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### On Nudging and Informed Consent—Four Key Undefended Premises

J. S. Swindell Blumenthal-Barby<sup>a</sup>

<sup>a</sup> Baylor College of Medicine

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manipulate them, trust might well break down, and the desire for a second, third, or fourth opinion would become commonplace. ■

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# On Nudging and Informed Consent—Four Key Undefended Premises

J. S. Swindell Blumenthal-Barby, Baylor College of Medicine

In his article “Nudging and Informed Consent,” Shlomo Cohen (2013) argues, among other things, that 1) “to the extent that the nudge-influenced decision making is rational—in whatever sense,” there is no opposition on grounds of respect for autonomy; 2) even nudges that take advantage of or induce epistemically or rationally flawed processes are ethically permissible so long as patients are not deceived; 3) preferences that result from taking advantage of or inducing such flawed processes are still normatively valuable because they are the patient’s actual preferences; and 4) nudges that take advantage of these processes are more ethical when they exert their impact on the environment rather than the patient directly.

In this commentary, I argue that 1) premise 1 begs the key question of what exactly rational decision making is, 2) premise 2 is certainly false, 3) premise 3 fails to recognize that if the preferences are caused by a nudger who induces processes to get the patient to adopt that preference then in fact there is a real sense in which it is *not* the patient’s (think meddling, preference-implanting neurosurgeon), and 4) premise 4 draws a false dichotomy between impact on patient’s choice architecture and patient directly in addition to failing to defend the normative importance of indirect rather than direct impact.

## PREMISE 1: NUDGES, RATIONAL DECISION MAKING, AND AUTONOMY

Cohen notes the challenge that autonomy is preserved either by noninterference or by interference through “rational persuasion alone,” and that exploitation of imperfections in judgment and decision making is *prima facie* threatening to liberty or autonomy. In response to this challenge, he responds that nudges often do not elicit irrational decision making and thus are not a threat to autonomy. He then goes

on to give several examples where nudges do not (so he claims) elicit irrational decision making. The problem with this line of argument is that 1) insofar as it succeeds, it only succeeds in showing that this very limited set of examples pose no threat to autonomy; 2) it does not succeed in that some of the examples *are* examples of eliciting irrational decision making (insofar as I can intuit his view of irrational decision making); and 3) the core problem is that he fails to offer an *account* of rational versus irrational decision making that would tell us when nudges pose a threat to autonomy. So, for example, he tells of a doctor who frames a woman’s cancer risk comparatively (compared to other women) instead of simply absolutely (her risk alone). He characterizes this nudge as “providing relevant information,” “adding a comment,” simply “adding information” (5), and inducing rational deliberation. But certainly it induces emotions as well. The whole reason that giving comparative information is an effective nudge is because it induces fear, alarm, and sensitivity to the normal. Would decision making driven by alarm and fear count as rational decision making for Cohen? He gives us no account of what rational decision making is, only saying that whatever it is, as long as nudging elicits it, or rather avoids eliciting “irrational decision making,” it poses no threat to autonomy (5).

## PREMISE 2: NUDGES, DECEPTION, AND ETHICAL PERMISSIBILITY

Cohen goes on to argue that even nudges in informed consent that take advantage of or induce epistemically or rationally flawed processes (and subvert autonomy) could still be ethically permissible as long as patients are not deceived. He argues that according to Onora O’Neill, *the* function of informed consent is to prevent patients from being coerced

Address correspondence to J. S. Swindell Blumenthal-Barby, PhD, Assistant Professor, Center for Medical Ethics and Health Policy, Baylor College of Medicine, One Baylor Plaza, Room 310D, Houston, TX 77030, USA. E-mail: jsswinde@bcm.edu

or deceived. I'm not sure whether Cohen has O'Neill quite right here, and I'm sure that many other scholars have different accounts of the purpose of informed consent (and he does not indicate why he favors O'Neill's theory over those), but regardless, the premise that a nudge is morally permissible as long as it is not deceptive seems to me to be obviously false. Simply imagine that a physician offers a patient \$100,000 to choose A over B, or yells at a patient until she chooses A over B. No deception, yet still morally problematic. Cohen might claim that these are problematic because they are coercive, but that won't work here, as he is trying to make the argument that *even if* nudges subvert autonomy they can still be ethically permissible.

### PREMISE 3: NUDGES AND LOCATION OF PREFERENCES

Cohen further argues that preferences that result from nudging that takes advantage of or induces flawed processes are still normatively valuable simply because they are the patient's actual preferences. But this is an odd way to look at it. I would say that preferences that are caused by a nudger who induces processes to get the patient to adopt that preference are in a very real sense *not* the patient's. Imagine a meddling neurosurgeon who implants preferences into an agent (à la Harry Frankfurt: Frankfurt 1969), or an evil demon who plays a piano, the keys of which are attached to an agent's brain cells, with the chords inducing certain neurological processes, resulting in certain behaviors or decisions (à la Peter van Inwagen: Van Inwagen 1983). Externalists about autonomy would deem such cases to be cases where the agent fails to act autonomously because they are not acting on *the agent's* preferences. But even internalists like Frankfurt who would allow for the possibility of autonomous action in such cases would require a further story to be told, namely, that the agent identifies with the preference that she finds herself having.<sup>1</sup>

### PREMISE 4: NUDGES AND CAUSE AND EFFECT

Another major premise in Cohen's argument is that nudges that take advantage of these processes are more ethical when they exert their impact on the environment rather than the patient directly. Ones that do the reverse (impact the person directly) are less ethically permissible. On the nudge's causation being direct versus indirect, Cohen writes of the importance of "the extent to which a nudge exerts its influence on the environmental circumstances of choice *as distinct from* the chooser itself" (8, emphasis in original). This line of argument draws a false dichotomy between impact on the patient's choice architecture and the patient directly. What impacts the patient's choice architecture will necessarily impact the patient—this is not an either/or. Moreover, it is not clear what the normative importance is of an indirect impact versus a direct impact. As James Rachels (1975) persuasively argued years ago, if Smith directly kills

1. For an extremely helpful discussion of all of this see Mele (2001), particularly chapters 8–11.

his cousin by drowning him and Jones indirectly kills his cousin by happily watching him drown when he could have easily saved him (and let us say arranging the environment to make his accident likely), Jones is just as morally responsible as Smith. The direct versus indirect mechanism is irrelevant; what matters is that both men intended for their cousin to die and the outcome was the same in both cases.

### INTER ALIA

Cohen mentions several times that the literature on nudging in health care deals almost exclusively with health policy, but this is not accurate, as my colleagues and I have written extensively on nudging and shaping decisions at the level of individual to individual (even in clinical contexts) in previous and forthcoming work (Blumenthal-Barby 2012; 2013; in press; Blumenthal-Barby and Burroughs 2012; Blumenthal-Barby, McGuire, and Halpern 2010; 2011; Blumenthal-Barby et al. 2013a; 2013b). Some of these articles may be helpful to those interested in thinking about this debate. Second, Cohen characterizes the use of nudges during informed consent as a "new model" between autonomy and paternalism, but to claim it is a new model is quite a stretch. Physicians are acutely aware of the fact that they shape decisions during the shared decision-making encounter. Third, Cohen's characterization of shared decision making (SDM; which is, in fact, an "in between model," a third option) is highly problematic. Cohen characterizes SDM as the patient bringing knowledge of his or her values, and the physician having "the trivial [role] of offering technical knowledge" (4; Cohen cites a paper from 1990 for this characterization). The concept has evolved a great amount since 1990. Alex Kon (2010), for example, has recently argued that SDM is a continuum concept with five key points, and that one of those points (the middle one) is where the physician and patient are "equal partners," working together to reach a decision. Cohen also claims that SDM promotes a meager ideal of professionalism, divesting the doctor-patient relationship of depth and meaning. These claims seem to me to be completely unsupported and misguided, though no doubt due to a certain understanding (which I hope to have shown to be incorrect) of SDM. Recent studies have illustrated the promise of SDM for increasing patients' satisfaction with decisions, increasing patients' understanding, improving health outcomes, and better aligning care with patients' values (Lee and Emanuel 2013).<sup>2</sup> ■

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# Nudging in Interpersonal Contexts

Yashar Saghai, Johns Hopkins University

In “Nudging and Informed Consent,” Shlomo Cohen (2013) attempts to address the common objection against nudges that they are autonomy-thwarting because they foster irrationality. He explicitly focuses on informed consent, which he contrasts with the policy context in which health nudges are usually discussed. I think Cohen’s rich article is a significant contribution to the nudge literature. However, I have some concerns with the way he frames and motivates his inquiry.

Cohen states that his ambition is to examine the ethics of nudging in the context of informed consent rather than health policy and public health. He maintains that “one may arguably detect an anomaly, in that the [nudge] theory has been developed in the context of policy when it focuses essentially on individual choice” (4). I disagree. It is precisely because health policy and public health interventions do not need to be coercive that nudge is a useful concept in those contexts. Population-wide nudges have the potential to generate significant group-level effects without coercively influencing individuals’ choices. There is, therefore, no reason to complain about the focus of the nudge literature on public health and health policy.

A related issue with Cohen’s piece is that he replaces the relatively clear distinction between a policy and a one-time action with an odd distinction between policy

and informed consent. Although it is true that the implementation of many health policies and public health interventions bypasses individual express and informed consent, this is not necessarily the case (Berg 2012). For instance, all members of a population can be offered routine screening (opt-in). They are informed of the procedure and have the right to give or withhold consent (Gostin 2008, 402). This is clearly an intervention quite typical of public health and it involves individual express and informed consent. Of course, opt-in policies are not nudges, but my point is that the right distinction cannot be between policy and informed consent. Perhaps Cohen’s focus should be on the ethics of using nudges in interpersonal contexts.

Every interpersonal context raises problems of its own due to the particular type of relationship in which different parties stand. I read Cohen’s piece as a helpful attempt to shed light on the special obligations and responsibilities involved in the patient–physician relationship. Should we, however, conclude with Cohen that nudges constitute a whole new “model” of the patient–physician relationship overcoming the gap between paternalism and autonomy? The answer is clearly, no.

Nudges, I suggest, are a type of influence, not a model of the patient–physician relationship. I have argued elsewhere that a nudge is best characterized as an influence

Address correspondence to Yashar Saghai, Johns Hopkins University, Berman Institute of Bioethics, 1809 Ashland Avenue, Baltimore, MD 21205, USA. E-mail: ysaghai@jhu.edu