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DEFAULT RULES AND THE INEVITABILITY OF PATERNALISM

Leandro Martins Zanitelli¹

ABSTRACT

In a paper published some years ago, Cass R. Sunstein and Richard Thaler argue for a sort of soft paternalism referred to as “libertarian paternalism.” Relying on cognitive findings regarding the status quo bias, one of Sunstein and Thaler’s central claims is that default rules can be used for paternalistic purposes, given people’s proneness to adhere to what is established by these rules. This strategy is also called ‘libertarian’, since parties remain free to contract around the paternalistic rule if they wish.

Considering the influence of default rules on parties’ behavior, Sunstein and Thaler affirm that soft paternalism is not just defensible but inevitable, inasmuch as any adopted rule will affect people’s choices. This is an audacious conclusion, which surprisingly has attracted little attention from critics of the paternalism of behavioral law and economics

The aim of this paper is to assess the alleged inevitability of paternalism. After examining the distinction between hard and soft paternalism, it sustains that, in order to validate Sunstein and Thaler’s claim, paternalism has to be broadly equated to

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“influencing behavior”. A more restricted definition of paternalism, according to which an act or norm is paternalistic only if it tries to advance someone else’s objective well-being, leads to the conclusion that default rules, whose end is not necessarily to protect parties’ interests, are not paternalistic by definition.

Taking into account the potential, but not inherent, paternalism of default rules, the last Section of the paper comments on three criticisms regarding the interventionist character of behavioral law and economics. The first criticism refers to the fact that public authorities are vulnerable to the same cognitive pitfalls of the individuals whose activity is regulated; the second concerns the redistributive effects of paternalism involving rational and irrational people; and the third one warns against the “slippery slope” consequences of soft paternalism, i.e., the risk that milder paternalistic measures, as those supported by Sunstein and Thaler, give rise to more intrusive forms of state intervention.

KEY WORDS

Libertarian Paternalism; Soft Paternalism; Default Rules; Behavioral Law and Economics

I. INTRODUCTION

Cognitive psychology has become prominent between law and economics scholars due to its findings on human decision making. These findings contest some assumptions traditionally made by economists about human behavior, revealing, for instance, people’s limited ability to process information, subjection to biases, and use of

heuristics.² This more refined description of the way we make choices has led scholars to defend governmental intervention to protect agents from their judgment errors.³ For example, contrasting the habitual view according to which fully informed consumers will not purchase risky products in excess, since risks would be correctly regarded as part of a product's price, legal economists conscious of optimism bias support regulation as a manner of compensating for consumers' neglect of accident costs.⁴

The development of behavioral law and economics has therefore motivated a crude, choice-constraining kind of paternalism. Sunstein and Thaler, in a paper published some years ago,⁵ argue however for a new style of legal paternalism, one which, as they claim, even the most radical partisan of freedom would not have reason to object. The so-called libertarian or soft paternalism was characterized as a form of state intervention which, unlike traditional paternalism, preserves people's choices. Instead of banning products which may cause obesity, a cafeteria director pursuing this milder paternalistic strategy would try to induce consumers to eat healthier, by, for example, presenting light items earlier in the line.⁶

² See generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

³ See Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1166 (2003) ("In fact, virtually every scholar who has written on the application of psychological research on judgment and choice to law has concluded that cognitive psychology supports institutional constraint on individual choice.").

⁴ See, e.g., Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993).

⁵ Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

⁶ Sunstein & Thaler, *supra* note 5, at 1164-1165.

One remarkable claim made by Sunstein and Thaler is that paternalism, at least in the soft version they defend, is inevitable.⁷ This claim is related to the importance of default rules, i.e. rules which are applied only in the absence of a contractual clause. Contrary to what is commonly assumed in the law and economics literature, evidence suggests people's tendency to follow the default rule independently of its contents, virtually manifesting what psychologists refer to as status quo bias.⁸ Paternalism would be inescapable because: (1) a legal system must contain default rules; (2) these rules influence behavior.

With one exception,⁹ the inevitability of paternalism has not been denied by critics of Sunstein and Thaler's paper. This omission is surprising, since these critics usually argue that soft paternalism should be rejected. Yet if the inevitability claim is correct, the real question would concern the ways paternalism should be exercised by the legal order, rather than its acceptability.

The purpose of this article is to examine more carefully the pretense inevitability of paternalism and its consequences on criticism regarding cognitive research as a basis for legal paternalism. The paper is organized as follows. Section II presents the distinction between hard and soft paternalism. Section III focuses on soft paternalism,

⁷ See Sunstein & Thaler, *supra* note 5, at 1164 ("The first misconception is that there are viable alternatives to paternalism. In many situations, some organization or agent *must* make a choice that will affect the behavior of some people. There is, in those situations, no alternative to a kind of paternalism – at least in the form of an intervention that affects what people choose."). Later, however, they affirm more modestly that alternatives to paternalism ("such as choosing options to make people worse off"), although existent, are indefensible (*id.* at. 1166).

⁸ See generally Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

⁹ Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005).

more precisely on the soft paternalism exercised through default rules. It inquires whether default rules are in fact forcedly paternalistic. The answer is no, at least if a paternalistic rule is understood as one aimed at advancing individuals' objective well-being. Section IV addresses some of the objections made in recent years against soft paternalism in light of the conclusions reached in Section III.

II. HARD AND SOFT PATERNALISM

Moral philosophy habitually links paternalism to restriction of choice. The distinction between hard and soft paternalism isn't so conceived to refer to the way intervention occurs, but to the situation of the agent whose freedom of choice is curtailed.¹⁰ One classifies paternalism as hard when an agent's deliberative powers are fully satisfactory, while soft paternalism is directed to people who, due to ignorance, inexperience or mental illness, cannot function as rational agents.

Behavioral law and economics contrasts hard and soft paternalism in a quite different manner. Soft paternalism is treated in this case as a sort of paternalism which, although influencing choice, gives agents the last word. So, while helmet and seat-belt laws are examples of hard paternalism, default rules and cooling-off periods conciliate the aim to protect people and respect to freedom, thus corresponding to a milder way of intervention dubbed soft paternalism.

¹⁰ See Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: the Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 661 (2004) ("Soft paternalism, restricting a subject's self-regarding conduct where the conduct is *not* substantially voluntary, is morally uncontroversial. Hard paternalism, restricting a subject's self-regarding conduct where the conduct is substantially voluntary, on the other hand, is very morally controversial and presents interesting and difficult moral questions." (footnotes omitted)).

In the latter sense, the distinction between hard and soft paternalism therefore lies in the fact that choice is constrained only by the former. Yet, once we take into account the dubious meaning of “constraining choice,” this distinction risks to be blurred. Consider a law imposing an insignificant fine to drivers who do not wear a seat-belt. Is such a law constraining choice, as every person who does not wish to follow what is prescribed can do it at a low cost? Can a statute conditioning the right to abortion on a waiting time and a sequence of embarrassing meetings be cited as an example of soft paternalism just because the final word about interrupting pregnancy is still left to women?

One way to answer these questions is to say that choices are constrained whenever the legal system regards a certain course of action as forbidden. The dichotomy between soft and hard paternalism would then be parallel to that of licit-illicit. So, according to this formal interpretation of the word “constraint,” the seat-belt requirement mentioned in the above paragraph would be classified as hard paternalism, since its non-observance is considered as an infringement of the law. On the other hand, conditions to the exercising of a right, no matter how demanding, would still be an example of soft paternalism.

Because it ignores the costs created by legal rules, this solution does not seem well suited to the idea of combining paternalistic concerns and the value of freedom. As shown by the two examples, the cost of acting against the law may be much lower than that which one incurs to meet the requirements of a legally approved choice.

If constraining choice is by contrast associated with the costs borne by people acting in a specified manner, one will be bound to conclude that the separation between hard and soft paternalism does not have a qualitative character. As the costs legally imposed vary gradually, soft and hard paternalism differ only according to the level of

difficulty imposed to some activity, where low-cost rules represent the moderate (soft) form of paternalism and high-cost rules stand for hard paternalism.

III. ARE DEFAULT RULES ALWAYS (SOFT) PATERNALISTIC?

One preliminary question is to determine whether paternalistic default rules are necessarily soft paternalistic. At first glance, one would be prone to admit so, since the only cost created to parties by such rules is the cost of contracting them around. Nonetheless, authors have suggested that this cost may be considerable in some circumstances, as a proposal for concealing a right or duty can attract the other party's distrust, impeding bargain.¹¹ Considering that the difference between hard and soft paternalism is just a matter of degree, one is allowed to cogitate if, exceptionally, default rules would not be more correctly viewed as a heavy constraint and, consequently, as a case of hard paternalism. However, as we are mainly interested in the alleged paternalism of default rules, this point should be set aside.

Another preliminary question concerns the inevitability of default rules. Remember that the claim according to which paternalism is an indefectible feature of a legal system is anchored on the influence of default rules over behavior, which assumes that default rules are an indispensable part of law. Is that true?

Assuming the incompleteness of contracts and the corresponding supplying role of laws, proving the dispensability of default rules would require to conceive a legal system where these rules are all replaced with mandatory rules. In this case, freedom of contract would be eliminated, and people's rights and duties would be entirely

¹¹ See Omri Ben-Shahar & John Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006).

determined by legal rules. Although imaginable, such legal system is quite different from the existing law and is hardly defensible.

Another alternative to default rules are judge-made rules.¹² Law might establish that, whenever a contract is silent regarding parties' rights, judges are in charge of supplanting this omission. Due to safety reasons, this is also a thinkable, yet surely not desirable, solution. Naturally, adherence to precedents could enhance predictability, but then the binding contents of judicial decisions would have the status of default rules.

Instead of default rules, lawmakers may still adopt choice-requiring rules.¹³ These are rules which force agents to perform certain choices, thus avoiding the omissions default rules are destined to supply. For example, in lieu of a default rule governing adherence to a retirement plan, law can force workers to manifest their preference on this subject. Although choice-requiring rules may be adequate in some cases, they could not completely substitute default rules without obligating people to choose all the time, which is patently undesirable.

Therefore default rules seem to be, even if not a conceptually indispensable feature of a legal system, a practical necessity. We can thus turn to our central point here, which is to establish whether default rules are paternalistic in nature. If law must contain default rules and paternalism is an inherent characteristic of this kind of rule, it will follow that law is inevitably paternalistic.

¹² The rule applied by a judge in order to fill a contractual gap is sometimes also called a default rule. *See, e.g.,* Christopher A. Riley, *Designing Default Rules in Contract Law: Consent, Conventionalism and Efficiency*, 20 OXFORD J. LEGAL STUDIES 367, 368-369 (2000) (speaking of legislative and adjudicative defaults). I prefer to designate only those rules which can be known by the parties before contract as default rules, since these are the possibly sticky rules through which soft paternalism would take place.

¹³ *See* Sunstein & Thaler *supra* note 5, at 1173.

Analysis must begin here by defining what makes a rule paternalistic. Sunstein and Thaler say that default rules are paternalistic because they influence behavior.¹⁴ Cognitive research reveals that, even if transaction costs are insignificant, agents tend to adhere to the default rule regardless of its contents. The election of a default rule, thus, determines people's choices.

This is a very broad conception of paternalism, and a very unusual one too. Once accepted, it would be hard to deny legal paternalism, as one of the clear purposes of law is to persuade people to act in specified manners by means of sanctions. Proverbial opponents of paternalism such as law and economics scholars would be obliged to recognize themselves as paternalists in view of their understanding of legal rules as incentives. So, the idea according to which default rules assume a paternalistic character because they influence behavior transforms the inevitability claim into a trivial one.

Another criterion to assess the paternalism of default rules is related to the purpose of these rules. Although this criterion undermines the claim that default rules, and, by consequence, law, are inevitably paternalistic, I think it is not alien to Sunstein and Thaler's general goal of defending libertarian paternalism.

Default rules are suited to pursue two main objectives. One of them is broadly defined as the economic objective of allocative efficiency. It is well-known that economic analysis of law is grounded on Coase's description of an ideal world without transaction costs.¹⁵ In such a world, the contents of legal rules (more precisely, the contents of legal default rules¹⁶) would not matter, since parties' ability to negotiate would lead rights to be attributed to whoever values them more. In a real world in which

¹⁴ See *supra* note 7.

¹⁵ Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

¹⁶ Since parties' freedom to stipulate contractual terms is assumed, legal rules in Coase's Theorem are default rules.

transactions are costly, law can help to achieve efficiency by diminishing the costs of contracting or by mimicking the results of hypothetical bargains.

Bearing efficiency in mind, economic analysis of default rules has followed two main guidelines. The first consists in adopting as default rule that which would be more often preferred by contractual parties, the “majoritarian” rule. In so doing, law would simplify bargain by reducing as much as possible the number of cases in which parties would have to contract around the legal rule.¹⁷

Another proposal is to treat default rules as a way of inducing informational disclosure. By suggesting the contractual derogation of a default rule, one of the parties might reveal some relevant information to the other. As the cost to be informed is a transaction cost, a strategy to promote efficiency is to establish default rules which will probably produce this result. These default rules are called penalty rules.¹⁸

Instead of efficiency, however, default rules may be thought to pursue agent’s objective well-being. This seems closer both to what Sunstein and Thaler have in mind as they speak of paternalism¹⁹ and to the common wisdom on this subject. Paternalism is related to objective well-being because it is presented as a form of intervention aimed

¹⁷ See, e.g., Gary T. Schwartz, *Proposals for Products Liability Reform: a Theoretical Synthesis*, 97 YALE L. J. 353, 361 (1988) (the default rule should be that which “most well-informed persons would have adopted if they were to bargain about the matter”). If transaction costs are insuperable, the majoritarian rule is that which best mimics the outcomes of Coase’s idealized world, because it is the rule to which most parties would agree whether if bargain were feasible.

¹⁸ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87 (1989).

¹⁹ See Sunstein & Thaler, *supra* note 5, at 1162 (“In other words, we argue for self-conscious efforts, by private and public institutions, to steer people’s choices in directions that will improve their welfare. In our understanding, a policy therefore counts as ‘paternalistic’ if it attempts to influence the choice of affected parties in a way that will make choosers better off.”).

at protecting someone's interests against her or his will. Although not unique, one way to justify this intervention is by arguing that it is performed to render the person well-off.

There are other possible purposes default rules can be destined to pursue, such as enhancing parties' freedom²⁰ and safeguarding the interest of third parties.²¹ The important here is to recognize that this class of rule is not necessarily directed to enhancing the well-being of the involved parties, and as a consequence, it is not inherently paternalistic in the more restricted sense.

It is not within the scope of this article to discuss which of the various ends that have just been mentioned a default rule should in fact pursue. A good reason to prefer objective well-being instead of transaction cost reduction is psychological research into the effects of default rules on choices, demonstrating that people's preferences are in some instances undefined. This, however, is not a sufficient reason to renounce efficiency completely, considering both the penalty strategy and the fact that the status quo bias may be in some cases unexpressive. There is even less of a reason to neglect whichever social goal default rules are fitted to obtain in order to favor the paternalistic goal of protecting people's interests independently of their will.

To sum up, the thesis according to which paternalism is an inevitable mark of every legal system in view of the presence of default rules is warranted only if legal paternalism is viewed as influence of the law on human behavior. So conceived, however, the inevitability claim turns out to be trivial and, with respect to default rules specifically, it is empirically dependent as well. Another way to understand the

²⁰ See Mitchell, *supra* note 9, at 1260-1269 (default rules should try to debias agents, helping them to exercise freedom).

²¹ The stickiness of default rules invites us to revise the idea according to which these rules are not fitted to the protection of third parties.

paternalism of default rules is related to the purpose of protecting agents' objective well-being, mainly in circumstances in which their preferences are unstable or undefined. As this paternalistic goal is but one of the various goals a default rule can be designed to pursue, legal paternalism would be the result of a legislative choice rather than an intrinsic characteristic of law.

This analysis of the role of default rules in paternalistic law may throw some light on the debate concerning behavioral law and economics and its interventionist tendency. In the next Section, criticism directed against paternalism inspired by cognitive research will be assessed in view of the conclusions of this Section.

IV. SOME OBJECTIONS AGAINST THE PATERNALISM OF BEHAVIORAL LAW AND ECONOMICS

Sunstein and Thaler's soft paternalism is far from being the sole example of a paternalistic proposal grounded on psychological findings regarding human irrationality. Some scholars support notably aggressive measures most of us would not hesitate to label as hard paternalism, such as mandatory liability²² or non-enforcement of contractual terms.²³ Sunstein and Thaler's concerns, on the other hand, are not limited to default rules. Before proceeding, it is thus convenient to observe that, although critics' targets are often interventionist claims in general, and not just paternalism of default rules, my focus here is exclusively on the latter.

²² Croley & Hanson, *supra* note 4 (advocating mandatory products liability).

²³ Russell B. Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

This caveat having been made, in this Section, I shall examine three important objections made against legal paternalism. The first of them considers that, even if behavioral law and economics premises are sound and human beings suffer from serious cognitive flaws, this is not enough to justify state intervention, since state decisions can be contaminated by these same flaws. The second objection attacks the redistributive effects of paternalism: a legal change targeted at protecting people who act irrationally may negatively affect those who do not act like that, having in this case a redistributive character. The third objection is specifically related to soft paternalism. It indicates that, once accepted, mild paternalism might have “sloping” consequences, giving room to more invasive measures.

A. State Agents’ Errors

Glaeser fears that state agents designated to adopt paternalistic measures might commit errors.²⁴ Unlike free-market partisans who oppose state intervention, arguing that public authorities are frequently captured by interest groups, Glaeser has in mind public-spirited regulators suffering from the same cognitive problems afflicting people in general. His suspicion is that public agents are more likely to act on the basis of false beliefs than consumers, turning legal paternalism into a dangerous enterprise.

In order to demonstrate that lawmakers and other public agents are in general more vulnerable to errors than private parties, Glaeser makes three points. He first affirms that consumers have more incentive to learn than do public authorities, because a bad choice in market-place affects consumers’ own welfare more than someone else’s. A disastrous decision in the public sphere, in contrast, might have little or no negative

²⁴ Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133 (2006).

impact for its authors.²⁵ Second, as mistakes result from manipulation by firms or interest groups, it can be expected that they will occur more often in the public realm, since it is cheaper to manipulate a few politicians than a great number of consumers.²⁶ Third, private decisions are also preferable to public ones because people tend to act more carefully as buyers than as voters.²⁷

My goal here is not to discuss the merit of Glaeser's assertions, but to examine if they give us any reason to abandon the paternalism of default rules. In this respect, it is useful to go back to the conclusion drawn above regarding the practical necessity of default rules. Arguments opposing state intervention cannot ignore the fact that, as for default rules, "intervention" is unavoidable. If Glaeser is right, legislators may do a poor job by enacting default rules, but what can we do about it? The main alternative to a default rule is another default rule, established by a legislative body or some other public organ (including the judiciary) facing the same risks of error. Although it is possible to compel private parties to make a choice, it would be a defensible solution only if the losses caused by public agents' myopia were high enough to compensate for the additional transaction costs this solution creates.

One should ask whether Glaeser's reasons against state intervention affect the paternalism of default rules in the more restricted meaning referred above, i.e., paternalism as safeguard of parties' objective well-being. Is the probability of acting on the basis of false beliefs greater when state authorities aim at meeting people's interests than when their intent is simply to reduce transaction costs? This is a hard question. "Objective well-being" is a very uncertain concept, subjecting whoever tries to improve

²⁵ *Id.* at 144-145.

²⁶ *Id.* at. 145-146.

²⁷ Glaeser (*id.* at 150-156) raises specific objections against soft paternalism concerning its "sloping" character. These objections will be assessed below in this Section in item C.

other people's lives to a great chance of error. In order to diminish transaction costs, on the other hand, legislators should know about people's preferences or informational asymmetries between contract parties, which is not always the case. Even if state agents are satisfactorily informed, one should take into account their possible resistance to relying on cost-benefit analysis.

B. Redistributive Effects

Another argument against paternalism is related to its redistributive implications.²⁸ The protection of irrational individuals often inflicts costs upon those who do not suffer from the same cognitive problems, as in Sunstein and Thaler's retirement plan example.²⁹ Changing the default rule to increase savings can help individuals whose discount rate is excessively high, but brings extra transaction costs to those for whom the decision of not being enrolled is the rational one.

However, unless preferences are homogeneous, redistribution is an inevitable consequence of default rules, which will always benefit agents whose preferences are adjusted to their contents and create transaction costs to the others. If, instead of determining workers' immediate enrollment in the savings plan, the default rule did require a positive manifestation to this end, those interested in participating (either or rational or irrational agents) would incur larger costs to do it.

²⁸ See Mitchell, *supra* note 9, at 1269-1275 (arguing that paternalism redistributes resources from rational to irrational people). The concern with the redistributive effects of paternalism inspires Camerer et al. defense of asymmetric paternalism, a kind of paternalism whose benefits outweigh costs (including the costs incurred by rational individuals). See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211 (2003).

²⁹ Sunstein & Thaler, *supra* note 5, at 1172-1173.

Assuming that there should be some default rule, it is necessary to examine if there is something especially wrong with the redistribution that takes place through a paternalistic legal norm.

Once paternalism is tied to the pursuit of people's interests, the paternalistic nature of a norm depends on its end, not on its effects. Even though one may admit that default rules are always similar in their redistributive effects, one can oppose the redistribution that a paternalistic default rule creates due to its rationale. Instead of redistribution *per se*, the focus will then be on the principle behind it, moving the debate to the realm of political philosophy. In the next paragraphs, I sketch out some points related to this.

Paternalistic redistribution may be rejected on libertarian grounds, as done by Mitchell.³⁰ Arguing that Sunstein and Thaler's paternalism is not congruent with libertarianism, he sustains that a redistribution which harms rational agents to benefit irrational ones violates the basic principle of libertarianism according to which no person should be used as a means to advance someone else's good.

Paternalistic redistribution can also be attacked in virtue of its inefficiency. While every default rule is comparable in its propensity to redistribution, a paternalistic default rule neglects the goal of lowering transaction costs and informational asymmetries, thus having the additional disadvantage of wasting resources. Evidently, by raising such objection one is simply affirming that efficiency rather than objective well-being should be the target of law.

The paternalistic redistribution of default rules is finally also refutable for egalitarian reasons. Instead of condemning redistribution *per se*, egalitarian theories seek to establish who deserves help and who should pay for it. Paternalistic default rules

³⁰ *Supra* note 9, at 1269-1275.

might therefore be criticized, in light of these theories, if they redistribute resources in the wrong way. There is, however, a good reason to suspect that this is not the case. If the frequency of judgment errors is in part determined by educational level, with less educated agents tending to make mistakes more often than more educated ones, paternalistic redistribution will benefit the former. Considering that less educated people usually belong to a lower income class, paternalistic redistribution hence proves roughly favorable to the poor.

C. “Slipping” Danger

Whitman and Rizzo fear the “slippery slope” consequences of soft paternalism.³¹ Once paternalism is accepted as an adequate answer to cognitive deficiencies, as these authors point out, the shy measures defended by soft paternalists may be followed by more invasive ones. Soft paternalism, in other words, leads to hard paternalism.³²

The slippery slope claim is sustained on the basis of the vagueness of paternalism. Whitman and Rizzo argue that state intervention inspired by cognitive research does not have well-defined boundaries. There is no certainty about the concept of cognitive failure and, even if clearly conceptualized, judgment errors are not easy to identify. Such lack of precision, they alert, can steer legal paternalism away from what is now defended by soft paternalists.

Whitman and Rizzo’s concerns are clearly directed to the fundamental idea underlying paternalistic proposals. The danger described by them resides in the

³¹ Douglas Glen Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 NYU. J. L. & LIBERTY 411 (2007).

³² See also Glaeser, *supra* note 24, at 153-154 (soft paternalism intensifies social recrimination of certain behaviors, helping to create circumstances that are propitious to more invasive legislation).

indeterminacy of the principle according to which state should help bounded rational agents, an indeterminacy that risks replacing good policies (those presently sustained by soft paternalists) with bad (i.e., more intrusive) ones. As such, the slope criticism applies to the paternalism of default rules once one understands that paternalism has the aim of enhancing people's objective welfare. Although Whitman and Rizzo would presumably agree that some default rule must be established, they reject Sunstein and Thaler's suggestion of choosing the rule that best fits the protection of some valuable interest as the default rule, since the rationale behind this choice may give room to further and undesirable intervention.

Behavioral law and economics leads us to contrast two possible views of autonomy: the first is an idealized one, which corresponds to what a person would choose if perfectly rational (whatever that means), while the other one associates autonomy with what a person really chooses, rationally or not. Even though the former view warrants state intervention to protect cognitive bounded agents, it reinforces Whitman and Rizzo's concerns, since there would not be autonomy-related reasons to avoid whichever measure, no matter how choice-constraining, able to save individuals from their judgment errors. The second and realistic view, on the other hand, discards autonomy as a means of justifying behavioral paternalism.