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Curtailing freedoms to protect freedom: regulating against behavioural-informed infringements on a fair exchange

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ABSTRACT

Behavioural public policy is a relatively new, but already substantial, subfield of public policy. To date, paternalistic frameworks have tended to dominate this subfield, at least in terms of the rhetoric, but attempts at informing public policy with findings from behavioural science set within a liberal framework are emerging. In this article, I argue for a liberal vision for the field, and yet recognize that when one places a high premium on individual freedom it is inevitable that some will act upon their egoistic instincts to attempt to obtain advantage at the expense of others. Since some of those attempts will, in essence, use the findings of behavioural science in order to manipulate others in an exchange relationship, harms – or negative externalities – will be imposed upon the manipulated. This therefore provides a behavioural-informed justification to regulate against what might be adjudged as excessive harms, regulations that are defined here as budges. Budges sit well within a liberal behavioural public policy framework.

KEYWORDS Behavioural science; budges; harms; liberalism; regulation

Why regulate exchange?

The field of behavioural public policy, which focuses on how the findings of behavioural science can be used to inform the design of public policies, institutions and interventions, has thus far been dominated by paternalistic frameworks. That is, the emphasis has been on how one might intervene in individual behaviours such that the wellbeing of those targeted for behaviour change is improved. In this short article, I aim to present an alternative vision for the field, one that eschews paternalism, supports liberalism, and yet recognizes the need to address negative, and positive, externalities.

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The origins of human tendencies to regulate against negative externalities are ancient. In his book on the evolution of morality, Boehm (2012, p. 273) wrote that:

Critically important are the underlying generous feelings that help a system of indirectly reciprocated meat-sharing to be invented and maintained. Yet it's also true that basically these altruistic tendencies are so moderate that hunter-gatherer sharing institutions need continuous and strong positive cultural support if cooperative benefits are to be reaped without undue conflict. In a sense, then, these innately generous tendencies are not quite up to the job. To finish the job at the cultural level, the serious and continuous threat of group disapproval and active sanctioning does its part in making systems of indirect reciprocity among non-kin work without too much conflict.

Boehm thus contends that the positive reciprocal instincts that evolved to benefit the individuals who comprise a group will only take us so far, and that the egoism – the visceral selfishness – that resides to a degree in most of us will cause some people to continue to act entirely selfishly if they believe that they can get away with it. Therefore, in order to deter egoism, the threat of punishment – and the actual act of punishment if people transgress – is required to complement the general, if incomplete, tendency for people to reciprocate positively, if all of those who comprise the group are to be given a reasonable opportunity to flourish.

The position taken in this article is that people ought to be given a great deal of freedom over how they live their lives so that they can pursue their own desires as they see fit. The contention is that in these circumstances, given the right institutions and structure of society, people will generally seek to cooperate and reciprocate with others so that each has a better chance of fulfilling his or her personal desires, a conjecture that is consistent with classical liberalism. However, it is acknowledged that when allowing substantial freedoms there is a risk that those driven principally by egoism may attempt to exploit others, or, at the very least, may pay insufficient attention to the circumstances of others, due to their own selfish inclinations. As such, these inclinations ought to be tempered and countered with interventions that make them less likely to be acted upon, which will inevitably place restrictions on some freedoms. In short, to protect freedom for all we need to curtail some specific freedoms.¹

Constraining freedoms to protect freedom would not enjoy unquestioned support from all of those who one might identify with classical liberalism. For instance, some (for example, von Mises, 1927/2005) – although by no means all – of the members of the Austrian School of Economics, while believing that an efficient and broadly beneficial economy is driven by cooperation and fair reciprocal exchange, did not appear to acknowledge sufficiently the substantive harms that a free market can incentivize – for example, when employers, driven by their own egoism or acting out of necessity in response to the

egoism of others, attempt to cut costs by lowering wages and the quality of working conditions (see Anderson, 2017).

To be fair to even the most *laissez faire* of the Austrians, their support for the free market was not entirely unqualified. Even von Mises (1927/2005) acknowledged that the free market is not perfect, and he maintained that the state ought to offer protection from theft and fraud, but he nonetheless contended that the free market is the only workable system that allows people to attain the ends for which they strive, which, in an economic setting, he assumed to be prosperity, abundance and material wellbeing. By aspiring to and achieving these ends, he argued, people will engage in social cooperation, their suffering will be alleviated, and their happiness enhanced. von Mises also worried that with regulation, governments might impose their own goals, or those that favoured established wealth and special interests, upon an unwilling citizenry, but, to reiterate, he perhaps did not sufficiently acknowledge the importance of asymmetries in power in a supposedly free exchange, either in their direct (e.g., in setting wages and working conditions) or indirect (e.g., in exploiting market failures, such as information asymmetry) manifestations.

Regarding the indirect manifestations, from a behavioural public policy perspective, one party could, via, for example, carefully designed advertising and other misleading practices and offers, use the findings uncovered by behavioural scientists (for instance, the tendencies for people to place a heavy emphasis on the immediate moment, to be influenced disproportionately by salient features of an option, and to place more weight upon losses than similarly sized gains) to manipulate other parties in an exchange relationship. If this happens, the notion of a free and fair exchange has been undermined, and the manipulated parties may end up purchasing more of a product or service than they desire.² If these circumstances are interpreted as the imposition of harms, then, *caveat emptor* arguments aside, they provide a liberal justification for regulating the free market.³

A liberal justification, that is, à la Mill (and others before him, such as von Humboldt), who famously believed that in certain circumstances the weight of argument justified government regulations against externally-imposed harms. In *On Liberty*, for instance, Mill (1859/1969, p. 75) wrote that:

Encroachment on [people's] rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; unfair or ungenerous use of advantages over them; even selfish abstinence from defending them against injury – these are fit objects of moral reprobation, and, in grave cases, of moral retribution and punishment.

Although he did not recognize explicitly the behavioural influences, many of Mill's concerns regarding harms listed in the passage above also inform the arguments presented in this article, but before considering these in greater depth it ought to be acknowledged that neither Mill nor I contend that all externalities ought to be regulated against (or regulated for, in the case of

positive externalities). Almost every act – perhaps almost every utterance – will be noxious, even if only to a small degree, to someone, and thus if all harms were forbidden or punished, people may feel safe only if their privately-held views and behaviours were never aired in public. This would be the antithesis of a liberal society.⁴ Therefore, when deciding whether a particular action or behaviour ought to be regulated from a behavioural perspective, a number of considerations must be balanced against each other.

When to regulate from a behavioural perspective?

As intimated above, it is likely that all real and imaginable government regulations against harms will impose their own harms on someone. Even regulations that are widely accepted as sensible, such as vehicle speed limits, for instance, will on occasion cause some people to be late for work, and harms that are perceived but that cannot be objectively discerned are still objectionable to the perceiver. Moreover, many commentators argue that regulations can stifle innovation, distort priorities, prioritize government interests over those of the citizenry, and impose unnecessary barriers to efficiency. In short, regulations generate broadly perceived costs as well as benefits, and when deliberating on their introduction careful consideration ought to be given to whether the former are likely to outweigh the latter.

It is postulated here that, from a behavioural public policy perspective, if one uses the behavioural influences to manipulate another party in an exchange relationship, then it is legitimate to consider whether this use should be regulated against. Some may contend that attempts to protect the interests of one party to an exchange from the manipulations of the other party is, in essence, a form of indirect paternalism (and thus does not sit well with liberalism), because it is to distrust that the first party cannot secure for himself his own best interests (see Feinberg, 1986). However, Le Grand and New (2015, p. 141) note that:

In these situations neither the private interests concerned nor the government could be said to be acting paternalistically. In the case of the private interests, their intention is not to improve the welfare of the individual but merely to maximize their profits, the effect on the individual being irrelevant [to them]. So, if the effect were detrimental, then government intervention to prevent such would not be paternalistic either but merely intended to *prevent harm to others*.

On this, I concur with Le Grand and New: out of self-interest and unbeknownst to the other party, the manipulator is using the behavioural influences to undermine the notion of a free and fair exchange (i.e., to distort the exchange in an attempt to serve disproportionately the manipulator's interests), and thus regulations against these activities potentially serve to protect one party against the actions of the other. That is, the regulations are justified by externality concerns.

If we focus on the relationship between sellers and purchasers of goods and services, it goes without saying that the former use multifarious marketing tactics to encourage people to buy their products, but there may be little support or justification for regulating against many of these efforts, even in cases where such actions are informed by the behavioural influences. For instance, manufacturers of breakfast cereals might use bright anthropomorphic figures on their packaging, which may entice people in the moment to buy more of those products than they otherwise would. However, even though the figures are not in themselves educative of what the cereals contain, so long as they do not substantively misinform or mislead, their use might generally be viewed as a relatively harmless infringement on the exchange relationship, intended mainly to get the product noticed in a crowded marketplace (and may often draw the consumer's attention to a product that they did not know existed). If, on the other hand, the behavioural influences are used to mislead people about the quality, price or implications of purchasing and/or using a product or service, then the argument in favour of regulating against those practices is strengthened. For example, if payday loan companies that typically issue short-term loans at high rates of interest were to make salient the joys of spending and to mislead with respect to the full financial terms of repayment, the general conclusion might be that their interference in the exchange relationship is excessive and that their activities in this respect ought to be constrained.

Admittedly, the point at which any particular regulation is favoured is somewhat nebulous, but to reiterate, the focus here is on interference in the exchange relationship, not on whether a good or service is deemed a good or a bad thing to purchase from a particular paternalistic perspective. For instance, let us consider two consumables – say, cigarettes and lettuces – the former harmful to health and the latter typically not. Without any behavioural-informed manipulative marketing tactics, some people will still consume cigarettes because, for them, the benefits they get from smoking may outweigh the possible harms, and many people will of course continue to consume lettuces. In such circumstances, placing the tricky issue of addiction to one side and with a focus upon adults, the purchase of these two products is the result of a free and fair exchange and from the liberal behavioural perspective offered here there are no grounds for government intervention. An antismoker might not like the fact that some people still smoke, but if smokers are imposing no harms on other people then there is no justification to regulate smoking either on the demand-side or the supply-side, because to do so would be to impact on the smokers' personal desires.

However, if the producers of cigarettes and lettuces use the behavioural influences to manipulate people into purchasing more of these products than they would otherwise desire, then we would witness an infringement upon the notion of a free and fair exchange in these markets. In such

circumstances, regulation is potentially, although not definitely, warranted; the strength of the case for regulation would need to be considered on a product-by-product basis. The interference from producers in both markets is likely to be motivated by their own egoism and therefore ought to be scrutinized, but the case for regulating the cigarette manufacturers might be viewed as stronger than that for regulating the suppliers of lettuces because, in the former, consumers may be induced to accept more potential health-related harms than they, in the absence of manipulation, desire – and health can be considered a primary good that impacts on our potential to pursue many of our other desires. Cigarettes are also expensive, and thus purchasing more of them than one really desires may crowd out the capacity to finance objectives that are potentially more important to the individual. Moreover, producers of goods that are associated with significant harms are highly incentivized to manipulate the exchange relationship as they may feel the need to counter the perception of those harms with more positive imagery and information pertaining to their products. The consumption of an extra lettuce or two each week is unlikely to have such serious potential health and financial implications, and thus the broad conclusion might be to turn a blind eye to any manipulations by lettuce sellers (within reason).

In the above discussion, the focus is on the parties who are involved directly in the exchange relationship. Unless the party who suffers the externality is being manipulated *entirely* to engage in the exchange – i.e., unless that party, in the absence of manipulation, would choose not to engage in the exchange at all – then even with the manipulation the trade would to some extent be conducive to the pursuit of that party's personal desires. For example, if the person were to smoke one packet of cigarettes per week in the absence of manipulation (and, say, two packets a week if manipulated), then we cannot conclude that smoking one packet, even with manipulation, is inconducive to his personal desires. We can, however, surmise that smoking the extra packet is not something that he really wants to do and may therefore impact negatively on the pursuit of his desires. Thus, when considering the externalities that might arise from behavioural-informed manipulation to the parties that are directly involved in the exchange relationship, behavioural regulation would rarely call for an outright ban on that activity. It would, at most, call for a ban on the offending manipulation, and, as suggested, the only times that it would be consistent with an outright ban is if the person being deliberately manipulated, in the absence of such manipulation, took no part at all in the exchange.

However, in economics the more common conception of a negative externality occurs to a third party – a party who does not participate directly in the exchange relationship at all. As alluded to earlier, consideration of these third-party negative externalities would further strengthen the case for behavioural regulation if a manipulated exchange between two parties

were imposing substantive negative externalities on a third party, because the third party would be feeling consequences that may in turn negatively affect the potential for him to pursue his own desires in life, and yet he would be reaping none of the benefits of the exchange. What of cases where there is no substantive manipulation in the exchange relationship? To return to the example of smoking, many may contend quite reasonably that to claim that smokers impose no harms on others is an infeasibly strong assumption. There are, for example, possible negative externalities associated with passive smoking, and smokers may impose more costs upon health care systems than non-smokers, depending on whether the additional costs of smoking-related morbidity outweigh costs saved from earlier deaths. However, if the smokers themselves are not being manipulated to smoke, we cannot conclude that their behaviour is anything other than what they desire, and thus regulations imposed on reducing harms in this situation are tools not of behavioural public policy, but of public policy more broadly defined to tackle third-party negative externalities.⁵

I have elsewhere called applications of behavioural-informed regulation 'budes' (e.g., Oliver, 2013).⁶ Perhaps the parameters of this framework can be further clarified with a few illustrative examples.

Illustrating budes

In imagining one potential budge intervention, consider the online gambling industry, which lends itself heavily to the exploitation of the behavioural influences since people tend to anchor on jackpot prizes, are overoptimistic with respect to the objective probability of winning, and chase losses with ever more risk-seeking choices (which are all robust behavioural science phenomena).⁷ Responsible gambling is a safe, enjoyable activity for many people and is thus likely to reflect their considered desires, but if the exchange relationship is open to undue manipulation, then the gambling industry has the capability of inflicting serious harms. For instance, with the use of offers of 'free' bets to entice people to gamble, many of those who win might be manipulated into thinking that they cannot lose. Unfortunately for most of them, when their free bets are over their losses will begin to mount, and behavioural science predicts that they will continue to take risks to try to recoup their losses. For some people, this will lead to a downward spiral of increasing debt that they would not have encountered if there had been no initial interference in the exchange relationship. If it was felt that these free offers were resulting in substantive harms for people who would not otherwise gamble, then a government may justifiably regulate – or budge – against them.⁸

A further example of a potential budge can be illustrated with reference to a vaccination programme in the United States in the 1970s. Meyer and Kunreuther (2017, pp. 63–64) note that:

The Diphtheria-Tetanus-Pertussis (DTP) combination vaccine had been routinely used for more than 20 years, so that whooping cough had become a much less common disease in comparison with its incidence in the mid-20th century. In January 1974, however, an article described 36 children who were claimed to have suffered severe neurological complications following their DTP immunization. It reported that the vaccine was only marginally effective, and questioned whether its benefits outweighed the risks. Television documentaries and newspaper reports dramatized tragic stories of profoundly intellectually disabled children allegedly injured by the vaccine ... The result of all this negative publicity was a rapid fall in the immunization rates against whooping coughs ... pertussis epidemics followed, leading to the deaths of some children.

The media are incentivized to sensationalize, because a dramatic depiction of circumstances and events tends to boost viewing and circulation figures, but when reporting on vaccinations, which of course has strong resonance in the era of the coronavirus pandemic, anchoring upon the potential costs without sufficient attention to their benefits may harm those (or the children of those) who might otherwise choose to vaccinate, and by undermining herd immunity is also likely to cause further negative externalities to third parties. A budget intervention might therefore be to regulate so that news stories that depict the potential harms of any vaccination programme must also give an appropriate degree of attention to the harms of not vaccinating (and *vice versa*).

There are also grounds for budgets that focus upon generating positive externalities rather than ameliorating harms. To return to Mill (1859/1969, p. 14):

There are ... many positive acts for the benefit of others, which [the individual] may rightly be compelled to perform; such as to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow-creatures life, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.

There are occasions when the behavioural influences cause individual inertia, and where it is assumed that the default position that people are faced with is consistent with the pursuit of their desires. However, although many people perhaps have a desire to be inert, they may often be largely indifferent to the position that this places them in, so long as an altered position is not substantively costly to them – and yet that altered position may offer great benefits to others.

To illustrate, assume that the default on organ donor registration in a particular country is an opt-in system. In such a system, many people who do

not object to being a donor are, due to inertia, unlikely to register, and yet not registering has serious potential negative implications for the health and lives of others. In short, the potential forgone external benefits equate to serious potential external harms. If the organ donor registration system was changed to one of presumed consent – or opt-out – those people who did not previously opt-in and yet would not object to being a donor are now registered, and their organs, in the event of their death, can potentially be used to improve the health and to save the lives of others. They would still of course be required to do nothing with respect to organ donor registration, and thus their desire to be inert is unaffected without cost, but the position that they are now placed in helps to realize otherwise foregone external benefits. Changing the default from opt-in to opt-out in the expectation that it would change the outcome regarding the number of people who are registered as potential donors can be justified by the findings of behavioural science, would require an act of legislation that some might feel undermines their sense of liberty, and is motivated by externality concerns. Given all this, although changing the default for organ donation is often mislabelled as a nudge (i.e., a behavioural-informed, liberty-preserving, internality-focused intervention), it is a clear example of a budge (i.e., a behavioural-informed, liberty-constraining, externality-focused regulation).

Conclusion

When placing a high premium on individual freedom, which is the essence of the classical liberal tradition, it is inevitable that there will be those who act upon their egoistic instincts to attempt to obtain advantage at the expense of others. Some of those attempts will use the behavioural influences, either implicitly or explicitly, to distort the exchange relationship, but these influences can also cause people to impose harms on others unintentionally, in the form of what would be easily won but ultimately forgone external benefits, as might be seen when individuals are influenced and impacted upon heavily by inertia. This article thus proposes that regulation is sometimes needed, in the form of budge interventions, against behavioural-informed negative, and for behavioural-informed positive, externalities.

There are countless potential budges and some examples were earlier introduced, but this is not to argue that every budge necessarily ought to be implemented. Each potential intervention would need to be considered on a case-by-case basis, and only those activities that are generally adjudged to have exceeded some level of unacceptability will be regulated against (or for), with such factors as possible harms to third as well as second parties to an exchange, whether the harms imposed by the activity negatively affect what might be considered primary goods (e.g., health and income), and

how intrusive it really is in terms of impacting liberty when moving people from one default position to another, all adding grist to the mill when one is considering whether or not to budge.

Notes

1. There is a Lockean flavour to this statement, who, in his *Second Treatise*, maintained that people ought to be free to do what they want to do so long as they do not encroach upon the natural rights of others (Locke, 1689/2016). However, of the old masters, my framework in this article is principally inspired by von Humboldt (1791-92/1993) and Mill (1848/1970, p. 1859/1969).
2. It is assumed here that a person's unmanipulated (or lesser manipulated) preferences are a better indication of their desire for a good or service than preferences that have been manipulated by another party for that other party's self-interest. Of course, for some goods and services – namely, those that someone has consumed for a long period of time – the effects of previous manipulations may be impossible to mitigate entirely. But that does not render as useless attempts to mitigate them to some extent.
3. Regulating advertising and related practices in this way has not traditionally been associated with liberalism. For example, Buchanan (1991, p. 229) wrote that 'Individuals are not to be "protected from their own folly", even if the basic stance is tempered with ordinary compassion', and one suspects that being manipulated unduly by advertising would fall under Buchanan's categorisation of folly. Hayek (1961), in critiquing Galbraith's (1958) contention that powerful corporations can cultivate artificial desires via the manipulative use of advertising, argued that although such preferences can be produced in these ways they are, as 'acquired tastes', not necessarily unimportant (e.g. tastes for art, literature, etc.). He also maintained that market competition ensures that no one producer can determine the entire 'wants' of consumers, which protect the latter's sovereignty. Sugden (2018) is similarly unsympathetic to calls to regulate against these types of harms. I suggest in this article that advertising and other behavioural-informed practices can indeed sometimes – although perhaps not always – manipulate people into purchasing more of particular products and services than they ideally want.
4. As noted by Coase (1960, p. 35), 'Nothing could be more "anti-social" than to oppose any action which causes any harm to anyone.'
5. Coase (1960) wrote a classic essay on this more traditional conception of an externality, and argued, as I have done in this article, that one needs to account for the harms that regulation imposes on the regulated (and those who benefit from their practices) in any consideration of whether a regulation is justified. Coase's argument is entirely consequentialist (and specifically, welfarist), and he is opposed to rigid laws of liability that always favour either the externality producer or the externality recipient. The correct decision, he contends, depends on context, after a careful consideration of all possible costs and benefits. However, while I agree that one should carefully consider the costs and benefits of (in the case of this article) behavioural-informed regulations, I maintain that these ought to be defined in broader terms than Coase's consequentialism. For instance, there may be cases where an infringement upon a free and fair exchange requires analysis beyond outcomes-based

consequences – i.e. that the immorality of manipulating someone may, for many people, outweigh any consideration of whether the outcomes-based benefits for the manipulator exceed (or otherwise) the outcomes-based harms for the manipulated. These ethical considerations perhaps align with Anderson's (1993) plurality of values.

6. Although I contend that nudges are allowable within certain liberal behavioural public policy frameworks, and, in particular, within a Millian liberal framework that I have developed in detail elsewhere (Oliver, 2023), they are also likely to be deemed acceptable, and even desirable, by non-liberals, including soft paternalists, who, incidentally, often mislabel some nudges as nudges.
7. To be clear, I am not necessarily advocating for any of the nudge interventions that are mentioned in this section. They are presented for purposes of illustration.
8. Subjective assessments of this sort are inevitably prone to a degree of arbitrariness, and possibly even abuse, by regulators. To guard against these potential negative consequences, all cases where such regulation is considered ought to be open to public scrutiny, and the reasons for deciding whether regulation is or is not warranted should be explicitly and clearly articulated.

Disclosure statement

No potential conflict of interest was reported by the author.

Notes on contributor

Adam Oliver is editor of the journal, *Behavioural Public Policy*, and author of *The Origins of Behavioural Public Policy* (Cambridge University Press, 2017), *Reciprocity of the Art of Behavioural Public Policy* (Cambridge University Press, 2019), and *A Political Economy of Behavioural Public Policy* (Cambridge University Press, 2023).

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