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The Law, Economics, and Psychology of Manipulation

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Abstract. This comment on Cass Sunstein's paper, *Fifty Shades of Manipulation*, argues that "manipulation"— "controlling or playing upon someone by artful, unfair, or insidious means especially to one's own advantage"—has always been regarded as wrongful, an indirect form of fraud, by common law courts and government regulators. The manipulator perceives that the victim brings incorrect assumptions to a transaction and does not correct them, or else anticipates and takes advantage of people's propensity to make incorrect inferences. Thus, the manipulator is able to effect a transfer from the victim to himself without resorting to explicit fraudulent statements or coercion. Within the various standard constraints like problems of proof, the government should and does try to restrict manipulation for standard efficiency and welfarist reasons. The law does not provide a remedy to fraud when it causes no harm, and similarly it should not for manipulation. Analogously, I argue that when government uses manipulation to advance the public good, it should be evaluated on welfarist grounds.

Is manipulation a problem? Should the law try to stop it? Should the government employ manipulation if the government's ends are good ones? As is so often the case, the answers depend on how one defines the term. In this comment, I argue that manipulation (properly understood) where it takes place in the marketplace is a problem and for that reason is regulated by the law. Manipulation by the government, by contrast, is not a special or specially troublesome category of government behavior, and is justified just when government coercion is. A few judicial opinions will be used to illustrate the problem of manipulation, and provide a springboard for answers to the questions I began with.

I start with a definition of manipulation taken from the dictionary: "to control or play upon by artful, unfair, or insidious means especially to one's own advantage."[2] The definition usefully distinguishes between means and ends. The *means* may be objectionable ("unfair," "insidious") but they need not be; they could merely be clever ("artful"). As will become clear, I define manipulation in a relatively narrow way: the manipulator perceives that his addressee brings to incorrect assumptions to a transaction and does not correct them, or else anticipates and takes advantage of people's propensity to make incorrect inferences. Whether this behavior is unfair or merely artful depends, I will argue, on what the manipulator is trying to accomplish. For brevity, I will often refer to the means element of manipulation as *insincerity*. At a minimum, the manipulator does not fully explain to the addressee what he is doing.

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[2] Merriam-Webster, http://www.merriam-webster.com/dictionary/manipulate.

The *end* of manipulation, according to our definition, is typically one's own advantage, but it need not be. Parents frequently manipulate their children for the children's interest, and not for (or not just for) the parents'. A common parental trick is to walk away from a stubborn toddler, telling her that she will be left behind if she does not proceed on her own locomotion. This manipulation benefits the child if otherwise the parent injures his back carrying the child and drops her headfirst to the ground, or they miss dinner, bedtime, etc., because of the child's reluctance to move along.

The matrix below illustrates these comments and provide a hint as to why libertarian paternalism is controversial.

	Ends	
Means	Jointly beneficial (or benefits addressee)	Transfer (benefits speaker at expense of addressee)
Sincere	Good	N/A
Insincere	Paternalism	Exploitation

The northwest box contains the ideal case, where a speaker plainly explains why the addressee should do X or Y and the addressee responds in kind. A lawyer advises the client that he can't win the case and the client drops it. The government explains that cigarette smoking harms your health and you stop smoking. A parent explains to the child that it is dangerous to cross the street without looking and the child looks. I stipulate that if the speaker is sincere, the addressee will always act in his own interest (northeast box is therefore empty), although of course people can make mistakes.

The southeast box contains the paradigm case of manipulation where the speaker causes the addressee to act to the speaker's advantage, at the expense of the addressee. The seller, marketer, propagandist, etc., conveys the state of the world in a misleading way, causing the addressee to buy or support something he doesn't want. The southwest box represents paternalism, both private and public. The parent tricks the toddler, and the government tricks the citizen—but in both cases to the addressee's advantage.

In this comment, I will flesh out the concept of manipulation by focusing on the private arena—where sellers manipulate buyers. While no law or legal doctrine by its terms bans such behavior, numerous doctrines allow courts to restrict it when the levels of culpability and of harm are sufficiently high. The rules against manipulation, so understood, can be given a simple welfarist account based on standard principles of law and economics. Manipulation is a classic type of rent-seeking behavior that results in a transfer of resources rather than in wealth generation, while causing potential victims to take expensive precautions. This perspective provides a way to think about the more complicated forms of manipulation that involve advantage-taking of cognitive biases and heuristics.

Finally, I turn to the government. The genesis of Cass Sunstein's paper lies in the accusations lodged against him by critics of "libertarian paternalism," the approach to policy that he advocates with Richard Thaler in *Nudge* and other work.[3] The critics argue that nudges, or at least many of them, "pervert decision making."[4] I agree with Sunstein that there is nothing inherently objectionable about libertarian paternalism from the standpoint of "manipulation." Some of my comments, however, may be useful for evaluating certain policy interventions on a case-by-case basis.

I. The Law of Manipulation

Sunstein is correct that manipulation has many shades of grey but I don't think he's right that the legal system "usually does not attempt to prevent it" (p. 6). If one looks at the common law rather than regulation, one finds many examples of lawsuits in which plaintiffs complain that they were manipulated by defendants and courts lend a sympathetic ear. What is true is that many types of manipulation cause little harm, and so people do not bother to bring lawsuits and courts may rule against victims when they do because other values are at stake. But this is true for all types of behavior. If you touch someone on his arm without his permission, that is legally an assault, and the person you touch could sue you, but if he did and won, his damages would be zero.

The problem of manipulation arises, predictably enough, in numerous cases where businesses try to take advantage of consumers without engaging in outright fraud, which, under the law, requires an explicit misstatement of fact. In a recurrent pattern, a seller offers a product or service while omitting a feature or warranty that consumers normally assume will be part of the deal. In the case of Henningsen v. Bloomfield Motors,[5] for example, the plaintiffs bought a car from a dealership and were later injured in an accident caused by a defect. In the contract, there was the following clause, in a small, hard-to-read font:

> The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty <u>being limited to making good</u> at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; <u>This warranty being expressly in lieu of all other warranties expressed or implied</u>, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.[6]

The problem here is not just the perhaps unavoidable tedium of plowing through mind-numbing legalese. The problem is that the seller uses legalistic language to conceal that the seller disclaims what many buyers might assume that the seller provides—a promise that if a defect in the car causes personal injuries, the seller will compensate the buyer for those injuries. The two

[3] Cass R. Sunstein, Fifty Shades of Manipulation (2015).
[4] T.M. Wilkinson, Nudging and Manipulation, 61 Pol. Stud. 341, 349 (2013).
[5] 32 N.J. 358, 161 A.2d 69 (1960).
[6] My emphasis.

underlined phrases limit the remedy without saying what is excluded, so even someone who managed to wade through this stuff would not be alerted to what he is giving up.

Is this type of contract-writing manipulative? It seems to be. Drafting a contract so that the buyer thinks that he receives protection that he does not receive—all without overtly lying—is clearly manipulative. It is worth understanding why. The seller understands that many buyers bring to a transaction certain assumptions. In Henningsen, the buyers assumed that the seller would pay them damages for personal injuries if a defect in the car causes an accident. The seller could dispel this misunderstanding, but chooses not to by drafting the contract in such a way that most buyers will overlook the language that discloses that their assumption is incorrect.

Courts caught on to this practice long ago and today police these contracts like watchdogs. It is not hard to find cases where the seller loses. The general problem—of language that is manipulative but not fraudulent—is addressed in statutes as well. The Truth in Lending Act, for example, requires lenders not only to tell the truth but to express the costs of loans in a way that makes it easy (at least in theory) to compare the terms of one loan to the terms of another. The Act recognizes that lenders like sellers can manipulate consumers by using language that consumers do not understand and—crucially—that consumers do not realize they do not understand, so they don't think to ask for a clarification.

For a different kind of manipulation, consider Odorizzi v. Bloomfield School District.[7] An elementary school teacher was arrested for engaging in homosexual conduct—a crime at the time—and booked and then released. He subsequently agreed to resign at the request of his employers, and then sued for the rescission of that agreement. He alleged that

> he was under such severe mental and emotional strain at the time he signed his resignation, having just completed the process of arrest, questioning by the police, booking, and release on bail, and having gone for 40 hours without sleep, that he was incapable of rational thought or action. While he was in this condition and unable to think clearly, the superintendent of the district and the principal of his school came to his apartment. They said they were trying to help him and had his best interests at heart, that he should take their advice and immediately resign his position with the district, that there was no time to consult an attorney, that if he did not resign immediately the district would suspend and dismiss him from his position and publicize the proceedings, his "aforedescribed arrest" and cause him "to suffer extreme embarrassment and humiliation"; but that if he resigned at once the incident would not be publicized and would not jeopardize his chances of securing employment as a teacher elsewhere.[8]

The court held that the defendants had not coerced the teacher, and had not used fraud, but nonetheless held in the teacher's favor under the doctrine of "undue influence." Here again we can redescribe the defendants' behavior as "manipulation." They used artful, unfair, and insidious means to their advantage, means that included confronting the teacher while he was tired and emotionally distraught, drawing a vivid picture of the negative consequences if he did not resign, and insisting that they sought only to act in his own interests.

[7] 246 Cal. App. 2d 123 (1966).
[8] Id.

If the cases discussed so far suggest that the law tries to stop manipulation only when used against consumers or vulnerable individuals, the impression is not correct. Consider a well-known case taught in classrooms called *Market Street Associates Limited Partnership v. Frey*.[9] The dispute arose from a sale-leaseback between J.C. Penney and General Electric Pension Trust. Penney borrowed money from the pension trust by selling various properties to it and leasing them back—effectively paying interest rate on the loan in the form of rent. The lease provided that if Penney needed additional financing, it could ask the pension trust for a loan, and both parties would be required to negotiate an interest rate in good faith. If negotiations broke down, then, under paragraph 34 of the lease, Penney would have the right to buy back the properties at the original price subject to a 6-percent annual adjustment.

Penney later assigned the lease to Market Street Associates. MSA decided to try to buy the properties back from the pension trust so that it could use them as security for additional financing. An MSA partner named Orenstein contacted his counterpart at the pension trust—a man named Erb—who offered to sell the properties at a price that Orenstein thought was too high. A month later, MSA sent a letter to the pension trust requesting a $2 million loan. The letter did not mention paragraph 34 or the lease itself. Erb did not respond. MSA sent another letter which again asked for the loan and offering to enter negotiations. Meanwhile, Erb turned down the loan. MSA then wrote a letter saying that it would seek a loan elsewhere. In none of the letters sent by MSA was paragraph 34 mentioned. Then a month later, Orenstein wrote a letter that invoked paragraph 34 and demanded the property at its original price subject to the 6-percent adjustment—an amount significantly less than what Penney had offered. The pension trust refused to sell, and the lawsuit followed.

Orenstein's behavior, on the plaintiff's account, is a straightforward example of manipulation. Orenstein never lied to Erb—which would have been actionable fraud. His strategy was more subtle than that. He assumed (correctly) that Erb would not consult the lease—a lengthy, tedious document dense with legalese—before turning down a loan request that did not meet the pension trust's investment criteria because it was too small. Even while exploiting the trigger in paragraph 34, Orenstein made sure not to draw Erb's attention to it—until it was too late. The court held that if MSA can prove that Orenstein believed that Erb did not know or would not find out about paragraph 34, then the pension trust wins the case.

To be clear, the court did not hold that MSA violated a "law against manipulation." It held that if Orenstein acted in bad faith or opportunistically, then MSA breached the contract. But the specific legal hooks are of no concern here. The court was bothered by manipulative behavior. Orenstein should have reminded Erb of paragraph 34, especially because he knew that Erb was inattentive. Failure to do so was, arguably, the use of "artful, unfair, or insidious means … to one's own advantage."

There is a law against manipulation though it goes under various other names: unconscionability, misunderstanding,[10] bad faith, deceit, and so on. Manipulation is a type of

[9] 941 F.2d 588 (7th Cir. 1991).
[10] See Restatement (Second) of Contracts, §20, which says that if two contractual parties attach different meanings to a term of a contract, the meaning of one party is enforced if the other party knew or had reason to know that the first party attached the different meaning.

misbehavior that is not quite fraud and not quite coercion, but achieves the same goals that those other types of behavior do. It frequently involves the exploitation of incorrect assumptions that the manipulator knows that his victim brings to the transaction, so that the manipulator can take advantage of those assumptions without overtly lying. It causes a person to act against his own interest, and for the interest of someone else, in a setting where the victim cannot easily protect himself by relying on common sense or ordinary willpower.

II. The Economics of Manipulation

The economics of manipulation has not, in these terms, ever been discussed or identified, but probably because the economics of manipulation are the same as those of its cousins—fraud and coercion—which have received a great deal of attention.

Consider the simple case of coercion. X forcibly takes money from Y. For what reason, from an economic perspective, should Y be given a remedy? The conventional economic wisdom is that, initially, a simple transfer of $100 from the pocket of Y to the pocket of X does not generate any wealth. X and Y value the $100 at exactly the same amount—$100.[11] So nothing is gained from this act from a social standpoint. Meanwhile, if the theft were unpunished, then people would need to take expensive precautions to protect themselves. Y might buy a gun or hire a bodyguard or not leave his house. The case for a law against theft, then, rests on the simple premise that the government—using its laws and institutions—can deter forcible transfers more cheaply than individuals acting on their own.

The case of fraud is similar. Some sellers try to defraud buyers by representing used cars as new. They slap fresh paint on old cars and set the odometer back to zero. Buyers could protect themselves from this fraud by bringing a mechanic along with them and insisting that they will not buy a car until the mechanic has inspected it. Either buyers will incur the cost of compensating a mechanic or end up with cars they don't want. A legal remedy for fraud is cheaper for society than conditions in which fraud or self-protective behavior flourishes.

The manipulation cases fall easily into this pattern. Sellers should inform buyers of the terms of the contract so that buyer don't need to hire lawyers to protect them from buying things that they don't want. Orenstein should have reminded Erb of paragraph 34 because Orenstein knew (or so it was alleged) that Erb did not know about it, and could have reminded him of it cheaply. Odorizzi's employers should have let him have a night's sleep and advised him to consult a lawyer.

I want to make a last point about the difference between manipulation and simple lack of clarity. The school principal and Orenstein both engaged in manipulation. They knew that the actions they took would result in the transfer they sought. When firms design complex forms, they may well engage in similar manipulation. But they don't always. Many of the complex-

[11] Complications arise when a poor person steals from a rich person. The poor person obtains more utility from $100 than the rich person does. Or one can imagine a case where an art lover steals a Gaugin from a tycoon who does not appreciate it. In these cases, the transfers increase social welfare, but they will also generate huge self-protective costs and are banned for that reason. In the second case, economists also argue that bargaining is a more efficient form of transfer than coercion because bargaining ensures that the transfer increases joint utility.

language cases are not cases of manipulation because no one sought to mislead. Poor drafting can be a sufficient cause for the type of confusion that causes transfers victims don't benefit from.

To make clear this distinction, consider an employer that wants employees to buy stock in the employer but does not want to be seen as forcing them to. Taking a page from behavioral economics, it sets out its own stock as the default in employees' 401(k) plan but allows the employees to opt out. The employer knows that most employees will not opt out for psychological reason. By contrast, imagine an employer that sets up two randomly selected stock index funds and two randomly selected bond index funds as the default. Research in behavioral economics tells us that many or most employees will contribute equally to the four funds, which is not likely to be in their interest.

From a moral standpoint, the first employer is more culpable than the second. If economic lingo must be used, the way to put this is that the second employer faced real costs if it wanted to improve the allocation. It chose not to incur them—quite possibly because no one really knows what an optimal default would look like. It may well be that a reasonable expenditure to improve them in a meaningful way might not have been possible. By contrast, the first employer could have at zero cost to itself refrained from making its own stock the default. The first employer's manipulation in this way resembles fraud. And just as in the case of manipulation, a person who deliberately misrepresents the truth is considered more culpable than someone who does so accidentally, and more likely to be slapped with a penalty. In MSA, the court rested on just this principle when it held that the pension trust could prevail only if it proved that Orenstein knowingly took advantage of Erb's ignorance.

The economic approach to manipulation rests on a simplified, perhaps unhelpful, picture of human rationality. In the case of the consumer who does not read the contract, we say his information cost is high. In an economic model, Henningsen enters the transaction with a subjective prior that the warranty will cover personal injuries. The prior is strong enough that Henningsen does not think it is worth the cost to take the contract home, read it carefully, consult a lawyer, and so on. This cost is greater than the expected harm from the probability of a defect multiplied by the probability of an accident multiplied by the probability of an injury multiplied by the probability that the warranty does not cover personal injury multiplied by the harm. By contrast, the cost to the seller of disclosing this information to Henningsen is low. So the law puts the burden on the seller to disclose rather than on the buyer to read.

I have simplified the economic analysis and ignored various objections. For example, there has been a lively debate about whether sellers would voluntarily disclose information—like the limited warranty—in order to obtain a competitive advantage. Some commentators argue that if Bloomfield Motors refuses to offer a warranty while trying to mislead buyers into thinking that it does, and consumers are willing to pay for warranties, then competitors should be willing to offer warranties and trumpet Bloomfield Motors' refusal to do so. Others argue that in markets characterized by asymmetric information and market power, sellers can gain by concealing information. Another issue concerns whether it is really as cheap for the seller to disclose information as the analysis above suggests. Sellers do not always know the entire range of product attributes that consumers care about, and so may be unable to predict what they need to know. Finally, courts are rarely in position to stop manipulation unless it is obvious. But the principle seems to be clear. Indeed, we could identify an anti-manipulation or (perhaps, more properly) an anti-advantage-taking principle. According to this principle, a person may not effect a transfer of resources by intentionally saying or doing things that causes the other person to misunderstand the nature of the transaction, and think that the transaction is in his interest when it's not.

III. The Psychology of Manipulation

The economic analysis rests on a very simple model of human decisionmaking. The cognitive biases discussed by Sunstein are not so much ignored as swept under the rug of "information costs" or "transaction costs." Scholars writing in this tradition, laboring under the discipline of the rational-actor model, have generally overlooked the different ways that people can take advantage of each other, and thus have missed opportunities for tailoring appropriate legal responses that are sensitive to the psychological nuances involved. Still, the very simple anti-manipulation principle that I have discussed provides an entry-point for thinking about this problem.

Let's consider two examples. In the first, health clubs exploit people's excessive optimism about their ability to commit to an exercise regimen (sometimes called "hyperbolic discounting"). A club might offer the choice between a $10/day pass or a $500/year membership. Customers believe that they will exercise at least three times a week and so choose the annual membership because $500 is less than approximately $1560. In fact, most customers use the club a handful of times and then stop. The club knows from experience that most people will not keep their commitments. We might conclude that the club engages in a mild form of manipulation by offering the $500/membership—especially if it encourages people to take it by describing in glowing terms unrealistic scenarios of lost weight and toned muscles.

The example falls firmly within the anti-manipulation principle. The club effects a transfer of money from customers to itself—a pure transfer which by definition does not increase social welfare. If few people or no one benefits from the annual membership, the club could easily avoid these unnecessary transfers by declining to offer it. The existence of this type of manipulation contributes to an atmosphere of mistrust, which requires people to use their wiles to avoid similar temptations—a cost, even if a hard-to-quantify cost.

From a legal standpoint, a simple lawsuit to obtain restitution of one's money would probably fail. I think the reason is that the annual membership benefits some people—those who really do want to use the club several times a week for an entire year. If a court held that a health club can't offer annual memberships, then it would deprive those customers of something they value. Moreover, virtually any menu of options will mislead some people, causing them to choose an option that is not best for them. The inherent complexity of communication, combined with the ubiquitous quirks of rationality, virtually guarantees this result. Courts should not—and likely will not—interfere with private transactions by demanding clarity in communication that cannot realistically be achieved.

In the second, creditors offer "teaser rates" in order to induce people to borrow money, or structure lending transactions in ways that people find confusing. These practices exploit people's excessive optimism—they think they will pay off loans when in fact they will not—and their lack of sophistication about financial transactions. Many people do not understand basic financial concepts like compound interest. They don't realize that a fee on a small loan is equivalent to an extremely high rate of interest that they would normally reject.

This example is more troublesome than the health club case because loan transactions are both more important and more confusing for people than health club memberships. A person who obtains a mortgage at a teaser rate might believe—unrealistically—that he can either refinance or resell the house at a profit before the rate resets. If this belief is unrealistic, and the seller both knows that the belief is unrealistic and structures the loan to take advantage of it, then the transaction is manipulative. The creditor effects a transfer of money from the borrower to itself. Again, the transfer does not enhance social wealth; indeed, it will reduce social wealth when a costly foreclosure takes place. Again, we would be better off if the law halted these transactions. Again, things aren't simple because many people could genuinely benefit from teaser rates—for example, people who expect a salary increase, bequest, or other windfall before the rate resets.

Ironically, the law has always been far ahead of the academics. Efforts to address these problems date back at least until the 1960s. Courts, regulators, and legislatures have banned some credit terms that seemed inherently abusive—that creditors seemed to use routinely to manipulate consumers. A famous example is the cross-collateral clause, which allowed creditors to repossess goods that credit buyers had thought they had repaid in full. The clause was struck down by courts and then banned by regulators.[12] Economists argued that these clauses *could* be beneficial for some people—and, more aggressively, that they *had* to be beneficial because they survived market competition. Policymakers wisely disregarded these arguments. Psychologists have since provided plausible reasons for thinking that even if many of these clauses can be beneficial, they can also be used to exploit cognitive biases, and may well do more harm in the aggregate than good.

However, the point I want to make does not depend on whether these clauses are on balance good or bad. The point is that sellers and creditors can use contractual design both to generate a socially valuable transaction—one that benefits both sides—and to manipulate. In the latter case, the contract effects a transfer from buyer to seller rather than a wealth-generating transaction. Manipulation produces no social gain, while causing people to take costly self-protective measures. It also typically harms poor and vulnerable people. This is why the law tries to restrict it.

IV. Government Manipulation

With this framework in hand, we can finally turn to the topic of Sunstein's paper—the use of "manipulation" by the government. Now we have a transaction between a person and the government. Under what circumstances does the transaction run afoul of the anti-manipulation principle?

[12] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir., 1965).

In the simplest case, the government may use manipulation in precisely the way that private parties do—to effect a transfer through artfulness or unfairness. The government engages in numerous transactions with citizens. People read complex forms and documents when they pay taxes, apply for drivers licenses, and start businesses. If the government wants an outcome that many people would resist, it can try to use complex language, opt-outs, and similar devices to obtain these outcomes through manipulation. It can do the same through regulation by compelling private parties (usually sellers or employers) to use appropriate language and opt-outs in contracts.

Now it is not clear that government officials do this consciously, as one suspects that market actors often do. Market agents face pressure to maximize profits, and if manipulation maximizes profits, they will be tempted to manipulate.[13] Sometimes, clarity maximizes profits and then they will be clear. So in the market, one can find both very clear and very complex contracts. By contrast, government officials seem to churn out confusing but not intentionally manipulative forms because they personally gain nothing from clarity and nothing from manipulation.

Nonetheless, we can begin to understand the negative reaction to libertarian paternalism. People have long called for the government to use clearer forms. For the most part, these calls have gone nowhere. But the call for the government to exploit people's cognitive biases is a new one. This argument seems to ask government officials to think like marketers and advertisers—all of them behavioral economists *avant la lettre*—people who we have never been inclined to trust.

Sunstein provides two responses. The first is that nudging is no more manipulative than other forms of communication. Indeed, one might argue that nudging just is a form of communication. The second is that even if nudging is manipulative, it will generally be justified so long as it advances the public's interest.

Let me start with the first response. When we communicate with each other, we inherently take account of behavioral biases—or at least, the psychology, in a broad sense, of the listener. How could we not? We need to use metaphors, images, exaggerations, and so on, just to convey meaning to people who may bring to bear strong assumptions, confusions, and so on. The cafeteria example illustrates this point. People in the cafeteria line will act in one way if dessert comes first and another way if dessert comes last. There is no non-manipulative way to arrange the food. Similarly, there is no non-manipulative way to write a contract, choose between opt-ins and opt-outs, and so on. Here "manipulation" is used in its innocent sense. The drafter knows more than the customer or citizen, but cannot fully inform his counterpart because of the limits of communication. He thus avoids informing to the extent that it be theoretically possible and instead tries to offer a product or menu of choices that he thinks the counterpart would want.

While there is an element of truth in this argument, I don't think it's persuasive. It may be that in some settings it is impossible to identify sincere, clear, or non-manipulative speech or behavior. But in normal settings, that is not the case. We might throw up our hands in the

[13] Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2013).

cafeteria but still demand that automobile sellers explains the pros and cons of a particular model of automobile rather than distract buyers with mood lighting, balloons, and free steak knives.

Moreover, if we focus on the mental state of the speaker, we can distinguish cases of manipulation and non-manipulation. If the cafeteria owner puts dessert at the start of the line because that's what he has always done, or the dessert fits better in that location, or it seems aesthetically pleasing, he's not deliberately manipulating people. If he has read Sunstein and Thaler and wants to make profits by selling food that people don't really want, then he is manipulating people. We want to discourage manipulative behavior because people who might be tempted to manipulate can easily refrain from it if made aware of it. Communicative behavior that is inadvertently confusing and produces unintended negative consequences is a less avoidable feature of life. In the common law, this distinction has been made, as I have explained.

In sum, critics of libertarian paternalism can coherently take the position that inadvertent exploitation of biases is less bad than intentional exploitation of biases. But, as the common law analogy shows, intentional exploitation of biases is hard to object to unless the victim or addressee is harmed.

For that reason, I find Sunstein's second response more powerful. A government, unlike a seller, should act in the interest of the public. If we can publicly debate the government's actions and approve or disapprove of them based on their consequences, then we should endorse those that produce good consequences at a wholesale level even if they involve exploitation of behavioral biases at the retail level. If it's hard to communicate with people because of the noise of everyday life, then the government should use effective rather than ineffective means to do so.

But he sells his argument short. I don't find any of Sunstein's "not easy" cases not easy. If people do not understand an abstraction like 1/100,000 because of the way that their brains work, then public officials should use a concrete formulation that they do understand. If a hazard doubles a remote risk, the government may be better able to convey that information by telling people that the risk is higher but still remote than by telling them only that the risk is higher. But if people discount remote risks without understanding them, then telling them that the risk is double without telling them that it is remote may better communicate the hazards to them. Everything depends on the assumptions and cognitive quirks that people bring to bear on the stream of information supplied by the government.

I think that what makes these examples seem at first sight not easy is not the communicative strategy that is employed but the possibility that the government's asserted interest and citizens' interests diverge. Many citizens want to take certain risks even if they cause heart disease (#1). Others don't want to save energy by incurring additional costs (#2, #3, #4); like to drink alcohol and take drugs (#3); and don't want to save their money (#4). In all these cases, the government's effort to communicate the costs and benefits of courses of action can easily become efforts to cause people to do things they don't want to do—or to force transfers from one group of disfavored people to another group of favored people.

Consider, for example, the suggestion that the government should order public utilities to include a green default, so that people who don't opt out on their utility bills or contracts spend a little more money and save energy. Divide the population into three types: Econs, who choose the outcome they prefer regardless of the default; Greens who want to save energy but need the default to prompt them; and Cheapskates who do not want to save energy but will fail to opt out of the energy-saving default. If the government uses the green default, then it is fair to say, using the definition I started with, that the Cheapskates are manipulated.[14] If the government does not use the green default, then the Greens are manipulated. We might find either of these options objectionable, but unless some other method can be found, manipulation of part of the population—in the sense of using artifice to cause a transfer that is not desired—is unavoidable. Accordingly, we should choose the option that maximizes aggregate well-being.

If we think more broadly about how the government behaves in other settings, we can't possibly argue that "manipulation" should be off the table because it can "deprive people of agency," fail to respect "autonomy," or "bypass deliberation." While we do not want the government to short-circuit public deliberation about policies and the merits of elected officials, democratic policy-making can certainly endorse regulatory *means* that do so.

That is why we dot no object to government ceremonies that instill patriotism by invoking emotionally resonant images and stories. We acquiesce in the good-cop-bad-cop routine. We acknowledge that financial regulators might be justified in exaggerating their confidence in the financial system in order to forestall a run on banks. We let judges wear robes and sit on daises so that they project authority. We understand that enforcement agencies like the IRS must give the impression that they engage in more audits than they actually do. In a democracy, we authorize the government to manipulate us—just as we authorize it to use force against us—as long as it acts in the common good.

Conclusion

The government should feel free to use manipulation as long as the manipulative act advances aggregate welfare or achieves other publicly endorsed goals, whatever they might be. The analogous claim about coercion—that the government should use coercion to advance public goals but only for such purpose—is hardly controversial, and there does not seem to be anything different about manipulation, as long as the policy of manipulation is made clear and is open to public debate.[15]

I believe that criticisms of libertarian paternalism is partly based on this misunderstanding that manipulation is worse than, or relevantly different from, coercion. It's not. I think that the main source of uneasiness about libertarian paternalism is that it is not actually libertarian; it is just paternalism.

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[14] One might argue that the Cheapskates are not manipulated, just adversely affected, at least if the government does not intended this outcome. But I assume that it does.

[15] Manipulation that is concealed from the public is more troublesome, but no one seems to defend this type of manipulation.

To see why, consider a blatantly paternalistic (and coercive) law that forbids financial institutions to sell complex financial instruments to unsophisticated investors.[16] The law divides the public into two populations: the sophisticated people who are allowed to buy, and the unsophisticated people who are not allowed to buy. Now consider an alternative approach that uses a nudge. The law provides that when people sign up with investment brokerages, they must check a box on a form that allows them to opt out of a prohibition on buying complex instruments. Suppose further that the form is designed on the basis of behavioral insights, so that only sophisticated investors check the box. The upshot is that the nudge produces the same outcome—the division of the population into sophisticated people who are allowed to buy, and unsophisticated people who are forbidden to buy—as the coercive law.

It is tempting to argue that the opt-out approach is not coercive and hence not really paternalistic. After all, the unsophisticated person *could* opt out if the function of the box were brought to his attention. The problem with this argument is that the nudge approach is premised on the assumption that the unsophisticated people can be screened out. If they can't be, then we would judge this nudge a failure. To be precise: nudges are effective only to the extent that they are coercive.

So there is nothing libertarian about nudging. They may not seem as coercive as mandates and prohibitions but appearances are deceiving. When Sunstein compares a nudge to a mandate, he compares a nudge that is directed at a small population with a mandate that is directed at a large population. The different sizes of the populations make the mandate seem more coercive, but the population size is not inherent to the distinction between a nudge and a mandate. After all, a mandate like the minimum wage law could be applied to as small or large a population as one wants.

Whether a nudge is paternalistic depends on whether it is designed to force people to avoid unwise choices that harm themselves. As Sunstein's many examples show, a nudge can also be designed for the less controversial task of correcting negative externalities. "Libertarian paternalism" is accordingly a confusing name for Sunstein's research program. Paternalism is perhaps an element of the research program but does not exhaust it.

[16] This example is based roughly on the "suitability doctrine," which provides that certain broker-dealers must recommend investments that are appropriate for their customers' investment needs. The actual law is more complex. The suitability doctrine is not a legal rule, but a rule that exchanges and other self-regulating organizations impose on their members. It is also regarded as ethical obligation. But when broker-dealers violate this rule, victims may be able to sue them under federal securities fraud laws. Courts are more sympathetic to victims when they are unsophisticated, which has reinforced the norm that broker-dealers may offer more complex products to sophisticated customers than to unsophisticated customers.

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