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► **To cite this version:**

Antoinette Baujard. Beyond the Consent Dilemma in Libertarian Paternalism, a Normative Void. *Homo Oeconomicus*, 2015, 32 (2), pp. 369-373. halshs-01136393

HAL Id: halshs-01136393

<https://shs.hal.science/halshs-01136393>

Submitted on 22 Nov 2016

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Beyond the Consent Dilemma in Libertarian Paternalism, a Normative Void

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I am convinced by Alain Marciano's argument (Marciano 2015). He remarks that consent to the condition of choice is considered by neo-classical economics to be an external issue. And although it does remain an issue as far as the theory of rational choice is concerned, there too it is not unjustified to consider it as an external one. For libertarian paternalism, though, it becomes an internal issue as soon as the suppositions of rationality and perfect cognitive capacities are dropped. A dilemma thereby arises, because libertarian paternalists do not take seriously the issues raised by the absence of consent to the condition of choice.

My comment aims to go beyond merely establishing the consent dilemma, and to elaborate the normative stakes of the issue of consent more widely. In my view, such elaboration should serve to demonstrate the importance of the consent dilemma. Libertarian paternalists claim they are helping to make "good decisions;" so let us open the black box of these good decisions.

As no "true preferences" exist for individuals, libertarian paternalists consider it legitimate to fill in the blanks and do good to each individual. The conditions of choice are therefore intentionally framed by the libertarian paternalists in order to nudge people towards their interest. According to a prominent illustration, men's behavior in the urinals of Schiphol international airport at Amsterdam may be improved thanks to a bee-nudge (Thaler and Sunstein 2008). It is implicit within the libertarian paternalist theory that there is no reason to believe that each traveler going through Schiphol airport is able to rationally calculate how much he earns from a diffuse reduction of detergent use somewhere in the world. It is

hard to claim the bee nudges the traveler's decision in his own interest. Nonetheless, the bee nudges agents towards "good decisions" because this change in men's behavior makes the world a better place to live in general. Before they realize it, libertarian paternalists end up being the architects of choices framed around arriving at "good social decisions,"¹ since letting people make individual choices, given their limited cognitive capacities, would fail to reach the social optimum. This therefore suggests a hypothesis: libertarian paternalists do actually think they can make "good decisions," and even aim to make "good social decisions."

Implicitly, libertarian paternalists are supposed to follow proper and relevant principles regarding good social decisions. This is debatable on at least two grounds.

On the one hand, if such principles were to exist, what guarantees that the libertarian paternalists would follow them? Imagine that the latter have their own beliefs, preferences, information, values, cognitive capacities and rationality limits. And imagine there are some conflicts of interests and divergences of views. Libertarian paternalists are hence likely to make wrong decisions, and here there is most certainly an agency issue. These problems were raised explicitly by Bentham (see, e.g., Bentham 1811: 142); the agency issue is taken on board in Crawford and Sobel (1982)'s seminal paper, and in the huge literature developed after them on adverse selection and moral hazard in expertise.

On the other hand, we may ask, what are the proper and relevant principles? What, after all, is a "good" decision? I distinguish three levels in this normative issue.

Firstly, in neo-classical economics, the normative issue is solved by the mere assumption of individuals' sovereignty. This implies a blind trust in the value of their preferences. A good decision is a decision that is in the individual's interest. At the collective level, a good decision is therefore welfarist, i.e., the only relevant information to assess social welfare is individual utilities – or equivalently, individual preferences (see, e.g., Sen 1977). In libertarian paternalism, and more generally in all theories based on limited rationality, including behavioral economics or evolutionary game theory, there is no definitive account of what rational choice is. As Marciano asserts in his note, there is not even such thing as a true preference in libertarian paternalism. Hence, as soon as "true preferences" are no longer supposed to exist, an irreducible normative issue emerges. If

¹The rationale for nudges in the libertarian paternalist literature is usually based on the link between individuals' choices and individuals' interests, although they sometimes support their approach as follows: "The most important social goals are often best achieved ... with gentle nudges" (Sunstein and Thaler 2008).

not preferences, what information are we to rely on? What is the basis of any judgment?

Secondly, even the distinction between the concerned individual and the libertarian paternalist in business raises a problem of the proper definition of the proper notion of good for the individual. What is in the individual's interest and how could a libertarian paternalist come to identify it? Even if the principal-agent problem described above is put aside, a perfectly benevolent libertarian paternalist should measure the individual's well-being. But there is an issue here. There are a significant number of potential notions of well-being (see, e.g., Sen 1980-81). Each of them belongs to one of the various theories of moral and political philosophy, e.g., subjective preferences, informed and well-laundered ethical preferences, primary goods, declared happiness, capabilities à la Nussbaum, opportunities, etc.

Valuing subjective preferences is a possible conception, or at least it is a choice which can be debated (see, e.g. Sen 1979a, b); but let us agree on the fact that at least it is consistent with the remaining rational choice theory. In libertarian paternalism, as we have just discussed above, valuing preferences is not even an option, since they do not exist *per se*. The libertarian paternalist will need to select one of the various well-being theories, even though no consistency argument may now be available on the basis of which to make one's choice. It is still an essentially normative choice, full of consequences for individuals. And I wonder why individuals themselves should not be involved in such a choice.

Thirdly, when libertarian paternalists end up contributing to the social good, they face an aggregation issue, which is not an innocuous exercise – to put it mildly. Let us now suppose there is no principal-agent problem. Let us suppose that the notion of individual welfare has been properly chosen, whatever this means. Let us also suppose that each individual's welfare has been concretely and properly measured. The individuals who are concerned by the policy to be established by libertarian paternalists are numerous. Meanwhile, the latter must face up to the various measures of individual well-being, and must aggregate them into one value of social welfare. Social choice theorists have long known that, without explicit normative views, this is a vain attempt. Libertarian paternalists, whether they wish it or not, will again be choosing among the numerous theories of aggregation, including sum, prioritarianism, etc. Again, I wonder why individuals should not be involved in such choices.

I fear that these three issues have not been considered as such by libertarian paternalists. Paternalists do as if they knew what is good, and do not wonder about the views of the people concerned. Paternalism is an issue according to the Kantian tradition because it conflicts with a principle of equal respect of persons, in the sense that persons should be

treated as ends in themselves (see, e.g., Dworkin 2014). I claim that persons are hardly being considered as ends by those who design public policy when the latter do not ask about their consent, and do not involve them in the decision process. In the presentation I have made, these individuals are the mere containers of some well-being, where this notion is selected by libertarian paternalists without the individuals' consent. Ultimately, individuals on this view are not ends but containers. As a consequence, libertarian paternalists do not do better than paternalists in this regard: they do not respect individuals' consent about the way their interest should be defined, valued, or weighted. The absence of consent amounts to treating concerned individuals and libertarian paternalists differently, and hence leads to a violation of the principle of equal treatment of persons. Libertarian paternalists are merely paternalists, after all.

This comment aimed to shift the focus from the absence of consent by concerned individuals to what fills in the absence, i.e., the specific intentional framing of choices by libertarian paternalists. The absence of consent to the conditions of choice indeed raises an essential normative issue. I have shown that there exists a hidden social preference within libertarian paternalism, and that there is an implicit assumption at work in libertarian paternalist, although this is questionable on different grounds. I submit that this clearly stands in need of debate. Ultimately, there is a normative void in libertarian paternalism, and this normative void raises another issue concerning the violation of the principle of equal respect of persons. Why is the legitimacy of the normative view of libertarian paternalists never questioned?

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