

EXPERT PATERNALISM

*Jeremy A. Blumenthal**

Abstract

Scholars and policymakers from multiple disciplines have long debated whether and when paternalistic intervention might be appropriate to guide ordinary decisionmakers choices and behaviors. Recently, the use of empirical data has begun to inform this debate. Some such research has demonstrated that individuals' susceptibility to cognitive and emotional biases leads to nonoptimal decisions in a variety of areas, including health, finance, and safety, among others. This has led some scholars to suggest a role for third-party intervention to help protect citizens from their own biased decisionmaking.

Critics of this approach suggest that such intervention prevents individuals from learning from their mistakes; that it infringes not only on individuals' autonomy per se but also on their preference for choosing; or that those designing the interventions can truly know what principals' true preferences are. Substantial empirical evidence challenges these claims, however, showing that in many instances people do not learn from their mistakes or in fact prefer to leave choices to others.

Most recently, antipaternalists have challenged experts' ability to develop interventions in the first place, arguing that experts (a) are likely to be "captured" and act in their own interests, rather than the public's; and (b) are just as susceptible to the same cognitive and emotional biases as ordinary citizens, and thus deferring to their interventionist decisions is unwarranted.

As I have done for some of the earlier criticisms, in this Article I show that antipaternalists' arguments are contested by empirical evidence. First, citizens in fact tend to be more accepting of intervention than is typically assumed, especially when the process by which a policy is adopted is transparent and seen as in the public interest. Second, capture is less of a concern than is traditionally assumed. Third, despite findings that experts do also suffer some biases, most evidence shows that experts are better decision-makers than laypeople, both due to substantive expertise and to a smaller likelihood of being affected by the relevant biases. I show that other antipaternalist criticisms are either overbroad or are based on

* Jeremy A. Blumenthal, J.D., University of Pennsylvania Law School; A.B., A.M., Ph.D., Harvard University. For helpful comments and feedback, thanks to Danny Hayes, Evan Criddle, and participants at the 2011 Bowling Green Workshop on Applied Ethics. Thanks also to Kristen Stewart, Chelsea Rogen, and the staff of the Barclay Law Library for research assistance.

problematic assumptions about human psychology, e.g., people are often not motivated to learn or to self-correct and do not always act according to traditional rational choice assumptions.

In brief, even when subject to similar biases, experts are relatively better decisionmakers than laypeople. Thus, as with previous antipaternalist objections, criticisms of expert decisionmakers must meet higher hurdles than has been assumed. Paternalistic intervention is “here to stay,” and debate over the propriety of particular policies should continue, but taking into account its costs and benefits as well as the increasing body of relevant empirical findings.

INTRODUCTION	722
I. ACCEPTANCE OF PATERNALISM.....	728
II. WILL THEY?: DO EXPERTS ACT IN THE PUBLIC INTEREST?...	730
III. CAN THEY?: DO EXPERTS MAKE BETTER DECISIONS?	732
A. <i>The Knowledge Problem</i>	732
B. <i>Individual Differences</i>	736
C. <i>Determining “True” Preferences</i>	739
D. <i>Correcting Biases</i>	742
E. <i>Slopes</i>	745
F. <i>“Economic Insights”</i>	746
IV. ARE EXPERTS HUMAN?	749
CONCLUSION.....	756

INTRODUCTION

Paternalism, in the form of government or other third-party intervention into individual citizens’ decisionmaking, is typically considered objectionable or even repugnant.¹ Indeed, “paternalism” and “paternalistic” are themselves often terms of offense, used to end an argument or dismiss a proposed policy.² This is so despite paternalism

1. See, e.g., Jeremy A. Blumenthal & Peter H. Huang, *Positive Parentalism*, NAT’L L.J., Jan. 26, 2009, at 27, 27 (“The ‘nanny state,’ ‘Big Brother’ and similar terms invoke the dire specter of government intruding on individuals’ thoughts, behavior and choices.”); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 519 (1988) (“[P]aternalism has not been held in high regard by democratic theorists and practitioners.”).

2. See Paul Burrows, *Patronising Paternalism*, 45 OXFORD ECON. PAPERS 542, 542 (1993) (“‘[P]aternalism’ is a term of abuse. Paternalism is seen as illiberal, coercive, arrogant and patronizing”); see, e.g., Jennifer L. Gold, *Paternalistic or Protective? Freedom of Expression and Direct-to-Consumer Drug Advertising Policy in Canada*, 11 HEALTH L. REV. 30,

being common, even in a political and legal system that champions liberal principles.³ Public debate over the propriety of paternalism reaches back to John Stuart Mill⁴ and further, and has hardly lessened today.⁵

Proponents of paternalism, whether hard or soft,⁶ have emphasized the potential gains in individual or public welfare to which limiting citizens' choice or behavior can lead. Critics, however, emphasize the value of letting people learn from experience, or the values that inhere in autonomous decisionmaking.⁷ Recently, the use of empirical data has begun to inform the paternalism debate. Legal commentators, economists, psychologists, and others have surveyed and collected empirical data bearing on the justifications for, and objections to, paternalistic intervention.⁸ Most prominently, empirical research into ordinary individuals' decisionmaking has demonstrated that susceptibility to cognitive and emotional biases leads to nonoptimal decisions in a variety of areas, including health, finance, and safety, among others.⁹ In a sense, of course, this is hardly surprising—for instance, it is a commonplace that individuals smoke, overeat, make overly risky investment decisions, engage in unsafe sex, or marry the “wrong” person. But academics and policymakers have suggested further that this research—showing that such self-injurious decisions can be traced to those cognitive and emotional biases—warrants an

35 (2003) (arguing that a “deleterious effect[]” of Canadian laws regulating direct-to-consumer advertising of prescription drugs is the “paternalistic” protection that the laws provide).

3. See Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998) (noting several examples of relatively uncontroversial paternalistic policies in the American legal system); see also Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763–64 (1983) (same).

4. See John Stuart Mill, *On Liberty*, reprinted in J.S. MILL, *ON LIBERTY* IN FOCUS 21, 90–91 (John Gray & G.W. Smith eds., 1991) (1851).

5. E.g., DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS ON BENEVOLENCE* 11–12 (1986); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 4, 14 (2007); Paul Burrows, *Analyzing Legal Paternalism*, 15 INT'L REV. L. & ECON. 489, 506–07 (1995); Andrew Caplin, *Fear as a Policy Instrument*, in *TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE* 441, 441–42 (George Loewenstein et al. eds., 2003); Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 133–34 (2006); Kronman, *supra* note 3, at 765; Shapiro, *supra* note 1, at 519; J.D. Trout, *Paternalism and Cognitive Bias*, 24 LAW & PHIL. 393, 409–11 (2005).

6. See Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 661–62 (2004) (distinguishing between hard and soft paternalism).

7. E.g., Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1622–26 (2006); Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1248 (2005).

8. See Blumenthal, *supra* note 5, at 10–14 (analyzing the implications of empirical research for traditional arguments for and against paternalistic intervention).

9. See *id.* at 2–4, 11.

increased role for third-party intervention to help protect citizens from their own biased decisionmaking.¹⁰

A number of critics have challenged such suggestions, arguing that the empirical data, in fact, do not warrant such intervention; these critics either echo traditional antipaternalist objections or develop new ones that purportedly address the data directly. Jonathan Klick and Gregory Mitchell, for instance, argue that paternalistic intervention interferes with individuals' ability to "learn by doing."¹¹ Claire Hill challenges the idea that paternalists can know what individuals "really want" in such a way as to help them satisfy those preferences.¹² Others, including a number of courts¹³ and policymakers, resort to arguments based on notions of autonomy. They suggest either that people's freedom to make choices, even nonoptimal ones, should be valued per se,¹⁴ or that we should value individuals' *preferences* to make choices—that is, that "the freedom to choose should . . . be protected because people value that freedom itself."¹⁵

10. See Trout, *supra* note 5, at 416 ("If individuals routinely make crucial and predictable errors in judgments about their own welfare, and are unable to control doing so without turning life into an existence of contemplative paralysis or one of distorted value otherwise disavowed, then we should ask for an argument *against* introducing institutional prosthetics."); see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 5 (2008); Blumenthal, *supra* note 5, at 4; Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 234–37 (2005); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1211–14 (2003); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1543–45 (1998); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217–18 (2003); Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207, 224–25 (2006) [hereinafter Rachlinski, *Cognitive Errors*]; Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1165–67 (2003) [hereinafter Rachlinski, *Uncertain Psychological Case*]; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1162 (2003).

11. Klick & Mitchell, *supra* note 7, at 1633; cf. Shapiro, *supra* note 1, at 546 ("[T]he very ability to choose—which necessarily implies the ability to make poor choices by some objective standard—is critical to the growth of our diverse intellectual, emotional, and volitional capacities.").

12. Claire A. Hill, *Anti-Anti-Anti-Paternalism*, 2 N.Y.U. J.L. & LIBERTY 444, 445 (2007).

13. See Shapiro, *supra* note 1, at 538 (suggesting that numerous courts' willingness to sustain challenges to various sorts of legislation stem from an antipaternalist perspective, that is, the importance placed on the right to be "let alone" in making choices for oneself).

14. See Sunstein & Thaler, *supra* note 10, at 1167 n.22 ("Some of the standard arguments against paternalism rest not on consequences but on autonomy—on a belief that people are entitled to make their own choices even if they err.").

15. See Blumenthal, *supra* note 5, at 12; see also Zamir, *supra* note 3, at 240 ("Having relatively broad freedom to make one's own decisions, including wrong ones, is probably quite high on most people's list of ideal preferences.").

One recurring objection is that government paternalists—legislators, judges, or agency experts—are no better decisionmakers than are individual citizens, because such experts are (a) susceptible to capture and (b) vulnerable to the same cognitive and emotional biases as other individuals. In either case, it is thus unhelpful—and potentially worse—to leave decisions to these experts.¹⁶ In various forms, these criticisms are known as the “knowledge problem”¹⁷ (reflecting Friedrich Hayek’s critique of central planning that experts simply do not know as much as individuals about those individuals’ preferences¹⁸); as the “public-choice critique” (relating to capture)¹⁹ or as the “comparative institutional critique.”²⁰

Elsewhere I have reviewed a number of the traditional objections to paternalism from an empirical social science approach.²¹ For instance, I addressed objections²² that emphasize the value of autonomous decisionmaking or the value of letting people learn from experience.²³ Such objections are called into question by substantial empirical research demonstrating that: (1) people may not always know their own preferences;²⁴ (2) even if people do know their preferences, they often make self-injurious choices and decisions in many contexts, such as health, finance, and safety;²⁵ (3) people often prefer *not* to make decisions²⁶ (which undercuts the presumed importance of autonomous

16. E.g., Glaeser, *supra* note 5, at 133–34; Hill, *supra* note 12, at 449; Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 687 (2009).

17. Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905, 909–10 (citing FRIEDRICH A. HAYEK, *Socialist Calculation I: The Nature and History of the Problem*, in INDIVIDUALISM AND ECONOMIC ORDER 119 (1948)); FRIEDRICH A. HAYEK, *Socialist Calculation II: The State of the Debate*, in INDIVIDUALISM AND ECONOMIC ORDER, *supra*, at 148; FRIEDRICH A. HAYEK, *Socialist Calculation III: The Competitive “Solution”*, in INDIVIDUALISM AND ECONOMIC ORDER, *supra*, at 181).

18. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945); see also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 319 (Hafner Publ’g Co. 1948) (1823); Mill, *supra* note 4, at 91.

19. Rizzo & Whitman, *supra* note 17, at 908.

20. *Id.*

21. See Blumenthal, *supra* note 5; Blumenthal, *supra* note 10.

22. See *supra* note 7 and accompanying text.

23. Blumenthal, *supra* note 5, at 12–14.

24. See Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 345, 401–02 (2003).

25. Blumenthal, *supra* note 5, at 11.

26. *Id.* at 13; Barry Schwartz et al., *Maximizing Versus Satisficing: Happiness Is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCHOL. 1178, 1179 (2002); Simona Botti & Sheena S. Iyengar, *The Psychological Pleasure and Pain of Choosing: When People Prefer Choosing at the Cost of Subsequent Outcome Satisfaction*, 87 J. PERSONALITY & SOC. PSYCHOL. 312 (2004); Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5, 12 (1999).

decisionmaking), and thus tend to procrastinate²⁷ or transfer decisions to others;²⁸ (4) when people do make decisions, they often prefer to retain flexibility in their decisionmaking options, even when that flexibility comes at the expense of the quality of their decisions,²⁹ and even when changing one's mind in fact increases regret over the foregone option;³⁰ (5) contrary to intuition, having more choices can often lead to lower quality decisions and decreased satisfaction with the choices made;³¹ and (6) people often do not learn from their mistakes—this is obviously the case in one-shot or dangerous contexts,³² but is true even in more ordinary situations, as well.³³

Most recently, I proposed a “psychological defense” of paternalism, identifying a *prima facie* case, in certain circumstances, for intervention by government or by other third parties into individual behavior and decisionmaking.³⁴ I suggested that this *prima facie* case survives a number of objections to paternalism that modern commentators have raised, showing that the hurdles antipaternalists face are higher than usually thought. In this Article I continue this approach, focusing on some of the direct attacks on experts. Specifically, I address the important policy question of experts' ability to make better decisions

27. See Amy B. Monahan, *Addressing the Problem of Impatients, Impulsives and Other Imperfect Actors in 401(k) Plans*, 23 V.A. TAX REV. 471, 482 (2004) (noting that people “tend to procrastinate in making savings decisions”). For an empirical study on procrastination control strategies, see Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 PSYCHOL. SCI. 219 (2002).

28. See Rachlinski, *Uncertain Psychological Case*, *supra* note 10, at 1216 (“[P]eople can delegate their decisions to others.”); Sunstein & Ullmann-Margalit, *supra* note 26, at 10 (“A familiar way of handling decisional burdens is to delegate the decision to someone else.”).

29. See Jiwoong Shin & Dan Ariely, *Keeping Doors Open: The Effect of Unavailability on Incentives to Keep Options Viable*, 50 MGMT. SCI. 575, 575–76 (2004).

30. Geir Kirkeboen et al., *Revisions and Regret: The Cost of Changing Your Mind*, 10 J. BEHAV. DECISION MAKING 756 (2012).

31. Sheena S. Iyengar & Mark R. Lepper, *Choice and Its Consequences: On the Costs and Benefits of Self-Determination*, in SELF AND MOTIVATION: EMERGING PSYCHOLOGICAL PERSPECTIVES 71, 85 (Abraham Tesser et al. eds., 2002); Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995, 999–1000 (2000); Schwartz et al., *supra* note 26, at 1179. *But cf.* Chris M. White & Ulrich Hoffrage, *Testing the Tyranny of Too Much Choice Against the Allure of More Choice*, 26 PSYCHOL. & MKTG. 280, 281 (2009) (“[P]eople are more likely to select one of the options when presented with a larger choice set compared to a smaller choice set.”).

32. See, e.g., Zamir, *supra* note 3, at 277 n.123 (“In those cases where irrational risk-taking may result in death, there may be no chance for learning from error.”).

33. See James P. Byrnes, *The Development of Decision-Making*, 31 J. ADOLESCENT HEALTH (SUPPLEMENT) 208, 214 (2002) (“It has often been said (but rarely shown) that a competent decision-maker is someone who learns from mistakes Research shows that learning is by no means automatic when people are shown the errors of their ways.”).

34. Jeremy A. Blumenthal, *A Psychological Defense of Paternalism*, in PATERNALISM AND PUBLIC POLICY (Michael E. Weber & Christian L. Coons eds.) (forthcoming 2012).

than laypeople: *will* they do so (or will they simply act in their own interests) and *can* they do so (or do they simply fall prey to the same heuristics and biases as everyday people)? I conclude that in this context, too, antipaternalists' objections are either logically or empirically unsupported, or at the very least must meet more significant hurdles than have been recognized. As in my other discussions, I thus fall more into the "anti-anti-paternalist" rather than the "paternalist" camp.³⁵ That is, paternalistic intervention may not be the appropriate response or policy in all or even most circumstances. However, many antipaternalist objections are challenged by empirical data, old and new. Rather than simply relying on documentation of citizens' shortcomings,³⁶ or on *ipse dixit*s about the importance of autonomy³⁷ or the shortcomings of experts, careful consideration of the benefits and costs of any intervention is essential³⁸—not only the direct costs but also the psychic, stigmatic, and other derivative costs.³⁹ Accordingly, my discussion here demonstrates that because experts often *do* know better than individual citizens, the benefits of relying on them for policymaking—even potentially "paternalistic" policies—are likely higher than antipaternalists suggest. My theme is a broad one, however, emphasizing experts' ability at a general level. As such, I spend less time on specific policies that central planners might introduce and more time demonstrating the propriety of expert decisionmaking and addressing particular antipaternalist criticisms.

35. Indeed, by addressing certain arguments, I may be founding an "anti-anti-anti-anti-paternalist" camp. Cf. Hill, *supra* note 12 (titling her article *Anti-Anti-Anti-Paternalism*); Jolls et al., *supra* note 10, at 1541 (articulating the authors' "skepticism about antipaternalism, [rather than] an affirmative defense of paternalism"). Note that even among commentators and social scientists applying and conducting this research, there is still a marked hesitancy to call oneself a "paternalist." See, e.g., Blumenthal, *supra* note 10, at 236 (noting that social scientists exhibit this hesitancy when discussing the results of their research); Colin F. Camerer, *Wanting, Liking, and Learning: Neuroscience and Paternalism*, 73 U. CHI. L. REV. 87, 93 (2006) ("I am truly not an eager paternalist."); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1171 (1986) (distinguishing governmental "interference[]" and "troublesome" paternalism).

36. See, e.g., Rachlinski, *Uncertain Psychological Case*, *supra* note 10, at 1168 ("Merely linking a cognitive bias in judgment to a decision that law could regulate should not support implementing a constraint on individual choice."); Sunstein, *supra* note 35, at 1139 ("[T]he identification of defects in a system based on private preferences is a necessary but not sufficient condition for a regulatory solution.").

37. See, e.g., John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1024 (2001) (suggesting that potential gains from precommitment strategies "should not be shunted aside with an *ipse dixit* about personal liberty").

38. See, e.g., Blumenthal, *supra* note 5, at 72 ("[P]aternalism is often appropriate and sometimes warranted, but should be applied only after careful cost-benefit analysis, including the costs of implementing the particular policy in question."); Rachlinski, *Uncertain Psychological Case*, *supra* note 10, at 1219; Sunstein & Thaler, *supra* note 10, at 1190.

39. Blumenthal, *supra* note 5, at 71–72; Glaeser, *supra* note 5, at 150.

Thus, after first noting some evidence that citizens are more amenable to interventionist policies than traditionally assumed, I turn to the two focal questions of this Article: whether central planners *can* make better decisions than lay citizens, and whether they in fact *will* do so.

I. ACCEPTANCE OF PATERNALISM

As suggested above, individuals often prefer not to make personal decisions, whether due to laziness, anticipated regret, deference to authority, rational ignorance, or other reasons.⁴⁰ This reluctance to decide occurs at the political level as well, with citizens expressing a perhaps counterintuitive preference not to become involved in political decisionmaking.⁴¹ Indeed, researchers find that citizens would in fact prefer to “defer virtually all political decisions to government officials,” if only those officials would refrain from what citizens see as self-interested squabbling and, instead, simply govern in the public interest.⁴² Citizens seem most concerned with whether officials are governing in a transparent, empathetic way, oriented toward the common good and the public interest; if officials govern in this manner, citizens would prefer to defer to officials’ decisions, even where they may not match citizens’ expressed preferences.⁴³ Indeed, citizens’ preferences for “empathetic non-self-interested decisionmakers”⁴⁴ (ENSIDs) in fact reflect a preference for a fiduciary model of government decisionmaking, which sees agencies and other policymakers as obligated to act in a manner that is other-regarding, purposive, deliberate, and deliberative.⁴⁵ Under this approach, policymakers’ decisions must be reasoned, objective, and transparent, and must be taken in the interest of their beneficiaries (that is, citizens).⁴⁶ This approach captures citizens’ desire to “avoid government by people who act selfishly, *not government by experts and elites*.”⁴⁷

40. See *supra* text accompanying note 26.

41. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 87 (2002).

42. *Id.* at 159.

43. See *id.*; Blumenthal, *supra* note 34. Apparently, the public agrees with the longstanding philosopher’s “dream . . . to replace the politician by the scientist.” WILL DURANT, THE STORY OF PHILOSOPHY: THE LIVES AND OPINIONS OF THE GREATER PHILOSOPHERS 176 (Pocket Books 2006) (1926).

44. HIBBING & THEISS-MORSE, *supra* note 41, at 161.

45. Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448–49 (2010) [hereinafter Criddle, *Fiduciary Administration*]; see also Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 121 (2006).

46. Criddle, *Fiduciary Administration*, *supra* note 45, at 448.

47. HIBBING & THEISS-MORSE, *supra* note 41, at 141 (emphasis added).

Importantly, however, this decisionmaking in the beneficiaries' interest does not mean simplistic adherence to those beneficiaries' expressed interests. Rather, if beneficiaries have abdicated some decisionmaking authority to decisionmakers they trust to make appropriate decisions (ENSIDs in particular), then under the fiduciary model, the decisionmaker's conduct must be consistent with his beneficiary's interest, but not necessarily with his beneficiary's desires.⁴⁸ To this extent, the fiduciary model allows for some paternalistic policies, and so long as those policies are enacted through the processes citizens expect—objectively, transparently, and in a reasoned manner, the very means the fiduciary model demands—citizens may be content with those ENSIDs' decisions. Indeed, the public consistently gives favorable ratings to one of the more paternalistic agencies, the Food and Drug Administration (FDA) (which evaluates and bans food additives or similar ingredients based on experts' advice, even though food sales might otherwise be left to the market),⁴⁹ with about two-thirds of the public reporting positive ratings over the last several years.⁵⁰ Accordingly, citizens may be more content with paternalistic interventions than initially assumed and more accepting than they realize.⁵¹

Elsewhere I review the public's apparent willingness to accept some paternalistic policymaking by the government, even if they do not quite realize it.⁵² Nevertheless, in evaluating whether such deference is justified, at least two questions arise, mirroring antipaternalists' objections to policymakers' intervention into individual citizens' decisionmaking and behavior: (1) whether agency experts in fact can make better decisions than lay citizens, and (2) whether they in fact will do so. That is, are experts in fact better policymakers than citizens, and will they in fact act dispassionately, neutrally, and in the public's interest rather than their own: "Can they?" and "Will they?"

48. Criddle, *Fiduciary Administration*, *supra* note 45, at 471–72; *see also* Dimitrios Kyritsis, *Representation and Waldron's Objection to Judicial Review*, 26 OXFORD J. LEGAL STUD. 733, 742–43 (2006) (describing the "trustee" model of legislative representation).

49. *Cf.* Paul Calcott, *Paternalism and Public Choice*, VICTORIA ECON. COMMENTS., Mar. 2000, at 39, 39 ("Paternalists are willing to override individuals' assessments of their own interests. Sometimes expert opinion is imposed, such as when a food additive is banned on the advice of toxicologists and doctors.").

50. *See* Press Release, Harris Poll, CDC, FAA, NIH, FDA, FBI and USDA Get the Highest Ratings of Thirteen Federal Government Agencies (Feb. 6, 2007), *available at* <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Government-Agencies-2007-02.pdf>.

51. This may suggest that antipaternalists are engaging in the very type of overprotective behavior they criticize.

52. Blumenthal, *supra* note 34.

II. WILL THEY?: DO EXPERTS ACT IN THE PUBLIC INTEREST?

Taking the latter question first—will they?—involves an examination of the tendency of government actors to be “captured.” Critics of paternalist intervention tend not to trust experts or legislatures to willingly act in the public interest.⁵³ However, scholars have documented that the conventional picture of political control over agency decisionmaking is likely overstated.⁵⁴ Observational and empirical research, though somewhat mixed, are consistent with an account of minimal agency capture. David B. Spence and Frank Cross, for instance, note that regulated interest groups tend to seek *less* regulation and to constrain agency authority.⁵⁵ This is hardly dispositive, of course, because the regulation they may seek may nevertheless be quite favorable to them even within those constraints. Spence and Cross note, however, that those interest groups seem to prefer judicial review, “consistently favor[ing] ‘an active, easily triggered role for the courts in reviewing agency decisions,’” and suggest that this reflects skepticism among such groups about their prospects for capturing agency decisionmaking.⁵⁶ Jonathan R. Macey suggests that such skepticism may be warranted, especially considering the Supreme Court’s invalidation of the legislative veto.⁵⁷ He argues that such a veto was typically exercised in favor of special interest groups and that striking it down decreases the influence of well-organized, powerful groups.⁵⁸

Thomas Merrill also challenges the conventional perspective on agency capture, pointing out “serious objections” and “implausibilities” regarding the theory.⁵⁹ Merrill notes that agencies are subject to a wide array of external pressures, not only interest groups but also political

53. See Rizzo & Whitman, *supra* note 17, at 908–09; see also Douglas Glen Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 N.Y.U. J.L. & LIBERTY 411, 417 (2007) (“[L]egislatures can be affected by the lobbying pressure of groups with an interest in further legislation in a given area.”).

54. See, e.g., KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 344 (1986) (“Capture is not by any means the norm, and where capture occurs, it does not always last.”); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 123 (2000) (“[W]hile regulated interests may be overrepresented in the political process, the lingering popularity of capture theory as a description of reality seems baffling.”).

55. Spence & Cross, *supra* note 54, at 122.

56. *Id.* at 122–23 (quoting Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 276 (John E. Chubb & Paul E. Peterson eds., 1989)).

57. Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 694–95 (1992).

58. *Id.*

59. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2144–45 (2004).

and judicial monitoring.⁶⁰ “Indeed, the checks on agency behavior are so numerous and powerful that some have complained the problem is not agency drift, but agency paralysis.”⁶¹ He also identifies internal constraints, such as the diversity of interest groups that may participate in agency decisionmaking, as well as the internal deliberative procedures that agencies undertake.⁶² Another constraint is perhaps both internal and external: the desire of agencies to *appear* neutral and not beholden to special interests. In an extensive review of the now-defunct Office of Technology Assessment, Bruce Bimber notes that, given the importance of being seen as neutral, congressional agencies “tend to adopt some form of a strategy of neutrality as a response.”⁶³

Empirical evidence also suggests that capture theory—and, accordingly, part of antipaternalists’ challenge to intervention—is less worrisome than assumed. For instance, in a review of the impact that industry had on rules promulgated by the Environmental Protection Agency (EPA), Cary Coglianese found that although industry participated more in early stages of rulemaking than environmental groups, that participation did not seem to translate into actual influence.⁶⁴ Similarly, in a review of thirty empirical studies looking at the relationship between public opinion and effectuated policy, Paul Burstein found that the influence of interest groups (including traditional interest groups as well as social movements) on policy was less than expected.⁶⁵ Indeed, interest group involvement seemed to enhance government responsiveness to public opinion rather than decrease it.⁶⁶ In their respective works, Macey, Merrill, and Kay L. Schlozman and John T. Tierney review a variety of further empirical evidence and find little support for the idea of agency capture.⁶⁷ Most recently, Steven P. Croley developed an “administrative process theory” to challenge the traditional public choice account of capture, pointing to a number of high-stakes regulation contexts involving the EPA, FDA,

60. *Id.* at 2144.

61. Merrill, *supra* note 59, at 2144.

62. *Id.*

63. BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* 97–98 (1996); *see also* R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 11–12 (1983) (suggesting that the approach courts took to interpreting the Clean Air Act was motivated in part by a desire to protect against capture).

64. *See* Spence & Cross, *supra* note 54, at 122 n.105 (citing Cary Coglianese, *CHALLENGING THE RULES: LITIGATION AND BARGAINING IN THE ADMINISTRATIVE PROCESS* 47–51 (unpublished manuscript)).

65. Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RES. Q. 29, 35 (2003).

66. *Id.*

67. SCHLOZMAN & TIERNEY, *supra* note 54, at 343–44; Macey, *supra* note 57, at 702; Merrill, *supra* note 59, at 2143–44.

Securities and Exchange Commission, and Federal Trade Commission to show that agencies pushed back against industry and special-interest lobbying, applying administrative rules in order to effect regulation in the public interest.⁶⁸

Thus, recent evidence suggests less of a capture concern than was once put forth.⁶⁹ And, of course, those who advocate the consideration of intervention fully acknowledge that it is inappropriate when there is a strong possibility of “self-dealing.”⁷⁰ As such, critics must provide further evidence to challenge the presumption of experts’ willingness to develop policies that align with the public interest rather than with their own or that of interest groups.

III. CAN THEY?: DO EXPERTS MAKE BETTER DECISIONS?

Accordingly, the first question—whether experts in fact can make better decisions than laypersons—may be more relevant to the paternalism issue. This question itself has two parts: the “knowledge problem” and its corollaries, and the “experts are human problem.”

A. *The Knowledge Problem*

The knowledge problem⁷¹ reiterates the well-known objection of philosophers Jeremy Bentham, John Stuart Mill, and Friedrich A. Hayek that experts can never know citizens and their preferences better than the citizens themselves.⁷² That is, central planners simply have insufficient knowledge to prescribe in place of citizens’ judgments:

[W]ith respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one [sic] else. The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.⁷³

68. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 72–74, 258–67 (2008).

69. Criddle, *Fiduciary Administration*, *supra* note 45, at 497.

70. See Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1171–72 (2010) (quoting THALER & SUNSTEIN, *supra* note 10, at 248) (internal quotation marks omitted).

71. See, e.g., Rizzo & Whitman, *supra* note 17, at 909.

72. See *supra* notes 17–18 and accompanying text.

73. Mill, *supra* note 4, at 91.

As corollaries, economists raise the arguments that light paternalistic approaches place us on a slippery slope to “‘hard’ paternalism,”⁷⁴ or do not sufficiently consider insights from economics that can be applied to intrapersonal decisionmaking.⁷⁵

Unfortunately, though, there are a number of gaps in these lines of objections. First, given individuals’ predilections for making poor health, safety, financial, and other decisions, the claim that objective third parties might make better decisions than some individuals should probably not be seen as an idea as extravagant as Bentham, Mill, Hayek, and modern economists and libertarians suggest. Indeed, some commentators imply, not entirely unreasonably, that merely observing and scientifically documenting such “human fallibility and the existence of significant limits on people’s cognitive abilities” itself defeats Mill’s objection.⁷⁶

It is true that people tend to know their own preferences with only limited accuracy.⁷⁷ This fact, however, and people’s poor decisionmaking, does not entirely prove the case. From an individual’s perspective, the essential question is whether a third party’s perception of “what is good for me” is sufficiently *better* than my own perception (badly flawed as it may be) that that third party should act to replace or constrain my choices. As I have discussed elsewhere, in some instances, we know it can be sufficiently better: especially in the context of emotionally salient or influential situations, third parties such as experts and policymakers can, in fact, assess others’ preferences better than those others can themselves.⁷⁸ Decisionmakers removed from such emotional circumstances are more accurate at estimating such likelihoods. This is especially so when decisionmakers attend more to “calculation”—objective factors—and less to emotional aspects of an event. In that case, their judgments and decisions are far more sensitive to the accurately identified relative probabilities.⁷⁹ For instance, individuals tend to overestimate the likelihood of emotionally salient events, such as terrorism and nuclear accidents.⁸⁰ Where lay perceptions

74. E.g., Whitman & Rizzo, *supra* note 53, at 412–13.

75. E.g., Glen Whitman, *Against the New Paternalism: Internalities and the Economics of Self-Control*, CATO INST. POL’Y ANALYSIS, Feb. 22, 2006, at 1, 14 (2006) (arguing that “new paternalism” relies on a theory of “internalities” based on an out-of-date version of the economic concept of externalities).

76. Zamir, *supra* note 3, at 238. *But see supra* note 36, and accompanying text.

77. *See supra* note 24 and accompanying text; *see also* Blumenthal, *supra* note 10, at 166–72 (reviewing social psychological research and concluding that “empirical evidence shows that errors in predicting future emotional experiences are prevalent and consistent”).

78. Blumenthal, *supra* note 5, at 64–65.

79. E.g., Christopher K. Hsee & Yuval Rottenstreich, *Music, Pandas, and Muggers: On the Affective Psychology of Value*, 133 J. EXPERIMENTAL PSYCHOL.: GEN. 23, 28 (2004).

80. Lay estimates of the likelihood of nuclear accident will likely increase as a result of

of risk are biased due to emotional factors, more accurate third-party judgments of those risks should be substituted.⁸¹

The possibility of experts making more accurate judgments is not limited to emotional contexts, however. For instance, Eyal Zamir identifies a plethora of cognitive biases to which consumers might be susceptible—ones that would lead to nonoptimal decisionmaking.⁸² For a number of reasons, a policymaker is unlikely to suffer from the same self-relevant biases in making decisions for others, and thus should be able to make more accurate, welfare-enhancing decisions. For instance, an expert might

use empirical and statistical data that are unavailable to agents [affected by the policy]. Moreover, even if her estimation is based on common sense and intuition, she is unlikely to suffer from most of the cognitive biases mentioned above. . . . [P]resumably her decision as to what is best . . . is not affected by emotional stress, wishful thinking, over-optimism regarding low-probability risks, and the like. . . . Thus, it may be reasonably assumed that the various inputs to the legislative and judicial processes, along with the wisdom and cumulative experience of the relevant policymakers, are likely to result in a sensible assessment of the relevant variables.⁸³

Further, of course, many policy decisions that agency experts make involve technical knowledge. Robert C. Clark, in particular, criticizes as “desperately implausible” antipaternalists’ “odd strategy” of claiming that regulators analyzing such knowledge and making such decisions do not know better than the regulated what is in the latter’s best interest.⁸⁴ Some critics seem to characterize deferring to experts and authorities in

Japan’s recent crisis. See, e.g., Tsunoda Katsuya, *Public Response to the Tokai Nuclear Accident*, 21 RISK ANALYSIS 1039, 1044 (2001) (noting that after the September 30, 1999 nuclear accident in Japan, “perceived accident likelihood significantly changed”). But see *id.* (noting that prior research on this topic “found no significant difference between accident likelihood before the Chernobyl accident and the likelihood after the accident,” but explaining that “[t]his was probably due to the fact that [the researchers’] American sample would not have been likely to think that an accident at a Russian reactor had any relevance to the operation of an American nuclear power plant”) (citing Michael K. Lindell & Ronald W. Perry, *Effects of the Chernobyl Accident on Public Perceptions of Nuclear Plant Accident Risks*, 10 RISK ANALYSIS 393, 398 (1990)).

81. Cf. Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 1039–43 (2004).

82. Zamir, *supra* note 3, at 267–71.

83. *Id.* at 275.

84. Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1718–19 (1989).

such situations as a logical fallacy and suggest that this is particularly likely in the context of paternalistic interventions.⁸⁵ It is true that when an individual accepts another's decision *simply* because the other is in a position of authority—and not because the other is, in fact, an expert in the substantive matter at hand—the *ad verecundiam* fallacy occurs.⁸⁶ Antipaternalists, however, elide the conventional way this fallacy is characterized by implying that simple deference to *any* authority or expertise commits it.⁸⁷ In logic, however, the fallacy is actually an appeal to *false* or *inappropriate* authority.⁸⁸ When an expert does have relevant substantive knowledge, skill, or authority, it is hardly an error for a layperson to defer.⁸⁹

In many instances, experts clearly do know better than those for whom they are making decisions, and thus in many instances the knowledge problem is inapposite. But critics also seek to raise a number of empirical objections to support their claims. These objections include, broadly, noting individual differences in the citizenry and a perceived need for planners to focus on individual circumstances.⁹⁰ More specifically, planners must consider how to identify individuals' true preferences, identify the scope or extent of biases, and consider

85. *E.g.*, Whitman & Rizzo, *supra* note 53, at 433–34.

86. RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 180 (3d ed. 1997) (noting that the *ad verecundiam* fallacy “makes an appeal to authority or prestige of parties having no legitimate claim to authority in the matter at hand”).

87. *See, e.g.*, Whitman & Rizzo, *supra* note 53, at 434 (“We will dub this tendency to defer to authorities, *of whatever variety*, the ‘ad verecundiam’ heuristic.” (emphasis added)).

88. ALDISERT, *supra* note 86, at 180 (“The [*ad verecundiam*] fallacy occurs . . . when the conclusion to the argument is based on an authority having no rational claim to expertise in that field . . .”); Julian L. Bush, *Argument and Logic*, 67 MO. L. REV. 463, 468 (2002) (“Argument *ad verecundiam* is an appeal to an inappropriate authority . . .”); Alan G. Gless, *A Simple Country Judge’s Musings on the Use of History by Trial Lawyers*, 7 GREEN BAG 2D 343, 351 n.34 (2004) (referring to “the fallacy *ad verecundiam* or false authority”); Jeffrey Kahn, *No-Limit Texas Hold ‘Em, or, the Voir Dire in Dallas County*, 13 GREEN BAG 2D 383, 392 (2010) (“The appeal to false authority is a fallacy of logic old enough to have a Latin name: *argumentum ad verecundiam*.”); Mike Nair-Collins, *Death, Brain-Death, and the Limits of Science: Why the Whole-Brain Concept of Death Is a Flawed Public Policy*, 38 J.L. MED. & ETHICS 667, 674 (2010) (“An *ad verecundiam* is a fallacy that appeals to an inappropriate authority.”); Lawrence J. Nelson, *Is There Any Indication for Ethics Evidence? An Argument for the Admissibility of Some Expert Bioethics Testimony*, 33 J.L. MED. & ETHICS 248, 250 (2005) (referring to “the classical logical fallacy *ad verecundiam*, the unjustified appeal to authority”).

89. Richard H. Underwood, *Logic and the Common Law Trial*, 18 AM. J. TRIAL ADVOC. 151, 166 (1994) (“[T]he *argumentum ad verecundiam* . . . is not necessarily fallacious. Many times we can and should rely on experts and other authorities.”); *cf.* Julia Evetts et al., *Professionalization, Scientific Expertise, and Elitism: A Sociological Perspective*, in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 105, 108 (K. Anders Ericsson et al. eds., 2006) (“[L]ay people *must* place their trust in professional workers (electricians and plumbers as well as lawyers and doctors) . . .”).

90. *See, e.g.*, Rizzo & Whitman, *supra* note 17, at 921.

individuals' tendency to self-correct.⁹¹

B. *Individual Differences*

At a general level, critics object that individual differences exist among the public, that is, there are those who suffer from bias and those who do not (or, better, that there is a spectrum of vulnerability upon which members of the public are distributed).⁹² Some people may not suffer from some biases and some may be free from others.⁹³ As such, paternalistic efforts may not be necessary for all people in all circumstances, and planners must take individual circumstances into account.⁹⁴ Because they are unable to do so, given the sheer number of citizens, they will not be able to develop welfare-enhancing policies.

First, however, those whom economists term the “new paternalists” are fully aware of such individual differences and indeed explicitly design interventions to account for them. The “asymmetry” of Camerer and colleagues’ “asymmetric paternalism,”⁹⁵ for instance, is expressly designed to develop policies that target those who are susceptible and let be those who are not.⁹⁶ Others have similar policy examples. One of the best-known, Thaler and Benartzi’s SMarT (Save More Tomorrow™) Program, takes advantage of the status quo bias and helps employees making retirement plan choices to substantially increase their savings.⁹⁷ Camerer and his colleagues document instances where

91. See *id.* at 910.

92. See, e.g., *id.* at 961 (“There is abundant evidence that both behavioral and cognitive biases are not uniform.”); see also Rachlinski, *Cognitive Errors*, *supra* note 10, at 216 (“People likely express enormous variation in their abilities to make accurate judgments . . .”).

93. Rizzo & Whitman, *supra* note 17, at 964.

94. See Rachlinski, *Cognitive Errors*, *supra* note 10, at 207 (“If predictable groups of people avoid making the errors that others commit, then law should account for such differences because those who avoid errors will not benefit from paternalistic interventions and indeed may be harmed by them.”); Rizzo & Whitman, *supra* note 17, at 960–61 (“Whether the gains from those helped exceed the losses to those harmed by a policy depends crucially on the distribution of the extent of bias across the affected population—which means the paternalist policymaker needs extensive information about that distribution.”).

95. Camerer et al., *supra* note 10, at 1212. Asymmetric paternalism is also known as “cautious paternalism.” See Ted O’Donoghue & Matthew Rabin, *Procrastination in Preparing for Retirement*, in *BEHAVIORAL DIMENSIONS OF RETIREMENT ECONOMICS* 125, 150 (Henry J. Aaron ed., 1999) (“[W]e focus on policies that reflect a kind of ‘cautious paternalism’: they can be extremely valuable if people are making errors, but they have relatively small costs if people are fully rational.”).

96. Camerer et al., *supra* note 10, at 1212 (“A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.”).

97. See Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164, S170–71 (2004); see also Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1160, 1179 (2001) (showing that 401(k) enrollment

such interventions already exist,⁹⁸ as well as contexts in which policies could or should be developed that help those susceptible to bias but do not harm those who are less vulnerable.⁹⁹ Indeed, a focus of the so-called “new” paternalism is an effort to accommodate such individual differences and thus minimize the amount of infringement and intervention.

More generally, however, an objection based on the difficulty of identifying an appropriate level of intervention (or of identifying individual preferences) is quite overbroad. By fanciful analogy, does society not need speed limits because some citizens do not speed? Should society not prohibit murder because most individuals do not kill?¹⁰⁰ In almost any instance of lawmaking or policymaking, assigning a level of liability, blame, or punishment that is appropriately keyed to individual preferences and behavioral tendencies (in the absence of definitive knowledge of those preferences and behavioral tendencies) will be of equal difficulty.¹⁰¹ Similarly, although paternalist interventions may “generate unintended consequences through their effects on economic incentives,”¹⁰² this is true for any law or policy. We hope to be able to predict or model such consequences—as with nonpaternalist interventions—but not being able to do so fully need not, by itself, detract from a policy’s viability. Thus, antipaternalists’ objections could apply to any legislative, administrative, or even judicial action, and if strictly applied, these objections would have perhaps unreasonably far-reaching implications. As with any law, policy, or regulation, interventionist policies look (as they must) at what

rates increase from about 50% to about 85% when employees are automatically enrolled in a 401(k) plan).

98. Camerer et al., *supra* note 10, at 1232–37 (discussing existing policies).

99. *Id.* at 1230–32 (discussing possible policy contexts).

100. Even this caricature raises an important question. Some citizens may not speed or murder precisely—only—because the law prohibits speeding or murder. As such, there is an endogeneity issue that arises with paternalistic policies, as well: might certain interventions inculcate better decisionmaking, along the lines of an Aristotelian virtue-induction approach? I bracket the question here, but note that some recent legal scholars are discussing, in a communitarian vein, the usefulness of law as a means of inculcating virtue. *E.g.*, Eduardo M. Penalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

101. See Zamir, *supra* note 3, at 236 (noting the “over- and under-inclusiveness that are inherent in legal rules”); see also Rizzo & Whitman, *supra* note 17, at 960 (“Most, if not all, proposed policies have a ‘one-size-fits-all’ flavor, in that they cannot be targeted at specific individuals.”). We have known this since Aristotle’s time. See John T. Valauri, *As Time Goes By: Hermeneutics and Originalism*, 10 NEV. L.J. 719, 730 n.80 (2010) (“Aristotle shows that every law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness.” (quoting HANS-GEORG GADAMER, *TRUTH AND METHOD* 316 (Joel Weinsheimer & Donald G. Marshall trans., Continuum 2d rev. ed. 2004) (1960)) (internal quotation marks omitted)).

102. Whitman & Rizzo, *supra* note 53, at 429.

is likely true on average. To the extent feasible, each policy acknowledges and takes into account the fact that it may not apply to every citizen in every circumstance.

Antipaternalists acknowledge this response to their objection.¹⁰³ Their reply, however—that the response is “mistaken, largely because of the effects of heterogeneity”¹⁰⁴—seems tautological at best. That is, the response points out that although there is a spectrum of vulnerability to some bias, it is not impossible to address that bias and to increase welfare by keying an intervention to what will help the most people (the mean of that spectrum or curve). With more information, the intervention can be adjusted to fit a more specific population (or subsample of that curve), as appropriate. The antipaternalists reply that there is a spectrum, and the average person might respond differently from others on the spectrum.¹⁰⁵ To the extent that biases are distributed normally, however, designing an intervention to help those at the “average” of the spectrum by definition helps the *most* people, not just the individual “average person.” To the extent that biases are not normally distributed, though, citizens either may fall in a positive tail and be less vulnerable to a bias (in which case a policy’s benefits might be fewer than its costs and it should not be applied),¹⁰⁶ or they may fall in a negative tail and be more vulnerable (in which case, as with the bell curve, more people will benefit from an intervention and the costs will be outweighed). As such, simply pointing out that a distribution exists does little to rebut the usefulness of looking at “general tendencies.” Most important, this is a true concern only where planners design policy in the absence of any other information. As noted below, this is rarely the case—indeed, in the absence of other information about a bias, we might not even know that we should be concerned.

Antipaternalists nevertheless maintain that the presence of individual differences defeats the viability of paternalistic interventions (but apparently not other policies). As Rizzo and Whitman note, “Most, if not all, proposed policies have a ‘one-size-fits-all’ flavor, in that they cannot be targeted at specific individuals. As a result, most policies will tend to create problems of both under- and over-inclusion”¹⁰⁷ They argue that regulators do not have full information about the distribution of decisionmaking or behavioral biases. In their example, people differ

103. *E.g.*, Rizzo & Whitman, *supra* note 17, at 967.

104. *Id.*

105. *E.g.*, *id.*

106. Rizzo and Whitman implicitly make this point. They note that some biases may be “small,” and thus an intervention would inappropriately increase costs and thus be inefficient. *Cf. id.* at 938. Of course, if the costs of an intervention outweigh its benefits, then central planners should not enact it.

107. *Id.* at 960.

in their tastes for potato chips, susceptibility to the temptation of chips, and reactions to incentives and disincentives at different levels of chip regulation.¹⁰⁸ Faced with such hurdles, they argue, regulators will likely ignore such difficulties and simply regulate.¹⁰⁹ Again, this is precisely the situation in which legislators or agencies find themselves when faced with any law or policy. To return to my somewhat tongue-in-cheek example above, legislators do not know precisely how many people speed on the highway, or whether that number is different from the number who speed on less traveled roads, or whether a thirty-five mile-per-hour speed limit will be more effective than a thirty mile-per-hour speed limit, or whether young adults will be more deterred from speeding in a school zone on weekends than will older adults.¹¹⁰ Nevertheless, for a host of public safety reasons, policymakers infringe on citizens' autonomy to choose how fast to drive and post reasonably, if not perfectly tailored, speed limits. To the extent that policymakers know that, on average, individuals will act in a particular way, or will be susceptible to particular behavioral tendencies or cognitive or emotional biases, policymakers will, uncontroversially, tend to regulate in particular ways.¹¹¹

C. Determining "True" Preferences

These points also illustrate why ascertaining individuals' "true" preferences is not as intractable a goal as critics suggest, and thus why regulators need not know every individual's specific preferences in

108. *Id.* at 962–63.

109. *Id.* at 963.

110. Some such data are likely available. Through empirical study in the lab and in field studies, similar data are just as likely available for determining who is most likely susceptible to cigarette advertising, decisions about unhealthy food, and other cognitive and affective biases more generally. *Cf. infra* notes 128–134 and accompanying text.

111. Indeed, this sort of actuarial judgment is often found to be more accurate overall than individual, clinical judgment—almost by definition, policies based on nomothetic averages will be accurate more often than will individual predictions (more precisely, actuarial studies with some clinical correction for individual cases are the most accurate, but actuarial predictions alone tend to be more accurate than clinical predictions alone). See PAUL E. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE 119 (Jason Aronson Inc. 1996) (1954) (surveying twenty-two studies comparing clinical and actuarial predictions in a variety of contexts, and finding that the actuarial predictions tended to be as good as or better than the clinical ones); Robin M. Dawes et al., *Clinical Versus Actuarial Judgment*, 243 SCIENCE 1668, 1669–71 (1989) (reviewing approximately 100 studies and concluding that, "[i]n virtually every one . . . the actuarial method has equaled or surpassed the clinical method, sometimes slightly and sometimes substantially"); William M. Grove & Martin Lloyd, *Meehl's Contribution to Clinical Versus Statistical Prediction*, 115 J. ABNORMAL PSYCHOL. 192, 194 (2006) ("Whether such [independent clinical] reasoning actually helps clinicians dependably outperform statistical formulas and computer programs is an empirical question with a clear, convincing answer: No, for prediction domains thus far studied.").

order to develop policy. Again, to simplify, it is arguably less important whether drivers derive more welfare from driving sixty-five miles-per-hour on a highway instead of fifty-five, when we can be fairly sure that at a broader level they derive more welfare from avoiding accidents and being safe, relative to being injured or killed in a speeding accident. Antipaternalists set out a false dichotomy when they ask, "Which is the correct standpoint for the paternalist to adopt: the avoidance of immediate feelings of guilty regret after the indulgence," for example, having sex or eating unhealthy junk food, "or the later avoidance of wistful regret over missed pleasures?"¹¹² The paternalist, in my view justifiably, pursues the standpoint of encouraging the individual's avoidance of sexually transmitted diseases (versus contracting one); of avoiding obesity and its accompanying health crises (versus succumbing to it); and, to extend the example, of avoiding death from failure to wear a seat belt or motorcycle helmet (versus surviving). From an objective perspective, it seems justifiable for a regulator to pursue policymaking that encourages individuals' achievement of such outcomes.¹¹³ Similarly, Whitman applies a point from traditional economics: the Coasian insight that costs (or harms) are reciprocal.¹¹⁴ Thus, the preferences or actions of an individual's "short-run self" (who may prefer junk food or cigarettes) may conflict with those of her "long-run self" (who may "refuse[] to allow ice cream in the house" or "flush[] cigarettes down the toilet").¹¹⁵ Whitman suggests that if so, "having no further information," there is no *a priori* reason to privilege one set of preferences or actions over the other.¹¹⁶ Indeed, he points out, to the extent that the goal of intervention is "consistency" between self-preferences (for example, short-run and long-run, or Time₁ and Time₂), manipulating either set to be consistent with the other achieves that goal.¹¹⁷

Of course, consistency, *per se*, is hardly the only goal prompting interventions to increase welfare. By definition, the goal is to make an individual better off, not simply internally consistent.¹¹⁸ Thus, to take Whitman's example, when an individual is faced with a "choice

112. Rizzo & Whitman, *supra* note 17, at 930.

113. Similarly, it does not seem unreasonable to decline to balance, for instance, the outcome of the pleasure of eating oneself to obesity or death with the outcome of death. *Contra id.* at 931 ("[E]ven if we were to assume unambiguous post-decision regret, this must be balanced against heightened enjoyment during or immediately following the decision. The paternalist policymaker is therefore faced with deciding the correct *balance* of the preferences . . .").

114. Whitman, *supra* note 75, at 4.

115. *Id.*

116. *See id.* at 5.

117. *See id.*

118. I acknowledge potential disagreement over what constitutes "better off."

between \$100 one day and \$110 a day later,” there seems little reason to “‘correct’ him by making him choose the smaller amount.”¹¹⁹ Whitman is of course correct that the fact of inconsistency by itself does not tell us how to resolve the conflict between the two amounts. But by any objective means, and *having no further information*, \$110 will make someone better off than \$100, and there seems little reason to prefer the smaller amount. Likewise, if we stipulate that a healthy future is objectively better than either (a) a fleeting current pleasure, or (b) an unhealthy future, then there is little reason—other than “consistency,” which, again, is not the primary goal of intervention—to encourage an individual through education, persuasion, or intervention to make a smaller, less healthy, or otherwise nonoptimal choice.

Critics, including Rizzo and Whitman, object to this suggestion, arguing that focusing on the “objective standard” of a regulated individual’s welfare “constitutes an abandonment of the new paternalist project.”¹²⁰ They apparently object because it reminds them of what they consider “old” paternalism—the substitution of regulators’ preferences for those of the regulated.¹²¹ This objection is flawed for at least two reasons. First, it expressly conflates objective and subjective standards by suggesting that “the new paternalism, supposedly based on the underlying normative preferences of individuals, shades into the old paternalism, based on what is ‘objectively best’ *in the opinion of an outside observer*.”¹²² Second, it neglects the extensive literature persuasively advocating objective criteria for human flourishing and policymaking that encourages citizens’ welfare.¹²³ Such literature has prompted some disagreement; however, its proponents establish a

119. Whitman, *supra* note 75, at 5.

120. Rizzo & Whitman, *supra* note 17, at 929 n.82.

121. *See id.* at 907, 935.

122. *See id.* at 935 (emphasis added).

123. *See generally* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011) (explaining the “Capabilities Approach” to objectively evaluating human well-being); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000) (grounding an argument for gender equality in an objective account of human well-being); THE QUALITY OF LIFE (Martha Nussbaum & Amartya Sen eds., 1993) (collecting theoretical perspectives on criteria for human well-being); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003) (advocating an objective theory of human well-being within the legal context). The capabilities approach and similar objectivist approaches seek to identify goods that would consensually be seen as conducive to human flourishing, even if identified at a broad level. Some of the anti-anti-paternalists, as the antipaternalists note, also emphasize “objective” welfare, but in a sense leave such welfare unspecified. *E.g.*, Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. PAPERS & PROC. 175, 175 (2003) (“We intend ‘better off’ to be measured as objectively as possible, [reflecting choices individuals would make] if they had complete information, unlimited cognitive abilities, and no lack of willpower.”).

plausible account for such objective criteria. Indeed, some commentators have developed an approach to paternalism (“positive paternalism”) based in part on such criteria.¹²⁴

D. *Correcting Biases*

Critics raise two other concerns related to the knowledge problem. They note that central planners do not know the *scope* of individual biases, for instance, the precise extent to which individuals exhibit the endowment effect, discounting effect, or affective or other biases.¹²⁵ And as noted, critics contend that central planners do not take into account the likelihood that individuals engage in “self-debiasing” or self-correction.¹²⁶

Again, however, critics somewhat overstate the case. The same objection about the scope of individual behavioral tendencies applies to any general law or policy.¹²⁷ Thus, not having measurements of biases at the individual level is hardly a fatal objection to developing policies that benefit those individuals. This is especially so where the policies can be informed by existing empirical research—and this is a more direct response to the antipaternalists. That is, in many instances we are not ignorant of the scope of cognitive or emotional biases; in fact, we have empirical studies that give us an idea of the magnitude of a particular bias. Drawing on such studies can help us develop specific policies that are keyed as much as possible to what we know about the distributions of biases and the means of correcting for them.

One of the antipaternalists’ examples, the endowment effect,¹²⁸ is a useful one. This effect, “the tendency to . . . value a good or entitlement more highly when it is possessed, is a robust effect considered to significantly undercut basic assumptions of law and economics.”¹²⁹ Substantial empirical evidence supports the existence of the endowment effect,¹³⁰ but also shows that its expression varies with context—for

124. Peter H. Huang & Jeremy A. Blumenthal, *Positive Law and Policy*, in THE ENCYCLOPEDIA OF POSITIVE PSYCHOLOGY 730, 732 (Shane J. Lopez ed., 2009); Blumenthal & Huang, *supra* note 1; cf. Peter H. Huang & Jeremy A. Blumenthal, *Positive Institutions, Law, and Policy*, in OXFORD HANDBOOK OF POSITIVE PSYCHOLOGY 589, 592–93 (C.R. Snyder & Shane J. Lopez eds., 2d ed. 2009) (discussing positive paternalism of institutions).

125. *E.g.*, Rizzo & Whitman, *supra* note 17, at 932–43.

126. *E.g.*, *id.* at 943–51.

127. *See supra* notes 100–111 and accompanying text.

128. Rizzo & Whitman, *supra* note 17, at 937–38.

129. Blumenthal, *supra* note 5, at 33; *see also id.* (discussing the endowment effect). *See generally* Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (demonstrating the endowment effect empirically and discussing its implications).

130. *See* John K. Horowitz & Kenneth E. McConnell, *A Review of WTA/WTP Studies*, 44 J. ENVTL. ECON. & MGMT. 426, 442 (2002) (reviewing forty-five studies and concluding that “[t]he

example, the type of good or entitlement, whether it is obtained by skill or chance, or whether there exists a close substitute for it.¹³¹ For antipaternalists, this context-dependence suggests that no intervention to address the bias is appropriate.¹³² In fact, understanding and exploring such contributing factors helps refine the theory and clarify boundary conditions and influential factors. Such refinement can then help policymakers develop appropriate interventions.

Russell Korobkin took just this approach in his review of the relevance of the endowment effect to legal policy.¹³³ Korobkin reviewed the social science literature on the endowment effect, expressly noting its context-dependence, but also illustrating how an understanding of the effect can aid law and policy in areas such as property, contracts, damages, and general litigation.¹³⁴ Similarly, planners and policymakers can incorporate existing data into their assessment of appropriate interventions, evaluate the magnitude of particular biases and the contexts in which they are most likely to appear, and determine whether intervention is appropriate.

Of course, it is also the case that *individuals* are often unaware of the scope of the biases to which they are vulnerable. Indeed, people typically presume that their judgments and decisions are accurate and unbiased.¹³⁵ As such, people typically do not spontaneously self-correct

extensive literature . . . provides sturdy evidence for” the effect’s existence); Serdar Sayman & Ayşe Öncüler, *Effects of Study Design Characteristics on the WTA-WTP Disparity: A Meta Analytical Framework*, 26 J. ECON. PSYCHOL. 289, 297–300 (2005) (performing a meta-analysis of thirty-nine studies and examining the influence of different variables on the effect). Two studies on which antipaternalists rely, e.g., Rizzo & Whitman, *supra* note 17, at 938 & n.110, purport to show that there is no endowment effect, or only a weak effect. Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 AM. ECON. REV. 1449, 1463 (2007); Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay–Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 542 (2005). Of course, finding a null effect in an experiment does not show that the phenomenon in question does not really exist; rather, it shows either that the experiment may not have been powerful enough to identify the effect, or even that it “corrects” the phenomenon. Indeed, some procedures might correct a bias too much, leading to overcorrection. *See infra* note 142 and accompanying text. Plott and Zeiler’s data in fact show a slight *reverse* endowment effect. *See* Jeremy A. Blumenthal, *Thoughts on Plott and Zeiler (2005, 2007)*, Paper Presented at the Endowment Effect Workshop, Georgetown University Law Center (Nov. 13, 2009) (on file with author).

131. *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1235–42 (2003).

132. *See* Rizzo & Whitman, *supra* note 17, at 910, 946–49.

133. *See* Korobkin, *supra* note 131, at 1293.

134. *Id.* at 1256–68 (discussing property law); *id.* at 1268–81 (discussing contract law); *id.* at 1283–91 (discussing remedies law); *id.* at 1291–92 (discussing litigation).

135. Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 185, 190 (Thomas Gilovich

or self-debias, as antipaternalists suggest,¹³⁶ and doing so is a difficult process. Not only must an individual recognize the cognitive or emotional bias to which he is vulnerable, but he must also be motivated to correct it.¹³⁷ Through a variety of mechanisms, individuals tend to downplay or reject the possibility that they make or are likely to make biased decisions.¹³⁸ For instance, we tend to ignore or reject evidence that does not conform to our existing hypotheses.¹³⁹ When this “confirmatory bias” is combined with individuals’ further tendency toward overoptimism about their skills and opportunities,¹⁴⁰ and their likelihood to attribute failure to situational rather than personal factors,¹⁴¹ the clear-headed objective individual who recognizes and seeks to correct his flaws is likely rarer than antipaternalists presume.

Given the self-serving biases to which people are typically subject, neither recognition nor motivation tends to occur. And even if a citizen is aware of a bias and is motivated to correct it, the citizen is often unaware of the scope or size of that bias. Note that this is precisely Rizzo and Whitman’s objection to central planners making corrections. However, it is also apparent that individuals themselves are rarely aware of the scope or size of the relevant bias, and thus either do not correct adequately or, equally bad from the economists’ perspective, overcorrect.¹⁴² As another example, Whitman points to studies of people’s efforts to plan around their likelihood of procrastinating as

et al. eds., 2002) (“[P]eople’s default response is to assume that their judgments are uncontaminated.”).

136. See, e.g., Rizzo & Whitman, *supra* note 17, at 943–51.

137. Blumenthal, *supra* note 5, at 52.

138. See Wilson et al., *supra* note 135, at 190.

139. E.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 646 (1999).

140. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2498 (2004) (“Hundreds of psychological studies, however, show that people are consistently too optimistic and therefore overconfident in their chances of achieving favorable outcomes.”); Hanson & Kysar, *supra* note 139, at 653–58 (describing the results of empirical studies demonstrating overoptimism about likelihood of both positive and negative events).

141. See Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 948 (2006) (discussing the “‘actor-observer’ effect,” whereby “[i]ndividuals . . . attribute their own behavior to the product of the situation in which they find themselves,” while observers “attribute it to some stable aspect of their personality”).

142. See Blumenthal, *supra* note 5, at 52–53. This is often the case when an individual tries to correct for an affective bias. See, e.g., Linda M. Isbell & Robert S. Wyer, Jr., *Correcting for Mood-Induced Bias in the Evaluation of Political Candidates: The Roles of Intrinsic and Extrinsic Motivation*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 237, 246–48 (1999); Cathy McFarland et al., *Mood Acknowledgment and Correction for the Mood-Congruency Bias in Social Judgment*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 483, 489 (2003); Victor C. Ottati & Linda M. Isbell, *Effects of Mood During Exposure to Target Information on Subsequently Reported Judgments: An On-Line Model of Misattribution and Correction*, 71 J. PERSONALITY & SOC. PSYCHOL. 39, 48 (1996).

evidence of the ability to self-correct.¹⁴³ However, these findings showed that people are actually relatively poor at setting appropriate deadlines for themselves to account for procrastination.¹⁴⁴ Third parties were, in fact, better at setting such deadlines to counteract individuals' flawed work habits, with better outcomes for those individuals' work¹⁴⁵—arguably supporting some notion of paternalism, rather than challenging it.

E. *Slopes*

Next, objections to soft or light paternalistic policies because of the danger that they will lead inexorably to “harder” paternalism only have traction if those hard paternalistic policies are themselves problematic. In some contexts, they may indeed be problematic—but equally, of course, they may not be. Again, simply an *ipse dixit* that a policy is paternalistic or interventionist, or even that it is “hard paternalism,” should not suffice to invalidate it.

Further, it is true that these critics' warnings about the danger of slippery slopes in the context of paternalistic policies are more well-reasoned and sophisticated than is common,¹⁴⁶ providing some plausible accounts of when such dangers occur.¹⁴⁷ But despite some ambivalent language, these critics overstate how inexorable the move is from soft or light or cautious or asymmetric or libertarian paternalism to hard paternalism, by suggesting that slippery slopes are especially likely in the new paternalism context.¹⁴⁸ As is implicit in their discussion, however, this slide need not be inevitable. Policymakers and courts *do* draw lines that create friction on those “slippery slopes,” and even erect barriers to prevent slides altogether, whether through precommitment (for instance, establishing rules or standards that constrain or guide future decisionmakers¹⁴⁹) or other means.

143. See Whitman, *supra* note 75, at 10 & 16 n.38 (citing Ariely & Wertenbroch, *supra* note 27, at 219–24).

144. Ariely & Wertenbroch, *supra* note 27, at 223–24.

145. *Id.*

146. Cf. Whitman & Rizzo, *supra* note 53, at 413–15 (confronting traditional skepticism about slippery slope arguments and defending the use of such arguments in addressing new paternalism).

147. See, e.g., *id.* at 427–31. See generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985) (analyzing the empirical and rhetorical nature of slippery slope reasoning and discussing the use of slippery slope arguments in law); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (providing a comprehensive legal overview of slippery slopes).

148. See, e.g., Whitman & Rizzo, *supra* note 53 *passim*.

149. This helps address Rizzo and Whitman's concern that “[t]he present decisionmaker and the future decisionmaker need not be the same. Even if present decisionmakers are willing and able to make the relevant distinctions, future decisionmakers may be unable or unwilling to do so.” Whitman & Rizzo, *supra* note 53, at 414.

Indeed, the examples Rizzo and Whitman provide illustrate this. For instance, they ask, “Where is the line between mentally able and retarded (for purposes of capital punishment)?”¹⁵⁰ The U.S. Supreme Court drew a clear guideline rejecting the idea that the mentally handicapped may be executed.¹⁵¹ As the Court noted, though, and as Rizzo and Whitman imply, there can be debate over who qualifies as “mentally retarded.”¹⁵² Rizzo and Whitman suggest that given such potential disagreement, line-drawing is difficult at best.¹⁵³ Yet the Court noted that in such circumstances, the individual states are charged with developing appropriate standards for making such determinations,¹⁵⁴ similar to an agency or other expert decisionmaker being charged with decisionmaking authority in applying a paternalist intervention. And as the Court noted, even though such guidelines may be “vague,” which concerns some antipaternalists,¹⁵⁵ the States have actually arrived at largely consensual definitions of “mental retardation.” (Importantly, those definitions were generally consistent with expert scientific definition.¹⁵⁶)

I do not suggest that slippery slopes do not exist. Some circumstances will make certain policies more likely to be promulgated if earlier ones already exist. I am unsure, however—but not naively so—that policymakers and courts will be as unable or unwilling to draw lines as antipaternalists suggest. When they do, the question is not whether the line is arbitrary—indeed, in many instances it must be—but rather whether it is reasonable and effective. Again, in developing interventionist or paternalistic policies, as with any policy, assessing and balancing their costs and benefits is a more useful approach than rejecting them outright.¹⁵⁷

F. “Economic Insights”

Finally, antipaternalists have perhaps an overoptimistic view of human psychology. A recurring theme of their writing is that individuals have incentives to correct their errors, learn from their mistakes, and solve their own problems.¹⁵⁸ As I have shown elsewhere,

150. *Id.* at 416.

151. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

152. *See Atkins*, 536 U.S. at 317 (“To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.”); Whitman & Rizzo, *supra* note 53, at 416.

153. *See Whitman & Rizzo*, *supra* note 53, at 416.

154. *Atkins*, 536 U.S. at 317.

155. *See, e.g., Whitman & Rizzo*, *supra* note 53, at 415–26.

156. *See Atkins*, 536 U.S. at 317 n.22.

157. *See supra* notes 38–39 and accompanying text.

158. *See, e.g., Klick & Mitchell*, *supra* note 7, at 1629; Whitman, *supra* note 75, at 14; Whitman & Rizzo, *supra* note 53, at 442–43.

however, learning from experience is not as common as antipaternalists believe.¹⁵⁹ Indeed, as James Byrnes has pointed out, “[L]earning is by no means automatic [even] when people are shown the errors of their ways.”¹⁶⁰ Given the difficulties of recognizing, acknowledging, and accurately evaluating a bias, motivating oneself to correct it, and doing so effectively, it is hardly a given that individuals will respond optimally to the economists’ putative incentives to learn.¹⁶¹

Some of the antipaternalists’ arguments sketched above are plausible, but ultimately unpersuasive. At least one of the “failure to consider” arguments, however, seems outright wrong. Specifically, these authors criticize the “new paternalism” for ignoring recent economic insights.¹⁶² In particular, they claim that new paternalists argue not that government should instill its preferences and values (hard or traditional paternalism), but rather that the individual has multiple selves—for instance, a present and a future self.¹⁶³ Whitman in particular suggests that this concept of “multiple selves” allows the new paternalists to demonstrate that acceding to the present self’s unhealthy preferences harms the future self and that this harm should be abated.¹⁶⁴ Drawing on Coase’s insights that (1) harm between individuals is reciprocal (that is, even if A’s lawful conduct harms B, to restrain A’s conduct in favor of B would harm A in the exercise of his rights),¹⁶⁵ and (2) individuals negotiate in the market and resolve such harms without the need for intervention,¹⁶⁶ Whitman suggests that an individual will negotiate internally and resolve conflicts between the interests of his present and future selves.¹⁶⁷

First, however, we need not think of a person as consisting of multiple selves. As Whitman notes, it is a “controversial philosophical position” that may be useful in some contexts but not others.¹⁶⁸ Here,

159. Blumenthal, *supra* note 5, at 12 n.53; *see also supra* notes 32–33 and accompanying text.

160. Byrnes, *supra* note 33, at 214.

161. Whitman suggests that individuals “have every reason to understand their own needs and find suitable means of solving their own problems.” Whitman, *supra* note 75, at 14. Unfortunately, despite those very reasons, people often do not and cannot do so.

162. *E.g., id.*

163. *E.g., id.* at 2. For a thorough discussion of identity as comprising multiple selves, see DEREK PARFIT, *REASONS AND PERSONS* pt. 3 (1987 reprt.). *See generally* THE MULTIPLE SELF (Jon Elster ed., 1986) (collecting essays on the idea of multiple selves in relation to topics concerning philosophy, psychology, and economics); Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 *LEGAL THEORY* 23 (1997) (contemplating the potential implications of multiple selves analysis).

164. *See* Whitman, *supra* note 75, at 5.

165. *See* R. H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 2 (1960).

166. *See id.* at 17–18.

167. Whitman, *supra* note 75, at 7–9.

168. Whitman, *supra* note 75, at 2. Whitman is open about this and adopts the multiple-

for instance, it is a useful heuristic in discussing the comparison of, and relative costs and benefits of, different preferences (for example, at Time₁ versus Time₂). But we might also maintain the idea of a unitary “self,” and say that a choice at Time₁ harms that self in the future. That is, we need not compare Time₁ and Time₂ preferences, just what a Time₁ or Time₂ self would choose if fully informed, or what that self should choose, and so forth.

Even taking the multiple selves approach, however, the difficulty in Whitman’s argument lies not in psychologists’ and “new” paternalists’ use of “economic theory that is at least 40 years out of date.”¹⁶⁹ Rather, the problem is in the other direction; that is, economists do not consider the psychological evidence that shows that Coase’s approach is flawed.¹⁷⁰ For instance, the very findings that show the potential need for paternalistic intervention also demonstrate that individuals do *not* always behave rationally, whether negotiating in the market or making decisions in their own lives. Individuals often do not negotiate due to antipathy for the other party,¹⁷¹ and often place inaccurate values on the goods about which they negotiate, with those values affecting their willingness to enter into transactions and contracts.¹⁷² There seems little reason to presume that if an economic theory does not predict interpersonal behavior well, it will nevertheless predict metaphorical intrapersonal behavior well.¹⁷³ Essentially, Whitman argues that the new paternalists have failed to consider a theory that has been called into serious question.¹⁷⁴

selves hypothesis “for argument’s sake.” *See id.*

169. *See* Whitman, *supra* note 75, at 2–3.

170. Indeed, although Whitman suggests that the new paternalists’ approach “should incorporate at least some of the lessons learned in the last half century from research on externalities,” *id.* at 14, it may be argued that the opposite is, in fact, more accurate.

171. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 384 (1999) (interviewing lawyers for both parties in twenty nuisance cases and reporting that in almost all cases “acrimony between the parties was an important obstacle to bargaining”).

172. *See* Korobkin, *supra* note 131, at 1232–35 (summarizing the results of various psychological studies).

173. *Cf.* Whitman, *supra* note 75, at 2 (suggesting that “multiple selves” could simply be a “metaphor”).

174. Another anomaly of applying Coasian analysis—perhaps less serious than the others—is the uncertain nature of whom the analysis is to benefit. For instance, an important reason for a court to apply the Coase Theorem is to help determine which of two parties should receive a particular legal entitlement or right, especially in the (real-world) presence of transaction costs. *Cf.* Coase, *supra* note 165, at 19–28. But in applying the Theorem to choosing whether to satisfy short-run self or a long-run self, it is not clear who the “court,” or third-party, is, or whether it even exists.

Certainly, these (and other) economists' criticisms of what they call the new paternalism warrant a fuller response. As an initial matter, however, we can suggest that, as with their objections regarding autonomous decisionmaking and the value of experience described earlier in this Article,¹⁷⁵ the new paternalists' criticisms are called into question by empirical findings in psychology, and thus face higher hurdles than might be assumed.

IV. ARE EXPERTS HUMAN?

None of this proves that experts will be better decisionmakers than individuals. Rather, the discussion shows that experts are presumptively in a better position to make welfare-enhancing decisions than are laypeople. Nevertheless, in a second objection, critics emphasize the "problem" that the alleged experts enacting policies are just as "human" as those in whose interest they are acting, and are thus subject to the same cognitive, emotional, and other biases that influence decisionmaking.¹⁷⁶ If so, then the idea of a decisionmaking similarity between experts and laypeople is supported. With the value of individual autonomy in mind, then, perhaps vesting experts with paternalistic authority¹⁷⁷ is a mistake.

On the one hand, a long line of empirical findings in the judgment and decisionmaking (JDM) literature does suggest that experts suffer deficiencies in decisionmaking. Psychologist James Shanteau, an expert on experts, reviewed a number of studies indicating such flawed decisionmaking, and his work shows that a wide range of experts make mistakes, lack reliability, are poor at calibration and coherence, use little relevant information in making their decisions, and are subject to the same heuristics and biases as laypeople.¹⁷⁸ Larry T. Garvin suggests that

175. See *supra* notes 21–33 and accompanying text.

176. E.g., Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1093–94 (1990); Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 142–43 (2000); Paul Slovic, *Perception of Risk*, 236 SCIENCE 280, 281 (1987); cf. Zimmerman, *supra* note 70, at 1172 (“[T]here is some evidence that fund designers also may be subject to cognitive bias themselves.”). But see Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1152 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)), and acknowledging that experts “are subject to cognitive errors, and . . . show affiliation bias,” but also finding that “in the domains in which they specialize, experts are far more likely to be right than are ordinary people”).

177. Or any authority at all, but that is another question.

178. James Shanteau, *Competence in Experts: The Role of Task Characteristics*, 53 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 252, 253–54 (1992) [hereinafter Shanteau, *Competence in Experts*]; James Shanteau, *Psychological Characteristics and Strategies of Expert Decision Makers*, 68 ACTA PSYCHOLOGICA 203, 204–05 (1988) [hereinafter Shanteau, *Psychological Characteristics*].

experts' increasing familiarity with the decisions they make over time (as they gain experience) leads them to make those decisions more heuristically and with more confidence, though not necessarily more accurately.¹⁷⁹ Gregory Mandel, focusing on the decisionmaking of regulators in the intellectual property and technological context, notes that both experts and laypeople suffer similar heuristics and biases; he thus suggests that deliberation between the two groups would best achieve appropriate regulatory results for technology.¹⁸⁰ The work of Chris Guthrie and his colleagues reveals that trial judges sometimes fall prey to various heuristics and biases, although they are resistant to others.¹⁸¹ And Paul Slovic, focusing on studies of the perception of risk—a crucial judgment underlying a range of policy decisions—notes that experts are prone to similar biases as laypeople, especially when experts go beyond the available data and make decisions intuitively.¹⁸² Quite simply, as Nobel laureate Daniel Kahneman summarized (or predicted) the conclusions of this line of research two decades ago, “[T]here is much evidence that experts are not immune to the cognitive illusions that affect other people.”¹⁸³

Such pronouncements, however, may be misleading. First, although jeremiads against expert ability may be quite marketable,¹⁸⁴ even within this JDM literature, a range of studies show experts' superiority. Experts do make accurate, well-calibrated judgments, using appropriate amounts and types of information. Nevertheless, Shanteau suggests that such “instances of strong performance [of expert decision making] have been largely ignored in the judgment literature . . . [s]tudies within [the

179. See Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 347–48 (2005).

180. Gregory N. Mandel, *Technology Wars: The Failure of Democratic Discourse*, 11 MICH. TELECOMM. & TECH. L. REV. 117, 186 (2005).

181. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) [hereinafter Guthrie et al., *Inside the Judicial Mind*]; see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 22–24 (2007); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1482 (2009); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1256–57 (2006); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1258–59 (2005).

182. Slovic, *supra* note 176, at 281. For a similar discussion, see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130 (1974).

183. Daniel Kahneman, Commentary, *Judgment and Decision Making: A Personal View*, 2 PSYCHOL. SCI. 142, 144 (1991).

184. See Jay J.J. Christensen-Szalanski & Lee Roy Beach, *The Citation Bias: Fad and Fashion in the Judgment and Decision Literature*, 39 AM. PSYCHOLOGIST 75, 75 (1984).

cognitive-science research] tradition have shown expert superiority over novices in nearly every aspect of cognitive functioning, [including] problem solving and reasoning.”¹⁸⁵

Research from outside this tradition yields similar findings. Again, even studies finding that trial judges are subject to some of the same biases as laypeople also find biases to which those judges are resistant.¹⁸⁶ For instance, judges were found to be more resistant than laypeople to framing effects and to the representative heuristic.¹⁸⁷ Moreover, in specific domains, experts clearly perform better than novices and laypeople. Lawyers make better decisions than their clients, particularly with regard to settlements;¹⁸⁸ expert teachers make better decisions than novice teachers.¹⁸⁹ Importantly, this is also true for judges engaging in domain decisions directly relevant to their judicial role—that is, not “simply” on general cognitive tasks. For instance, judges seem less susceptible to the hindsight bias than laypeople, a resistance that helps them to more accurately evaluate whether a warrant was issued with probable cause.¹⁹⁰ And recent findings show that judges are apparently better able than laypeople¹⁹¹ to set aside erroneously admitted confessions in conducting harmless error review.¹⁹²

Second, in direct opposition to the JDM findings, an equally long line of research in the cognitive sciences clearly demonstrates expert superiority in reasoning, memory, and other cognitive functions as compared to novices.¹⁹³ Experts are better at simplifying problems, at identifying and attending to what is relevant and irrelevant in a particular problem, and seem to be more creative in their approach to problems.¹⁹⁴ Importantly, experts’ superior decision strategies—an

185. See, e.g., Shanteau, *Competence in Experts*, *supra* note 178, at 254–55.

186. See Guthrie et al., *Inside the Judicial Mind*, *supra* note 181, at 784.

187. *Id.* at 816.

188. See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 137 (1997); Sunstein, *supra* note 176, at 1152. *But cf.* Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT’L REV. L. & ECON. 289, 295–96 (1995) (arguing that plaintiffs’ attorneys are more risk averse regarding settlement than defense attorneys).

189. Delores A. Westerman, *Expert and Novice Teacher Decision Making*, 42 J. TCHR. EDUC. 292, 293 (1991).

190. Reid Hastie & Kip Viscusi, 40 AZ. L. REV. 901, 906 (1998); Jeffrey J. Rachlinski et al., *Probable Cause, Probability, and Hindsight* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877125.

191. See Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997).

192. D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors?*, LAW & HUM. BEHAV. (forthcoming 2012).

193. Shanteau, *Competence in Experts*, *supra* note 178, at 254.

194. Shanteau, *Psychological Characteristics*, *supra* note 178, at 209–10.

ability to make adjustments and corrections, consulting with others, learning from past decisions, and developing informal decision aids, among others—often help them “overcome the effects of cognitive limitations” and biases.¹⁹⁵

Again, this is true for all kinds of experts, including physicists, mathematicians, chess masters, weather forecasters, test pilots, livestock judges, and accountants.¹⁹⁶ Notably, these contexts are closer to those scientific or technological decisions that agency experts might be expected to make.¹⁹⁷ Whether that expertise transfers to general skills or superior reasoning and ability in other domains is less clear. For instance, expertise tends to be domain specific—expertise in one context may not lead to superior reasoning skills in other contexts.¹⁹⁸ On the other hand, generalizability of expert reasoning may not be as important in the paternalism context, because there is little question that these experts are—by definition—expert in their field. Experts’ expertise may be domain specific, but it is also “domain adapted.”¹⁹⁹ They can thus make expert content decisions about the particular issue with which they are faced.²⁰⁰ And crucially, experts tend to be *less* vulnerable to biases in domains in which they are expert.²⁰¹

Third, the “experts are human” criticism elides one of the very objections that some antipaternalists put forth—the idea of individual differences.²⁰² As noted in Part III.B., the objection is that within the public there is a spectrum along which some individuals suffer biases and some do not. Therefore, planners must take individual circumstances into account, as not everyone will necessarily benefit from paternalistic efforts.²⁰³ Because the planners are unable to do so, they will not be able to develop welfare-enhancing policies.²⁰⁴

I sketched one response to these arguments above. But more importantly, the individual differences objection undercuts itself by emphasizing a curve of abilities in the citizenry. We presume—we intend—indeed we hope that central planners fall on the positive tail of

195. *Id.* at 207–08.

196. Shanteau, *Competence in Experts*, *supra* note 178, at 258 tbl.1.

197. *Cf. supra* note 84 and accompanying text.

198. See JOHN R. ANDERSON, *COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS* 280 (3d ed. 1990).

199. P.E. SLATTER, *BUILDING EXPERT SYSTEMS: COGNITIVE EMULATION* (1987).

200. *Cf. supra* note 84 and accompanying text.

201. Jennifer K. Phillips et al., *Expertise in Judgment and Decision Making: A Case for Training Intuitive Decision Skills*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 297, 298 (Derek J. Koehler & Nigel Harvey eds., 2004).

202. See, e.g., Rachlinski, *Cognitive Errors*, *supra* note 10, at 207; Rizzo & Whitman, *supra* note 17, at 960.

203. E.g., Rizzo & Whitman, *supra* note 17, at 960–61.

204. *Id.*

that curve and are thus among the least likely to fall prey to flawed decisionmaking. As Rachlinski puts it,

[S]uppose that those who are highly experienced with making public-health decisions are unaffected by frame. Such experts . . . might be able to ignore the features of the problem that produce the decision's frame. Dividing up the experts and laypersons might reveal that the frame had a decisive effect on lay judgment, but no effect on the judgment of the experts. If so, then the nomothetic model would have to be rejected as failing to recognize an important factor in the decisionmaking process. A policy proposal founded upon data on framing gathered from laypersons but directed towards experts might be misleading.²⁰⁵

Fourth, even if experts are subject to the same or similar biases as citizens, they may nevertheless still know citizens' preferences better than do citizens themselves. This is not because of some privileged knowledge base (that is, because they are necessarily more aware than citizens), but rather because in making the relevant decisions, experts are not in a position to experience the particular bias.²⁰⁶ This would especially be the case for affective biases. Many poor decisions are made under the influence of a particular affective state—fear, desire, anxiety, sexual arousal—to which the third-party decisionmaker would not be subject.²⁰⁷ Similarly, even when these decisionmakers are still subject to such biases (for example, emotional influences²⁰⁸), empirical evidence suggests that group deliberation of the sort in which agency or legislative decisionmakers would engage can alleviate some emotional biases on judgment.²⁰⁹ If so, then shifting decisions to deliberative groups, rather than to individuals and rather than to nondeliberative groups such as voters, might be useful in order to avoid the negative effect of emotional biases. Indeed, commentators often characterize the bicameral structure of the U.S. government and the Constitution in just this way—as an effort “to protect the people against [themselves].”²¹⁰

205. Rachlinski, *Cognitive Errors*, *supra* note 10, at 214–15.

206. *Cf.* Rachlinski, *Uncertain Psychological Case*, *supra* note 10, at 1216–17 (“Attorneys, situated somewhat outside of the decisionmaking environment, can see multiple frames and other perspectives more easily than clients.” (emphasis added)).

207. *See* Blumenthal, *supra* note 5, at 65–66.

208. *See* Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 117.

209. For a review of studies demonstrating this point, *see* Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1, 21–22 (2005).

210. Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules*

Fifth, empirical evidence shows that relative to laypeople and novices, experts use qualitatively different thought processes and strategies.²¹¹ Experts perceive, process, and use information more effectively and efficiently,²¹² and adapt better to changing circumstances,²¹³ than do laypeople. Accordingly, some research demonstrating biases in experts may simply be a consequence of experts being “forced” to use nonexpert thought processes. Moreover, in some instances, there may be methodological confounds; studies comparing putative “experts” and “novices,” for instance, may have in fact compared naïve participants (those with “little or no skill” in a field) and novices (those “intermediate in skill and knowledge,” who may have “even work[ed] at subexpert levels”), skewing the results by not actually studying those experts who function qualitatively differently.²¹⁴ Alternatively, researchers may conflate simple experience with expertise, even though experience is a necessary but not sufficient condition for expertise.²¹⁵ One review of studies on auditors, for instance, found that increased experience did not lead to increased consensus among auditor judgments; however, the review noted that many of these studies did not directly address whether those with more experience were necessarily more expert.²¹⁶

Sixth, even when experts are appropriately identified, researchers may be asking them the wrong questions, thus leading to flawed inferences. For instance, Frederick Schauer has suggested that the sort

and *Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1988–89 (2003) (quoting Jon Elster, *Intertemporal Choice and Political Thought*, in CHOICE OVER TIME 35, 40–41 (George Loewenstein & Jon Elster eds., 1992)).

211. See, e.g., Jill H. Larkin, *Information Processing Models and Science Instruction*, in COGNITIVE PROCESS INSTRUCTION 109, 113–14 (Jack Lochhead & John Clement eds., 1979); Westerman, *supra* note 189, at 293.

212. Stuart Read et al., *What Do Entrepreneurs Really Learn from Experience? The Difference Between Expert and Novice Entrepreneurs*, in FRONTIERS OF ENTREPRENEURSHIP RESEARCH 2003: PROCEEDINGS OF THE TWENTY-THIRD ANNUAL ENTREPRENEURSHIP CONFERENCE 186 (William D. Bygrave et al. eds., 2003), available at <http://fusionmx.babson.edu/entrep/fer/BABSON2003/VII/VII-P4/vii-p4.htm>.

213. James Shanteau, *The Psychology of Experts: An Alternative View*, in EXPERTISE AND DECISION SUPPORT 11, 17 (George Wright & Fergus Bolger eds., 1992).

214. Shanteau, *Competence in Experts*, *supra* note 178, at 255–56 (“[M]uch research on ‘experts’ in fact has used novices. Thus, many ‘expert-novice’ studies are better described as ‘novice-naïve’ studies.”).

215. See *id.* at 262.

216. William F. Wright, *Audit Judgment Consensus and Experience*, in BEHAVIORAL ACCOUNTING RESEARCH: A CRITICAL ANALYSIS 305, 320 (Kenneth R. Ferris ed., 1988) (“Although numerous studies purport to be investigating the effects of experience and, therefore, judgment expertise, the reality is that judgment expertise has been operationalized in a very simplistic way in much of the existing auditing research The implicit assumption is that the number of years [of experience] is an adequate surrogate measure for the specific judgment task being investigated.”).

of tasks presented to trial judges to show that they are subject to heuristics and biases may not test the particular sort of decisionmaking that he considers paradigmatic of *judicial reasoning*—that is, second-order or a sort of meta-reasoning—and may thus be irrelevant to the question whether judges make better judicial decisions than laypeople.²¹⁷ This is related to the point that expertise in a particular domain has been found to alleviate biases—experts can be less susceptible to a general cognitive heuristic or bias when the decision in question is directly related to that domain.²¹⁸

Experts *are* human. As such, they are subject to human foibles and the panoply of cognitive and emotional biases to which many humans are vulnerable. And, significantly, one context in which experts have difficulty is in the prediction of human behavior, especially when such prediction is based on perceptions of the expert's own abilities.²¹⁹ This underscores the importance of empirically informed judgments.²²⁰ However, experts' reasoning and decisionmaking strategies, by virtue of their expertise in a particular area, are typically less vulnerable to such biases than are laypeople, and experts are better at compensating for them, consciously or unconsciously.²²¹ Antipaternalist critics have set up a false dichotomy by insisting that experts be free from decisionmaking bias and error, a criticism that misses the point: the question is not whether experts might be subject to biases (an "absolute" evaluation), but whether they are nevertheless able to make better policy decisions, ones that will better further public welfare, than citizens might make if left on their own (a "relative" evaluation). Opposition to paternalism based on the objection that those engaging in paternalistic

217. Frederick Schauer, *Is There a Psychology of Judging?*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 103 (David Klein & Gregory Mitchell eds., 2010).

218. See, e.g., Brian H. Bornstein et al., *Rationality in Medical Treatment Decisions: Is There a Sunk-Cost Effect?*, 49 *SOC. SCI. & MED.* 215, 220–21 (1999); Marvin S. Cohen, *The Naturalistic Basis of Decision Biases*, in *DECISION MAKING IN ACTION: MODELS AND METHODS* 51, 59–60 (Gary A. Klein et al. eds., 1993); Gideon Keren, *Facing Uncertainty in the Game of Bridge: A Calibration Study*, 39 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 98, 100, 112–13 (1987); James F. Smith & Thomas Kida, *Heuristics and Biases: Expertise and Task Realism in Auditing*, 109 *PSYCHOL. BULL.* 472, 486 (1991).

219. See Michelene T.H. Chi, *Two Approaches to the Study of Experts' Characteristics*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE*, *supra* note 89, at 21, 25; Shanteau, *Competence in Experts*, *supra* note 178, at 254; Shanteau, *Psychological Characteristics*, *supra* note 178, at 204.

220. See *supra* notes 128–34 and accompanying text.

221. See Shanteau, *Psychological Characteristics*, *supra* note 178, at 208 (“[Experts’ strategies] seemed to have been introduced without awareness or appreciation of psychological processes or concerns (such as biases or heuristics). Nevertheless, they have the effect of permitting experts to make less biased decisions.”).

decisionmaking are subject to these same biases is thus perhaps too facile—data show that all else being equal, experts *are* better decisionmakers than laypeople, even if we do document biased decisionmaking on the part of experts as well as laypeople.²²² I do not mean to overstate the claim. Data do show that even experts are subject to ordinary heuristics, biases, and affective influences, but they are still better than laypeople at decisionmaking. Thus, as with earlier objections, the “experts are human” criticism must meet a higher hurdle than has been assumed.

CONCLUSION

The last forty years have generated substantial empirical evidence that individuals are subject to a host of cognitive and emotional biases in decisionmaking, biases that can lead to negative or self-injurious health, financial, safety, social, and personal outcomes. Recently, a number of scholars and policymakers have begun discussing the implications of such findings for third-party intervention into citizens’ behavior and decisionmaking to minimize the potential harm from those outcomes. Critics of such interventionist policies have objected that individuals learn from such outcomes and mistaken decisions; that individual autonomy is a value that trumps the potential benefits of such paternalism; that policymakers are likely to be captured by special interests and thus should not be trusted to make interventionist decisions; and that, for a number of reasons, central planners designing these interventions have less knowledge of individual preferences than do citizens. I have addressed the former two sets of objections elsewhere. Here I addressed objections regarding experts’ decisionmaking. I showed that capture, especially of agency experts, occurs less frequently than antipaternalists suggest, and, importantly, that experts are quite likely better decisionmakers than individual citizens, even about matters for which individuals allegedly have more or better information.

Again, however, none of this discussion shows that paternalistic intervention is necessarily appropriate in any particular case. It is, however, more common, and more commonly accepted, than is traditionally assumed. “[P]aternalism is here to stay,” acknowledges one critic,²²³ and as a result, to determine the propriety of a particular intervention, policymakers must conduct a thorough, transparent, and

222. See Blumenthal, *supra* note 34 (“Even to the extent experts might be vulnerable to bias, their expertise nevertheless makes them less vulnerable, and thus their decisions would be more worthy of effectuating as policy.”). But see George Wright et al., *An Empirical Test of the Relative Validity of Expert and Lay Judgments of Risk*, 22 RISK ANALYSIS 1107, 1109 (2002).

223. Glaeser, *supra* note 5, at 156.

sincere balancing of its costs and benefits.²²⁴ In doing so, however, we must also acknowledge challenges to both traditional and new objections. That is, empirical findings contest traditional assumptions about autonomy, preferences for autonomy, individuals' knowledge, learning, and self-correction.²²⁵ Here, I have shown further that new objections, including assumptions about experts' knowledge and skills, are also open to question. As such, debate over and evaluation of particular paternalistic policies should continue, but in an informed fashion, recognizing those new challenges and questions.

224. Blumenthal, *supra* note 5, at 72 (“[P]aternalism is often appropriate and sometimes warranted, but should be applied only after careful cost-benefit analysis, including the costs of implementing the particular policy in question.”); Rachlinski, *Uncertain Psychological Case*, *supra* note 10, at 1219; Sunstein & Thaler, *supra* note 10, at 1190; *cf.* Criddle, *Fiduciary Administration*, *supra* note 45, at 448 (discussing the importance of transparency and other factors relating to decisionmaking by administrative agencies).

225. *See supra* notes 21–33 and accompanying text.

