

‘Nudging’ Healthy Lifestyles: The UK Experiments with the Behavioural Alternative to Regulation and the Market

Adam Burgess*

This article critically reflects upon the introduction of behavioural, ‘nudging’ approaches into UK policy making, the latest in a series of regulatory innovations. Initiatives have focused particularly upon correcting lifestyle risk behaviours, marking a significant continuity with previous ‘nannying’ policy. On the other hand, nudging represents a departure, even inversion of previous approaches that involved the overstating of risk, being based partly upon establishing a norm that bad behaviours are less, rather than more common than supposed. Despite substantive similarities, its attraction lies in the reaction against the former approach but must also be understood in the context of the economic crisis and a diminished sense of liberty and autonomy that makes intimate managerial intervention seem unproblematic. Problems are, in fact, substantial, as nudging is caught between the utility of unconscious disguised direction and the need to allow some transparency, thereby choice. Further, it assumes clear, fixed ‘better outcomes’ but encourages no development of capacity to manage problems, contradicting a wider policy intent to build a more responsible and active citizenry. More practically, nudging faces considerable barriers to becoming a successfully implemented programme, in the context of severe, Conservative-led austerity with which it is now associated.

I. ‘Nudge’ crosses the Atlantic

A new Conservative-led Coalition government came to power in May 2010 in the UK. They have initiated a programme of ‘nudging’ individuals into making better choices through manipulating their environ-

ment, as part of a radical programme of transformation. Alongside wellbeing, transparency and decentralisation this experiment with behavioural economics is one of the new emphases in government thinking. All this is underpinned with the promotion of an ethos of promoting greater personal responsibility.¹

Conservative Party leader, David Cameron, has been engaged in a long term project of creating a modern, liberal conservatism. Now in power, and despite the limited mandate of a minority government, the Coalition have quickly moved to attempt a transformation of institutions, and the individuals’ relationship to them. Power and responsibility are to be devolved to the local level, in an oddly entitled project to establish a ‘big society’.² Even critics are agreed that one thing the programme does not lack is ambition; it is widely seen as nothing less than a cultural revolution in a country historically defined

* Reader in Social Risk Research, University of Kent. Thanks to the anonymous reviewer who provided detailed and very useful criticism of the original article. Also to Tracey Brown, Jerry Busby and Helen Reece for helping think through some of the issues.

1 See speech by David Cameron, “David Cameron attacks UK ‘moral neutrality’”, Daily Telegraph, 7 July 2008, available on the Internet at <<http://www.telegraph.co.uk/news/newstopics/politics/conservative/2263705/David-Cameron-attacks-UK-moral-neutrality---full-text.html>> (last accessed on 11 January 2012).

2 For a mapping of the Conservatives’ agenda see Nick Boles, *Which Way’s Up?* (London: Biteback Books, 2010) by a leading moderniser and Cameron advisor.

by its gradualism and stability.³ Thus university funding has been virtually abandoned, with costs passed on to individual students, and much of the health budget is to be devolved to the control of local doctors. Alongside this large scale cost-cutting, the government is encouraging a philosophy of smart, cheap and local solutions to a range of problems in society, inspired by modern behavioural economics. The Coalition’s message is to pose the classical question: ‘Ask not what society can do for you, but what you can do for society’. Their role is to make that more possible, be that through making it easier to do voluntary work, or reduce the burden on the health service by encouraging healthier lifestyles.

The dramatic change of political direction in the UK has been accompanied by a shift in the sources of intellectual inspiration. The previous Labour government expanded the contribution of social research to its ‘evidence based’ programmes, encouraging a language of risk avoidance that Cameron made a focus of attack during the election.⁴ The Conservatives, by contrast, are drawing upon the disciplines of psychology and economics, with their starting points in the abstract individual, rather than social structure or context. More specifically, the new government is drawing upon behavioral rather than neoclassical economics, which is based on the more real and imperfect ways in which the individual makes choices, rather than the purely rational actor of neoclassical theory. This is combined with insights from social psychology – nowhere more clearly and attractively than in the bestselling account, *Nudge* by Richard Thaler, often described as the founder of behavioural economics, and Cass Sunstein, similarly described as the father of behavioural law and economics, and now ‘nudger in chief’ as head of the Office of Regulatory Affairs in Obama’s American administration.⁵ The book is a practical manual for applying the principles of behavioural economics; how institutions can configure ‘choice architecture’ to encourage beneficial decision making amongst the population. The Conservative modernisers were drawn to the practical, non-ideological solutions suggested by *Nudge*, and Cameron made it obligatory reading for his colleagues before the election. By mid 2008 the Conservatives were consulting with Thaler over specific schemes such as to reduce the carrying of knives by young people and increasing recycling.⁶ An example of the kind of solutions being explored are American schemes that attempt to re-

duce electricity consumption by providing feedback to households on their own and neighbours’ usage. The intention is that individuals will try and adjust – hopefully reduce – their consumption in line with the norm (and thereby reinforcing the norm itself).⁷

Behavioural economics, now some 40 years old, is not the same as the ‘nudging’ with which it is now associated, but lends itself to all manner of approaches. The boundaries between behavioural economics, various forms of ‘nudging’, social marketing and psychology are not clear, but they all inform the policy mix that is now generally known as ‘nudging’.⁸ The language of ‘nudges’ and ‘shoves’ has been a relatively familiar one in the US for more than a decade.⁹ There is also a significant crossover between behavioural and ‘new governance’ approaches in regulation.¹⁰

Behavioural approaches proceed from the recognition that we misjudge decisions systematically because of our inherent biases and rules of thumb for making sense of information. These ‘heuristics’

3 Astonishingly, their programme has been frequently described as ‘Maoist’ in character. See, for example, Ed Rooksby, “Vince Cable is right: in some ways the coalition is a bit like Maoism”, *The Guardian*, 23 December 2010, available on the Internet at <<http://www.guardian.co.uk/commentisfree/2010/dec/23/vince-cable-mao-coalition-marxist-capitalism?INTCMP=SRCH>> (last accessed on 11 January 2012).

4 See Cameron, *David Cameron attacks UK’ moral neutrality*, *supra* note 1.

5 Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness*, (London: Yale University Press, 2008).

6 As an indication of the extent, and public nature of collaboration, Cameron’s second-in-command, Chancellor George Osborne, co-wrote an article with Thaler – with the unfortunate title, “We can make you behave”, *The Guardian*, 28 January 2010, available on the Internet at <<http://www.guardian.co.uk/commentisfree/2010/jan/28/we-can-make-you-behave?INTCMP=SRCH>> (last accessed on 11 January 2012).

7 See Dora Costa and Matthew Kahn, Energy Conservation “Nudges” and Environmentalist Ideology: Evidence from a Randomized Residential Electricity Field Experiment. Presentation at 2010 Power Conference, Princeton University, available on the Internet at <http://academics.hamilton.edu/economics/home/kahn_hamilton_paper.pdf> (last accessed on 11 January 2012).

8 Alongside *Nudge*, the two key texts now usually cited are Robert Cialdini, *Influence: The Psychology of Persuasion* (New York: Harper Business, 2007), and Ariely, *Predictably Irrational*, *supra* note. 7.

9 Dan Kahan, “Gentle Nudges versus Hard Shoves: Solving the Sticky Norms Problem”, 67(3) *University of Chicago Law Review* (2000), at pp. 607–646.

10 On Amir and Orly Lobel, “Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy”, 108 *Columbia Law Review* (2008), at pp. 2098–2139.

were elaborated most famously in the experiments of Kahnemann and Tversky, and are laid out in *Nudge*. Among other insights, the distinction between short term pleasure and long term benefit is a key one in the behavioural armoury, which explains a range of our (at least formally) irrational decision making. A wide range of behavioural studies continue.¹¹ Whilst some seem obvious, even banal, other studies are more interesting and useful, such as observation of how we choose to pay back the small ones first when dealing with multiple loans – despite a higher rate of interest on the larger one.¹² Another example underlines the potentially large impact behavioural modification can make, despite the typically modest nature of ‘nudges’ in themselves. A field experiment in China on the effect of incentives upon productivity suggests the difference between those framed positively and negatively amounted to over 1 % per annum; a ‘hugely significant’ difference.¹³ The collective insights from behavioural studies have been drawn together in simple terms through the UK government’s MINDSPACE framework.¹⁴

These approaches are addressed to demonstrated patterns of behaviour that are deeply embedded, and realistically draws upon them to produce better

outcomes. The contrast here would be with policy making that imagines that all human behaviour is readily changed, and that it is only a matter of finding the right combination of carrot and stick. Doing this, it embraces the power of social norms and pressures rather than an assumption that simply changing laws, regulations or policies will be effective. Nudging’s strength is its practical character. It attempts to design around our imperfections for positive social ends, recognising that we are typically lazy about what we choose not to prioritise, but nonetheless regard as right. An example would be ‘getting around to’ agreeing to organ donation, for example, something which behavioural thinking sees could be changed through establishing an ‘opt out’ rather than ‘opt in’ system.¹⁵ Nudging is grounded rather than exhortative, calling into question the assumption that more information about negative consequences will result in improved behaviours and providing the modern policy maker with a fresh and practical perspective on a range of problems in society.

The centrality of using behavioural insights to the Coalition government is such that it introduces the formal written agreement between the Conservative and Liberal parties, in the foreword by the two party leaders:

“There has been the assumption that central government can only change people’s behaviour through rules and regulations. Our government will be a much smarter one, shunning the bureaucratic levers of the past and finding intelligent ways to encourage support and enable people to make better choices for themselves.”¹⁶

They have set up a 7-person ‘Behavioural Insight Team’ within the Prime Minister’s Cabinet Office – a statement of priority on its own, at a time when everywhere else in the administration is experiencing significant cuts to personnel. The country’s then leading civil servant, Gus O’Donnell, is directly involved, charged with ensuring delivery. Behavioural solutions are here considered in the context of a wider devolution of power to local communities, the ‘nudge unit’ looking to examples from around the world of schemes where communities themselves appear to have solved problems without the direction of central authorities. David Halpern, head of the new unit, claims that, in combination with greater transparency and social network affects it can be ‘genuinely transformative’.¹⁷ They have now set out their first initiatives, centred primarily on eliminating various

11 For a useful review see, Amir and Lobel, *Stumble, Predict, Nudge*, *supra* note 10, at pp. 2127–2132.

12 For example, findings that we are more prepared to have unprotected sex when sexually aroused, or that we are more likely to steal stationery from work than the financial equivalent. See these and other examples in Dan Ariely, *Predictably Irrational: the Hidden Forces that Shape Our Decisions*, (New York: Harper Collins 2008). Results are perhaps less surprising than why it was thought these issues were thought worthy of investigation in the first place.

13 This interesting example is cited in the interview with Ariely in Matthew Taylor, “Better the devil you know”, *RSA Journal*, available on the Internet at <<http://www.thersa.org/fellowship/journal/features/features/better-the-devil-you-know>> (last accessed on 11 January 2012).

14 Cabinet Office and Institute for Government, *MINDSPACE: Influencing Behaviour through Public Policy* (London: Cabinet Office, 2010).

15 Ben Saunders, “Normative Consent and Opt-Out Organ Donation,” 36(2) *Journal of Medical Ethics* (2010), at pp. 84–87.

16 The Coalition, *Our Programme for Government* (London: HM Government, 2010) at p. 7, available on the Internet at <http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf> (last accessed 11 January 2012).

17 David Halpern, Institute for Government blog, “No.2 to No.10: Taking Mindspace to Downing Street”, available on the Internet at <<http://www.instituteforgovernment.org.uk/blog/764/no-2-to-no-10-taking-mindspace-to-downing-street/>> (last accessed 11 January 2012).

‘unhealthy behaviours’.¹⁸ The strategy is to school the civil service in ‘smart’, behavioural solutions to social problems. It is through this mechanism that they hope to square the awkward contrast between a new centralised directing body, and the local initiative supposedly at the heart of the new project. The intention is that officials schooled in the new approach will successfully diffuse into local communities the spirit rather than only the prescriptive details of what they have learnt from the behavioural insight team.

Despite the recent association of modern Conservatism with ‘nudge’, it is worth noting that there is no necessary political connection along these lines. Whilst there may seem to be a natural affinity between Conservatism’s and economics’ focus upon the individual, this is by no means exclusive as ‘socialist’ politics has adapted itself in this direction in the UK, like elsewhere.¹⁹ The ‘MINDSPACE’ research programme which shaped the Coalition’s behavioural work was commissioned by the previous Labour government, and Halpern worked under them.²⁰ In the American context, nudge is a Democrat administration initiative.²¹ After all, nudging is precisely intended to represent an alternative to clear interventionist approaches; an attempt at a ‘third way’ between the regulation associated with the left, and ‘leave it to the markets’ approach of the right.²² Back in the UK, had the Labour Party not been in a period of disarray in the mid 2000s it could have been they, not the Conservatives, who adopted it as their own.

II. Economic crisis and the reaction against ‘nannying’

Whatever the political identification, it isn’t self evident in its own terms why behavioural approaches not only have a certain appeal, but have been adopted in such a wholesale and exclusive fashion. It is not driven by compelling evidence that it works, especially not as a general approach to a range of problems. For the most part it is only evidence-based in the sense that proposed schemes are informed by particular misperceptions found in experimental settings.²³ It is in this context we can understand why the cleverly modified urinals at Amsterdam airport are so often cited; not only is the placing of a pretend fly a funny example, it is also one of the few clear successes.²⁴ More often, examples cited are, actually, tentative (but tend not to be suitably qualified).

Certainly, part of the answer to its appeal can be located in its post ideological, centrist character. Contemporary politics on both sides of the Atlantic has increasingly concentrated around a middle ground to which nudge solutions seem ideally suited. But more important is the wider context of the economic crisis that has undermined faith both in conventional economics and the economic system itself. As Dan Ariely, one of the principal behavioural economists explains:

“Without the financial crisis, I don’t think behavioural economics would have gained the popularity it has. Almost everyone believed that the market was the most rational place on the planet, yet it failed in a magnificent way. This proved that people who deal with large amounts of money are as capable of irrationality – from reckless gambling to myopia and overconfidence – as anybody else”.²⁵

Behavioural economics’ contemporary appeal is, in this regard, primarily a negative one; in a context of disillusionment with conventional assumptions and solutions. As one commentator put it: ‘Nudge

18 Their initial projects are on: smoking, organ donation, teenage pregnancy, alcohol, diet and weight, diabetes, food hygiene, physical exercise, and social care. See “Applying Behavioural Insight to Health”, (London: Cabinet Office Behavioural Insights Team, 2010), available on the Internet at <<http://www.cabinetoffice.gov.uk/resource-library/applying-behavioural-insight-health>> (last accessed on 11 January 2012).

19 On the fundamental continuity between recent Labour and Conservative administrations, and way in which the Conservatism of Margaret Thatcher subsequently shaped Labour policy, see Simon Jenkins, *Thatcher and Sons: A Revolution in 3 Acts* (London: Penguin, 2007).

20 MINDSPACE, *Influencing Behaviour through Public Policy*, *supra* note 14.

21 For a journalistic account of how nudging is being used in the Obama administration see, Michael Grunwald, “How Obama is using the science of change”, *Time*, 2 April 2009, available on the Internet at <<http://www.time.com/time/magazine/article/0,9171,1889153,00.html>> (last accessed 11 January 2012).

22 Sunstein situates ‘Nudge’ in this context in this interview, available on the Internet at <http://www.youtube.com/watch?v=DD-fUJs5t_k> (last accessed 11 January 2012).

23 Lord Alderdice quizzed civil servants applying behavioural solutions, making the useful distinction between ‘informed design’ which describes most behavioural ideas, and actually ‘evidence based policy’. See House of Lords Select Committee on Science and Technology Inquiry on Behaviour Change, Evidence Session 2 (2 November 2010), available on the Internet at <<http://www.parliament.uk/documents/lords-committees/science-technology/behaviourchange/ucSTI021110ev1.pdf>> (last accessed on 20 December 2010).

24 Men aim at the ‘fly’, reducing spillage.

25 Taylor, *Better the devil you know*, *supra*, note 13.

is relevant in 2009 because it helps us look in the mirror’, at our own, and the economic system’s failings.²⁶ Chancellor George Osborne, the Conservatives second-in-command, made a case for the relevance of behavioural economics to recessionary circumstances before they came to power, on the basis that not only do individuals behave irrationally, but so do markets.²⁷ Its subsequent appeal within the British policy making circles is the promise of cost effectiveness; achieving ‘more for less’, particularly in public services. The practical emphasis is on ‘smart’ solutions that do not involve more resources; an imperative in recessionary times with a government committed to reducing spending.

A second factor explaining the appeal of nudging is one particularly relevant in the British context, and one that emphasizes why these developments are of interest to those concerned with risk and regulation. Not only does it promise a potentially a cheaper means of dealing with social problems, it is also distanced from the heavy-handed regulatory approach

identified with the previous administration. In this sense it marks an important marker of identity for a new administration that otherwise shares much in common with its similarly centrist predecessor. The Coalition promote ‘nudging’ as an alternative to the legislative restrictions and ‘nannying’ of the Labour years, showing that government can do more than ‘leave it to the market’ but without expensive, intrusive and unpredictable interference.²⁸ Thaler and Sunstein describe their approach as both ‘paternalist’ and ‘libertarian’, and it is the latter aspect that is emphasized in the UK case, as the Coalition distinguishes itself from its predecessor.²⁹ From this perspective the behavioural initiative can be placed in the deregulatory thrust of recent British ‘better regulation’ initiatives: the Better Regulation Executive, Better Regulation Commission and Risk Regulation Advisory Council.³⁰ The Coalition agreement foreword cited above declares that it will be a ‘smarter one’ than its Labour predecessor, which resorted to ‘bureaucratic levers’ all too often. Health Secretary, Andrew Lansley, counter posed Labour’s excessive legislative zeal and ‘nannying’ to his ‘new approach to public health’, heavily framed by nudging, in July 2010.³¹

The backdrop here is a contemporary politics of heightened risk aversion and precaution that reached its climax under the last Labour government, far too narrowly presented now as simply one of a bossy ‘nannying’. This is not to say that there was no ‘nannying’; sweeping, paternalistic criticism of unhealthy behaviours became relatively routine. For example back in 2007, without embarrassment or qualification, then Public Health Minister, Dawn Primarolo told off middle class, “everyday” drinkers who have drunk too much for too long. This has to change.³² Another health minister, Gillian Merron instructed us how best to spend our Christmas holidays: “Whatever the weather, a traditional festive walk is a great way for families and friends to avoid that sluggish feeling and have a more active Christmas.”³³ But such pronouncements were part of a much wider promotion of risks intended to stimulate a change of thinking and behaviour. High alcohol and food consumption were presented as polarised and simple matters of life and death, and as dramatic and implausibly recent and fixed epidemics.³⁴

A wide range of prominent risks – from terrorists, paedophiles and possible disease threats, to purported dangers from chemicals, food and alcohol – were politicised and brought to public attention. At

26 Jon Dennis, “We still need a nudge”, *The Guardian*, 25 March 2009, available on the Internet at <<http://www.guardian.co.uk/commentisfree/2009/mar/25/nudge-economics-social-policy>> (last accessed on 11 January 2012).

27 Andrew Sparrow, “Nudge Economics still relevant in recession”, *Guardian blog*, 8 April 2009, available on the Internet at <<http://www.guardian.co.uk/politics/blog/2009/apr/08/nudge-george-osborne>> (last accessed on 11 January 2012).

28 The notion of ‘nannying’ derives from the phrase the ‘nanny state’; that is an overly interventionist style of government that dictates to its citizens like a grandmother (‘nanny’).

29 Reaction to this description prompted a direct response from the authors; Cass R. Sunstein & Richard H. Thaler, “Libertarian Paternalism Is Not an Oxymoron”, 70 *U. Chi. L. Rev.* (2003), at p. 1159, and expanded on in *Nudge* (pp. 4–6). This has been the subject of much further debate, such as in Amir and Lobel, *Stumble, Predict, Nudge*, *supra* note 6.

30 These initiatives were, somewhat paradoxically, initiated by Labour governments. They were, practically, marginalised however, most clearly with the Risk Regulation Advisory Council created by Gordon Brown.

31 Andrew Lansley, “A New Approach to Public Health”, 7 July 2010, Speech to Faculty of Public Health conference, available on the Internet at <http://www.dh.gov.uk/en/MediaCentre/Speeches/DH_117280> (last accessed on 11 January 2012).

32 Cited in Duncan Brown, “Hazardous drinking, the middle class vice”, *The Times*, 16 October 2007, at p. 7.

33 See ‘Burn off Christmas with a walk’, *BBC News Online*, 22 December 2009, available on the Internet at <<http://news.bbc.co.uk/1/hi/health/8425433.stm>> (last accessed 11 January 2012).

34 Heavy drinking in public is an endemic not epidemic phenomenon in the UK; a long established cultural trend. At the same time it is still subject to considerable fluctuation because of shifts in social behaviour, such as the decline in young people’s drinking in the later 2000s. See Adam Burgess, “The Politics of Health Risk Promotion. ‘Passive Drinking’: A ‘Good Lie’ Too Far?” 11(6) *Health Risk and Society* (2009), pp. 527 *et seq.* p. 536.

the same time the belief was encouraged that risk might somehow be eradicated if sufficient energy and resources were dedicated to it, and all obstacles to this agenda eliminated.³⁵ To an extent this was through the classical modern form of a punitive law and order agenda, stimulated by outrageous criminal incidents in the intensely reactive political culture of those years. During his decade in power Tony Blair presided over more than 3000 new laws, 1000 of which carried jail terms.³⁶ But a wider range of contemporary risks to individual health and safety were politicised during these years. Ministers found themselves having to promote various health anxieties that acquired a life of their own – often through the media. Thus Health secretary John Reid appeared in a populist newspaper under the headline, ‘I salute the Sunday Express for its hospital crusade’ (over ‘super bugs’), back in 2003. Here he rehearsed what became a well-worn ritual of government adapting itself to what the media indicated were popular concerns and anxieties.³⁷ Characteristically the laws and regulations that emerged in these contexts were hastily and badly drafted, reflecting the fact that they were substantially a means of demonstrating that government was ‘doing something’ about whichever new risk had been thrust to the centre of attention.³⁸ Not unfairly this has been described as: ‘truckloads of legislation simply to send out signals, make a point or obtain a headline.’³⁹

Health became a particular focus for risk concerns in a wider landscape of risks that required management and vigilance. As public anxieties were seen to centre upon risks to health, it became natural to engage with, and expand these concerns. It is striking that Gordon Brown chose the promise of universal health screening as a last ditch effort to save his Premiership, in his re-launch, in late 2009, for example. Health risks even became the villains in a curious new populism, such as when Brown called on manufacturers and the European Union to take action against food additives, following the publication of a single study suggesting they might affect children’s behaviour in 2007.⁴⁰ The appeal of promises to remove risk required that it first be elevated, and there was, in effect, an approach of attempting to alarm the public into behavioural change. This is most widely recognised in relation to how the threat of terrorism was relentlessly promoted by both Labour premiers, and draconian legislation passed to combat this allegedly pervasive threat.⁴¹ But, again, a wider range of risks became a focus for politicisation.

Alarming representations of risk to stimulate public responses became relatively routine in the Labour years, from dramatising and denying uncertainty around climate change, to inventing notions of ‘passive drinking’ by the Chief Medical Officer.⁴² This, latter example, illustrates a process of unchecked regulatory expansion and over confidence; it was success in banning ‘passive smoking’ that created both a need for a new campaigning focus, and the confidence to construct a further, but this time implausible, target.

This process of risk dramatisation and expansion involved a range of characteristic techniques, among which were the denial of any uncertainty, reliance upon the most dramatic examples, and use of worst-case scenario projections as realistic models. There is some generalised recognition of, and reaction against this approach in behavioural thinking. Cialdini’s widely-cited policy making ‘big mistake’ is to imply that problem behaviours are relatively widespread.⁴³ This form of risk politics centred on making problems appear of more immediate and pervasive dimensions than they really are, is the opposite of the nudge device, which is to underplay them instead. The idea is to make individuals believe the social norm is different, typically lower, than

35 For a substantial account of these developments in the UK see Michael Moran, *The British Regulatory State: High Modernism and Hyper Innovation*, (Oxford: Oxford University Press, 2007). An important policy response was provided by the Better Regulation Commission, *Risk, Responsibility and Regulation – Whose Risk is it Anyway?* (London: Better Regulation Commission, 2006). This provided the basis for developing the Risk Regulation Advisory Council.

36 Philip Johnston, *Bad Laws* (London: Constable, 2010), p. 10 *et seq.*

37 See Adam Burgess, “Media Risk Campaigning: From Mobiles Phones to Baby P”, 13(1) *Journal of Risk Research* (2010), pp. 59 *et seq.*, at p. 69.

38 For example, the Safeguarding Vulnerable Persons Act – which subjected all adults coming into contact with children on any regular basis to regulation – was so badly drafted that it required 250 amendments by the end of its parliamentary progress. The Act was a response to the publicity generated by the murder of two schoolgirls by a school caretaker, Ian Huntley, and the subsequent public inquiry.

39 Johnston, *Bad Laws*, *supra* note 39, p. 36.

40 Paul Webster and Dennis Sanderson, “Brown’s plea to take the additives out of children’s food”, *The Times*, 7 September 2007. p. 5.

41 Most controversially, Labour’s anti terrorism was pursued through ‘control orders’ – virtual house arrest – and through a 28-day detention for suspects. These were major behind-the-scenes controversies for the Coalition government who were formally committed to their abolition but eventually only moderated them.

42 Burgess, *The Politics of Health Risk Promotion*, *supra* note 34.

43 Cialdini, *Influence*, *supra* note 8.

they imagine in the case of consumption, stimulating them to adjust their behaviour and eat, drink and smoke less, or consume less energy. Whilst the agenda may not be radically different – particularly the promotion of lifestyle risk avoidance – the means of doing so certainly is.⁴⁴ To an extent, nudge represents recognition of the failure of an old risk politics perfected during the Labour years in the UK, even whilst the fundamental agenda remains unquestioned.

III. Managerial project in an era of devalued freedom?

A third factor explaining nudge’s contemporary appeal is a further negative one; that barriers to its application have fallen away. The impact of psychologically-based behaviourism has long been the subject of concern about its impact upon civic freedoms and rights, but these concerns are less marked in the late twentieth and early twenty first centuries.⁴⁵ Attachment to concepts of liberty and autonomy were dismantled in the 1990s, as Wilson eloquently explores; relegated by the imperatives of risk avoidance and security.⁴⁶ The managerial regime of Tony Blair’s New Labour regarded civic freedoms as an inconvenience, the removal of which should be of no concern in an enlightened age. They then accelerated a longer term decline in even an understanding of the case for liberty. Individual liberties were systematically compromised; rendered of only token value in the context of the fight against international terrorism, and other threats.

Contemplating society-wide application of behavioural solutions assumes a fundamentally pliant and passive population that attaches limited value to individual liberty and autonomy. It is inconceivable that nudging could be contemplated in a more contested and charged environment, such as the Britain of the 1970s, dominated as it was by class conflict. In short, behavioural solutions developed in the laboratory seem viable when society itself can be envisaged in similar terms. In this sense the Coalition’s nudging owes a debt to Labour’s elevation of risk and security and diminution of liberty, no matter how much they might counter-pose their initiative, and identify itself with a libertarian agenda.

There is a wider backdrop here, of the diminishing meaning of privacy in the age of Facebook and Google, and an ‘actuarial society’ shaped by amoral probabilistic calculation.⁴⁷ There is also a greater fluidity of social norms and assumptions in the late modern ‘risk society’.⁴⁸ This is an individualized society where each is prone to greater insecurity, and assumption that institutionalised security should be paramount. Beck’s sense of individualization also points to the fracturing of social norms, making the assumptions involved in everything from raising children to the etiquette of sexual encounters unclear.⁴⁹ In such an environment of social uncertainty behavioural solutions can seem both necessary and viable. Attempting to manipulate patterns of drinking and related problems of unwanted sexual encounters (in the university context) is one of the first schemes announced by the ‘Nudge unit’, and illustrates an attempt to influence more fluid contemporary social norms.⁵⁰

It is in the context of the much blunter contemporary social canvass that we can understand the surprising confidence of behavioural proponents – surprising when we remember that, for the most part, they only have experimental results rather than clear, applied successes. Concluding their first report where they set out some tentative experiments, the nudge unit declare that: ‘There is no reason why we cannot succeed in tackling today’s rising tide of chronic lifestyle-related disease’.⁵¹ Given that unravelling the relationship between, for example, lifestyle factors and environmental and genetic influences on ill health remains difficult and contested, such declarations seem unreasonably bold. The relationship between behaviour and health is a complex one, as is the interface between what is a risk and benefit to the individual, and society as a whole. The ‘preven-

44 Lansley’s speech (*A New Approach to Public Health*, *supra* note 31) makes clear that he shares a similar agenda to his predecessors – from targeting obesity to amplifying the threat of flu epidemic.

45 Jerry Willis and Donna Giles, “Behaviourism in the Twentieth Century: What we Have Here is a Failure to Communicate”, 9(3) *Behaviour Therapy* (1978), pp. 15–27.

46 Ben Wilson, *What Price Liberty? How Freedom was Won and is Being Lost* (London: Faber and Faber, 2009).

47 Wilson, *What Price Liberty?*, *supra* note 46, pp. 285–338.

48 Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage 1992).

49 Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization* (London: Sage 1992).

50 Behavioural Insights Team, *Applying Behavioural Insight to Health*, *supra* note 18, p. 13.

51 Behavioural Insight Team, *Applying Behavioural Insight to Health*, *supra* note 18, p. 25.

tion paradox’, for example, tells us that for one individual to benefit, a far larger number have to change their behaviour – even though they gain no benefit themselves, or even suffer, from the change.⁵² More generally, sustainably transforming social norms through manipulation – even in combination with other approaches – is not a strikingly attainable objective, yet this remains the temper of current behavioural declaration. With few apparent obstacles to experimentation and allowed free rein, it seems behaviouralism can become an inflated project with limited self restraint.

It can be argued that there is a relative underplaying of how behavioural solutions can be reconciled with issues of liberty and responsibility, issues, we should recall, that are supposedly central to the Coalition vision. Certainly by implication, behaviouralism challenges the moral autonomy at the heart of modernity. Contesting its assumptions, one commentator thus called for:

‘... an injection of a bit of the old Enlightenment idea, that humans are autonomous agents who can shape the world. Indeed, Locke and Mill argued specifically that people would be able to make choices that others would consider stupid or wrong’.⁵³

More substantially, Bovens highlights behaviouralism’s absence of concern for the development of moral independence, instead tending to infantilize those for whom it directs choices.⁵⁴ A lack of concern for such important matters of principle is partly because ‘nudging’ is inherently technocratic; it is about solutions to assumed problems, and wider issues do not readily figure in its landscape.⁵⁵ But relevant also is the overconfidence of an approach whose time has apparently come.

This is not to say that normative issues are ignored. Nudge has a dedicated afterword, engaging objections and criticisms. Explaining his approach in the House of Lords, Halpern volunteered his concern on the ‘legitimacy of who is making those choices about choices’ at the end of his contribution:

“That’s actually a pretty big deal and a profound one, not least since many of the choices we make in the moment actually aren’t the ones that we would make on reflection. I guess it’s an argument that applies in many areas of science, but, boy, it applies in this one. You can’t stray too far from the legitimacy and the public permission of what you are doing. You already see, actually, some of the

reaction against this early work, that people feel worried about it, and “is it illiberal” and “is this Orwellian?” Well, at local or national level, if you want to take these kind of approaches, particularly some of the more controversial ones like priming, you actually just have to have that public permission. You are going to have to have the discussion, the debate, where the public give you permission to do the framing around the choices. And if you don’t do that I think you can get in deep trouble. So you have to answer this agency point both at the individual level but also at a more collective, reflective level”.⁵⁶

What is striking, even as Halpern acknowledges that there are issues of legitimacy and agency, is that his unit was immediately operationalized by the Coalition without pause for reflection, and the contradiction between a wider libertarian agenda and behaviouralist programme not even recognised, let alone addressed. Schemes such as to reduce the amount of sex university students may be having are explored without hesitation, suggesting how marginalised concerns for privacy and liberty have become. It would appear to confirm that a managerial approach to society is firmly established, and manipulating information for the ‘greater good’ of avoiding risk or improving behaviour unremarkable and assumed to be unproblematic. In this context it is important to further consider – here at least – some of the substantive problems.

52 The paradox was first put forward by statistician Geoffrey Rose, “Strategy of prevention: lessons from cardiovascular disease”, 282 *British Medical Journal* (1981), pp. 1847–51.

53 Alan Miller, “Let’s Banish Nudges and Bans”, Huffington Post, available on the Internet at <http://www.huffingtonpost.com/alan-miller/nudges-and-bans-lets-bani_b_781651.html> (last accessed on 11 January 2012).

54 Luc Bovens, “The Ethics of Nudge”, in T.Yanoff-Grune and S.Hansson (eds.) *Preference Change* (New York: Springer, 2009), available on the Internet at <<http://www.bovens.org/TheEthicsFV.pdf>> (last accessed on 11 January 2012).

55 See Kyle Powys Whyte and Evan Selinger, “Competence and Trust in Choice Architecture”, 23 (3-4) *Knowledge, Technology & Policy* (2010), pp. 461–482.

56 House of Lords Select Committee on Science and Technology Inquiry on Behaviour Change Evidence Session 1 (9 November 2010), available on the Internet at <<http://www.parliament.uk/documents/lords-committees/science-technology/behaviourchange/ucSTI021110ev1.pdf>> (last accessed on 20 December 2010).

IV. Problems of transparency and learning responsibility

There are matters of competency and trust in the design of choice architecture.⁵⁷ Thaler and Sunstein address such concerns and their ultimate defence of nudging is on the grounds that it's a process that inevitably goes on anyway. This is an important observation, as is the fact – more generally with regulation – that the choice is often between different forms rather than between regulating or not. But it is equally important to also look further, to who is doing the designing, on what basis and to what effect.⁵⁸ As individuals, many of us effectively design our own choice architecture in the knowledge of foibles and weaknesses; for example I don't have fattening snacks available in my larder when I'm trying to lose weight, in order to remove the temptation. This is an informed choice subject to revision, based on my own priorities and changing knowledge. This example, of weight loss strategies, illustrates well the necessity for continual monitoring of strategies in the light of evolving knowledge, rather than assuming it is a matter only of technique and application. There remains uncertainty around how best to lose weight, complicated by the possible negative effects upon health of carbohydrate-limiting diets.⁵⁹ Perhaps most importantly, my nudge is still part of an overall regime of, hopefully improving, self control which is not neglected or precluded by the resort to manipulating (my own) unconscious biases.

Beyond the individual, there is less choice involved in other forms of nudging undertaken by authorities, such as redesigning tax forms to pre-

vent common mistakes, or crime prevention campaigns that aim to reduce its occurrence. Whilst such schemes are less open and less clearly involve autonomous choice, they retain a foundation in established procedure and assumption in a democratic society, making compliance with established rules and regulations easier. Tax must be paid and crime avoided, and nudges to facilitate these ends have legitimacy. Nudges based upon transparent rules and regulations are ultimately based upon a democratic consensus that is itself subject to modification. Behavioural manipulation is more problematic when tied to commercial ends, where society recognizes a need for recourse and even protection from advertising and marketing that is subliminal or deliberately deceptive. Similar concerns arise when the state directs us to behavioural change that unreasonably denies choice or agency, whether through more traditional or more behavioural means. It is because of this problem that the proponents of nudge wish it to retain a degree of transparency, leaving it to open to, at least, theoretical exposure.

An important part of nudge's justification is that an element of choice is preserved, unlike with more heavy-handed regulatory responses such as legal bans. This requires – somewhat awkwardly – that nudges remain visible rather than subliminal; awkward because externally administered nudges are likely to work best precisely when they are not transparent; can we really all be ‘in on’ the nudge?⁶⁰ On the demanding terms of being both sufficiently masked to bypass too much conscious attention yet still recognizable to the whistleblower who detects an infringement of liberty, few nudges can be strictly defined as such. This awkward balance is reflected in the difficult description of being both ‘libertarian’ and ‘paternalist’.

There is another fundamental contradiction in nudging, particularly in the context of the declared intent to increase a sense of individual responsibility outlined by the Prime Minister. Whilst there may be an attempt to provide at least token interference transparency to preserve the possibility of exposing a ‘nudge too far’, this also underlines how far this process is from one that encourages greater learning about problems and how the individual might take on some responsibility for their management. Behaviouralism directs us away from building the renewed sense of personal and social responsibility the Coalition government has set out as fundamental to its mission. Its advantage lies in psychologically

57 For a useful philosophical critique, see Whyte and Selinger, *Competence and Trust in Choice Architecture*, *supra* note 54.

58 Bovens also makes this point, *The Ethics of Nudge*, *supra* note 55, p. 12.

59 Recent analysis now tends to suggest that they are at least as effective, probably more so than traditional fat and calorie controlling diets. See for example, Michael L. Dansinger, Joi Augustin Gleason, John L. Griffith et al., “Comparison of the Atkins, Ornish, Weight Watchers, and Zone diets for weight loss and heart disease risk reduction: a randomized trial”, 293(1) *Journal of the American Medical Association* (2005), pp. 43–53. Increasing recognition that weight loss may be better achieved through limiting carbohydrates also illustrates the often counter-intuitive nature of biological processes, as *becoming* less fat is not necessarily best done by *eating* less fat.

60 Bovens discusses this issue interestingly, suggesting that nudge needs to preserve at least ‘in principle’ rather than ‘actual’ token interference transparency; that we could, at least theoretically, be able ‘to identify the intention of the choice architecture and she could blow the whistle if she judges that the government is overstepping its mandate.’, *The Ethics of Nudge*, *supra* note 55, p. 13.

‘accepting us as we are’, utilising this to produce better outcomes. This same approach is problematic in similar terms, the flip side being disengagement from the possibility of moral or educational improvement.

We don’t learn much in the behavioural universe. Bovens asks the important question:

“Does it increase our capacity for self control?’ The problem is that – at least theoretically – this is unlikely; indeed the opposite appears more likely...To warrant long-term success, we should let people make their own decisions while providing minimal aid. My point is that short-term success of *Nudge* may be consistent with long-term failure. The long-term effect of *Nudge* may be infantilisation, i.e. decreased responsibility in matters regarding one’s own welfare”.⁶¹

What happens when the nudging stops, with a change of government for example? There is a logical case to say that not only will we be confronted with the problem afresh, but even less capable of dealing with it, having grown accustomed to it being dealt with by others – with only our, primarily unconscious, passive involvement. Or perhaps our behaviour will have been successfully reoriented towards the better outcomes? Actually, biases may be at least partially ‘corrected’ more consciously. Self knowledge about biases such as to clear many small loans instead of tackling the large one can lead us to try and not do that anymore. As Bovens points out, there is no proof either way about whether genuine preference change will result, and it remains a matter for empirical study. At the very least, however, such uncertainty and absence of evidence suggests the need for greater caution and humility. Yet the opportunity to socially experiment made by the diminished value attached to liberty, among other factors, has determined an absence of appropriate restraint.

V. Better outcomes?

In traditional democratic terms, we must consider the minority who are unhappy or unwilling to be nudged into better or healthier choices, and to this end the process must remain one open to scrutiny. Those who might decide against being directed towards ‘improved outcomes’ may be irrational in economic terms, but even in economics a more social and contextual view has developed. We now recog-

nise that ‘happiness’ and ‘wellbeing’ are relatively independent of financial circumstances, suggesting a wider sense of rationality and fulfilment.⁶²

Behavioural economics, like the discipline more generally, tends toward an abstract, socially-blind sense of ‘irrational’ behaviour that takes no account of values. Yet research suggests, for example, that the success of American schemes using nudge to reduce electricity usage are dependent upon political values; unsurprisingly, whilst it works with liberals, it can backfire with some conservatives.⁶³ This is a useful one in indicating that those unwilling to be nudged might be significant, even a majority. Rejecting ‘better outcomes’ might also be a less clear cut, political, question of values. Consider our ‘irrational’ bias towards paying off small loans rather than tackling the larger ones, even though we are likely to pay more interest as a consequence. Actual people – this author included – choose to limit engagement with financial affairs on the basis that the gains are small compared to the cost of activity which we find particularly tedious. In fact, we must all do this to some degree as there is always more energy that can be spent saving money – always more research that could be done into switching loans and reorganising finances – so a decision remains to be made about the point at which we stop and the balance against other aspects of our lives. In other words, it may not be (financially) *rational* if we were to assume an actor focused upon maximizing returns, but it can well be *functional* on the basis of particular beliefs, choices and options. Alternatively, we can say that economics tends to work on the basis of an implausibly narrow conception of what is rational, or not.

Even in cases of relatively unambiguously better outcomes, these remain relative and implementation requires careful weighing up on a longer time frame. All policies and actions have unintended consequences.⁶⁴ Nowhere is this a more important recognition than when thinking through risks and

61 Bovens, *The Ethics of Nudge*, *supra* note 55, p. 11.

62 Laura Camfield, Gina Crivello and Martin Woodhead, “Wellbeing Research in Developing Countries: Reviewing the Role of Qualitative Methods,” 90(1) *Social Indicators Research* (2009), pp. 5–31; Bruno Frey, *Happiness: A Revolution in Economics*, (Cambridge, MA: MIT Press, 2008).

63 Costa and Kahn, *Energy Conservation “Nudges” and Environmental Ideology*, *supra* note 7.

64 Robert Merton, The Unanticipated Consequences of Purposive Social Action, 1(6) *American Sociological Review* (1936), at pp. 894–904.

benefits. Risk management is a process of complex negotiation of trade-offs and exchange.⁶⁵ Risks migrate from one site to another rather than simply disappear through policy or design.⁶⁶ Consider a well intentioned behavioural changes brought about, in this case, by legal sanction. Compulsory cycle helmet wearing leads to a fall in the numbers of children in particular, who cycle, as it becomes a regulated rather than more spontaneous experience.⁶⁷ Initiatives can have counter intuitive effects such as how doing ‘our little bit’ for the environment by recycling might curtail any impulse to take more significant action. Meanwhile, any relationship of the domestic recycling ‘ritual’ to slowing, let alone stopping global warming is, to say the least, uncertain.⁶⁸ Such complexity can all too easily be ignored in behavioural scheming focused on short term solutions.

Matters of expanded public health and its relationship to individual choice are among the most complex in modern society. The idea of putting fluoride into the water supply, from the 1940s, to protect the teeth of those who might not do so themselves might be considered an early behavioural nudge. But it has rightly provoked half a decade of debate, as have

more recent initiatives such as putting folic acid into flour to reduce the number of babies born with spina bifida and neural tube defects.⁶⁹ ‘Better outcomes’ – particularly in the complex world of health and human behaviour – are far from given, particularly concerning untargeted interventions such as these. Where better outcomes are largely incontestable, nudging only makes sense where the problem is clearly behavioural rather than one of resources or technology, leaving only quite particular foci for intervention. Increasing usage of oral rehydration salts to treat diarrhoea, particularly in India, is one important example, having a potentially significant effect on the still shocking levels of infant mortality from this treatable condition. The technological problem has been fundamentally solved, and nor is it a basic question of resources, as salts are widely available. The problem is to behaviourally encourage mothers to remember to medicate. Diabetes is a disease which can be effectively treated but requires vigilant self management, and it no surprise that behavioural solutions are also the focus of extensive research and initiative, including the UK ‘nudge unit’.⁷⁰ At the same time such examples may be more an exception than a rule; diseases which are agreed, significant and stubborn problems with a simple solution but requiring some applied thinking. We should add that even in these examples there is rarely such a thing as an exclusively behavioural issue, however. In more traditional terms the problem in India also remains one of education, with many women still fundamentally misunderstanding how diarrhoea should be treated and not recognizing the life-saving potential of the salts.⁷¹

VI. The continuity of lifestyle risk intervention

Despite the relative absence of substantive contesting of nudging, its implementation by the Coalition has stimulated, largely negative, commentary. One liberal columnist typically complained that: ‘Cameron’s hijacking of Nudge theory is a classic example of how big ideas get corrupted’, affirming the sense that it is the application rather than substance that is the subject of criticism.⁷² A withering tone was captured by the title of another: ‘Oh, Mr Cameron, do stop all that annoying nudging.’⁷³ Again, this article did not contest the substantive, interventionist aim, however; indeed it complained that nudging

65 John D. Graham and Jonathan Wiener, *Risk vs Risk: Trade-offs in Protecting Health and the Environment* (Cambridge, MA: Harvard University Press 1995); W. Kip Viscusi, *Fatal Tradeoffs: Public and Private Responsibilities for Risk* (New York, NY: Oxford University Press, 1992).

66 Ruth Alcock and Jerry Busby, “Risk migration and scientific advance: the case of flame-retardant compounds”, 26(2) *Risk Analysis* (2006), pp. 369–381.

67 The most comprehensive study into the effects comes from Australia. For example, data from Western Australia shows the number of Australian children walking or riding a bicycle to school plunged from about 80 % in 1977 to the current level around 5 %. This fall directly coincided with the introduction of compulsory helmet wearing. See the compilation of research, *Bike numbers in Western Australia*, available on the Internet at <http://www.cycle-helmets.com/bicycle_numbers.html> (last accessed on 11 January 2012).

68 Sarah Moore and Adam Burgess, “Risk rituals?”, 14 *Journal of Risk Research* (2011), pp. 111–124.

69 Allan R. Freeze and Jay Lehr, *The Fluoride Wars: How a Modest Public Health Measure Became America’s Longest Running Political Melodrama* (London: Wiley, 2009). David Smith, Young-In Kim and Helga Refsum, “Is Folic Acid Good For Everyone?” 87(3) *American Journal of Clinical Nutrition* (2008), pp. 517–533.

70 See the Behavioral Diabetes Institute, for example, available on the Internet at <<http://behavioraldiabetesinstitute.org/about-Behavioral-Diabetes-Institute.html>> (last accessed on 11 January 2012).

71 See Sendhil Mullainathan’s talk on these issues, available on the Internet at <http://www.ted.com/talks/sendhil_mullainathan.html> (last accessed on 11 January 2012).

72 Adita Chakkraborty, “Brain Food”, *The Guardian* G2, 7 December 2010, at p. 5.

73 Catherine Bennett, “Oh, Mr Cameron, do stop all that annoying nudging,” *The Observer*, 5 December 2010, at p. 43.

will be insufficient, as we: ‘can’t rule out a surge in obesity, hyperactivity or mass poisoning’. The problem, particularly for critics of the liberal left, is that corporate players like food manufacturers will not now be frozen out of regulation as they tended to be under Labour, but will also play their part in improving health lifestyles. Those closely aligned with health promotion initiatives write dramatically of a complete reversal in public health because industry will no longer be sidelined.⁷⁴ The polarised politics of risk consolidated under the previous government involved an at least rhetorical hostility towards corporate influence, and this has left a considerable legacy. Other critics have attacked the British application of nudging on the grounds that it wrongly precludes more regulation and legislation to promote health.⁷⁵

Hostility towards nudge is as pronounced from the anti-regulatory right, as it is from the left. For example, influential conservative commentator Melanie Phillips writes of the ‘happy mind benders of No.10’⁷⁶ Criticism has been such that ministers have responded in public.⁷⁷

To an extent, this is a predictable problem for an approach that deliberately steers itself between left and right. The result can be to satisfy neither side, whilst aggravating both. But the more particular aspect is that nudge is being adopted at a time of austerity, by a Conservative-led government. Both left and right complain that their cherished services are being cut dramatically; for the former, public services and jobs are the focus, whilst for the right it is cuts to the defence and policing budgets that rankle. Government experiments involving American-imported ideas, in this context, can become the focus of resentment and ridicule. For those angered already by funding cuts, Conservative initiatives are part of an ideological offensive to ‘roll back’ the state and make ordinary citizens and initiative pay for services themselves. The background is here is a longstanding popular mistrust of Conservative policies as being dishonest and hypocritical, and memories of cuts under the infamous administration of Margaret Thatcher and her successors. There is a suspicion that the rhetoric of freedom and responsibility is only a cover for market domination, and nudge can be seen as the latest attempt to justify reductions in state spending. This is in a context where Coalition policy as a whole is regarded by critics as driven by an ideological hostility towards state spending (on the poor) – rather than determined by the dire economic circumstances of the UK economy, married with a determination to

shift power towards the local and individual.⁷⁸ Cameron has assiduously sought to distance himself from traditional conservatism through adopting new ideas such as nudge. But the imperatives of recession have confounded both his distancing from traditional conservatism, and nudge’s independence of either left or right. In this respect, *the recessionary circumstances that have helped thrust nudging to the fore have also led to the compromising of it as a policy approach*, as behavioural economics becomes not so much ‘smart’ policy as austerity policy. Experimental conditions for behaviouralism have turned out to be less ideal than might first appear.

Finally, it is important to recognise that the grounds upon which nudge policy making in the UK is *not being criticised*; the appropriateness of government attempts to shape health lifestyle behaviours, or that this is a self evident ‘good’. There are objections to partnership with industry in schemes to encourage ‘healthy behaviour’, but concern is that the worthy objective of improving people’s lifestyles might be compromised by association with commercial actors. There is little criticism of objectives themselves and in this respect we can identify a triumph of lifestyle health interventionism. At the same time it is significant that nudging initiatives are, thus far, concentrated primarily in this domain, precisely because health improvement now stands as

74 See, for example, Joe Millward, “Letting the food industry shape policy will ruin a century of progress”, *The Guardian*, 3 December 2010, at p. 17.

75 Chris Bonell, Martin McKee, Adam Fletcher et al., “Nudge Smudge: UK Government Misrepresents ‘nudge’”, 377 *The Lancet* (2011), early online publication, 17 January 2011, available on the Internet at <[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(11\)60063-9/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(11)60063-9/fulltext)> (last accessed 11 January 2012).

76 Melanie Philips, “The happy mind-benders at No.10,” *Daily Mail*, 29 November 2010, available on the Internet at <http://www.melaniephillips.com/the-happy-mind-benders-of-number-ten?searched=mind-benders&advsearch=oneword&highlight=ajaxSearch_highlight+ajaxSearch_highlight1> (last accessed 11 January 2012).

77 Francis Maude, “The nudge is no fudge”, *The Guardian*, 27 December 2010, available on the Internet at <<http://www.guardian.co.uk/commentisfree/2010/dec/27/nudge-fudge-community-level>> (last accessed 11 January 2012).

78 The impulse behind Coalition policy remains a debateable question. But in my view, critics tend to act as if financial restrictions simply do not exist – yet they are plainly real. Further, an example like the transformation of higher education suggests that the ideological determination to shift the focus of power is predominant. The changes in higher education are likely to cost the state more in the long term, as a large proportion of the new student loans will not be paid back. Meanwhile, the immediate consequence is to take resources from university teaching budgets and, at least theoretically, place greater power in the hands of the individual student ‘consumer’.

a kind of universal imperative. A rare critic from inside the medical profession terms this the ‘tyranny of health’.⁷⁹ By contrast, there is little sign of schemes in more difficult areas where there is no such consensus.

Critical reflection allows an appreciation of the lifestyle health consensus as a distinctive, even curious development. Basic public health has long been established. We thankfully live in an era of, remarkably, still ever-increasing life expectancy and, at least in the developed world, the eradication of infectious disease. Attention has shifted towards the much more uncertain world of lifestyle risk, but often as if problems and solutions in how people choose to live their (unhealthy) lives are matters of will and resources like public health in the past, and can be easily framed around unambiguous choices. Yet whilst in the world of health promotion and experimental nudging the choice is a simple one between, say, the ‘good’ fruit juice and ‘bad’ fizzy drink, in reality it is not nearly so clear cut. The ‘natural’ sugar in fruit juice will rot teeth as surely as the ‘unnatural’ in fizzy drinks, and the choice of one over the other is essentially a lifestyle choice marking distinctions of taste and class.⁸⁰ It is misleading to distinguish consumption around ‘goods’ and ‘bads’, as diet is fundamentally a matter of balance, based around the often-confirmed maxim that ‘all things are best in moderation’. More useful is to consider how health has become intimately connected to morality; more

a modern way of denoting ‘responsible’ behaviour than simply reflecting upon the state of bodily functions.⁸¹ We might like our children to be more active and walk to school, for example, but there is no clear purpose to making children ‘fitter’, and it is clear that exercise has only the most limited impact upon weight loss – should that be the objective.

Matters become even more complex when we consider the impact of actual programmes intended to improve health, particularly those ‘preventative’ schemes intended to identify illness in its early stages. These are fraught with unintended consequences, such as the false positives and unnecessary treatment that accompany the ‘good’ of mass screening programmes.⁸² Such problems are not resolved simply by nudging people into more regular screening or undertaking self examinations. Meanwhile, it is, at least historically, uncontentious to suggest that the singular pursuit of health in its own terms and for its own sake is not necessarily a ‘healthy’ one.⁸³ Among the consequences are the ‘worried well’, and how the intense scrutiny of health and consumption provides an environment conducive to health alarms.⁸⁴ It would seem to be no coincidence that the UK has witnessed so many ‘panics’ around food since the 1980s, around everything from eggs, to cheese, to meat, as the elevation of health – and risks to it – has been particularly clear and political.⁸⁵

It was the previous Conservative administration that began the politicisation of lifestyle health subsequently consolidated under Labour. It was their ‘Health of the Nation’ White Paper back in 1992 – with its 27 targets on issues from teenage pregnancy to taking more exercise – that signalled the new, expanded health agenda. It was unveiled by the then Health Secretary:

Honourable Members will know that people have become more conscious about what they eat, how much exercise they take and how they can generally improve the quality of their lives by becoming healthier. We wish to build on that healthy trend. No responsible Government can be a disinterested observer of an unhealthy nation. We should prevent illness wherever we can ... Prevention is better than cure.⁸⁶

Food health alarms encouraged by a climate of health politicisation began under the Conservatives also, following another health minister’s declaration that ‘all eggs have salmonella’ in 1988.⁸⁷ More dramatic and widely targeted health initiatives also began in

79 Michael Fitzpatrick, *The Tyranny of Health: Doctors and the Regulation of Lifestyle* (London: Routledge, 2000).

80 For thinking socially about matters of taste, see Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Cambridge MA: Harvard University Press, 1987).

81 Allan Brandt and Paul Rozin, *Morality and Health: Interdisciplinary Perspectives*, (London: Routledge, 1997).

82 Angela Raffle and J.A. Muir Gray, *Screening, Evidence and Practice*, (Oxford: Oxford University Press, 2007).

83 Maintaining ‘good health’ in the past was not generally regarded as an end in itself – as tends to be the case today – but simply as the bodily prerequisite for moral, intellectual and practical achievement. Those unreasonably concerned were known as ‘hypochondriacs’, a term which also indicates the necessary connection with unending concern about even the most minor possible threats to health.

84 Fitzpatrick, *The Tyranny of Health*, *supra* note 79.

85 Christopher Booker and Richard North, *Scared to Death* (London: Continuum, 2009).

86 Virginia Bottomley, “Health of the Nation”, Hansard, 8 July 1992, Vol. 211, cc.335, available on the Internet at <<http://hansard.millbanksystems.com/commons/1992/jul/08/health-of-the-nation>> (last accessed 11 January 2012).

87 Booker and North, *Scared to Death*, *supra* note 85.

the late 1980s, with the campaign to alarm the whole population into believing that they were all at risk from AIDS.⁸⁸ Likewise, more media-driven risk politics was initiated during this period, with the passing of the Dangerous Dogs Act in 1991, which banned certain breeds of dog, following a single attack on a schoolgirl.⁸⁹ As the Conservatives are now innovating the politics of nudge, it was they also who, earlier, innovated those of risk and health ‘nannying’.

Nudge is less of an alternative than is being claimed to the ‘nannying’ of the past, particularly as it enters an environment where lifestyle health interventionism is already well established as the norm. In this context ‘nudge’ is only the latest addition to the portfolio of interventionist approaches, rather than an alternative to it. Any libertarian principle is subsumed; for example in the government’s new policy proposals on health which state, at one point, that: ‘The Government will take a less intrusive approach, staying out of people’s everyday lives wherever possible.’⁹⁰ More importantly, the document and policy are then structured around the Nuffield Council of Bioethics Ladder of Interventions, which ‘increases in intrusiveness’ from ‘do nothing’ to ‘eliminate choice altogether’. All behaviours seem open to intervention in these terms, with no sense of limits or boundaries. There are here only some ‘minor’ behaviours trends that can be left alone as they may ‘fizzle out’, and these are only one out of 8 options. In practice, a range of new initiatives targeting lifestyle risk have been unveiled that now involve corporate as well as public health actors.⁹¹

Nudge has been adopted in the UK in an uncritical and wholehearted way, to the exclusion, for example, of valuable work on better regulation that better engaged with the damaging politics of risk in the contemporary UK.⁹² Unveiled at the same time as the Coalition’s wider programme of change, its attraction lay in offsetting the sense of austerity for austerity’s sake. But in the context of severe economic cuts and widespread reaction against them, the plans to nudge behaviour have been drowned out by criticism. Meanwhile, more substantive problems with behavioural solutions remain uncontested. The technocratic assumption of ‘better outcomes’ ignores complex realities, and nudging crucially limits the possibility of conscious learning and improvement. But it is not only nudging in its various forms that requires examination and debate, but the wisdom and consequences of the fixation on lifestyle health issues and where the limits to all forms of direct external interference lie.

88 See Burgess, *The Politics of Health Risk Promotion*, *supra* note 34, p. 537.

89 See Johnston, *Bad Laws*, *supra* note 34, p. 62.

90 Department of Health, *Healthy Lives, Healthy People: Our Strategy for Public Health in England*, (London: HM Government, 2010).

91 Behavioural Insight Team, *Applying Behavioural Insight*, *supra* note 18.

92 See, for example, BRC, *Whose Responsibility*, *supra* note 33. Risk, Regulation Advisory Council, *Response with Responsibility: Policy Making for Public Risk in the 21st Century*, (London: BIS, 2009).