

NUDGING FOR EQUALITY: VALUES IN LIBERTARIAN PATERNALISM

MATTHEW A. SMITH*
MICHAEL S. MCPHERSON**

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INTRODUCTION

In their recent book *Nudge*,¹ Richard H. Thaler and Cass R. Sunstein argue persuasively that default rules and framing effects affect people’s decisions and thus that default rules and framing effects should be designed to improve people’s welfare (where welfare is understood as their self-regarding interest).² For example, if a medical procedure is described

* Matthew A. Smith is a research associate at the Spencer Foundation in Chicago, Illinois, and is a graduate of Stanford University.

** Michael S. McPherson is the President of the Spencer Foundation in Chicago, Illinois, is the President Emeritus of Macalester College, and is the former Dean of Faculty and Professor of Economics at Williams College. He has been a Fellow of the Institute of Advanced Study in Princeton and cofounded and edited the Cambridge University Press journal *Economics and Philosophy*.

1. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) [hereinafter *NUDGE*]. For the original and slightly more technical formulation of their ideas, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) [hereinafter *Libertarian Paternalism*].

2. Although Thaler and Sunstein concentrate explicitly and exclusively on “welfare” in *Libertarian Paternalism*, the emphasis on welfare is continued implicitly in *Nudge*: “[W]ith an eye on these NUDGES, choice architects can improve the outcomes for their Human users.” *NUDGE*, *supra* note 1, at 100.

as having a 10% mortality rate at five years, people are far less likely to undergo the procedure than if it is described as having a 90% subsistence rate, even though one logically entails the other.³ Choosing the right framing effect can thus enhance patients' welfare by helping them make the "right" decision. This focus on welfare is a notable aspect of Thaler and Sunstein's work. Our work here is distinctive because we focus on values other than welfare. More specifically, we use a range of examples to show that default rules and framing effects can also promote values such as liberty and equality. In so doing, we hope to expand the range of issues and ideas advanced by Thaler and Sunstein. Initially, it will be helpful to review the disciplinary strands on which our work is predicated.

One of the most influential developments in legal analysis has been the application of insights from what is known as behavioral economics, a movement that began as psychologists questioned the behavioral assumptions of modern economics. The dominant view in economics had been (and to a large extent continues to be) that individuals choose in their best interests all or most of the time. As a simplifying assumption, this view of human behavior has proven extraordinarily useful, at least as witnessed by the prestige accorded the profession, its ascendancy within the academy, and its applications to public policy.⁴ However, excellent work in psychology has shown that this dominant view is often wrong: humans regularly make systematic and predictable errors of judgment. For instance, in making probability judgments about an individual, humans often rely on a personality sketch of that individual. Critically, the resulting judgments may violate the laws of probability. Consider the following description: "Bill is 34 years old. He is intelligent but unimaginative, compulsive, and generally lifeless. In school, he was strong in mathematics but weak in social studies and humanities."⁵

3. See *id.* at 36 (outlining the importance of framing effects in a variety of domains, including the present medical example).

4. See DAVID JOHN FRANK & JAY GABLER, RECONSTRUCTING THE UNIVERSITY: WORLDWIDE SHIFTS IN ACADEMIA IN THE 20TH CENTURY 133 (2006) (showing that economics departments worldwide have grown at least 124% in the 20th century); Marion Fourcade, *The Construction of a Global Profession: The Transnationalization of Economics*, 112 AM. J. SOC. 145, 185 (2006) (detailing the increasingly international uses for, and bases of, the discipline of economics); Marion Fourcade-Gourinchas, *Politics, Institutional Structures, and the Rise of Economics: A Comparative Study*, 30 THEORY & SOC'Y 397, 397 (2001) ("[M]odernity has been a witness to the dramatic rise of economics around the world as it has evolved from a loose discursive 'field,' with no clear and identifiable boundaries, into a fully 'professionalized' enterprise, relying on both a coherent and highly formalized disciplinary framework, and extensive practical claims in administrative, business, and mass media institutions.").

5. Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 19, 24 (Thomas Gilovich et al. eds., 2002).

Undergraduates who were given this description were also asked to rank the independent probabilities that Bill is an accountant (A), Bill plays jazz (J), and Bill is an accountant who plays jazz ($A\&J$). Although it is impossible for $A\&J$ to be more probable than J (since the conjunction of two events will always be less probable than one of them alone), 87% of the students submitted the following probability ranking: $A > A\&J > J$.⁶ The flawed reasoning here is that Bill is so staid he must be an accountant, whatever else he may be.

Legal academia is just beginning to work out the implications of these psychological insights, but their conceptual impact is clear and striking. Under the old economic assumption, legal rules that sought to change behavior could do so only by changing individuals' interests—by altering incentives with mandates, subsidies, or other types of regulation. In contrast, this new psychological research opens the conceptual space: if individuals make systematic and predictable errors of judgment, then it may be possible to change their behavior by mitigating or exploiting those errors. For example, people often display status quo bias, preferring to stick with whatever default they are given even if there are better options. A characteristic illustration is the default rule employers use for enrollment in retirement savings programs: if employers use an opt-out rule (in which employees are automatically enrolled in the program and may actively choose to become unenrolled), a greater percentage of employees will be enrolled than if employers use an opt-in rule (in which employees are automatically unenrolled and may actively choose to enroll).⁷ Here, simply changing the default rule without altering the incentives for enrollment results in substantial changes in outcomes.

The most thorough and convincing exploration of this new terrain is given by Thaler and Sunstein.⁸ They focus on what they call “choice

6. *Id.*

7. See James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, in 16 TAX POL'Y & ECON. 67, 76 (James M. Poterba ed., 2002) (showing that, for companies with automatic enrollment participation in 401(k) plans, enrollment was 31% to 34% higher after thirty-six months of employment than at companies without automatic enrollment); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1150 (2001), cited in *Libertarian Paternalism*, *supra* note 1, at 1160 n.1.

8. NUDGE, *supra* note 1; see also *Libertarian Paternalism*, *supra* note 1, at 1160 (arguing that libertarian paternalism provides a framework for analyzing certain legal questions). The literature discussing the legal and policy implications of behavioral economics is copious. See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000) (arguing that an understanding of behavior and choice is necessary to the analysis of law); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211 (2003) (proposing a conservative approach to evaluating paternalistic regulations and doctrines); Ehud Guttel & Alon Harel, *Matching Probabilities: The Behavioral Law and Economics of Repeated Behavior*, 72 U. CHI. L. REV. 1197 (2005) (analyzing the effects of probability matching on

architects,” anyone who “has the responsibility for organizing the context in which people make decisions.”⁹ This not surprisingly encompasses a vast range of individuals, from doctors describing and seeking consent for proposed treatments to legislators designing tax forms. The core intellectual contribution of their work is to argue persuasively that small changes in “choice architecture” can improve people’s welfare while preserving freedom of choice, an approach that is simultaneously libertarian and paternalistic.¹⁰ For instance, the retirement example detailed above (in which an opt-out default rule results in greater participation in retirement savings programs while preserving the opportunity not to participate) is libertarian because of its “straightforward insistence that, in general, people should be free to do what they like.”¹¹ It is simultaneously paternalistic because “it tries to influence choices in a way that will make choosers better off, *as judged by themselves*”;¹² or, as Thaler and Sunstein originally described the paternalistic element, it is “chosen with the explicit goal of improving the welfare of the people affected.”¹³

law enforcement policies and legal doctrine); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473–74 (1998) (proposing “a systematic framework for a behavioral approach to economic analysis of law, and using behavioral insights to develop specific models and approaches addressing topics of abiding interest in law and economics”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (rejecting the use of rational choice theory to shape legal policy); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000) (arguing that behavioral decision theory can improve legal analysis by providing greater insight into human choice); Editors’ Note, Symposium, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075, 1075 (2003) (“At its core, the law and economics tradition embraces the notion of a rational, utility-maximizing actor as the principal figure with which the law should concern itself. The contributors to this Symposium question whether people truly fit the profile offered by law and economics scholars.”); Douglas G. Baird et al., Symposium, *Homo Economicus, Homo Myopicus, and the Law and Economics of Consumer Choice*, 73 U. CHI. L. REV. 1, 1–2 (2006) (“Behavioral law and economics has enriched our account of how individuals make choices . . .”).

9. NUDGE, *supra* note 1, at 3.

10. For a discussion of paternalism as a concept applied to the state’s role in particular, see N. Fotion, *Paternalism*, 89 ETHICS 191 (1979). Notably, use of the term *paternalism* departs from the general usage since it does not formally or coercively limit the range of options available. See, e.g., Thaddeus Mason Pope, *Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 662 (2004) (finding that “both soft paternalism and hard paternalism,” taken to be exhaustive of the conceptual space, “are liberty-limiting principles”); Gerald Dworkin, *Paternalism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2002), <http://plato.stanford.edu/archives/win2002/entries/paternalism/> (“The analysis of paternalism involves at least . . . some kind of limitation on the freedom or autonomy of some agent and it does so for a particular class of reasons.”).

11. NUDGE, *supra* note 1, at 5.

12. *Id.*

13. *Libertarian Paternalism*, *supra* note 1, at 1161.

As we have said, these implications for choice architects were made possible as psychologists questioned whether individuals choose in their best interests all or most of the time. A parallel project by philosophers and philosophically minded economists has questioned another key behavioral assumption in economics. In this case, they have questioned whether people act exclusively to enhance their own welfare, where welfare is understood as their self-assessing best interest (literally what is best for them and only them). In particular, economist Amartya Sen has argued that individuals often act out of moral considerations while simultaneously acknowledging that it would be better *for them* to do something else.¹⁴ So, for example, it is perfectly plausible to imagine a situation in which an individual would choose to honor a commitment (to family, friends, religion, decorum, business ethics, etc.) even though it comes at greater personal cost than breaking the commitment.¹⁵ The basic point is that people have values that do not reduce to their own welfare—a point we will not argue here. Suffice it to note that economists have focused on welfare because of two interlocking theoretical commitments they have found appealing. The first is that *welfare* can be easily defined: welfare, for a person, is the satisfaction of her self-regarding preferences. The second is that choice reveals preference in the sense that, as between any pair of options, people will always choose the one they prefer. These assumptions have obvious appeal because they make the assessment of preferences an empirical matter (what did one choose?), but ultimately they fail to capture the range of reasons for which individuals may act. That an exclusive emphasis on welfare is problematic should be especially clear in a field like law, where freedom of speech is accepted as an almost axiomatic value and attempts to justify it in terms of welfare become perilous precisely because abridging that freedom sometimes enhances welfare.¹⁶

14. See, e.g., AMARTYA SEN, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory*, in CHOICE, WELFARE, AND MEASUREMENT 84, 88–99 (MIT Press ed. 1982) (arguing, inter alia, that someone who attempted to maximize his own welfare in every situation would be rational “in the limited sense of revealing no inconsistencies in his choice behaviour” but would otherwise be a “social moron”).

15. This is a complicated subject that we need not treat in detail for the purposes of this paper. However, we take the following example as strengthening the point. Two boys find two apples.

Boy A tells boy B, “You choose[.]” B immediately picks the larger apple. A is upset and permits himself the remark that this was grossly unfair. “Why?” asks B. “Which one would *you* have chosen, if you were to choose rather than me?” “The smaller one, of course[.]” A replies. B is now triumphant: “Then what are you complaining about? That’s the one you’ve got!”

Id. at 93. Boy A’s anger is the result of his recognizing (1) that he would be better off with the larger apple, (2) that as a matter of courtesy he would have chosen against that interest were he in B’s position, and (3) that B did not extend him the same courtesy. *Id.*

16. Once freedom of speech is justified in terms of welfare, it opens the possibility that many abridgements of freedom of speech could be justified in terms of welfare. One way to

Just as questioning the assumption that individuals mostly choose in their own best interests suggests new ways to influence human behavior (detailed by Thaler and Sunstein), questioning the assumption that humans act exclusively to enhance their own welfare suggests new directions in which to influence human behavior. Our argument consists of two claims: (1) that choice architecture can be used to promote values other than welfare and (2) that these other values widen the deliberative processes available to choice architects. In Parts I and II we argue for the former point; in Part III we argue for the latter.

I. CHOICE ARCHITECTURE THAT PROMOTES WELFARE

We will show that the same structure of choice architecture that promotes welfare—the choice architecture argued for by Thaler and Sunstein—can be adapted to other values. In this Part, we use the retirement savings example cited above to preface this argument. When choice architecture promotes welfare, the following structure is present: (1) some group of people has preferences that are sensitive to particular choice architecture, such that changes in that architecture result in changes in the people's behavior; (2) the corresponding changes in behavior are ordered such that some are more conducive to welfare than others; and (3) choice architects are able to choose an architecture so that a greater percentage of these people behave in a way that is more conducive to their welfare than they otherwise would.

To see how this structure works in practice, consider again the promotion of welfare through opt-out retirement savings programs.¹⁷ At the outset, we take structural condition (1) as established: there is a subset of people whose decision to enroll in a retirement savings program is sensitive to the default rules of the program. In natural experiments (i.e., nonlaboratory situations in which corporations or businesses actually switched from opt-in to opt-out

circumvent this problem is to insist on a rule-consequentialist justification: freedom of speech is justified by welfare because strong enforcement of freedom of speech (treating it as a rule from which deviations are unacceptable) will result in greater overall welfare, even when taking into account cases where it would decrease welfare. The problem with the rule-consequentialist justification is that it must provide a reason why clear exceptions—however marginally they might improve welfare—should not be allowed if everything else is held constant. If it is absolutely clear that abridgement of free speech in a particular and isolated case will improve welfare, why should that abridgement not be allowed if welfare is the sole justification for freedom of speech? In the argot of constitutional law, if welfare justifies free speech and if in certain cases rational basis review would result in greater welfare, why insist on strict scrutiny? For a baseline discussion of rule-consequentialism, see Brad Hooker, *Rule-Consequentialism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2003), <http://plato.stanford.edu/archives/spr2004/entries/consequentialism-rule/>.

17. For a far more comprehensive discussion of retirement savings programs, see NUDGE, *supra* note 1, at 103–31. Our purpose here is merely to lay the groundwork for our discussion of liberty and equality.

programs), “401(k) participation is significantly higher under automatic enrollment” and “the default contribution rate and default investment allocation chosen by the company for automatic enrollment has a strong influence on the savings behavior of 401(k) participants.”¹⁸ Because these findings are independent of the characteristics of the laboratory environment, we expect they are widely accepted.

In the case of retirement savings programs, we believe structural condition (2) is also met. It is extremely plausible that different retirement savings choices would result in different levels of welfare for each individual. For some individuals, welfare would be higher if they delay savings in favor of immediate consumption; this may be so for a variety of reasons, ranging from satisfaction of present need to the calculation that one will be in a better position to save in the future. However, most individuals would have higher overall welfare by delaying some portion of present consumption in favor of savings; this is because “households are assumed to want to smooth consumption over the life cycle,”¹⁹ where smooth consumption is understood not as keeping expenditures constant but rather as “try[ing] to keep the marginal utility of money constant over time.”²⁰ Those whose productivity will decline or cease in old age (a group that includes most of us) will need substantial savings to smooth consumption.²¹ Unfortunately, even those who express a preference for consumption smoothing later in life often fail to save sufficient amounts of money. Again, this may happen for a variety of reasons, including inability to calculate the correct savings rate or a lack of self-control.²² But for whatever reason, structural condition (2) is met: there is an ordering of savings options (roughly from no savings to more savings) and some of those options (more savings) will increase people’s welfare.

The natural experiments that showed us condition (1) is met also show that condition (3) is met: choice architects, in this case private employers

18. Madrian & Shea, *supra* note 7, at 1150.

19. Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164, S165 (2004) (showing that a program that commits employees to saving some portion of their future raises results in an overall increase in those employees’ savings rates).

20. Martin Browning & Thomas F. Crossley, *The Life-Cycle Model of Consumption and Saving*, 15 J. ECON. PERSP. 3, 3–4 (2001) (arguing that the theory behind the life-cycle model fits the empirical desiderata sufficiently well to be useful in estimating life decisions “such as consumption, saving, education, human capital, marriage, fertility and labor supply”).

21. For example, in 2003 only 11.8% of men and 6.2% of women age seventy and older were employed on a full-time or part-time basis. WAN HE ET AL., U.S. DEP’T OF HEALTH AND HUMAN SERVS., CURRENT POPULATIONS REPORTS: 65+ IN THE UNITED STATES: 2005, at 89 (2005) (summarizing labor trends among Americans sixty-five years old and older), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

22. Thaler & Benartzi, *supra* note 19, at S165.

offering 401(k) programs, are able to choose default rules that increase enrollment in retirement savings programs and thus result in increased welfare for many individuals. As we will show in the following Part, the same structure of choice architecture that promotes welfare can be adapted to promote liberty and equality.

II. CHOICE ARCHITECTURE THAT PROMOTES VALUES OTHER THAN WELFARE

A. *Choice Architecture that Promotes Liberty*

In this Part we will show that choice architecture can promote liberty. The best place to begin defining *liberty* is Thaler and Sunstein's use of the term. Although they never explicitly define it, it is possible to cull a definition from their discussion of libertarian paternalism:

The libertarian aspect of our strategies lies in their straightforward insistence that, in general, people should be free to do what they like—and to opt out of undesirable arrangements if they want to do so. To borrow a phrase from the late Milton Friedman, libertarian paternalists urge that people should be “free to choose.” We strive to design policies that maintain or increase freedom of choice. When we use the term *libertarian* to modify the word *paternalism*, we simply mean liberty-preserving.²³

Under this definition, individuals have liberty when there are no laws or organizational rules barring them from the option that they prefer. We will call this *formal liberty* because it takes the absence of formal constraints on an individual's options in some area as a sufficient condition for liberty in that area. So, for example, people are free (i.e., have liberty) not to save for retirement if there are no legal or organizational bars to nonparticipation in a retirement savings program. Formal liberty is thus ensured by both opt-in and opt-out default rules.²⁴

So understood, formal liberty contrasts with what we will call *substantive liberty*—the opportunity for autonomous reflection. More explicitly, individuals have substantive liberty only if they have the time, whether or not they utilize it, to reflect on their goals and aspirations and engage in practical reasoning and action toward the same. What are their goals? Are they realizable in first-best or second-best form? If so, by what means are they realizable? What are the rough probabilities and what are the costs? So defined, it is easy to see why substantive liberty and formal

23. NUDGE, *supra* note 1, at 5.

24. Formal liberty is also ensured by what Thaler and Sunstein call “required choice.” NUDGE, *supra* note 1, at 86–87; see also *Libertarian Paternalism*, *supra* note 1, at 1173 (labeling this same option “required active choosing”). We will have more to say about required choice in Part IV.

liberty are not coextensive. In an extreme case, a company that insisted on an immediate decision between participation and nonparticipation in its retirement savings program would preserve formal liberty and trample substantive liberty. And more broadly, formal liberty and substantive liberty can conflict as in Jean-Jacques Rousseau's famous dictum that "if anyone refuses to obey the general will[,] he will be compelled to do so by the whole body; which means nothing else than that he will be forced to be free."²⁵ In contrast, all of the examples we discuss will preserve formal liberty. This is because we are interested in examples that are "libertarian" in Thaler and Sunstein's use of the term. In other words, our focus is choice architecture that promotes substantive liberty while preserving formal liberty. As such, our discussions of *liberty* in the remainder of this Article will focus on substantive liberty unless otherwise noted.

How can choice architecture promote substantive liberty? The structure of choice architecture that promotes substantive liberty mirrors the promotion of welfare, except that it enhances people's opportunities for autonomous reflection rather than necessarily enhance their welfare. Or more colloquially, default rules, framing effects, and the other forms of choice architecture can be used to give people more or better opportunities to reflect. Thus, instances of libertarian paternalism used to promote liberty will have the following structure: (1) there are circumstances in which some people make decisions but do not have the opportunity to autonomously reflect or are otherwise incapable of autonomously reflecting on those decisions; (2) some of these people would have the opportunity or capability to autonomously reflect were different choice architecture in place; (3) choice architects are able to choose architecture so that more of these people have the opportunity or capability for autonomous reflection (i.e., have substantive liberty) than otherwise would. Some people will of course be more reflective than others, but this is to be expected.²⁶

On the topic of generally unreflective people, our first example of choice architecture that promotes liberty comes from pop culture: at 5:30 in the

25. JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT 58 (Christopher Betts trans., Oxford Univ. Press 1994). To gloss Rousseau's reasoning in our terms: the reduction in formal liberty—being coercively bound by the general will—is compensated by an increase in substantive liberty—not being at the whim of others and being compelled to "consult his reason before he attends to his inclinations." *Id.* at 59.

26. As should be clear, the force of our argument does not depend on accepting substantive liberty as a value. Rather, it relies merely on the possibility that it could be accepted as a value. Kantians, for example, might argue that they value substantive liberty for its own sake. *See, e.g.*, ALLEN WOOD, KANT'S ETHICAL THOUGHT 72–75 (1999) (arguing that there are rational grounds for following moral imperatives because our conceptions of ourselves as people able to choose among ends and then pursue them—in our terminology, being able to utilize substantive liberty—impose fundamental requirements themselves).

morning on January 3, 2004, Britney Spears married a childhood friend named Jason Alexander in Las Vegas.²⁷ The couple decided to get married immediately after watching the movie *The Texas Chain-Saw Massacre* and were married within hours.²⁸ The marriage was annulled within fifty-five hours.²⁹ This case clearly meets the three structural conditions for choice architecture that promotes liberty and is not reducible to welfare considerations. Condition (1) is surely met: Britney was incapable of exercising substantive liberty at that time. As the Clark County judge summarized Britney's state of mind in his order of annulment,

Plaintiff Spears lacked understanding of her actions to the extent that she was incapable of agreeing to the marriage because before entering into the marriage the Plaintiff and Defendant did not know each other[']s likes and dislikes, each other[']s desires to have or not have children, and each other[']s desires as to State of residency.³⁰

Many of us are not in a position to think through decisions of such magnitude at 5:30 in the morning, particularly given the concomitant effects of sleep deprivation.³¹ Condition (2) is also met. There are strong reasons to think that a mandatory waiting period (say three days) might very well have allowed Britney to consider her decision at a time when she was capable of considering its consequences. For example, after three days the impulsive appeal of her decision would have faded, and she would have at least had the opportunity to get to know her husband-to-be. This would seem to be a prerequisite for deciding whether to live her life with him. Finally, condition (3) is also met: choice architects (in this case, Nevada legislators) are eminently positioned to require such a waiting period as some other states do.³² Moreover, Spears's marriage is a perfect example of choice architecture that promotes liberty because the benefits of a waiting period would not reduce welfare. Putatively, the marriage did not have any ill effects on Spears or her erstwhile husband. Spears lost no

27. Karen Thomas, *Britney's Vegas Vacation: Stunt or Screw-Up?*, USA TODAY, Jan. 6, 2004, at 3D, available at http://www.usatoday.com/life/people/2004-01-06-britney-wedding-main_x.htm.

28. *Id.*

29. Gary Susman, *Me Against the Marriage*, EW.COM, Jan. 6, 2004, <http://www.ew.com/ew/article/0,,571226,00.html>.

30. *Spears v. Alexander*, No. D311371 (Nev. Dist. Ct. Clark County, Jan. 5, 2004) (declaring the marriage between Britney Spears and Jason Alexander "null and void").

31. See Yvonne Harrison & James A. Horne, *The Impact of Sleep Deprivation on Decision Making: A Review*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 236, 246 (2000) (arguing that "flexibility of thinking, avoidance of distraction, risk assessment, awareness for what is feasible, appreciation of one's own strengths and weaknesses at the current time (meta-memory), and ability to communicate effectively" are the tasks most likely to be deleteriously affected by sleep deprivation).

32. See, e.g., MASS. GEN. LAWS ch. 207, § 28 (2007) ("On or after the third day from the filing of notice of intention of marriage . . . the clerk or registrar shall deliver to the parties a certificate signed by him . . .").

money, and the firestorm of publicity arguably helped her career, thus promoting her welfare. As such, a waiting period might have given her the opportunity to think through her decision but lowered her long-term welfare. A waiting period for marriage is thus an example of choice architecture that can promote substantive liberty.³³ And the same rationale has been applied to waiting periods for abortions, as when the Supreme Court upheld a twenty-four-hour waiting period in *Planned Parenthood v. Casey*:³⁴ “[Because] important decisions will be more informed and deliberate if they follow some period of reflection[,] the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does not amount to an undue burden.”³⁵

While the Spears example is noteworthy, far more important examples come from the field of medicine, in which patients are often required to choose between bad and worse decisions. In this context, choice architecture can help improve patients’ liberty by making sure patients have been exposed to the necessary information and have had opportunity to deliberate—in medical parlance, that they have been given “informed consent” for their treatment. Informed consent gained substantial currency in the late 1970s and early 1980s as medical advances raised the spectre of prolonged incapacitation and concomitant loss of autonomy. Indeed, the import of the issue was large enough that in 1982 the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (Commission) issued an influential report on the subject.³⁶ The Commission prefaced its specific recommendations by noting that “[t]he ethical foundation of informed consent can be traced to the promotion of two values: personal well-being and self-determination.”³⁷

33. Colin Camerer and his coauthors originally proposed a similar waiting period as an example of “asymmetric paternalism,” a regulation that “creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.” Camerer, *supra* note 8, at 1212. Our work remains distinctive in its emphasis on liberty rather than welfare (i.e., “benefits”). It is also worth noting that a waiting period would infringe formal liberty by restricting people from marrying immediately after the decision to do so. However, given the scope of such a decision, the infringement hardly seems worrisome. As Camerer and his coauthors put it, “How onerous can a one- or two-week delay be in the context of a marriage that is supposed to last a lifetime?” *Id.* at 1243. An alternative arrangement that would not infringe formal liberty whatsoever would be a no-cost option to annul a marriage within a certain timeframe (even if unilaterally).

34. 505 U.S. 833 (1992).

35. *Id.* at 885. It goes without saying that legislators may support waiting periods for abortion not because they care about the promotion of substantive liberty but because of the possibility that such waiting periods may decrease the number of abortions performed.

36. PRESIDENT’S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMED. & BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT–PRACTITIONER RELATIONSHIP (1982).

37. *Id.* at 2.

The Commission further found that in order

[t]o ensure these values are respected and enhanced[,] . . . patients who have the capacity to make decisions about their care must be permitted to do so voluntarily and must have all relevant information regarding their condition and alternative treatments, including possible benefits, risks, costs, other consequences, and significant uncertainties surrounding any of this information.³⁸

The important point here is that informed consent does not reduce to the promotion of welfare: patients may end up choosing a treatment plan that is ultimately less conducive to their own welfare than an alternative treatment plan. For example, a mother who experiences late-term pregnancy complications should have the option to sacrifice her own welfare to enhance the probability that her child will be born healthy. Thus, informed consent is premised on the idea that patients should have liberty to make medical decisions, not that doing so will necessarily improve welfare.

One particularly instructive example of how informed-consent default rules can be used to promote liberty comes from an intervention in an intensive care unit of a tertiary hospital in Chicago.³⁹ Intensive care presents a distinct challenge to informed consent precisely because patients themselves are often incapable of giving consent and the exigencies of their conditions may necessitate immediate treatment. The result is that proxies representing the patients are required to give consent, although again “the pace of critical illness is often rapid and unpredictable, and situations may arise that do not permit sufficient time to locate a proxy.”⁴⁰ In these situations, treatments are often performed with implied consent, defined as any treatment to which most individuals in the same situation would consent. Because implied consent is clearly suboptimal—to promote liberty and patient autonomy it would be better to have explicit (written) consent from patients or their proxies—the study used a universal consent form that summarized the relevant information on, and asked patients or their proxies to grant blanket consent for, eight common intensive care procedures (e.g., catheter placement) that otherwise would have required consent on an ad hoc basis. Individuals granting consent were also asked to complete a questionnaire that measured their comprehension of the treatments by asking about indications for the treatment, description of the

38. *Id.*

39. See Nicole Davis et al., *Improving the Process of Informed Consent in the Critically Ill*, 289 J. AM. MED. ASS'N 1963 (2003) (measuring the increase of informed consent in an intensive care unit after introducing a universal consent form for eight commonly performed procedures accompanied by the availability of a handout describing each procedure, and concluding that consent was obtained more frequently after the introduction of the informed consent form without compromising the consentor's comprehension of the process).

40. *Id.* at 1963.

treatment, right to refuse the treatment, and possible complications.⁴¹ As compared with a baseline period in which written consent was given for only 53.1% of the procedures that were actually performed, “90.5% of the procedures were performed with written consent” after the universal consent form was introduced—a difference that is statistically significant at $p < .001$.⁴² Comprehension of the procedures performed was also as good or better using the universal consent form.⁴³

Like the Spears example, this informed-consent intervention is instructive because it meets the structural conditions for libertarian paternalism and because it represents an intervention to promote liberty rather than welfare. Condition (1) is clearly met in cases where informed consent is unavailable: patients or their proxies literally do not have the opportunity to consider the procedures in question. Condition (2) is met because the universal consent forms help remedy the fault in reasoning: they give patients or their proxies the opportunity to reflect on the treatments they may receive during their stay in the intensive care unit. In other words, the choice of when and how institutions ask for informed consent changes the likelihood that patients or proxies will have the opportunity to give informed consent. Condition (3) is also putatively met: introducing the intervention requires minimal training or institutional change and works “without increasing ICU physicians’ burden.”⁴⁴ Of course, more research would have to be done before this intervention could be introduced more broadly, but there are reasons to think that it is possible. Moreover, it is hard to argue that the value of the intervention is an increase in welfare: because most of the treatments in question would be performed under implied consent if informed consent had not been given, the medical outcomes in most cases would be the same with or without the intervention. What is valuable about informed consent in this context is that it enhances substantive liberty by giving patients more opportunity to deliberate. As both this example and the Spears example illustrate, choice architecture can promote substantive liberty.

B. Choice Architecture that Promotes Equality

Equality is an abstract concept signifying parity in a given relationship between two or more individuals.⁴⁵ The given relationship, however, could

41. *Id.* at 1964.

42. *Id.* at 1965–66.

43. *Id.* at 1966–67.

44. *Id.* at 1967.

45. See Dennis McKerlie, *Equality*, 106 ETHICS 274, 274 (1996) (defining *equality* as a “relationship between different people” that obtains when “they are equally supplied with resources, or equally happy”).

be anything from happiness and welfare to the amount of coffee consumed in a day. An initial task in any discussion of equality is thus answering the question: Equality of what?⁴⁶ Once the relevant sense of equality has been specified, choosing equality as a value to promote means bringing about parity in the specified sense because there is something good, intrinsically or extrinsically, about the state of affairs in which parity is achieved. In reference to libertarian paternalism, then, promoting equality could mean something as superficial as maximizing the percentage of people who choose a particular outcome, regardless of what the outcome is. Or in the alternative, it could mean something more substantive, like trying to maximize the percentage of people who choose a particular outcome because there is value in having more people choose that particular outcome. Instances of libertarian paternalism used to promote equality—for simplicity we will call this *egalitarian paternalism*—will thus have the following structure: (1) some group of people have preferences that are sensitive to choice architecture; (2) the choice architecture affects the decisions of these people in ways that may result in outcomes that are more or less equal in the specified sense; and (3) choice architects are able to choose an architecture so that a more, rather than a less, equal outcome is reached.

To illustrate the importance of specifying the sense of equality, consider two superficial but instructive versions of egalitarian paternalism. Suppose that choice architects are to choose between two sets of default rules: one set of default rules results in a 50–50 split between participation and nonparticipation, while another set of default rules results in a 20–80 or 80–20 split between participation and nonparticipation. Which of these two sets of default rules is preferable depends on the sense of equality that is important to choice architects. On one hand, the latter set might be preferable because a greater percentage of people (80% as compared with 50%) would receive the same treatment. What is being equalized here is the number of people who participate in the same outcome. On the other hand, the former set, which results in a 50–50 split, might be preferable if what matters is equality between outcomes—making sure that both outcomes are equally represented. While these examples of egalitarian paternalism are illustrative, the most interesting examples use default rules to promote more-substantive conceptions of equality—a subject to which we now turn.

The type of equality that most interests us, at least as far as egalitarian

46. Within modern political theory, this is known as the “equality of what debate,” eponymously named for Amartya Sen’s famous article on the topic. See Amartya K. Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 195, 197 (Sterling M. McMurrin ed., 1980) (critiquing different types of equality).

paternalism is concerned, is equality of political influence—a concept that has both a distinguished intellectual pedigree and particular salience in a democracy dominated by market-driven, mass-media coverage of candidates. We follow Harry Brighouse in understanding political influence of individuals as “the probability we would assign to their getting their way [politically], if they and everyone else engaged in political activity, and we knew nothing of what any other citizens wanted.”⁴⁷ So conceived, it is easy to see how pecuniary inequalities would, other things being equal, result in disparate political influence: remaining agnostic about the epistemic content of political positions, individuals with more money have greater ability to promote their political positions through the mechanics of mass media and other forms of influence than those with less money. Indeed, worries on this score likely motivated President Barack Obama’s executive order forbidding appointees to the Executive Branch from, among other things, accepting gifts from lobbyists and working on specific issue areas for which they had recently been employed as lobbyists.⁴⁸ Although, concerns about the effects of inequities, pecuniary or otherwise, are nothing new.

Equality of political influence is a dominant theme in democratic theory, starting at least with Rousseau’s *Discourse on Political Economy and the Social Contract*: “[I]nstead of destroying natural equality, the fundamental contract substitutes moral and legal equality for whatever degree of physical inequality nature has put among men; they may be unequal in strength or intelligence, but all become equal through agreed convention and by right.”⁴⁹ Because the accumulation of property and wealth may substitute for inequalities in strength or intelligence and may retrench moral and legal inequalities within a democracy, Rousseau proposed “that no citizen should be rich enough to be able to buy another, and none so poor that he has to sell himself.”⁵⁰ Even within American politics, concern about the influence of money has a long history, although one more-popular modern approach to enhancing equality of political influence is public financing of elections.⁵¹

The argument from political equality of influence to public subsidization is merely that public subsidization of campaigns (such that individual pecuniary contributions are nonexistent or lower than they otherwise would

47. Harry Brighouse, *Egalitarianism and Equal Availability of Political Influence*, 4 J. POL. PHIL. 118, 119 (1996).

48. Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1719.pdf>.

49. ROUSSEAU, *supra* note 25, at 62.

50. *Id.* at 87.

51. For a discussion of limitations on campaign contributions, see generally *McConnell v. FEC*, 540 U.S. 93, 115–32 (2003) (upholding the provisions of campaign finance reform).

be) helps reduce the political influence generated from wealth by replacing individual contributions with public contributions.⁵² This is not to say that we necessarily endorse public subsidization of elections or that the issue is so simple: pecuniary contributions may reveal the intensity of one's preference, in a way that voting does not, and thereby implicate free speech issues. Rather, the salient points for our purposes are that public financing of campaigns is simply one way to promote equal political influence and that under current law the public subsidies are constituted by voluntary contribution of tax dollars. In filing their taxes, taxpayers may elect to direct three dollars of their tax contribution to the presidential election campaign.⁵³ And, unlike other Treasury funds, the amount of money in the Presidential Election Campaign Fund is determined not by government officials or elected representatives but by the aggregate choices of individual taxpayers. "The Secretary of the Treasury shall, from time to time, transfer to the [F]und an amount not in excess of the sum of the amounts designated (subsequent to the previous Presidential election) to the [F]und by individuals There is appropriated to the [F]und for each fiscal year, out of amounts in the general fund of the Treasury not otherwise appropriated, an amount equal to the amounts so designated during each fiscal year"⁵⁴ The consequence is that decisions by individual taxpayers to allocate three dollars to the Fund help promote equality of political influence by actually constituting the Fund with money, not to mention the expressive value of such a choice. And critically, the default is set as an opt-in: taxpayers must affirmatively choose to direct their money by checking the appropriate box. A choice not to check the box—whether made on the merits (i.e., not wanting three dollars to go to the presidential election campaign) or on epistemically unrelated grounds (e.g., status quo bias, laziness, failure to engage with that portion of the return)—means that no portion of one's tax contribution will help fund presidential election campaigns. If status quo bias works the same way here as it did in the retirement example, all three structural conditions for egalitarian paternalism will be met: (1) people's preferences for donating to the Presidential Election Campaign Fund will be sensitive to the default rule; (2) changing the default to opt-out will result in outcomes that are more equal in the specified sense, in this case by promoting equality of political influence; and (3) choice architects are able to change this default rule. And, more importantly, it is very difficult to

52. See *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (holding that it is within Congress's power to institute a system of public campaign financing as a means to, inter alia, "reduce the deleterious influence of large contributions on our political process").

53. 26 U.S.C. § 6096 (2006).

54. *Id.* § 9006(a).

argue that this change merely promotes welfare because equality of political influence is likely something we would value as a part of democratic legitimacy even if disparate political influence had more salutary effects.⁵⁵

III. WHICH VALUES SHOULD CHOICE ARCHITECTURE PROMOTE?

In the previous Parts, we used specific examples to show that choice architecture can be used to promote values other than welfare. Our goal in this Part is to outline a deliberative process that can help choice architects choose among competing values. Our argument proceeds by considering one possible conflict between liberty and equality in a specific example of choice architecture. Ultimately the choice architects must resolve these conflicts themselves, but acknowledging the conflict between different values and choosing purposely between them is likely to result in better choice architecture as judged by the chosen value. To help ground our discussion, we will use the campaign finance example given above to explore a possible conflict between equality of political influence and substantive liberty.

Recall that the public financing of presidential election campaigns depends on the decisions of individual taxpayers to allocate three dollars of their tax burden to the Presidential Election Campaign Fund, and thus that changing tax returns from the current opt-in default rule to an opt-out default rule could promote equality of political influence. However, a third option between opt-in and opt-out is what Thaler and Sunstein call “required choice.”⁵⁶ Here the default rule forces individuals to choose to

55. However unlikely it is, there is no conceptual inconsistency in imagining a society in which disparately powerful private interests consistently furthered the public good more than any system of more diffuse political power. Even in this situation, our intuition is that a more diffuse system would be preferable precisely because equality of political influence is a primitive value. So articulated, equality of political influence is closely related to what Benjamin Constant called “liberty of the ancients” and Justice Stephen Breyer has expounded as “active liberty,” namely the right of each citizen to share in the collective role of governing. See STEPHEN BREYER, *ACTIVE LIBERTY* 3–34 (2005) (comparing and contrasting various approaches to judicial interpretation, concluding that judges should place a greater emphasis on active liberty—a democratic theme that resonates throughout the Constitution—when interpreting constitutional and statutory provisions).

56. NUDGE, *supra* note 1, at 86–87; see also *Libertarian Paternalism*, *supra* note 1, at 1173 (labeling this same option “required active choosing”). In *Libertarian Paternalism*, Thaler and Sunstein briefly suggest that required active choosing may be unacceptably coercive to those who would prefer not to choose. On further reflection, however, the psychological picture needed to make this the case is implausible, particularly in the context of the retirement savings program they discuss. The image here is of individuals who have no preferences about their retirement savings and no desire to form such preferences. The plausible reaction of these people to required active choosing is not resentment or autonomous deliberation of the sort we have called substantive liberty, it is in fact indifference—check a box, any box. In other words, if we take these people’s preference or

either contribute to the Fund or not contribute to the Fund—there is no status quo that they can just stick with. More concretely, if tax returns were to be designed with required choice, individuals would have to check a box signifying a contribution to the Fund or check a box signifying no contribution to the Fund in order for their tax returns to be complete. They would be required to choose between the two options. Significantly, required choice in this case could promote substantive liberty to the extent that it encourages some individuals to reflect on which option they prefer. For example, some of the individuals who would otherwise stick with the default option, whether opt-in or opt-out, would reflect and decide whether they want to support public campaign funds with their tax dollars if they were required to choose. The choice architects who design tax returns may thus be faced with the following dilemma: design the public campaign finance section of tax returns as opt-out so that it promotes equality of political influence, or design the section as required choice so that it promotes substantive liberty.

For the purposes of this Article, we need not definitively resolve this dilemma. Rather, we will outline some of the considerations that would influence any resolution. Upfront, it is worth noting that the weight given to any of these considerations will depend in part on an underlying theory of political justice.⁵⁷ For instance, political liberals may find equality of political influence a weightier consideration than substantive liberty precisely because they may view substantive liberty as a comprehensive doctrine and equality of political influence as a political one.⁵⁸ It would be a mistake, however, to conclude that a resolution is unattainable. As a practical matter, there must be a resolution—tax forms must be designed—and as we will show, there are considerations that militate for specific resolutions. Ultimately, the choice between different designs must emerge from a deliberative process of the sort we outline—making it no different from any other public policy dilemma.

The first consideration will always be empirical: in the case of public

lack thereof seriously, it should not matter to them that they have to choose between several options precisely because they are indifferent among them.

57. This is a broadly applicable point, but it is perhaps best articulated in debates about tax policy. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 40–75 (2002) (outlining the scope of various theories of distributive justice in service of the conclusion that most tax policy discussions take for granted a controversial theory of libertarian entitlement).

58. See generally JOHN RAWLS, *POLITICAL LIBERALISM* 78 (1993) (stating that full political autonomy is partly “realized by participating in society’s public affairs and sharing in its collective self-determination over time” and that “full autonomy of political life must be distinguished from the ethical values of autonomy and individuality, which may apply to the whole of life, both social and individual, as expressed by the comprehensive liberalism of Kant and Mill”).

campaign finance, does an opt-out default rule actually increase equality of political influence by directing more money to the Presidential Election Campaign Fund? And does a required-choice default rule cause more people to exercise substantive liberty or is it simply an annoyance to be checked randomly? What is the percentage increase in people who donate to the Fund under an opt-out default rule as compared with opt-in or required-choice default rules? In short, the extent to which choice architecture actually promotes a specific value is an empirical question, and evidence can be helpful in deciding the normative question of which value to promote. After all, if it is empirically true that opt-out vastly promotes equality of political influence while required choice only marginally promotes substantive liberty, opt-out will be unambiguously preferable.

If it is empirically true that both opt-out and required choice would promote their respective values, a way to decide between them is to examine the level of fit between the default rule in question and the social role of the value it is supposed to promote. Generally, choice architects should ask questions such as the following: Do other mechanisms or fora promote the value in question? Is the default rule in question the only way to promote this value? Are there other ways to realize the value? After all, if the default rule is the only way to promote a certain value, then it counsels toward promoting that value. Similarly, if there are lots of other forums or areas of life in which a certain value is realized, then promoting that particular value through the default rule may seem less important. Applied to the case of the Presidential Election Campaign Fund, one might think that it is more important to further equality of political influence than to further substantive liberty because individual contributions are the only way to constitute the Fund and because there are many other areas in which individuals can exercise substantive liberty. The choice architect responsible for designing tax forms might thus choose an opt-out default rule over required choice. This is not a definitive answer by any means, but a definitive answer would need to result from a deliberative process of this sort.

CONCLUSION

We have shown that Thaler and Sunstein's approach to choice architecture, libertarian paternalism, can be used to promote values other than welfare. Our argument was twofold: we began by showing that in specific situations the structure of choice architecture that promotes welfare can be adapted to promote liberty or equality; we then offered some guidance for choosing between different values by sketching a deliberative process that considers empirical effects of choice architecture and the social roles of the values in question. In so doing, we hope only to have provided the impetus for choice architects, among others, to consider the

various values they could promote in public policies—the beginning and not the end of the discussion.