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Nudging in gambling

The debate on gambling regulation and
the focus on libertarian paternalism

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*«The first misconception is that
it is possible to avoid
influencing people's choices».*

Richard H. Thaler

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ABSTRACT

The worldwide growth of gambling brings to think necessarily about what the best way to regulate this field would be. The arising interest for this issue has resulted in two main questions, representing the leitmotiv of this essay and corresponding to its two parts:

1. How should gambling be regulated and which direction should politics take, considering the positive and negative sides of the coin?
2. Could the Nudge theory be a fair compromise between the two poles and could be as successful as it is in other social and health fields?

In order to answer these questions, the first part of the paper deals with the debate between the supporters of the more paternalistic anti-gambling philosophy and the supporters of the more liberal pro-gambling view, presenting the motivations in favour of each position. And further, it highlights the limits of each position through the example of two opposite realities, the Italian and the Dutch situation.

The second part aims to verify whether the new libertarian paternalism theory can be a useful and appropriate solution to this issue. After presenting the “gentle push” theory, its main characteristics and its application in social and health policies, the second part analyses how the theory can be applied to the gambling field, considering that the current situation is going to the opposite direction, developing dark nudges.

INTRODUCTION

Gambling is getting more and more popular all over the world. Its spread, however, has also caused an increase in related problems, raising doubts and perplexities from all sides of the political spectrum.

Unlike what one might think, gambling is not an invention of modern times. The first representations of the roll of the astragals - ancestors of the dice - have been found in some Egyptian tombs dating back to 3500 B.C. It has attracted people of every culture, society, social stratum and historical epoch.

Nowadays, two characteristics are attributed to gambling that differentiate it from other types of games. The first characteristic is chance. Gambling, in fact, is considered a type of game whose peculiarity regards the fact that the result is left to chance. By rolling a die, one will have the doubt of which side will appear until the moment the die will stop. You can try to guess the result, you can try to do a probability calculation but you will never know the final outcome until the end of the action. This means that the individual's qualities are not so important since the outcome does not stem from megalocracy.

The second feature without which it is not possible to talk about gambling is the bet of a sum of money and/or other valuables in an irreversible way: all the participants must bet an item, without the possibility of withdrawing and on conclusion all the items will end up in the winner's pocket.

These two characteristics together form a particular type of hobby that is attracting more and more interest and, at the same time, is causing more and more problems and raising different concerns. The current situation has mobilized the various political parties to reflect on the critical issues and to rethink the solutions adopted, bearing in mind that the global context is changing and is proposing new alternatives.

The reasons that have led me to deepen this theme have a triple nature. First of all, the passion was born thanks to the bachelor internship that put me in touch with the reality of pathological gambling. Secondly, it fascinates me and intrigues me to understand how a type of game can be as seductive as it is dangerous. Finally, the confidence in the power of the new Nudge theory led me to want to understand whether it can be applied to the gambling industry.

The purpose of this work is precisely that, on the one hand, to offer an overview of the major concerns exposed by the main political tendencies with regard to the gambling sector, on the other to try to understand whether the new theory emerged in the new millennium, Nudge theory, may prove to be a better alternative solution.

The thesis consists of two parts. The first part analyzes the main arguments that defend the opposing positions: the pro-gambling and the anti-gambling positions. In particular, the first chapter deals with the arguments of those who have a tendentially negative attitude towards gambling and who are in favor of restrictive measures: first the moral justification is presented and the limits are highlighted; then, the argument of the paternalists is addressed, justifying the choice of coercive measures by demonstrating how gambling can lead the player to the pathological addiction with all the related physical, psycho-social and economic consequences; thirdly, the Mill principle "harm to others" is discussed, according to which gambling should be banned or severely limited since it might be dangerous for the gambler's family and friends, as well as to society. Finally, the Italian situation is reported understanding the real consequences of prohibitionist approaches.

The opposing arguments of those who are in favor of a gambling liberalization, so called "pro-gambling" positions, are presented in the second chapter: through the argument of justice, it defends both the responsible gamblers and the distributive system applied to gambling; the utilitarian argument is claimed, to affirm how the liberalization of gambling produces the greatest happiness for the

greatest number of people. Finally, the pure liberal argument is presented to remember all the positive effects that come with the freedom to choose. The analysis of the Dutch case makes it possible to report a concrete example of a country that has adopted policies that are basically liberal even with regards to the gambling sector.

The second part presents the new Nudge theory and tries to apply it to the gambling sector.

The third chapter deals with the Nudge theory: after presenting the theory and its libertarian paternalism philosophy, the pros and cons of the application of this new theory are dealt with first at the general level and then at the public level, in particular at the health sector, taking as an example the tobacco sector, one of the few health sectors in which studies have already been carried out with regard to nudges.

Finally, with the last chapter, an analysis of the nudges applied to the gambling sector is made. It offers motivations that explain how a public policy centred around the libertarian paternalism philosophy can represent a "third way" to the liberalism-paternalism debate also in the gambling sector, despite the current situation characterized by private dark nudges.

CHAPTER 1

ANTI-GAMBLING POSITION AND THE ETHICS OF SACRIFICE

1.1. An introduction to the debate

The explosion of gambling worldwide, starting from the last centuries and followed by an increase in problem gambling, raises many questions regarding how this market should be regulated. These doubts, motivated by philosophical, theological, social and economic beliefs, led to the development of different political views and gambling regulations, mainly oriented towards two opposite perspectives: the first one aims at pursuing public health interests in order to protect society from gambling disorders and gambling-related problems, whilst the second one is profit-oriented, attempting to promote economic interests of gambling companies, and free-choice-oriented, involving one of the most important individual rights.

The first one can be defined as “societal health benefit” approach because advocates the supremacy of the well-being of society over the individual. It asserts that one of the duties of government is to protect everybody from dangerous activities even if some population segment might derive benefit from them. Hence, the state cannot permit gambling, an activity which exploits the addiction of some population, seeing the prohibition as the best solution for the whole society.

The “free individual right” approach, on the other hand, mostly perceives gambling as entertainment and individual choice: as most people gamble without any gambling-related harm, they shouldn’t sacrifice their freedom in order to achieve some goal of public welfare. Everyone should be free to make his/her own decisions even in gambling sector since the responsibility of any behaviour and consequences, including severe financial losses, belongs to ourselves and not to the state.

To use Richard McGowan's words, anti-gambling forces invoke Ethics of Sacrifice of an individual right to ensure that no person is sacrificed to gambling addiction, whilst pro-gambling defenders appeal to Ethics of Tolerance in the interests of freedom right protection¹, especially since a market on gambling has been created, capable of making significant economic benefits.

The aim of this chapter is to review the justifications for an anti-gambling position, underlying the strengths and the weaknesses, before turning to an overview of the arguments provided by pro-gambling advocates in the second chapter, in order to understand the doubts which fuel the issue "How should gambling be regulated?".

1.2. Gambling as an immoral conduct

In some societies, still nowadays, gambling is seen as a "vice", one of the dishonest acts responsible for the collapse of humanity into intolerable decadence. This demonising picture of gambling is the result of radicalization of teachings and beliefs, mostly raised by religions, often accepted, in an incontrovertible way, in the reference society. An example of this is part of the Christian world which claims

«Gambling, in all its forms, is contrary to the mind and spirit of Christ. It is sub-Christian, non-moral and anti-social, an evil in itself and evil in its consequences.»²

This representation arouses strong negative emotions and, particularly, feelings of disgust and indignation at the thought of people gambling. This practice is

¹ R. McCowan, "The Ethics of Gambling Research: An Agenda for Mature Analysis", *Journal of Gambling Studies* 13, no 4 (1997): Cfr. 279-289.

² W. Lillie, "Gambling - A Problem for Christian Ethics", *The Expository Times* 61, no 11 (1950): 348.

difficult to accept on a legal level with the motivation that the state should not be contrary to the divine will.

Opponents have easily criticized this first argument. Firstly, such picture of gambling is not universally shared by the whole population. A part of it considers gambling as an entertainment, a way to spend some time in a fun and relaxing way. Therefore, why should the state penalize those who have a positive consideration of gambling on the sole basis that a group does not accept this game as moral? Rather, most people see the state interference in personal choices without offering solid explanations as an action with greater immoral ground.

Yet, the strongest objection is based on the assumption that this argument seeks to show how gambling is an immoral act as such, although it is not able to provide rational justifications. Indeed, as MacKenzie has claimed

«It has been assumed, almost universally, that it is impossible to prove that gambling is wrong»³.

There is nothing morally wrong in betting cash on the next number or colour that will appear in the roulette wheel or in playing a Black Jack match in exchange for money.

This concept can be better understood when compared with other acts whose deontological ethics raises less doubts, for instance the action of murder. Considering a man who murders another man, we would have two – utopian – opposite situations: in the first case, where a murderer kills a person whose life has been characterized by good principles and actions, probably there is no doubts about the wrongness of the act, but in the second case, where the murder is committed against a person of evil character and influence, it can be seen as a good act as it has apparently freed society from a bad soul. Nevertheless, many moralists would consider it wrong in any case, considering the act of murder as immoral in its true nature.

³ W.D. MacKenzie, *The Ethics of Gambling* (Philadelphia: Henry Altemus Manufacturer, 1896), 7.

No writer has been able to define why gambling is an act of guilt, as such. Even Herbert Spencer, one of the teachers of morality, supported the impossibility to figure out the wickedness of gambling unless taking into consideration the secondary effects of gambling habits. In order to understand the reasons that justify the prohibition of gambling, we need to go beyond the deontological level moving into the teleological level which explains how the evil aspects of gambling lie in the consequences that both affects the character of the gambler and, at the same time, harm people related to him.

1.3. The paternalistic protection from gambling harm

Gambling critique shows a greater argumentative solidity when it appeals to the protection of those who are not able to save themselves from the consequences of gambling. The second argument, raised in favour of banning gambling, takes into consideration the paternalistic view, explaining its justifications from the basic reason presented by Spencer. According to him, through gambling, there is

«[...] the obtainment of pleasure at the cost of another's pain [...]»⁴.

If we compare gambling with another type of money transfer, the job, we notice how different their basic intentions are. Through work, there is a fair transfer of goods/services and money between an individual who has used his energy and time creating that good/service (subject A) and a buyer who gets that good/service in exchange for monetary compensation (subject B). Consequently, this exchange implies, directly or indirectly, equivalent satisfaction for both parties involved: subject A obtains the satisfaction of getting a remuneration in exchange for his own sweat, whilst subject B gains satisfaction for the good/service obtained from the exchange.

⁴ H. Spencer (1897), *The Principles of Ethics Vol. I* (Indianapolis: Liberty Fund, 1978), 331.

In gambling, none of this happens. In gambling, the money received by the winner is obtained without effort and the pleasure of winning is such only as the loss of the adversary occurs, without the latter receiving something in return⁵.

The Islamic prohibition of gambling is based on this assumption: it considers morally wrong and therefore prohibits it, any activity that allows someone to get rich without working and gambling is one of these activities⁶.

It can be said that both gamblers are aware of the rules of the game and its consequences from the beginning and the loser derives his satisfaction from the game itself⁷. However, the point is that a conduct which generates individual pleasure at the cost of someone else's pain is anti-social and should be banned, not only because it creates inconvenience to the opponent but also because it produces a general deterioration of the players' character. The underlying problem lies in the fact that gambling cultivates hard egoism, reduces empathy and involves several anti-social desires. Such easy gain is selfishness-based and it is responsible for the development of avarice and other degrading values, decreasing sympathy with the material interests of one's fellows and arising indifference to the misfortunes of others⁸.

The individual progressively yields the control of his reason, affections and conscience until the pinnacle of pathology addiction, where the thrill of pleasure in the loss of others and in easy gain becomes a necessary priority.

The pathology poison flows gradually, following three steps. It starts from the individual hunger for money and power, satisfies him through a series of winnings usually of great importance and gives him a sense of prestige and omnipotence. This is the first phase, also called *honeymoon*, in which man adopts high levels of

⁵ MacKenzie, *The Ethics of Gambling*, Cfr. 16-18.

⁶ J. Wolff, *Ethics and Public Policy: A Philosophical Inquiry* (Routledge, 2011), Cfr. 44.

⁷ MacKenzie, *The Ethics of Gambling*, Cfr. 16-18.

⁸ J. A. Hobson, "The ethics of gambling", *International Journal of Ethics* 15, no. 2 (1905): Cfr. 140-147.

concentration and energy, sharpens his skills with numbers and adopts game strategies. His self-esteem improves due to the illusion of receiving benefits from gambling, so as to make use of it to escape from problems and to get negative moods fall asleep. Gambling, now, starts to monopolize man's thoughts and dreams so much that it pushes him to dedicate himself to the activity more intensely, taking away time and energy from friends and family. The consequences of this phase are not so harmful yet, although they have a certain importance.

It is especially in the second phase, called *loss and run-up*, and in the third, known as *despair*, that the consequences of gambling become more important. In the second phase, the player increases the frequency and the range of bets, chasing after lost money in the hope of recovering it. He begins to lie to their loved ones in order to hide the games and debts, becoming more and more ponderous, and he needs to borrow money from friends, relatives, banks or usurers. The social and family network that surround him/her begin to deteriorate, but the awareness of the extent of problems is, more often than not, still absent or inadequate and persists the idea that the best solution is to keep playing. The awareness of the real situation emerges when the third phase takes place: the phase of despair. At this stage, the pathological gambler can suffer from psycho-physical problems, because of all the serious economic, social, family and work consequences that gambling has brought to him/her⁹.

In particular, on an economic level, it is not so unusual to achieve bankruptcy of gambling debts. The mortgage, rent, gas, electricity, telephone, and other bills may be late or overdue. In the worst of situations, utilities are shut off, automobiles and furniture are confiscated, household items are sold, and there is the possibility of getting the house foreclosed or being evicted from an apartment. Besides, the

⁹ H. R. Lesieur, R. L. Custer, "Pathological Gambling: Roots, Phases, and Treatment", *The Annals of the American Academy of Political and Social Science* 474, no. 1 (1984): Cfr. 151-153.

most pathological gamblers lose their job because of the frequent hours of absence at work, replaced by gambling. They reach their workplace later or leave it early or use lunch time and any available break time to keep gambling. They take sick days off for gambling or even they use work time. Even when they don't gamble, they may appear distracted, focused on the heavy losses and the indebtedness and how to get the money back with gambling¹⁰. Some better engage in illegal activities to finance their gambling: asking for loan under false pretenses or withdrawing money, forging the partner's signature, are just a few examples. Some of them become bookmakers and others, who borrowed money from loan sharks failing to settle the debts, are forced to work for organized crime¹¹.

The financial pressure, the work and family difficulties combined with the craving of gambling, produce stress, anxiety, depression, insomnia and cognitive distortions in pathological gamblers' mind, with all the consequent physical effects on their human body: cardiac disorders, high blood pressure, migraines, allergies, nerve and sensory system disorders, respiratory problems, musculoskeletal disorders, oral or dental disease, weight imbalance, gastrointestinal pain, nausea, uncovered fatigue, colds and flu are the most frequent. Having already lost everything or being on the right track to lose everything, escape and suicide thoughts or attempts are not rare.

The extent of the consequences of gambling led to the decision, in 1980, of the American Psychiatric Association to introduce, for the first time, this kind of game in the third edition of DSM - Diagnostic and Statistical Manual of Mental Disorders - within the "impulse control disorder not elsewhere classified" under the name of Pathological Gambling. The awareness that it is a pathological addiction

¹⁰ H. R. Lesieur, "Costs and Treatment of Pathological Gambling", *The Annals of the American Academy of Political and Social Science* 556 (1998): Cfr. 155-158.

¹¹ P. Ferentzy, N. Turner, "Gambling and organized crime-A review of the literature", *Journal of Gambling Issues* 23 (June 2009): Cfr. 123-136.

was well-found in 2013 when, in the new DSM-5, the pathological gambling changed its name to Gambling Disorder and was inserted into the area dedicated to pathological addictions¹². This decision was the result of scientific evidence that has brought to light the difficulty of a clear demarcation between "authentic" addictions, resulting from substances abuse, and excessive behaviors otherwise known as "behavioral addictions".

Although the trigger element appears different, the basic brain mechanism is the same: the addiction arises following the learning of a behavior resulting from the positive association between the object (stimulus) and the effects determined in the individual (response). More precisely, it has been observed that gambling disorder possesses the three typical factors of the so-called classic addictions: tolerance, or the need to increase the gambling volume to achieve the same level of excitement; abstinence, i.e. the presence of symptoms such as nervousness, anxiety, irritability and tremors when the subject tries to stop; loss of control, that is the belief that the gambler can stop the abuse behavior at any moment, but that does not actually happen¹³.

The paternalistic view applied to gambling calls into consideration all these factors, proving how these problems increase when gambling is legalized.

It exposes these justifications to ask for a state that behaves like a father does towards his children. It justifies this state philosophy on the grounds that it pursues the goal to choose the rules and policies through which the affected person would be better off, or would be less harmed, even going against his will. It essentially bypasses individual freedom for a good cause.

¹² C. Reilly, N. Smith, "The Evolving Definition of Pathological Gambling in the DSM-5", *National Center for Responsible Gaming* (2013): Cfr. 1-4.

¹³ T.W. Robbins, L. Clark, "Behavioral addictions", *Current Opinion in Neurobiology* 30 (2015): Cfr. 67-69.

Part of the supporters of paternalism takes into consideration the moral paternalism¹⁴, since even the moral welfare of the person should be protected, according to them. They support the theory that, although some of the gamblers keep living decently and do not encounter any gambling-related problems, the state should still prevent from gambling because it is a morally corrupted act, for the arguments presented above.

Besides that, most support the welfare paternalism¹⁵, talking about gambling: people who gamble run the risk of ruining their economic, physical and psychosocial condition, and therefore the government should prevent them from incurring this risk. This second argument is strengthened by the intention to protect even the most vulnerable. Banning gambling, the government is supposed to ensure a safer and healthier life to those who are incapable of understanding the meaning of their behavior and decide accordingly, either because of a state of mental illness or mental deficiency or for minors.

Thus, in summary, the paternalistic concept applied to gambling starts from the deterioration of the individual character and concludes with the explanation of gambling disorder in order to demonstrate the impact that gambling has on the gambler and to support the need for a protective state intervention. Despite a greater tolerance towards this theory from the critics, it is still not considered a sufficient reason to impose the prohibition of this type of game.

1.4. The Mill's principle "harm to others"

The third argument in favor of the prohibition of gambling is closely related to the previous one and calls into consideration the Mill's principle of harm which

¹⁴ "Paternalism", Stanford Encyclopedia of Philosophy, accessed January 19, 2019, <https://plato.stanford.edu/entries/paternalism/>

¹⁵ *Ibidem*.

claims

«The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others»¹⁶.

Even one of the greatest exponents of liberalism, John Stuart Mill, in attempting to establish a principle in the relationship between authority and freedom in its essay “On Liberty”, supports the thesis condemning evil acts which cause injuries to others, without justifiable reason. Every individual is free to make his own choice regarding actions or omissions, even if harmful to himself, but whenever these actions or omissions also cause harm to others, they must be treated differently. Every individual is responsible for himself and also for others. Society, protecting all its members, must inflict pain, at least, with moral reprobation and, in grave cases, by enforcing laws in order to limit and punish the responsible individual.

He himself admits that there are cases in which this line of demarcation between the action that affects only the executor and action that encroach on others’ rights, is not so clear and immediate and gambling represents an example of this¹⁷. Recognizing that, in terms of gambling, there are arguments in favor of both tolerance and restriction, he does not reach a conclusion. The fact that there are individuals whose interest is in contrast to what is considered to be the common good, is a further complicating factor.

However, antigambling supporters start from the idea of “harm to others” and particularly from the doubts that Mill encounters, trying to apply his argument to gambling, to justify the reasons for their position.

¹⁶ J. S. Mill (1859), *On Liberty*, (Kitchener: Batoche Books, 2001), 13.

¹⁷ *Ivi* Cfr. 91-92.

Gambling studies have shown that legalized gambling does in fact cause unjustifiable harm to people other than those who gamble. The gambler's economic difficulties, resulting from loss of savings, redundancy and debts, as well as the almost total dedication to gambling, together with all physical and psycho-social gambling-related problems, are also reflected on family members. Indeed, both partners and children are faced with significant social, psychological and economic stressors as a direct result of their relative' gambling activities.

With regard to the gambler's partner, it is not unusual the appearance of feelings like anger or resentment, lost of trust, loneliness, guilt, helpless or hopeless. Several studies have provide empirical evidence in support of the emergence of mental distress, which may occur in the form of a generic state of confusion until the development of high level of anxiety and depression with all the consequences that entails, including isolation and withdrawing from family contacts and friends. Furthermore, the lack of communication and the frequent lies among the partners are the main causes of decreased libido or even lost interest in sex, resulting in unsatisfactory sexual relations¹⁸. The occurrence of psycho-social problems in the partner has also the effect of manifesting physical stress-related health difficulties including headache, intestinal disorders, faintness, breathing irregularities, back-aches, asthma, high blood pressure and insomnia. The anger and dissatisfaction of the gambler often result in attacks of violence and abuse towards the partner, from which suicidal ideation and even suicide attempts are originated. A further effect that gambling may have on gambler's partner is the development of dysfunctional coping behaviours, for instance, excessive drinking, smoking, eating, or spending.

¹⁸ N. Dowling, "The impact of gambling problems on families", *Australian Gambling Research Centre* 1 (2014): Cfr. 2-4.

Many partners see the separation or the divorce as the best solutions to the new family situation¹⁹.

In respect of children, it is not unusual for them to take on the role of mediators between the parents in order to try to resolve the situation, often feeling trapped at the centre of struggles. They may experience role conflicts, including acting as a peacemaker or being used as a scapegoat for family difficulties arising from problem gambling behavior. Yet, the greatest damage for children comes from the emotional deprivation resulting from the absence, physically and/or mentally, of the parent gambler: it can manifest itself with the onset of symptoms such as angry, hurt, sad, confusion, isolation, loneliness, guilty, helpless, anxiety and depression. Feelings of abandonment and rejection are the basis of a lack of trust and security, in oneself and in others, increasing the risk of developing poor self-image and inappropriate social and interpersonal skills. Neglect also arises from an economic point of view due to financial hardship caused by parent gambler: children might be compelled to skip holidays, trips or school opportunities until to experience an overall poor quality of life stemming from a reduced access to basic necessities such as housing, warmth and food. Not to mention the fact that, as much as for the partner, even for the problematic gambler's child the risk of being a victim of violence or sexual abuse is not so distant.

The consequences of all this can be reflected in significant behavioural problems like, running away from home, committing crime, developing health-threatening behaviours like smoking, drinking, drug use, overeating, gambling or engaging in drug-, alcohol-, or gambling-related activities, as well as showing sexual promiscuity or physically abusive tendencies. Some studies have shown that some pathological gamblers's sons have developed poor mental state and general school/work problems. In these children suicide thoughts or attempts are also fre-

¹⁹ R. Grant Kalischuk et al, "Problem Gambling and its Impact on Families: A Literature Review", *International Gambling Studies* 6, no 1 (2006): Cfr. 8-10.

quent²⁰.

These are the subjects who mainly get involved with the effects of relatives' excessive gambling, although they are not the only ones: other family members or even family outsiders might be affected by the manipulation from the problematic gambler with all the physical and psycho-social consequences deriving from it.

The consequences affect also society. It is affected economically, because of the increase in social and health expenditure in order to plan and implement treatment and prevention policies, for gamblers and their families, children included. It has to cope with unemployment and loss of productivity because of gambling-related work problems.

At a social level, gambling and crime are strictly connected, particularly organized crime. Legal gambling is responsible for the increase of problem gamblers and consequently also for the percentage of those who commit crimes to support gambling. Moreover, the greater the offer of legal gambling, the more easily criminal activities do business: some forms of legal gaming constitute a great opportunity for the mafia organizations to carry out, almost undisturbed, illegal activities such as passing counterfeit money, money laundering, loan-sharking and race fixing. Not to mention that gambling allows the mafias to have more people involved in their business²¹.

Finally, gambling is also responsible for the increase in alcohol-related problems due to the strong co-morbidity between the two disorders and because the places where generally it's possible to gamble are the same where alcohol is also served.

²⁰ *Ivi*, Cfr. 10-12.

²¹ E. Langham et al, "Understanding gambling related harm: a proposed definition, conceptual framework, and taxonomy of harms", *BMC Public Health* (2016): Cfr. 5-13.

Therefore, it is precisely on the basis of the pain that excessive gambling can cause not so much to the individual, who voluntarily chooses to play, aware of all the consequences, but especially to those around the player, that some require the prohibition of such activity. Here again, given these circumstances, it is invoked the Ethics of Sacrifice, giving priority to the good of community over personal freedom. Mill himself introduces his argument by claiming:

«If, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated, and might be justly punished»²².

1.5. The Italian case

The analysis of the Italian gambling situation allows to observe an example of how the antigambling philosophy has been concretely applied, as well as to anticipate its limits and introduce the opposite viewpoint, which will be better addressed in the next chapter.

Italy is one of the countries that has embraced the antigambling philosophy, supporting, in particular, the paternalistic view. The Italian Criminal Law has declared gambling illegal and, with Art. 718, punishes with the arrest from three months up to one year and with a fine exceeding two hundred euros

«whoever, in a public place, open to the public, or in private circles of any kind, holds a game of chance or facilitates it [...]»²³.

²² Mill, *On Liberty*, 75.

²³ L. Franchi, V. Feroci, S. Ferrai, *Codice penale e leggi complementari* (Milano: Ulrico Hoepli Editore, 2014), 148.

The penalty increases for all those who are surprised to participate in a gambling house or in a public exercise, and for all those who have bet economically relevant amounts of money. Article 110 of the Social Welfare Act elaborates on the issue by presenting a list of illegal games.

Italy expressed consensus to the anti-gambling philosophy since its unification, introducing the illegality of gambling in 1839 in the first Italian Criminal Code, the Sabauda Code, as considered a threat to the public order and the security of the Country. Gambling became illegal in all its forms, except in a few cases where the exercise was authorized by a rule of law. Nevertheless, banning gambling, the Italian peninsula did not achieve the desired result: man has always been attracted to gambling and whenever they can not find legal offers, makes use of illegal markets. As a result, illegal markets took advantage of the ongoing situation, which lasted almost a century, being as an obstacle.

Refused by "men of honor" in the Mafia families of the peninsula, as it was considered as much dishonorable as prostitution. To overcome this problem, some families entrusted their management to third parties, demanding a share of the profits, while others exercised it directly abroad. The reasons of principle gave way to those of profit when the mafia families not yet involved in the sector realized that this market on the one hand could make immense revenues and, on the other hand, gave the possibility to recruit new subjects to its service as well as practicing money laundering almost undisturbed.

Needing an anti-crime struggle, the Italian state introduced an important change in the field of gambling in 1992. It continued to support the antigambling philosophy as a guiding principle, hence not making significant changes in the Criminal Code, but it introduced the State Monopoly, subjecting gambling to taxation. Since then, the organization and performance of games involving a win of any kind and a cash payment, are reserved to the state.

However, the main reason for this change lies in the historical-economic period in which Italy was going through. In 1992, in fact, the Lira, the previous Italian coinage, suffered such a speculative attack that it was forced to leave the EMS - European Monetary System - where it entered in 1979, almost causing a state default. The currency depreciation allowed its re-entry into the EMS, but with consequences for the state budget. The search for new ways to ensure new entry into the treasury led the state to change its consideration towards gambling. Therefore, while before 1992 the state choice aimed to reduce the demand for gambling, after that date it turned into the enrichment of state funds, firstly to remedy the situation and in the second place to support public expenditures getting higher and higher. One of the most important innovations introduced by the State in those years were the instant lotteries such as the “scratchcards”, new games of chance whose innovative features were immediately beaten on the population: compared to traditional lotteries, indeed, new generation ones, not circumscribed temporally to special events such as the New Year, allowed the speeding up of the game cycles, which contributed to the increase in compulsive gambling²⁴. These instant lotteries, together with a new state lottery, the SuperEnalotto, promising the winner frequent and huge jackpots, convinced a large number of Italians, even the least suggestible, to bet money against the chance. Since then there has been an upward spiral of gambling consumption varied by double digits every year.

A further change in the situation began in 2003, when the purpose of taxation gave way to the creation of the company value of gambling. The State Monopolies acquired a wide strategic-managerial autonomy and the government started to promote the stock value of the game companies, aware of the political and economic advantages from which it could, and still can, derive from it. The new regulations,

²⁴ G. Bellio, M. Croce, *Manuale sul gioco d'azzardo. Diagnosi, valutazione e trattamenti* (Milano: FrancoAngeli, 2014), Cfr. 32-38.

therefore, aimed to expand the gambling market, now become oligopolistic and protected, widely spreading games beyond any space-time boundary. The invasion struck progressively throughout the peninsula, first through instant lotteries and slot machines, then with online gambling, giving the opportunity to bet at any place and time of day²⁵.

Since 2003, hence, the gross turnover has increased exponentially: it went from 17.5 billion euros in 2003 to 42.2 billion in 2007, reaching the peak in 2012 with 88.6 billion.

To summarise, the Italian decision to apply the anti-gambling philosophy was driven by the need to protect the safety and well-being of citizens. The subsequent introduction of the State Monopoly was presented as necessary in order to reduce the crime in the gambling field. Nevertheless, the desired results actually have not been achieved. There has been an increase in both the gamblers and the addiction so much that nowadays, gambling in Italy affects over 23 million people, of which almost 800 thousand are at risk of addiction and 300 thousand already have a gambling disorder. And it has not even solved the crime problem. It has been widely shown that the formula "one nail drives out another" does not work in this field; indeed, as the sociologist Maurizio Fiasco claims,

«illegal gambling fuels legal gambling by providing the motivation to justify the introduction of new games. Legal gambling fuels illegal gambling by expanding the population dealing with the criminal offer»²⁶.

²⁵ G. Meyer, T. Hayer, M. Griffiths, *Problem Gambling in Europe. Challenge, Prevention and Interventions* (New York: Springer, 2009), Cfr. 155-156.

²⁶ M. Fiasco, *Il gioco d'azzardo e le sue conseguenze sulla società italiana. La presenza della criminalità nel mercato dell'alea* (Roma: Consulta Nazionale Antiusura, 2014), 14.

Indeed, the turnover around this speculative activity has attracted the attention in equal measure of organized crime, to the point that today we talk about gambling as the "fourteenth occult concessionaire". The only result obtained was the increase in revenues in the state treasury. With a turnover of 84.4 billion euros wagered and 7.9 billion euros entered the state coffers in 2014, in Italy gambling is ranked as the third company preceded only by Eni and Enel²⁷ - the two largest multinational producers of electricity and gas in Italy. In the European gambling ranking, Italy ranks in first place and it occupies the fourth place after the USA, China and Japan in the world ranking. For these reasons, Italy has earned the appellation of "Azzardopoli", the country of gambling²⁸.

²⁷ M. C. Perilli, *Giocati da' azzardo. Mafie, illusioni e nuove povertà* (Sensibili alle foglie, 2015), Cfr. 142.

²⁸ D. Poto, *Azzardopoli 2.0. Quando il gioco si fa duro... le mafie iniziano a giocare. Numeri, storie e giro d'affari criminali della "terza impresa" italiana* (Torino: Edizioni Gruppo Abele, 2012), Cfr. 7.

CHAPTER 2

PRO-GAMBLING POSITION AND THE ETHICS OF TOLERANCE

2.1. Justice argument

Although there are no doubts about the need to safeguard those gamblers who have to face gambling disorder and the related problems, we can not but think of those people who only derive positive effects from gambling. When we deal with a problematic issue, we must take into account both sides of the coin. The positive side of the “gambling” coin invokes the argument of justice, supported especially by those who are in favor of gambling legalization.

According to Peter Collins, this theme provides its motivations through two justifications. The first derives from the theory of justice which uses a proportional system in establishing the punishment to impose: *the retributive justice*. In other words, the first argument appeals to the idea that the treatment of people depends on what they deserve.

This theory states that someone acting wrongly against the law, deserves to be punished proportionally to the severity of the offending behavior. Besides, according to this theory, inflicting disproportionately large punishments or punishing illegitimately those who are innocent, is considered morally wrong²⁹. Such theory, somehow, recognizes that there are some acts that can not be condemned a priori but the way in which such acts are carried out and their consequent results must be taken into account. In such situations, the attention is shifted from the premises to the consequences, and the results obtained by those who have failed to set limits are

²⁹ “Retributive Justice”, Stanford Encyclopedia of Philosophy, accessed January 23, 2019, <https://plato.stanford.edu/entries/justice-retributive/>.

condemned, without precluding the possibility of carrying out such act a priori.

If applied to gambling, this theory starts from the Spencer's premises stating that it is not possible to establish what makes gambling wrong as such, if not going to analyze the consequences it brings, to come to a different conclusion. There are people, in fact, who do not lose their values or the control of reason, do not cultivate selfishness, forgetting their responsibilities towards family, work and society in general and do not commit crimes. Hence, those who invoke restorative justice recognize that gambling, hypothetically, may affect the character of the gambler or damage third parties, but they wonder why, because of these latter, also those on whom gambling has no negative effects must be penalized. The measures that governments put in place to limit the damage caused by excessive gambling should not be at the expense of the legitimate enjoyment of the game by the vast majority of gamblers, who can not be labeled as people affected by a "problem".

According to Collins, the persuasiveness of this theory generally depends on the degree of incidence that a phenomenon has on population. Whenever the negative consequences of a phenomenon have a greater impact on population than positive ones, this argument loses relevance. Thus, if we consider that smoking dependence and its related problems are highly widespread, this theory does not succeed. Gambling and alcohol have different aspects and ,therefore, this argument takes on greater importance³⁰. Good evidence of this can be found in statistics.

With respect to gaming habits, we can take as examples two fairly different countries: Italy and the Netherlands. In Italy, although the phenomenon and the problems are quite widespread, studies and research are still few and under development. One of the latest research conducted in 2017 showed that, although the problem is increasing, still remains a clear difference between the percentage of the so-called responsible gamblers and the gamblers considered somehow at risk. The

³⁰ P. Collins, *Gambling and the Public Interest* (London. Praeger, 2003) Cfr. 44-46.

data show that, among all gamblers, 15.2% has a behavior defined as "at minimal risk", 5.9% is "at moderate risk" and 2.4% appears to be "at severe risk" of developing problematic gambling³¹. The result is that almost 80% of gamblers report no gambling-related risk. An even better situation is the Dutch one. In 2011 a study was conducted with the aim of detecting the gambling habit on the entire population; the estimate obtained revealed that problem gamblers were around 0.15%, those at risk were 0.68% and that the number of recreational gamblers rose up to 64.4% of respondents³².

As a result, it is understandable, therefore, the feeling of injustice of those who are non-problematic gamblers and the request that their voice too is heard.

To give support to this idea, there are also the motivations expressed by those who feel attracted by gambling. In this regard, Peter Binde noted the lack of studies concerning the motivations provided by people engaged in leisure gambling, as more focused on the study of the origins of problematic gambling. For this reason, he himself carried out a research aimed at bringing to the fore the positive elements which explain the reasons why gambling is so pursued. He, thus, shifted the focus from the human dissatisfaction or deprivation concerning, for example, money, rationality, and peace of mind, to the challenges, creativity, sociability and playfulness of gambling³³. Binde has identified five reasons.

The first two concern the classic dream of winning intended both to overturn life by hitting the jackpot and becoming rich, and for the pleasure deriving from the illusion of obtaining esteem and power to succeed in that risky challenge.

³¹ S. Cerrai, S. Molinaro, G. Resce, *Consumi d'azzardo: Rapporto di Ricerca sulla diffusione del gioco d'azzardo fra gli italiani attraverso gli studi IPSAD® ed ESPAD®Italia*, (Roma: Cnr Edizioni, 2017), Cfr. 22.

³² A. E. Goudriaan, "Gambling and problem gambling in the Netherlands", *Addiction* 109 (April 2013): Cfr.1069.

³³ P. Binde, "Why people gamble: A model with five motivational dimensions", *International Gambling Studies* 13, no 1 (2013): Cfr. 82.

The third reason concerns intellectual stimulation: for some people, gambling is a hobby and an interest used to stimulate the intellect through the development of skills and strategies required in the types of games of chance that also have aspects of *agon*, such as poker. Others perceive gambling as a way to change mood: particularly, it is often used to distract and relax from daily commitments and thoughts, just as any other hobby or leisure activity.

Finally other people see in gambling the social dimension of some games. Gambling serves as a way of getting together and socializing with other people³⁴. Examples of this are plentiful: it is quite common for elderly people meeting all together in a bingo house or for groups of friends having a good time in a betting shop or in a casino. Some of these games are linked to old traditions and they represent a generational connection within the family. One of the most famous cases is the Italian Tombola, a different version of the bingo, played during Christmas and New Year season, after the main dinner and the presents time, among children, parents, grandparents, uncles, friends and so on.

Besides this first argument, the justice theory appeals to another argument, in favour of its legalization, more oriented on the economic level.

This is the topic of *distributive justice* that supports the idea that the resources of society should be equally distributed and gambling is a good way to raise funds for projects of public interest. Gambling, would allow an equal redistribution of resources, that is, the redistribution of money from the wealthiest people to those who are in poor conditions, reducing the social gap. If gambling really allowed the government to finance projects paid by the rich in favour of the poor, then it could be concluded that gambling contributes to social justice³⁵. In more concrete terms, legalized gambling would thus be an effective way to support public spending on

³⁴ *Ivi*, Cfr. 84-88.

³⁵ T. J. Repham et al., "Casino Gambling as an Economic Development Strategy", *Tourism Economics* 3, no 2 (1997): Cfr. 161-183.

health and social care services.

Much of the legalized gambling policy is based on this idea. In this regard, in some parts of the United States, Canada, South Africa and France, gambling has been used in casinos as a strategy to raise funds for urban-regional development projects to be adopted in areas particularly disadvantaged³⁶.

This second argument in favor of justice presents two incongruities that contribute to creating doubts about the theory.

The first refers to the fact that we are talking about taxes and that people always hope for lower taxes, while still requiring large amounts of high quality public services. Although taxes do not appeal to people, a public system that raises funds from a tax-based system to finance the public activities that society needs, is considered more just and efficient than leaving the choice to individual conscience. Through this system, the government is able to guarantee various services of public interest to its citizens, such as protection and security, compliance with the law that prohibit the use of force and fraud in mutual relations and poverty reduction³⁷.

When, however, we talk about funds raised by gambling, it is questionable whether it is a right act or not. It should not be forgotten that the funds raised through gambling also come from gamblers who have matured an addiction and who have encountered various problems by continuing to gamble. In fact, governments prefer not to identify and allocate the proceeds collected from gambling for particular projects, but rather to channel them together with total public revenues and to administer them for the various projects.

Furthermore, it should be noted that people, for some types of services, such as the police, are willing to pay high taxes, while for others they ask for lower taxes or even zero taxes, either because these services are considered not so indispensa-

³⁶ M. Pedroni, "The «banker» state and the «responsible» enterprises. Capital conversion strategies in the field of public legal gambling", *Rassegna Italiana di Sociologia* 1 (2004): Cfr. 71-98.

³⁷ Collins, *Gambling and the Public Interest*, Cfr. 45.

ble or because sometimes they are unpopular. Within the latter category there are, for example, the services that make art accessible to all, even to the poor or funds for research in humanistic academic disciplines. Expenditures for combating and reducing poverty are also often underestimated and not considered to be of public interest. Thus, even relatively high gambling tax revenues are justified by the fact that they make public spending politically possible for activities that otherwise people would classify as "waste of money".

The second difficulty lies in fiscal policy itself, as there is a general mistrust in accepting gambling taxes as a good way to promote social justice. This is because the revenue from gambling, generally, in spite of what is believed, derive from the poorest sections of society and are used to finance projects benefited by the less poor. In particular, lottery funds are intended to finance scholarships for universities or to support cultural activities, such as art and music, services generally enjoyed by middle classes³⁸.

The fact that gambling promotes social justice by guaranteeing a redistribution of wealth is to a large extent dependent on the government, that is, on how it manages and spends money from gambling. In fact, some institutions have used gambling to generate funds to be allocated to charity, revealing, among other things, a more effective way than the simple demand for donation. However, opponents still wonder whether it is morally right to take advantage of an activity that mainly exploits addiction and problems, as well as the less well-off classes, to raise their funds, even if they are destined for charity.

In this regard, in 2000 the Canadian West Foundation conducted a research whose purpose was to investigate gambling and, in particular, on its charitable function. In particular, a questionnaire was designed to gather information on the use and attitude that people have towards gambling. A random sample of 4,000 charity

³⁸ *Ivi*, Cfr. 46.

organizations operating in Canada was chosen. Respondents were given a list containing various answers and were asked to indicate what they reflected or better could be approached to the work done by their organization. Religious organizations represented the largest group (35% of the sample), followed by social service organizations (17%), cultural, artistic and recreational organizations (16%), health, education and research (around 10%). About 34% of respondents reported that their organization, at least once between 1955 and 1999, took part in charitable gambling activities, such as bingo, lotteries or casinos.

From the answers provided by the sample, it emerged that an organization's function is a factor influencing its decision to engage in games for charity or not. Moreover, the percentages of use vary from province to province, suggesting how the various political environments play a fundamental role in determining whether that charity must use gambling for fundraising. 11% of respondents identified charity gambling as a fundraising method that generated the most income for their organization. Overall, it has been seen that health organizations are more likely to identify gambling for profit (22%), followed by culture, art and recreation (19%), social services (16%), education and research (12%) and religion (2%)³⁹.

This survey also measured the number of organizations that stopped using gambling as a fundraising method: in particular, about 9% stopped permanently.

Furthermore, the respondents specified the reasons that led them not engage in this type of charity activity; among these reasons we find, in addition to the lack of volunteers or staff, the ethical concerns related to gambling.

It should also be mentioned that although gambling is considered an important source of fundraising, it is not always completely stable. In the reference study, only 12% said that gambling represents a very stable source of income.

³⁹ J. J. Aznier, R. Roach, "The ethics of charitable gambling: a Survey", *Gambling in Canada Research Report* 10 (2000): Cfr. 9-16.

The results obtained represent a first step towards a better understanding of the pros and cons of gambling related to the topic of distributive justice. They show that for most respondents, charity gambling is not just a fundraising method since it evokes images of addiction and can raise a range of ethical concerns. And this is one of the main reasons why institutions avoid using gambling for good purposes. Specifically, the subjects who participated in the survey can be divided into four groups, reflecting four opinions related to gambling, quite different from each other:

- the first group includes all those subjects who refuse to use the charity gambling emphasizing its problematic nature;
- the second, those who are forced to use it, but express a significant discomfort in considering it as a good method of fundraising;
- the third, those who recognize some negative aspects of gambling but still support it, as they consider it a good method for fundraising;
- finally, the fourth group contains those who do not consider the use of charity gambling to be problematic⁴⁰.

On the basis of these results it seems that the largest group is the one that expresses the greatest discomfort on the use of revenue from gambling and therefore prefers to avoid using this activity for fundraising, confirming some of the doubts and the perplexities presented by the opponents to the pro-gambling vision.

In summary, the supporters of the justice argument do not conceive the fact that, in choosing the policy to be adopted, only the negative effects of gambling are taken into consideration. First, they point out that the majority of gamblers have no gambling problems. Secondly, they reiterate that even by prohibiting gambling, man will always seek ways to satisfy his instincts by making use of the illegal offer. Therefore, since gambling can not be eliminated, it is better to legalize it, subject it to taxation or use it to raise funds to donate to charity.

⁴⁰ *Ibidem.*

2.2. Utilitarian argument

The utilitarian argument partly refers to the theme of justice, in particular retributive justice and, on some points, anticipates the liberal argument.

Utilitarianism is a philosophical idea connected to consequentialism which states that the main reason for human action consists in the search for individual or social good. The central idea of this theory is that human beings are driven by utility, intended as a principle founded on the pursuit of happiness, conceived as an escape from pain and a pursuit of pleasure. According to this theory, pleasure and liberation from pain are the only things that man desires and which he sets as goals to be achieved in the course of his life.

A human action is judged on the basis of the principle of utility. Utility means that an action or a behavior have to produce positive consequences in the reality of pleasure or pain. Man is called to pursue actions that tend to provide the greatest possible happiness, as considered morally correct, and to avoid those that distance him from happiness. He is also called to promote the greatest possible happiness not only of himself but of all sentient beings, that is, capable of feeling pleasure and pain, which can be involved in the action itself. In this way, a morality and legislation based on the principle of utility provide the appropriate motivation towards a behavior for general happiness in individuals naturally driven by selfish interests.

In other words, following Bentham's reasoning, utilitarianism can be defined as the philosophical idea that the good is the greatest happiness for the biggest number of people.

The second aspect that distinguishes utilitarianism is the fact that it is inspired by the "consequentialist" moral doctrines, insofar as it claims that an action can be defined as good or bad, not because of the motivations that induced an individual to make it, but because of its consequences, of the results it produces. A certain action is justified only if it produces better results than any other option, if it is able to provide pleasure and reduce pain compared to any other alternative action. According

to this idea, what is important is not the agent who carries out certain behaviors, nor the nature of the actions themselves. What is of crucial importance is the state of the situations following the acts⁴¹.

The utilitarian argument in support of gambling can be considered starting from these two characteristic aspects of this theory.

Firstly, legal gambling produces the greatest happiness for the biggest number of people. The statistics concerning the Italian case and the Dutch case, presented in the justice argument, show how a bigger percentage of people gets pleasure and only a small percentage of them develops stress and gambling related problems. Furthermore, it is based on a system for which customers pay to have, in exchange, a leisure activity that allows them to have fun and relax; suppliers are satisfied when they get revenue for the service they offer and see their customers happy with the use of recreational and socializing activities; the state raises funds from the taxation of games of chance, thus, funding various services such as social-health expenditure. There are also third parties to this "triangle" that benefit from gambling, that is all the subjects that somehow work for the gambling industry: for example, the producers of slot machines and vlt, the producers of scratch cards, the shops responsible for direct sales of scratch cards and lottery tickets. Finally, as it was anticipated in the first chapter, the presence of legal gambling contributes in part to the fight against organized crime, providing legal games and thus reducing illegal gamblers.

Secondly, being a doctrine inspired by consequentialism, the utilitarian theory does not condemn the activity of gambling itself, nor the player and the suppliers' intentions, rather condemns the consequences resulting from this activity. Consequently, even for the supporters of utilitarianism, it is not correct to prohibit gambling. The individual who produces not-desired results by the use or supply of such

⁴¹ "The History of Utilitarianism", Stanford Encyclopedia of Philosophy, accessed January 23, 2019 <https://plato.stanford.edu/entries/utilitarianism-history/>.

activity should be punished. For these reasons, supporters of this philosophy are in favor of legalizing gambling.

Some anti-gambling supporters may argue that gambling, in fact, causes widespread and intense offense and distress that outweighs the pleasures of the consumers and suppliers of gambling services⁴². In other words, in the evaluation of utility gambling, utilitarians give the same weight to negative and positive sides, while other philosophers think that the intensity of negative aspects is not equivalent to the intensity produced by the benefits of gambling and that an evaluation made in this way is not right.

In addition, the situation does not change so much if the activity is kept illegal: there will still be producers, suppliers and customers of gambling, the only difference is the state revenue.

Two further benefits, less ambiguous, contribute to supporting the utilitarian theory applied to gambling. The first refers to the fact that many citizens of countries in which gambling is prohibited, look for countries, like Atlantic City or Monte Carlo, in which gambling is legal in order to satisfy their desire to gamble. This situation represents, for these countries, an incentive to legalize gaming in order to prevent its citizens from carrying monetary resources abroad. The second benefit remains the fact that in countries with an illegal gambling industry the costs will remain elevated and the benefits deriving from the satisfaction of consumers, producers and suppliers as well as the presence of taxes will remain lower, compared with the countries with a legal gambling industry⁴³.

In conclusion, according to utilitarians, prohibiting gambling does not make sense because it produces positive effects for the majority. And even if we admit

⁴² Collins, *Gambling and the Public Interest*, Cfr. 42-43.

⁴³ *Ibidem*.

that gambling can be harmful, it would make more sense to intervene in retrospect to punish those who have abused this activity by creating inconvenience to themselves and to third parties. In addition, they point out how, by prohibiting gambling, the effect of the disappearance of the activity will not be achieved, but simply the increase in the illegal offer, which produces more costs than benefits to society.

2.3. Liberal argument

Liberalism is a term that began to be used from the last century to indicate the Enlightenment thinkers whose thoughts were based on two fundamental principles: freedom and equality. They are the supporters of civil rights, freedom of speech, of the press, freedom of thought, of religion, democracy, gender equality and race and the recognition of full individual autonomy.

One of the precursors of liberalism was John Locke, who, in his work "*Two treatises on the government*", among other things, speaks of the natural right to life, liberty and property, underlining that governments must not violate these rights at all, rather they must ensure compliance and application. The main purpose of governments is to guarantee the basic political conditions for the exercise of personal freedom. Every human being must be free to make choices without fear of how many aspects of his life are in line with the freedom of everyone else. If applied to the political sphere, liberalism places at the center the problem of the freedom of individuals, whose rights must be guaranteed also against the interference of the state. In the economic field, however, it refers to the belief that it is necessary to avoid or reduce the intervention of the state in the economy, as it acts according to the rules of free competition⁴⁴.

⁴⁴ J. Locke, *Two Treatises Of Government*, (Adamant Media Corporation, 2005), Cfr. 106-111.

In essence, it is a doctrine that emphasizes the limitation of the powers of the state in favor of the natural rights of individuals. The role of the state must be minimal, that is

«[...] enforces contracts, protects private property from theft, and keeps the peace»⁴⁵.

Therefore, the liberals oppose three types of policies:

1. they reject a paternalistic state that tries to protect people. According to them, such a state limits their right to decide which risks to take;
2. they oppose the redistribution of wealth: a state that imposes the system based on taxation is a form of coercion similar to stealing. They are rather in favor of free market;
3. obviously, they reject moral laws: they consider the laws that impede certain activities on the basis of the moral convictions of the majority to be highly coercive⁴⁶.

Besides the inhibition of the interference with the freedom of others, liberalism does not follow particular positive doctrines on how people should lead their lives or what choices they must make⁴⁷. Liberals defend a wide range of free actions, including choices about leisure activities.

Trying to apply these characteristics to gambling, we note that the liberals wish to legalize this activity because, first of all, they do not consider its moral consideration sufficient; second, for them a state that imposes on its citizens the limitation of an activity for their protection is presumptuous. On the other hand, they express strong doubts about the legitimacy of taxation on games of chance, being

⁴⁵ M. J. Sandel, *Justice: What's the right thing to do?* (New York: Farrar, Straus and Giroux, 2009).

⁴⁶ *Ibidem*.

⁴⁷ N. L. Rosenblum, *Liberalism and the Moral Life* (USA: Harvard University Press, 1989), Cfr. 21-23.

against any redistributive system and in favor of free market.

Liberal thinking requires more complex reasoning when it comes to activities, such as gambling, which can harm third parties. To do so, let's resume John Stuart Mill.

Mill also emphasizes the complete autonomy of the individual towards others and the state, underlining how the latter has the task of guaranteeing the rights of the former. He also rejects any paternalistic conception of the state, as everyone is the only guardian of his own health, both physical and moral. And nobody has the right to force someone else to do something just because they are convinced that this is good for him. However, when the opponents show how difficult it is to guarantee full freedom to an individual who, with his own free action, harms third parties, responds in this way:

«Whoever fails in the consideration generally due to the interests and feelings of others, not being compelled by some more imperative duty, or justified by allowable self-preference, is a subject of moral disapprobation for that failure, but not for the cause of it, nor for the errors, merely personal to himself, which may have remotely led to it. In like manner, when a person disables himself, by conduct purely selfregarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offence»⁴⁸.

To further point out his thinking, he continues reporting an example:

«No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty»⁴⁹.

⁴⁸ Mill, *On Liberty*, 75.

⁴⁹ *Ibidem*.

This is the only condition for which the state can interfere with individual liberties:

«But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom»⁵⁰.

Mentioning gambling as an example, it becomes clear that, following liberal reasoning, it is not fair to condemn a person for gambling; if, however, the gambler does not take care of his family or causes any damage to it because of gambling, then the gambler must be punished. Mill is saying that activities that can cause undesirable consequences, such as gambling, can not be condemned, therefore prohibited, a priori. After all, anything not used responsibly and abused leads to unwanted excesses. Consequently, what must be condemned and subjected to punishment, moral or legislative according to the case, is the consequence of the actions and the subject who has performed it. To continue with the example above, if a person loses his job as a result of gambling and can no longer support his family, it is not considered right to prohibit gambling to prevent this from happening in the future. It is, however, a duty to punish the individual who is the protagonist of the affair and his action.

But for what reason for Mill, and for liberals in general, is it so important to defend individual liberty and to limit state action as much as possible?

According to Mill, the state should interfere as little as possible with the individual choices, because when it limits a freedom - even if it concerns the simple choice to decide how to spend free time, as in the case of gambling - it is easy then to extend this thought to other liberties, limiting these too. It is serious, according to the liberal, when the state tries to prescribe individual conduct concerning the area

⁵⁰ *Ivi*, p. 76.

of relationships, religious choices, political beliefs or economic activities. Not necessarily, then, government intervention is always correct. Or, anyway, it could be correct for a part of the population and wrong for the remaining part.

Secondly, if we agree that the state has the right and the duty to interfere with the other people's decisions, even for their own good, we can not complain if one day the state did the same with decisions that concern us. If a state decided to prohibit gambling, why could it not do the same for cigarettes or extreme sports?

Moreover, it is a question of dignity, since, by limiting also the freedoms that may seem less important, for example the freedom to spend one's free time as one likes, the state is violating fundamental rights recognized to all without distinction. Respecting everyone's freedom means ensuring dignity and consequently happiness.

Being free to choose how to lead one's life is the basis for a happy life. Leaving everyone the opportunity to spend their free time gambling, either to pathological or problematic players or to the responsible ones, means ensuring everyone's happiness. And while it is true that some subjects do not derive happiness from gambling, it is equally true that there is a part of the population that derives happiness (and consequently ensure this option), is a sacrifice that society can do for a wider good: respect for freedom.

The greater human happiness can only be achieved with the respect for human freedom. However, the dissenters must be also listened to. According to Mill, it is essential to listen to them for two reasons: their opinion could be right; and even if this was not true, encouraging most of them to debate about these ideas will help to prevent them from remaining closed in their own prejudice.

Mill expresses his own detachment from conformism, as a society that requires its members to adhere to certain customs and beliefs is an evil because it prevents the individual to improve himself, and therefore to reach the supreme end of human life, that is, the full development of human faculties. For self-realization and

progress, man needs to experiment, develop skills and abilities, and ultimately needs freedom. The freedom to experiment increases the sense of responsibility. Liberals defend the liberalization of gambling because, from a certain point of view, it can also bring beneficial effects to some so-called vulnerable subjects: leaving child free to experiment with gambling, under the guidance of an adult, lead to a growth of the child's responsibility towards this type of activity⁵¹.

The process of self-realization that leads to happiness changes from individual to individual. Only in this way, individual can contribute to personal progress, of the species and of society.

«He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties»⁵².

Limiting or forbidding gambling and therefore preventing people from gambling is detrimental because it does not consider the right that everyone has to pursue pleasure as it wishes. Using the power of the state to prevent people from making choices, restricts individual freedom and contrasts with the political ideal under which individuals must be free to decide how to lead their lives.

2.4. The Dutch case

From the analysis made so far, it is understood how, in recent years, gambling has become increasingly popular: most people have gambled at least once in their life and there are more gamblers than non-gamblers⁵³.

Consequently, within the European Union each member state has been called

⁵¹ Wolff, *Ethics and Public Policy*, Cfr. 41-42.

⁵² *Ivi*, p. 55.

⁵³ M. Abbott et al. *A review of research on aspects of problem gambling* (London: Gambling Research Centre, 2004).

to regulate its gambling market, in the most free way possible and adopting the most appropriate policy and philosophy. In doing so, each member state must remember to safeguard the upper end of consumer protection, since gambling may create substantial risks.

In the case of the Netherlands, politics still has a tendency to be liberal and tolerant in many respects, including the gambling sector. This is demonstrated by the fact that currently, in the Netherlands, gambling is legally provided by law and managed by the State Monopoly.

The biggest gambling industry is the National Lottery, which offers both scratch cards and lotteries. The peculiarity of this national lottery consists in the fact that it is obliged to pursue a socially responsible policy, ie it has the obligation to support scientific research, prevention and treatment of gambling addiction. It must also ensure that its product policy does not lead to addiction and inform players on the concepts of gambling and the risks that may result. One example is that in order to access National Lottery products, there is an age limit for gamblers, that is at least 18 years old⁵⁴.

In addition to the National Lottery, there are three other areas of games of chance, also regulated in an important law introduced in 1999: casinos, gambling club and bingo in pubs. This law was particularly important because it aimed at opposing the negative consequences gambling-related, such as the development of gambling addiction, illegal gambling, crime and financial frauds. For these purposes, the law of 1999 introduced the obligation to obtain a license in order to offer games of chance legally. A recent bill has amended several aspects of the 1999 law with the aim of strengthening its objectives.

The Netherlands pursues legal policy and liberal philosophy because it is

⁵⁴ Meyer, Hayer, Griffiths, *Problem Gambling in Europe*, Cfr.189-203.

aware of the fact that the majority has always gambled and still wants to gamble, so the ban would only cause a growth in the network of gambling of illegal nature. The government's goal of maintaining legal gambling is, therefore, seen as a way to prevent such a network and thus to reduce the various illegal opportunities. However, the further awareness that a totally free gambling would cause a disproportionate increase in gambling offers, led to the decision to subject this activity to the state monopoly. In fact, research shows how the introduction of gambling in its various modes, such as lotteries, slot machines, online gambling, games on TV or cell phones, facilitates its accessibility for all people of different ages, with the result of a considerable increase of people who need help for problems related to gambling⁵⁵. For this reason in the Netherlands the introduction of state monopoly was presented as a way for reducing competition between operators with a view to preventing the excessive consumption of gambling services.

The Dutch history of gambling has had an opposite course compared to the Italian one. Until 1726, in the Netherlands gambling was forbidden, although around the eighteenth century it was the custom to organize numerous lotteries. However, the prohibition was causing an increase in the illegal gambling circuit. For this reason, in 1726 the State Lottery was introduced. In the 1930s even the bets on horses became legal, followed by sports betting legalized in 1958.

Further significant change occurred in 1964 when the Gambling Act was accepted and a gambling control commission was established whose task was to regulate the state lottery, horse and sports racing. The objectives of the Gambling Act were the following: reduce the illegal nature of gambling; give people who want to gamble a legal opportunity; protect consumers by offering fair gambling; prevent gambling addiction.

In 1974, gambling was extended under government license: initially there

⁵⁵ Abbott et al., *A review*, Cfr. 129-132.

were only three casinos, but now there are fourteen casinos all owned by the state and managed by those who own the "Holland Casino" license.

Subsequently, the national gambling market became a monopoly of the Dutch government and in 2012 the Gambling Act commission was replaced by a new organization, the Gambling Authority (AG). The AG has the legal authority to issue licenses for games of chance; monitor supplier compliance with applicable laws and regulations; monitor compliance with payment regulations; reduce illegal gambling activities; impose penalties for those who violate gambling regulations. In addition to these tasks, the AG maintains the task of preventing and limiting that gambling becomes a widespread addiction.

Another interesting aspect of the Dutch situation concerns the fact that, according to the Dutch law, gambling providers within the national monopoly are not allowed to make personal profit. Part of the income is held back by the state in particular through state lotteries and casinos and the remainder must be used for good causes, in particular through sports betting, scratch cards and all lotteries with the State Lottery exemption. The only exception to this rule concerns slot machines that are located outside the casinos; these are not part of the state monopoly so the suppliers, from them, can make a personal gain⁵⁶.

In a review, it was found that there were changes in total costs and net revenues, which increased from 1996 to 2004 and then leveled between 2004 and 2010. This leveling may be due to policies more restrictive than in the past. Another important development concerns the fact that in the last 15 years, in the Netherlands, there has been an increase in gambling halls, especially in city centers⁵⁷.

Regarding the degree of involvement in gambling, in the Netherlands the propensity to gamble is 0.45, placing the nation in the medium range of involvement, comparing its situation with that of other Union European. More specifically, the

⁵⁶ Meyer, Hayer, Griffiths, *Problem Gambling in Europe*, Cfr.189-203.

⁵⁷ Goudriaan, "Gambling and problem gambling in the Netherlands", Cfr.1067-1069.

involvement is higher than in Belgium (0.25), Luxembourg (0.32) and Germany (0.39). The Netherlands can be compared to Denmark (0.44) and France (0.48), while there is a lower propensity to gamble than the United Kingdom (0.69).

Annual gambling fees in the Netherlands are estimated at 127.50 euros per person. From the various research based on gross income, it emerged that the most popular gambling activities in the Netherlands compared to other European countries are: gambling in casinos, slot machines; while the lottery entries, horse racing and sports betting are relatively lower than the European ones.

Currently, the Netherlands is facing a very important issue concerning online gambling. The Dutch Senate has rejected the proposal to legalize online gambling, as a result online gambling is currently not regulated.

The president of the Dutch gambling regulator, Kansspelautoriteit, Jan Suyver, called this fact a nationale disgrace; for this reason he urged the Senate to make a decision regarding the illegal nature of online gambling, and then approve the bill to reorganize the Dutch online gambling market. The Netherlands appears to be one of the few European countries in which the online gambling market has not yet been regulated, consequently new legislation would be essential in order to guarantee that international companies can apply for licenses and, thus, work in a safer and more regulated environment. According to the proposed bill, international gambling companies can apply for licenses and operate in a secure environment. Furthermore, the approval of this legislative act will give the Kansspelautoriteit wider powers that also allow the identification and sanction of those who transgress the norms⁵⁸.

This brief review of the Dutch situation confirms what has been presented so far: the liberalization of activity is the most effective way to counter the infiltration

⁵⁸ Gaming Authority, *Supervision & enforcement in the framework of the Betting and Gaming Act. Working towards the Remote Gambling Act and the Casino Regime (Modernisation) Act – Annual Report 2017* (The Hague: the Netherlands Gaming Authority, 2017), Cfr. 1-59.

of organized crime. However, gambling left totally uncontrolled does nothing but increase the availability of offers of games of chance and, therefore, the rate of people with a gambling disorder. State regulation, although minimal, is closer to the best choice.

CHAPTER 3

LIBERTARIAN PATERNALISM AND PUBLIC HEALTH

3.1. Nudge theory and behavioral sciences

Nudge is an economic theory born with the new millennium, thanks to the 2017 Nobel Prize in Economics Richard H. Thaler and his collaborator Cass R. Sunstein. The peculiarity of this theory consists in being part of an area of experimental economy, “behavioral economics”, which distances itself from the principles of standard economic theory. According to behavioral economics, traditional economy is too rigid, too perfect and therefore too far from reality. The traditional approach considers man as a perfectly rational being, able to establish what he wants and to order the possible alternatives according to logic. Within Theory of Games, for example, we find the conception that man, when he has to take a risky decision, for example in a bet, is able to calculate the expected utility: it is the sum of the possible outcomes of his bet, winnings and losses, multiplied by the odds⁵⁹. Behavioral economics contests this perfection by demonstrating how individuals' choices can be influenced by fallacies, irrationality and lack of self-control.

Behavioral economics employs concepts taken from psychology and applies them to financial phenomena, thus elaborating alternative behavioral models with respect to those formulated by standard economic theory. In a certain sense, it contaminates the rigid market laws with a little humanity, for greater authenticity and adherence to reality. Even economy, in fact, is reigned by unpredictable and not always reasonable human beings, thus it is influenced by human factors, difficult to

⁵⁹ J. V. Neumann, O. Morgenstern, *Theory of Games and Economic Behaviour*, (Princeton: Princeton University Press, 1944): 10-12.

encode in equations, which affect individual decisions and market outcomes.

Behavioral economics has historical precedents in the works of the 50s of the last century, in particular those of Maurice Allais and Herbert Simon. However, the greatest impetus came from the seventies thanks to the works of Amos Tversky and Daniel Kahneman. One of the most innovative theories of these two Israeli psychologists is Prospect theory. It was presented as an alternative to utility theory. While classical theory was intended to establish ideal conditions according to which a decision can be defined as "rational", prospect theory proposes, on the contrary, to provide a description of how individuals actually behave before a decision. Prospect theory focuses in particular on decisions in risky conditions, which are defined as the decisions in which the probability associated with the possible outcomes of each alternative available is known, or can be estimated⁶⁰.

Although Nudge was originally proposed in the United States behavioral economy, it was also used in other areas such as political philosophy. This theory is based on the concept of choice architecture: just as traditional architecture aims to create and organize spaces that can be used to meet human needs (buildings, highways, bridges, gardens, monuments, etc.), choice architecture tries to organize the context in which individuals must make decisions, suggesting and promoting the best possible choices. According to this theory, importance must be given to every single detail as it can have a great influence on individuals' behaviour. Obviously, it is not certain that what we plan is the perfect choice, but we are aware of the fact that we can try to design the best choices, with the greatest positive effects⁶¹.

Nudge theory is based on stimuli that aim to politely encourage citizens to behave more effectively and efficiently for themselves and for their community.

⁶⁰ D. Kahneman, A. Tversky, "Prospect Theory: An Analysis of Decision Under Risk", *Econometrica* 47, no.2 (1979): Cfr. 263-291.

⁶¹ R. H. Thaler, C. R. Sunstein, *Nudge. Improving Decisions About Health, Wealth, and Happiness*, (Yale University Press New Haven & London, 2008): 7-10.

Thaler and Sunstein define a nudge as

«[...] any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid»⁶².

Another characteristic element of this theory is that it proposes two different classifications of people, who reflect two different kinds of thoughts and decisions; One has been called "homo oeconomicus", characterized by logical and rational thinking that contrasts with "homo sapiens" whose behavior is irrational.

"Homo sapiens", or *Human*, is a type of person that we could consider "real" because it takes "real" human decisions, driven by a wide range of considerations, emotions and human factors such as inertia, optimism, negation. Having limited energies, little attention, limited knowledge and decision-making, he systematically makes mistakes and he is easily affected by social norms and advertising.

Human beings are irrationally optimistic and this is demonstrated in various situations. For example, successful lotteries are due to the fact that people tend to be fatalistic and they fully trust their potential and love for risk, even if this means damage to their own lives and health. For example, individuals, both smokers and non-smokers, are well aware of the damage caused by smoking, such as the risk of cancer, however, they continue to smoke.

"Homo economicus" or *Econ* is, on the contrary, an imaginary type of person who always thinks logically and rationally and does not allow himself to be influenced by the various heuristic factors that cause Humans to behave in an irrational, useless, destructive or negligent way. It is able to maximize his usefulness and make undistorted predictions.

⁶² Ivi, 6.

Thaler and Sunstein have explained that this classification does not refer properly to types of people, but to two characteristics that are part of each person and at the base of which two different cognitive systems work⁶³.

The automatic system is rapid, instinctive, imprecise, irrational and does not involve what we usually associate with the word “thinking”. Human beings are driven by this type of system. The reflective system is intentional, rational, aware, slow and calculated. It is what comes into play when we have to decide which university to attend or which destination to choose to go on vacation. It is typical of Econs.

These two different ways of acting are neither functional nor dysfunctional. Some people are more governed by one or the other system and anyway, depending on the situation and on the basis of what is deemed necessary, each person activates one or the other. The point is that people are not always able to balance the use of the two systems and understand which ones to activate. In certain situations, they are more likely and encouraged to think automatically when it would be better to think through the reflective system.

The reasons why people make mistakes are explained in the way human mind works, influenced by bias, heuristics and way social interactions occur. Here are some of these.

The first heuristic identified by behaviorists is *anchoring and adjustment*. If we want to estimate the probability of an event, we start thinking about a touchstone, an anchor precisely, based on the information that we already possess. For example, if we ask a person how big town A is, he will compare it to towns B and C of which he knows the size and he will try to estimate how much they differ from town A. The errors occur because not always the information used to make the adjustments to get to the solution are sufficient.

⁶³ *Ivi*, Cfr. 10-12.

The second heuristic is called *availability*. According to this heuristic, individuals attribute an estimate of the probability of a risk on the basis of how easy it is thinking of an example related to that risk. People, due to recent events, associate a more serious risk to terrorist attacks than to excessive exposure to the sun.

The third is defined *representativeness*. People evaluate the probability of a hypothesis considering how much this hypothesis can resemble available examples, even when there is no clear cause-effect link⁶⁴. It is believed that a very tall African is much more likely to become a basketball player than a shorter Chinese.

Other bias come from excessive *optimism*. People generally tend to be highly optimistic, exposing themselves to risk, even their own health. An example comes from the fact that when we think about our future we are inclined not to think about the probability of contracting certain types of diseases, of divorcing or becoming unemployed.

In many situations, careless choices are made. In these cases we are talking about *mindlessness*. It often happens that people stop paying attention and activate the "autopilot", that is the impulsive system. It happens when we perform an action unconsciously, for example, when we want to go to a place and we find ourselves in the car on the way to work.

Individuals also demonstrate a tendency, by inertia, to prefer the current state of things also because changes can be conceived as losses. This *status quo bias* is therefore closely linked to an aversion to losses. For example, it often happens that when someone chooses a particular retirement plan, he does not make any changes in the following years⁶⁵.

Finally, the effects of the social influences that produce the mentality "*following the herd*" deserve mention. People are strongly influenced by other people's behaviour: they tend, for example, to learn from others, to follow fashions and behav-

⁶⁴ A. Tversky, D. Kahneman, "Judgment under Uncertainty: Heuristics and Biases", *Science*, New Series 185, no 4157 (1974): Cfr. 1124-1131.

⁶⁵ Thaler, Sunstein, *Nudge*, Cfr. 23-35.

iors seen in others. This is because we tend to conformism, both because we allow ourselves to be influenced by what others think and because we do not want to fall into disapproval. In fact, we try not to break social conventions because we are convinced that others are focused on our behavior. This effect is called “spotlight effect”. We are convinced, for example, that others put much more attention on how we dress, especially when we do not wear clothes that are appropriate to the context, than they actually do⁶⁶.

The awareness of how these bias influence Humans creates the conditions to develop the “choice architecture” with the aim to contain these bias and influences and to suggest and promote the best possible choices. These nudges, that is stimulus, are nothing but simplifications of the decision-making process.

An outstanding example is the so called “default strategy”. It has already been seen that, in many situations, for various reasons, individuals do not want to choose, leaving things as they are, even if the consequences are not desired. As a solution, it has been thought to plan a default option, which is a prevalent setting in case someone chooses not to do anything, but keeping the possibility of making changes⁶⁷. If a computer is left on for many hours without using it, it will go into a standby mode to prevent energy waste. This is an example of default. With this strategy the experts say "we are aware that you probably do not have time or desire to make the setting, even if this would be the best choice, therefore we set this mode as default, leaving you the possibility to change it whenever you want".

⁶⁶ *Ivi*, Cfr. 53-70.

⁶⁷ *Ivi*, Cfr. 35.

3.2. Libertarian paternalism

The philosophy behind Nudge theory is called libertarian paternalism. This new philosophy consists in the union of two seemingly opposing concepts: paternalism and libertarianism. Thaler and Sunstein state:

«We elaborate a form of paternalism, libertarian in spirit, that should be acceptable to those who are firmly committed to freedom of choice on grounds of either autonomy or welfare»⁶⁸.

For the libertarian aspect they refer to the thought of Milton Friedman, in particular to his work "*Free to Choose*". Like Friedman, they are great supporters of every civil liberty and economy, and therefore favorable to a minimum state; they are opposed to any excess of regulations and to any impediment to individual liberties. The goal is to formulate policies that at least protect or even increase freedom of choice in any area. They avoid policies that block freedom of choice.

However, they consider the form of soft-paternalism important. It aims to influence individuals in such a way as to encourage them to make the best choice. They legitimize the influencing action of choice architects as long as they tend to improve people's life and society.

In essence, every option is made available to individuals, providing that choice architects develop policies that guide people to make the best choice for their own well-being and for that of society. These choice architects not only monitor or support individuals' choices, but try to accompany individuals toward the best direction and leave them all doors open.

One of the most innovative aspects of this strategy is precisely being a gentle "push" directing without forcing. The choice architects try to prevent the automatic

⁶⁸ R. H. Thaler, C. R. Sunstein, "Libertarian Paternalism Is Not an Oxymoron", *Public Law and Legal Theory Working Papers* 43, (2003): 2.

system from taking over the choices in which the reflective system would be sufficient, avoiding the mistakes and the heuristics mentioned above in human beings; they leave the Econs indifferent.

Each nudge is designed to have the maximum chance of being effective and the least likely to be harmful. According to this concept, the authors of Nudge theory are taking into account the asymmetric paternalism that involves the activation of measures aimed at helping the less sophisticated, causing the least possible harm to all others. Nudges, in fact, are such when they influence the behavior of the Humans, remaining indifferent to the Econs.

This concept can be better understood in this example.

Image 1 – Basket for cigarettes



Source – Picture taken in front of a supermarket in Groningen

Image 1 was taken in front of a supermarket in Groningen, one of the most important cities in the north of the Netherlands and where I did my Erasmus + for thesis. Image 1 shows a circular grid with a board attached on the side next to the supermarket entrance door. On this board there is the image of a used cigarette that is about to drop into a basketball hoop. This basket is inviting, nicely, people who want to smoke before entering the supermarket to hit the board with the cigarette-butt. The goal is to avoid the spreading of cigarette butts in front of the supermarket entrance. This is a real nudge as it influences people to make the best choice for society and environment, ie avoiding the littering in public roads, without preventing people from deciding to do otherwise. In Image 1 there is also a cigarette out of the basket, to prove that anyone is free to ignore the nudge without having to face costs or consequences.

In the Netherlands there are nudges everywhere. The reason probably lies in the fact that the Netherlands is one of the pioneers of economic psychology, a discipline that does not exist in Italy yet. In this country several centers have developed to study behavioral economics and nudges.

The example above is inspired by another nudge that has been very successful in the Netherlands and then started spreading all over the world. That is a nudge that can be found in the men's toilet in Schiphol airport in Amsterdam. In 1987, the supervisor of the Schinphol cleaners, Mr. Jos Bedaf, tried to think up a solution to limit urine out of the urinals. Men, in fact, do not pay much attention when they urinate, causing hygienic-sanitary problems, costs and energies in cleaning. Mr. Bedaf thought that a black fly attached to each urinals could be a sort of target. That nudge had the power to capture the attention of those who used the toilet. The results were so striking that the flies were never removed and are still in the airport toilets. Subsequently, research was carried out in this regard, demonstrating how that simple fly sticker had the power to reduce the leakage of urine by 80%, also leading to significant savings in cleaning costs.

Thanks to these examples, it is clearer the meaning of a nudge and of liberal paternalism. It is also easier to understand why, according to the authors, it would represent a "third way" to the classic liberalism-paternalism debate, as well as an effective bipartisan policy, which can be adopted by both right-wing and left-wing supporters.

3.3. Objections and responses

Many perplexities have been advanced against liberal paternalism, especially by liberals. The authors of Nudge have faced skepticism trying to offer answers. Before proceeding with the analysis of these objections and counter-objections, it is necessary to present assumptions without which it would be more difficult to legitimize nudges.

The first assumption derives from a misunderstanding. It is believed *that influences on individual choices can be avoided*. In reality, the opposite is true for some situations. In many cases, individuals and organizations must make a decision that will lead to different consequences. In these situations, even if decisions were made at random, consequences would be different from another random choice. Anyway, a decision must be made and that decision will have different influences compared to those caused by another option. In other words, the concept is similar to that of the first axiom of the pragmatics of human communication. It is impossible not to communicate. Basically, it is possible to state that in certain situations it is impossible not to influence⁶⁹. Whereas often there is no choice as a choice must be made; whereas the consequences to which certain random or involuntary choices may bring may be positive as well as dramatically negative; why not influence the choices with the aim of leading to the best choice?

⁶⁹ C. R. Sunstein, "Nudging and choice architecture: ethical considerations", *Yale Journal on Regulation* 809, (2015): Cfr.10-11.

The second fact concerns that there are *different types of nudges* of different nature. The decision regarding whether and what types of nudges to use depends on the type of context in which the nudge is to be applied. There are cases in which nudges could not, or better, should not be used. For example, a government has to be neutral during an election period. The fact that a candidate who is first on the ballot list is more likely to be elected than others, could lead to the idea of using nudges to influence citizens' choice. In this case, it is absolutely necessary to maintain a random order of the names of the candidates, so as to guarantee neutrality on the part of the government⁷⁰. Therefore, the situation must be evaluated on a case-by-case basis.

If a nudger does not aim at the well-being of those who take advantage of nudges, creating a nudge driven by *illicit reasons*, then we are talking about the third assumption. If, for example, a subject introduces nudges to encourage people to buy unhealthy products, driven by the sole goal of making money, this is a nudge built for illicit reasons⁷¹. There is, therefore, the risk that the choice architects abuse their power to nudge the individuals in ways that are advantageous to the architects themselves rather than to the users. The authors admit that there is this possibility. What they contest is not the veracity of this hypothesis rather the fact that the theory as such can not be criticized and not taken into account, providing as justification the only fact that there could be this possibility⁷². The theory is born with positive intentions and there are people who have the sincere goal of using it for beneficial purposes. Nudges are effective if nudgers are competent. Nudgers has to be able to help an individual to make the best choice for himself and/or for society. Nudgers has to be able to guess what is best for nudgees. Usually, nudgers succeed in their intentions when they possess one of the following characteristics: great experience

⁷⁰ Thaler, Sunstein, *Nudge*, Cfr. 242-243.

⁷¹ E. L. Glaeser, "Paternalism and Psychology", *Chicago Law Review* 73, no 133 (2006): Cfr.133-156.

⁷² Sunstein, "Nudging and choice architecture", Cfr. 18-19.

and specific knowledge and similar tastes and preferences⁷³. It happens when differences in tastes and needs can be easily identified. When choosing nudgers, these elements must be kept in mind.

Now we can proceed to the presentation of the major perplexities presented by the critics and the objections provided by the authors themselves.

First of all, they state that they diverge from those who oppose any form of forced exchange. They do not share the critics' view, their idea of disapproval of any measure that aims to help poor, poorly educated or unsophisticated people. Nudges are thought to help everyone, especially those people, implying a negligible cost for those who do not need nudges. According to nudge thinkers, this topic is about defending freedom of choice, whatever the cost, rather than general well-being. As a consequence, it makes no sense to proceed with further reasoning.

Secondly, they offers an answer to the criticism of the most fierce liberals who claim that this theory is in fact *paternalistic*: being a middle way between liberalism and paternalism, some form of paternalism is present indeed⁷⁴. Nevertheless it is a soft and means-oriented paternalism. The term soft is used to indicate a paternalism that does not impose any kind of coercion, thus safeguarding the freedom of choice. It does not limit the choice to a single option, like the highly coercive interventions; nor it restricts the options available or offers incentives to opt for a choice, like the soft coercive interventions. It is rather a form of noncoercive interventions⁷⁵ that helps people to make the best choices through different ways, which change depending on the type of nudges adopted:

⁷³ Thaler, Sunstein, *Nudge*, Cfr. 241-243.

⁷⁴ *Ivi*, Cfr. 248-251.

⁷⁵ F. Turollo, "Responsibility as an Ethical Framework for Public Health Interventions", *American Journal of Public Health* 99, no 7 (2009): Cfr.1199-12021.

- mindful nudges: guide people to a more controlled state such as eating healthier, stop smoking, exercising and saving more money;
- mindless nudges: use emotion or framing to sway decisions that people make;
- encouraging nudges: facilitate the implementation or continuation of a particular behaviour;
- discouraging nudges: hinder or prevent behavior that is believed to be undesirable.

The term “means-oriented” refers to a paternalism that respects people's goals; in fact, it does not ask questions about their purposes and does not even try to alter them, on the contrary, it gives people the means to achieve them. However, some critics are against any form of paternalism. In the first place, according to the anti-paternalistic view, allowing forms of soft-paternalism, such as nudges, would then lead to accept more intrusive interventions. To this objection Thaler and Sunstein answer asking if this fear is right to block nudges; if the answer is affirmative, this discussion should be avoided altogether.

Secondly, the anti-paternalistic critics claim that everyone is able to make the best decisions for himself or at least better than those made by a different individual. Most individuals know the best goals to achieve for themselves, as they know exactly their own values and tastes. The answer is that people are able to make the best choices when they have some experience and are well informed or when they get immediate feedback. Only in these circumstances individuals tend to make the best possible choices; otherwise, they are likely to make mistakes⁷⁶.

Closely related to this reasoning there is the last criticism from the anti-paternalistic thinkers. According to liberals, the distinction between means and ends is not always possible because, in certain situations, means correspond to ends⁷⁷;

⁷⁶ Sunstein, “Nudging and choice architecture”, Cfr. 26-29.

⁷⁷ *Ibidem*.

therefore, in these situations, even a means-oriented paternalism is seen as coercive because deciding to have the best means is also deciding to have the best ends. Some people are well aware of the goals they desire but they make mistakes in evaluating the means to achieve these ends. In this way, nudges warn individuals about these errors and bias and consequently help people to achieve their goals. Hence, considering that nudges were not conceived to be coercive but simply to help the choice of the best means to achieve a goal, why don't we use the choice architecture to influence the best possible choices?

Other critics have stated the importance and the right to be wrong. This right is important because "practice makes perfect". The principle of nudges, leaving little room for margin of error, does not allow the construction and growth of one's abilities because it does not allow people to learn⁷⁸. The liberal paternalists respond by reminding the fact that nudges do not impose any choice and always leave the freedom to make any decision. On the contrary, they believe, as expert, that it is advisable to advise non-expert individuals of the consequences they are going to face, without limiting any possibility. Besides, not all mistakes are necessary to learn lessons: it would be better to avoid making the mistake of being bitten by a venomous snake to learn that snakes bite and are very dangerous⁷⁹. The second answer is about the fact that nudges do not prevent from learning lessons but, on the contrary, they provide information and reminders.

Although the concept of nudges implies "non-coercion", some critics could still argue that some nudges are somehow *coercive*: if a nudge sets the "default rule" that an individual does not want, this individual could get an undesirable or even harmful result. The authors of nudges reply to this doubt by reminding that nudges can not be considered coercive unless they limit the freedom of choice. Alt-

⁷⁸ P. M. Todd, G. Gigerenzer, "Simple Heuristics That Make Us Smart", *Behavioral and Brain Sciences* 22, no. 5, (1999): Cfr. 1-21.

⁷⁹ Thaler, Sunstein, *Nudge*, Cfr. 103.

though this possibility must be taken into account, it can not be called coercion⁸⁰.

The theme of freedom of choice obviously has to do with *autonomy*. According to the most sceptical points of view, nudges would be intrusive, so they could contrast with the power of individuals to give themselves their own rules. Every individual is autonomous, in fact, as long as he controls or governs his own life. The supporters of Nudge contest the direct relationship according to which the possibility of choice, always and in any case, produces autonomy.

This idea seems to show that, in some conditions, the opposite situation takes place. Choosing could reduce autonomy in those situations where individuals do not want to "waste time" in choices of little importance and want to dedicate their time to more important activities⁸¹. It is true, for example, that subject A would choose to choose and that, by inertia, he forgets to choose, finding himself not to have chosen to not choose, thus perceiving an intrusion in his autonomy. However, it is also true that there are some subjects, like subject B, that would choose not to choose; in this cases, obliging subject B to choose would be a coercion and a greater and more serious intrusion in autonomy than that occurring to subject A. In this way, subject A is satisfied and subject B still has the opportunity to go somewhere else⁸².

This idea leads to the theme of *dignity*. People's wellbeing also depends on autonomy and dignity. If some people feel humiliated and not respected because of some nudges, they suffer a loss of well-being; in this case it is a non-considered consequence. Some people may feel humiliated because the State keeps reminding them of things they already know⁸³. The effect is similar to that produced by a

⁸⁰ Sunstein, "Nudging and choice architecture", Cfr. 31.

⁸¹ R. Rebonato, *Taking Liberties. A Critical Examination of Libertarian Paternalism*, (Basingstone: Palgrave Macmillan UK, 2012), Cfr. 50-60.

⁸² Sunstein, "Nudging and choice architecture", Cfr. 29-31.

⁸³ A. Margalit, *The Decent Society*, (Harvard University Press, 1998), Cfr. 10-12.

“nanny state”, called infantization of adults: they could perceive to be treated like children. It is true that ,in extreme situations, some nudges can cause damage to dignity (for example, if restaurants set “default rules” to present healthy food to their customers, in case they do not make a choice, probably it would have a more undesirable effect than letting customers make their own choice). But, according to libertarian paternalists, it would not be fair to doubt nudges in general, because of these extreme situations. The objection of dignity wouldn’t seem to be reasonable when referred to real facts⁸⁴.

Even paternalists have raised doubts. In fact, in some situations, the use of simple nudges could prove to be *too prudent* and ineffective. This topic will be better examined in chapter 4. Liberal paternalists agree that, in some situations, more incisive interventions are needed. They think that freedom must be defended as much as possible, with the least intrusive and effective interventions. In many respects, several nudges are seen as manipulative. Christian Coons and Michael Webster consider manipulative an action that ignores or undermines the individual’s rational capacities⁸⁵. Nudges influence rationality and undermine individual autonomy. They are dangerous as other forms of paternalistic interventions. They often exploit emotional factors to induce the best choice. Is this idea a good one even if it is thought to benefit manipulated people? The justifications provided in these situations are based mainly on the intensity of manipulation. There are various degrees of manipulation, some of which can not be avoided. A lie is considered a manipulation, just as our body, through its movements, expresses a certain degree of manipulation⁸⁶. To what extent can one speak of a justified manipulation or a sort of manipulation that it’s better to avoid?

⁸⁴ Sunstein, “Nudging and choice architecture”, Cfr. 31-34.

⁸⁵ C. Coons, M. Webster, *Manipulation: Theory and Practice*, (Oxford University Press, 2014).

⁸⁶ Sunstein, “Nudging and choice architecture”, Cfr. 34-42.

According to the authors of Nudge theory, the solution lies in the binomial self-interest and transparency. Nudges should always, and in any case, act in the interests of the people to whom they are addressed. If they act in their interest, it means that they respect them. This respect is ensured by transparency⁸⁷. If choice architects acted in people's interest, they would have no reason to conceal the real reasons for which they adopt a certain nudge and they would be always willing to provide a clear and sincere explanation, if asked. Manipulation can be also be allowed by those who are manipulated. If there is a consensus on manipulation and it has a legitimate, justified aim, why should it not be authorized?

Some problems have to be taken into consideration if we relate nudges to public health sector.

3.4. Nudging in health public sector

While choice architecture may be a relatively new tool in political sphere, industry has been using it for a number of years, by placing attractive products at prominent in-store locations, using convincing statistics and exploiting the power of consumer inertia.

There is no doubt that the nudge theory, in certain contexts, works and is the best solution. It is a low cost solution that does not require legislation and that can be applied to many problems caused by our behavior. While encouraging people to make the best choice, we promote their health and well-being, without increasing public health spending. Thus, nudges would avoid numerous health costs.

The question for politicians and policymakers is whether or not such success can be translated into the social and health policy arenas. If the application of nudges in private areas is seen favourably, this idea is not totally accepted when it is asked to use nudges in public sectors, in particular the social-health sector.

⁸⁷Thaler, Sunstein, *Nudge*, Cfr. 239-241.

These doubts question on the one hand the effectiveness of the nudges in public sphere, on the other hand their ethical correctness.

Does nudging work on public level?

As already stated, nudges are a powerful tool. But can they represent an effective health policy tool? There are already several fields of application of nudge strategies adopted by governments: from the social security system to the defence of environment, from organ donation to energy saving, from obesity to traffic problems. Table 1 shows some of the most famous examples and compares them with the most coercive measures currently in use.

Table 1 – Examples of nudging and regulating actions⁸⁸

	Nudging	Regulating
Smoking	Make non-smoking more visible through mass media campaigns communicating that the majority do not smoke and the majority of smokers want to stop	Ban smoking in public places
	Reduce cues for smoking by keeping cigarettes, lighters, and ashtrays out of sight	Increase price of cigarettes
Alcohol	Serve drinks in smaller glasses	Regulate pricing through duty or minimum pricing per unit
	Make lower alcohol consumption more visible through highlighting in mass media campaigns that the majority do not drink to excess	Raise the minimum age for purchase of alcohol
Diet	Designate sections of supermarket trolleys for fruit and vegetables	Restrict food advertising in media directed at children
	Make salad rather than chips the default side order	Ban industrially produced trans fatty acids
Physical activity	Make stairs, not lifts, more prominent and attractive in public buildings	Increase duty on petrol year on year (fuel price escalator)
	Make cycling more visible as a means of transport, eg, through city bike hire schemes	Enforce car drop-off exclusion zones around schools

Source – Roland et al, “Judging nudging”, 263.

⁸⁸ M. Roland, M. P. Kelly, M. Suhreke, “Judging nudging: can nudging improve population health?”, *British Medical Journal* 342 (2011): Cfr. 263-265.

In Holland, another notable example of nudges is represented by the public rental of bicycles. This initiative aims to encourage people to ride rather than to take other means of transport. The basic idea is that seeing more people cycling would create a new social habit that would replace the classic idea of people using means of transport. This is a visual suggestion. The presence of bicycles in towns does not exclude the possibility of taking bus or driving cars. From this type of initiative two benefits can be obtained: the first one involves individuals, as it increases physical exercise contributing to health improvement; the second concerns society because it reduces pollution and traffic congestion.

There are several examples of nudges referred to public health sector although there is still confusion expressed by researchers.

Firstly, research carried out on nudges was done in laboratory, therefore, in controlled conditions and on a small scale. Many experts wondered if the same effects would derive if nudges were used for entire populations and therefore on a large scale, or in situations where it is not possible to control the setting. These studies would also allow us to understand whether the effects of nudges are only short-term or long-term⁸⁹.

Furthermore, the fact that some nudges may work while others may not achieve results in the circumstances in which they are applied should be taken into account.

Secondly, even if some nudges turn out to be effective in a situation, they may not be sufficient to achieve the desired behavior change or "solve complex policy problem". The reason for this lies also in the complexity of the concept of health, determined by a combination of social, economic, and other factors.

⁸⁹ M. Roland, M. P. Kelly, M. Suhrcke, "Judging nudging: can nudging improve population health?", *British Medical Journal* 342 (2011): Cfr. 263-265.

The World Health Organization defines health as

«[...] a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity».⁹⁰

Therefore, nudges may not be the only solution and we wonder what their value is in the three levels of health prevention. There aren't any doubts about primary prevention as it acts on healthy people in order to prevent the appearance of diseases and maintain the conditions of well-being. Most nudges have the objective of facilitating people's life and avoiding negative consequences for them. So far nudges have been proved to have significant effects as secondary prevention: in certain situations, they have the power to act on those individuals who already adopt an abnormal behavior and thus have some kind of problem, although in their initial stage. Perplexities arise for the third type of prevention: how can nudges have the power to contain the most complex outcomes of a pathology.

Are nudges powerful enough to replace more coercive forms of intervention such as impediment regulations? If yes, in which contexts? Studies provided so far, for example, have shown that regulations restricting the availability of alcohol are more effective than voluntary agreement with the producing industries, in order to reduce alcohol consumption rates⁹¹.

Government is more legitimized to prevent people from taking "stupid decisions" on health issues for two important reasons, which ignore the paternalistic discourse addressed to the individual who performs the unhealthy act. The first concerns the fact that through prevention interventions, the harm to the others is being prevented. Closely related to the first, the second reason, refers to the fact that the

⁹⁰ World Health Organization, *Constitution of the World Health Organization*, , (New York: International Health Conference, 1946).

⁹¹ M. Quigley, "Nudging for health: on public policy and designing choice architecture", *Medical Law Review* 21, (2013): Cfr. 591-602.

actions affect the whole society, also in terms of costs⁹². If nudges proved to be a valid tool to prevent undesirable consequences, the state would have more time and resources to be used in other areas, such as education, further health care, and so on.

Is nudging applied to health policies ethically right?

The ethical questions concerning the nudges applied to public policies and in particular to health policies are closely related to the ethical dilemmas presented in the previous paragraph.

Let's analyse, in this section, the *illicit reasons* behind nudges. Many critics, in fact, show more perplexities about the application of nudges to public sphere, as its primary goal, always and in any situation, is that of protecting the well-being of its "customers" or citizens. On the contrary, private individuals look at their own interests and economic gain and therefore are more inclined to overshadow their clients' interests. It happens that some private institutions reveal their greedy, incompetent, exploiting aspects. However, it also happens that some public sectors behave in the same incorrect, wrong way. What would it happen if some nudges were projected by public sector employees characterized by the negative behaviour mentioned above?

Other academics are more concerned with providing public officials with an instrument that allows them to *manipulate* their citizens. It is true that governments, by ensuring transparency⁹³, demonstrate seriousness and goodness in the use of nudges by protecting the rights of their citizens. If they have nothing to fear, they should have no trouble revealing their methods and motivations, and they should be happy and proud to offer an explanation in terms of earning votes. In doing so, they are applying what John Rawl calls the Principle of Advertising. The term advertis-

⁹² M. Quigley, "Nudging for health: on public policy and designing choice architecture", *Medical Law Review* 21, (2013): Cfr. 588-621.

⁹³ Sunstein, "Nudging and choice architecture", Cfr. 45-46.

ing here means that instrument through which a public administration shows to its community the activity they are carrying out, from the training phase to the implementation phase⁹⁴. In other words, governments make their work public, they give citizens the opportunity to exercise control over their actions. In the event that governments adopt a policy that they are not willing or able to defend in public, it means they are disrespecting their citizens; they are treating them as tools to be manipulated for their own interests.

According to some critics, ensuring the principle of advertising and transparency is not sufficient to legitimize governments to apply forms of manipulation. Nudges are a form of “alien control” through which governments can impose their will on citizens and for this reason they can be very dangerous. We speak of “alien control” when the individual A has the power to exercise some form of influence towards the individual B who can not control.

The most consistent answer in the defense of the nudges used in the public sector is presented by Andreas T. Schmidt. According to Schmidt, through nudging even policies would reduce the intensity of “alien control” to which citizens are subjected. Nudging policies could be used to control the dangerous power of private agencies, the influence of groups of individuals. The result would be an action to contain the selfish and uncontrolled nudges of private companies, which exploit individuals for their own interests. The containment action can be obtained through different strategies⁹⁵.

The first consists in replacing nudges already in use with public nudges, so as to stop the action of private nudges. This strategy has already been adopted in the tobacco sector: a measure has forced tobacco companies to produce cigarette plain package in order to prevent the attractive action of the previous design created spe-

⁹⁴ J. Rawls, *Political Liberalism* (New York: Columbia University Press. Paperback edition, 1996; Second edition, 2005) 243-244.

⁹⁵ A. T. Schmidt, “The Power to Nudge”, *American Political Science Review* 111, no 2 (2017): Cfr. 413-415.

cifically to attract more customers. The second, a little less exhaustive, envisages limiting the damaging action of a private nudge, introducing a public nudge that has the opposite effect. Finally, the third consists in using public nudges to regulate what private nudges can use or to exercise a virtual control over private companies. This strategy could lead private institutions to abandon bad nudges or even to use nudges tending to collective well-being⁹⁶.

Schmidt's reasoning also makes it possible to make a connection with the first dilemma concerning the public nudges used for illicit reasons and offer an answer. "Bad public nudges" worry no more than the bad nudges adopted by private agencies, as the latter may be more harmful than public nudges with illicit reasons. Citizens are more likely to encounter "bad private nudges", seeing that private sectors are governed by a selfish interest, than public nudges with illicit reasons whose morality is invested by a greater collective responsibility.

In conclusion, although the effectiveness of nudges is recognized, there is a need for more studies applied to public health field and to its responsibility implications. This is a serious responsibility both for those with whom health care has to do, and for the levels it covers. Responsibility - as indicated by the latin etymology from which the word comes: *respondere* - in the field of public health not only refers to having to "answer" someone who asks for something, in this case a treatment, a cure for a problem. A more careful reflection shows how public health sector is also responsible for "responding to" the future consequences of its interventions. So, the final act of "*res pondere*" is necessary to evaluate each individual case, to understand which intervention or which combination of interventions best fit the individual situation⁹⁷.

And it is precisely in this context that nudges are introduced. Nudges contrib-

⁹⁶ *Ibidem*.

⁹⁷ Turollo, "Responsibility as an Ethical Framework for Public Health Interventions", Cfr. 1198-1199.

ute to the realization of the responsibility, acting as a prevention, in the list of the many tools available to health to ensure even more personalized treatment plans. What matters is not whether nudges work or not but asking more realistic questions in order to find out: "what works, for whom, under what circumstances and for how long".

3.5. Nudging in tobacco field

Let's consider tobacco as an example for three reasons. Being a relatively new theory, studies on nudges are still in their initial stage and, consequently, so are research on the effectiveness of their application: tobacco is one of the first areas in which studies about the association of health policies and nudges started early. Secondly, tobacco is considered a hobby as gambling. Thirdly, there has recently been a social acceptance of tobacco as an unhealthy and dangerous habit. Therefore these policies tend to be more restrictive, unlike the current situation of gambling.

These last two elements will be compared in the two areas of application in the following chapter.

Many people like to smoke a cigarette. Not only because it is addictive because of nicotine, but also for other reasons. We often smoke to be in company, to relax, to stimulate ourselves, to feel part of a group or to have our hands full.

It is a sort of habit, such as the combination of coffee-cigarette or digestive-cigarette. It represents a necessary ritual. In short, for one reason or another, smoking is an act that many people do not want to give up on. On the other hand, smoking cigarettes is a significant risk factor for the development of numerous chronic diseases including tumors and cardiovascular problems. Besides, it can annoy or be harmful for non-smokers who breathe passive smoking. For both individual health and public health, therefore, opposing tobacco smoking habits is now a priority.

For these reasons, the public ban on smoking is as old as the consumption of the product itself. The first known prohibition of tobacco consumption dates back to 1590 by Pope Urban VII. However, the same can not be said for its social aspect: tobacco has been socially accepted for centuries, even if governments often forbade it, so as to encourage people to buy cigarettes on the black market when tobacco was banished. Recently, a cultural transformation has taken place in many western countries. Tobacco is now considered unhealthy, highly harmful and polluting and, consequently, more and more interventions aim at a further reduced consumption⁹⁸.

This process is defined “de-normalization”. Its goal is:

«[...] to change the broad social norms around using tobacco – to push tobacco use out of the charmed circle of normal desirable practice to being an abnormal practice».⁹⁹

In other words, it is a process that tries to make smoking no longer normal, in order to reduce smoking rates and, therefore, to reduce all the problems connected to it. This process involves a series of different factors: customs, habits, education, opinions, reactions, taxes, social norms and prohibitive regulations. It is a virtuous circle that feeds on all these factors.

There seems to be a general agreement that legislative interventions are more effective than other types of intervention. However, it is difficult to prove if an intervention is more incisive than others because, unlike laboratory experiments, in real life it is not possible to isolate interventions from the other factors that contribute to influence the results. A result depends on a variety of social, political, economic forces that can not be controlled in the external world. In any case, legislative interventions are considered more incisive as regards the reduction of the smoking

⁹⁸ A. Alemanno, “Nudging Smokers. The Behavioural Turn of Tobacco Risk Regulation”, *European Journal of Risk Regulation* 1, (2012): Cfr. 5-7.

⁹⁹ D. Hammond, G. T. Fong, M. P. Zanna, “Tobacco De-normalization and Industry Beliefs among Smokers from Four Countries”, *American Journal Prev. Med.* 31, (2006): 225.

rate. To such an extent that smoking bans have been universally recognized, through an international agreement, the FCTC, the world's first public health treaty mediated by the World Health Organization. These bans are also, however, the most discussed topic by liberals and tobacco companies¹⁰⁰.

In this regard, nudges and libertarian paternalism theory are proposed as conciliators. The philosophy would ensure the freedom of choice to those who want to smoke and at the same time would help all those smokers who would like to quit. In the same way, nudges would not offer coercive obstacles but rather a series of moral and physical obstacles.

Policies, defined as nudges, have already been implemented:

- graphic warnings: dramatic images appear on cigarettes packets to depict the various problems that can incur while smoking, and to suggest a direct link between consumption and death;
- plain packaging: brand, colors and other design features have been removed from any cigarette packets to reduce the attractiveness and increase the visibility of graphic and textual warnings;
- visual display ban: the product access context changes so as to hide it from public view.¹⁰¹

As a direct consequence, the main criticism is now addressed to the libertarian paternalistic proposal to liberalize tobacco policies. The liberal idea related to tobacco has failed in the last decades not because smoking is dangerous for smokers but because the focus has shifted to defend the rights of non-smokers.

Although the paternalistic view is not totally accepted, we prefer coercive interventions on “tobacco matter”. As long as society allows people to smoke freely,

¹⁰⁰ A. Alemanno, “Nudging Smokers”, Cfr. 5-7.

¹⁰¹ A. Alemanno, “Out of Sight out of Mind – Towards a New Tobacco Products Directive”, *Columbia Journal of European Law* 18, no 2 (2012).

they will continue to make their individual choices. Free choice, in terms of smoking, means serious environmental and health damages and large costs for public health.

The effectiveness of the nudges related to tobacco is is not to be proved wrong. Instead, what many authors want to affirm is that nudges should represent a method that contributes to the process of delegalization of drugs, instead of being an alternative solution to some other present methods.

CHAPTER 4

JUDGING NUDGING IN GAMBLING

4.1. Nudging in gambling, a real “third way”?

In the first two chapters, arguments in support of the two gambling opposing schools of thought have been presented, highlighting the strong dissertations and limits. On the one hand we find the positions pro a closure towards gambling, more concerned with the negative consequences that individuals, families and society have to face. For that reason we can say these positions are oriented towards a paternalistic perspective. On the other hand, we find the more liberal positions in defence of responsible gamblers, who derive only pleasure from gambling, and of gambling market that creates entertainment, state funds and jobs.

In the third chapter an innovative theory has been presented that proposes itself as a "third way" to the classic debate between liberals and paternalists: libertarian-paternalism, concretized in “Nudge theory”. Nudges would lead to wise choices without imposing any kind of coercion; in other words, they would meet the greater demands placed by liberals to ensure a minimal state and freedom of choice also in the field of gambling and, at the same time, calm the paternalistic minds by ensuring some action to prevent negative effects coming from gambling addiction.

The question that, now, arises is the following: could this new theory be a real "third way" also for gambling sector, able to reconcile the most paternalistic and the most liberal positions? In other words, could nudges be the solution to the dilemma that affects gambling industry?

Let's try to consider Nudge theory on the basis of a liberal position. Liberalism supporters are in favor of a minimum state that guarantees the exercise of personal liberties as much as possible. They therefore oppose a paternalistic state and

any restrictive measure. Freedom of choice is so important because it is only through it that happiness, progress and self-fulfillment are possible. They finally refuse the redistribution of wealth.

Liberal thinking, according to the point of view of justice, highlights that: the majority of gamblers do not find problems with gambling; denying the responsible gamblers's rights is not fair as this prohibition is due to the State rule to protect those who are unable to control themselves and in general the most vulnerable.

Responsible gamers ask for "fair" treatment based on the fact that people need to be treated for what they deserve. Only on one point the supporters of justice distance themselves from pure liberalism: unlike the latter, the former believe that a system based on the redistribution of wealth is right. Gambling market, although not perfectly, also helps to support this redistribution.

The last analyzed argument in support of liberal thought is utilitarianism.

According to this theory, the possibility of carrying out an action or not should be granted, if the consequences of this action produce the greatest happiness for the greatest number of people. Therefore, gambling is allowed because it respects this principle: most gamblers are responsible and decide to pay for a recreational service, like other hobbies such as going to the cinema or theatre. Gambling market creates jobs as it needs producers, suppliers and employees; the State, through taxation, has another source of income available.

Both utilitarian and justice argument defend the principle that an activity can not be condemned, and therefore prevented, a priori, only because there is the probability of negative consequences. The judgment must be made retrospectively, only if negative consequences derive from an improper use of this activity. This principle, if applied to gambling, asserts that it is wrong to prevent such activity only because it could lead to addiction; interventions and measures must be adopted in case of irresponsible use, also in order to protect those who act responsibly.

In addition, the liberalization of gambling is an instrument to fight crime in general, and the organized one in particular. Although it can not eliminate the prob-

lem at its source. In fact organized crime also makes use of legal gambling to do business, as in the case of money laundering. Anyway it is shown that legalization reduces crime, unlike the prohibition that obtains the opposite effect. In this regard, pro-gambling supporters point out the fact that prohibition does not mean eradication: prohibiting gambling does not result in its elimination.

Considering that man is partly an instinctual being and that gambling allows him to satisfy his own impulses through the challenge of chance and the unknown, man will never stop looking for gambling, even if this were banished. The only effect that would be obtained is an increase in the gambling offer by the black market.

Basically, pro-gambling argument is opposed to anti-gambling argument by pointing out how legal gambling provides greater positive effects than negative. Besides it defends responsible gamblers and all those who derive some form of benefit from gambling, both in economic terms and in emotional and psycho-social terms.

First of all, paternalistic supporters answer to liberals by stating that, although it is true that the positive effects are numerically greater than the negative effects produced by the legalization of gambling, it is also true that the negative consequences have a weight qualitatively higher. The intensity of the negative effects can not be compared to the intensity of the positive effects. The problems encountered by pathological gamblers are much more serious and produce more costs both in economic terms and in psycho-social terms, compare to the benefits obtained by responsible gamblers.

On a psychological level, a problematic gambler develops a series of stress-related problems leading to anxiety and depression disorders, which may be alleviated with alcohol or drug abuse. Such stress-related problems also result in physical problems, such as gastro-intestinal disorders. All these bad consequences lead to irritability, fatigue, absence and other social problems, maturing quite a few problems with family members, friends or at work.

At the economic level, there are frequent bankruptcies, indebtedness and job

losses, with consequent refuge in crime, in particular organized crime. Since even the most vulnerable people, such as children, can face such problems, to what extent can we prefer individual freedom without worrying about it?

Such problems also affect the environment surrounding the gambler, passing from family and friends and reaching society in general: a hostile environment at home affects the partner but above all the children, who can develop dysfunctional behaviors; public spending increases as it has to concentrate part of its funds on the development and implementation of policies for the care and treatment of people with gambling disorder and also for family members.

Ultimately, what worries the paternalists most is that the legalization of gambling increases the capillary availability of the product, so that you can play anywhere and at any time of the day. And the increase in the product is directly proportional to the growth in the rate of the gambling disorder, with all the problems mentioned above. Even with a legalized gambling, the organized crime in that sector is not definitively eradicated; on the contrary, the widespread increase in products constitutes an incentive for crime to infiltrate new products of legal gambling market.

The anti-gambling advocates also open a parenthesis regarding the justice argument to challenge the principle of redistribution applied to gambling. One of the main criticisms derives from the fact that taxation on gambling designed to redistribute resources and to reduce social inequalities, does not actually achieve the desired result. The largest customers in this sector are part of the poorer classes, who are fooled into making a difference in their lives if they can only make a good win. Besides a moral motivation casts doubts about the fundraising from an activity that also exploits addiction and gambling related problems.

In conclusion, the most paternalist-oriented positions wonder why gambling has to be legalized if the costs paid by pathological gamblers and society are qualitatively heavy and the increased product on the territory results, as a negative consequence, in an increase in diseases.

The libertarian paternalism would seem to answer the major questions and perplexities posed by both positions. Nudges do not impose or limit, they leave every option available, just as liberals would like. In this way, they assure the rights of those who ask to play freely and those who work for gambling market. With the legalization and reduction of restrictive measures, gamblers have fewer reasons to turn to organized crime. Keeping it legal, the state still has some ways of applying taxation systems.

More extremist positions do not agree with any kind of redistributive system, not only the one applied to gambling. First, it is claimed that a system of redistribution is right so as to guarantee, at least, the minimum rights to the most vulnerable and in need. Second, from different points of view this system has defects, not just those applied to gambling: sometimes it disadvantages those who should be protected and benefits those who do not need it. Moreover, if gambling has to be legalized, its taxation is worthwhile; it is not because of its taxation that gambling produces addiction and suffering.

The most sceptical positions may be the paternalist ones. They are in favor of more restrictive measures, because of the heavy consequences of gambling on individuals, their family and community in general. They could state that, through the application of libertarian paternalism, the result is not so different from the totally liberal settings. Skepticism increases if current social considerations regarding gambling are not yet alarmist as those of tobacco; in other words, gambling is still socially accepted as an almost harmless activity and this leads to underestimating all gambling-related problems.

In this respect, the next paragraphs will try to develop a reflection on the strength of nudges, deepening the reasons that justify the skepticism of paternalists and trying to highlight how there is a prejudice against nudges in general. This idea causes an underestimation of them and a preference for more coercive interventions.

4.2. Dark nudges

Nudge is a recent theory and research into its application in various areas is still at the beginning. Some interventions and policies have proved to correspond to the characteristics of what are now called nudges, even before the very birth of the theory. Precisely, since they were created before the birth of Nudge theory, they are mostly single interventions, which are not part of a general policy oriented towards the theory.

The studies to verify whether it is possible to apply the theory as a basic principle on whole sectors instead of other philosophies are still in its beginnings.

Philip W. S. Newall reflected on the possible application of Nudge theory on gambling last year. According to his idea, the current situation that characterizes gambling market is such that the application of a policy based on “positive nudges” would be of little value. Gambling industry has produced and is still producing increasingly *dark nudges*, that is environments and stimuli that can influence more and more gamblers to gamble with greater frequency and intensity. These dark nudges are not designed to improve people's well-being but, on the contrary, to exploit their bias, for purely economic purposes. Introducing what we can call "positive nudges" in this context would not have sufficient effect to counter dark nudges¹⁰².

Skilled technicians in gambling industry, in recent years, have carried out studies to create new gambles and reprogramming old ones, with the aim of making them more attractive. These new generation games have features that make them more dangerous from the point of view of addictivity. For these reasons, they can be considered dark nudges.

Some examples of the most famous dark nudges in the field of gambling are briefly given below.

¹⁰² P. W. S. Newall, “Dark nudges in gambling”, *Addiction Research & Theory* (2018): Cfr. 1-3.

Speed and isolation: to understand these features, just think of slot machines and casinos. Many of the new games, compared to the past, are based on the assumption that the greater the speed and the immediacy of the games, the fewer the moments of pause that allow reflection and, consequently, the awareness of the hours that are going by and the amount of money spent. In addition, some gambling settings have been equipped with smoking rooms to allow smoking without interrupting the game. Furthermore, the repetition in sequence of the act without stopping, causes the subject to increase the level of concentration towards the game, to the point of becoming totally isolated from the surrounding context¹⁰³. This shows that more and more new games no longer respond to socialization needs and do not even offer the opportunity, indeed even limit it.

Immediate collection of winnings: the new games, in order to ensure the speed of the games, also had to increase the speed of payment. A quick, and sometimes virtual, collection of money makes a gambler be more willing to play again. Here is the reason why lotteries with a slow collection of winning specifics, have aroused less and less interest in gamblers, until when they were abandoned and then abolished. This is also a technique to encourage gamblers to gambling¹⁰⁴.

Technology and simplicity: the new generation games are designed in such a way as to avoid more and more contact with the specific elements of games. While in the past, gamblers themselves used to roll the dice or shuffle the cards, today they just press buttons, in the case of casinos, or click the mouse, in the case of online gambling¹⁰⁵. Moreover, while games of chance were once more complex and required more skills, as more often accompanied by aspects of *agon*, the new games are very simple and the main element, if not the only one, is the *alea*; hence they are simpler and arise interest in a wider audience.

¹⁰³ Perilli, *Giocati dall'azzardo: mafie*, Cfr. 59-63.

¹⁰⁴ *Ibidem*.

¹⁰⁵ *Ibidem*.

Near misses and pseudo-winnings: most of the new generation games, such as slot machines and scratch cards, have been programmed with the aim of providing frequent “pseudo-winning”. These are small amounts of money which are less than the amount of the bet or, at the most, they cover the expenditure of the bet. The purpose is to ensure the continuity of the gambler's activity, through this reasoning: "If I have easily won some money, it will be equally easy to win a higher amount!". A similar psychological mechanism is used by the so-called “near misses”: almost anyone who has played at least once with slot machines or with the scratchcards, has found two winning images/numbers out of three, believing that he has just missed the win. Let's take scratchcards as example: in the squares there are frequently numbers near or similar to the winning one - for example 46, 44 or 54 instead of the winning number 45. This strategy leads gamblers to believe that they are close to the "big payout" and encourages them to immediately start a new match. Gamblers feels that he is "not constantly losing but constantly nearly winning"¹⁰⁶.

Gambling industry continues to design games of chance, as well as the spaces used for them, in such a way as to increase the concentration level of individuals and to reduce whatever could be a distraction, in order to merge all their state of consciousness only in the game.

In this regard, casinos and vlt rooms, in addition to having set up areas for smoking through ventilation systems, have decided to offer food and beverages, generally alcoholic to increase comfort; they have eliminated every clock, window and anything else that can show the flow of time, replacing them with machines that amplify the sounds of the gambling devices. All this in order distract customers as little as possible from their business and to keep their hypnotic state active. Some hotels even, especially in Las Vegas, have been built in such a way as to have corridors leading directly to gambling halls. Modern electronic gambling machine have

¹⁰⁶ M. Griffiths, “Psychobiology of the near-miss in fruit machine gambling”, *The Journal of Psychology* 125, no. 3 (1991): Cfr. 347-357.

been equipped with additional characteristics whose purpose is to further exploit human psyche through tricks, sometimes trivial, but still highly dangerous. In particular, the new slot machines and vlt are the result of in-depth studies on ergonomics, on seats, on captivating lights, music and colors that serve as background to the context, on the images of the display, on the games they offer and on opportunity to bet on the bet itself.

The results have produced machines with characteristics that, together with their mechanical rhythm, are able to transport individuals into a hypnotic state. This hypnotic state makes individuals forget all their daily problems and this explains why most gamblers become addicted to gambling¹⁰⁷.

Because of the invasion of these and other dark nudges, the introduction of positive nudges would not be enough for Newall. Only strong restrictive measures would have the strength to counteract the exploitation carried out by gambling industry and thus to reduce pathology and public state expenditure. Given the growing concern about the gambling problem of the last few years, some gambling industries have been active in helping to spread responsible gambling initiatives. Although useful, these responsabilitative interventions will not be sincerely addressed for the full resolution of the problem; this is because such companies are born to maximize the profits, at best aiming at the customer satisfaction but, in some respects, it differs greatly from the customer well-being¹⁰⁸. Sometimes, consumer-friendly strategies get the opposite effect than initially designed. Newall reports the example of two companies that tried to adopt a consumer-friendly strategy:

«PokerStars and Betfair are two innovators of the early 2000s online gambling boom, which were based on consumer-friendly models, allowing “smart” gamblers to win in direct competition against other gamblers. But both companies are perceived by their smart professional gamblers to be moving to re-

¹⁰⁷ Perilli, *Giocati dall'azzardo*, Cfr. 59-63.

¹⁰⁸ Newall, “Dark nudges in gambling”, Cfr. 1-3.

duce the skill element of their offerings, ensuring the house now wins against everyone»¹⁰⁹.

Adopting a law enforcement action also means informing customers of all possible risks, for example through educational campaigns.

However, gambling companies could never be completely honest about the implementation of dark nudges, because the more gamblers get to know about them, the fewer gamblers there will be and, as a consequence, less earned money. This is not obviously the desired goal for companies born to maximize profits. Gambling products have often warning messages of the danger and risks that can be produced. For example, in Italy gambling publicity, by law, had to be accompanied by the warning "the game is forbidden to minors and can create pathological addiction". According to Newall's logic, these warning messages are not effective if they are not accompanied by the work that leads to a deep understanding of these complex and difficult problems. The weight of the gambling responsible interventions of gambling companies is almost insufficient compared to the implementation of the dark nudges of gambling companies.

Let's suppose to have a new gambling firm born with the sincere interest of making educational campaign bringing to light all the negative consequences of gambling, to help fight addiction. A company like that would be forced to close after a short time because it would not have sufficient profits. In short, according to Newall, given the current situation, it makes little sense to ask gambling market to adopt the consumer-friendly principle: nudges are not enough as well as the responsible gambling initiatives. The only policy able of effectively counteracting this critical situation is a coercive policy that adopts strong regulations.

Although the premise presented by Newall, specifically the current situation and dark nudges, is not questioned, my point of view does not agree with his con-

¹⁰⁹ *Ivi*, 2.

clusions. In the next section it is provided an explanation and demonstrations of the reasons why a policy based on nudges could also work in gambling sector.

4.3. Nudge as a possible policy in gambling

The first topic that needs to be pointed out is that nudges work and that single nudges can work in all sectors. Some strategies that are already active in the gambling sector can be considered "positive nudges". These strategies, without realizing it, already respect the characteristics assumed by the theory of nudges, that is:

- its intervention must not restrict choice;
- it must be in the interest of the person being nudged;
- it should involve a change in the architecture or environment of choice;
- it implies the strategic use of some pattern of human irrationality (e.g. cognitive biases);
- the action it targets does not stem from a fully autonomous choice (e.g. lack of full knowledge about the context in which the choice is made)¹¹⁰.

The most famous example, also reported by Thaler and Sunstein, is the self-exclusion from gambling. Some states, including Missouri, Indiana and the USA, have made available the possibility of self-exclusion from gambling. In particular, they have made available a register in which customers can register voluntarily; once registered, they will no longer be able to log in to the casino or collect winnings. The purpose of this nudge is to help people who can not control themselves in particular during times of craving, to have help not only from friends, relatives or health services, but also from the state itself and from one of the gambling compa-

¹¹⁰ L. Bovens, *The Ethics of Nudge*, in Till Grüne-Yanoff and Sven Ove Hansson, *Preference Change: Approaches from Philosophy, Economics and Psychology*, (Berlin and New York: Springer, 2008): Cfr. 1-16.

nies. In other words, with this system we help people with little self-control to maintain the impulsive system under the control of the reflexive system, without constraints¹¹¹.

Other examples can be mentioned. In Italy, at the end of every gambling advertising, the message "the game is forbidden to minors and can cause pathological addiction" flows. Another strategy that can be considered a nudge is the disposal of gambling in places far from the center, as in the case of some casinos, or when they are located in the center, at least far from view, such as slot machines .

It has already been seen how the nudges work in such a way as to contain and limit bias and heuristics. It is believed that the nudges applied to gambling can be very effective precisely because when we talk about gambling, we are talking about a sector rich in bias and heuristics, exploited to get more gamblers.

One of the most famous heuristics that characterize gamblers is that of *representativeness*. Some studies have proven the human difficulty of understanding randomness: man, in fact, even if with will and commitment, is not able to produce a random sequence of numbers, because it fails to ignore those newly composed, ending up with avoiding repetitions too much and producing excessive alterations. This difficulty is linked to an erroneous belief: the man is convinced that every casual event is connected to the previous one and that he can thus know what will happen in the future on the basis of what has just happened. This belief is well established even in gamblers and is known as the "fallacy of Monte Carlo". But in reality the case has no memory: random events are independent of each other, as are all the bets that are played on them¹¹². It is possible to predict with certainty the outcome of a roll of dice only through the art of cheating, otherwise, what remains is only a calculation of probabilities, never a prediction. Each game ends, therefore, with a

¹¹¹ Thaler, Sunstein, *Nudge*, Cfr. 233.

¹¹² G. Barron, S. Leider, "The role of experience in the Gambler's Fallacy", *Journal of Behavioral Decision Making* (2009): Cfr. 1-23.

"reset to zero": everything that has just happened resets, to start a new round from the beginning.

A second heuristic that people adopt in the field of gambling is the heuristic of *availability*. People are mistakenly convinced that some risks are higher than others, when in reality it is just the opposite. As for gambling, people are generally convinced that the odds of winning are higher than they are in reality. And it is precisely on this heuristic that the success of the gambling industries is based, in particular lotteries.

This heuristic is closely linked to people's tendency to be *overly optimistic and confident*. This is also reflected in gambling. Unreasonable optimism is seen when, for example, a gambler betting on roulette will keep repeating "this is the lucky bet" with each new game, ignoring the real odds of winning. Aware of this fact, casino croupiers try to attract customers by relying on the fact that "the lucky round is next" and still remembering how easy it is to win. Gambling advertising is designed and created in such a way as to reiterate the fact that "winning is easy". Many believe they are the future Charlie of the Chocolate Factory, the chosen ones who will succeed in winning the golden ticket. If this belief was not widespread then there would not be so many bettors. Yet, an Italian study has shown that in the space of a year there is a 1 in 12,000,000 chance of dying by being struck by lightning, or in the same year there is a 1 in 10,000 chance of dying following a traffic accident in the province of Treviso, that guessing six numbers to the SuperEnalotto (1 out of 622,614,630 chance) or five numbers to the Lotto (1 out of 43,949,268 chance)¹¹³. If the players were aware of the real odds of winning, they would probably think twice before betting.

Gambling also exploits the fact that people are easily carried away by temptations and make careless choices, activating the "autopilot" and ignoring the reflec-

¹¹³ G. Bellio, A. Fiorin, S. Giacomazzi, *Vincere il gioco d'azzardo. Manuale di autoaiuto per il giocatore che vuole smettere* (Azienda ULSS n.8: Castelfranco Veneto, 2011), Cfr. 5.

tive system. This happens when gamblers do not realize they have spent a whole day in the casino.

New positive nudges for gambling could be created starting from the awareness and study of these biases. A strategy that exploits the awareness of a bias is the one that was mentioned at the beginning of the paragraph, the possibility of self-exclusion from casinos or winnings. It reflects precisely a strategy that helps self-control, to limit the damage caused by the temptations and careless choices effect.

Other strategies could be developed by taking a cue from other sectors. For example, it could take a cue from the tobacco industry and altering the future design of scratchcards by removing any design and bright color that has the effect of increasing its attractiveness and highlighting potential risks.

The second point that must be thought is whether a nudge policy of wide-ranging with the aim of reducing addiction can also work in the gambling sector. Taking up the subject of the first paragraph of this chapter, while through the nudges, we would almost meet all the greater perplexities presented by the liberals, it remains to address the greater perplexity presented by the paternalists, according to whom the problem of pathological addiction could not be reduced without a repressive measures; therefore, a policy based primarily on nudges can not be sufficiently effective. Through a more careful analysis, we can get to draw different conclusions, even opposite, compared to those advanced by the paternalists.

The first argument considered for this analysis is the following: prohibiting gambling does not mean to eradicate the problem because the man has always liked to gamble. Gambling is an activity that dates back to 3500 B.C. and it has never disappeared even in those societies and historical periods in which it was highly forbidden¹¹⁴.

¹¹⁴ Perilli, *Giocati dall'azzardo*, Cfr. 11-12.

Man has always been fascinated by chance although he has difficulty understanding it. For his own survival, he tried to restrict the unpredictability basing his evolution on organization, sequentiality and order and developing logical and regular thought patterns, such as "where there is water, there are animals then the food". Thus, organized communities and societies have been created where everyone is forced to keep his instincts under control in order to give priority to the duties that must be fulfilled for the maintenance of the established daily order. This organization imposes the control and prediction of the consequences of every action and leaves no room for chance, for unforeseen events. Nevertheless, the excesses of uninteresting order and routine of the working day imposed upon the life overwhelm the spontaneity, the self-expression and the interest, the achievement and the surprise which are ordinary-human qualities. It is agreed that this order, although functional, may sometimes be intolerant to man and, consequently, he feels the need to seek forms for free expression of his natural qualities. Gambling is one of these non-organized and free-of-human-control forms in which man can satisfy his instinctive inclination in the unexpected, in the danger, in the disordered¹¹⁵.

Recently, the predominant choice of government seems to have been oriented more towards a regulation rather than a prohibition, aimed at protecting above all the most vulnerable, firstly minors. This orientation managed to slightly contain the spread of the pathology but was not able to reverse the situation. In many countries there is still an increase in the percentage of pathological gamblers, despite the adoption of measures to regulate the sector. Consequently, applying coercive measures to gambling means producing an increase in the players rate in the illegal market.

Moreover, containing does not necessarily mean reducing the private dark nudges. It is not uncommon to find situations in which regulations implemented in the interest of the community are applied, while leaving the already existing dark

¹¹⁵ Hobson, "The ethics of gambling", Cfr. 140-147.

nudges having an opposite effect to regulation. Private nudges typically lack transparency and sometimes provide customers with faulty information: the result is a difficult check on private nudges¹¹⁶.

The second argument concerns the power of social persuasion. The social consideration of a habit is very important: the consideration that a society accepts as regards an activity is an important element that conditions the effectiveness of the measures adopted for that activity. The fact that tobacco has undergone a trend reversal over the years, moving from socially accepted activity to harmful activity, has legitimized the intervention of the measures under way, as well as the introduction of new form of interventions. The more this activity is considered socially as a harmful habit, the greater the effectiveness of the measure adopted, in particular the coercive ones. So the work that has to be done is a work of persuasion on society since persuading is generally more effective than commanding¹¹⁷. If an activity is banned but no “de-normalization” work is carried out, a good portion of the society will continue to seek it by exploiting the black market. So as, if the society's attention was strongly directed towards the negative sides of the activity, there could not even be a need for coercive legislation. It is therefore understandable that the persuasive effect of the nudges should not be underestimated, just as the connding effect of the restrictive measures should not be overstated.

The third argument makes it possible to reply to Newall's conclusions, starting from the reasoning presented by Schmidt. Newall in his article on dark nudges, talks about how private gambling companies struggle to implement strong interventions directed towards the well - being of the customers, for obvious reasons of economic interest; they are born to maximize profit and not to safeguard customers' interests. His conclusion is that only strongly coercive actions have the power to counter the strength of dark nudges.

¹¹⁶ Schmidt, “The Power to Nudge”, Cfr. 414.

¹¹⁷ Alemanno, “Nudging Smokers”, Cfr. 14-17.

This reasoning has two limitations: the first concerns the fact that in this discourse we speak almost exclusively of private action, ignoring the importance of public action, primary agent in safeguarding the interests of society and the weakest; the second concerns the fact that it is taken for granted that the only effective action that the public can do is coercive. In this sense, Schmidt's idea is brought back to enhance both the importance of public nudges and their ability to reduce alien control.

The nudges have a strong power of influence that can result in alien control. The greatest concern comes from giving the public sector a power that can become alien control. Schmidt has shown how this concern is inconsistent and how in reality public nudges can even get to reduce alien control. This reasoning can also be applied in the gambling sector. The public sector could be invested with the task of creating "positive nudges" in order to regularize the private gambling nudges, so as to limit their effect. In the most serious cases, private dark nudges might be replaced with a positive public nudge: having ascertained the real effectiveness of nudges, the same effect or a greater effect could be obtained compared with more coercive measures, without restricting freedom of choice¹¹⁸.

In conclusion, the nudges effectiveness can not be denied, just as the most coercive measures effect can not be absolutely guaranteed. Use of nudges by the public could prove to be more powerful than restrictive public sector interventions to induce healthier gambling behaviors; and considering that some regulatory measures encourage a more responsible choice without intervening to reduce the dark nudges effect of the private sector, the use of positive public sector nudges could be more incisive precisely because it intervenes on dark gambling nudges. The final effect would seem to be that of a virtual control both on the attitudes of citizens, to incite them to behaviors more responsible for gambling, and on the alien

¹¹⁸ Schmidt, "The Power to Nudge" Cfr. 413-415.

control of the dark nudges issued by private companies of gambling.

More research is expected in order to understand to what extent the nudges can be adopted as alternative measures, representing a real “third way” capable of really meeting all the doubts of both liberals and paternalists; and to understand when they must be added to a mix of strategies already in progress, to support a denormalization process also in the gambling sector.

CONCLUSION AND RECOMMENDATIONS

That of gambling is a complex situation. The complexity is determined by its contrasting characteristics: it is a type of recreational activity that falls within the "games" category, with a market subjected to taxation that produces jobs and state profits, but at the same time it is the due to different costs and problems for individuals and companies. This situation has attracted the attention of exponents of different currents of thought, who have tried to offer answers to the most important issues regarding the ethics of gambling: whether it is wrong or right to gamble, to profit from gambling, to encourage people to gamble, and ultimately, how should it be regulated.

The answers given tend to be oriented towards two opposing currents of thought: the most paternalistic thought of the anti-gambling and the more liberal thought of pro-gambling.

The major worries of the advocates of prohibition or of a greatly restriction primarily concerns the risk of developing a pathological addiction and the consequences it brings to the gambler. According to these, the physical, psychic, social and economic consequences that loom over the pathological player are sufficient to legitimize coercive measures. This reasoning is further supported by researches showing that the consequences also affect the family members and friends of the problematic or pathological gambler, as well as society: relationship problems between children-parents and between partners, reduction of relationships with friends, decrease in attention to work or unjustified absences, carrying out crimes and involvement in organized crime, increase in the cost of public health spending are just some of the dangers which can occur with the liberalization of gambling.

A small part focuses on the immoral consequences that gambling brings to the

gambler's character. Still others do not find the gambling tax system morally correct: it is not fair that a state is enriched on the skin of people who have ruined their lives with gambling, nor is it justified for charity fundraising.

While anti-gambling focuses on the importance of the negative sides intensity, proponents of liberal thought focus on the amount of positive sides brought. First of all, freedom of choice in any context always brings beneficial effects with regards to happiness, stimulation to progress and self-realization. Gambling brings positive effects to the majority of gamblers and, by liberalizing it, makes it legal and in this way can be part of a legal market that offers jobs and can be taxed, allowing the state to raise additional funds to be allocated to projects for the community. Being an activity that does not always harm, it is not right to sacrifice it a priori, rather the consequences should be condemned. And finally, legalizing gambling prevents organized crime from expanding into the gambling industry.

At this point, the spontaneous question is: is there a solution that allows us to meet the supporters of both opposing currents of thought? Is there a policy that keeps gambling free, decreasing the rate of pathological gamblers?

With the new millennium, a new theory has emerged that stands as a "third way" to the classic debate between paternalists and liberalists. This is the Nudge theory, a theory that, while maintaining freedom of choice, is able to push people towards better choices for themselves and for society. Through the nudges, people are guided towards wiser choices, without imposing any kind of coercion. For these reasons, it is considered libertarian paternalist.

It seems to be a good strategy for the public sector, in particular the social-health one, because through the nudges it could persuade citizens to make the best choice, protecting their well-being and saving on public spending.

If applied to gambling, this theory on the one hand would retain the freedom to choose whether to gamble or not and whether to invest in the gambling market or not; on the other hand, it would push people to adopt less pathological behaviors

towards gambling, thus reducing addiction, just as paternalists would like.

Since there are still no significant studies on the application of nudges in the gambling sector, in this thesis I tried to reason on the following doubts.

Considering that, unlike the tobacco sector, gambling is still socially accepted, on a general level, as a non-harmful activity, private gambling companies are not strongly entitled to stop producing dangerous and addictive dark nudges. Consequently, the introduction of positive nudges from the public would be effective in stopping or limiting the effects of these dark nudges?

Could a policy based mainly on nudges and libertarian paternalism be applied? How far would it work? Would it be able to satisfy the major consternations presented by the paternalists, is it able to have the same effect of reducing the pathological addiction rate that have more coercive measures?

Below are the conclusions that allow you to approach answers:

- nudges also work in the gambling sector, some examples, although few, of positive nudges already exist;
- coercive measures do not solve the problem: man has always been attracted by gambling and if the legal market does not offer, he will make use of the illegal market;
- commanding is not completely effective if a denormalization process is not already under way; persuasion proves to be more effective, achieving less "re-search of the black market" effect;
- giving the public the instrument of nudges means giving the public an instrument to control or limit the dark nudges action of the gambling companies, thus reducing the alien control of private.

The focus is on the fact that the persuasion power, and therefore of the nudges, should not underestimate, just as commanding power should not have such confidence, typical of the most coercive measures.

More studies are needed to understand if a policy that is mainly addressed by nudges can work in the gambling sector or it is better to use the nudges as an additional tool to other strategies.

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