

# Are 'Nudges' Legitimate Regulatory Policy Instruments?

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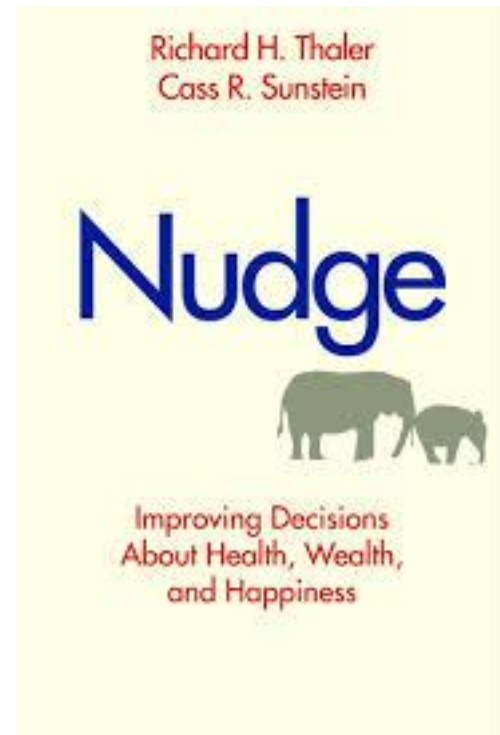
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# Introduction

- What is a nudge? (Thaler and Sunstein)
- a technique for seeking to control behaviour (a regulatory instrument)
- ‘an aspect of choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives’



# Schiphol Airport Facilities

□ Picture

# Cafeteria

- ▣ Picture of cafeteria layout

# Save More Tomorrow

- Picture of piggybank

automatically commits employees to contribute a portion of their salary to a retirement savings plan unless they return an opt out form to their employer

# The popularity of Nudge

- Fashionable in UK And USA – widely taken up by regulators and policy-makers. But controversial for a variety of reasons
- ‘Libertarian paternalism’ claimed to provide its underlying philosophical foundations
- UK nudge unit (inside Whitehall) - implementation of nudges in varied policy sectors. eg
  - Nudges used to improve tax compliance.
  - The wording of letters sent to those owing income tax was changed to inform them that most people in their town had already lodged their return.
  - Claimed to have resulted in an extra £200 million (\$290 million) being collected on time, practically cost-free..

# British and Australian experience

- Australia – not yet fashionable in policy circles
- But, this may be set to change.
- April 2012: NSW Department of Premier and Cabinet announced that it had recruited a senior member of the UK's nudge unit, Rory Gallagher, to help find ways to nudge the citizens of NSW

# Structure

- ▣ Nudge's intellectual heritage
- ▣ Behavioural law and economics
- ▣ Choice architecture as a tool of government
- ▣ Evaluating the legitimacy of nudges
  - A typology of nudges
  - Libertarian paternalism
  - Are nudges liberty-respecting?
  - Which nudges are illegitimate and why?
- ▣ Conclusion



# Nudge's intellectual heritage: experiments in cognitive psychology

- Origins: lab experiments conducted by cognitive psychologists concerned with understanding human decision-making
- systematic divergence between the rational actor model assumed in microeconomic analysis and how individuals actually make decisions.
- We systematically make 'sub-optimal' decisions due to our pervasive reliance on cognitive heuristics.

# Some common cognitive heuristics

- ❑ **Availability heuristic:** tendency to predict the frequency of an event, or proportion within a population, based on how quickly past instances can be brought to mind. Eg in aftermath of a natural disaster, insurance sales for that kind of event rise sharply then rapidly decline as vivid memories recede
- ❑ **Anchoring heuristic:** 'anchor' on one trait or piece of information when making decisions, influencing our intuitive assessment of probabilities. People start with an implicitly suggested reference point 'the anchor' and make adjustments to it based on additional information to reach their estimate
- ❑ **Status quo bias:** tendency not to change an established behaviour unless the incentive to change is compelling.
- ❑ **Framing effect :** presenting the same option in different formats can alter people's decisions. Eg Asked to choose between treatment options, Option A is presented as having a 70% chance of success, and Option B as having a 25% failure rate, a significant number of individuals will choose Option A, even though Option B has the higher probability of success

# Behavioural law and economics

- Strand of economic analysis draws on these findings of experimental psychologists, generating a body of work now known as 'behavioural economics' and its offspring "behavioural law and economics'
- Unlike orthodox law and economics, it seeks to challenge the standard economic model by pointing to systematic divergences from the premise of the rational self-interested decision-maker that orthodox economics takes as its starting point
- Two types of people:
  - **'Econs'** = actors who think and choose rationally and thus fit the picture of the decision-making assumed by traditional economics
  - **'Humans'** = real people, fallible individuals who have inescapable difficulties in making decisions that conform to the rational actor model

# Behavioural law and economics

- By taking account of the systematic flaws in human decision-making identified by psychological lab studies, proponents of behavioural law and economics hold out the prospect of a new and improved approach to legal and social policy.
- Aims – to develop an approach to legal and social policy questions that integrates the findings from cognitive psychology into an economic framework to yield an approach with greater descriptive accuracy and predictive reliability.
- Offers the prospect of accurately modelling how human beings will react to varying rules and policy interventions.
- Especially attractive to politicians of all stripes as a set of policy prescriptions for curing social ills.

# Choice architecture as a tool of government

- Core idea of nudge policies = ‘choice architecture’
- Refers to the conscious and deliberate attempt to shape the *context* in which people make decisions, rather than altering or extending the available range of choices.
- Can be understood as one specific form of ‘design-based’ regulation (i.e. the purposive use of design to promote desired social outcomes to channel social activities and behaviours that affect others)
- For Thaler and Sunstein, choice architects = those responsible for organising the contexts in which decisions are made

# Who is a choice architect?

Thaler and Sunstein cite the following examples:

- ▣ the food services director of a cafeteria who is responsible for the lay-out of food items
- ▣ A doctor who describes a range of possible treatment options to her patients
- ▣ A parent describing possible educational options to her child.
- ▣ Analogy with the choices made by building architects: make design choices that they expect will yield beneficial effects
- ▣ So, the cafeteria manager can choose particular food arrangement that is likely to influence what people eat.

# Nudge as a form of choice architecture

- Hence, choice architecture appears to offer a potentially powerful instrument to influence social behaviour by seeking to prompt or 'nudge' individuals to make decisions that the choice architect deems desirable.
- But not all choice architecture = nudge.
- Only if intervention is 'easy and cheap to avoid'
- putting fruit at eye level = nudge
- banning Frappacinos ≠ nudge

# A critical examination

Nudges can be roughly classified into three groups, based on the underlying architectural mechanism through which they are intended to work.

- (a) defaults and anchors
- (b) physical design
- (c) deliberation tools



# (a) Defaults and anchors

Seek to exploit several decision-making heuristics, esp status-quo bias and anchoring bias.

- Save More Tomorrow: aim to encourage more conscientious saving
- Cafeteria: aims to encourage healthier food choices
- ▣ By setting baseline defaults that reflect the nudger's preferred options
- ▣ Behavioural tendency to 'do nothing' that makes the default option 'ubiquitous and powerful.'
- ▣ Can be harnessed by policy-makers and effect magnified if combined with some implicit or explicit suggestion that it represents the normal or even the recommended course of action.
- Tax-payers can be encouraged to file their tax returns on time by advising them that 90% of the public comply with tax laws;

## b) Physical design

- ▣ Design of the physical environment and products routinely used by people in their regular activities can be utilised to promote particular kinds of social outcomes.

### Examples

- ▣ Painted Road Lines
- ▣ Child proof seals on medicine bottles

# Painted Road Lines



## c) deliberation tools

- ▣ Choice architecture can facilitate more informed, thoughtful decision-making aimed at helping individuals to comprehend the range of options available.

### Examples

- ▣ Government information campaigns
- ▣ Mandatory disclosure laws
- ▣ Statutory 'cooling off' periods

# Libertarian paternalism

“The libertarian aspect of our strategy lies in the straightforward insistence that, in general, **people should be free to do what they like** – and to **opt out** of undesirable arrangements if they want to do so... We strive to design policies that maintain or increase freedom of choice. When we use the term *libertarian* to modify the word paternalism, we simply mean liberty-preserving. And when we say liberty-preserving, we really mean it. **Libertarian paternalists want to make it easy for people to go their own way: they do not want to burden those who want to exercise their freedom**’ (Thaler and Sunstein)

- ▣ Yet they acknowledge that libertarian paternalism is a contradiction in terms,
- ▣ Paternalism = (1) some kind of limitation imposed on the freedom or autonomy of some agent (2) that limitation is imposed without the consent of the agent, (3) this limitation is imposed for a particular class of reasons, i.e. with the aim of improving the welfare of the agent or in some way promotes the agent’s interests (Gerald Dworkin)
- ▣ Because paternalism involves some intervention with the freedom or autonomy of the agent, without the agent’s consent, it appears – by definition – to be anti-libertarian in character

# 'Libertarian paternalism is not an oxymoron'

Thaler and Sunstein side-step this apparent contradiction in three ways:

- emphasise that nudge policies aim to promote outcomes in accordance with the agent's own understanding of her own self-interest (what she really really wants)
- The nature of the intervention which choice architecture entails (inevitable and unavoidable)
- That the agent retains freedom to opt out easily and cheaply = libertarian

# Soft paternalism

- T&S adopt a form of paternalism known as 'soft paternalism' ie. An intervention to prevent an agent from doing X where the paternalist judges that the doing of X is not in the agent's interests
- example: forcibly stopping a passer-by who speaks only Japanese from crossing a bridge which he does not know has collapsed
- Contrast hard paternalism: intervention to prevent the agent from doing X where the paternalist judges that, relative to the *paternalist's* view of what is in the agent's best interests, the doing of X is not in the agent's interests

# Classifying policies as paternalistic

- Difficulties in attempting to classify any intervention (not just nudges) as paternalistic arise from the heterogeneity of preferences.
- Eg Save More Tomorrow: automatically commits employees to contribute a portion of their salary to a retirement savings plan unless they return an opt out form to their employer
  - X: wants to save more for retirement but is weak-willed
  - Y: strongly prefers current consumption cf future consumption
  - Z: sometimes wants to save more, sometimes wants to live in the present



# Nudges as 'libertarian'?

- To overcome problems associated with the heterogeneity of preferences (which implies that for some individuals (sometimes) the policy preferences of the nudger will not be those of the nudgee), T&S insist that the formal range of choices available to the individual must not be restricted or altered
- To qualify as a nudge, each person remains **free to opt** out of the default arrangement **without appreciable costs** in terms of time, trouble or social sanctions.

# Are nudges libertarian?

- ▣ liberty as freedom (thin)
- ▣ liberty as autonomy (more accurate reflection of what we care about when we invoke libertarian concerns)
- ▣ My actions are autonomous when underwritten by **reasons**:
- ▣ “When I say that I am rational, at least part of what I mean is that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and principles’ (Isaiah Berlin)

# Irrationality exploiting nudges

- **Not** libertarian because they work by by-passing the individual's rational decision-making processes in order to channel behaviour in the direction preferred by the choice architect.
- subtle form of manipulation, which express contempt for individuals as rational agents capable of reasoned decision-making concerning their own affairs
- Compare false mirrors installed by clothing seller to Painted Road Lines.

# Compare with 'corrective' nudges

- Contrast: nudges which seek to correct or eliminate some kind of cognitive defect or bias to promote more informed individual decision-making, or are intended rationally to influence individual decisions
- Deliberation tools (cooling off periods): seek to encourage individuals to make active, reflective decisions.
- Some forms of physical architecture may seek to influence individuals in a rational manner – eg speed hump.
- These 'non-exploitative' nudges **can** properly be regarded as libertarian, understood in its thicker, richer sense as autonomy respecting
- Contrast: exploitation of cognitive 'failures (fly in urinal, Painted Road Lines, Cafeteria)
- But – line between 'exploitative' vs 'corrective' nudges not clear cut (eg social marketing campaigns intended to affect our emotions so that a situation is presented with such force that we change our behaviour

# Are nudges illegitimate?

- Non-exploitative nudges clearly liberty-respecting (hence unproblematic)
- But what of exploitative nudges?
- Should all exploitative nudges be regarded as illegitimate?
- No. I suggest that context and consequence-sensitive evaluation is needed to assess each nudge proposal on a case by case basis.

# Why case by case assessment of consequences?

- ▣ Assessment of the legitimacy of the *means* which we employ is frequently contingent upon its relationship to the *ends* we seek to secure. Contrast:
  - Are prison sentences legitimate?
  - Are 3 year prison sentences a legitimate response to those who park their cars on double-yellow lines?
- ▣ Hence some kind of consequentialist analysis is required, taking account:
  1. the harm arising from the manipulation of individual self-deliberation entailed by nudge techniques,
  2. its associated expression of contempt for individuals as rational agents; and
  3. the benefits arising from nudging individuals in the direction deemed desirable by the choice architect.

# The problem of mistakes

- ❑ In particular, the problem of **mistakes** requires consideration.
- ❑ Compare:
- ❑ I choose the salad rather than the lasagne (which I genuinely would have preferred)
- ❑ I slow down when driving around corners due to Painted Road Lines (contrary to my informed preference)

# Mistakes: rights and wrongs

- ❑ Sometimes, the consequences of mistakes may be **serious**:
- ❑ Infringement of rights; or
- ❑ Commission of a wrong
- ❑ So, improve criminal conviction rates by changing the 'default': presumption of innocence changed to a presumption of guilt?
- ❑ Absolutely not. Violation of the fundamental right of an accused person to have the prosecution prove the case against the accused at trial, significant risk of wrongful conviction of the innocent (grave injustice)
- ❑ State has an obligation to ensure that such moral harm is avoided



# Presumed consent for organ donation?

- Increase volume of posthumous organ donation by presumed consent?
- might entail wrongful treatment of deceased (failing to respect her informed wish) even though no violation of a right
- So, prefer a regime of 'mandated choice'?

# The importance of transparency

- Thaler and Sunstein acknowledge the 'insidious' nature of nudges: 'they empower governments to manoeuvre people in its preferred directions, and at the same time provide officials with excellent tools by which to accomplish this task.'
- They propose a 'publicity principle' that would prevent governments adopting policies that they could not be able or willing to defend publicly to its own citizens. Hence subliminal advertising unacceptable because it could not be cured by an open announcement by the government that it will employ such techniques.
- My view: such practices objectionable not merely because we have not been informed of their use, but because they involve a form of deception which we could not detect (at least not without special equipment)
- So, if a nudge is not sufficiently transparent so as to allow nudges to meaningfully monitor its use, then they are illegitimate (highly vulnerable to abuse)

# Infantilisation of policy pragmatism?

- Risk of infantilisation: even if nudges effective in the short-term, will they produce enduring changes?
- Might diminish people's rational decision-making capacities – we (hopefully) learn from our past mistakes.
- But pragmatic view: in reality many of our decisions result from processes that bear little resemblance to the paradigm of reflective, reasoned-decision making by autonomous individuals upon which liberal thought is premised.
- Our pervasive use of cognitive heuristics enable us to cope with the enormous volume of decisions that we routinely confront in daily life.
- Second wave' or 'counter-revolution' of behavioural psychology – demonstrates that many of our apparently irrational decisions are only irrational at a superficial level. Our decision-making heuristics are much more sophisticated than the first wave of behavioural law and economics suggest.
- So even if our policy respects should reflect a proper respect for liberal principles, there might be little point in staunch adherence to principle if it generates policies seriously out of step with the realities of our decision-making behaviour.

# Conclusion:

- Nudges have the potential to make a genuine contribution to public policy through small scale, experimental interventions to identify their behavioural effects and provide a stronger evidence base for legal and social policy
- But it falls far short of providing a coherent regulatory philosophy (eg. should councils provide public facilities?)
- Nudge demonstrates that government policy instruments have inescapably ideological dimensions, and that choice architecture is ubiquitous and unavoidable

# Nudge as Fudge

- ▣ The deliberate shaping of choice architecture interferes with the liberty or autonomy of agents when it explicitly seeks to exploit cognitive irrationalities
- ▣ But, such an interference might be justified in particular policy contexts, taking into consideration:
  - The importance of rights
  - The potential for wrongs

and paying careful attention to the consequences of mistakes.

- ▣ Thaler and Sunstein's 'Nudge' fails to deal adequately with the autonomy-diminishing character of some nudges, nor does it grapple with a set of important and difficult questions about the proper role of the state in shaping the choice environment we inhabit
- ▣ Nudge as fudge – presents architecture in a highly readable, readily accessible and digestible form offering superficial satisfaction of policy-maker's cravings for quick, simple and effective short-term solutions but which, ultimately, might not provide enduring sustenance.

# References

- R Thaler and C Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness*, London, Penguin Books 2008
- K Yeung 'Nudge as Fudge' (2012) 75(1) *Modern Law Review* 122-148