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### BOOK REVIEW

# Tough Choices: Structured Paternalism and the Landscape of Choice

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Sigal Ben-Porath Princeton University Press, 2010, Pp. 184.

Sigal Ben-Porath's thought-provoking book *Tough Choices: Structured Paternalism and the Landscape of Choice* advances a thoughtful and systematic defense of structured paternalism in several domains, including the regulation of intimacy, the treatment of children, the treatment of members of minority cultural groups, and school choice ( *TC* , 39).<sup>1</sup> State paternalism involves interference by the state in people's choices for their own good. This interference can take various forms, ranging from light “nudging” to coercion. Structured paternalism provides a middle ground between nonpaternalistic policies that aim to provide citizens with as much choice over their lives as possible and paternalistic policies that coercively limit citizens' choices for their own good. Structured paternalism aims to prevent “the most undesirable outcomes” ( *TC* , 59) while “steering the agent

through noncoercive measures in the direction of those choices which are assumed to best satisfy her inferred preferences and needs" ( *TC* , 40). Like a caring parent who enthusiastically incentivizes spending the day at the planetarium or at the library while strongly discouraging spending it in front of the television, structured paternalism aims to nudge citizens toward choice sets that will promote their well-being while discouraging them from choices that will disastrously undermine it. Insofar as it nudges citizens instead of coercing them and it discourages disastrous outcomes instead of dictating life choices, Ben-Porath's structured paternalism is devoid of much of what critics find alarming about paternalism and offers novel solutions to pressing issues facing policymakers. Nonetheless, I will argue that we should proceed cautiously in adopting such an approach lest it have unintended effects that would undermine the political legitimacy of democratic states.

Ben-Porath argues that some form of paternalism is unavoidable ( *TC* , 24). She maintains that the laws and institutions that constitute the liberal-egalitarian state are inherently paternalistic to the extent that they unavoidably impose restrictions on our conduct in various domains without our consent. Consequently, if we take the argument against paternalism to its logical conclusion, we would be led to the minimalist libertarian state Robert Nozick advocated.<sup>2</sup> But this argument overreaches because it ignores the important distinction between the unavoidable restrictions required to constitute a state and the potential overreach of a paternalism that aims to restrict citizens' choices for their own good. Some states are more paternalistic than others in that more domains of conduct are regulated and the choice sets individuals face are more restricted. For example, when Michael Bloomberg proposed restricting the soda size offered at restaurants, he was proposing a restriction on people's choice sets that was for their own good even though it clearly went beyond what was required to maintain a state.<sup>3</sup> We have to accept some restrictions on our conduct in order to have a state, the existence of which benefits everyone, but the important question facing liberal egalitarian states considering liberal paternalism concerns how far and into what domains to take this interference when it isn't required for the state's existence but would make its citizens better off.

One worry animating critics of paternalism concerns the means of interference; paternalist policies, these critics argue, constitute an overreach of the state's *coercive* power on citizens' lives. Ben-Porath persuasively responds to this worry by arguing that structured paternalism is noncoercive. Structured paternalism aims to set defaults that advance the well-being of individuals while expanding the opportunities available to them. The classic example here is retirement policies that set defaults that are beneficial to the individual's long-term well-being with the option to opt out.<sup>4</sup> Individuals are free to do as they wish with their retirement savings and are free to opt out if they do not wish to save for retirement at all. This is not the type of coercive exercise of the state's power that liberals fear.

However, even if noncoercive, the critic might still worry that structured paternalism will unjustifiably nudge citizens toward a particular way of life. But paternalism, as Ben-Porath conceives it, aims to direct citizens toward choices that will satisfy their own preferences. It is motivated by correcting the ways in which cognitive biases and false beliefs might lead citizens astray from satisfying their preferences, not by a critique of citizens' conceptions of a good life. In order to make this case, Ben-Porath, like other soft paternalists, relies on evidence from the "heuristics and biases" literature that shows the pervasiveness with which adults make systematic errors in reasoning that lead them to make suboptimal choices.<sup>5</sup>

In fact, the subtlety of Ben-Porath's particular brand of paternalism lies in the extent to which it

accommodates diversity. This is best exhibited in her insightful discussion of exit rights and minority cultural communities. She argues that policies that aim to make exit rights substantive by educating children from minority cultures for autonomy go too far in the direction of intervention that fails to respect and tolerate cultural diversity. Instead, she suggests, we ought to focus our attention on facilitating *entrance* to members of minority cultures who wish to exit. This can be done, for example, by investing in adult education and supporting employers who are willing to hire ex-members in transition, but also by giving tax breaks to organizations of ex-members ( *TC* , 119). Though we would need more empirical evidence on the effectiveness of these alternatives, these concrete suggestions show how structured paternalism offers a refreshing alternative to the tired old debate between those who advocate cultural diversity and those who advocate substantive autonomy.

Nonetheless, objectors might still see structured paternalism as requiring a relationship between the state and its citizens that, though not coercive or unjustifiably privileging one way of life, is nonetheless objectionable insofar as it treats citizens like children. Ben-Porath's response to this objection is twofold. She argues that the line between adults and children is not as clear-cut as objectors to paternalism would have it. She suggests that "traditional distinctions between adults and children, ones that highlight the superior knowledge and judgment of adults as contrasted with children's lack of knowledge and poor judgment, become blurry when adults and their actual processes of decision making are considered" ( *TC* , 31). Furthermore, she argues that drawing this line on the basis of adult's potential autonomy places too much value on autonomy. In doing so, we endanger our commitment to respecting members of diverse cultures, including those who do not espouse autonomy. Additionally, we fail to acknowledge that even those who value autonomy do not necessarily value it over and above the many other goods they value.

I agree with Ben-Porath's view that we should aim for policies that recognize "the reality of human abilities and limitations" ( *TC* , 39) and that acknowledge autonomy as one value among many. However, one important worry that Ben-Porath does not discuss in detail is whether structured paternalism requires citizens to depend on the judgment of the state in a way that has the potential to endanger political legitimacy.<sup>6</sup>

Parents guide children toward making choices that will benefit them in the long term and away from those that will harm them, but most parents also aim to educate their children so that they are able to make those choices for themselves as adults.<sup>7</sup> Of course, even as adults we depend on other people's judgments to make decisions in many aspects of our lives: choosing a school, a restaurant to try, or a vacuum cleaner to purchase. Nonetheless, becoming a self-governing adult involves becoming increasingly able to make one's own judgments about how to lead one's life in a variety of domains. Similarly, democracies are appealing in part because they rely on an ideal of citizens as self-governing. The potential problem for structured paternalism is not that it makes citizens dependent on somebody else's judgment, but that it has the potential to make citizens dependent on the *state's* judgment in domains that might be relevant to their role as self-governing citizens. Therefore, what we need to consider is whether a democratic state that opts for Ben-Porath's brand of structured paternalism might endanger the development of the abilities and knowledge citizens need to make judgments that are relevant to their political participation and, thereby, undermine its own legitimacy.

Citizens are obligated to obey the laws of a state when that state uses its power legitimately. A state that is concerned with promoting the well-being of its citizens, as one governed by Ben-Porath's

structured paternalism would be, has some claim to legitimacy.<sup>8</sup> However, many think that this is not enough. Most prominent liberal conceptions of political legitimacy also require citizens' free, reasonable, and informed consent or their participation in political decision making. Both of these traditions are subject to critiques. The requirement of consent is taken to be too strong to account for the necessity of the state.<sup>9</sup> The requirement of democratic participation is taken to be too subject to the contingent interests of the citizenry.<sup>10</sup>

Though these critiques are important, liberal political theorists generally agree that a state's legitimacy requires more than the promotion of citizens' interests; it also requires that it respect the free and equal standing of its citizens. And democracy is taken to be an important way in which the free and equal standing of citizens is constituted.<sup>11</sup> By being given an equal opportunity to run for office, vote for representatives, and participate in public debate, citizens afford legitimacy to those that govern them. A strongly paternalistic state that entirely bypassed citizens' judgments about how to govern themselves would not be legitimate according to this conception. Ben-Porath's structured paternalism would seem not to be subject to this objection because it is not coercive, it accommodates diversity, it aims to respect citizens' equal standing, and it is, on the face of it, compatible with democracy. However, there might be unintended effects that an extensive structured paternalism might have on citizens' judgments and, consequently, on their ability to participate in political decision making in the way required by a democracy.<sup>12</sup> For example, environmental policies that nudge citizens toward recycling and reducing their energy consumption might have an unintended effect on citizens' engagement with environmental issues by leading to complacency. This, in turn, might negatively affect citizens' capacity to evaluate candidates' environmental policies.

Furthermore, paternalistic policies might lead us to overlook the ways in which citizens' choices reflect deeper problems that undermine political legitimacy. A dramatic example is provided by the Peruvian government's paternalistic efforts in the 1990s to reduce poverty in rural indigenous communities by offering incentives in the form of food and clothing for women to undergo sterilization.<sup>13</sup> The government of President Fujimori appealed to the well-documented correlation between large family size and poverty and argued that reducing family size among the rural poor would reduce their risk of falling even further down into poverty. Since the use of contraception is frowned upon by the Catholic Church, which has wide support among the rural poor, sterilization was seen as the most viable method (though alternatives were made available to women). There is much that was problematic about this policy, but of particular concern was that many of these poor and uneducated women did not have adequate information when they "consented" to the procedure. However, it would be a mistake to focus solely on women's knowledge of contraception. In fact, the well-documented effect of education on women's reproductive choices indicates that high birth rates were evidence of a deeper underlying problem — lack of education among rural indigenous women. This problem directly threatened the government's legitimacy and was not going to be solved by reducing population size and, thereby, slightly increasing this population's well-being.

One way for structured paternalism to mitigate this worry would be to draw limits on the domains in which it is warranted. Ben-Porath does so when she draws a distinction between paternalism in domains in which we have experts whose opinions we would do better by trusting and those in which reliance on expert opinion makes little sense ( *TC*, 145). She argues that in the first domain, which includes economic activity, default rules make sense. In the second domain, which includes intimate

and identity-related behavior, paternalism should take the form of the careful construction of choice sets to avoid destructive choices while expanding opportunities for individual self-expression. Family planning clearly falls into this second domain. Consequently, the heavy-handed government interference in the Peruvian case would not meet Ben-Porath's criteria because it did not involve the careful construction of a reasonable set of contraception choices that would allow these women to make informed choices, even when this involved an expression of their religious beliefs regarding the impermissibility of contraception. Ben-Porath's distinction of different domains is useful and sensible. In a democracy, however, we should worry about relying too heavily on expert opinion via state intervention even in the first domain.

Take, for instance, the classic example of social security. Arguably, a social security benefit is a paternalistic policy that protects citizens from disastrous outcomes upon retirement. However, some economists suggest that a consequence of this policy is that people overestimate their social security benefits and, thus, underestimate how much they will need to save for retirement.<sup>14</sup> The potential effect of this error in judgment could be corrected by structured paternalism — that is, by incentivizing citizens to save more. However, an additional question we must consider is whether this error in judgment concerning retirement might have detrimental effects on citizens' ability to make judgments at the ballot box. Some evidence suggests that citizens who expect to receive social security often vote in favor of candidates that aim to eliminate those very social benefits.<sup>15</sup> There might be a variety of reasons for this. For example, social benefit policies might be bundled with other policies that voters support.<sup>16</sup> But one plausible explanation is that citizens do not fully understand how the benefits they receive are funded. If this is correct, then they are voting on the basis of less than adequate information. Whatever the explanation for this particular case, it is imperative that we gather empirical evidence to determine the effects paternalistic policies might have on citizens' capacity to make informed judgments in domains that are relevant to their political decision making.

The particular solutions to the savings problem and to the environmental policy problem surely involve “nudging” people toward saving more (in the case of the former) and reducing their environmental impact (in the case of the latter), but an important piece of the solution to problems of this sort involves educating citizens with respect to the economic, political, and social institutions that structure their choices. Without such education, citizens' understanding of how the economic and political system shapes their lives suffers and their capacity to make informed choices at the voting booth and in public discourse diminishes in tandem. There is a substantial literature on what kind of education is necessary for political citizenship that I cannot discuss here.<sup>17</sup> Accounts range from those that require education for substantial autonomy to those that require minimum conditions for political participation, such as knowledge of the constitution, understanding of political institutions, and the skills and knowledge needed to make an informed choice at the ballot booth.<sup>18</sup> However, even these minimal accounts of citizenship education should worry that allowing citizens to become too dependent on the state's judgment threatens to undermine citizens' capacities for political participation.

A concern for legitimacy should also lead us to be concerned about inequality in the conditions for good decision making. Though the “heuristics and biases” literature shows us that as humans our rationality is limited and liable to error, not all human error can be explained this way. Social scientists have noted that people who are poor often make decisions that dig them deeper into poverty. They tend to play the lottery, borrow too much at high interest rates, and fail to enroll in assistance programs

that might help them.<sup>19</sup> Social scientists have debated the nature of this correlation: whether people are poor as a result of irrational decision making or whether poverty itself plays a role in leading those who are poor to make seemingly irrational decisions. A recent pair of elegantly conceived studies supports the latter hypothesis — that the condition of poverty affects a person's decision making itself.<sup>20</sup> What this research shows us is that people make seemingly irrational choices because they live in conditions of extreme scarcity. When removed from situations of scarcity, those very same people make better choices. Sendhil Mullainathan and Eldar Shafir, authors of a recent book on the topic, argue that “scarcity captures our attention, and this provides a narrow benefit: we do a better job of managing pressing needs. But more broadly, it costs us: we neglect other concerns, and we become less effective in the rest of life.”<sup>21</sup> Scarcity leads people to focus on the short-term at the expense of their long-term well-being.

These findings should worry us because they negatively impact the well-being of some citizens; however, they should also worry us from a political legitimacy perspective. Some citizens are in an unequal position to adequately participate in political decision making because they are in conditions of economic scarcity that make it difficult for them to form adequate judgments concerning their long-term interest in the first place. We could mitigate this effect through structured paternalism by setting default rules that privilege better choices and steer them away from choices that dig them deeper into poverty. Then again, a concern with the state's political legitimacy ought to lead us to prioritize changing those background conditions so as to empower those citizens to be in a position to make their own judgments.

This argument is compatible with the spirit behind Ben-Porath's structured paternalism, though it is not an issue she directly addresses. However, notice that such a solution requires recognizing that some defects in rationality are not the product of unavoidable human error but the result of social and political structures that distribute the necessary conditions for rational decision making unequally. Some bad choices are the result of severe poverty and inadequate education. Understanding and acknowledging how our political institutions put some citizens in conditions that are not conducive to good decision making ought to be a part of crafting paternalistic policies that seek to remedy defects in our decision making. Of course, the best solution probably involves doing both, but my point here is that concerns stemming from political legitimacy allow us to see an aspect of this problem that might not be immediately obvious if we are only concerned with steering citizens toward choices that are better for their long-term well-being.

My argument is not meant as an indictment against structured paternalism, but rather as a word of caution about how we proceed when the state takes it upon itself to structure choice sets for citizens. Citizens are overwhelmed by choices and are often worse decision makers than theories of economic rationality would predict. The state can ease this burden on citizens while nudging them away from disastrous choices and toward ones that will lead them to have better opportunities. At the same time, the state should exercise this power without undermining its own legitimacy by educating citizens not just to make better choices, but also to understand how and why choices are being made for them. Furthermore, the state should acknowledge its role in creating the conditions that lead citizens toward making suboptimal choices and aim to mitigate those conditions.

Ben-Porath, in the concluding chapter of her book, reiterates the importance of education in helping citizens identify and develop their preferences and in making choices that allow them to express their

identities. Furthermore, she argues that we should invest in adult education to enable citizens to make better choices. I wholeheartedly agree with Ben-Porath on these points, but we should not overlook that the capacity to understand and make judgments concerning the choices citizens confront is important not only because it allows citizens to express their identities and lead better lives but because democratic states depend on citizens making informed choices for their legitimacy.

- 1 Ben-Porath's *Tough Choices* will be cited as *TC* in the text.
- 2 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- 3 Michael M. Grynbaum, "New York Soda Ban to Go Before State's Top Court," *New York Times*, October 17, 2013; [www.nytimes.com/2013/10/18/nyregion/new-york-soda-ban-to-go-before-states-top-court.html?\\_r=0](http://www.nytimes.com/2013/10/18/nyregion/new-york-soda-ban-to-go-before-states-top-court.html?_r=0).
- 4 Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, Connecticut: Yale University Press, 2008).
- 5 Daniel Kahneman, *Thinking, Fast and Slow* (New York: Macmillan, 2011).
- 6 It should be noted that she discusses the issue of democratic citizenship extensively in *Citizenship Under Fire: Democratic Education in Times of Conflict* (Princeton, New Jersey: Princeton University Press, 2009).
- 7 This is not a point about autonomy. Even children who grow up in communities that do not value autonomy as liberals conceive it are expected to eventually be able to make judgments about how to pursue their particular way of life independently of their parents.
- 8 For a view that sharply distinguishes justification from legitimacy and takes legitimacy to be based solely on consent, see A. John Simmons, "Justification and Legitimacy," *Ethics* 109, no. 4 (1999).
- 9 The classic critique of consent as the basis of political obligation can be found in David Hume, "Of the Original Contract," in *Social Contract: Essays by Locke, Hume and Rousseau* (1969; repr. Westport, Connecticut: Greenwood Press, 1987).
- 10 The classic critique here can be found in Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (New Haven, Connecticut: Yale University Press, 1928).
- 11 Thomas Christiano, "The Authority of Democracy," *Journal of Political Philosophy* 12, no. 3 (2004).
- 12 For a discussion of how the "heuristics and biases" literature might undermine democratic

legitimacy, see Jamie Terence Kelly, *Framing Democracy: A Behavioral Approach to Democratic Theory* (Princeton, New Jersey: Princeton University Press, 2012).

- 13 See Calvin Sims, "Using Gifts as Bait, Peru Sterilizes Poor Women," *New York Times*, February 15, 1998; <http://www.nytimes.com/1998/02/15/world/using-gifts-as-bait-peru-sterilizes-poor-women.html>. For discussion of this and other similar programs around the world, see Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control* (Boston, Massachusetts: South End Press, 1995).
- 14 Martin Feldstein, "Social Security, Induced Retirement, and Aggregate Capital Accumulation," *Journal of Political Economy* 82, no. 5 (1974).
- 15 This issue is too complex to be adequately discussed here. See Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America* (New York: Macmillan, 2007).
- 16 Thanks to Harry Brighouse for bringing up this point in particular, and more generally for his helpful comments on an earlier version of this review.
- 17 For an overview, see Blain Neufeld, "Political Liberalism and Citizenship Education," *Philosophy Compass* 8, no. 9 (2013).
- 18 For an account that argues that education for political legitimacy requires autonomy-facilitating education, see Harry Brighouse, "Civic Education and Liberal Legitimacy," *Ethics* 108, no. 4 (1998).
- 19 Anuj K. Shah, Sendhil Mullainathan, and Eldar Shafir, "Some Consequences of Having Too Little," *Science* 338, no. 6107 (2012).
- 20 Ibid. See also Anandi Mani et al., "Poverty Impedes Cognitive Function," *Science* 341, no. 6149 (2013).
- 21 Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (New York: Macmillan, 2013), 14–15.

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