For Lea Preston
1 Introduction

In “Libertarian Paternalism is not an Oxymoron”, Cass Sunstein and Richard Thaler employ recent research in behavioral economics to suggest a way in which a government planner could both enact paternalistic policies and respect freedom of choice. I will assess their suggestion in light of two of the most common anti-paternalist arguments. John Stuart Mill and Joel Feinberg exemplify these anti-paternalist positions. Section 1 of this paper introduces the anti-paternalist arguments made by Mill and Feinberg. Section 2 outlines Sunstein and Thaler’s suggestion and the empirical research it is based on. Sections 3 and 4 assess their suggestion in light of arguments introduced in section 1. In section 3, some of the points raised by Mark White in his book *The Manipulation of Choice: Ethics and Libertarian Paternalism*, which was written in response to Sunstein and Thaler, are considered. I side with Sunstein and Thaler against White.

I will work with the following definition of paternalism. A policy (or law, or institution, or whatever) counts as paternalistic if and only if the justification offered for that policy is of the following two-part form: 1) the policy will influence a person’s actions 2) in a way that promotes the welfare of that person. Note three things about this definition.

First, the definition speaks of the justification being “offered”. Offered by whom? A paternalistic justification might be offered by government planners as their actual reason for enacting a policy, or it might be offered by philosophers as a reason for thinking that a certain

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1 I would like to thank the members of my advisory committee, Tom Hill, Jan Boxill, and Bernard Boxill. Special thanks are due to Tom Hill, for sticking with me throughout this project.
policy is morally permissible. Either way, the policy would count as paternalistic relative to the person offering the justification.

Second, whether or not a policy counts as paternalistic depends on the justification that is offered for that policy, not on the content of the policy. So a law that prohibits public smoking on the grounds that secondhand smoke harms others is not paternalistic, but if the same prohibition is enacted on the grounds that it promotes the welfare of smokers, it is paternalistic.

Third, it is clear that, on this definition of paternalism, some paternalistic policies are permissible. Or, if they are not permissible, it is not because they are paternalistic that they are forbidden. Policies directed towards children are the clearest case. There are arguments for thinking that 1) choices made by adults are especially morally important and 2) this importance gives us reason for thinking that many paternalistic policies are impermissible. But these arguments do not produce reasons for thinking that choices (perhaps “choices” is better) made by children have the same importance. Therefore, paternalistic policies directed towards children are not objectionable. Or, if they are objectionable, it is not because they are paternalistic. Because children are a special case, this paper’s discussion will be restricted to adults from now on.

Even when the discussion is restricted to adults, it is plausible that some paternalistic policies are permissible. This is because not all paternalistic policies directed towards adults fall afoul of the importance of choices. For example, consider a government anti-smoking information campaign of the most innocuous kind. The government produces informational pamphlets and leaves them in government buildings for members of the public to pick up, if they want. Such a campaign does not seem to run afoul of the importance of choices because one can
simply walk past the pamphlets. Similarly, Sunstein and Thaler think they have identified a class of paternalistic policies that respect choice. In order to see why they think this, consider each of the two standard arguments for thinking that paternalistic policies often fail to respect choice.

1.1 Mill

The first argument is given by John Stuart Mill in *On Liberty*. Mill claims that a person’s decisions about how to run his or her own life will very often be better, as measured by his or her own welfare, than the decisions that a government planner would make. This is because, to give just two reasons, individuals have better access to their own preferences than planners do, and individuals are motivated by self-interest to make decisions that satisfy their own preferences. Government planners have no such motivation, or if they do, they will almost always have other motivations that conflict with it. These considerations suggest that the general welfare is maximized if government planners leave people free to choose how to live their own lives. This needs a qualification, of course. The general welfare is maximized if you are left free to make your own choices, so long as you do not choose to, say, murder or steal. These considerations form Mill’s basic argument for the harm principle, which he states as follows: “The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”

At this point, I want to note two conventions that I will adopt throughout this paper. First, I will use the words ‘exercise of power’ slightly differently than Mill does. The way Mill phrases the harm principle, it looks like cases of exercise of power over an individual can be

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5 Mill 13.
divided into two kinds: exercises of power that are against the individual’s will, and exercises of power that are not. In this paper, I will reserve the phrase ‘exercise of power’ for the first kind of case. If an exercise of power over an individual has that individual’s consent, it will not, strictly speaking, be counted as exercise of power at all. This, I think, will make for a clearer exposition, and it is in line with the spirit of Mill’s words anyways.

Second, Mill’s harm principle covers all of the ways in which society might exercise power over individuals, but Sunstein and Thaler are interested just in the exercise of power by the government. This paper’s discussion will be restricted to that topic.

Returning to the exposition of Mill’s argument against paternalism, the justification offered for paternalistic policies is by definition not a harm to others justification. Therefore, if a paternalistic policy involves the exercise of power over individuals, then it is ruled out by the harm principle. If it does not, however, it is not ruled out. Many paternalistic policies clearly do involve the exercise of power over individuals, and so they are ruled out. For example, if the sole justification for the criminalization of marijuana is the negative effects it has on those who use it voluntarily, then the harm principle requires its decriminalization. This is because criminalization involves physical coercion, and if anything counts as the exercise of power over individuals, physical coercion does.

Does the anti-smoking information campaign described above involve the exercise of power over individuals? It is intended to influence the behavior of individuals. However, if that is all that is required for it to count as exercising power over individuals, then many of the everyday activities of individuals and businesses involve the exercise of power over individuals. Surely, then, the line between what counts as the exercise of power over individuals and what
does not should be drawn so that not every way of influencing individuals counts as exercising power over them. The question *Where to draw the line between what counts as the exercise of power over individuals and what does not?* will recur throughout this paper. So too will a second question about the interpretation of the harm principle, namely, *What counts as a harm?* It does not seem like every way of making someone else worse off counts. For example, if I do not like unnatural hair colors, then I am made worse off by my neighbor’s dyed blue hair, but we should not say that this harms me. If we did, society would be authorized to exercise power over my blue-haired neighbor in order to get her to change her hair color.

1.2 Feinberg

Mill’s anti-paternalist argument is consequentialist. He argues that choice is especially morally important because respecting choice promotes the general welfare. The second standard anti-paternalist argument is a rights-based argument. Joel Feinberg’s four volume *The Moral Limits of the Criminal Law* exemplifies this approach. Feinberg assumes as an axiom that individuals have a right to autonomy. Feinberg makes two claims about what this right involves. First, if the government’s policies are not constrained by the harm principle, then they violate this right. The second claim is connected to Feinberg’s answer to the question *What counts as a harm?* A harm is a rights violation, Feinberg says. What counts as a rights violation? Feinberg does not offer a complete answer to this question. A complete theory of rights is outside the scope of his books. The goal of his books is to argue against paternalism and legal moralism. In

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7 Feinberg’s statement of the harm principle is not exactly the same as Mill’s statement, quoted above. But for the purposes of this paper, they are effectively the same. In order to avoid confusion, I will use Mill’s formulation of the principle throughout.
order to do this, he does not need a complete theory of rights. All he needs is the claim that all plausible theories of rights include the *volenti* maxim. Roughly, the *volenti* maxim states that ‘to one who consents, no harm is done’. So, for example, you violate my rights if you take my possessions without my consent. But with my consent, you may have them. In general, the *volenti* maxim is the claim that you have a right to waive your rights, whatever your rights are. A failure to follow the *volenti* maxim is a failure to respect the right to autonomy, Feinberg thinks. This is the second of the two claims that Feinberg makes about what the right to autonomy involves.

Taken together, the *volenti* maxim and the harm principle rule out many paternalistic policies. For example, take laws against voluntary euthanasia. If I voluntarily consent to a lethal injection, to be administered by a doctor, then by the *volenti* maxim, she does not violate my rights by killing me with that injection. The harm principle allows the exercise of power over individuals only to prevent the violation of the rights of others. Therefore, the law may not exercise power over the doctor in order to keep me alive, even if the government planner judges that it is in my best interest to stay alive.

On Feinberg’s view, are any paternalistic policies permissible? Feinberg limits his discussion to criminal law. Every case of paternalism that Feinberg considers is paternalism through the criminal law. Criminalization always involves physical coercion because it is always backed up by threats of imprisonment or execution. As I said above, if anything counts as exercise of power over individuals, physical coercion does. Therefore, every case of paternalism Feinberg considers involves the exercise of power by the government over individuals. Therefore, every case of paternalism Feinberg considers is ruled out by the harm principle.
Feinberg does not consider cases of paternalism, such as the anti-smoking information campaign discussed above, that arguably do not involve the exercise of power over individuals. The paternalistic policies that Sunstein and Thaler propose are supposed to be of this kind, so Feinberg’s position will have to be extended if it is to address their proposal. I will extend it in section 3.

Mill and Feinberg start from different premises, but they reach the same conclusion. Many paternalistic policies are impermissible because they do not respect freedom of choice. The argument that Sunstein and Thaler develop, based on research in behavioral economics, is of interest because this research was done after Mill and Feinberg wrote. Or at least, it was in its infancy when Feinberg was writing. I will now turn to Sunstein and Thaler’s argument.

2 Sunstein and Thaler

Research in behavioral economics, some of it done by Sunstein and Thaler themselves, claims to have uncovered peculiarities in human behavior. These peculiarities are sometimes, perhaps unfortunately, called “cognitive biases”. One commonly cited cognitive bias involves what are called “default rules”\(^8\). Consider the following example. A firm offers a retirement savings plan to its employees. It automatically enrolls each employee in the plan. If an employee wishes not to enroll, he or she can opt-out by, say, filling out and submitting an online form. Another firm offers an identical retirement plan, but its employees are not automatically enrolled. If they wish to enroll, they must opt-in by filling out a similar online form. Studies find that, everything else equal, more employees end up enrolled under the opt-out plan than

\(^8\) All of the behavioral economics research I consider is discussed in Sunstein and Thaler.
under the opt-in plan. The way that the default rule is set, opt-in or opt-out, affects people’s behavior.

What sort of psychological principle explains this phenomenon? Why should behavior be affected by the way default rules are set? The answer must be something like: People like to hang on to stuff that they have. This psychological principle is given the name ‘endowment effect’. To be more precise about what endowment effects involve, consider two situations. In the first, a person has an item, and then loses it. In the second, the person does not have the item, and then gains it. Everything else equal, the person is likely to view the loss in the first situation as greater than the gain in the second situation. This is just because people like to hang on to stuff that they have.

Sunstein and Thaler claim that, because of the endowment effect, default rules shape the preferences of individuals. That is, the way a default rule is set literally changes what people’s preferences are. If your employer initially enrolls you in a savings plan, you will value enrollment in that plan more than you would if you were not initially enrolled. The default to enrollment changes the strength of your preference.

There are other examples of cognitive biases. Two notable ones go by the names ‘anchor effect’ and ‘framing effect’. I will not discuss these here because the clearest and most compelling examples of situations in which paternalistic government policies might make use of cognitive biases involve default rules. One very clear case, which I will focus on throughout this paper, comes from the field labor law. The government might allocate to firms the right to dismiss their employees at will, or it might allocate to employees the right to be dismissed only

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9 Sunstein and Thaler 1187.
for cause. In either case, the party allocated the right has the right to waive their right, if they wish. This is required in order to comply with the *volenti* maxim. In particular, the parties might be interested in waiving their rights if they can get something in return for doing so. As part of a labor contract, employees might waive their right to be dismissed only for cause in return for higher wages. Or firms might waive their right to dismiss at will in return for lower wages. On the basis of the results of the savings plan study, as well as similar studies, Sunstein and Thaler hypothesize that employees will be more likely to end up with the right to be dismissed only for cause if they are initially assigned that right by the government. I will assume that this hypothesis is correct.

On the basis of this hypothesis, Sunstein and Thaler develop the following line of reasoning. Suppose that the government planner is concerned to protect the welfare of workers. Suppose also that the welfare of workers is promoted when they have the right to be dismissed only for cause. Then the planner has good reason to assign the right to be dismissed only for cause to workers instead of assigning the right to dismiss at will to firms.

This policy would count as paternalistic. It takes advantage of the endowment effect in order to influence the behavior of workers for those workers’ own good. Though it is paternalistic, Sunstein and Thaler argue that it does not infringe on freedom of choice. Their basic argument is as follows. The government planner has to either assign the right to employees, or assign the right to firms, or assign the right to neither. If the planner takes the third option, there would be no default rule. In this case, the government would have to require every employment contract to state explicitly whether the employee may be dismissed at will or only for cause. Without either a default rule or an explicit statement in the contract, it would not be clear when it is legal to fire employees and when it is not. Now, we know from empirical
research that if the planner assigns the right to employees, there will be an endowment effect. If the right is assigned to firms, will there be such an effect? Do firms like to keep what they have? It is unclear. It is clear, though, that if the planner assigns the right neither to employees nor to firms, there will be no endowment effect. Sunstein and Thaler argue that, no matter which of the three options the government planner selects, the planner cannot avoid having an effect on what people’s preferences are. If the planner assigns the right to employees, the preferences of employees will be different than if it did not. No matter which government policy is selected, people’s preferences will be different than they would have been if an alternative policy had been selected. Because the government planner cannot avoid having an effect on what people’s preferences are, then it might as well steer people’s preferences in a direction that is good for those people.

Note one thing about this argument. It relies on the claim that there is more to human well-being than just the satisfaction of preferences, whatever those preferences might be. If there were not, then given the opportunity to steer preferences, the government would do best to steer them towards easily satisfied preferences. But this is not what Sunstein and Thaler suggest.

I will consider Sunstein and Thaler’s argument in light of Feinberg’s rights-based anti-paternalist framework, and then in light of Mill’s consequentialist framework.

3 Feinberg’s Framework

Do the anti-paternalist considerations Feinberg offers rule out the sort of paternalism Sunstein and Thaler propose? Or does Sunstein and Thaler’s proposal slip through? Remember that Feinberg thinks that power may be exercised by the government over individuals only in
order to prevent the violation of the rights of others. The paternalistic policies Sunstein and Thaler propose do not, of course, have as their aim the protection of the rights of others. Therefore, Feinberg will allow the proposed policies only if it turns out that they do not involve the exercise of power over individuals. So, what counts as the exercise of power over individuals? I will consider two answers to this question. The first is Nozick’s. Nozick’s view is instructive because it is so minimal. The second view, White’s, can be seen as modifying Nozick’s view by adding to it.

3.1 Nozick’s Answer

For Nozick, what counts as the exercise of power over an individual? The answer to this question can be extracted from section 2.8.7 “Voluntary Exchange” of Anarchy, State, and Utopia, in which Nozick cashes out coercion in terms of rights violations. The answer is as follows. Divide the question into two parts. What counts as illegitimate exercise of power over a person, and what counts as legitimate exercise of power over a person? Exercise of power over a person is illegitimate if and only if that person’s rights are violated by that exercise of power. In light of this, we can say that exercise of power over a person is legitimate when it would have violated that person’s rights, if not for the presence of some mitigating factor.

Like Mill and Feinberg, Nozick thinks that government policies ought to be limited by the harm principle. A government may exercise power over an individual only in order to protect the rights of others. We can now restate the harm principle as follows. A government legitimately exercises power over an individual only if it does so in order to protect other

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11 See Nozick section 1.3.1 “The Minimal State and the Ultra-minimal State”, for example.
individuals from illegitimate exercises of power over them. The harm principle is the claim, then, that there is only one mitigating factor that can excuse the government from doing something that would otherwise count as a rights violation. That factor is the protection of the rights of others.

To the harm principle, Nozick adds a further claim. Individuals have a very limited set of rights. This set includes a right against physical aggression, the right to keep property that was acquired without violating the rights of others, the right to performance on contracts, and the right to waive one’s rights (the volenti maxim). If the set contains more rights than these, it does not contain many more. In particular, it does not contain a right to be free from the sort of influence that the paternalistic policies Sunstein and Thaler propose would have on individuals. The policies they propose influence what people’s preferences are. Among Nozick’s set of rights, there is no right against having what your preferences are influenced by government policy. Therefore, this sort of influence does not count as the exercise of power over individuals. Therefore, the harm principle does not rule out the policies that Sunstein and Thaler propose. Therefore, Nozick’s view allows the paternalistic policies that Sunstein and Thaler suggest. Perhaps this is surprising, considering the limited scope Nozick allows the government and Nozick’s description of his theory as “nonpaternalistic”.¹² Or perhaps it is not surprising, considering Sunstein and Thaler call their view “libertarian paternalism”. Although, I do not think Sunstein and Thaler had in mind the line of reasoning just described when they gave their view that name.

A side note. Nozick might respond to this line of reasoning as follows. Though, Sunstein and Thaler have identified paternalistic policies that cannot be ruled out on the grounds

¹² Nozick 58.
that they are paternalistic, they can still be ruled out for other reasons. In particular, they require impermissible taxation. This response will not work, however. According to Nozick, the government is permitted to tax in order to pay the costs associated with setting up and enforcing contract law. It would cost no more money to set these laws up in the paternalistic way that Sunstein and Thaler suggest than it would to set them up otherwise, so this would not be forbidden on the grounds that it requires impermissible taxation.

3.2 White’s Answer

As I said above, Nozick’s view is instructive because it is so minimal. If the results of Nozick’s theory are unsatisfactory, his theory could be added to in order to generate different results. In particular, we could keep Nozick’s view about what counts as legitimate and illegitimate exercise of power over individuals, but add more rights. Some of the moves that Mark White makes in *The Manipulation of Choice* are clarified if they are seen along these lines. White writes that “Paternalism…denies autonomy in two ways: by substituting someone else’s idea of a person’s interests for that person’s own, and by blocking or manipulating choice to promote the interest imposed by the paternalist”.\(^{13}\) Sunstein and Thaler (and Nozick) agree with White that choices should not be blocked off. In fact, they write that “choices are not blocked or fenced off” by the policies they propose.\(^ {14}\) Their disagreement is over the two additional requirements that White introduces. White gives the perhaps unfortunate name ‘value substitution’ to the substitution of someone else’s idea of a person’s interests for that person’s own. In addition to blocking choices, White suggests that value substitution and the

\(^{13}\) White 92.
\(^{14}\) Sunstein and Thaler 1162.
manipulation of choices are wrong because they violate autonomy. I will address these two claims in turn.

Clearly not all value substitutions count as autonomy violations. For example, I see that you are about to be hit by a car. You do not see the car coming, and I have no time to alert you. If I want to save your life, the only thing I can do is push you out of the way. If I push you, I do so because I have substituted my idea of your interests for your own, but pushing you is clearly not a violation of your right to autonomy. This example shows that value substitution is only impermissible in certain situations. Therefore, White’s claim needs to be qualified. Perhaps value substitution is always impermissible when it is a government planner doing the substituting? Reconsider the car accident example, but with a government agent, acting on a standing government policy, doing the pushing. The moral assessment of the example does not change. There is still no violation of autonomy. Therefore, we need to search for a different way to qualify White’s claim.

Perhaps value substitution fails to respect an individual’s autonomy when that individual could have been allowed to make a choice for him or herself, but was not. However, this proposal too is subject to counterexamples. For example, imagine a wealthy romantic who waits for his lover to fall asleep and then, without waking her, carries her gently onto a private plane and flies her off on a surprise vacation. He could have consulted her, but that would have ruined the surprise. Though he did not consult her, his actions appear permissible. This counterexample suggests that the above conjecture does not apply to some interactions between individuals.
Neither of the two qualifications I have considered has done the job on its own. Perhaps a plausible version of White’s proposal can be reached by combining them. The resulting proposal would read: Value substitution on the part of the government planner fails to respect an individual’s autonomy when that individual could have been allowed to make a choice for him or herself, but was not.

This proposal is still subject to a problem. What counts as not allowing an individual to make a choice for him or herself? The obvious answer is: When power has been illegitimately exercised over that individual. That is, when that individual’s rights have been violated by blocking or, White suggests, manipulating their choices. Thus, it can be seen that White’s claim that value substitution violates autonomy collapses into his claim that blocking and manipulating choices violates autonomy. White could avoid this collapse by qualifying his claim that value substitution violates autonomy in a different way than I have qualified it, but it seems to me that the qualifications I have suggested are the intuitively correct ones for dealing with the counterexamples I have highlighted.

There is no controversy over the suggestion that blocking choices violates autonomy. Therefore I will turn to the suggestion that manipulating choice violates autonomy. The aspect of the policies Sunstein and Thaler propose that might count as manipulative has already been clearly identified. The policies they propose work by influencing what preferences individuals have. They affect choice by changing what people’s preferences are. At least sometimes, government policies that manipulate choice by changing what people’s preferences are do violate autonomy. Consider, to give an extreme example, a government brainwashing campaign. The task Sunstein and Thaler face, then, is to distinguish the sort of policy they propose from the brainwashing campaign and similar examples.
I suggest that Sunstein and Thaler could make this distinction in the following way. Return to the labor law example. The government planner has three options: assign the right to the employees, assign the right firms, or assign the right to neither and require every labor contract to deal with the issue explicitly. The planner has harm to others grounds for taking at least one of these three options. Assume, with Nozick and many other philosophers, that there is a right to performance on contracts. If you make a contract with someone, you have a right against them for the performance of their duties under that contract. It is this right that the government protects by writing and enforcing contract law. In the particular labor law case under consideration, this right is protected by taking one of the three options.

Does the government planner have harm to others grounds upon which it could select between these three options? That is, would the planner violate anyone’s right by selecting one option rather than another? If the answer is yes, the grounds for thinking so cannot be the sort of manipulation that White is worried about. This is because each option is equally manipulative. No matter which option the planner selects, the preferences of individuals will be influenced. That is, the preferences of individuals will be different than they would have been had the planner selected a different option. With manipulation of choice ruled out, I cannot think of any other grounds upon which to argue that the planner violates a right by selecting one option rather than another. Therefore, I conclude that the government planner does not have harm to others grounds for selecting between the three options.

On the basis of this conclusion, I propose the following principle. If the government planner is justified on harm to others grounds in enacting either policy x or policy y (or policy z, and so on), and there are not harm to others ground upon which the planner can select between them, then the planner is justified in selecting between them on welfare grounds. One welfare
consideration that the planner might take into account is the one highlighted by Sunstein and Thaler. That is, one of the policies might, through the mechanism of a cognitive bias, influence people’s preferences in a way that benefits those very people. Other welfare considerations might be taken into account as well. It would be laborious to require every labor contract to deal explicitly with the issue of when dismissal is permitted. Just to save time, therefore, the planner might enact a default rule. Or, on the other hand, we might find that the system for opting-out of the situation one is defaulted into is very complex and time consuming. Just to save time, then, the government might forgo a default rule. The considerations highlighted by Sunstein and Thaler have a legitimate place in this welfare calculation.

I conclude that White does not offer compelling reasons for thinking that the policies that Sunstein and Thaler suggest violate rights. Therefore, he does not offer compelling reasons for thinking that they are ruled out by the harm principle as illegitimately exercising power over individuals. It is of course possible that some other philosopher might offer more compelling reasons for thinking that the policies that Sunstein and Thaler propose violate rights, but I cannot consider such a proposal until it is on the table. This completes the discussion of Feinberg’s rights-based anti-paternalist framework. I will now turn to Mill’s framework.

4 Mill’s Framework

Do the anti-paternalist considerations that Mill offers rule out the sort of paternalism that Sunstein and Thaler propose? Mill offers various considerations in favor of the claim that individuals are better at promoting the satisfaction of their own preferences than a government planner would be. I will address these considerations in turn.
First, Mill claims that individuals know their own preferences better than a government planner could. This claim is surely correct in general. But in the cases highlighted by Sunstein and Thaler, what the preferences of individuals are depends on what policy the government pursues. Sunstein and Thaler might say that, in the cases they focus on, the government planner has an easy way of knowing your interests. That is because the plans the government planner makes will affect what your interests are.

Second, Mill claims that, even if the government planner could know your interests, it would not have much incentive to care about them. If this is true in general, it will inform how we write the constitution for the government. When writing the constitution, we might reason as follows. If we allow the government planner to pursue a certain sort of policy at its discretion, it will not make the decision about whether or not to pursue that policy with the general welfare in mind. Instead, it will make the decision with the welfare of the planner (who ever that is, congress, say) in mind. For example, if congress is allowed to permit or forbid the use of marijuana at its discretion, then campaign contributions from the beer industry might influence legislation on the issue more than concern for the general welfare. This consideration might lead us to conclude that it is best for the general welfare to prohibit the government planner from pursuing certain sorts of policies altogether. In particular, we might prohibit the planner from pursuing paternalistic policies. Again, this certainly seems correct in general. But the cases highlighted by Sunstein and Thaler are an exception. Return again to the labor law case. In order to create a background for contracts, the government has to select one of the three options. Could anything be gained by constitutionally requiring the planner not to take into account the sort of paternalistic consideration Sunstein and Thaler highlight when deciding which of the three options to select? Suppose that one of the three options is in the best interest of the
planner. Prohibiting the planner from taking into account the paternalistic considerations that Sunstein and Thaler highlight would not make the planner less likely to select that option.

5 Conclusion

I have focused on the labor law case. This is not, of course, the only case in which the government planner might make use of cognitive biases to enact paternalistic policies. A policymaker would have to assess each case individually because welfare will be affected differently in each case. Welfare considerations will be relevant because, as I have said, if policy x and policy y protect the rights of others equally, then the planner is justified in selecting between them on welfare grounds. It is possible, then, that it is a good idea to enact some paternalistic policies that make use of cognitive biases but not others. However, neither Feinberg’s rights-based anti-paternalist argument, as supplemented by White’s claims about rights, nor Mill’s consequentialist argument provide compelling reasons for ruling out the sort of paternalism Sunstein and Thaler recommend.
Works Cited


