"Libertarian Paternalism and the Danger of Nudging Consumers"

Alberto R. Salazar V.

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LIBERTARIAN PATERNALISM AND THE DANGER OF NUDGING CONSUMERS

Consumer law and policy have sought to protect consumers through various forms of information disclosure. This has, however, failed in several areas. A central reason for such a failure has been irrational consumer behavior. Libertarian paternalism, a currently influential view in the US and the UK, attempts to capture the many ways in which market behaviour can be irrational and suggests nudging consumers towards self-interest. This has important implications for consumer protection policies. In the area of healthy eating, rather than insisting on nutrition labeling and other legislative interventions, libertarian paternalism claims that nudging consumers towards healthy food is likely to improve healthy eating and reduce obesity in society. This work critically assesses the limitations of nudging consumers for healthy eating. It argues that nudge intervention can only induce short-term cosmetic behavioral changes likely to work for nutrition-conscious, somewhat informed or affluent consumers. This should not be surprising as nudge interventions have no interest in changing the structural disadvantages and social constraints that underlie the patterns of unhealthy eating; the harmful effects of corporate nudging and advertising; and the negative impact of nudged food choices on social welfare, the environment and economic inequality. This work suggests moving beyond nudge interventions and presents some evidence for combining non-regulatory and regulatory interventions in order to reduce more effectively unhealthy eating and the obesity epidemic.

Keywords: libertarian paternalism, nudge intervention, consumer protection law and policy, nutrition labeling, healthy eating, obesity

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Alberto R. Salazar V., PhD
York University
Toronto, Canada
asalazar@osgoode.yorku.ca
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INTRODUCTION

Consumer protection law and policy have sought to protect consumers largely through many information provision strategies. In the area of healthy eating, consumer law has particularly required nutrition labelling in an effort to help consumers make more informed decisions and choose healthy food options. As a result, nutrition information has increased significantly and consumers are now greatly exposed to richer information about their food choices. Yet, the current pattern of unhealthy eating and the obesity epidemic indicate that nutrition labelling and other similar regulatory interventions have had a limited impact as consumers continue to buy and consume unhealthy food.¹

While several factors may explain the current pattern of unhealthy eating and the obesity epidemic, a central reason in explaining the failure of nutrition information strategies concerns consumer behaviour.² Consumers have largely been assumed to be rational actors capable of good judgment and of making decisions that will enhance their self-interest. It is then further assumed that nutrition information will assist consumers to make informed decisions about food


² See e.g. Julie S. Downs, George Loewenstein, and Jessica Wisdom, “Strategies for Promoting Healthier Food Choices” (2009) 99:2 Am. Economic Rev. 1; R. L. Rothman, R. Housam, H. Weiss, “Patient Understanding of Food Labels: the Role of Literacy and Numeracy” (2006) 31 (5) Am. J. Prev. Med. 391; Krukowski RA, Harvey-Berino J, Kolodinsky J, Narsana RT, DeSisto TP, “Consumers may not use or understand calorie labeling in restaurants”, J Am Diet Assoc. 2006;106: 917-920 (44% to 57% of community and college students “reported that they were not likely to use food label information in restaurants if it were available”
choices. However, such a behavioural assumption has been widely questioned as consumers increasingly buy and consume unhealthy foods that harm their health and cause obesity.

Libertarian paternalism has become an influential view that attempts to develop an approach that captures the many ways in which market behaviour can be irrational and suggests a new form of intervention that will promote rational behaviour. Specifically, it suggests nudging consumers towards self-interest without legislation. In the area of healthy eating, rather than insisting on nutrition labelling and other legislative interventions, it claims that nudging consumers towards healthy food is a more effective solution to improve healthy eating in society.

This work critically examines the extent to which nudging consumers for healthy eating is an effective intervention to change the current patterns of unhealthy eating and reduce obesity in society. After reviewing the central assumptions and supportive evidence of libertarian paternalism, it is argued that nudging consumers for healthy eating is highly problematic and dangerous. Nudge intervention can only induce short-term cosmetic behavioural changes likely to work for nutrition-conscious, somewhat informed or affluent consumers while concealing a number of important problems underlying unhealthy eating and the obesity epidemic, namely, the misperception of healthy food choices; the neglect

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of structural disadvantages and long-term behavioural change; the distortive influence of corporate nudging and advertising; the significant difficulties in designing nudges for healthy eating; and the negative impact of nudged healthy food choices on social welfare, the environment and economic inequality. Nudge intervention thus creates an illusion of a significant behavioural change and raises an unrealistic expectation of improving healthy eating in society.

The argument is developed in three major sections. The first section briefly describes the insights of libertarian paternalism and its normative proposition that nudging consumers towards healthy food will improve healthy eating and help reduce obesity in society. The second section is central and critically assesses the limitations of nudging consumers for healthy eating. It raises a number of problems with nudging for healthy eating ranging from the misperception of healthy food choices to the neglect of the negative impact of nudged healthy food choices on social welfare, the environment and economic inequality. The third and last section briefly suggests moving beyond nudge interventions in the area of healthy eating and presents some evidence for non-regulatory and regulatory interventions in that area.

LIBERTARIAN PATERNALISM AND NUDGING CONSUMERS FOR HEALTHY EATING
Drawing on insights from behavioral economics, nudging associated with libertarian paternalism⁴ or asymmetric paternalism⁵ has attracted the attention of policy makers and academics, with both the UK and US governments embracing it⁶. It starts by recognizing that individuals have cognitive biases that lead them to act in irrational ways so that they often act against their own self-interest.⁷ It clearly departs from traditional rational choice theories that unrealistically assumed that consumers and other market participants act rationally to maximize their self-interest. A policy intervention should seek to re-organize the context in which people make decisions (“choice architecture”) so that they overcome their cognitive biases and are in a position to enhance their self-interest.⁸ Rather than operating via information, that approach suggests nudging self-destructive

behavior toward self-interest without abridging individual’s ultimate freedom to choose and without distorting the decisions of those behaving in a self-interested fashion. A nudge intervention “must be easy and cheap to avoid”. It preserves freedom of choice but authorizes “both private and public institutions to steer people in directions that will promote their welfare” as judged by themselves. Nudges can help individuals to overcome cognitive biases, highlight better choices for them, and increase the effect of behavioral change without restricting their choices. Nudge is defined as:

... any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit at eye level counts as a nudge. Banning junk food does not.

Nudging may be appealing because it proposes seemingly simple, low cost solutions that do not require legislation. Nudges can replace requirements, mandates or bans and impose no burden on taxpayers. This can be extremely attractive because, for instance, public health can be improved with significant

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savings in both regulatory cost and public spending and avoiding the typical failures of a ‘nanny state’.

*Nudging* has important implications for promoting healthy eating. By making low-cost/no cost changes to how food is displayed, placed, described, highlighted, offered, and paid for in supermarkets, cafeterias and restaurants, a smarter food environment can nudge adults and children toward more nutritious food choices, without taking away their choices.16 For example, given that diners are likely to choose what comes first in the line, arranging the presentation of food in a cafeteria line so that healthy foods appear first may increase the consumption of healthy food without depriving eaters of their freedom to choose any food option.17 Putting fruits before desserts steers consumers towards healthy food without forbidding any choice.18

There are some evidence that food nudging is working. It has been claimed that that moving the fruit bowl, and naming the veggies immediately improve how healthy kids eat. The first increases fruit sales by over 100%, the second increases veggie sales by 27%.19 Researchers at New Mexico State University

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16 See e.g. Behavioral Economics and Nutrition Center, Cornell University, online: http://www.facebook.com/pages/Behavioral-Economics-and-Nutrition-Center/115669951830104?v=info
19 See e.g. Behavioral Economics and Nutrition Center, Cornell University, online:
conducted a research at supermarkets in Las Cruces. They marked a line with yellow duct tape across the width of shopping carts, and put a sign on the cart requesting shoppers to place fruit and vegetables in front of the tape line, and the rest of their groceries behind the line. Researchers saw a bump of a 102% increase in purchasing of fruits and vegetables with that simple sign and line. Placing fruit next to the cash register increased the amount of fruit bought by school children at lunchtime. These initial findings will be taken further by the UK government’s Behavioural Insights Team as it is planning to engage the private sector to experiment with the design of trolleys and the order or height of healthier options on supermarket shelves. Positioning soft drink vending machines in obscure places will reduce the pressure on consumers so that they will not constantly have to choose whether or not to consume them, a choice that requires and depletes will power. A key strategy is to “make healthy behaviors more convenient (less immediately costly) and unhealthy behaviors less convenient (more immediately costly).”

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Similarly, making healthy food options the default can help people eat healthy as they tend to stick with the current or default option even when superior options are available (status quo bias).\textsuperscript{26} For instance, an experiment demonstrated that participants were more likely to choose low-calorie sandwiches when these latter were offered first on the front page and high-calorie options were presented at the back of a menu.\textsuperscript{27} The study concluded that participants were more likely to choose low-calorie sandwiches when it was more convenient to do so.\textsuperscript{28} This convenience manipulation plays on two biases that ordinarily promote high calorie intake. Present-biased preferences (present enjoyment of meal outweighs future weight gain) were exploited by introducing a tiny cost to selecting a sandwich off the additional menu (opening the menu and looking at the back).\textsuperscript{29} The status quo bias was also exploited by making healthful options the implicit default.\textsuperscript{30} There is, however, the possibility that those eating fewer calories in a single meal may compensate later in the day by snacking or eating more.\textsuperscript{31} At fast food restaurants, for example, large sodas in combination meals can be replaced with a bottle of water as the default, with soda served only on request, and such change “would cost restaurants little and preserve freedom of choice.

\textsuperscript{27} Julie S. Downs, George Loewenstein, and Jessica Wisdom, “Strategies for Promoting Healthier Food Choices” (2009) 99(2) Am. Economic Rev. 1, 3. See also Karen Blumenthal and Kevin G. Volpp, “Enhancing the Effectiveness of Food Labeling in Restaurants” (2010) 303 (6) JAMA 553 at 554 (“Designing a menu board or menu so that the healthier (lower-calorie) options appeared first, or were printed in larger and bolder font, may help individuals identify and choose these healthier items.”)
\textsuperscript{28} Julie S. Downs, George Loewenstein, and Jessica Wisdom, “Strategies for Promoting Healthier Food Choices” (2009) 99(2) Am. Economic Rev. 1, 3
while potentially producing a major change in beverage consumption behaviour.”

THE LIMITATIONS OF NUDGING FOR HEALTHY EATING

*Nudging* has important shortcomings, however. First of all, no always the presence of default healthy food options results in consumers choosing healthy food. A recent study has found that including healthier options in a menu can *increase* the number of consumers that may purchase less-healthful menu items. The mere presence of a healthy food option vicariously fulfills nutrition goals and provides consumers with a license to indulge. Similarly, the presence of healthy food options may distort consumers’ perception of the actual calorie content of a food product. A study has shown that consumers tend to estimate that a hamburger contains 697 calories when it is presented alone, but 642 calories when it is presented with three celery sticks. This misperception is more severe among people concerned about managing their weight. Weight-conscious individuals are more likely to believe that adding a healthy option to an unhealthy meal decreases the calorie content of a meal (*‘negative calorie

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32 George Loewenstein, Troyen Brennan and Kevin G. Volpp, “Asymmetric paternalism to improve health behaviors” JAMA, November 28, 2007—Vol 298, No. 20, 2415 at 2416. See also Karen Blumenthal and Kevin G. Volpp, “Enhancing the Effectiveness of Food Labeling in Restaurants” (2010) 303 (6) JAMA 553 at 554 (“Restaurants could replace the default soda and fries in a combination meal with a bottle of water and a side salad or fruit”).
illusion’). Weight-conscious participants estimated that a hamburger alone contains 734 calories and 619 when accompanied with celery sticks. If food consumers make their decisions with such misperception, this problem may indicate that defaults create an additional problem, namely healthy defaults may decrease the incentives for individuals to both gather further or superior information and engage in social learning about nutrition in order to check or acquire more accurate knowledge about healthy food options.

A policy intervention that focuses on adding a healthy food option may thus unintentionally “promote the erroneous belief that the healthy aspects of a meal can compensate for its unhealthy aspects, and that an unhealthy meal can be made healthier and less likely to promote weight gain by simply adding a healthy item or ingredient.” These findings raise concerns about the possibility that seemingly benign nudges may have paradoxical effects, namely unexpectedly reinforce overconsumption of calories and obesity. Thus, the evidence to support the view that nudging alone can improve population health is still weak and

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40 Marteau TM, Ogilvie D, Roland M, Suhrcke M, Kelly MP. “Judging nudging: can nudging improve population health?” BMJ 2011;342:d228
further thorough evaluations are needed to assess the extent of the effectiveness of nudging and the relevance of other policy interventions.\textsuperscript{41}

Moreover, a nudge (e.g. changing the place of fruits and vegetables in a supermarket) may be helpful, but little it is said about the pressures and the social constraints that most food consumers face. On the one hand, consumers are likely to be driven by price, taste and convenience, with some consideration given to nutrition. We may change the placement of fruits and vegetables in supermarkets and cafeterias or make healthy food default options that appear on the front of menus, but if consumers cannot afford them or have limited access and time to shop them regularly, little can be changed. In particular, low-income consumers are likely to buy food that is more affordable, available and from places conveniently located, which will probably outweigh nutrition considerations and will result in giving little attention to nudges for healthy eating. Such nudges may not even exist in low-income neighborhoods because they often lack supermarkets and stores offering fresh food within short distance.\textsuperscript{42}


\textsuperscript{42} Anthony Kessel and Peter Allmark, “Déjà Vu. Groundhog Day for Public Health Policy?” in Food Ethics (The magazine of the Food Ethics Council) Spring 2011 Volume 6 Issue 1 at 11 (noting that “[r]esidents in remote social housing, for instance, will find it impossible to eat fresh fruit and vegetables if there are no shops locally selling them. And nudge says relatively little on the importance of sustainability and related issues of food ethics.”), online: http://www.foodethicscouncil.org/system/files/fec%206-1.pdf.
These problems are so serious that they are jeopardizing food security. For instance, the 2004 Canadian Community Health Survey reported high prevalence of food insecurity among low income households and those formed by recent immigrants. A recent study has found a considerably high rate of food insecurity (56%) among recent Latin American immigrants in Toronto. Household food insecurity was highly associated with being on social assistance, limited English language proficiency, and the use of food banks. The study concluded that the primary correlate of a household's food security status is income. This suggests the need for improving the financial power of such consumers to purchase sufficient, nutritious, and culturally acceptable food. It thus appears that nudging for healthy eating makes a little sense for low-income consumers and can be more helpful for higher-income and affluent consumers. An intervention that heavily relies on nudging is in danger of hiding the structural disadvantages that low-income consumers often face.

48 Chris Bonell; Martin McKee; Adam Fletcher; Andrew Haines; Paul Wilkinson, “Nudge smudge: UK Government misrepresents “nudge”, The Lancet (June 2011), 377 (9784), pg. 2158-2159 at 2159 (“...Nudge, ... largely ignores the socioeconomic determinants of behaviour. Rather than combating poverty and injustice, nudgers can only hope to compensate by nudging people who are poor more vigorously. But how can one nudge away the poor life-chances of children living in poverty, the societal harms arising from income inequality, or the obesogenic effects of the excessive use of fossil fuels? How could nudges have combated cholera from poor hygiene in the 19th century or respiratory disease from pollution in the 20th century?...This government has apparently welcomed Marmot’s review while using a misrepresentation of nudge theory to muddy debate, obscuring its failure to engage with the upstream socioeconomic determinants of health...”)
Such criticisms thus suggest that the structural determinants of food choices associated with income, access and food culture are largely underestimated by libertarian paternalism. This should not be surprising as many of the studies that support nudging have been conducted in lab-like scenarios in which the broader institutional environment of food choices is not given significant attention. Further studies are needed to account for the different institutional contexts and to assess which nudges work, for whom, in what circumstances, for how long and under what type of regulatory environment.\textsuperscript{49}

Even when nudges such as placing healthy food options in the back of supermarkets or making them default on the front part of menus appear to work in some instances, there is the possibility that consumers may learn the trick over time and understand that if they feel like eating high calorie foods they have to go directly to the back of the menu or the supermarket and do not be distracted with what is presented first to them. Similarly, while it is possible that consumers may buy more healthy food as a result of nudges, it is also possible that consumer may not actually consume them. Buying nutritious food to cook healthy meals daily requires time and will power as well as commitment to sustain such a practice over a longer period of time. It is likely that many consumers and families will gradually give up cooking as the pressures of time, stress and other problems grow in capitalist societies and some healthy food will have to go to the

\textsuperscript{49} Marteau TM, Ogilvie D, Roland M, Suhrcke M, Kelly MP. “Judging nudging: can nudging improve population health?” BMJ 2011;342: d228; Bruce Ian Carlin, Simon Gervais and Gustavo Manso, “When Does Libertarian Paternalism Work?” (NBER WORKING PAPER SERIES Working Paper 15139, July 2009), National Bureau of Economic Research, at 2 (“…default options are unlikely to increase social welfare when peoples’ needs are more heterogeneous…”).
garbage bin. This latter may become a disincentive to buy healthy food next time, an attitude that may grow stronger despite the presence of nudges for healthy eating. As consumers continue to switch to eating out rapidly, nudges will likely find a better place in restaurants, which, as indicated above, may ironically result in promoting over-consumption of high calorie food.

These problems reveal a central limitation of nudging, namely, nudges may work for some time influencing automatic behavior, but they are not capable of sustaining long-term behavioral change as nudges do not really change individuals’ knowledge, attitudes or values and their decision making process in the reflective system as well as are irresponsible to the pressures from consumerist lifestyles in modern capitalist societies that are behind the obesity epidemic. The problem of obesity cannot be attributed solely to ‘irrational’ consumer choices or personal irresponsibility as nudging suggests. The current wider environment in capitalist societies also encourages unhealthy choices.


51 See e.g. UK, House of Lords, Science and Technology Select Committee, “Behaviour Change” (2nd Report of Session 2010–12) (London: The Stationery Office Limited) (published 19 July 2011, HL Paper 179) at 53 (“Professor Baldwin said, …: “... the explanation for [the rise in obesity] is plainly not to be found in a collapse of personal responsibility over this period. Instead the explanation revolves around a
It is thus important to seek some modification of consumers’ knowledge, attitudes, values and lifestyles in order to sustain significant long-term behavioral change of unhealthy eating patterns. Education and persuasion through effective information dissemination and massive awareness campaigns then appear to be one necessary action.\textsuperscript{52} For example, if consumers tend to erroneously believe that adding healthy foods to an unhealthy meal can decrease the meal's calorie count, there is then a need for educating consumers about the fact that adding a healthy item can make a meal healthier, but it cannot lower its calories and the importance of monitoring the actual overall quantity consumed.\textsuperscript{53} Yet, nudges do not include openly persuasive interventions such as media campaigns, the massive provision of information\textsuperscript{54} or educational programs\textsuperscript{55}. Nudge interventions thus run the risk of making short-term cosmetic behavioral changes likely to work for health-conscious, somewhat informed or affluent consumers.

\textsuperscript{52} Vania Phitidis and Sophie Sabbage, “Beyond nudge: it's time to call forth people's internal willingness to change. Nudging is all very well, but to create real behavioural change we need to transform attitudes” The Guardian (Thursday 6 October 2011), online: \url{http://www.guardian.co.uk/sustainable-business/consumer-behaviour-sustainable-change}. (“...Transforming these attitudes calls for vision, boldness, compassion and an educational revolution that makes attitudinal intelligence as accessible, practical and mainstream...”).


\textsuperscript{55} Richard H. Thaler and Cass Sunstein, \textit{Nudge: Improving Decisions about Health, Wealth, and Happiness} (New Haven, CT: Yale University Press, 2008) at 114 (Noting the ineffectiveness of education programs for increasing savings, suggest that automatic enrolment and Save More Tomorrow are better than education). See also Cass R. Sunstein, \textit{Economics & Real People}, 3 GREEN BAG 397, 404 (2000) (“A very large question involves the extent to which education can counteract cognitive and motivational distortions, so as to eliminate some of the effects described above. Is it possible for those involved in law to ‘debias’ people, in the process, perhaps, lengthening human lives? What institutions work best at reducing the effects of biases?”).
who may be in a better position to adjust their lifestyles to new patterns of healthy eating.

Furthermore, an overreliance on nudges for healthy eating is likely to shift the focus away from corporate nudges and advertising that continue to aggressively influence food consumers exploiting consumers’ interest in price, taste, and convenience, appealing to images and pleasant lifestyles, and targeting children. This problem cannot be neglected. Food products are often packaged, presented, and engineered to stimulate our automatic, affective system.\textsuperscript{56} Supermarkets seek to direct our choices by, for instance, placing sweets at the level of children’s eyes while lining at the check-outs, a well-researched and widely practiced nudge that corporations have been using long before libertarian paternalism’s nudging.\textsuperscript{57} This corporate nudging has evolved into sophisticated computer-based models of optimum shelf position, space allocation and use of flyers and menus seeking to influence consumers’ choice more effectively.\textsuperscript{58} Corporate nudges often result in over-consumption,\textsuperscript{59} which is further primed by

\textsuperscript{56} Marteau TM, Ogilvie D, Roland M, Suhrcke M, Kelly MP. “Judging nudging: can nudging improve population health?” BMJ 2011;342:d228.
\textsuperscript{57} Blythman J. Shopped: the shocking power of British supermarkets. Fourth Estate, 2004 (discussing evidence of these corporate nudges in the UK).
advertising. A recent study has demonstrated that children consumed 45% more when exposed to food advertising. Adults consumed more of healthy and unhealthy snack foods following exposure to snack food advertising. These experiments demonstrate “the power of food advertising to prime automatic eating behaviors and thus influence far more than brand preference alone”. This is just an example of the many ways in which food advertising contributes to worsen the obesity epidemic.

In light of those findings, aggressive corporate nudging and advertising are likely to undermine the advantage of nudging for healthy eating. For instance, while the UK government’s Change4Life anti-obesity campaign seeks to get people to modify their behaviour, many of Change4Life’s corporate partners engage in extremely expensive marketing campaigns to persuade people to consume

64 Chandon, Pierre and Wansink, Brian, “Is Food Marketing Making Us Fat? A Multi-Disciplinary Review” (May 26, 2011). INSEAD Working Paper No. 2011/64/MKT/INSEAD Social Science Research Centre. Available at SSRN: http://ssrn.com/abstract=1854370, at 49 (“...Still, if asked to summarize how food marketing has made us fat, we would say that it was through increased access to continuously cheaper, bigger, and tastier calorie-dense food. In addition, we can hypothesize that the effectiveness of persuasive mechanisms that operate through deliberate decision-making processes (e.g., nutrition information, health claims, informational advertising) is probably overestimated, whereas the effectiveness of factors that operate “below the radar” and often through self-regulation failures (brand associations, calorie density and sensory complexity of the food; the size and shape of portions, packages, and serving containers; and the convenience and salience of food stimuli in the eating environment) are probably underestimated.”)
65 For similar claim see Marteau TM, Ogilvie D, Roland M, Suhrcke M, Kelly MP. “Judging nudging: can nudging improve population health?” BMJ 2011;342:d228
unhealthy products.\textsuperscript{66} Recently, for example, “Change4Life partner Kellogg’s ran an aggressive advertising campaign encouraging children to eat one of its most sugary cereals as an after-school snack”.\textsuperscript{67} Similarly, one may wonder whether food companies will be genuinely committed to remove or significantly reduce their nudges for unhealthy food products such as the ones high in calorie, sugar and salt in order to create room for healthy nudges that promote the consumption of fruits, vegetables and less processed foods, which will ultimately lower their profitability. It is thus difficult to see how nudges for healthy eating are likely to succeed in such environment of massive corporate advertising and nudging for unhealthy food.

Libertarian paternalism appears to underestimate the influence of corporate advertising and nudging as it largely assumes that the problem lies with individual consumers themselves and their mistakes in making market decisions. Consumers are blamed for their irrational behavior and little of the problem is also attributed to structural or external factors such as aggressive corporate advertising and nudging.


Thus, effective nudge interventions require legislation to prevent unhealthy nudges and advertising from the food industry.\textsuperscript{68} Moreover, regulation may also be necessary to implement healthy eating nudges.\textsuperscript{69} For example, companies may be required by regulation to provide a particular choice architecture in order to “nudge” individuals.\textsuperscript{70} All this indicates the necessity of regulation despite the original claim of \textit{nudging} under libertarian paternalism, namely, that legislation and significant government intervention are unnecessary. If nudge interventions are to be aided by regulation, there is however the need to protect the design and implementation of nudges such as default food options from rational ignorance, mistake, manipulation or bias on the part of regulators, choice architects\textsuperscript{71} or food companies. This problem is exacerbated by the fact that a default food option can hardly capture multiple healthy food choices that would ideally satisfy consumers’ diverse taste, income constraints, convenience and food culture. The effectiveness of defaults requires capturing such diversity.

\textsuperscript{68} Marteau TM, Ogilvie D, Roland M, Suhrcke M, Kelly MP. “Judging nudging: can nudging improve population health?” BMJ 2011;342:d228.
\textsuperscript{69} Marteau TM, Ogilvie D, Roland M, Suhrcke M, Kelly MP. “Judging nudging: can nudging improve population health?” BMJ 2011;342:d228.
\textsuperscript{71} Edward L. Glaeser, \textit{Paternalism & Psychology}, 73 U. CHI. L. REV. 133, 134 (2006); Gregory Mitchell, Review Essay, \textit{Libertarian Paternalism Is an Oxymoron}, 99 NW. U. L. REV. 1245, 1268–69 (2005) (questioning Thaler and Sunstein’s assumption that central planners can identify objective welfare measures that will satisfy everyone); Anuj C. Desai, Libertarian Paternalism, Externalities, and the “Spirit of Liberty”: How Thaler and Sunstein are Nudging Us toward an “Overlapping Consensus” \textit{Law & Social Inquiry} Volume 36, Issue 1, 263–295, Winter 2011 at 288 (“…Even if we could put aside the possibility of choice architects having cognitive biases of their own (Glaeser 2006), it would still not be enough to have the perfect choice-architect-in-chief, who was completely versed in all the latest psychological and behavioral economics research.”).

Thaler has acknowledged that problem and responded by adopting a libertarian “Best Guess” approach. Thaler, Richard H. 2010. The Argument Clinic. \textit{Cato Unbound: The Conversation}, April 16\textsuperscript{th}, 2010, online: \url{http://www.cato-unbound.org/2010/04/16/richard-thaler/the-argument-clinic} (“…let’s re-label our policy “Best Guess”: “Best Guess” is the policy of choosing the choice architecture that is your best guess of what the participants would choose for themselves if they had the time and expertise to make an informed choice. … implementing Best Guess can be hard in some cases, but …, you must choose something, including not having a sign. This is what we mean by inevitability. …”).
addition to the potential failures of the regulator, the inevitable heterogeneity of consumers’ subjective preference thus presents a significant barrier to a nudge intervention.\footnote{Bruce Ian Carlin, Simon Gervais and Gustavo Manso, “When Does Libertarian Paternalism Work?” (NBER WORKING PAPER SERIES Working Paper 15139, July 2009), National Bureau of Economic Research, at 17 (“…default options will likely decrease welfare when the government knows less about its constituents, when people are heterogeneous, and when the value at stake in the decision is large”); Russell Korobkin, \textit{Libertarian Welfarism}, 97 Calif. L. Rev. 1651, (2009) at 1652, 1669 (“…there are few situations in which there is both complete homogeneity of preferences and near-certainty that the state can know which default will maximize SEU [subjective expected utility]”)
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Furthermore, if nudges are supposed to be used to improve people’s health by steering them towards healthy food, social planners will need to determine whether a nudge is to encourage the consumption of, for instance, any kind of fruit and vegetable. Presumably, food products that are organic and free from genetic modification are likely to enhance people’s health more safely and greatly. It then seems desirable that a nudge intervention also encourages the consumption of that type of food. This is of course controversial but governments and food companies will have to confront that issue if a nudge intervention is to claim that is truly improving consumers’ health. Otherwise, it will conceal long-term health problems and reinforce controversial patterns of food production and consumption.

Moreover, if we are ready to accept a paternalistic intervention that nudges consumers to enhance individual welfare, we can also be paternalistic about enhancing social welfare and other values through food choices.\footnote{Similar ideas have generally been articulated from a law and economic perspective under the concept of ‘libertarian welfarism’. This latter suggests that nudges can also be used to both minimize negative}
disagrees, social welfare concerns associated with a nudge intervention are unavoidable. A nudged individual choice inevitably has a significant impact on others, thereby creating an externality problem, has distributional effects and may be consistent with individuals' preferences. Arranging the presentation of food in a cafeteria line so that fruits and vegetables appear first not only may increase healthy eating but may also have a positive impact on the environment and redistribute from industrialized food companies to farmers and the like. If this is inevitable, it is then possible to nudge individuals to buy food that is not only healthy but also environmentally friendly, locally produced and fairly traded so as to achieve not only individual welfare but also sustainable and fair local and global economies. This is not only socially desirable but also consistent with consumers' freedom as they are, for instance, increasingly demanding organic externalities associated with people's choices and maximize social welfare. See Russell Korobkin, Libertarian Welfarism, 97 Calif. L. Rev. 1651, (2009).

The impact of individual choices on third parties or the externality problem is a central criticism of libertarian paternalism. For a general discussion of this criticism see Russell Korobkin, Libertarian Welfarism, 97 Calif. L. Rev. 1651, 1665–66 (2009); Anuj C. Desai, Libertarian Paternalism, Externalities, and the “Spirit of Liberty”; How Thaler and Sunstein Are Nudging Us toward an “Overlapping Consensus” Law & Social Inquiry Volume 36, Issue 1, 263–295, Winter 2011 at 278 (“... any change in policy, even one that is merely a change in choice architecture, has an impact on more than just the individual whose choices are being shaped. Many individual choices impose externalities on others...”), 279 (“...The key is that Thaler and Sunstein’s ideas inevitably affect those other than the direct subject of the nudge, despite Thaler and Sunstein’s insistence on measuring their policy’s impact solely on whether it makes people better off as judged by themselves.”).


It is possible to conceive nudges as seeking to promote values other than welfare such as equality. See generally Matthew A. Smith & Michael S. McPherson, Nudging for Equality: Values in Libertarian Paternalism, 61 ADMIN. L. REV. 323, 341 (2009) (“...in specific situations the structure of choice architecture that promotes welfare can be adapted to promote liberty or equality”). The need to connect nudged individual choices to their impact on the broader economic environment has also been noted in the context of automatic enrollment in retirement plans. See Anuj C. Desai, Libertarian Paternalism, Externalities, and the “Spirit of Liberty”; How Thaler and Sunstein Are Nudging Us toward an “Overlapping Consensus” Law & Social Inquiry Volume 36, Issue 1, 263–295, Winter 2011 at 280 (“...In macroeconomic terms, more saving means less spending. ...a proposal aimed at increasing savings simply cannot be divorced from its macroeconomic implications. If aggregate savings matter, then Thaler and Sunstein’s proposal for increasing savings must be weighed along with other policy concerns.”).
food. After all, libertarian paternalism generally suggests nudging individuals to make environmentally-friendly choices. A nudge intervention that does not address these concerns will simply hide the significant negative impact of what appears to be healthy food choices.

Thus, designing and implementing nudges to promote healthy eating are complex and highly political. To claim that individuals can be nudged to consume more fruits, vegetables and other healthy food in order to improve people’s health is simplistic and overshadows fundamental issues about the true health of citizens and the sustainability of the food economy. It is therefore difficult to make rapid or conclusive claims that a default or other form of nudge interventions is actually improving healthy eating. It rather suggests the need for a broader

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77 Thomas Schramme “When consumers make environmentally unfriendly choices” Environmental Politics, Vol. 20, No. 3, May 2011, 340–355 at 341 (“It is true, of course, that many consumers already encourage green consumerism themselves. A good example of this internal, i.e. consumer-induced, driver of the ‘moralization of the markets’ … is the exponentially growing market in organic food”).

78 Thaler, Richard H., Sunstein, Cass R. and Balz, John P., “Choice Architecture” (April 2, 2010). Available at SSRN: http://ssrn.com/abstract=1583509 (“Some clever feedback systems are popping up in ways that are good for the environment and household budgets. There is the Ambient Orb, a small ball that glows red when a customer is using lots of energy but green when energy use is modest. Utility companies have experimented with sending customers electricity bills that tell them how much energy they are using compared to their neighbors. …”). See also Thomas Schramme “When consumers make environmentally unfriendly choices” Environmental Politics, Vol. 20, No. 3, May 2011, 340–355 at 348 (“…But why not consider less severe influences, for instance, friendly reminders of the impacts of one’s consumer choices? This is the recently much-discussed strategy of ‘green nudges’ (Thaler and Sunstein 2009)…”).

79 See generally Thomas Schramme “When consumers make environmentally unfriendly choices” Environmental Politics, Vol. 20, No. 3, May 2011, 340–355 at 342 (discussing harm through consumption, states that “…the crux of the matter is that private consumption accounts for much of the impact on a healthy climate…the larger per capita consumption in developed societies is responsible for the lion’s share of carbon emissions…”); Anuj C. Desai, Libertarian Paternalism, Externalities, and the “Spirit of Liberty”: How Thaler and Sunstein Are Nudging Us toward an “Overlapping Consensus” Law & Social Inquiry Volume 36, Issue 1, 263–295, Winter 2011 at 280 (“…Even nudging individuals toward their own long-term self-interest in the face of cognitive biases can impose negative externalities that we ought not ignore.”).

80 Similar concerns about the indeterminacy of a nudge intervention have been raised using examples in other areas. See Russell Korobkin, Libertarian Welfarism, 97 Calif. L. Rev. 1651, 1680 (2009) (“…the two indeterminacy problems that reduce the usefulness of the libertarian paternalism paradigm. First, when informational interventions would alter choice by making some information more salient than it otherwise
policy framework in which, for instance, defaults can be either supplemented with other regulatory or non-regulatory interventions to promote long-term true healthy eating or disregarded so as to force consumers to seek healthy food options more optimally or at least not be inaccurately informed or misguided by imperfect default options provided by social planners.  

On the other hand, if nudge interventions are to rely on voluntary agreements with the food industry and self-regulatory strategies, the evidence indicates that they often deliver modest results with respect to improving healthy eating. For instance, daily salt consumption in the UK has been reduced by 0.9 g per person as a result of agreements by food manufacturers and encouraged by the Food Standards Agency, whereas Finland and Japan achieved a reduction of 5 g per person after legislation. Voluntary action by the food industry may help improve public health and reduce health sector spending, but the population health benefits could be 20 times greater with government legislation on moderate salt

would be, it is often practically difficult to predict with a high degree of certainty which choice would actually maximize the SEU of most individuals. Second, when the government action changes the behavior of individuals by altering the context in which preferences are constructed, it is theoretically impossible to say which choice maximizes SEU: one choice does in the first context, and the alternative choice does in the second context….”)


See e.g. Chris Bonell; Martin McKee; Adam Fletcher; Andrew Haines; Paul Wilkinson. “Nudge smudge: UK Government misrepresents “nudge”, The Lancet (June 2011), 377 (9784), pg. 2158-2159 at 2158 (“…In his House of Commons speech, Health Secretary Andrew Lansley argued: “Rather than nannying people, we will nudge them by working with industry to make healthier lifestyles easier.”…””).


Cappuccio FP, Capewell S. “How to cut down salt intake in populations.” Heart 2010; 96:1863-1864. See also He FJ, MacGregor GA. Reducing population salt intake worldwide: from evidence to implementation. Prog Cardiovasc Dis 2010;52:363-82
limits in processed foods. More lives can be saved by cutting salt (and long-term reductions in blood pressure and stroke rates) at a rapid pace with government regulatory intervention. The argument for regulatory intervention becomes stronger if one realizes that it is extremely problematic to reach an agreement with the food industry and, more importantly, to ensure that food companies are truly committed both to promoting healthy eating and sustaining such commitment for a longer period of time. The concerns over the truthfulness of the food industry’s commitment are significant and are likely to create a monitoring cost associated with overseeing whether that industry meets the expected goal of improving healthy eating in society. The failure to fulfill such commitment or to monitor its implementation will come at the cost of losing people’s lives.

Cobiac LJ, Vos T, Veerman L. Cost-effectiveness of interventions to reduce dietary salt intake. *Heart* 2010; 96:1920-1925 (discussing an Australian study)


See e.g. UK, House of Lords, Science and Technology Select Committee, “Behaviour Change” (2nd Report of Session 2010–12) (*London*: The Stationery Office Limited) (published 19 July 2011, HL Paper 179) at 40 (reporting on the scepticism of several expert witnesses about voluntary agreements, noted that “Richard Wright, Director of Sensation, Perception and Behaviour at Unilever, told us that “the reality ... is that any business is in business to make money” and that opportunities to influence behaviour will be taken if they are a means to selling more products. Mr King said that decisions taken by Sainsbury’s that might discourage consumption of unhealthy products, for example removing confectionery from their checkouts in some stores, were taken when they were what the customer wanted rather than on the basis of any judgement about improving the health of consumers. Mr Letwin indicated a similar view when he said that working with businesses through voluntary agreements involved thinking about whether the agreement was “possibly in their commercial interest”. ... Professor Lindsay Davies, President of the Faculty of Public Health, said that voluntary agreements were an “experiment” and so should not be allowed to “drift on and on as a substitute for ... taking harder action, because the obesity epidemic can’t wait”, a point also made by Professor Nathanson. Other witnesses emphasised the importance of timelines, arguing that if agreements could not be reached or were not effective, then the Government had to be prepared to regulate. Professor Nathanson said, for example, that the Government should be prepared to say “if we don’t get a sufficiently challenging-to-the-industry ... agreement, then we would be prepared to regulate on the areas that the voluntary agreement should cover, as well as the areas that will only happen through regulation”), and 41 (concluding “…we have major doubts about the effectiveness of voluntary agreements with commercial organisations, ... Voluntary agreements should be rigorously and independently evaluated…”).
BEYOND NUDGE INTERVENTION

In light of the limitations of legally required nutrition information and nudging, it is important to explore more effective legal interventions in order to reduce the growing problem of obesity. A combination of different policy interventions such as the use of an improved labeling system, healthy food options as defaults\(^9^9\) and extensive consumer awareness and educational campaigns about healthy eating and physical activity\(^9^0\) appears to be the best approach to effectively fight obesity in society.\(^9^1\) In addition, pricing policies that increase the price of unhealthy food content or reduce the cost of healthy foods rich in fibre, and regulatory measures that restrict the marketing of unhealthy foods to children are likely to produce the largest health gains in the short term.\(^9^2\) Banning food advertising to children or requiring schools to sell nutritional food in all venues\(^9^3\) contribute to promote healthy eating among children and to the formation of a healthy taste and a pattern of healthy eating behaviour that can be carried over the future of a child.

89 Karen Blumenthal and Kevin G. Volpp, “Enhancing the Effectiveness of Food Labeling in Restaurants” (2010) 303 (6) JAMA 553 at 554 (“Defaults and more effective labeling could be used in a complementary fashion. …Menu labeling likely can be made more effective, but it is important to recognize that this is just one of a series of well-designed complementary approaches necessary to address the obesity epidemic.”)


91 The House of Lords in the UK has recently reached a similar conclusion. UK, House of Lords, Science and Technology Select Committee, “Behaviour Change” (2nd Report of Session 2010–12) (London: The Stationery Office Limited) (published 19 July 2011, HL Paper 179) at 5 (“…Our central finding is that non-regulatory measures used in isolation, including “nudges”, are less likely to be effective. Effective policies often use a range of interventions.”) and 71 (recommending the implementation of an improved nutrition labelling using a traffic-light system, recognizing the value of the Change4Life programme for consumer education and awareness and expressing scepticism about voluntary agreements with the food industry).


93 A policy implemented in Ontario as of September 1, 2011.
The evidence thus indicates that the use of a range of regulatory and non-regulatory interventions offers a better solution to the problem of unhealthy eating and obesity rather than excluding regulatory measures in order to rely solely on nudge interventions. This is an important conclusion and reveals the danger in the current enthusiasm for nudging that is leading governments to underestimate its significant limitations and exclude needed regulatory interventions in the area of healthy eating.94 It is understandable the desire of governments to avoid the problems with excessive, costly and ineffective regulatory policies. But nudge programs alone can also be costly to society because implementing such programs with little effect on changing long-term behaviour may be not only a waste of public and private resources but more importantly endanger the lives of millions that may die as a result of unstoppable unhealthy eating while waiting for nudges to work. While a combination of multiple policy interventions to reduce obesity may be more costly in the short-term, it will generate substantial health gains and will then be largely paid through future reductions of health-care

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94 For example, the UK government is reportedly excluding regulatory measures in order to heavily rely on nudge interventions. See UK, House of Lords, Science and Technology Select Committee, “Behaviour Change” (2nd Report of Session 2010–12) (London: The Stationery Office Limited) (published 19 July 2011, HL Paper 179) at 5 (“...the evidence we received indicated that the Government’s preference for non-regulatory interventions has encouraged officials to exclude consideration of regulatory measures when thinking about behaviour change”), 7 (“...since taking office, their focus has been on non-regulatory interventions and, in particular, on the concept of ‘nudging’...”); Chris Bonell; Martin McKee; Adam Fletcher; Andrew Haines; Paul Wilkinson, “Nudge smudge: UK Government misrepresents ‘nudge’, The Lancet (June 2011), 377 (9784), pg. 2158-2159 (“We argue that the government has misrepresented nudging as being in opposition to their use of regulation and legislation to promote health...”).
expenditures\textsuperscript{95} and savings in future regulatory interventions that may be required as the problem of obesity grows in complexity and magnitude.

**CONCLUSION**

This work has critically examined the approach of libertarian paternalism and its implications for consumer protection policies in the area of nutrition information and healthy eating. It has specifically assessed the extent to which nudging consumers for healthy eating is an effective intervention to change the current patterns of unhealthy eating and reduce obesity in society. It has been argued that nudging consumers for healthy eating is highly problematic and even dangerous. Nudge intervention can only induce short-term cosmetic behavioural changes likely to work for nutrition-conscious, somewhat informed or affluent consumers. It largely neglects to address a number of important problems underlying unhealthy eating and the obesity epidemic, namely, the misperception of healthy food as a consequence of adding healthy food options; structural disadvantages associated with income, access and lifestyles that undermine food choices and the effectiveness of nudges; existing knowledge, attitudes and values that hinder long-term behavioural change associated with unhealthy eating; the distortive influence of corporate nudging and advertising; the significant difficulties in designing nudges for healthy eating due to the potential failures of choice architects or regulators and the complexity in capturing the

heterogeneity of food options; and the negative impact of nudged healthy food choices on social welfare, the environment and economic inequality. Ignoring those problems, nudge intervention creates an illusion of a significant behavioural change and raises an unrealistic expectation of improving healthy eating in society. This work has also claimed to move beyond nudge interventions in the area of healthy eating and presented some evidence for non-regulatory and regulatory interventions. Further empirical investigation is needed to measure the effectiveness of such combined interventions.