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Can nudges promote individual autonomy? Yes, but not unconditionally

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Abstract

The current debate on nudging is dichotomous since it either mentions the arguments in favor of or opposed to nudging. Proponents of nudging also assume that nudges should pursue the goal to produce certain desired outcomes. This paper questions the current dichotomy of the debate and the assumption on the goal of nudges by differentiating between an output-oriented and a process-oriented conception of nudging. The aim of the thesis is to argue that process-oriented nudges rather than output-oriented nudges are desirable because they can promote the autonomy-based freedom of individuals. The thesis formulates three conditions that process-oriented nudges should satisfy in order to promote autonomy-based freedom and it applies the process-oriented conception of nudging to three different nudges. The paper concludes that especially the nudges that make relevant information salient and that change defaults are compatible with a process-oriented conception of nudging. The process-oriented conception of nudging was applied to the empirical case of vaccination policies in order to find out what kind of nudges would be compatible with a process-oriented conception of nudging.

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Introduction

One might not always realize it, but both governments and private actors attempt to influence our everyday decision-making. A picture of a pair of diseased lungs on a pack of cigarettes to discourage people to smoke, a TV commercial for toothpaste in which an actor dressed up as a dentist recommends that particular brand of toothpaste and a picture of a fly on a urinal in order to prevent spillover are all well-known everyday examples of so-called ‘nudging’.

Nudging is a practice in which some private or public actor attempts to steer peoples’ behavior in a certain direction without forbidding or mandating any choice options (Marteau, 2011, p.2). However, disagreement exists on whether nudges are desirable tools to influence peoples’ behavior. Some argue that nudging is a cost-effective way to promote desirable behavior in people, whereas others think the practice is manipulative as it seeks to take advantage of peoples’ cognitive flaws by bypassing their limited rationality. Current literature on nudging mainly focuses on the arguments in favor of or opposed to nudging. However, the conditions under which nudges can be justified and whether different nudges may be desirable in different circumstances are discussed to a much lesser extent. The current debate is dichotomous as the existing literature seems to argue that nudging is either always morally permissible or that nudging never can be morally permissible. Current literature also does not question the goal of nudges as it assumes that nudges have to produce a specific outcome in order for the nudge to be effective.

This paper will question this outcome-oriented conception of nudging and it will propose a process-oriented conception of nudging that emphasizes the deliberative process that is triggered in the nudged individual rather than the outcome that is produced by the nudge. I argue that a process-oriented conception of nudging can promote individual autonomy and I

will formulate conditions under which this can be the case. The research question is the following: “Is process-oriented nudging by governments morally permissible?”.¹ I will argue that nudges are morally permissible and even desirable as long as those nudges promote individual autonomy. I will argue that a process-oriented conception of nudging is compatible with individual autonomy, and I will examine under what conditions these process-oriented nudges can promote the autonomy-based freedom of individuals.

Chapter 1: Literature review

The main debate on nudging revolves around the question of whether the practice is a morally justifiable way to influence peoples’ decision-making. Some would argue that it is because nudges do not diminish freedom of choice (Sunstein and Thaler, 2003), whereas others argue that the interference of nudges with individual freedom is not morally justifiable as they are negatively affecting the autonomy-based freedom of people and their ability to make choices on their own (Hausman and Welch, 2010). Another point of (minor) contestation is whether nudges are effective tools for governments to steer the behavior of their citizens in a certain direction. Some argue that nudging is a cost-effective way to steer people’s behavior in a direction that promotes their own wellbeing (Sunstein and Thaler, 2003), whereas others argue that nudges are not capable of dealing with the big and complex issues governments face nowadays (Snowdon, 2018). I review each of these debates in the next section.

¹ Even though nudges are used both by governments and private actors, this paper will focus on the use of nudges by governments because governmental nudges raise additional issues as governments have some distinctive characteristics that private actors do not have such as the power to coerce people into acting in a certain way by means of threatening citizens with sanctions and by persecuting and punishing people who act contrary to the law.

1.1 Liberty as freedom of choice and autonomy-based freedom

In their seminal defense of nudging Sunstein and Thaler (2003) use the concept of libertarian paternalism. The authors define libertarian paternalism as ‘an approach that preserves freedom of choice but that encourages both private and public institutions to steer people in directions that will promote their own welfare’ (Sunstein and Thaler, 2003, p. 1201). Even though libertarianism and paternalism might seem mutually exclusive, the authors argue that the libertarian paternalist approach is not an oxymoron. Libertarian paternalism is libertarian in the sense that it advocates freedom of choice and it urges that people should be free to opt out. Paternalism is defined as ‘interference by some outside agent in a person’s freedom for the latter’s own good’ (Le Grand and New, 2015, p.7). The libertarian paternalist approach is paternalistic in this sense as it claims that it is legitimate for private and public institutions to attempt to influence people’s behavior even when third-party effects are absent (Sunstein and Thaler, 2003, pp.1161-1162). The authors argue that libertarian paternalism is an approach worth pursuing as it attempts to promote peoples’ wellbeing, whilst at the same time allowing freedom of choice (p.1170). According to Sunstein and Thaler (2003), the so-called ‘choice architect’ can design nudges that promote peoples’ wellbeing without limiting their freedom of choice. However, the authors never clarify who these ‘choice architects’ should be and how those ‘choice architects’ can evaluate whether their nudges are actually promoting the wellbeing of individual people. This point of criticism will be discussed further later on in this paper. Another argument Sunstein and Thaler (2003) use to justify nudging is that some form of paternalism will always be inevitable simply because there is no way to avoid any external effects on the decision-making process (p.1182).

Other proponents of nudging argue that nudges are not only permissible because they allow freedom of choice, but also because nudges promote individual autonomy. Before elaborating on this point, it is important to define autonomy. Raz (1988) argues that one lives an autonomous life when three conditions are met. In order to respect one another's autonomy everyone has a negative duty of non-interference. This condition entails that one cannot be autonomous when one is coerced or manipulated by others to undertake certain actions or to refrain from certain actions. However, this negative freedom is not sufficient and therefore two positive freedom-based conditions must also be met. One has the duty to help in developing the capacities that are needed to live an autonomous life (practical rationality) and an adequate range of valuable options must be created for the individual to choose from. However, that the individual must be offered an adequate range of valuable options does not entail that any particular option has to be necessarily included in that range of options. One must bear in mind that social, economic and technological processes are constantly changing the opportunities that are available within a society and that the public culture which colors much of what we can and cannot do is constantly fluctuating. When deciding on what options should be available and what options should be eliminated it is important to distinguish between the effect of the elimination of an option on those who were already committed to that option and its effect on others. The longer and more deeply one is committed to a certain kind of behavior the less one is able to change this behavior. A person who may but has not yet chosen the eliminated option is affected less since all he is entitled to is an adequate range of options and the excluded option can be easily replaced by another alternative option (Raz, 1988, pp.407-411).

Schmidt and Engelen (2019) use the concept of volitional autonomy in their refutation of some objections to nudging. Volitional autonomy refers to 'the idea that one's actions should

reflect the preferences, desires or ends that are truly one's own' (p.4). Nudges do not harm this volitional autonomy as nudges do not diminish the extent to which one's actions reflect the preferences, desires or ends that are one's own. The authors make a similar argument to the argument of Sunstein and Thaler (2003) by stating that any influence on the individual decision-making process is simply inevitable. Even when the nudge is removed there would still be aspects in people's decision-making environment that influence their choices. When the nudge is removed people's choices would be influenced by other factors that randomly shape their decision-making environment. However, it is not clear how those other factors would be better able to respect, let alone promote, people's volitional autonomy. Mills (2015) even argues that nudges can promote people's volitional autonomy as nudges can help their subjects to choose in such a way that their actions reflect their own preferences, desires or ends (Schmidt and Engelen, 2019, p.4). According to this argument nudges can help to satisfy Raz's (1988) condition of practical rationality for autonomy as nudges can assist people in developing the capacities that are needed to live an autonomous life. I agree with Schmidt and Engelen (2019) that nudges have the potential to promote individual autonomy by helping people to choose according to their own conception of the 'good life'. However, the authors seem to assume that nudges will always promote individual autonomy and they ignore the conditions under which nudges might harm autonomy. Schmidt and Engelen (2019) also do not discuss the goal of nudges and whether 'helping people to choose according to their own conception of the good life' (p.4) automatically implies that a specific outcome must be the result of the decision-making process or whether it is sufficient for nudges to stimulate the decision-making process irrespective of the outcome. This point on the goal of nudges will be developed further later on.

1.2 Objections to nudging: individual autonomy, individual responsibility and the slippery slope argument

Some proponents of nudging argue that nudges are morally permissible because they allow freedom of choice whilst at the same time improving people's choices (Sunstein and Thaler, 2003). Critics of Sunstein and Thaler (2003) argue that the concept of liberty as freedom of choice is too narrow because this concept of liberty just emphasizes that the set of alternatives to choose from cannot be limited whilst ignoring the autonomy of individuals (Hausman and Welch, 2010, p.128). Hausman and Welch (2010) propose a wider concept of liberty as autonomy-based freedom in which autonomy is defined as 'the control an individual has over his or her own evaluations' (p.128). Opponents of nudging tend to use this wider autonomy-based concept of freedom as they argue that nudges harm individual autonomy because they undermine the control individuals have over their own decision-making by taking advantage of cognitive flaws and by exploiting the bounded rationality of individuals. Nudges take advantage of peoples' cognitive flaws because they attempt to shape choices by means other than rational persuasion. For example, the 'change of defaults' nudge turns an opt-in into an opt-out without explaining why the setting of the default should be changed (De Quintana, 2021, p.28). Hausman and Welch (2010) argue that nudges such as setting defaults may "push" people to make one choice rather than another instead of convincing people why they should make one choice rather than another and therefore their individual autonomy is diminished (p.128).

A second objection is that nudges are disrespectful of people's abilities to lead their own lives. According to Quong (2010), all forms of paternalism are wrong since paternalism per

definition involves the assumption that people are not capable of making good choices on their own about how to live their lives. (Soft) paternalism, such as nudging, fails to treat people as if they were free and equal because it involves one person or group denying that another person or group has the necessary capacity to formulate a conception of the good and to live one's life according to this conception (Moles, 2015, pp.651-652). Proponents of paternalism therefore assume that someone other than yourself knows best how you should live your life.

Another objection is that nudges actively reduce agents' engagement in the decision-making process as nudges tend to be hard to perceive. The subjects of the nudge are often unaware that their decision-making is being influenced and therefore the subjects are unable to engage with the factors that influence their decision-making and to attempt to exert some sort of effort and deliberation into their decision-making (De Quintana, 2021, p.31). Opponents also argue that nudges reduce individual responsibility. As nudged individuals are not challenged to learn how to make good choices, those individuals will expect other members of society to take that responsibility for them by nudging them away from anything that is bad for them (Selinger and Whyte, 2011, p.929). It is also argued that nudges will become a slippery slope towards more coercive measures as soft intervention on peoples' behavior leads those people to accept more coercive interventions in the long-term. A final critique questions the privileges of the so-called 'choice architects'. The concept of nudging does not tell anything about who those 'choice architects' should be, what values and preferences should be promoted and which biases should be nudged (pp.929-930). Therefore, the risk exists that 'choice architects' will use their privilege to shape the context of decision-making processes in such a way that the choice architects' own values and preferences are (indirectly) forced upon those who are nudged.

The arguments discussed in the previous two sections are related to the moral permissibility of nudges. The final section of this chapter will discuss a minor debate concerning the effectiveness of nudges.

1.3 Effectiveness of nudges

A minor debate on nudging revolves around the effectiveness of nudges as some authors argue that nudges are useful tools to steer peoples' behavior in a desirable direction, whereas others argue that current proof of the effectiveness of nudges is insufficient or that nudges are not effective at all as they are not able to deal with complex issues governments face nowadays.

The COVID-19 pandemic offers a very recent and salient case to study the use of nudges to promote desirable behavior during a global health crisis. Reñosa, Landicho, Wachinger, et al. (2021) argue that the pandemic has shown that nudges can be very effective in boosting vaccination rates. However, not every nudge is as effective as another and different kinds of nudges may be preferable under different circumstances. The authors conclude that the nudges that make information salient, change defaults and that purposefully select the messenger have shown to be especially effective in steering peoples' behavior in order to reach a higher vaccination rate (pp.16-17).

Whereas Reñosa, Landicho, Wachinger, et al. (2021) argue that nudges are effective tools to boost vaccination rates, Marteau (2011) argues that the cost-effectiveness of nudges in improving public health has not been evaluated sufficiently yet and he argues that nudges

could be potentially harmful as well when an emphasis on nudging results in the neglect of other (more coercive) interventions that were potentially more effective (pp.3-4). Snowdon (2018) jettisoned the effectiveness of nudges altogether by arguing that nudges are only effective as a sole reminder for people to do things, but that they are not capable of dealing with the big and complex issues contemporary governments face (pp.93-94).

As the effectiveness of nudges is only a minor part of the debate on nudging the focus of the thesis lies on the moral permissibility of nudging and the effectiveness of nudges will not be among the core considerations. However, the paper does discuss when a nudge can be considered effective and it develops an argument on whether a nudge has to produce a certain outcome in order to be effective or whether a nudge can be considered effective when it triggers and stimulates the individual thought process instead of producing a specific outcome.

Currently the debate on nudging is dichotomous as the current literature either mentions the cost-effective way in which nudges can steer human behavior in a certain direction and that nudges can promote autonomy, or it mentions the ethical objections to nudging by arguing that nudges are per definition harming individual autonomy. I argue that there is a need for a more nuanced debate. In the current debate, both proponents and opponents assume that nudging is either always morally permissible or that nudges never can be morally permissible. A gap in the literature arises as it does not question the conditions under which nudges may or may not be morally permissible and it does not account for the various forms nudges may take. Proponents of nudging also assume that the main goal of nudges is to produce a certain desired outcome of human behavior. However, I will argue that this assumption is unjustified and that nudging is more about promoting and facilitating the individual decision-making

process than it is about producing specific outcomes. Therefore, an outcome-oriented and a process-oriented conception of nudging will be developed. I will argue in favor of the process-oriented conception as the outcome-oriented conception assumes that one specific outcome per definition promotes the wellbeing of every single individual that is subjected to the nudge. Therefore, it denies the fact that individuals have very different views on what might promote their wellbeing since individuals hold different conceptions of ‘the good life’.

Chapter 2: Argumentative outline

2.1 An autonomy-based concept of freedom: individual freedom and the pursuit of the ‘good life’

Before defining two different conceptions of nudging and formulating the conditions under which nudges can be morally permissible, an autonomy-based concept of freedom will be defined. I think Sunstein and Thaler (2003) unjustly think of freedom as the mere presence of freedom of choice in the sense that nudges do not limit the range of options from which people can choose and I agree with Raz (1988) and Hausman and Welch (2010) that autonomy is a necessary part of any concept of freedom. Autonomy is an essential part of individual freedom because it urges that individuals should be the authors of their own lives and that individuals cannot be subjected to the will of others. According to Raz (1988) the concept of autonomy-based freedom consists of autonomy and value-pluralism. An individual is considered autonomous when her life is her own free creation. Value-pluralism refers to the idea that there must be a multiplicity of valuable options and favourable conditions of choice (p.412). The concept of autonomy-based freedom therefore consists of a right and a duty. Individuals have a right to pursue their own conception of the good. Individuals hold different

conceptions of the ‘good life’ because individuals have different preferences, interests and goals they want to pursue. Therefore, individuals have a duty to respect, or at least tolerate, other individuals in pursuing their own conception of the good even when this conception is incompatible with their own conception of the good life. Based on this concept of autonomy-based freedom two conceptions of nudging will be introduced in the next section and it will be argued that one conception rather than the other is able to promote the ability of individuals to exercise their right to pursue their own conception of the good.

2.2 Two conceptions of nudging: Output-oriented nudging and process-oriented nudging

As mentioned in the first chapter, a minor debate on nudging revolves around the effectiveness of nudges. Some argue that nudges are effective because they are low-cost tools that improve the wellbeing of people (Sunstein and Thaler, 2003), whereas others argue that nudges are not effective because they are not able to deal with the complex issues governments face nowadays (Snowdon, 2018). According to those who argue that nudges are effective, nudging can improve people’s choices in two different ways. First, nudges can improve the process through which the subject of the nudge makes his decision by making relevant reasons more salient, by obscuring some distracting factors or by reducing the impact of cognitive biases. A second way in which nudges can improve a person’s choice is by making sure that the decision of the subject of the nudge aligns with his preferences (Moles, 2015, p.647). Bearing in mind the distinction between these two nudging strategies as formulated by Moles (2015), two different conceptions of nudging will be introduced, namely output-oriented nudging and process-oriented nudging.

An output-oriented nudge is defined as a nudge that is designed with the aim to make sure that the decision of the subject of the nudge corresponds with his preferences. According to this conception of nudging, a nudge can be considered effective when it produces a certain outcome, namely an outcome that reflects the preferences of the subject of the nudge.

However, this conception of nudging is problematic because it is very hard, if not impossible, for the choice architect to design the nudge in such a way that the outcome of the nudge actually reflects the preferences of every single individual that is subjected to the nudge since individuals hold very different and diverging preferences and interests. Output-oriented nudges seem to be based on perfectionism. Perfectionism refers to ‘the view that it is permissible for the government to promote or discourage particular activities, ideas, or ways of life on grounds relating to their inherent or intrinsic value’ (Moles, 2015, p.658). Some liberals support state perfectionism as they argue that it is not only important for individuals to be autonomous, but also that the lives they live are valuable in their own right (Swift, 2019, p.120). It might seem evident that, for example, smoking is not a valuable way of life because it is unhealthy and that governments should therefore design nudges in such a way that they produce an outcome in which the nudged individual does not buy the cigarettes. However, when you look at someone’s first- and second-order desires, this assumption becomes less evident. Someone may have a second-order desire to stop smoking but has been unsuccessful in doing so because of the temptation to give in to her first-order desire to smoke. Another individual may have a first-order desire to smoke but not a second-order desire to stop smoking because according to his conception of the good the pleasure he receives from smoking outweighs the costs (Moles, 2015, p.665). An outcome-oriented nudge that is designed with the goal to stop people from smoking may help the first smoker to pursue her own conception of the good because her second-order desire is to stop smoking. However, such a nudge may harm the autonomy-based freedom of the second smoker when he is not

aware of the fact that his decision-making is being influenced and therefore makes a decision contrary to his second-order desire to smoke.

A process-oriented nudge is defined as a nudge that is designed with the aim to improve the process by which the subject of the nudge reaches her decision. In other words, the goal of a process-oriented nudge is to ‘find an arrangement that makes it easier for people to realize their permissible conceptions of the good, independently of their intrinsic merits’ (Moles, 2015, p.666). Contrary to the output-oriented conception of nudging, the process-oriented nudge does not stress the outcome that is produced by the nudge. Instead, process-oriented nudges attempt to facilitate the decision-making process of its subject by making relevant information salient and by triggering a thought-process that makes the subject of the nudge aware of a certain issue. Process-oriented nudges can therefore promote individual autonomy by ‘helping people to choose according to their own conception of the good life where they would have done different otherwise’ (Schmidt and Engelen, 2019, p.4). Whilst process-oriented nudges help people to choose according to their own conception of the good life by making relevant information salient and by triggering a thought-process, they do not prescribe what this conception of the ‘good life’ should entail. Therefore, a process-oriented nudge can be considered effective when it triggers a thought-process and when it makes the subject of the nudge think about the relevant information that is needed to make a well-informed decision on a certain issue. In the example of smoking, a nudge such as making relevant information salient by putting pictures of smoking-related diseases on cigarette packages can improve the decision-making process by triggering and stimulating a thought-process. In the case of a smoker who has a second-order desire to stop smoking but who has been unable to do so due to a strong temptation to give in to her first-order desire to smoke, making

information on smoking-related diseases salient can increase the autonomy-based freedom of this individual as she is directly confronted with the negative health consequences of smoking. Being confronted directly with the consequences of smoking the nudge helps this smoker think about her own conception of the good which involves not wanting to smoke despite her strong first-order desire to smoke. The nudge is easy to ignore for the second smoker who has a first-order desire to smoke but not a second-order desire to stop smoking since according to his conception of the good the pleasure he receives from smoking outweighs the health risks, because this individual can simply ignore the nasty pictures and still buy the cigarettes. A third smoker may have a first-order desire to smoke but has remained indifferent or unsure about his second-order desire. This smoker might already know about the negative health consequences of smoking, but he has not taken these consequences into account when deciding on whether or not to buy the cigarettes. The nudge of the nasty pictures on the cigarette packages can promote the autonomy-based freedom of this individual by making him think about the issue and by triggering a thought-process. The nudge enables this individual to take the health risks of smoking into account during his decision-making process and to formulate his second-order desires on whether or not to smoke.

Process-oriented nudging promotes individual decision-making processes by making relevant information salient and by triggering a thought process at the individual level. However, the fact that process-oriented nudges trigger and promote decision-making processes at the individual level does not account for the question who gets to decide what issues to nudge and what kind of behavior to promote. Therefore, a process at the collective level needs to be

defined in which citizens collectively decide on what issues to nudge, what behavior to promote and what biases to nudge.

The following three sections will discuss conditions that nudges should satisfy and it will discuss how these conditions can enforce process-oriented nudging as opposed to output-oriented nudging. These conditions are the transparency condition, the possibility to dissent and the condition of democratic deliberation. The first two conditions relate to the way in which process-oriented nudges can promote decision-making processes at the individual level. The third condition accounts for the question about who should decide on what issues to nudge and what behavior to promote.

2.3 The transparency condition

The first condition for process-oriented nudging is that governments using nudges must be transparent towards their citizens that they are using certain nudges and governments must be able to explain why they are using nudges in a certain case. This is important since non-transparent nudges can be manipulative. Opponents of nudging argue that nudges are manipulative because they attempt to influence their subjects' behavior without their subjects being aware of the fact that their decision-making is being influenced (De Quintana, 2021, p.27). Opponents of nudging also argue that due to their lack of transparency nudges deprive people of the possibility to reflect on their decision-making as people are not aware of the factors that influence their choices and are therefore not able to engage with these factors and to exert some sort of effort and deliberation into their decision-making (p.31). These objections to nudging should be taken seriously because non-transparent nudges harm individual autonomy since they attempt to influence peoples' decision-making processes by

bypassing it as the nudged individual is not aware of the means through which the government is trying to steer his decision-making and why the government is trying to steer his behavior in a certain direction. When taking into account that the goal of process-oriented nudges is to facilitate the decision-making process by triggering a thought process that makes the subject of the nudge think about a certain issue it is perfectly fine and even desirable that a government is transparent about the nudges they use. When a government is not transparent about the nudges they use and the reason why they use nudges in a certain case the goal of process-oriented nudges would be undermined. In this case the nudge would fail to stimulate the individual thought process as the nudged individual would not be able to engage in the thought process that is triggered by the nudge. Therefore, the subject of the nudge is not able to take the result of this thought process into account when deciding on whether or not to comply with the nudge.

The nudge that makes relevant information salient by putting nasty pictures on cigarette packages is an example of a transparent nudge because the picture of some smoking-related disease is often accompanied by a message like ‘smoking kills’ or ‘smoking causes this or that disease’. Recently, the Canadian government put warning labels with messages like ‘poison in every puff’ not only at the pack of cigarettes but also at every single cigarette that is in the package (Yousif, 2023, www.bbc.com). Taken together, the picture on the package of cigarettes emphasizes the message on the health consequences of smoking by drawing the attention of the potential smoker. The cigarette package often refers to a website or a phone number that can provide the smoker with the help to stop or it can refer to a governmental funded anti-smoking campaign. Therefore, the government is transparent about the fact that they are trying to encourage smokers to stop by warning them about the health consequences of smoking. However, when it would not have been clear why those pictures on cigarette

packages are there and when it would not have been made clear in some way by the government the nudge would have been manipulative as the smoker would not have been aware that the government is attempting to influence his decision-making and why the government is attempting this in a certain way. Therefore, the smoker would not have been able to take the health risks of smoking fully into account during his decision-making process and to decide for himself whether those risks outweigh the pleasure that he receives from smoking. The condition that a government must be transparent about the fact that they use nudges and that governments must be able to explain why they are using nudges in a certain case makes nudging less manipulative as citizens are being informed about the nudge and why the nudge is used. Therefore, citizens are enabled to reflect on the nudge and it increases their individual autonomy.

2.4 The possibility to dissent

Governments using nudges must not only be transparent about why they use certain nudges, but it must also be clear for citizens how to dissent and the act of dissent must be reasonably easy to perform. Opponents of nudging argue that nudges will become a slippery slope towards more coercive measures as soft intervention on people's behavior creates conditions that lead them to accept more external control over their lives in the long term. This entails that the more people are getting accustomed to being nudged the less they may be bothered by the incremental introduction of more controlling measures (Selinger and Whyte, 2011, p.929). For example, at first fastfood restaurants have to put the amount of calories on their menu that each of the dishes they serve contain. In the second step the customers of fastfood restaurants must pay a special tax on the fastfood they eat. Then the government continues the restrictions

on the consumption of fastfood by prohibiting the sales of fastfood to minors and ultimately the consumption of fastfood gets banned altogether. So according to this slippery slope argument something that might start as a nudge may eventually lead to more restrictive measures in the future. This objection should be taken seriously because policy makers that are ‘faced with a policy proposal that is appealing in the present, but which creates a danger of bad policies being adopted in the future, will be inclined to focus on the former at the expense of the latter’ (Rizzo and Whitman, 2009, p.725). Another concern is that when nudges are being accepted as a way to influence people’s behaviors, policy makers will seek more opportunities for paternalistic intervention than they otherwise would (p.727).

Therefore, governments should always communicate clearly to their citizens how they can dissent. This condition decreases the risk of a slippery slope towards more coercive measures as citizens are made aware of their right to dissent and how to use this right.

Reñosa, Landicho, Wachinger, et al. (2021) conclude that the ‘change of defaults’ nudge is an effective way to boost vaccination-rates in a population (p.17). The ‘change of defaults’ nudge changes an opt-in, in which dissent is assumed until consent is expressed, into an opt-out, in which (tacit) consent is assumed until dissent is expressed. To develop this point, I will use Simmons’ (1979) account of (tacit) consent which is developed in the debate concerning political obligation. Consent is defined as ‘the personal performance of a voluntary act which is the deliberate undertaking of an obligation’ (Simmons, 1979, p.57). Consent is called ‘tacit’ when it is given by remaining silent and/or inactive (p.80). Simmons (1979) formulates five conditions that must be met for consent to be called ‘tacit’. The first condition is that the situation must be such that it is perfectly clear that consent is appropriate and that the individual is aware of this. There must also be a definite period of reasonable duration when objections or expressions of dissent are invited, or clearly appropriate, and the acceptable

means of expressing this dissent must be understood or made known to the potential consentor. The third condition states that the point at which expressions of dissent are no longer acceptable must be obvious or made clear in some way to the potential consentor. The final two conditions that Simmons (1979) proposes are that the means acceptable for indicating dissent must be reasonable and reasonably easily performed and the consequences of dissent cannot be extremely detrimental to the potential consentor (pp.80-81).

The conditions of (tacit) consent as formulated by Simmons (1979) prevent the risk of a slippery slope as it is made clear to citizens that they have the right to dissent and how to dissent from the nudge for example via democratic deliberation that will be discussed in the next section. At the same time this condition increases individual autonomy as people are nudged to actively make a choice (to comply or to dissent) even though the means to dissent are easily accessible and the act of dissent is easy to perform. Therefore, the condition of the possibility to (explicitly) dissent promotes the goal of process-oriented nudges to trigger the individual thought process and to facilitate individual decision-making as it nudges people into thinking about a certain issue.

2.5 The democratic deliberation condition

As mentioned in the first chapter, my main criticism of Sunstein and Thaler (2003) is that the authors claim that nudges can improve people's wellbeing without limiting their freedom of choice (p.1170). However, the authors never clarify who the so-called 'choice architects' should be and how those 'choice architects' can evaluate whether their nudges are actually promoting the wellbeing of individual people as individuals have different conceptions of the

‘good life’. The fact that individuals have very different preferences and interests makes the evaluation of nudges more difficult because it makes it very hard, if not impossible, to design a nudge in such a way that the outcome of the nudge will promote the preferences and interests of every single individual that is subjected to the nudge. After all, the concept of nudging says nothing about what preferences should be promoted and what biases should be nudged. According to Button (2018), the formal freedom to opt out of a pre-formulated decision-making environment is insufficient to safeguard the democratic legitimacy of nudging policies since the principle of legitimacy ‘can only be fully satisfied by the meaningful and equal opportunity to participate in the consideration of policies that affect citizens’ interests’ (p.1038). Therefore, nudges continue to suffer from a ‘democratic deficit’.

In order to overcome this democratic deficit, Button (2018) argues that citizens must also be empowered to become their own ‘choice architects’ through education ‘about systemic and predictable errors in human decision-making alongside the consideration of public policy responses to social dilemmas’ (p.1045). One way in which citizens can be empowered to become their own ‘choice architects’ is through so-called ‘mini-publics’. Deliberative mini-publics are ‘carefully designed forums where a representative subset of the wider population comes together to engage in open, inclusive, informed and consequential discussions on a particular issue’ (Farell and Field, 2022, p.289). The willingness to participate in deliberation is quite widespread and it is exactly those who are less likely to participate in traditional partisan politics who are most interested in deliberative participation. At the same time, democratic deliberation through representative mini-publics can account for concerns about the democratic legitimacy of nudging policies because it includes rather than bypasses citizens in the meaningful consideration of the goals and methods of nudges (Button, 2018, p.1044). A final condition that nudges should satisfy is therefore that citizens should be

enabled to engage in democratic deliberation about the goals and methods of nudges, for example through representative mini-publics.

2.6 Relationship between the three conditions: mutually reinforcing rather than isolated from one another

The conditions of transparency and the possibility to dissent promote the goal of process-oriented nudges to trigger and promote the decision-making process at the individual level.

The condition of democratic deliberation accounts for the question who gets to decide what issues to nudge, what preferences to promote and what biases to nudge by enabling citizens to decide collectively on those issues, for example through representative mini-publics.

However, how do the three conditions relate to each other and do all the three conditions have to be satisfied in order for nudges to become morally permissible?

I agree with Sunstein and Thaler (2003) and Schmidt and Engelen (2019) that any external influence on the individual decision-making process is inevitable and that other factors that randomly shape people's choices are not necessarily better able than nudges to respect, let alone promote, individual autonomy. However, the authors seem to ignore that governments have some distinctive characteristics that those 'other factors' do not have. Namely the power to coerce people into acting a certain way by threatening its citizens with sanctions and by persecuting and punishing those who act contrary to the law. Therefore, Sunstein and Thaler (2003) and Schmidt and Engelen (2019) do not consider that governmental nudges require additional justification and scrutiny. In order to increase scrutiny on nudging policies governments need to be transparent about the nudges they use and the issues they choose to nudge. Transparency about nudging policies also makes nudges less manipulative since

citizens are being made aware of the fact that the government is trying to influence their behavior and the means through which the government is attempting this.

However, the mere given that governments are transparent about the nudges they use and the issues they nudge does not guarantee an easy way to dissent from the nudges' goal for those who wish to do so. It must always be possible to dissent from the nudges' goal for else the nudge would not be a nudge anymore. However, there must not only be a possibility to dissent but the means to dissent must also be easily accessible and the act of dissent cannot be unreasonably difficult to perform. Therefore, it is important to keep in mind that nudges should satisfy the conditions for (tacit) consent as formulated by Simmons (1979). This entails that the means for indicating dissent must be reasonable and reasonably easily performed and that the consequences of dissent cannot be extremely detrimental to the potential consentor (Simmons, 1979, p.81).

The transparency condition makes nudges less manipulative as it makes the nudges' subjects aware of the fact that the government is trying to influence their behavior and the means through which the government is attempting this. The condition that urges an easy way to dissent guarantees means to dissent that are easily accessible. However, the transparency condition and the (easy) dissent condition do not account for the question who gets to decide what biases to nudge and what preferences to promote. After all, the fact that a bias can be nudged does not automatically mean that it should be nudged. As long as it is unclear who the so-called 'choice architect' should be and what issues and biases should be nudged the democratic legitimacy of nudges remains questionable because the 'choice architects' can abuse their privilege to design nudges by (indirectly) forcing their own values and preferences upon those who are nudged (Selinger and Whyte, 2011, pp.929-930).

2.7 Objections

One objection to the conditions for process-oriented nudging that were formulated is that when a nudge satisfies all three conditions, so when a government is transparent about the use of the nudge, when it is made clear by the government how to dissent from the nudge and when the government encourages its citizens to actively participate in decision-making on what nudges to use, nudges will lose their effectiveness because in this way the subjects of the nudge are informed about the way in which nudges attempt to steer their behavior in a certain direction. Therefore, it is made easier for the subjects of the nudge to bypass it by acting contrary to the intended outcome of the nudge. However, as was argued earlier, the main goal of process-oriented nudges is to promote individual autonomy by triggering a thought process and by helping its' subjects to engage in this thought process. Nudging can still be effective in this sense even though its subjects are informed about the use of the nudge and about how to dissent as the nudge makes people think about an issue and they are enabled to make a decision based on this thought process. For example, in the case of a change of defaults regarding organ donation the nudge forces people who would previously have been indifferent on the question of whether or not to donate ones' organs after death to think about some moral considerations on this issue and those previously indifferent people are empowered to make a choice based on these moral considerations. However, when a government would not have been transparent about the change of default or if the government would have made it unreasonably difficult to abstain from donating ones' organs after death the government would have denied those previously indifferent citizens the possibility to engage with their own moral considerations one might have and to make a choice based on these moral considerations. Those citizens who had already thought about the moral considerations of donating ones' organs and who already made a decision based on this

thought process prior to the nudge are not influenced a lot by the change of default nudge because both the means to comply and to dissent are easily accessible and both the acts of compliance and dissent are easy to perform.

A second objection one might have is that even though a government is transparent about why they use a certain nudge and it is made clear how to dissent from the nudge, the government still imposes a disproportionate burden on the individuals who wish to dissent from the nudges' goal in comparison with those individuals who choose to comply. However, some form of influence on an individuals' decision-making environment is inevitable and the second condition that states that the means to dissent must be clearly communicated by the government to its citizens and that the act of dissent must be easy to perform significantly reduces the burden that is imposed on those citizens who choose to dissent. When bearing in mind that the main goal of nudges should not be to produce specific outcomes but to help people to think about an issue and to stimulate a thought process, nudges impose a roughly equal burden on those who choose to comply and those who choose to dissent as people from both groups are nudged into thinking about an issue they might not have thought of otherwise and to make a choice based on that thought process.

A final objection is that the conditions of transparency and democratic deliberation might come into conflict with one another when a democratic majority decides that non-transparent nudges that favor some conceptions of the good are permissible and maybe even desirable. However, I would argue that a certain degree of transparency is necessary when taking the democratic legitimacy of nudges into account. Democratic legitimacy is often distinguished between output legitimacy and input legitimacy. Output legitimacy means that 'people agree that a particular structure should exist because of the benefits it brings' and input legitimacy

entails that ‘social acceptance of the structure in question derives from a belief that citizens have a fair chance to influence decision-making and scrutinize the results’ (Curtin and Meijer, 2006, p.112). So, for nudging policies to be legitimate citizens should agree that certain nudges should exist because of their benefits (output legitimacy) and citizens should have a fair chance to influence decision-making concerning nudging policies and they should be enabled to scrutinize the results of those policies (input legitimacy). However, when a democratic majority would decide that non-transparent nudges are permissible the democratic legitimacy of nudging policies would be violated since for citizens to agree on the existence of certain nudging policies and to be able to influence those policies and scrutinize their results a certain degree of transparency is required because it is impossible for citizens to agree upon and to influence policies they are not aware of.

The remainder of the paper will apply these theoretical considerations to the empirical case of vaccination policies. The final paragraph will look at different kinds of nudges and the way in which those nudges can be used to promote a higher vaccination rate among citizens. It will be discussed whether and how those nudges can be used in such a way that they promote the autonomy-based freedom of individuals by triggering and improving their own decision-making process.

Chapter 3: Nudging towards a higher vaccination rate: relevance of nudging in the aftermath of a pandemic

When the COVID-19 pandemic broke out governments around the world introduced various restrictive measures in order to limit further spreading of the coronavirus. Coercive measures such as the mandatory wearing of face masks, curfews and governmental imposed lockdowns have sparked some controversial debates. Some argued that those restrictive measures were necessary to protect their own health and the health of their fellow citizens. Others however deemed such measures to be an illegitimate restriction of their individual freedom. A long-term perspective was offered when various vaccines were introduced that could help the world get out of the pandemic. However, the introduction of those vaccines did not come without controversy too as an old debate about mandatory vaccination gained saliency again. Like in the case of the restrictive measures such as mandatory wearing of face masks and governmental imposed curfews and lockdowns, the proponents of mandatory vaccination argued that people should get vaccinated not only to protect themselves but also to protect others. Some also argued that it was justified to exclude non-vaccinated people from public activities such as eating in a restaurant and visiting museums and the cinema in order to pressure people to get vaccinated. Others, however, considered mandatory vaccination and the exclusion of non-vaccinated people from public activities to be an illegitimate infringement on their individual freedom.

Looking back at the pandemic and the restrictive measures that were taken by governments during this period it might be useful to think about whether, in some cases, nudging might have been more desirable than (some of) the coercive measures that were introduced. The debate on mandatory vaccination also offers an interesting case for the application of

(process-oriented) nudges in order to steer peoples' behavior in a desirable direction during a pandemic. Reñosa, Landicho, Wachinger, et al (2021) conclude that the nudges that make available information salient, change defaults and change the messenger have shown to be especially successful in nudging people into getting vaccinated (p.17). The remainder of this chapter will discuss these three governmental nudges that aim to increase the vaccination rate and it will discuss whether those nudges satisfy the conditions of process-oriented nudging.

3.1 Making available information salient

One way in which governments can promote vaccination rates among its citizens is the salient messaging of novel, accessible and simple information in order to capture attention.

Information can be made salient by directly relating it to the personal experiences of the subject of the nudge. For example, in the United Kingdom parents who just got their baby received a celebration card to congratulate them with their newborn child. This celebration card was accompanied by the child's vaccination record and an information leaflet about the vaccination program for newborn children. In Australia the government attempted to boost the vaccination rate among Aboriginal Australians by sending them individualized letters and pamphlets with photographs of Aboriginal families and information on vaccines (Reñosa, Landicho, Wachinger, et al., 2021, p.7). This nudge is compatible with a process-oriented conception of nudging and can therefore be considered morally permissible because this nudge increases individual autonomy as it makes the individuals who would previously have been indifferent about whether or not to get vaccinated aware of the issue of vaccination and it triggers a thought process that makes those previously indifferent individuals think about the topic where they might not have thought about it without the nudge. The nudge is easy to ignore for those who already made a decision either in favor of or opposed to vaccination

since those individuals are free to choose to either comply with or to dissent from the vaccination program regardless of the information they received via the governmental distributed leaflets.

3.2 Change defaults

A second nudge governments use to increase vaccination rates is to change the defaults of its vaccination program from an opt-in to an opt-out. A survey in the United Kingdom studied the use of defaults to increase the vaccination rate of the MMR vaccine at schools.

Participants of the survey were offered five options. The options were no vaccination program at all, presumed dissent unless consent was expressed (opt-in), generally assumed consent based on school enrollment, presumed consent unless dissent was expressed (opt-out) and mandatory vaccination. The participants turned out to be most favorable of the opt-out option and the option of general permission. The participants were highly opposed to mandatory vaccination and to no vaccination program at all (Reñosa, Landicho, Wachinger, et al., 2021, p.10). Changing defaults from an opt-in to an opt-out can be compatible with a process-oriented concept of nudging because it can nudge people into thinking about an issue they might not have thought about otherwise. However, it is important to keep in mind that the nudge must satisfy the conditions of (tacit) consent. This entails that it must be made clear by the government how one can dissent and that the means to dissent must be easily accessible and the act of dissent must be easy to perform. When it is not made clear how one can dissent or when the act of dissent is unreasonably difficult to perform the nudges' main goal seems to be the production of a specific outcome rather than the triggering of a thought process. In this case the nudge harms the autonomy-based freedom of individuals because it does not take

into account the different conceptions of the good life that the different subjects of the nudge might have.

3.3 Change the messenger

Another nudging intervention that is used to increase the vaccination rate is a change of the messenger who communicates the information about vaccines and the health benefits they produce. In the case of parents who decide on whether to vaccinate their child it is another parent instead of a medical expert who communicates the vaccination-related information (Reñosa, Landicho, Wachinger, et al., 2021, p.8). This nudge uses a community approach to build a stronger connection among peers by shifting the perceived authority from medical experts to parents themselves. In this nudging intervention parent advocates are mobilized to establish dialogues about vaccines through means such as one-on-one communication with peers or advocacy on social media (p.10). However, whether this nudge improves individual autonomy is questionable. Contrary to the nudges that make available information salient and change defaults, the nudge that changes the messenger does not facilitate the decision-making process by nudging its' subjects into thinking about an issue and into taking certain information into account when making their decision. Instead, it aims to steer people's behavior in a certain direction by choosing a messenger the subject of the nudge happens to trust. That a peer of the subject of the nudge behaves in a certain way and that this peer advocates this kind of behavior does not improve the autonomy-based freedom of the nudged individual because the fact that a peer of the nudged individual acts in a certain way does not provide a reason why the nudged individual should also act in this way. Instead this nudge aims to produce a certain kind of behavior by appealing to the emotions of the nudged individual. This nudge might even harm the autonomy-based freedom of individuals when the

nudged individual is acting in a certain way simply because other members of his peer group are also acting that way. In this case, the nudge does not improve its subjects' ability to pursue his own conception of the good life. Instead, this nudge makes its' subject pursue the chosen messengers' conception of the good life. This nudge is therefore not compatible with a process-oriented conception of nudging.

Conclusion

Whether nudging is a morally acceptable way to steer peoples' decisions remains a controversial topic subject to debate. Current literature offers various arguments either in favor of or opposed to nudging. However, it does not discuss the conditions under which nudging might or might not be morally permissible as it tends to argue that nudging is either always morally permissible or that the practice never can be morally permissible. Proponents of nudging also seem to assume that the goal of nudges should necessarily be to produce certain desired outcomes. This paper has questioned the current dichotomy of the debate and the assumption on the goal of nudges by differentiating between two conceptions of nudging and by formulating conditions under which a process-oriented conception of nudging rather than an output-oriented conception can be realized.

The aim of this paper was to formulate a conception of nudging that is compatible with autonomy-based freedom in which individuals have the right to pursue their own conception of the 'good life'. Two nudging strategies as formulated by Moles (2015) were used to differentiate between an output-oriented and a process-oriented conception of nudging and it was argued that process-oriented nudges rather than output-oriented nudges are compatible with the autonomy-based freedom of individuals. Three conditions were formulated under

which process-oriented nudges can respect and even promote individual autonomy. The final chapter applied the process-oriented conception of nudging to the debate on (mandatory) vaccination policies and it discussed whether three kinds of nudges would satisfy the conditions for process-oriented nudging. It was concluded that nudges that make available information salient and that change defaults are compatible with process-oriented nudging because they can trigger and promote a thought process in the nudged individual. The nudge that purposefully selects the messenger turned out to be morally impermissible because it does not trigger and stimulate the individual thought process. Instead, it appeals to emotions by selecting a messenger the subject of the nudge happens to trust.

The debate on mandatory vaccination offers an interesting case for the application of (process-oriented) nudges especially in the aftermath of a pandemic. Future research should therefore look into the possibilities of nudging in times of a (global) health crisis. Contrary to some of the mentioned examples, such as smoking and the consumption of fast food, the case of vaccination has third-party effects. Therefore, it could be useful to look into the possibilities to combine nudges with more coercive measures in times of a pandemic in order to preserve as much individual freedom as possible whilst at the same time protecting the health and freedom of those who could be affected by an individual who decides not to get vaccinated or who chooses not to comply with certain safety measures such as the wearing of face masks. Future research could also apply the process-oriented conception of nudging in other policy areas and it could look further into the possibilities of democratic deliberation through representative mini-publics as a way to increase the democratic legitimacy of nudging policies.

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