autonomy counters the strong intuition that the autonomous person has authority over certain areas of her life. What is problematic about the S/T argument is that it subordinates the individual's will to considerations of her well-being. Sunstein and Thaler provide no good reason to accept the view that considerations of well-being should be prior to considerations about autonomy, an argument they need to provide given the strong intuition of autonomy as authority. In Chapter Five, I propose that libertarian paternalism might be defensible if construed as a version of Joel Feinberg's notion of soft paternalism. I consider an article by J.D. Trout (2005) as one example of this strategy. Trout contends that since an individual's capacity to make choices is compromised by cognitive biases, it is acceptable for the government to institute remedial policies to promote the welfare of those individuals. I present an objection that libertarian paternalists would need to overcome to go this route. In Chapter Five, I conclude that the most promising defense will involve challenging the notion that, in the case of competent adults, considerations about autonomy should always serve as a trump over considerations of well-being.

1.1 THE DEFINITION OF PATERNALISM

Joel Feinberg (1986) captures one aspect of what makes paternalistic behavior intuitively inappropriate in the case of competent adults. In his description of what he calls "presumptively benevolent paternalism," Feinberg broadly explains that paternalism involves acting toward individuals in a certain way "'for their own good,' whatever their wishes in the matter" (1986, p. 5). Paternalistic behavior ultimately amounts to "treating adults as if they were children ... by forcing them to act or forbear in certain ways" (1986, p. 5) for their own welfare. It is commonly agreed that paternalistic behavior directed toward competent adults involves treating individuals in a degrading way that disregards their capacity for directing their own lives.

However, though it is widely agreed that paternalistic behavior involves treating competent adults in a degrading manner, the exact characteristics of a behavior that qualify it as "paternalistic" is hotly contested among many moral and political philosophers. Standard definitions of paternalism tend to identify three necessary features that must be present for a particular behavior to be considered "paternalistic: 1) interference in the self-regarding actions of an individual, 2) coercion or a limitation of the individual's freedom, and 3) a motive to advance the individual's well-being or to avert harm of the individual. Representing this standard definition, Gerald Dworkin (2010) argues that "[p]aternalism is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm" (2010, p. 1; c.f. Feinberg, 1986,¹ p. 5; Archard, 1990, p. 36-42; Beauchamp, 2010, p. 103). Richard Arneson (1980) utilizes a similar notion of paternalism in his own definition of paternalistic government policy,

¹ Feinberg calls this sort of paternalism "presumptively blamable benevolent paternalism."

observing that a paternalistic policy is one that involves a restriction on liberty, is done exclusively out of consideration for the individual's good, and opposes the individual's present will or "prior commitment" (Arneson, 1980, p. 471). While philosophers debate the details of the three main components of paternalism (e.g. the nature of coercion, the distinction between self-regarding and other-regarding action, the nature of legal motives, etc.), they typically assume that the three must be present in a particular behavior for it to qualify as paternalistic.

Several challenges have recently been issued to the standard criteria that identify a behavior as paternalistic. According to Seana Valentine Shiffrin (2000), the standard criteria offered for paternalism are overly narrow and fail to capture "the driving force behind our aversion to paternalism" (p. 212). Shiffrin argues that a good definition of paternalism isolates precisely what it is about a particular behavior that strikes us as disrespectful or impermissible, and can be employed across diverse cases to account for normative reactions. Using a series of hypothetical situations, Shiffrin contends that a behavior need not involve direct interference with the self-regarding actions of an individual or coercion/limitation of freedom for the behavior to qualify as paternalistic. Rather, she argues that the worrisome aspects of paternalism have to do with the "substitution of judgment" and "the circumvention of an agent's will" (p. 213). Shiffrin describes the characteristics of paternalism as behavior

- (a) aimed to have (or avoid) an effect on an individual or her sphere of legitimate agency
- (b) that involves the substitution of one person's judgment or agency for the individual's
- (c) directed at the individual's own interest or matters that legitimately lie within the individual's control

- (d) undertaken on the grounds that compared to the individual's judgment or agency with respect to those interests or other matters, the interferer regards her judgment or agency to be (or likely to be), in some respect, superior to the individual's.

(Shiffrin, 2000, p. 218)

While Shiffrin's characterization of paternalism might seem unconventional, philosophers like Daniel Groll (2012) and Daniel Scoccia (2012) agree with her that coercion is neither a necessary nor sufficient condition for paternalism.

My aim in this thesis is not to defend or critique a particular definition of paternalism, though I do draw from Daniel Groll (2012) who explicitly identifies with Shiffrin's approach to paternalism, in my own efforts to better understand why we have good reason to think that libertarian paternalism is disrespectful to competent adults (2012, p. 712). Like Shiffrin, I hold that what is most worrisome about a certain behavior identified as paternalistic is the "affirmative devaluing of the agent" that is seen in the "disrespect for those core capacities or powers of the agents that underwrite and characterize his autonomous agency" (Shiffrin, 2012, p. 220). While I do not explicitly critique Sunstein and Thaler's use of the term "paternalism,"² I do argue that their defense of certain government behavior is disrespectful to autonomous agents, and should therefore be rejected.

1.2 THE EMERGENCE OF NEW PATERNALISM

Cass Sunstein and Richard Thaler first proposed their idea of libertarian paternalism in a brief paper aimed at encouraging economists to "rethink their views on paternalism" in light of research in behavioral economics (2003, p. 175). Sunstein and

² Groll (2012) provides a brief critique of the S/T use of "paternalism" (p. 707, ft. note 33). Daniel Hausman and Brynn Welch (2010) provide a more extensive critique, calling the S/T definition of paternalism "unsatisfactory" (2010, p. 126), and arguing that the S/T characterization of several supposed paternalistic behaviors is outright mistaken (2010, p. 127).

Thaler's initial paper led to two other papers (2003b, 2006), which they recently formed into a book (2008). Recognizing that the terms "libertarian" and "paternalism" might immediately strike many as a contradiction in terms, Sunstein and Thaler contend that their version of paternalism manages to preserve individual autonomy while getting people to act in ways that promote their own well-being. Though other thinkers have joined the discussion by proposing their own versions of paternalism in response to studies on cognitive biases (Camerer et al., 2003; Loewenstein and Haisley, 2008; Bent-Porath, 2010), Sunstein and Thaler's libertarian paternalism remains one of the more well-developed theories in the movement, sparking literature that supports their theory and provides additional defense for its application in the private realm (Maloberti, forthcoming) and literature that rejects libertarian paternalism on both theoretical (Hausman and Welch, 2010) and practical grounds (Rizzo, 2009).

There are two primary approaches to responding to libertarian paternalism represented in current literature. The first approach is to press Sunstein and Thaler on their support of paternalism in their theory. This approach includes pushing Sunstein and Thaler on their definition of paternalism (Hausman and Welch, 2010; Groll, 2012), questioning whether paternalism is really inevitable in certain situations as Sunstein and Thaler contend it is (Mitchell, 2005), and arguing that libertarian paternalism fails to address the worries that plague other paternalistic theories, such as not providing a bright line for limiting the reach of the government interference in the lives of individuals (Rizzo and Whitman, 2009).

A second approach to Sunstein and Thaler's libertarian paternalism is to question whether their theory actually protects individual autonomy as they contend. Gregory Mitchell, for instance, argues that one problematic element with libertarian paternalism is that in the face of evidence that individuals are quite biased in their choices

and behavior, Sunstein and Thaler's objective is to promote welfare and not to protect or promote liberty (2005, pp. 1260-69). Given their objective, Mitchell questions their commitment to liberty. He writes, "A libertarian approach to choice-framing paternalism would direct the central planner to frame choices in ways that push irrational persons in directions that maximize their liberty or help them retain the greatest degree of future freedom to contract" (2005, p. 1262). According to Mitchell, libertarian paternalism fails to achieve the "libertarian" part of the title because the preservation and promotion of liberty is a secondary concern behind advancing well-being. Likewise, Daniel Hausman and Brynn Welch (2010) argue that the sort of liberty that Sunstein and Thaler protect, i.e. having a range of choices, is much narrower than what most people have in mind when they contend that liberty is important, i.e. having control over one's own evaluations and deliberation (2010, p. 128). My own response to libertarian paternalism is akin to these concerns about whether Sunstein and Thaler are as successful in protecting liberty in their theory as they contend. I briefly consider a problem with their notion of well-being, but the heart of my argument is concerned with whether libertarian paternalism affords autonomy the sort of respect most people intuitively think it deserves.

2 LIBERTARIAN PATERNALISM, WELL-BEING, AND PREFERENCES

In this chapter I present Sunstein and Thaler's basic argument and consider a difficulty with interpreting their notion of well-being. Section I explains the S/T argument for libertarian paternalism, and Section II draws attention to a potential problem with Sunstein and Thaler's presentation of the relationship between preferences and well-being.

2.1 THE DEFENSE OF LIBERTARIAN PATERNALISM

According to Sunstein and Thaler, although it is commonly taken for granted that reason and reflection will lead the individual to make good decisions, empirical studies reveal a number of cognitive biases that undermine that assumption. Such studies show, for example, that individuals tend to be unrealistically optimistic about the success of their plans, prefer the status quo even if it is disadvantageous for them, and experience an aversion to loss that leads them to make decisions that go against their own interests (2009, pp. 31-35). An individual's choices are even influenced by the way the options are framed (2009, p. 36). Sunstein and Thaler offer the example of retirement savings behavior as one instance of cognitive biases thwarting well-being (2009, pp. 105-119). Because individuals tend to stick with the default option when given a set

of options, if a default employee savings plan requires individuals to “opt-in” to participate in the plan, individuals tend to remain un-enrolled. In contrast, if a workplace makes enrollment in the plan the default option and then requires employees to “opt-out” if they do not want to participate, participation in the savings program is significantly higher (2009 p. 112). Also, individuals enrolled in the savings plan tend to save the default recommended amount even though this amount is often much too low, and individual aversion to loss leads many people not to increase the amount of their contributions with their pay raises (2009, p. 115). According to Sunstein and Thaler, cognitive biases influence individual deliberation in key areas of people’s lives beyond simply money matters—including in decisions about eating, choosing a health plan, selecting a school, and entering a marriage contract. In these areas, individuals tend to make decisions that thwart their well-being, decisions they would not make if they had overcome those biases (2006, p. 234).

Moreover, Sunstein and Thaler contend that government action could, in certain kinds of cases, negate the bad effects of cognitive biases and increase the chances that people will make better choices. They point out that the government often presents a number of options to individuals, for example, as when individuals are given a choice among several motorist insurance plans (2006, p. 244). The government, though, typically presents these options randomly without any regard for the biases that affect individual choice. Under this random approach, individuals often do not select what is good for them. Sunstein and Thaler reason that since the government must present choices in some way, the government might as well “nudge” individuals to make better selections by setting as the default option the choice that the government thinks is best for most individuals.

The government might also nudge individuals by means of what Sunstein and Thaler call “required active choices” or “mandated choice” (2006, p. 257; 2010, p. 88). In this type of nudge, no default is given and individuals are forced to decide from options that are presented equally. For instance, in giving students the choice to provide their addresses for military recruitment purposes, the government might make students (or their parents) fill out a form indicating whether or not they wanted recruitment literature to be mailed to them. (2010, pp. 88-89). The hope is that individuals will more carefully select an option that is best for them if they must choose from equally presented options. Yet, Sunstein and Thaler contend that though the mandated choice method might be the best approach for “emotionally charged” issues like providing information to the government for its military recruitment efforts, the default method is typically better because it is more effective at shaping the decisions of individuals toward choices that will promote their well-being (2010, p. 88; 2006, p. 258).

Paternalism is commonly thought of as interference in the self-regarding actions of an individual against that individual’s will but purportedly justified by a consideration of her well-being (Dworkin, 2010; cf. Arneson, 1980). Sunstein and Thaler depart from this standard definition and construe paternalism more broadly as intentional “attempts to influence the choices of the affected parties in a way that will make choosers better off” (2006, p. 234; cf 2003, p. 179). As they explain, libertarian paternalism is “paternalistic” because the government is intentionally encouraging individuals to make better choices than they otherwise would make. (2009, p. 5; 2006, p. 235). Sunstein and Thaler understand paternalism as a continuum (206, p. 252). At one end of the continuum is *non-libertarian paternalism*, which involves coercion in that it forecloses an individual’s options by either removing particular options from a choice set or imposing a

high cost on the individual for making certain choices (2006, p. 253).³ At the other end of the continuum is *libertarian paternalism*. Since libertarian paternalism merely involves a structuring of options in the choice set *without* foreclosing any of the options or making any options excessively burdensome to choose, they hold that libertarian paternalism is non-coercive.

Sunstein and Thaler contend that libertarian paternalism is consistent with the libertarian ideal of freedom because it is non-coercive. They contend that libertarian paternalism is “libertarian” precisely because it is “liberty preserving” (2009, p. 5). They also agree with anti-paternalists that freedom of choice is important: “Libertarian paternalists care about freedom; they are skeptical about approaches that prevent people from going their own way” (2009, p. 199). Insisting on libertarian paternalism’s freedom-preserving credentials, Sunstein and Thaler claim that “[s]ince no coercion is involved, we think that some types of paternalism should be acceptable to even the most ardent libertarian” (2006, p. 236). In libertarian paternalism, if an individual does not want to go with the government’s default choice, she only has to “opt-out” by selecting one of the other choice options. Most people will go with a default option because of the cognitive bias toward defaults. However, an individual who wants a different option only has to put in a small amount of effort to select it. Sunstein and Thaler compare libertarian paternalism to setting up a cafeteria. The cafeteria director can arrange food options in a way that encourages the clientele to select healthy options without actually removing the unhealthy options. Intentionally structuring the food choices to encourage certain selections is a paternalistic but non-coercive act because all options are still available to individuals (2009, pp. 1-4; 2006, pp. 235-6).

³ In the extreme form, the coercion associated with legal paternalism is primarily seen as prohibitive legal pronouncements backed by criminal sanctions. See Joel Feinberg (1986, p. 8).

Sunstein and Thaler consider libertarian paternalism to be non-coercive in another way, namely, that it does not counter the will of individuals by going against their currently held preferences. Paternalism is standardly understood to involve opposition to the will of an individual (Groll, 2012, p. 696, cf. Dworkin, 2010). However, Sunstein and Thaler argue that since people often lack preferences, or at least well-formed preferences, until the government presents a choice set, the policies of libertarian paternalism to shape the choice set do not violate individual liberty (2006, pp. 235-6, 342).

In order to function, even at the most minimal level, the government makes default rules that influence “preferences and behavior” (2006, p. 243). Revisiting the cafeteria example, it is clear that the cafeteria director must decide how to arrange the food. Yet, Sunstein and Thaler contend that the director cannot simply guess at what people would choose based on pre-existing preferences, because individual preferences will be shaped by how the food is presented (2006, p. 236). In shaping how choices are presented to individuals, the government is actually the starting point of preference formation. According to Sunstein and Thaler, if people can be significantly influenced by how choices are shaped, then “their true ‘preferences’ do not formally exist” prior to the presentation of choices (2006, p. 236). However, if an individual does happen to have a strong preference for a particular option, she can simply “opt-out” of the default and select a different option.

The ultimate aim of libertarian paternalism is to advance the well-being of individuals. Sunstein and Thaler think that government policy is a good way to accomplish this. In response to those who object to paternalism on the grounds that an individual herself is best equipped to make the optimal decisions for her own life, Sunstein and Thaler contend that this assumption is false: “people’s choices cannot be reasonably thought, in all domains, to be the best means of promoting their well-being” (2006, p.

238). Individuals can mitigate some of the effects of biases through education or seeking expert assistance, but these tools are infrequently used, leaving Sunstein and Thaler to argue that “delegation and learning are insufficient to ensure that people’s choices always promote their welfare or that they always choose better than third parties would” (2006, p. 239). It can even be counterproductive to merely provide people information about their choice options and let them freely choose what they want without shaping the choices. Factors such as fear of knowledge about risks might actually result in people avoiding deliberation about the risks of choices altogether (2006, p. 251). Because of biases, Sunstein and Thaler write, “it is hopelessly inadequate to say that when people lack relevant information the best response is to provide it” (2006, p. 250). For these reasons, they argue that libertarian paternalism is more likely to promote an individual’s well-being than merely giving the person options without first shaping them; “[s]o long as people are not choosing perfectly, it is at least possible that some policy could make them better off by improving their decisions” (2006, p. 235). Specifically, the S/T argument advocates giving an individual a default option, which will influence her selection if she lacks a strong preference, but preserve her options if her preferences are firm.

Sunstein and Thaler contend that “respect for autonomy is adequately accommodated by the libertarian aspect of libertarian paternalism,” namely that libertarian paternalism is non-coercive in that it does not block or heavily penalize any choice options (2012, p. 237, ft note 1). However, for Sunstein and Thaler, the well-being of individuals is the government’s primary consideration in its deliberation process about how to act in the lives of competent adults. In the S/T argument, autonomy is valuable depending on the person and whether or not she likes to make decisions. Sunstein and Thaler admit that “freedom of choice is sometimes an ingredient in welfare,” but they do

not think that this is the case for everyone (2006, p. 237, ft note 1). While some people like to select a wine from a wine list or be in charge of their medical decisions, others find the process of selecting a wine “basically intolerable” and “would prefer their doctors to choose [their medical procedures] for them” (2006, p. 260). According to Sunstein and Thaler, if an individual finds making choices to be “a subjective good,” then the government has more reason to mandate a choice (2006, p. 260). Yet, ultimately, the respect given to autonomy is couched in concern for the individual’s overall well-being. Autonomy, as considered by the S/T argument, is only one part of an all-things-considered evaluation of an individual’s good.

Sunstein and Thaler recognize that some people think autonomy should be treated as an end in itself. As they note, “Some of the standard arguments against paternalism rest not on consequences but on autonomy - on a belief that people are entitled to make their own choices even if they err” (2006, p. 237). However, Sunstein and Thaler reject the idea that the will of individuals should ever be lexically prior to considerations about well-being when individuals lack set preferences. They write: “We do not disagree with the view that autonomy has claims of its own, but we believe that it would be fanatical in the settings that we discuss [i.e. in settings in which the government serves as the starting point of the decision process], to treat autonomy, in the form of freedom of choice, as a kind of trump not to overridden on consequentialist grounds” (2006, p. 237, ft note 1).

2.2 WELL-BEING AND PREFERENCES

Before turning to address the role of autonomy in libertarian paternalism, which is the primary concern of this thesis, I think Sunstein and Thaler's understanding of well-being and its place in their theory deserves some attention. It is difficult to determine exactly what Sunstein and Thaler mean by "well-being," and the elusiveness of this

concept presents another possible problematic element in the S/T defense. Sunstein and Thaler defend libertarian paternalism as a means to promoting individual well-being. They contend that in shaping individual choices, libertarian paternalism aims "to avoid random, arbitrary, or harmful effects and to produce a situation that is likely to promote people's welfare, suitably defined" (2003, p. 175). According to Sunstein and Thaler, well-being or welfare (they use these terms interchangeably throughout their work) is different than just the satisfaction of revealed preferences, i.e. what people seem to want according to their actual choices. In reference to their goal to promote individual well-being, Sunstein and Thaler note that "we intend 'better off' to be measured as objectively as possible, and we clearly do not always equate revealed preference with welfare" (2003, p. 175). This contention and the other claims of libertarian paternalism presume that (1) individuals do not choose in ways that perfectly promote their own well-being, and (2) a third party can sometimes do a better job than an individual at promoting that individual's own well-being.

There are two ways to understand the first premise. One interpretation is that Sunstein and Thaler simply mean that individuals do not choose perfectly in that individuals do a less-than-optimal job of connecting means to ends due to cognitive biases. For example, an individual might prefer to retire with a certain amount of money, but, although thinking that he is making investment choices that advance this goal, the individual's choices actually thwart its achievement because of cognitive biases. People tend to be more averse to losing money that they already have than to missing out on possible gains, a cognitive bias that results in people choosing to "play it safe" when their investments could be earning more money (Sunstein and Thaler, 2009, pp. 33-4, 122-3). Encumbered by this bias, the individual, though aiming to save a particular amount of money, will make decisions that ultimately hinder or even thwart his goal.

According to Sunstein and Thaler, in this situation a third party could make a better decision than the individual because there is an objective standard of means-end thinking. If the goal is to accumulate a certain amount of savings, there are better and worse ways to achieve this goal.

On this reading of libertarian paternalism, an individual's well-being is comprised of achieving those preferences that the individual would have were she to make perfect means-ends decisions. This seems to suggest that while well-being is comprised of achieving one's over-arching preferences, like the preference to have a comfortable retirement, one's well-being can be thwarted by other preferences, like the preference to be conservative with one's money rather than taking risks. While over-arching preferences are subjective to each individual, there is an objectively better or worse means to achieving those preferences. Moreover, because of weakness of will, a phenomenon that Sunstein and Thaler thinks plagues most individuals, people are tempted away from achieving their preferences. For instance, we might make plans to exercise in the morning, but when the afternoon comes, we are often tempted away from achieving what we set out to do (2010, p. 41). Sunstein and Thaler draw from behavioral economics to say that individuals tend to display behavior that is "dynamically inconsistent" in that people tend to ultimately pursue preferences that differ from their initial preferences (2010, p. 41). Libertarian paternalism would be effective at promoting individual well-being because the government is able to design policy options that help individuals overcome their cognitive biases in order to achieve their ultimate end goals. The government figures out what the majority of people want in terms of over-arching preferences and then helps them to achieve that goal (2006, p. 260). On this reading, the government advances individual well-being through libertarian paternalism by helping people achieve what they initially prefer before they are hindered by a lack of time to

research their choices, cognitive biases that skew their understanding of what it takes to achieve their goals, and weakness of will that leaves many goals unaccomplished through a lack of motivation.

However, the above interpretation does not seem to capture entirely what Sunstein and Thaler have in mind when they say that individuals do not choose perfectly to promote their own well-being. The first interpretation seems plausible in examples in which making choices that promote an individual's ultimate aim are tricky and complicated, as is the case with investing money for the goal of having a comfortable retirement. Investing money is complicated, and it is easy to see how cognitive biases might lead one astray from accomplishing one's overarching preferences. Yet, Sunstein and Thaler provide many examples in which it seems that the real issue that they are concerned with is the ultimate aim of individuals. While individuals are susceptible to cognitive biases when selecting the means to achieving overarching preferences, the fundamental problem is that the overarching preferences thwart well-being. Sunstein and Thaler's argument for libertarian paternalism also lends support for this second interpretation of premise (1), namely that individuals do not choose well to advance their own well-being because individuals do not always accurately identify what overarching, or ultimate, preferences they ought to have in order to live well. The issue is not so much that individuals cannot figure out how to bring about an end that they want, though this is a problem too, but rather that people choose the wrong ends.

On this second interpretation of premise (1), individuals are hindered by cognitive biases from recognizing and acting on what is really in their own best interest. For instance, in the cafeteria example Sunstein and Thaler think it is pretty clear that eating apples will contribute more to well-being than eating Twinkies (2006, p. 236). Because of cognitive biases, though, people are hindered from recognizing that what is really in

their best interest is that they eat healthy meals. Likewise, in the example of automatic enrollment in retirement plans, Sunstein and Thaler think that being part of a retirement plan is a good action that promotes well-being (2006, p. 241). They argue that if people were perfect at reasoning and not hindered by a lack of knowledge, they would see that having a certain amount of money set aside for a retirement is an objectively good thing. On this account, individuals do not recognize what is really good for them because they are hindered by biases, lack self-control, and have a limited amount of time. It is permissible for institutions like the government to encourage people through choice architecture to save money for retirement, invest wisely, eat well, and get exercise because these are all components of individual well-being that people would really seek after if they could reason perfectly. In libertarian paternalism, there seems to be specific notion of well-being that can be known and promoted by the government.

A problem arises in Sunstein and Thaler's use of well-being in their argument in that while they want to limit their commitment to the first interpretation of premise (1), their argument also relies on the second interpretation of the premise, which has unfavorable implications. On the second interpretation of premise (1), Sunstein and Thaler are critiquing people's ends rather than just critiquing the means that people typically select in attempting to achieve their preferred ends. This second interpretation of premise (1) is importantly different from the first interpretation, but I think it is present in Sunstein and Thaler's argument for libertarian paternalism. According to the first interpretation, the government is merely helping individuals to get what they really want. On the second account, the government is identifying what individuals should want because individuals are unable to do this for themselves.

So, on the one hand, Sunstein and Thaler want the concept of well-being to connect with preferences that individuals currently have because they are motivated to

make the libertarian paternalism's government policies as minimally intrusive in the lives of individuals as possible. Libertarian paternalism is liberty preserving in that it does not counter any of the deeply held preferences of individuals. They do not want to be seen as promoting "official meddling" with individual preferences (2006, p. 241). Individuals are not that good at making choices to promote their own well-being. Under the first interpretation of premise (1), the government is merely helping individuals get what they already want, which strikes many as permissible government action (c.f. Feinberg, 1986, p. 19; Arneson, 1980, pp. 471-72). However, on the other hand, the S/T argument for libertarian paternalism also seems to rely on the idea that there are optimal ends that individuals would want if they could think more clearly about the issues. These ends are objectively good, though Sunstein and Thaler say nothing about what makes the ends objectively good or how the government can identify these ends while particular individuals cannot. In conflating the two views of well-being, Sunstein and Thaler gloss over many issues that might pose significant problems for their theory, and that might reveal their theory to permit more intrusive government action that would require a more robust argument for its defense.

3 LIBERTARIAN PATERNALISM AND THE AUTONOMOUS PERSON

In this chapter, Section I draws from Daniel Groll's recent argument that paternalism can violate autonomy even if it is non-coercive. I argue that the treatment of competent adults licensed by S/T's libertarian paternalism is intuitively unacceptable. Section II draws from Joseph Raz's idea of exclusionary reasons and Groll's conception of autonomy to argue that the S/T argument for libertarian paternalism fails to respect autonomy.

3.1 PATERNALISM, COERCION, AND THE WILL

Readers of Sunstein and Thaler's works might find themselves agreeing with the policy recommendations of libertarian paternalism. Helping people make better choices in order to live better lives seems like a good idea. Libertarian paternalism appears especially attractive when the stakes are high. If an individual's life could be made significantly better through the government's non-coercive nudges, libertarian paternalism seems to be a good solution to promoting the well-being of individuals while also preserving individual autonomy. However, I think there is good reason to question whether the S/T argument for libertarian paternalism is actually consistent with a commitment to autonomy, as they contend it is. I grant, for the sake of argument, that libertarian paternalism is indeed non-coercive, but I show that even non-coercive paternalism is intuitively problematic.

Daniel Groll (2012) has recently argued against the idea that the distinguishing mark of impermissible paternalism is coercion. According to Groll, impermissible paternalism is commonly thought of as involving an act against the will of an individual (2012, p. 696).⁴ However, he thinks that it is quite intuitive that paternalism can be problematic even when the individual being acted upon lacks a preference, or a determinate will, about a certain choice or action. Groll provides the example of Ernest, a competent adult who is in debt (2012, p. 698). Ernest has a good friend Sabina who could help him, but he has never even thought to seek her help with his money problems. Without consulting Ernest, Sabina has been paying down his debt without giving any thought as to what Ernest would want her to do. Her primary motive is to do what is best for Ernest. Groll holds that Sabina is not acting contrary to Ernest's will. Since

⁴ While the term 'will' plays a central role in Groll's paper, he never explicitly defines it. At one point he indicates that he means by will the general power of autonomous choice (2010, p. 694). At other points, Groll seems to use the term to describe intentionally held preferences. In this sense, an individual has a will in regard to certain actions or outcomes. I use the term 'will' to refer to the power of autonomous choice, which is manifested by making determinate choices.

Ernest has never considered Sabina's help as an option, "he has no will with respect to the issue" (2012, p. 698). Yet, Groll contends that Sabina's paternalistic treatment of Ernest is intuitively problematic; the more secretive she is about her actions, the more intuitively troubling her behavior is. Even if her actions do not counter Ernest's will, Sabina's actions appear to be impermissible because, though Ernest is a competent adult and this matter is entirely of his concern only, she bypasses Ernest's will to act out of concern for his well-being. Ernest's debt is his (and the creditor's) business alone, unless he chooses to make it someone else's business. When Sabina is deliberating about how to act to promote Ernest's well-being in this matter, her primary consideration should be Ernest's will.

Sunstein and Thaler might respond that Sabina's behavior is relevantly different from libertarian paternalism. Unlike Ernest, subjects of libertarian paternalism do not have a choice made for them. What is significant about the Ernest and Sabina case is that Sabina acts without giving Ernest any options. In libertarian paternalism's framework, the individual is the ultimate authority with regard to the actions of others undertaken for her own well-being. Rather than the government bypassing the choices of individual, as Sabina does with respect to Ernest, the government gives individuals a range of choices and merely arranges the options, ultimately allowing the individual to freely choose what she wants. Even if the government's paternalism is secretive in that individuals are not informed that the government is actively shaping the options it gives to individuals, an individual can still make any choice she wants from the choice set. For this reason, Sunstein and Thaler might contend, libertarian paternalism is not problematic like Sabina's actions.

In response to this possible reply by Sunstein and Thaler, I argue that libertarian paternalism is still problematic, even though the government gives individuals choices.

Imagine two roommates: Casey and Merritt. Casey tends to “mindlessly” eat when she is writing papers for school, gravitating to the most readily available food in the kitchen. Merritt, who does all the grocery shopping with Casey’s consent, notices that Casey is not making optimal food choices and that Casey complains about how she feels when she eats too many chips and sweets. Without consulting Casey, Merritt secretly rearranges the kitchen cupboards so that healthier food is toward the front of all the drawers, with the intention that Casey will make better food selections. She is motivated only by concern for Casey’s well-being. Merritt is not closing off any of Casey’s options. He continues to buy sweets and chips. He is merely nudging Casey to make better choices for her own well-being.

By Sunstein and Thaler’s standards of acceptable paternalism, Merritt’s behavior is entirely permissible. Merritt is not blocking any of Casey’s options. Moreover, since Merritt does the grocery shopping, essentially serving as the starting point for all Casey’s food preferences, Merritt’s paternalistic actions do not counter any of Casey’s deeply held preferences. As Sunstein and Thaler understand coercion, Merritt’s paternalistic actions are non-coercive. Yet, Merritt’s attitude and actions toward Casey, a competent adult, are intuitively unsettling. The more secretive he is about his actions, the more unsettling his behavior becomes. We can imagine that were Casey to find out that Merritt has been secretly trying to influence her eating habits, Casey, a competent adult, would be justifiably irritated or even angry about Merritt’s attitude toward her and the paternalistic treatment. It would seem that, though Merritt acts non-coercively, by manipulating Casey’s own reasoning biases to influence her actions, Merritt intends to circumvent Casey’s ability to deliberate and decide for herself. Even if she typically makes her eating choices mindlessly, she is a competent adult who is

capable of making decisions about her own well-being. By trying to sidestep Casey's will, Merritt fails to give Casey's will the respect it intuitively deserves.

The above hypothetical cases show that in certain areas of an individual's life, competent adults command a certain authority, or dominion of choice. In certain cases, respecting the will of an autonomous individual entails treating her will as the decisive consideration when one deliberates about how to act toward that individual. This is the case whether the individual being acted upon has no choice in the matter, as in Ernest's case, or whether the individual has options, as in Casey's situation. The significant feature that makes paternalism intuitively problematic is how the paternalist actor reasons about how to treat a competent individual. What this means for libertarian paternalism is that, even if the government necessarily presents the choice options and does not block the individual's choice among those options or coerce the individual in any way, there are features of the policies recommended by such paternalism that should remain worrisome to those who are committed to autonomy.

3.2 AUTONOMY, RESPECT, AND EXCLUSIONARY REASONS

In this section, I draw on Daniel Groll and Joseph Raz to give one possible account of the intuition that, in certain matters, the will of competent adults should not be subordinated to concerns about their well-being. I argue that, for those who hold to what I call the conception of "autonomy as authority," libertarian paternalism does not give the autonomy of individuals the sort of respect we think it deserves.

Daniel Groll (2012) argues that what is so problematic about Sabina's treatment of Ernest is that she does not treat Ernest's will as decisive, or as having dominion, when considering her actions directed at Ernest's well-being. Drawing from Joseph Raz's idea that some practical reasons carry the force of excluding other reasons from consideration, Groll argues that in deliberations about cases in which a competent

adult has the authority as the decision maker, the competent adult's will should exclude other considerations in the deliberation process.⁵ In decisions that pertain to a competent individual's own well-being, which is an area of concern over which that individual has authority, the individual's will should play a structurally decisive role in the deliberations of another party. By "structurally decisive," Groll means that the will of a competent person "is meant to supplant the reason-giving force of other considerations not because it outweighs those considerations but because it is meant to silence, or exclude, those other considerations from the practical deliberations of the subject of the demand" (2012, p. 701). Groll recognizes that competent individuals, who by definition have a capacity for sound judgment, possess the capacity to make good decisions for themselves. Yet, he contends that the will has normative authority apart from whether an individual makes the best decisions for herself. In those situations where the individual has the right to be the decision-maker, the individual's status as an autonomous agent is what grounds the authority of her will and its exclusionary force with respect to what can be done to or for her.

To illustrate his account, Groll gives the case of Bob, a competent adult who needs surgery for his own well-being. Since Bob is a competent adult, his will is authoritative, or has dominion, meaning that in the matter of deciding whether to undergo surgery, Bob, and Bob alone, is "the de jure ultimate decision maker" (2012, p. 701). Bob's capacity for autonomy grounds authoritative demands in the area of decision making that pertains to Bob's health. In her deliberations about how to act regarding the surgery, the doctor's primary consideration should be Bob's will not his well-being: "The point of an authoritative demand in this context is to render such appeals to what

⁵ Raz describes an exclusionary reason as a "second-order reason to refrain from acting for some reason," with second-order reasons being any reason for an individual "to act for a reason or to refrain from acting for a reason" (Raz, 1999, p. 39). So, if the will of an individual serves as an exclusionary reason in a certain case, it is a reason that excludes first-order reasons for an action, such as considerations about that individual's overall well-being.

is good for Bob, at least on the part of the doctor, irrelevant” (2012, p. 701-2). Groll imagines the doctor not doing the surgery at Bob’s request, but only because accommodating Bob’s request is important for Bob’s overall well-being, saying something like “I have decided that you should not have the surgery, because you do not want it” (2012, p. 707). Were the doctor to reason this way, Groll thinks Bob would be rightfully upset. Getting the surgery is Bob’s decision to make. The doctor would respect Bob’s capabilities as an autonomous agent only by making Bob’s will, and not his well-being, the decisive reason dictating how to act toward and for Bob.

In contrast to Bob, Groll offers the case of Carl, an incompetent person who needs the same surgery as Bob.⁶ Unlike Bob, Carl lacks a capacity for deliberation and so his will is unable to ground authoritative demands. For this reason, it is not disrespectful to Carl’s will to treat it as only “substantially decisive,” i.e., as one part of an all-things-considered evaluation of Carl’s good. As Groll explains, “There can be no in-principle conflict between Carl’s good and Carl’s will, since Carl’s will cannot ground practical reasons that have any normative force apart from considerations of his own good” (2012, p. 706). Groll argues that in considerations about Carl, Carl’s will is just one factor among many that go into the process of deliberation. If Carl is adamantly against the surgery, the doctor might forgo the surgery because Carl’s preference is, in this instance, the constituent of his well-being that provides the strongest practical reason. If Carl is less adamantly against the surgery, other factors may outweigh considerations about his will.

⁶ Groll does not offer a bright distinction between competent and incompetent persons. A competent individual is someone who has the “cognitive powers” to make decisions for himself. He imagines Carl as someone who lacks the cognitive powers for his will to be authoritative, but who has “enough of a picture of how [his] life should go to have autonomy be a constituent part of [his] well-being” (2012, p. 704).

Groll emphasizes that the primary feature that makes paternalism impermissible with respect to competent adults is the practical reasoning of the paternalist actor (2012, p. 717).⁷ In particular, one of the reasons that the paternalist actor does not treat the will of a competent subject as structurally decisive in her considerations is that she thinks that the subject “fails to exercise [his] capacity for sound judgment” (p. 718). The reasoning that underlies the actions of Bob’s doctor and Ernest’s friend Sabina is that they think Bob and Ernest are failing to make a good self-regarding decision, or at least not as good a decision as Bob’s doctor and Ernest’s friend could make for them (2012, p. 718). Yet, whether Bob or Ernest make the optimal decision in self-regarding matters is their own business. Respecting the will of a competent adult means recognizing that the individual’s self-regarding decisions are hers, and hers alone, to make. Respecting the will involves making it the decisive consideration when deciding how to act toward that individual in matters regarding her well-being.

While Groll (2012) does not explicitly discuss the S/T argument, his distinction between treating the will as structurally decisive and treating it as substantially decisive is useful for understanding why libertarian paternalism disrespects the will of individuals, even though it preserves choices and does not counter the preferences of individuals (2012, p. 692). If the government adopted the S/T argument for libertarian paternalism as a basis for policymaking, it would fail to accord the will of competent adults the respect it intuitively deserves.

Sunstein and Thaler think that the will of competent adults should only be treated as substantially decisive in the government’s policy deliberations. In the government’s

⁷ Similar to Groll, Seana Valentine Shiffrin contends that the defining feature of impermissible paternalism is the motive of an agent to supplant her own judgment for that of another competent individual in a matter that lies within the control of that individual (2000, p. 218). Shiffrin writes that “[t]he essential motive behind a paternalist act evinces a failure to respect either the capacity of the agent to judge, the capacity of the agent to act, or the propriety of the agent’s exerting control over a sphere that is legitimately her domain” (p. 220).

deliberation process, they make considerations of well-being to be of higher priority than considerations about the will; “The promotion of well-being should be a principal goal” of the government (2006, p. 253). This prioritization of considerations is especially apparent in Sunstein and Thaler’s reasons for preferring the default method of nudging over the mandated choice method. Recall that in the mandated choice method, an individual’s options are presented in a way that encourages her to deliberate about what choice is really the best for her, hopefully engaging her ability for careful judgment. In contrast, the default method is aimed at utilizing reasoning biases to increase the likelihood of an individual making a specific decision. Sunstein and Thaler favor the default method precisely because it is more likely to result in the individual selecting the optimal option. They write that if a certain option likely “promotes people’s welfare, perhaps [the default method] should be preferred over requiring active choices” (2006, p. 258). However, while mandated choices are intended to engage an individual’s abilities for deliberation and judgment, the default method attempts to skirt these abilities to achieve a specific outcome, i.e. the individual’s well-being. Rather than supporting a method intended to encourage individuals to deliberate about their options, Sunstein and Thaler prefer a method intended to manipulate reasoning biases in order to promote well-being.

Related to this last point, the S/T argument treats the will as only substantially decisive by treating the value of the will as entirely dependent on its role in well-being. Again, Sunstein and Thaler think that the mandated choice method is preferable if “making choices is itself a subjective good” (2006, p. 260). For the most part, though, they think that individuals typically find “required choices to be a nuisance or worse,” which Sunstein and Thaler think is good enough reason to offer a default option instead of a mandated choice (2009, p. 89). In support of this position, the S/T argument offers

the case of selecting a wine in a restaurant. Some people like to choose their own wine while others prefer to have someone choose for them. Sunstein and Thaler argue that this shows that, just by forcing individuals to make their own decisions, mandated options might actually hinder the well-being of those who find selecting an option unpleasant. They explain, “If we ask the waiter to select a good bottle of wine to go with our dinner, we will not be happy if he says that we should just choose for ourselves” (2009, p. 246). Because forcing people to make a decision can hinder their well-being, Sunstein and Thaler think that there is good reason to prefer the default method over mandated choice in government policy.

However, selecting a wine in a restaurant is importantly different from the government policy defended by libertarian paternalism. In the wine scenario imagined in the S/T argument, an individual *makes the choice* to request the waiter to recommend a wine. The individual is presented with the option of referring to the wine list, but decides that she would prefer to defer to the recommendation of the waiter. In other words, the restaurant gives the individual the choice as to whether she would like to forego choosing for herself. In contrast, in the S/T argument for libertarian paternalism, when an individual is presented with a default option she is not first given the choice as to whether she would like to defer to the government’s recommendation. One can imagine a scenario in which the government gives an individual a mandated choice as to whether she would like to be offered a default option that the government thinks would be the optimal choice. But this scenario is importantly different from the default method defended by the S/T argument. Sunstein and Thaler support the default method because it is the most effective method for promoting well-being; individuals do not like to make choices about many matters and the default method minimizes the chances that individuals will make a sub-optimal choice. To achieve this result, though, the de-

fault method attempts to bypass the individual engaging in the deliberation process. Sunstein and Thaler's primary consideration is not the will of individuals, but their well-being. Yet, it seems that the existence of individuals as autonomous beings capable of deliberation and judgment, whether or not they decide to exercise this capacity, provides a strong practical reason for the government to make considerations about autonomy the primary principle in making of policy.

Sunstein and Thaler might respond that it is permissible for the government to prioritize considerations of overall well-being over autonomy because government policy serves as the starting point for individuals to develop a determinate will about their particular options. There is an importance difference between cases in which individuals have a determinate will about the matter, like Bob does, and cases in which individuals do not have a determinate will, such as Casey and the cafeteria patrons. Bob has a determinate will about the matter of surgery, indicating a strong preference not to undergo the surgery. In contrast, Sunstein and Thaler argue that individuals typically do not have a determinate will with respect to many of the choices given to them by the government, such as choices in matters like insurance plans or savings contribution rates. Since the individuals lack a determinate will with regard to the options prior to receiving them, the government does not disrespect autonomy by prioritizing considerations of well-being over autonomy.

This objection, though, misses the importance of the government's reasoning in making policy that concerns the self-regarding choices of individuals. The distinguishing feature that makes paternalism impermissible in regard to competent adults is the practical reasoning that drives the paternalist actor to substitute her own judgment for that of a competent adult in a sphere of decision-making over which that adult has authority. What is particularly worrisome is that Sunstein and Thaler's reasoning makes

individual well-being the principal consideration over autonomy, reasoning manifested in their questionable support for the default method of nudging over the forced choice method. In a recent response to the book *Nudge*, Daniel Hausman and Brynn Welch contend that Sunstein and Thaler are essentially advocating manipulation to achieve a certain result. According to Hausman and Welch, those who defend autonomy typically think of it as not simply about the cost and number of options, but the "control an individual has over their own evaluations and choices" (2010, p. 128). Sunstein and Thaler's attempt to shape choices through the default method is essentially taking advantage of people's psychological flaws and seems to diminish individual control over evaluation and deliberation. Their chief worry, which is akin to my own, is that though libertarian paternalism is not coercive, "there may be something more insidious about shaping choices than about open constraint" when the intent is to bypass individual control over evaluations and deliberation (2010, p. 130). Sunstein and Thaler do not hide the fact that well-being is their chief concern, but what they miss is the problematic nature of subordinating the individual's will to considerations of her well-being through the manipulation of individual cognitive biases. The government fails to respect individual autonomy when it attempts to bypass the individual's will, whether the will is determinate or not.

4 SOFT PATERNALISM TO THE RESCUE?

It is worth repeating that the concern of this thesis is not with libertarian paternalism's policies, but with Sunstein and Thaler's defense of the policies. Namely, they think that because libertarian paternalism is non-coercive, it is an acceptable treatment

of competent adults. They think that by merely preserving freedom of choice, they respect autonomy. Yet, because Sunstein and Thaler prioritize considerations of well-being over considerations of autonomy, their defense is unlikely to be persuasive to those who defend a conception of autonomy as authority. Intuitively, in deliberations about an individual's self-regarding actions, the individual's capacity for rational deliberation should exclude other considerations, like the individual's well-being. Yet, even if the S/T defense of libertarian paternalism fails to satisfy those committed to a conception of authoritative autonomy, I think that Sunstein and Thaler's policy recommendations might be still be defensible.⁸ In this section, I review a paper by J.D. Trout to consider a possible soft paternalist defense of libertarian paternalism, but suggest that ultimately the best defense of libertarian paternalism would involve challenging the notion that autonomously made decisions should always trump concerns about an individual's well-being.⁹

4.1 COGNITIVE BIASES AS A VOLUNTARINESS-VITIATING FACTOR

John Stuart Mill argues that there are generally no good reasons for government paternalism. According to this position, the government, in general, is justified in infringing on individual sovereignty only in order to prevent harm to others who not consent to be harmed (Mill, 1978, p. 9; Feinberg, 1986, p. 3). More recently, liberals building on the work of Joel Feinberg have argued that there is never a good reason for paternalistic legal infringement on personal autonomy even if such infringement is a

⁸ This is not to rule out that libertarian paternalist policies might be problematic for other reasons. For instance, Mario J. Rizzo (2009) represents the concern that the policies of the sort that Sunstein and Thaler defend are especially open to expansion and will likely to result in an unacceptable infringement on autonomy.

⁹ Sunstein and Thaler hint at this line of reasoning, but their unsupported claim that the autonomy-trumps-consequential concerns is "fanatical" is unhelpful at best.

means to enhancing individual autonomy (Feinberg, 1986, p. 68).¹⁰ In *Harm to Self*, Feinberg describes government paternalism in criminal law as especially "offensive morally" because it "invades the realm of personal autonomy where each competent, responsible, adult human being should reign supreme" (Feinberg, 1986, p. 25). According to Feinberg (1986), concerns about autonomy should take precedence over concerns about wellbeing; valuing personal sovereignty means treating it as a moral trump that "takes precedence even over [an individual's] own good" (Feinberg, 1986, p. 61). Autonomy should be protected and can only be limited when one infringes on the autonomy of another who does not consent to this infringement.

Feinberg, however, proposes an important modification to the above "hard" anti-paternalist position. Following Mill, who allows for outside interference with an individual's choices or actions when the voluntariness of that individual's choice is compromised in some way, Feinberg argues that the government can intervene in individual choices when an actor is making "dangerous choices that are not truly his own" (1986, p. 99). Contrasting his position with a more stringent or 'hard' form of anti-paternalism, Feinberg labels his view as 'weak' or 'soft' paternalism, saying that, in respect to the criminal law, "the state has the right to prevent self-regarding harmful conduct ... *when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not" (Feinberg, 1986, 12).

Feinberg contends that soft paternalism is not really paternalism at all because the in-

¹⁰ It is essential to clarify that Feinberg's position on paternalism is limited to concerns about the justification of the criminal law (1984, 3-4). While many people have applied his notion of soft paternalism beyond the criminal law, as I do in this thesis, Feinberg is clear that he only intends his notion of soft paternalism to pertain to understanding the criminal law's moral limits. To acknowledge the distinction between Feinberg's own view and the view that Feinberg's soft paternalism can be used more broadly in discussions about paternalism beyond the criminal law, I will refer to the conception of soft paternalism used in this thesis as "Feinbergian." Additionally, although I quote Feinberg extensively to explain the basic components of the Feinbergian position, the reader should keep in mind that Feinberg only intends for these passages to apply to the criminal law.

fringement merely protects the individual as though from another individual. Since the individual might not choose the harm were the individual to be free from “voluntariness-vitiating factors,” Feinberg explains that when an individual’s voluntariness is compromised, “there are grounds for suspecting that [the choice] does not come from his own will, and might be as alien to him as the choices of someone else” (Feinberg, 1986, 12). Thus, Feinberg argues that soft paternalism is actually more akin to anti-paternalism than to paternalism.

Ideally, a voluntary act is rationally chosen with “calmness and deliberateness ... no distracting or unsettling emotions, no neurotic compulsion, no misunderstanding” (Feinberg, 1986, 104). Yet, there are many factors that could compromise the rationality of an action. The voluntariness of an act is inversely related to the presence of elements that work to distort rationality. Since the individual might not choose the harm were the individual free from “voluntariness-vitiating factors,” Feinberg explains that when an individual’s voluntariness is compromised, “there are grounds for suspecting that [the choice] does not come from his own will, and might be as alien to him as the choices of someone else” (Feinberg, 1986, 12). Feinberg contends that when the voluntariness of an act falls below the threshold of “voluntary enough,” the government is justified in intervening in order to save the individual from self-inflicted harm. In the soft paternalism framework, when the voluntariness of an act is sufficiently compromised and the threatened self-harm is great enough, the government is justified in interfering in the individual’s self-regarding actions.

Given evidence of cognitive biases, it would seem that many of our choices might not be products of our rational capacity but instead be “choices” that arise apart from our own will. In light of the ubiquitous and entrenched nature of cognitive biases, J.D. Trout (2005) argues that we should question whether we should view typical adults as

possessing the capacity to be competent decision makers. Rather than thinking that competent adults have a capacity to deliberate, decide, and direct their lives however they want, whether or not they choose to do so, Trout contends that we should instead think of humans as bias-ridden creatures who are not all that capable at rationally going about achieving our considered judgments or implicit long-term goals (2005, pp. 395-408). According to Trout, cognitive biases are “systematic and psychologically incorrigible” (2005 p. 421). It is nearly impossible for individuals alone to overcome their cognitive biases even if they want to. Biases are much like a common affliction shared by all people as a natural condition and “arise independently of the will; they are a factor external to it” (2005, p. 416). In light of how biases work, Trout argues that the “choices” people make while under the influence of biases should not be considered as intentionally chosen (2005, p. 416). Following Trout’s reasoning, if cognitive biases are outside the will and compromise an individual’s ability to make fully informed rational judgments, then on the Feinbergian soft paternalism account we might say that the government is justified in substituting its own judgment for that of individuals in order to protect them from self-inflicted harm they are not really voluntarily choosing.

Sunstein and Thaler indicate a potential amenability of libertarian paternalism to a Feinbergian soft paternalism justification. They contend at one point that with libertarian paternalism the government is only helping individuals make the decisions they would otherwise make were they freed from their cognitive hindrances (2006, p. 234). However, there are several good reasons to think soft paternalism might not serve as an adequate foundation for libertarian paternalism. First, the government action allowed by soft paternalism is more restricted than what Sunstein and Thaler propose. In soft paternalism, the government can intervene with self-regarding actions only to protect the individual from harm. Even if it is shown that an individual’s deliberative ca-

capacities are sufficiently compromised, for the Feinbergian account the risk to the individual must be quite severe before the government is justified in intervening. As Feinberg notes, “[p]ersons may act as nonvoluntarily as is imaginable and as frequently as possible, so far as the soft paternalist is concerned, provided no harm is caused thereby” (1986, p. 118). The harm that Feinberg imagines here is an irrevocable harm to self like serious injury or death, not merely a failure to make the optimal choice (1986, p. 118-24). In contrast, the policies of libertarian paternalism are aimed at making the lives of individuals better. While Sunstein and Thaler consider some choices that might indirectly lead to harm were the individual to choose unwisely, like selecting a health insurance plan, it is unlikely that individuals who make the less optimal choice will risk anything like the level of harm that a Feinbergian imagines is necessary to justify government action in self-regarding choices.

One might then simply reject the Feinbergian view that the government can only act when an individual, through her sufficiently nonvoluntary choices, risks significant and irrevocable harm. Instead, one might propose that it is permissible for the government to intervene in self-regarding choices whenever the individual’s autonomy is compromised by cognitive biases. However, if this were the *only* criterion, the government would have broad permission to intervene in individual self-regarding choices that defenders of autonomy would resist. Feinberg draws a useful distinction between irrational choices and unreasonable choices. While “rationally” refers to an individual’s capacity to deliberate and judge, “reasonableness” refers to how people value the worthwhileness of a choice (1986, p 106). A person could possess the capacity to deliberate and judge and also make decisions that others find to be unreasonable. Feinberg, following Mill (1978) and Arneson (1980), insists that valuing a thick notion of autonomy entails giving individuals the space to make choices that others might find

unreasonable. Yet, if the cognitive biases operate as stealthily as Trout proposes, it is not always clear when an individual is making a rational but unreasonable choice and when an individual is making an irrational and unreasonable choice that will result in unwanted self-harm. Even interviewing an individual to discover the voluntariness of her choice would not likely clarify how much her choice is really a product of reflective deliberation or a product of a pernicious bias because biases influence how we view our own actions. Since irrationality and unreasonableness blur together, if the presence of irrationality is the *only* criterion that justifies government action in the lives of individuals, a soft paternalistic approach to cognitive biases might very well allow for government interference in self-regarding actions that are unreasonable but not irrational. Allowing for this would chip away at the very notion of autonomy that libertarian paternalists would be trying to preserve by turning to soft paternalism to justify their policies.

Another promising defense of libertarian paternalism might involve a challenge to the notion that autonomously made decisions should always trump concerns about an individual's well-being. Groll provides some direction in this matter, noting that it is unclear whether anti-paternalistic intuitions in the case of competent individuals are right. He asks, "If someone is really going to make a poor choice with respect to his own well-being, why wouldn't it be justified to paternalistically intervene just because he has the (here unexercised) capacity for sound judgment?" (2012, p. 719). Groll contends that responding to this question is a big task that would "involve giving an account of what is valuable about autonomy" (2012, p. 719). While answering this question is beyond the scope of this thesis, I think that there can be a middle course between treating the will as structurally decisive and treating it as substantially decisive. Defending a middle course would likely involve taking into account considerations

about the relationship between autonomy and well-being, as well as considerations about the relationship between the value of autonomy and the value of other goods, like fairness. This course would need to defend a position concerning when the will is to be treated as structurally decisive and when other considerations, like well-being or the threat of harm, might have priority.¹¹

4.2 CONCLUSION

I have shown why those who hold to a notion of autonomy as authority have good reason to reject the Sunstein and Thaler's argument for libertarian paternalism.

Though the S/T argument holds that libertarian paternalism respects autonomy because it is non-coercive, paternalism in the case of competent adults does not have to involve coercion for it to be problematic. What is ultimately worrisome about Sunstein and Thaler's defense is that they think that concerns of well-being have priority over concerns of autonomy. In making well-being lexically prior to autonomy, Sunstein and Thaler do not give autonomy the respect it deserves, at least if the conception of autonomy as authority is accepted. Weak-paternalism might offer one foundation for libertarian paternalism, though this approach has considerable problems that would need to be addressed. It seems, then, that an adequate defense of libertarian paternalism would require a direct attack on autonomy as authority, and such an attack is yet to be forthcoming from the defenders of libertarian paternalism.

¹¹ Russ Shafer-Landau (2005) and Richard Arneson (2005) both offer sketches of positions that might demonstrate how autonomy can be balanced with other concerns, like self-harm and well-being.

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