

Choosing Not to Choose

Cass R. Sunstein*

Abstract

Choice can be an extraordinary benefit or an immense burden. In some contexts, people choose not to choose, or would do so if they were asked. For example, many people prefer not to make choices about their health or retirement plans; they want to delegate those choices to a private or public institution that they trust (and may well be willing to pay a considerable amount for such delegations). This point suggests that however well-accepted, the line between active choosing and paternalism is often illusory. When private or public institutions override people's desire not to choose, and insist on active choosing, they may well be behaving paternalistically, through a form of choice-requiring paternalism. Active choosing can be seen as a form of libertarian paternalism, and a frequently attractive one, if people are permitted to opt out of choosing in favor of a default (and in that sense not to choose); it is a form of nonlibertarian paternalism insofar as people are required to choose. For both ordinary people and private or public institutions, the ultimate judgment in favor of active choosing, or in favor of choosing not to choose, depends largely on the costs of decisions and the costs of errors.

I. Respecting Choice

Consider the following problems:

1. Public officials are deciding whether to require people, as a condition for obtaining a driver's license, to make an active choice about whether they want to become organ donors. The alternatives are to continue with the existing "opt in" system, in which people become organ donors only if they affirmatively indicate their consent, or to change to an "opt out" system, in which consent is presumed.

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2. A private company is deciding among three options: to enroll people automatically in a health insurance plan; to make them opt in if they like; or to say that as a condition for starting work, they must indicate whether they want health insurance, and if so, which plan they want.
3. A utility company is deciding whether to adopt for consumers a “green default,” with a somewhat more expensive but environmentally preferable energy source, or instead a “gray default,” with a somewhat less expensive but environmentally less desirable energy source, or alternatively to ask consumers which energy source they prefer.
4. A social network site is deciding whether to adopt a system of default settings for privacy, or whether to require first-time users to say, as a condition for access to the site, what privacy settings they would prefer.
5. A state is contemplating a method of making voting more automatic, by allowing people to visit a website, at any time, to indicate that they want to vote for all candidates from one or the other party, and even to say, if they wish, that they would like to continue voting for such candidates until they explicitly indicate otherwise.
6. An online bookseller has compiled a great deal of information about the choices of its customers, and in some cases, it believes that it knows what people want before they know themselves. It is contemplating a system of “predictive shopping,” in which it sends people certain books, and charges their credit card, before they make their wishes known. It is also considering whether to ask people to make an active choice to enroll in a system of predictive shopping, or instead to enroll them automatically.

In these cases, and countless others, an institution is deciding whether to use some kind of default rule or instead to require some kind of active choice. (I shall say a good deal about what the word “require” might mean in this setting.) Default rules tend to be “sticky,” and can therefore greatly influence ultimate outcomes; for this reason, they might seem to be a form of objectionable paternalism. For those who reject paternalism and who prize freedom of choice, active choosing has evident appeal. Indeed it might seem far preferable to any kind of default rule.

In recent years, there have been vigorous debates about freedom of choice, paternalism, behavioral economics, individual autonomy, and the use of defaults.¹

¹ See, e.g., SARAH CONLY, *AGAINST AUTONOMY* (2012); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT WEALTH, HEALTH, AND HAPPINESS* (2008); Ryan Bubb & Richard Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. (forthcoming 2014); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for Asymmetric Paternalism*, 151 U. PA. L. REV. 1211 (2003); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U.L. REV. 1033 (2012);

Invoking recent behavioral findings, some people have argued that because human beings err in predictable ways, some kind of paternalism is newly justified, especially if it preserves freedom of choice, as captured in the idea of “libertarian paternalism.”² Others contend that because of those very errors, some form of coercion is required to promote people’s welfare, and that the argument for choice-denying or nonlibertarian paternalism is much strengthened.³

These claims have been sharply contested. A possible response is that public officials are prone to error as well, and hence an understanding of behavioral biases argues against paternalism, not in favor of it.⁴ The “knowledge problem” potentially affects all decisions by government,⁵ and behavioral findings seem to compound that problem, because they suggest that identifiable biases will accompany sheer ignorance. The emerging field of “behavioral public choice” draws attention to that possibility.⁶ It might also be objected that on grounds of both welfare and autonomy, active choosing is desirable even if people have a tendency to err.⁷ On this view, people should be asked or allowed to choose, whether or not they would choose rightly. For all sides, the opposition between paternalism and active choosing seems stark and plain, and indeed it helps to define all of the existing divisions.

My main goal here is to unsettle that opposition and to suggest that it is often illusory. In many contexts, an insistence on active choosing should be seen as a form of paternalism rather than as an alternative to it. Some people choose not to choose.⁸ Sometimes they make that choice explicitly (and indeed are willing to pay a considerable amount to people who will choose for them). They have actively chosen not to choose. Sometimes people have made no explicit choice; they have not actively chosen anything. But it is nonetheless reasonable to infer that in particular contexts, their preference is not to choose, and they would say so if they were asked. They might

Riccardo Rebonato, *A Critical Assessment of Libertarian Paternalism* (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346212.

² See Camerer et al., *supra* note; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not An Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

³ See CONLY, *supra* note; Bubb and Pildes, *supra* note.

⁴ See Edward Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133 (2006).

⁵ Friedrich Hayek, *The Uses of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945).

⁶ See Jan Schnellenbach and Christian Schubert, *Behavioral Public Choice: A Survey* (2014), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2390290

⁷ See Wright and Ginsburg, *supra* note.

⁸ An important clarification: My focus throughout is not on “not choosing,” which involves no choice at all, and which is different from choosing not to choose, in the sense of choosing someone else to choose on one’s behalf. One might not choose because (for example) of procrastination or because one wants to retain option value. See Ziv Carmon et al., *Option Attachment: When Deliberating Makes Choosing Feel Like Losing*, 30 J. CONST. RES. 15 (2003). There is, of course, an overlap between the two phenomena: People might decline to choose because they are busy, do not want to take responsibility, or think that they might err. But choosing not to choose is a form of choice, and those who want to avoid choosing might be as adverse to that choice as any other.

fear that they will err. They might be aware of their own lack of information⁹ or perhaps their own behavioral biases (such as unrealistic optimism¹⁰). They might find the underlying questions confusing, difficult, painful, and troublesome -- empirically, morally, or otherwise. They might not enjoy choosing. They might be busy and lack “bandwidth.”¹¹ They might not have a preference at all, and they might not want to take the trouble to try to form one. They might not want to take responsibility for potentially bad outcomes for themselves (and at least indirectly for others).¹² They might anticipate their own regret and seek to avoid it.¹³ To take just one example: In the medical context, many patients do not want to make, or even to participate in, their own medical decisions, and doctors systematically overestimate their patients’ desire to do so.¹⁴

But even when people prefer not to choose, many private and public institutions favor and promote active choosing on the ground that it is preferable for people to choose. For example, many doctors expect or ask patients to choose,¹⁵ and some states require people to indicate their preferences with respect to organ donation at the time that they receive their driver’s licenses. To the extent that people are being asked to choose when they would prefer not to do so, active choosing counts as paternalistic. To be sure, nanny states forbid choosing, but they also forbid the choice not to choose. *Choice-requiring paternalism* might be an attractive form of paternalism, but it is no oxymoron, and it is paternalistic nonetheless.

We shall see that in many cases, those who favor active choosing are actually mandating it, and may therefore be overriding (on paternalistic grounds) people’s choice not to choose.¹⁶ When people prefer not to choose, required choosing is a form of coercion — though it may be the right form, at least where active choosing does not increase the likelihood and magnitude of errors, and where it is important to enable people to learn and to develop their own preferences.

⁹ On the effects of lack of information in producing abstention, see Tom Coupe & Abdul Noury, *Choosing Not to Choose: On the Link Between Information and Abstention*, 84 ECON. LETTERS 261 (2004).

¹⁰ See TAL SHAROT, *THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN* (2011).

¹¹ See SENDHIL MULLAINATHAN & ELDAR SHAFIR, *SCARCITY* 39-66 (2013).

¹² For a demonstration, see Bjorn Bartling & Urs Fischbacher, *Shifting the Blame: On Delegation and Responsibility*, 79 REV. ECON. STUD. 67 (2012). On people’s preference for flipping a coin, as a way of avoiding responsibility, see Nadja Dwengler et al., *Flipping A Coin: Theory and Evidence* (2013) (unpublished manuscript). Consider this suggestion, *id.* at 1: The “cognitive or emotional cost of deciding may outweigh the benefits that arise from making the optimal choice. For example, the decision-maker may prefer not to make a choice without having sufficient time and energy to think it through. Or, she may not feel entitled to make it. Or, she may anticipate a possible disappointment about her choice that can arise after a subsequent resolution of uncertainty. Waiving some or all of the decision right may seem desirable in such circumstances even though it typically increases the chance of a suboptimal outcome.”

¹³ Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 51-54 (1980).

¹⁴ See Carl Schneider, *The Practice of Autonomy* 36-46 (1998).

¹⁵ See *id.*

¹⁶ There is an irony here in light of evidence that people sometimes place an excessive value on choice, in the sense that their preference for choice leads to welfare losses. See Simona Botti & Christopher Hsee, *Dazed and Confused by Choice*, 112 ORG. BEHAV. AND HUM. DECISION PROCESSES 161 (2010).

If, by contrast, people are *asked whether they want to choose*, and can opt out of active choosing (in favor of, say, a default rule), active choosing counts as a form of libertarian paternalism. In some cases, it is an especially attractive form. A company might ask people whether they want to choose the privacy settings on their computer, or instead rely on the default, or whether they want to choose their electricity supplier, or instead rely on the default.

With such an approach, people are being asked to make an active choice between the default and their own preference, and in that sense, their liberty is fully preserved. Call this *simplified active choosing*. Simplified active choosing has the advantage of avoiding the kinds of pressure that come from a default rule,¹⁷ while also allowing people to rely on such a rule if they like. In the future, we should see, and we should hope to see, adoption of this approach by a large number of institutions, both public and private. For health insurance or protection of privacy, simplified active choosing has evident appeal.

It is important to acknowledge, however, that whenever a private or public institution asks people to choose, it might be overriding their preference not to do so, and in that sense engaging in choice-requiring paternalism. This point applies *even when people are being asked whether they want to choose to choose*. After all, they might not want to make that second-order choice (and might therefore prefer a simple default rule). In this sense, there is a strong nonlibertarian dimension to apparently liberty-preserving approaches that ask people to choose between active choosing and a default rule. If these claims do not seem self-evident, or if they appear a bit jarring, it is because the idea of active choosing is so familiar, and so obviously appealing, that it may not be seen for what it is: a form of choice architecture, and one that many choosers may dislike, at least in settings that are unfamiliar or difficult.¹⁸

I also aim to show that whether or not people should favor active choosing, or should instead choose not to choose, depends on a set of identifiable questions, generally involving the costs of decisions and the costs of errors.¹⁹ If, for example, people believe that private or public institutions lack relevant knowledge, are self-interested, or are subject to the pressures imposed by self-interested private groups, they should probably favor active choosing, because that approach will reduce the costs of errors. If choosing is a benefit rather than a cost, because people enjoy it, there is a further reason for active choosing. In such cases, people should choose to choose. But if the area is complex, technical, and novel, there is a strong argument against active

¹⁷ See Eric J. Johnson & Daniel G. Goldstein, *Decisions by Default*, in THE BEHAVIORAL FOUNDATIONS OF POLICY 417, 417-18 (Eldar Shafir ed., 2013) (discussing impact of defaults).

¹⁸ A valuable discussion is presented in Barbara Fried, *But Seriously, Folks, What Do People Want?*, 65 STAN. L. REV. 1529 (2013).

¹⁹ This question is discussed in more detail in Cass R. Sunstein, *Deciding By Default*, 162 U. PA. L. REV. 1 (2013), and in the environmental context, in Cass R. Sunstein & Lucia Reisch, *Automatically Green: Behavioral Economics and Environmental Protection*, 37 HARV. ENV. L. REV. (forthcoming 2014).

choosing, because that approach will increase decision costs and potentially error costs as well. Another question is whether people believe that choosing is intrinsically desirable or not.²⁰ Often they do, but choosing not to choose is itself a form of choice, and perhaps an active one (and may be intrinsically desirable²¹).

There is undoubtedly a great deal of heterogeneity here, both across persons and across contexts.²² Some people in some contexts would be willing to pay a premium to have the power to choose themselves, other things being equal; other people in other contexts would be willing to pay a premium to have someone else choose for them, other things being equal.²³ (Some people like choosing wine, while other people hate it; the same is true for retirement plans. In both contexts, it much matters whether people have an antecedent preference.) People tend to have an intuitive appreciation of these points and to incorporate them into their judgments about whether and when to choose. An investigation of particular areas often reveals both the force and the weakness of the argument for active choosing. Many restaurants, for example, do best with a large menu, offering people diverse items, but tourists in unfamiliar nations may well prefer a default menu — a difference that reflects the costs of decisions and the costs of errors. An interesting question is whether, in identifiable contexts, people are too willing to choose (for example, because of overconfidence) or insufficiently willing (for example, because of excessive trust in certain institutions). Further empirical research would be extremely valuable on that question.

At first glance, it seems that the choice between active choosing and some kind of default rule, based on decision costs and error costs, should be made by people themselves, at least if the interests of third parties are not involved. If choosers choose not to choose, or if that what they would choose if asked, their choice (even if imputed rather than explicit) should generally be respected. To that extent, choice-requiring paternalism should be avoided. Unless there is some kind of market failure, including a behavioral market failure (such as “present bias,” meaning an emphasis on the short-

²⁰ For strong evidence that people do believe choosing is intrinsically valuable, see Björn Bartling et al., *The Intrinsic Value of Decision Rights* (U. of Zurich, Dep’t of Econ. Working Paper No. 120, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255992. See also Rebonato, *supra* note, at 41 (“Failing to make (or rarely making) this important distinction between the outcome in itself and the full choice process (outcome plus the ability or otherwise of choosing) is at the root of the widespread absence in the libertarian paternalistic literature of a sympathetic treatment of autonomy.”).

²¹ Bartling et al. do not test this proposition, but there is every reason to expect that any such test would so suggest.

²² For a finding of a general commitment to the intrinsic value of the power to decide, cutting across a relatively diverse population, see *id.*

²³ Ernst Fehr et al., *The Lure of Authority: Motivation and Incentive Effects of Power*, 103 AM. ECON. REV. 1325 (2013). Compare the related phenomenon of “reactance,” which suggests a negative reaction to persuasive efforts, produced in part by the desire to assert autonomy. See Sharon Brehm and Jack Brehm, *Psychological Reactance: A Theory of Freedom and Control* (1981); Louisa Pavey & Paul Sparks, *Reactance, Autonomy and Paths to Persuasion: Examining Perceptions of Threats to Freedom and Informational Value*, 33 MOTIVATION & EMOTION 277 (2009).

term and a neglect of the future),²⁴ private and public institutions should not insist on active choosing when people prefer not to choose (just as they should not insist on a default rule when people prefer active choosing).

An important qualification is that the argument for active choosing gains strength when learning and the development of values and preferences are important.²⁵ In such cases, choice-requiring paternalism might have real appeal. This point raises a significant cautionary note about any program that defaults people into goods or services on the basis of their own previous choices — a seemingly attractive approach that might nonetheless prove an obstacle to learning and to what we might consider a form of self-expansion, and even autonomy, by people in their roles as both consumers and citizens. In such cases, choice-requiring paternalism is no oxymoron, and it has strong justifications. As we shall see, some evidence, which I present here, suggests that people have an intuitive appreciation of this point as well.

The remainder of this Article is organized as follows. Part II explores how, and in what settings, active choosing might be required. Part III draws attention to choice-requiring paternalism and shows that it is not a contradiction in terms. It explains that when people choose not to choose, active choosing counts as a form of paternalism, one that runs into both welfare-based and autonomy-based arguments in favor of freedom of choice (including the choice not to choose). Part IV investigates why active choosing may or may not be desirable, from the point of view of both choosers and choice architects (understood as the people who design default rules and other aspects of the background against which choices are made²⁶). Part V offers a brief note on “big data,” predictive shopping, and presumed choice. It presents some empirical findings, suggesting considerable skepticism about predictive shopping. It also suggests that in ordinary market contexts, the best argument for active choosing is that choosers know best what they want, but that with the rise of big data, sellers may have equally good information, potentially supporting the otherwise objectionable idea of default purchases. Part VI concludes.

II. Varieties of Choice

Many of those who embrace active choosing believe that consumers of goods and services should be free from government influence.²⁷ Of course they recognize that in markets, producers will impose influences of multiple kinds, but they contend that when third parties are not affected, and when force and fraud are not involved,

²⁴ See OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012).

²⁵ As we shall see, however, there is a strong response to this argument: People can also learn from making the choice between choosing and not choosing.

²⁶ See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008) (discussing choice architecture in detail).

²⁷ This is the general thrust of Rebonato, *supra* note.

government should remain neutral. They reject paternalism on government's part.²⁸ Perhaps it is legitimate for public officials to require the provision of accurate information, so as to ensure that consumer's choices are adequately informed. But if government seeks to "nudge"²⁹ people in its preferred directions in other ways – by imposing default rules or embracing paternalism of any kind – it is exceeding its appropriate bounds.

But what does active choosing entail?³⁰ What does it mean to "require" people to indicate their preferences?

A. Three Faces of Active Choosing

Those who insist on the inevitability of default rules will object that there is no good answer to this question. Even if choice architects seek to promote active choosing, they have to specify what happens if *people simply refuse to choose*. Isn't the answer some kind of default rule?

The question is the right one, because some kind of default rule is ultimately necessary. Choice architects have to establish what happens if people decline to choose. But we can nonetheless identify three different ways that active choosing might be required. For shorthand, we can refer to them as direct penalties, leveraging, and ordinary market arrangements; each raises its own complexities. Only government can impose direct penalties, but leveraging and ordinary market arrangements are available to both private and public institutions.

- (a) *Direct penalties for those who refuse to make an active choice.* In most contexts, no one contends that if people fail to make a choice, they should be imprisoned or otherwise punished. The sanction for that failure is that they do not receive a good or service (see (b) and (c) below). But there are exceptions. In some nations, including Australia, Belgium, and (before 1970) the Netherlands, people have been subject to civil sanctions if they fail to vote,³¹ and in that sense they may be punished for refusing to make an active choice. So too, the Affordable Care Act requires people to make a

²⁸ *Id.*; Wright & Ginsburg, *supra* note.

²⁹ See THALER & SUNSTEIN, *supra* note.

³⁰ I am understanding the term in a purely formal sense, to capture a response to a question about what one prefers. One might answer that question without having any kind of substantive preference. It would be possible to understand "choosing" in a functional rather than formal sense, to capture deciding for reasons, as distinguishing from simply "picking," which is akin to tossing a coin. For an important discussion, see Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOCIAL RESEARCH 757 (1977). As I understand it here, active choosing includes "picking," and can occur even when people lack an antecedent preference.

³¹ Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting A Solution*, 18 J. THEORETICAL POL. 207, 208 (2006).

choice about health insurance, subject to economic penalties if they fail to do so.³²

With respect to active choosing, both of these cases do have a wrinkle: People are being forced to choose along one dimension (for whom to vote and which health insurance plan to obtain), but are being prohibited from choosing along another dimension (whether to vote or to obtain health insurance). But insofar as one kind of choice is being required, we may fairly speak of coerced choosing. We could imagine other contexts in which people would face sanctions if they do not choose, though admittedly such cases look more like science fiction than the real world. Consider cases in which people must decide whether to become organ donors (or face criminal penalties) or must choose privacy settings on their computer (subject to civil sanctions if they do not). The fact that sanctions are rarely imposed on people who choose not to choose might be taken to suggest an implicit recognition that in a free society, such choices are generally acceptable and indeed a legitimate part of consumer sovereignty. One reason involves information: People know best what they want, and others should not choose for them, even if the choice is not to choose.³³

- (b) *Requiring active choosing with respect to a related or ancillary matter as a condition for obtaining a good or a service (or a job).* Sometimes active choosing involves a form of leveraging. It is mandatory, but in a distinctive sense: *Unless people make an active choice on some matter, they cannot obtain a good or service, even though that good or service, narrowly defined, is not the specific topic of the choice that they are being asked to make.* We can imagine a continuum of connections between the matter in question, for which an active choice is being required, and the specific good that has already been chosen. There would be a close connection if, for example, people were told that unless they indicate their preferences with respect to car insurance, they cannot rent a car. So too, there would be a close connection if people were told that unless they create a password, or indicate their preferences with respect to privacy settings, they cannot use their computer. And indeed, both of these cases are standard. In markets, sellers sometimes insist that purchasers must make an active choice on some related matter in order to obtain or use a product.

By contrast, there would be a weaker connection if people were informed that they could not work with a particular employer until they have indicated their preferences with respect to their retirement plan. The

³² 26 U.S.C. § 5000A (2012). Note that by 2015, large employers will be required to adopt a form of automatic enrollment for health insurance. See 29 U.S.C. 218A.

³³ For a powerful demonstration, see Joel Waldfogel, SCROOGENOMICS: WHY YOU SHOULDN'T BUY PRESENTS FOR THE HOLIDAYS (2009) (showing that even family members and close friends make large mistakes in choosing for people during holiday season).

connection would be weaker still if people were told that they could not obtain a drivers' license unless they indicate their preferences with respect to organ donation. The connection would be even weaker if people were told that they could not register to vote unless they have made a choice about their preferred privacy settings on their computer.

In the final two examples, there is not a tight connection between the matter on which people are being asked to make a choice and the good that they are specifically seeking.³⁴ In cases of this kind, the choice architect is requiring an active choice on a matter that is genuinely ancillary. Note that in some cases that fall in this category, the requirement of active choosing has a strongly coercive dimension insofar as the good in question is one that people cannot easily reject (such as a driver's license, a job, or a right to vote). The choice architect is, in effect, leveraging that good to ensure an active choice on some other matter. From the normative point of view, we might want to distinguish between public and private institutions here. Perhaps private institutions, disciplined as they are by market forces, should freely compete along this dimension as along others, and perhaps public institutions should hesitate before requiring people to choose, unless there is a close connection between the good or service in question and the object of active choice.

- (c) *Requiring active choosing among goods, services, or jobs as a condition for obtaining a good, a service, or a job.* For most consumption decisions in ordinary markets, people are given a range of options, and they can choose one or more of them, or none at all. Unless they make a choice, they will not obtain the relevant good or service. They are not defaulted into purchasing tablets, cell phones, shoes, or fishing poles. Indeed, this is the standard pattern in free markets. When people visit a website, a restaurant, or a grocery or appliance store, they are generally asked to make an active choice. The default – understood as what happens if they do nothing – is that no product will be purchased. People do not receive goods or services unless they have actively chosen them. The same point holds for the employment market. People are not typically defaulted into particular jobs, at least not in any formal sense. They have a range of options, and unless they take one, they will be unemployed. In this respect, free markets generally require active choosing.

There is nothing inevitable about this situation. We could imagine a situation in which sellers assume, or presume, that people want certain products, and in which buyers obtain them, and have to pay for them,

³⁴ There is a counterargument in the case of organ donations. In 2007, for example, motor vehicle accidents accounted for about 20 percent of all organ donations. See Stacy Dickert-Conlin et al., *Donorcycles: Motorcycle Helmet Laws and the Supply of Organ Donors*, 54 J.L. & Econ. 907, 912 (2011).

passively. Imagine, for example, that a bookseller has sufficient information to know, for a fact, that Johnson would want to buy any new book by Stephen King, Amartya Sen, or Joyce Carol Oates, or that Smith would like to purchase a new version of a particular tablet, or that Smith would want to buy a certain pair of sneakers, or that when Williams runs out of toothpaste, he would like new toothpaste of exactly the same kind. If the sellers' judgments are unerring, or even nearly so, would it be troublesome and intrusive, or instead a great benefit, for them to arrange the relevant purchases by default? Existing technology is increasingly raising this question.³⁵

There is a good argument that the strongest reason to require active choosing is that reliable predictive shopping algorithms do not exist, and hence active choosing is an indispensable safeguard against erroneous purchases, and thus not in the interests of those who might be denominated purchasers (by default). On this view, the argument for active choosing is rooted in the view that affirmative consent protects against mistakes – which leaves open the possibility of “passive purchases” if and when a reliable technology becomes available. So long as such technology does not exist, passive purchases would be unacceptable. I will return to these issues in Part V.

The major qualification is that some institution – usually the law -- has already given people rights of a certain kind, and what that institution already gave people determines what they will later have to buy in the markets. Markets require a background set of entitlements, establishing what people have and do not have, before they begin to choose. Individuals choosers did not select those entitlements, which are given rather than chosen, and they might reflect a form of paternalism.

For example, people might have some kind of “default entitlement” to be free from the right to sue for age discrimination, a right that they can waive for a price³⁶; some entitlements of this kind (such as the right to sue for discrimination on the basis of race and sex) are not waivable, in the sense that no waiver would be legally valid.³⁷ Because people's preferences may be affected by decisions about background entitlements,³⁸ a form of

³⁵ See Greg Bensinger, *Amazon Wants to Ship Your Package Before You Buy It*, WALL ST. J. (Jan. 17, 2014, 3:12 PM), <http://blogs.wsj.com/digits/2014/01/17/amazon-wants-to-ship-your-package-before-you-buy-it/?mod=e2tw>.

³⁶ 29 U.S.C. § 626(f)(1) (2012).

³⁷ See also, e.g., *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (holding that employees may not waive their rights to the minimum wage or overtime pay under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19).

³⁸ See Keith M. Marzilla Ericson & Andreas Fuster, *The Endowment Effect* (Nat'l Bureau of Econ. Research, Working Paper No. 19384, 2013), available at www.nber.org/papers/w19384.

paternalism may be difficult or perhaps impossible to avoid insofar as some person or institution is making those decisions.³⁹ If people's preferences are an artifact of entitlements, we cannot select entitlements by asking about those preferences. But with background entitlements in place, people usually do not obtain goods or services unless they have actively chosen them (putting gifts to one side).

B. Institutions As Choice Architects

As the examples suggest, both private and public institutions might choose leveraging or ordinary market arrangements, though of course only government can impose direct penalties. It should be clear that active choosing is far from inevitable. Instead of imposing active choosing, an institution might select some kind of default rule, specifying what happens if people do nothing.⁴⁰

For example, those who obtain driver's licenses might be defaulted into being organ donors, or those who start work with a particular employer might be defaulted into a specific retirement or health care plan. Alternatively, those who make an active choice to purchase a particular product – say, a book or a subscription to a magazine – might be enrolled into a program by which they continue to receive a similar product on a periodic basis, whether or not they have not made an active choice to do that. The Book of the Month Club famously employs a strategy of this sort.⁴¹

An active choice to purchase a product might also produce a default rule that is unrelated to the product – as, for example, where purchase of a particular book created default enrollment in a health care plan, or where an active choice to enroll in a health care plan created default enrollment in a book club. In extreme cases, where disclosure is insufficiently clear, an approach of this kind might be a form of fraud, though we could also imagine cases in which such an approach would actually track people's preferences. Suppose, for example, that a private institution knows that people who purchase product X (say, certain kinds of music) also tend to like product Y (say, certain kinds of books). Suggestions of various kinds, default advertisements, default presentations of political views, and perhaps even default purchases could be welcome and in people's interests, unfamiliar though the link might seem. For example, the website Pandora tracks people's music preferences, from which it can make some inferences about likely tastes and judgments about other matters, including politics.⁴²

³⁹ I am bracketing the possibility that entitlements are a product of a “spontaneous order” of some sort, rather than of any kind of decision.

⁴⁰ Of course leveraging and ordinary market arrangements also come with a kind of default rule: unless people make an active choice, they will have no good, no service, and no employment.

⁴¹ See Peter Bowal, *Reluctance to Regulate: The Case of Negative Option Marketing*, 36 AM. BUS. L.J. 377, 378-79 (1999).

⁴² For evidence to this effect, see Natasha Singer, *Listen to Pandora, and It Listens Back*, N.Y. TIMES, Jan. 5, 2014, at BU3, available at http://www.nytimes.com/2014/01/05/technology/pandora-mines-users-data-to-better-target-ads.html?hpw&rref=technology&_r=2&, and consider in particular: “During the next

We could also imagine cases in which people are explicitly asked to choose whether they want to choose.⁴³ Consumers might be asked: Do you want to choose your cell phone settings, or do you want to be defaulted into settings that seem to work best for most people, or for people like you? Do you want to choose your own health insurance plan, or do you want to be defaulted into the plan that seems best for people in your demographic category? In such cases, many people may well decide in favor of a default rule, and thus decline to choose, because of a second-order desire not to do so. They might not trust their own judgment; they might not want to learn. The topic might make them anxious. They might have better things to do.

This approach – simplified active choosing, in the form of active choosing with the option of using a default -- has considerable promise and appeal, not least because it avoids at least many of the influences contained in a default rule,⁴⁴ and might therefore seem highly respectful of autonomy while also giving people the ability to select the default. For cell phone settings or health insurance plans, active choosers can choose actively if they like, while others can (actively) choose the default. Note, however, that simplified active choosing is not quite a perfect solution, at least for those people who genuinely do not want to choose. After all, they are being asked to do exactly that. At least some of those people likely do not want to have to choose between active choosing and a default rule, and hence they would prefer a default rule to an active choice between active choosing and a default rule. Even that active choice takes time and effort, and imposes costs, and some or many people might not want to bother. In this respect, supposedly libertarian paternalism, in the form of an active choice between active choosing and a default, itself has a strong nonlibertarian dimension – a conclusion that brings us directly to the next section.

III. Choice-Requiring Paternalism

A. Does the Nanny State Forbid Choosing Not to Choose?

Is it paternalistic to require active choosing, when people would prefer not to choose? To answer that question, we have to start by defining paternalism. There is of course an immensely large literature on that question.⁴⁵ Let us bracket the hardest questions and note that while diverse definitions have been given, it seems clear that the unifying theme of paternalistic approaches is that *a private or public institution does not*

federal election cycle, for instance, Pandora users tuning into country music acts, stand-up comedians or Christian bands might hear or see ads for Republican candidates for Congress. Others listening to hip-hop tunes, or to classical acts like the Berlin Philharmonic, might hear ads for Democrats.” *Id.*

⁴³ See Bartling et al., *supra* note, which shows that people will often say “yes,” other things being equal, thus supporting the conclusion that decision rights have intrinsic value. We can agree with that conclusion while also asserting that in some cases, the intrinsic value will be outweighed by the instrumental value of delegation (as, for example, where people believe they will err, or where people are busy).

⁴⁴ See Rebonato, *supra* note.

⁴⁵ See, e.g., PATERNALISM (Christian Coons & Michael Weber eds., 2013); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988).

*believe that people's choices will promote their welfare, and it is taking steps to influence or alter people's choices for their own good.*⁴⁶

What is wrong with paternalism, thus defined? Those who reject paternalism typically invoke welfare, autonomy, or both.⁴⁷ They tend to believe that individuals are the best judges of what is in their interests, and of what would promote their welfare, and that outsiders should decline to intervene because they lack crucial information.⁴⁸ John Stuart Mill himself emphasized that this is the essential problem with outsiders, including government officials. Emphasizing the importance of avoiding paternalism on explicitly welfarist grounds, Mill insisted that the individual “is the person most interested in his own well-being,”⁴⁹ and the “ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.”⁵⁰ When society seeks to overrule the individual’s judgment, it does so on the basis of “general presumptions,” and these “may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases.”⁵¹ Mill’s goal was to ensure that people’s lives go well, and he contended that the best solution is for public officials to allow people to find their own path.⁵²

Recall that this is an argument about welfare, grounded in a claim about the superior information held by individuals. But there is an independent argument from autonomy,⁵³ which emphasizes that even if people do not know what is best for them, and even if they would choose poorly, they are entitled to do as they see fit (at least so long as harm to others, or some kind of collective action problem, is not involved). On this view, freedom of choice has intrinsic and not merely instrumental value. It is an insult to individual dignity, and a form of infantilization, to eliminate people’s ability to go their own way.⁵⁴

Whether or not these objections to paternalism are convincing,⁵⁵ there are legitimate questions about whether and how they apply to people whose choice is not to choose. On reflection, they apply quite well, and so choice-requiring paternalism is no oxymoron. People might decline to choose for multiple reasons. They might believe that they lack information or expertise. They might fear that they will err. They might not enjoy the act

⁴⁶ For a valuable and relevant discussion, bearing particularly on means paternalism, see B. Douglas Bernheim & Antonio Rangel, *Beyond Revealed Preference: Choice Theoretic Foundations for Behavioral Welfare Economics*, 124 Q.J. ECON. 51 (2009).

⁴⁷ Rebonato, *supra* note, is an especially helpful discussion.

⁴⁸ FRIEDRICH HAYEK, *THE MARKET AND OTHER ORDERS* 384-86 (Bruce Caldwell ed., 2014).

⁴⁹ John Stuart Mill, *On Liberty* (Kathy Casey ed., 2002) (1859).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See also HAYEK, *supra* note.

⁵³ For a recent version, see Wright & Ginsburg, *supra* note.

⁵⁴ For an illuminating and skeptical discussion, suggesting that overriding choices need not entail a lack of respect, see CONLY, *supra* note.

⁵⁵ For detailed discussion, see *id.*; CASS R. SUNSTEIN, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* (2014).

of choosing; they might like it better if someone else decides for them. They might not want to incur the emotional costs of choosing, especially for situations that are painful or difficult to contemplate (such as organ donation or end-of-life care). They might find it a relief,⁵⁶ or even fun, to delegate. They might not want to take responsibility.⁵⁷ They might be too busy.⁵⁸ They might not want to pay the psychic costs associated with regretting their choice.⁵⁹ Active choosing saddles the chooser with responsibility for the choice, and reduces their welfare for that reason.

In daily life, people defer to others, including friends and family members, on countless matters, and they are often better off as a result. In ordinary relationships, people benefit from the functional equivalent of default rules, some explicitly articulated, others not. Within a marriage, for example, certain decisions (such as managing finances or planning vacations) might be made by the husband or wife by default, subject to opt-out in particular circumstances. That practice has close analogues in many contexts in which people are dealing with private or public institutions and choose not to choose. Indeed, people are often willing to pay others a great deal to make their choices for them. But even when there is no explicit payment or grant of the power of agency, people might well prefer a situation in which they are relieved of the obligation to choose, because such relief will reduce decision costs, error costs, or both.

Suppose, for example, that Jones believes that he is not likely to make a good choice about his retirement plan, and that he would therefore prefer a default rule, chosen by someone who is a specialist in the subject at hand. In Mill's terms: Doesn't Jones know best? Or suppose that Smith is exceedingly busy, and wants to focus on her most important concerns, not on a question about the right health insurance plan for her, or even about the right privacy setting on her computer. Doesn't Mill's argument support respect for Smith's choice? In such cases, the welfarist arguments seem to argue in favor of deference to the chooser's choice, even if that choice is not to choose. If we believe in freedom of choice on the ground that people are uniquely situated to know what is best for them,⁶⁰ then that very argument should support respect for people when they freely choose not to choose.

Or suppose that Winston, exercising his or her autonomy, decides to delegate decisionmaking authority to someone else, and thus to relinquish the power to choose, in a context that involves health insurance, energy providers, privacy, or credit card plans. Is it an insult to Winston's dignity, or instead a way of honoring it, if a private or public institution refuses to respect that choice? It is at least plausible to suppose that respect for

⁵⁶ For related discussion, see Edna Ullmann-Margalit, *On Not Wanting to Know*, in REASONING PRACTICALLY (Edna Ullmann-Margalit ed., 2000).

⁵⁷ See Dwengler et al., *supra* note, for an emphasis on delegation to a randomized process.

⁵⁸ See MULLAINATHAN & SHAFIR, *supra* note.

⁵⁹ Thaler, *supra* note. *But see* Jeffrey R. Brown et al., *The Downside of Defaults* (Nat'l Bureau Econ. Res. Working Paper No. 12-05, 2012), available at <http://www.nber.org/aging/rrc/papers/onb12-05.pdf> (finding higher levels of regret in cases in which people went with a default rather than making an active choice).

⁶⁰ See HAYEK, *supra* note.

autonomy requires respect for people's decisions about whether and when to choose. That view seems especially reasonable in view of the fact that people are in a position to make countless decisions, and they might well decide that they would like to exercise their autonomy by focusing on their foremost concerns, not on what seems trivial, boring, or difficult.⁶¹ Note here that "a substantial number of" studies find that patients "do not want to make their own medical decisions, or perhaps even to participate in those decisions in any very significant way."⁶²

This point raises a broader question: In general, are people genuinely bothered by the existence of default rules, or would they be bothered if they were made aware that such rules had been chosen for them? We do not have a full answer to this question; the setting, and the level of trust, undoubtedly matter. But note in this regard the empirical finding, in the context of end-of-life care, that even when they are explicitly informed that a default rule is in place, and that it has been chosen because it affects people's decisions, there is essentially no effect on what people do – a finding that suggests that people are not uncomfortable with defaults.⁶³

To be sure, we could imagine hard cases in which a choice not to choose seems to be an alienation of freedom. In the extreme case, people might choose to be slaves or otherwise to relinquish their liberty in some fundamental way.⁶⁴ In a less extreme case, people might choose not to vote, not in the sense of failing to show up at the polls, but in the sense of (formally) delegating their vote to others. Such delegations are impermissible,⁶⁵ perhaps because they would undo the internal logic of a system of voting (in part by creating a collective action problem that a prohibition on vote-selling solves⁶⁶), but perhaps also because individuals would be relinquishing their own freedom. Or perhaps people might choose not to make choices with respect to their religious convictions, or their future spouse,⁶⁷ and they might delegate those choices to others. In cases that involve central features of people's lives, we might conclude that freedom of choice cannot be alienated and that the relevant decisions must be made by the individuals themselves. It is a complex question which cases fall in this category.⁶⁸ But even if the category is fairly large, it cannot easily be taken as a *general* objection to the

⁶¹ See Esther Duflo, Tanner Lectures on Human Values and the Design of the Fight Against Poverty (May 2, 2012), <http://economics.mit.edu/files/7904>.

⁶² Schneider, *supra* note, at 41.

⁶³ See George Loewenstein et al., *Warning: You Are About To Be Nudged* (2014) (unpublished manuscript).

⁶⁴ For an overview, see Andrew Sneddon, *What's Wrong with Selling Yourself Into Slavery? Paternalism and Deep Autonomy*, 73 CRÍTICA REVISTA HISPANOAMERICANA DE FILOSOFIA 97 (2001).

⁶⁵ See Steven Rieber, *Vote-Selling and Self-Interested Voting*, 15 PUB. AFF. Q. 35 (2001).

⁶⁶ The basic idea is that if vote-selling were permitted, voting power could be concentrated in individuals or individual entities, and while decisions to sell might be individually rational, the result would be bad from the standpoint of a large group of vote-sellers. See *id.*

⁶⁷ For relevant discussion, see Amitrajeet Batabyal, *On the Likelihood of Finding the Right Partner in an Arranged Marriage*, 30 J. SOCIO-ECON. 273 (2001); Conly, *supra* note.

⁶⁸ CONLY, *supra* note.

proposition that on autonomy grounds, people should be allowed not to choose in multiple domains.

It is important to acknowledge that the choice not to choose may not be in the chooser's interest (as the chooser would define it). For that reason, choice-requiring paternalism might have a welfarist justification. Perhaps the chooser chooses not to choose only because he lacks important information (which would reveal that the default rule might be harmful) or suffers from some form of bounded rationality. A behavioral market failure (understood as a nonstandard market failure that comes from human error⁶⁹) might infect a choice not to choose, just as it might infect a choice about what to choose.

A non-chooser might, for example, be unduly affected by "availability bias" because of an overreaction to a recent situation in which his own choice went wrong.⁷⁰ Or perhaps the chooser is myopic and is excessively influenced by the short-term costs of choosing, which might require some learning (and hence some investment), while underestimating the long-term benefits, which might be very large. A form of "present bias"⁷¹ might infect the decision not to choose. People might face a kind of intrapersonal collective action problem, in which such a decision by Jones, at Time 1, turns out to be welfare-reducing for Jones at Times 2, 3, 4, and 5.

But for those who reject paternalism, these kinds of concerns are usually a justification for providing more and better information – not for blocking people's choices, including their choices not to choose. In these respects, the welfarist objections to paternalism seem to apply as well to those who insist on active choosing. Of course welfarists might be wrong to object to paternalism.⁷² But with respect to their objections, the question is whether the choice not to choose is, in general or in particular contexts, likely to go wrong, and in the abstract, there is no reason to think that that particular choice would be especially error-prone. In light of people's tendency to overconfidence, the choice not to choose might even be peculiarly likely to be right, which would create serious problems for choice-requiring paternalism.⁷³

Consider in this regard evidence that people spend too much time trying to make precisely the right choice, in a way that leads to significant welfare losses. In many situations, people underestimate the temporal costs of choosing, and exaggerate the benefits, producing "systematic mistakes in predicting the effect of having more, vs. less, choice freedom on task performance and task-induced affect."⁷⁴ If people make such

⁶⁹ See BAR-GILL, *supra* note; SUNSTEIN, WHY NUDGE?, *supra* note.

⁷⁰ A good overview is ROLF REBER, *Availability*, in COGNITIVE ILLUSIONS 147 (Rudiger F. Pohl ed., 2012).

⁷¹ For a summary, see SUNSTEIN, *supra* note.

⁷² See CONLY, *supra* note.

⁷³ See ULRICH HUFFRAGE, *Overconfidence*, in COGNITIVE ILLUSIONS, *supra* note, at 235.

⁷⁴ See Botti & Hsee, *supra* note, at 161.

systematic mistakes, it stands to reason that they might well choose to choose in circumstances in which they ought not to do so on welfare grounds.

My aim is not to endorse the welfarist rejection of paternalism; it is only to say that the underlying arguments apply to all forms of paternalism, including those that would interfere with the decision not to choose. To be sure, some welfarists are willing to interfere with people's choices; they may well be libertarian or nonlibertarian paternalists.⁷⁵ The central points are that the standard welfarist arguments on behalf of freedom of choice apply to those who (freely) choose not to choose, and that those who want to interfere with such choices might well be paternalists. And from the standpoint of autonomy, interference with the choice not to choose can be paternalistic as well, and therefore objectionable to those who reject paternalism, unless it is fairly urged that that choice counts as some kind of alienation of freedom (as in the case of slavery and arguable analogues, discussed above⁷⁶).

B. Cases

In which cases would it be paternalistic to reject a choice not to choose? Begin with (a) above.⁷⁷ Suppose that people are subjected to criminal punishment if they do not choose (for example to vote or to purchase health care) and that they wish not to choose. To know whether paternalism is involved, we need to identify the reason that people are being forced to choose. If people face some kind of collective action problem, and if coercion is meant to solve that problem, paternalism is not involved. But if public officials believe that it is best for people if they choose, and if they are punishing people in order to ensure that they do what is best for them, then we have a case of paternalism. Everything turns on the reason for the punishment.

Whether or not people should be forced to vote or to purchase health care, there is a plausible argument that in both contexts, the goal of coercion is to solve a collective action problem. But we could easily imagine cases in which people are being forced to choose on the ground that it is good for them to do so, even if they think otherwise. Some of those who support both compulsory voting and the "individual mandate" for health insurance believe exactly that. In the latter context, the idea might be that people suffer from inertia⁷⁸ or fail to make a choice that will protect them in the event that things go unexpectedly wrong.

⁷⁵ See CONLY, *supra* note.

⁷⁶ An exploration of these cases would require an assessment of some foundational issues. Note, however, that when choosing not to choose seems to be an alienation of liberty, it appears to be because in the context at hand, people are required to take responsibility for their own decision, and that a delegation to others, or a relinquishment of authority, seems to be an abdication of that responsibility. It is for this reason that slavery is a defining case, and that a delegation of the power to vote, or to choose one's spouse, would raise serious problems. These are of course very brief and inadequate remarks on a complex subject.

⁷⁷ See *supra* Part II(a).

⁷⁸ See Punam Keller et al., *Enhanced Active Choice: A New Method to Motivate Behavior Change*, 21 J. CONS. PSYCH. 376, 377-78 (2011).

Now turn to (b), which seems to involve many of the most interesting cases. In those cases, some choosers undoubtedly have a second-order preference not to choose, and active choosing interferes with or overrides that preference. Nonetheless, choice architects are imposing a requirement of active choosing in circumstances in which some or many people, faced with the option, would choose not to choose. Is active choosing paternalistic for that reason?

As before, the answer turns on *why* choice architects are insisting on active choice. In the case of organ donation, paternalism is not involved. The goal is to protect third parties, not choosers.⁷⁹ So too with a case in which a choice architect favors a default rule that reduces environmental harms; in such cases, third parties are at risk.⁸⁰ But suppose that as a condition for entering into an employment relationship, people are asked or required to make an active choice with respect to their retirement plan; suppose too that choice architects believe that it is good for them to do so, even though prospective employees disagree (and would prefer to be defaulted). If so, then choice architects are acting paternalistically. In such cases, those who insist on active choosing are hardly avoiding paternalism; they are engaging in it.

It might seem puzzling to suggest that paternalism might be involved in (c). How can it be paternalistic to say that you do not own a pair of shoes, a tablet, an automobile, or a fish sandwich unless you have actively chosen it? The question is a good one, but it should not be taken as rhetorical; everything depends on the reasons that underlie the creation of a particular system of choice architecture.⁸¹ To be sure, there are many justifications for free markets and active choosing, and a number of them have nothing to do with paternalism. Some of those justifications speak of efficiency and others of liberty or autonomy.⁸² But suppose that we think that active choosing is a way to ensure that people develop certain characteristics and tastes. Suppose that the idea is that choosers gain independence, self-sufficiency, and a sense of initiative, and that a system of active choosing (subject to background entitlements) is desirable for exactly that reason. That would be a paternalistic justification.

This view is hardly foreign to those who emphasize the importance of freedom of choice; it plays a significant role in Mill's own defense of liberty.⁸³ It is also a cousin of an early defense of free markets, memorably sketched by Albert Hirschmann, which emphasizes that free commerce creates a certain kind of culture, in which traditional

⁷⁹ I turn to the resulting issues in Part VIII.

⁸⁰ See Sunstein & Reisch, *supra* note.

⁸¹ I am bracketing here the question whether markets can be seen as a kind of spontaneous order, or whether they should be seen as a product of conscious design. For a valuable discussion, see Edna Ullmann-Margalit, *Invisible Hand Explanations*, 39 *SYNTHESE* 263 (1978).

⁸² See Friedrich Hayek, *The Road to Serfdom* (1945), for a classic discussion, emphasizing both welfare and autonomy (understood as liberty); Richard A. Epstein, *The Classical Liberal Constitution* (2014), is in a similar vein, with an emphasis on a certain understanding of the Constitution.

⁸³ See MILL, *supra* note.

social antagonisms, based on religion and ethnicity, are softened as people pursue their economic interests.⁸⁴ For at least some of those who prize active choosing, the concern is not softening of social divisions, but the development of engaged, spirited, informed people. Those who favor active choosing often embrace a form of liberal perfectionism, embodied in the idea that the government legitimately promotes certain desirable characteristics, on the ground that it is best for people to have those characteristics.⁸⁵ To the extent that active choosing promotes independence, self-sufficiency, and a sense of initiative, it might be preferred on perfectionist grounds, even if people would choose not to choose.

To be sure, it is not exactly standard to see those who embrace free markets as favoring any kind of paternalism, and it is often wrong to see them in that way, because other justifications are available, and because people often do in fact have a first-order desire to choose, certainly in cases that fall in category (c).⁸⁶ But suppose that private or public institutions favor active choosing, and reject mandates or default rules, because they want to influence people for their own good. Recall our working definition, which suggests that paternalism is involved when a private or public institution does not believe that people's choices will promote their welfare, and it is taking steps to influence or alter people's choices for their own good. If people have a second-order desire not to choose, and if active choosing overrides that choice, then paternalism is indeed involved, even in cases that fall in category (c). I will turn to some complications, for cases that fall in that category, in Part VIII.

IV. Active Choosing As Choice Architecture

A. In Defense of Active Choosing

What might be said on behalf of active choosing and hence against choosing not to choose?⁸⁷ The answer is fairly clear if the antonym is a mandate or a ban.⁸⁸ But suppose that the alternative is a default rule, which maintains freedom of choice. Why is active choosing better than that?

Consider an analogy. In constitutional law, the Supreme Court has often spoken of the nondelegation doctrine, which forbids Congress from delegating its legislative

⁸⁴ See ALBERT HIRSCHMANN, *THE PASSIONS AND THE INTERESTS* (1997).

⁸⁵ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); liberal perfectionism is criticized by John Rawls, *Political Liberalism* (1991).

⁸⁶ See Ernst Fehr et al., *supra* note.

⁸⁷ This section and section V borrow from Sunstein, *supra* note; Sunstein & Reisch, *supra* note. For valuable discussion, overlapping with that here, see Gabriel Carroll et al., *Optimal Defaults and Active Decisions*, 124 Q.J. ECON. 1639 (2009); Bruce Carlin et al., *Libertarian Paternalism, Information Sharing, and Financial Decision-Making* (2010) (unpublished manuscript).

⁸⁸ The point is not that a mandate or ban is always bad, but that it might reduce welfare or compromise autonomy, and it needs some kind of justification, standardly in the form of a market failure.

authority.⁸⁹ The central idea is that Congress must choose, at least insofar as it must state some kind of “intelligible principle.”⁹⁰ Congress is forbidden from choosing to allow others to choose that principle. In this respect, the nondelegation doctrine requires a form of active choosing on the part of the national legislature. It is the institutional analogue to the idea that individuals should not choose not to choose.

The problem, of course, is that the courts have shown little enthusiasm for enforcing the doctrine, in part because it may be a good idea for Congress not to choose, for the same reasons that lead individuals to choose not to choose.⁹¹ Congress may lack expertise. It might be busy and lack “bandwidth.” On some questions, it might trust agencies more than it trusts itself, perhaps because they are able to master technical details. Whether or not an intelligible principle should be formally required,⁹² a legislative choice not to choose – in the sense of a choice to delegate considerable discretion to others – often makes a great deal of sense.⁹³ For courts to overrule that choice would not be exactly paternalistic, but it would count as a form of intrusion into judgments that the national legislature is often in the best position to make.

In this Part, I aim to uncover the factors that both choice architects and choosers might consider when they are deciding whether to favor active choosing or instead some kind of default rule.⁹⁴ At least as a presumption, the preferences of choosers, on that very question, should be respected. We have seen that if private or public institutions do not respect those preferences, it must be because of some kind of error on the part of choosers, perhaps in the form of a lack of information, perhaps in the form of some kind of behavioral bias. The considerations that might justify a refusal to respect the choice not to choose are essentially identical to the considerations that would justify a refusal to respect any other choice – with an additional factor, involving the importance of learning and of developing one’s preferences.⁹⁵

We shall see that there are several strong arguments in favor of active choosing, but there is also a tempting response that falls somewhat short. That response is that in many contexts, people affirmatively like to choose, and active choosing is desirable for that reason. The premise is certainly correct. Sometimes people do prefer to choose, and indeed they would retain their authority to choose even if delegation would in their material interest.⁹⁶ This point argues strongly against coercion in the form of mandates

⁸⁹ *Schechter Poultry Corp. v. US*, 295 U.S. 495, 541-42 (1935). For discussion, see Cass R. Sunstein, *Nondelegation Canons*, *U Chi L Rev* (2000).

⁹⁰ *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 472 (2001).

⁹¹ See Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. CHI. L. REV.* 1721 (2002).

⁹² See *id.*

⁹³ See *id.* at 1744.

⁹⁴ Precommitment strategies, by which people bind themselves, raise distinctive issues, and I do not discuss them here. See JON ELSTER, *ULYSSES AND THE SIRENS* (1981).

⁹⁵ See *supra* Part IV.A.

⁹⁶ See Ernst Fehr et al., *supra* note.

and bans. But it is not clearly an objection to the use of default rules. If such rules are in place, people retain freedom of choice, and they can reject the default. True, it may be best to ask active choosers whether they want to rely on a default, rather than simply to rely on a default, but in either case, people are free to choose.⁹⁷ The strongest arguments on behalf of active choosing lie elsewhere.

1. Learning

a. The basic problem. As we have seen, active choosing promotes learning and thus the development of preferences. Mill made the essential point, emphasizing that “the free development of individuality is one of the leading essentials of well-being” and indeed that “it is not only a coordinate element with all that is designated by the terms civilization, instruction, education, culture, but is itself a necessary part and condition of all those things.”⁹⁸ Mill noted that conformity to custom “does not educate or develop . . . any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgment, discriminative feeling, mental activity, are exercised only in making a choice The mental and moral, like the muscular powers, are improved only by being used.”⁹⁹

There is strong evidence that Mill was right. Libertarian paternalists often refer to the GPS as a prime nudge,¹⁰⁰ because it helps people to find the right route while also allowing them to go their own way. But there is a downside, which is that use of the GPS can make it harder for people to know how to navigate the roads. Indeed, London taxi drivers, not relying on the GPS, have been found to experience an alteration of their brain functions as they learn more about navigation, with actual changes in physical regions of the brain.¹⁰¹ As the GPS becomes widespread, that kind of alteration will not occur, thus ensuring that people cannot navigate on their own. This is an unusually dramatic finding, to be sure, but it raises the possibility that when people rely on defaults or on other nudges, rather than on their own active choices, some important capacities will fail to develop or may atrophy.¹⁰² This is the anti-developmental consequence of some helpful nudges, including the GPS itself.

Choosers may themselves favor active choosing, and reject defaults, for exactly these reasons. They might want to develop their own faculties. For their part, choice architects might know that a certain outcome is in the interest of most people, but they might also believe that it is independently important for people to learn about the underlying questions, so that they can use the “stock” of what they learn to make choices

⁹⁷ For some cautionary notes, emphasizing the power of defaults, see Rebonato, *supra* note, at 5.

⁹⁸ MILL, *supra* note.

⁹⁹ *Id.*

¹⁰⁰ See Richard H. Thaler and Will Tucker, Smarter Information, Smarter Consumers, Harvard Business Review (2013), available at <http://hbr.org/2013/01/smarter-information-smarter-consumers/ar/1>

¹⁰¹ Eleanor A. Maguire et al., *Navigation-Related Structural Changes in the Hippocampi of Taxi Drivers*, 97 PROC. NAT'L ACAD. SCI. 4398 (2000).

¹⁰² See Rebonato, *supra* note, at 49.

in multiple areas in the future. In the context of financial decisions, it may be valuable for people to develop the kinds of understandings that will enable them to choose well for themselves. The same point holds for decisions relating to health care. With respect to health insurance, choosers may wish to choose, not because they enjoy the process, but because they would like to learn, and perhaps choice architects believe that that would be a good idea as well. And while doctors might be tempted to choose some kind of default rule in difficult cases, and to suggest that patients ought to rely on it, they might reject that approach in favor of a strong presumption of patient autonomy, offering information but asking for an active choice, in part so that patients learn.

The point is not to suggest any particular judgment about these examples. It might well turn out that on balance, the justification for active choosing is unconvincing. But we could easily imagine a kind of science fiction tale, envisioning a Brave New World in which people are defaulted into a large number of good outcomes, or even choose to be so defaulted, but are made comfortable but thereby deprived of agency and learning. In the word of Huxley's novel: "A really efficient totalitarian state would be one in which the all-powerful executive of political bosses and their army of managers control a population of slaves who do not have to be coerced, because they love their servitude."¹⁰³ If some people fear that default rules threaten to infantilize people, the underlying concern lies here. Consider the pleas of Huxley's hero, the Savage, surrounded by a world of comfortable defaults: "But I don't want comfort. I want God, I want poetry, I want real danger, I want freedom, I want goodness. I want sin."¹⁰⁴ Or consider this passage¹⁰⁵:

All right then," said the savage defiantly, I'm claiming the right to be unhappy."

"Not to mention the right to grow old and ugly and impotent; the right to have syphilis and cancer; the right to have too little to eat, the right to be lousy; the right to live in constant apprehension of what may happen tomorrow; the right to catch typhoid; the right to be tortured by unspeakable pains of every kind."

There was a long silence.

"I claim them all," said the Savage at last."

Such objections should not be romanticized (as Huxley tended to) or overstated. Syphilis and cancer, typhoid and torture, and having too little to eat are likely to be "claimed" by those who have never suffered from those things. Nonetheless, there are important domains in which learning is important and active choosing is necessary to promote it. Here, then, is an enduring argument for choice-requiring paternalism.¹⁰⁶

¹⁰³ Aldous Huxley, *Brave New World* yy (19zz).

¹⁰⁴ Aldous Huxley, *Brave New World* xx (19xx).

¹⁰⁵ *Id.* at YY.

¹⁰⁶ *See id.* at 53 ("Indeed, given the incessant drumming by the behavioural economists and the libertarian paternalists about how bad we are at making choices, it would not be surprising if theirs became a self-fulfilling prophecy. And when these conclusions about human nature are reached, liberalism becomes a rather vacuous concepts, and loses the enriching and capability-enhancing features it has possessed at the very least since the work of Mill.").

b.. *Self-narrowing*. We have seen that these points raise concerns about any approach that defaults people into certain outcomes on the basis of their own past choices. Suppose, for example, that a political system defaulted people into voting for political candidates of the same party for which they previously voted (subject to opt out). Such a system would unquestionably reduce the burdens of voting, simply because people's preferences would be registered automatically. We might well think that for many voters, that system would be desirable, because it would reduce the costs of decisions without much increasing the costs of errors. But there is a strong argument that it would be inconsistent with a goal of a democratic system, which is to ensure continuing learning and scrutiny by voters.

If that goal is taken seriously, we would object not only to "default voting," based on people's past choices, but also to a system in which people actively choose to enroll in default voting, on the ground that the aspiration to learning and continuing scrutiny forbid even active enrollment into default voting. If people could enroll into default voting, the registration of preferences and values would, in a sense, be too automatic, because it would not reflect any kind of active, current judgment about candidates and issues. As a preliminary test of the question, I conducted a small experiment at a large university, asking about seventy students the following question:

You live in a state that is considering a system of "default voting," in accordance with which people could set up party-line votes in advance. In this system, they could go online, at any time, to partyvote.gov, and say that they want to vote for all Republicans or all Democrats in the coming election. What do you think of this idea? (Assume the site is completely secure.)

A strong majority (79 percent) disapproved of the idea. Interestingly, over one-fifth approved of it, apparently on the ground that it would increase convenience. But the widespread approval testifies to a norm in favor of a more active form of participation. I also asked a different group of people, recruited from Amazon Mechanical Turk, the same question, and here the numbers were essentially identical, with 78 percent (of fifty) rejecting that system. It is possible that such disapproval merely suggests a prevailing social norm, which could be changed as technology evolves. But the norm might well be taken to suggest a defensible social judgment in favor of relatively active engagement in choosing among candidates.

Or consider the website Pandora, which allows people to identify a favorite song or singer, and which devises a kind of default music station on the basis of that choice. The website has many virtues, and it is a lot of fun, but there is a risk to learning and self-development in any situation in which people are defaulted into a kind of echo chamber, even if they themselves took the initial step to devise it.¹⁰⁷ The same might be said about Netflix, which does not exactly use defaults (in the sense of playing music or movies

¹⁰⁷ For an extended argument to this effect, see Cass R. Sunstein, REPUBLIC.COM (2001).

even when one does nothing), but which assembles a set of suggestions, based on people's previous choices (and evaluations). Netflix's kind of fine-tuning, which allows a great deal of precision in the resulting suggestions, obviously produces large welfare benefits, because people see what they are highly likely to like (and can choose it – actively, not by default). The question is whether the welfare benefits come at a cost, in the form of inevitable self-narrowing, simply because the relevant suggestions are based on previous choices, and do not encourage people to branch out.

c. *An objection.* Let us step back from the particular examples and notice that there is a formidable objection to the learning-based argument for active choosing. The objection is that *people do and should learn about whether to choose actively or instead to choose not to choose.*¹⁰⁸ People sometimes decide correctly, and sometimes they err, in making that particular choice, as in making all other choices. It is important for people to learn, over time, about when they should be choosing and when they should be relying on a default rule (and accepting the force of inertia or the power of suggestion¹⁰⁹). That form of second-order learning is exceedingly important. The problem is that those who insist on active choosing, or even favor it, will reduce or prevent learning along this important dimension. Claiming to promote learning and the development of values and preferences, they truncate such learning and such development about an extremely important set of questions.

In light of this objection, the argument from learning must be more refined. It must be that in particular cases, it is especially important that people engage in first-order rather than second-order learning, because the subject is one for which they should accumulate some kind of “capital” – as, for example, by learning about what they actually like (in terms of, say, politics, art, or music) or by developing an understanding of certain matters that very much affect how their lives will unfold over time (in terms of, say, health insurance or investments). In some such cases, the argument for active choosing may be convincing -- perhaps because people are subject to inertia or a form of myopia that leads them to favor a default. Nonetheless, it must be acknowledged that second-order learning might therefore be compromised.

2. Overcoming Error-Prone or Ill-Motivated Choice Architects

When choice architects lack relevant information, so that the chosen rule might be harmful to some or many, there are significant advantages to active choosing, and choosers might appreciate that fact. Suppose that a private institution is producing the default rule, and it really does not know a great deal about what informed people would choose. In the context of ice cream flavors, tablets, cell phones, and sneakers, people tend to know what they like, and while advice might be welcome, active choosing is far better than an impersonal default rule. The same is true for many activities and goods provided

¹⁰⁸ I am grateful to Adrian Vermeule for pressing this point.

¹⁰⁹ See N. Craig Smith et al., *Choice Without Awareness*, 32 J. PUB. POL'Y & MARKETING 159, 161 (2013).

by private institutions. Market pressures can lead such institutions to a good mix of default rules and active choosing, fitting the desires of diverse customers.

Or suppose that the government is producing the default rule. If public officials are biased or inadequately informed, and if the default rule is no better than a guess, that rule might lead people in the wrong direction. Followers of Friedrich Hayek,¹¹⁰ emphasizing “the knowledge problem,” emphasize that public officials will inevitably know less than participants in the market do.¹¹¹ An appreciation of the knowledge problem might well argue in favor of active choosing. The same point argues against a default rule, and in favor of active choosing, when self-interested private groups are calling for government to select it even though it would not benefit those on whom it is imposed. Active choosing is much less risky on these counts. If choosers do not trust public officials — perhaps because they do not know everything, perhaps because their motivations may not be pure — they might like active choosing best, and have no interest in choosing not to choose.¹¹²

3. Handling Changes Over Time

Choosers might be aware that default rules are usually static, and if situations change over time, such rules might be suboptimal even if they were sensible when originally imposed.¹¹³ By contrast, active choosing could be designed in such a way as to require periodic revelation of chooser’s preferences. In markets, such dynamism is essentially guaranteed. People purchase goods and services as they want or need them, and as they develop new tastes (for, say, soap, or sneakers, or cell phones), those new tastes will be registered at the time of purchase.

In theory, of course, default rules could also change over time. An all-knowing choice architect could project how tastes are likely to evolve, perhaps by generalizing from the behavior of large populations. We might know, for example, that young people are more likely to select certain retirement plans (with high risks over the short-term) and that older people are more likely to select very different plans. But in practice, and outside of the context of a few relatively clear cases, it might be hard to produce accurate projections. Even if this challenge could be surmounted, evolving default rules might less accurately reflect choosers’ situation than would active choosing. Choosers themselves might choose to run the risk of inaccuracy, especially if they are not much interested in the area at hand, or if the stakes are relatively low.¹¹⁴ But in many cases, the possibility of changes over time argue strongly in favor of active choosing.

¹¹⁰ Friedrich Hayek, *The Uses of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

¹¹¹ See, e.g., L. Lynne Kiesling, *Knowledge Problem* (Working Paper, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001633.

¹¹² See Rebonato, *supra* note, at 50-51.

¹¹³ See James Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance*, in TAX POLICY AND THE ECONOMY (James Poterba ed., 2002).

¹¹⁴ See Sidney Morgenbesser & Edna Ullmann-Margalit, *Picking and Choosing*, 44 SOC. RES. 757 (1977).

4. Heterogeneity

Active choosing appropriately handles diversity. As compared with either opt-in or opt-out, active choosing can have major advantages when the relevant group is heterogeneous, so that a single approach is unlikely to fit diverse circumstances. If one size does not fit all for health insurance or savings, then choice architects might want to ensure that people make choices on their own. For this reason, active choosing may be far better. In the face of diversity, a default rule might be especially harmful, because the power of inertia, or the force of suggestion, may mean that many people will end up in a situation that is not in their interest. People might be far better off if they are asked, “what health insurance plan do you like best?” than if they are automatically enrolled in a plan chosen by their employer.

True, freedom of choice, in the form of the ability to opt out, is an important safeguard against the problem of one-size-fits-all, but because of the effects of inertia and the power of suggestion, some people will stick with a default even when it does not fit their situation. And to be sure, a personalized default rule, designed to fit people’s diverse situations, might reduce the problem of heterogeneity. But design of personalized defaults can present serious challenges of its own, especially when the choice architect has limited information.¹¹⁵

5. Overcoming Inertia

Because a decision is required, active choosing overcomes inertia, as a default rule will not.¹¹⁶ Suppose that inertia and procrastination are playing a significant role in ensuring that people do not give serious consideration to the possibility that the default rule is not in their interest. If so, active choosing may be an excellent corrective, even if it is mandatory. Such choosing requires people to incur effort costs that might otherwise lead them to focus on other matters. Consider savings plans, health insurance, and privacy settings. The problem with an opt-in default rule is that it will likely ensure that some people end up with outcomes that they would not select if they were to make a choice. A key virtue of active choosing is that it increases the likelihood that people will end up with their desired outcomes. For this reason, choice architects might favor it.

B. Against Active Choosing (and for Not Choosing)

1. Which Track?

Notwithstanding its potential benefits, active choosing could also create serious problems, and it is hardly the right approach in all situations. Often people benefit from not choosing. To see why, consider the words of Esther Duflo, one of the world’s leading experts on poverty:

¹¹⁵ See Sunstein, *supra* note, at 48-52, 54; Sunstein & Reisch, *supra* note.

¹¹⁶ See Keller et al., *supra* note.

[W]e tend to be patronizing about the poor in a very specific sense, which is that we tend to think, “Why don’t they take more responsibility for their lives?” And what we are forgetting is that the richer you are the less responsibility you need to take for your own life because everything is taken care for you. And the poorer you are the more you have to be responsible for everything about your life . . . Stop berating people for not being responsible and start to think of ways instead of providing the poor with the luxury that we all have, which is that a lot of decisions are taken for us. If we do nothing, we are on the right track. For most of the poor, if they do nothing, they are on the wrong track.¹¹⁷

Duflo’s central claim is that people who are well off do not have to be responsible for a wide range of things, because others are making the relevant decisions, and to their benefit. In countless domains, choices are in fact “taken for us,” and such steps not only increase our welfare but also promote our autonomy, because we are freed up to spend our time on other matters.¹¹⁸ In ordinary life, most people in developed countries do not have to decide how and whether to make water safe to drink or air safe to breathe; we do not have to decide whether to build roads and refrigerators and airplanes; the Constitution settles the basic structure of the federal government, and we revisit that structure rarely if at all; the alphabet is given to us, not chosen by us. It is true and important that we may participate in numerous decisions through politics and markets. But often we rely on the fact that choices are made by others and we go about our business without troubling ourselves about them. This is a blessing, not a curse.

2. Burdens on Choosers

These points suggest a serious problem with active choosing, which is that it can impose large burdens on choosers. Many people do not or would not welcome those burdens. Suppose that the situation is unfamiliar and complicated. Suppose that people lack information or experience. If so, active choosing may impose unjustified or excessive costs on people; it might produce frustration and appear to require pointless red tape. Most consumers would not much like it if, at the time of purchase, they had to choose every feature of their cell phone plan or all of their computer’s initial settings. The existence of defaults saves people a lot of time, and most of them may well be sensible and suitable. Few consumers would like to spend the time required to obtain relevant information and to decide what choice to make. As compared with a default rule, active choosing increases the costs of decisions, sometimes significantly. In the process, active choosing can increase “decision fatigue,”¹¹⁹ thus creating problems for other, potentially more important decisions.

¹¹⁷ Susan Parker, *Esther Duflo Explains Why She Believes Randomized Controlled Trials Are So Vital*, CTR. FOR EFFECTIVE PHILANTHROPY (June 23, 2011), <http://www.effectivephilanthropy.org/blog/2011/06/esther-duflo-explains-why-she-believes-randomized-controlled-trials-are-so-vital/> (alteration in original).

¹¹⁸ See MULLIAINATHAN & SHAFIR, *supra* note.

¹¹⁹ See *id.*; Jonathan Levav et al., *Order in Product Customization Decisions: Evidence from Field Experiments*, 118 J. POL. ECON. 274, 287, 290 (2010).

3. Burdens on Providers

At the same time, active choosing can impose large burdens on providers. Choosers may not particularly care about those burdens, but they can end up having a range of adverse effects on choosers of all kinds. The basic point is that defaults can be desirable and even important for those who provide goods or services. The reason is that they avoid costs, which might result in increases in prices (and thus harm consumers as well). It is true that to build a system of good default rules, the costs of production might well increase. But without a series of default rules, and with constant active choosing, significant resources might have to be devoted to patient, tedious explanations and to elaborating the various options with consumers or users, who might not welcome the exercise. The experience of buying a cell phone or a laptop might be horrific if active choosing were required for every product characteristic. We could easily imagine a bit of science fiction, or perhaps a situation comedy, that makes this point especially vivid.

4. Errors

A final point, emphasized perhaps above all by those who prefer not to choose, is that active choosing can increase errors. The goal of active choosing is to make people better off by overcoming the potential mistakes of choice architects. But if the area is unfamiliar, highly technical, and confusing, active choosing might have the opposite effect. If consumers are required to answer a set of technical questions, and if the choice architects know what they are doing, then people will probably enjoy better outcomes with defaults. Perhaps it would be best to rely on experiments or pilot studies that elicit choices from informed people, and then to use those choices to build defaults. But if choice architects have technical expertise, and are trustworthy, there is a question whether this exercise would be worthwhile.

5. A Brief Accounting

It is time to venture a summary of the various considerations that might justify active choosing, or suggest instead that it is a big mistake. A simple framework, investigating the costs of decisions and the costs of errors, helps to explain when it make sense to choose, and when it makes sense to choose not to do so. That framework clarifies the decisions of choice architects as well.

To the extent that the area is unfamiliar and confusing, default rules are desirable, because they reduce both decision costs and error costs. But if choice architects are ignorant or biased, they will not be in good position to devise accurate default rules, and hence active choosing seems best. To the extent that there is relevant heterogeneity within the population of choosers, active choosing has real advantages, because it diminishes error costs. To the extent that preferences and situations change over time, there is a strong argument for active choosing, on the ground that any default rule may well become anachronistic. The value of learning, and of development of tastes and

preferences, may well argue on behalf of active choosing as well – a general theme that has run throughout the discussion and that argues against choosing not to choose.

In view of these considerations, a promising approach is often to ask people to make an active choice, but to inform them that they can rely on a default rule if they like. Under this approach, active choice is essentially the default, but people can reject it. Sometimes this approach minimizes decision costs and error costs, and it can also be seen to protect people’s autonomy as well (as a default rule, standing by itself, might not¹²⁰). These points should not be taken to suggest that active choosing, with a default rule alternative, is the right approach for all times and places. Sometimes a simple default rule is better. But active choosing with a default is often worth careful consideration.

To these points we can add two others. The first is that people might not have any kind of preference in advance. If they lack a preference, they might simply “pick,”¹²¹ and it is not clear why that would be desirable. If they develop a preference, the question is whether it is worthwhile for them to do so, a question that requires (again) analysis of decision costs and error costs. An additional point is that active choosing itself requires some form of choice architecture, and neutrality is not easy to achieve. Small differences in presentation may affect what people end up selecting. This point does not count against active choosing, but it suggests the importance of close attention to design, especially if the goal is to elicit what people actually want, or to ask them to figure that out on their own.

C. Third Parties

Throughout the discussion, I have assumed that the welfare of choosers is all that is at stake, and that the choice between active choosing and a default rule is best assessed by reference to choosers’ welfare. In some cases, however, the interests of third parties are very much at stake. Those interests may complicate the analysis in two different ways. Above all, it might suggest some reasons to favor a default rule over active choosing, at least if the default rule protects third parties, and if active choosers might not attend to their interests.

1. Externalities

The first involves externalities. Return to the organ donation example. A choice architect might conclude that if the welfare of choosers is all that matters, active choosing is the best approach, or perhaps active choosing with an option to select the default rule. But suppose that with this approach, hundreds or even thousands of lives will be lost that would be saved with a pro-donation default rule.¹²² For that very reason, the choice

¹²⁰ Rebonato, *supra* note, at 24.

¹²¹ See Ullmann-Margalit and Morgenbesser, *supra* note.

¹²² Eric Johnson & Dan Goldstein, *Do Defaults Save Lives*, 302 *SCI.* 1338 (2003).

architect might give serious consideration to that default rule, even if the case for active choosing would otherwise be quite strong.

Or consider the case of energy supplier. Suppose that from the standpoint of the consumer, the best approach is to require active choosing between various providers, on the ground that different options (involving varying costs and varying environmental effects) will suit different people's values and situations. But suppose as well that greener energy sources would avoid significant environmental harms. If so, the argument for green defaults might be overwhelming.¹²³

It is true that in both cases, and in others in which externalities are involved, a mandate or ban might be justified or required, because it will maximize net benefits. If the externalities are large, we have a standard market failure, calling for regulation that goes well beyond a default rule. But suppose that the externalities are not entirely clear, or that the obligations of choosers are complex and contested (as in the organ donor case), or that there are political obstacles to the use of mandates or bans. If so, a default rule, designed to address the likely externalities, might well be preferable to active choosing.

2. Psychology, Responsibility, and Choice

The second point involves the potentially profound *psychological* differences between active choosing and defaults, and the effects of those differences on other people. Active choosing offers distinctive signals and has a distinctive meaning. With an active choice, the chooser takes full responsibility, and his intended decision is unambiguous, at least along a potentially relevant dimension.¹²⁴ With a default rule, by contrast, both responsibility¹²⁵ and intention can be murkier. We might not quite know what the chooser wants, because inertia and inattention might be responsible for his apparent decision. This difference matters.

Suppose, for example, that someone is defaulted into being an organ donor, or into a “no heroic measures” approach toward extension of his own life. In such circumstances, a responsible family member might well hesitate before honoring the relevant “choices,” for exactly the same reasons that mandate the use of quotation marks around that word. If what is sought is a clear expression of the chooser's actual will, and if other people will

¹²³ See Sunstein & Reisch, *supra* note.

¹²⁴ The federal sentencing guidelines, which operate as defaults and are not mandatory, are an interesting example. It would be useful to study the guidelines in psychological terms, emphasizing how the issue of responsibility works in practice.

¹²⁵ See Bartling & Fischbacher, *supra* note. The authors find: “If the dictator delegates the decision right and the delegee makes the unfair choice, then mainly the delegee is punished, while the dictator is almost spared By conducting treatments with and without punishment opportunities of the receivers, the experimental design allows to test whether the avoidance of punishment is indeed a motive for the delegation of a decision right. This is strongly confirmed as the share of delegated decisions is three times higher in the treatment with punishment than in the treatment without punishment opportunities.” *Id.* at 69.

not take any apparent decision as authentic without such an expression, then there is a strong argument for active choosing — and hence for choice-requiring paternalism.

There are associated questions of guilt and regret, and these may argue either for or against active choosing. Suppose that a family member is herself deciding whether to take heroic measures to extend the life of someone she loves. If that family member is required to make an active choice, her responsibility is clear; it is hers alone. If, by contrast, a default rule goes one way or the other, the chooser can reasonably rely on or refer to a system-wide judgment, serving to diffuse her responsibility and also to carry a kind of authority that legitimately influences her choice. The family member might well appreciate such effects. At the same time, we can easily imagine settings in which it is important to place the responsibility fully in the chooser's hands, partly to protect third parties or whole systems; return to the case of voting, where a default rule would be objectionable in part because it intrudes on that responsibility.

V. Predictive Purchases? Notes on “Big Data”

A. “The Chief Basis of the Argument for Liberty”?

We have seen that in free markets, people do not obtain goods and services unless they choose them. In that domain, active choosing is the rule. As a general rule, we do not own things by default, whether they are cell phones, sneakers, soap, tennis racquets, or automobiles.

But why, exactly, is this so? Why is active choosing required? An obvious answer is that unless people have actually said that they want some good or service, we cannot know what they want and whether and when they want it. No planner can possibly have the requisite knowledge.¹²⁶ Active choosing and the resulting freedom are, on this view, indispensable welfarist safeguards against error, understood as mistaken judgments about what people want. If, for example, a bookseller presumed that a consumer wanted certain books, and defaulted them into ownership (subject to opt-out), there would be an undue risk that people would end up with books that they do not want. By requiring active choosing in ordinary markets, we minimize the sum of decision costs and error costs. Consider Hayek's remarkable suggestion that “the awareness of our irremediable ignorance of most of what is known to somebody [who is a planner] is *the chief basis of the argument for liberty*.”¹²⁷

One understanding of this suggestion, with the reference to liberty, is that active choosing is necessary to protect autonomy,¹²⁸ not welfare, as reflected in the view that without some affirmative statement of intention, people should not find themselves forced (or assumed) to purchase goods or services. But the welfarist account itself seems

¹²⁶ See HAYEK, *supra* note, at 386.

¹²⁷ See *id.* (emphasis added).

¹²⁸ See CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

especially straightforward. Some people might think that the autonomy argument is a shorthand way of capturing that account, and not in any way independent – a point to which I will return.

B. Experiments

To test these claims, let us consider a thought experiment, signaled above, in which sellers know, with perfect or near-perfect certainty, what people would want to buy. Suppose that “big data,” understood as immense data sets about people’s past decisions,¹²⁹ helps to ensure that level of accuracy.¹³⁰ Suppose that on the basis of such decisions, a bookseller knows what people will buy before they know themselves. If so, the welfarist conclusion seems clear: People should be defaulted into those purchases.

The reason is that this approach reduces (and even eliminates) decision costs¹³¹ and by hypothesis, has zero or near-zero error costs. It is tempting to think that such defaults, leading to a form of “predictive shopping” or “as if shopping,” are also unacceptable from the standpoint of autonomy, but the temptation should be resisted. We are speaking of cases in which we know, with perfect or near-perfect certainty, what people want. From the standpoint of autonomy, what is the problem? In such cases, it might well seem that rational people would choose not to choose, because the default serves them perfectly well. It gives them what they want, without requiring them to take the necessary steps to obtain it. To test reactions to this question, I asked about seventy university students (in law, business, and public policy) the following question:

Suppose that over the years, your favorite online bookseller has compiled a great deal of information about your preferences. It thinks it knows what you want before you do. Would you approve or disapprove if the seller decides in favor of “default purchases,” by which it sends you books that it knows you will purchase, and bills you (though you can send the books back if you don’t want them)? (Assume that the relevant algorithm is highly reliable — accurate in at least 99 percent of cases — though not completely unerring.)

Notably, 84 percent disapproved. Perhaps the problem is that the bookseller is enrolling people automatically, and without their consent, but significantly, a large majority -- 70 percent – would also decline to sign up for a system. With a different population, recruited for Amazon Mechanical Turk, the results were broadly similar. Of fifty people, 86 percent rejected default purchases and 84 percent would decline to sign up.

¹²⁹ For relevant discussion, see VIKTOR MAYER-SCHONBERGER & KENNETH CUKIER, *BIG DATA* (2013); JOESPH TUROW, *THE DAILY YOU* (2012).

¹³⁰ See Bensinger, *supra* note.

¹³¹ A qualification would be necessary if people actually enjoy making the relevant decisions, so that the relevant process creates benefits rather than imposing costs. Decisionmaking can be a benefit and not a cost, as for example when it is fun to choose among relevant options.

These results are a bit of a puzzle, because at first glance, the most serious problems with predictive shopping, and with the resulting defaults, involve accuracy, and in the question, a high level of accuracy was stipulated. How can the survey results be explained? Perhaps people did not believe the stipulation. In the real world, of course, there is a risk that those who use the relevant algorithms will be self-serving. They want to sell their products, and they might assume a desire to purchase even when people lack, or would not form, that desire. To be sure, markets will discipline errors of this kind, and people should be able to return products that they do not want, but because of the power of inertia, many people will inevitably retain unwanted products.¹³² It is also true that in the context of book-buying, many people affirmatively enjoy the opportunity to search among options, to find out what has arrived, and to choose accordingly.

In addition, and more fundamentally, people's preferences change over time, certainly with respect to books. We have seen that what people want this month might be quite different from what they want next month and the month after, when predictions are being made. People might like Stephen King novels in January, but have little interest in June, and predictive purchases will have an exceedingly difficult time capturing such changes. Even if the algorithms are extraordinarily good, they must extrapolate from the past, and that extrapolation might be hazardous.

It is of course an empirical question, not a conceptual one, whether and to what extent changing preferences would confound predictive shopping. Perhaps the relevant predictions would be perfectly accurate, or nearly so, across certain domains. With respect to certain household items – soap, toothpaste, toilet paper – preferences do not much change, and automatic purchases, at the point of need, could be a great boon. Imagine a kind of household manager that would automatically supply, at a charge, certain products as soon as people run out. What would be wrong with that? I asked about seventy students the following question:

Assume that at some point in the future, homes can be monitored so as to “know” when you run out of various goods, such as soap, paper towels, and toilet paper. Would you approve of a system in which the home monitor automatically buys such goods for you, once you run out?

The strong majority – 69 percent – did indeed approve. It is noteworthy that people's negative reactions to predictive shopping “flipped” compared to books when household items are involved. One reason may be that tastes are relatively static and errors are unlikely. Unlike in the context of book-buying, it is also not exactly a benefit, for most people, to choose among items of this kind. And in the event of some kind of error, people might not much mind the idea of having extra soap, paper towels, and toilet paper. Compare automatic renewal of newspapers or magazine subscriptions, which many people appreciate.

¹³² Robert Letzler & Joshua Tasoff, *Everyone Believes in Redemption: Overoptimism and Nudges* (Working Paper, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2066930.

Notably, a different population, recruited on Amazon Mechanical Turk, did not approve of automatic shopping. In a group of fifty people, only 38 percent were in favor. Perhaps the reason was skepticism about the neutrality and accuracy of the home monitoring system. For the relevant population, perhaps it was feared that the monitor would buy goods that people did not want or need. Skepticism about choice architects, or about household monitors, can lead people in the direction of active choosing, even if choosing is not exactly fun.

C. Solutions

If the empirical problem posed by changing preferences could be solved, so that accuracy were not a problem, both welfare and autonomy might well be promoted by predictive shopping, and by assuming that people would prefer it, and would choose not to choose. The principal qualification is that automatic enrollment in programs of this kind might not make sense where people affirmatively like to make selections. In many domains, this is an exceedingly important point. With books, part of the point, for many people, is the experience of choice – the minutes or even hours spend looking over the alternatives and making selections. But in other contexts, that experience is not exactly fun or enjoyable, and it is best avoided if accuracy can be guaranteed. The most forceful objection is that in many domains, the empirical problem cannot be solved – at least not yet.

In these circumstances, the appropriate solution seems simple. People should not be defaulted into a system of “predictive shopping,” but they should be given an active choice about whether they want to enroll. Some algorithms might prove themselves over time, and some people might want to take their chances with them even if they have not been proved. A consumer might think: “I do not want to bother to shop; the seller knows me well enough to choose for me.” Other consumers might think: “I enjoy shopping; it is a benefit rather than a cost; and I don’t trust the seller.” In this domain, which is undoubtedly the wave of the future, people should be making active choices about when they want to rely on defaults.

VIII. Conclusion

Choice can be either a great benefit, a kind of gift, or instead an immense burden, a kind of curse. In evaluating private and public institutions, and people’s diverse attitudes toward freedom of choice, it is crucially important to appreciate their frequent desire to choose and also their frequent antipathy toward choosing. If either is neglected, there is a risk that both low-level policy judgments and high-level theoretical claims will go badly wrong.

Many people have insisted on an opposition between active choosing and paternalism, but in many contexts, the opposition is illusory, even a logical error. The reason is that some people choose not to choose, or would do so if they were asked. To be sure, the power to choose may well have intrinsic value, but people often exercise that power by delegating authority to others. Nanny states forbid people from choosing, but

they also forbid people from choosing not to choose. If choice architects are overriding that particular choice, they may well be acting paternalistically — at least if they are motivated by the belief that active choosing is good, notwithstanding the fact that people reject that belief. Insistence on active choosing may simultaneously reduce people's welfare and insult their autonomy. The same concerns that motivate objections to paternalism in general can be applied to paternalistic interferences with people's choice not to choose.

We have also seen that the argument for active choosing, or instead for some kind of default rule, depends largely on the costs of decisions and the costs of errors. Where people are relevantly heterogeneous,¹³³ and where choice architects lack information or neutrality, active choosing has real advantages. But if a default rule is accurate, active choosing does not make a great deal of sense, at least when people remain free to go their own way if they see fit. When choice architects overlook this point, and nonetheless insist on active choosing, they might well be behaving paternalistically, and in a way that reduces both the welfare and the autonomy of those whom they are seeking to help.

In such cases, choice-requiring paternalism should be avoided. The principal qualification – and it is an important one – is that such paternalism might be justified insofar as it operates in the interest of the free development of individuality.¹³⁴ In some settings, it is important for people to learn and to develop their values and preferences. In such cases, an insistence on active choosing can be seen as a way of promoting learning and self-development. This qualification is important, but it should not deflect attention from the larger point: When people choose not to choose, it is paternalistic – potentially a diminution of their welfare and an insult to their autonomy -- to refuse to honor their choice.¹³⁵

¹³³ Recall that a personalized default rule can reduce the problem. *See* Sunstein, *supra* note, at 48-49.

¹³⁴ Note, however, that people should also learn about when to choose and when not to choose, and an insistence on first-order learning will inevitably compromise that form of second-order learning. *See supra* text accompanying notes.

¹³⁵ Recall the case of patient autonomy, where doctors sometimes ask for choices that patients would prefer not to make. *See* Carl Schneider, *The Practice of Autonomy: Patients, Doctors, and Medical Decisions* (1998).