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Reply to Sunstein

DANIEL B. KLEIN*

TERMS CARRY IDEAS. WHEN TERMS ARE MUDDIED, THE IDEAS they carry suffer.

The cogent idea of liberty or freedom—the idea as understood by everyone in the tradition of Locke, Hume, Smith, the American Founders, the Abolitionists, and so on—is that each is free to do with his property (including his person) and to enter into agreements as he sees fit, provided he does not tread on others' property (including contracted rights). Social Security taxes and consumer protection laws (with concomitant enforcement) tread on property and freedom of contract, and hence on freedom; they are coercive. If anyone other than the government tried it, everyone would cry bloody murder. Imagine if your neighbor threatened his own violence against you for employing someone at a wage rate he deemed to be too low. Everyone would recognize it as coercion. In contrast, the rules at the Weight Watchers club do not tread on anyone's property; they are not coercive. Libertarianism is the political persuasion that government coercion should be vastly reduced.

Yet Thaler and Sunstein (2003: 177) imply that making the dessert at a cafeteria hard to find would not “meet libertarian muster.” That's wrong. Making the desserts hard to find *would* “meet libertarian muster.” Thaler and Sunstein warp “libertarian,” partly by identifying it with “rationality.”

They put “libertarian” to work in a context in which it simply does not belong. You might watch Jay Leno, or you might watch David Letterman. Neither activity would fail to “meet libertarian muster.” Saying that watching Jay Leno meets libertarian muster is like say that birds flying north meets libertarian muster. Libertarianism does not speak to birds

* Department of Economics, Santa Clara University.

flying north v. flying some other direction, nor Leno v. Letterman, nor hard-to-find desserts v. easy-to-find desserts.

The term “paternalism” is only seriously used in its political sense. An encyclopaedia defines “paternalism” as “public policies which restrict the freedom of persons in order that their interests may be better served” (Weale 1991, 367). By calling both government coercion and cafeteria decisions “paternalism,” Thaler and Sunstein disparage the notion that one is a restriction of freedom while the other is not. As I emphasized in my Comment, denying the natural, classical idea of freedom is openly propounded in *The Cost of Rights* (Holmes and Sunstein 1999).

Sunstein’s Response elides my challenge to the “libertarian muster” sentence and persists in muddying terms:

But as Klein knows, we refer to many policy issues, including employee savings, consumer protection, social security reform, and employment discrimination. Klein claims that we must be making some "idiosyncratic" distinction between voluntary and coercive action. But it is not idiosyncratic to distinguish between approaches that respect freedom of choice and those that do not. (Sunstein 2004, 272)

Again he lumps together voluntarily entered rules and coercive government rules as instances of rules that do not “respect freedom of choice.”

And in the Response, Sunstein writes that the Thaler-Sunstein approach “opposes libertarian paternalism to nonlibertarian varieties, and . . . endorses the former over the latter” (272). Sunstein is playing nice, but really is dodging the criticism. By “nonlibertarian varieties” Sunstein here means, not drug prohibition and the like, but cases like the cafeteria that eliminates dessert options that people would otherwise select. This “non-libertarian paternalism” is discussed by Sunstein and Thaler in their *University of Chicago Law Review* article at pages 1185-86.

Suggesting that the cafeteria or company policy violates freedom weakens the very idea of freedom, and thus weakens the claim that Social Security levies etc. violate freedom. That is precisely Sunstein’s strategy in *The Cost of Rights*. Page 210 of that book says that people pay Social Security taxes voluntarily. Likewise, in their *University of Chicago Law Review* article, Sunstein and Thaler (2003: 1188) gives as an example of libertarian paternalism mandatory “cooling off” laws (e.g., for door-to-door sales)—a

clear case of coercion, as such laws threaten aggression against vendors and would-be vendors who have not tread on anyone's property.

By adding "libertarian" to "paternalism," Thaler and Sunstein make it seem like they affirm the libertarian distinction between voluntary and coercive. They use "libertarian"—a political call to depoliticize—to counteract the political meaning of "paternalism." But "libertarian paternalism" is like "voluntary coercion." Sunstein and Thaler concoct new meanings—of "voluntary" and "coercion" as much as of "libertarian" and "paternalism."

The bastardization "libertarian paternalism" upsets people's understanding of those terms in their critical function: highlighting the coercive nature of government intervention. In espousing government intervention, Sunstein would advance honest discourse by admitting that it is coercive and defending it as such.

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