

Book Reviews

How I Learned to Stop Worrying and Love Nudges

THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE. By Cass R. Sunstein. New York, New York: Cambridge University Press, 2016. 234 Pages. \$29.99.

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Imagine yourself commuting home from work in the near future.¹ As you start your car, an audible recording reminds you that nine fatalities occur every day due to distracted driving,² all of which can be avoided by switching off your phone. When you fail to switch off your phone, your car (having had sensors installed to detect the phone, as required by the National Highway Traffic Safety Administration) reminds you that texting and driving causes 341,000 accidents each year.³ Although you are in a hurry, you sigh and switch off your phone before driving off.

Your phone is partly the reason you are in a hurry. It is Election Day, and a social media app encouraged you to make a public commitment to your Facebook friends to vote on the way home from work. Several of your friends have already sent you texts (on the phone you have now switched off) to remind you of this promise. Anyway, President Sunstein is running for a second term, and you support many of the welfare-enhancing initiatives of the last four years—even the annoying reminder in your car. You are also late because you spent time late in the workday at a mandatory meeting with your company's retirement planner. Minor changes to retirement-savings-taxation regulations created an opportunity for you to save an extra few hundred dollars a year in your retirement account, so long as you rearranged your savings plan. Regulations required your employer to meet with all affected employees because email requests to the employees to update their plans induced an inadequate fraction of younger workers to take advantage of the potential savings.

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1. Readers should regard the first seven paragraphs as a hypothetical fiction, based on many of the concepts behind “nudging” as discussed in CASS R. SUNSTEIN, *THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE* (2016).

2. Erin Schumaker, *10 Statistics That Capture the Dangers of Texting and Driving*, HUFFINGTON POST (June 8, 2015), http://www.huffingtonpost.com/2015/06/08/dangers-of-texting-and-driving-statistics_n_7537710.html [<https://perma.cc/U936-3AES>].

3. *Id.*

Being in a hurry you decide that you do not have time to cook, so you stop at a drive-through fast-food restaurant. You order a cheeseburger and fries, even though the menu advises you that the calorie count, salt content, sugar content, and saturated-fat levels of your meal vastly exceed the recommended norms for a healthy life. Indeed, the employee taking your order asks you, as is now required, whether you would not prefer a healthy salad instead of the fries or a chicken burger instead of the cheeseburger. The menu screen also informs you that your meal is reducing your life expectancy by one hour relative to having the salad and chicken.⁴ With another sigh, you decide that you might need that extra time and change your order.

No nudging at the voting booth. At one time voters were asked to swipe a credit card and make a donation to the American Red Cross before voting. But people reacted negatively to that, even though they could opt out by signing a statement indicating that they preferred not to donate. So the program was eliminated. Each voter gets a pamphlet on how to vote by mail in the future, however. That program arose when research indicated that Election Days produce an average of twenty-four extra traffic fatalities each year.⁵ A proposal to force registered voters to reregister, so as to make them choose whether to vote by mail or in person, failed after preliminary studies suggested that many would simply fail to reregister, thereby suppressing voter turnout. The Federal Election Commission seemed willing to tolerate the excess fatalities to keep voter turnout high. Only new registrants must make such a choice.

You finally get home. You sort through your mail to find two utility bills. The monthly electric bill was at one time paid automatically (you were forced to consider that option when you moved to your apartment), but no more. The electric company discovered that informing their customers each month of the amount of energy consumption reduced overall demand for energy.⁶ Your bill shows that your apartment used more energy than 62% of your neighbors in the same building. A yellow frowny face accompanies this statistic. You turn off the hall light behind you and read about the latest electricity-choice program that the electric company insists you must assess. If you do nothing, you will be enrolled in a green energy program that costs 3% more than your current plan, but also reduces carbon emissions. You are

4. Assuming a six-ounce cheeseburger. See Michael Blastland & David Spiegelhalter, *Measuring MicroLives*, SLATE (Sept. 8, 2014), http://www.slate.com/articles/Health_and_science/medical_examiner/2014/09/calculating_life_expectancy_on_the_micro_level_the_impact_of_smoking_red.html [<https://perma.cc/GL4N-M5XE>] (indicating that one portion or three ounces of red meat reduces life expectancy by one “microlife” or thirty minutes).

5. Donald A. Redelmeier & Robert J. Tibshirani, Research Letter, *Driving Fatalities on US Presidential Election Days*, 300 JAMA 1518, 1518 (2008).

6. See P. Wesley Schultz et al., *The Constructive, Destructive, and Reconstructive Power of Social Norms*, 18 PSYCHOL. SCI. 429, 430–33 (2007) (describing a field experiment in which households decreased their energy consumption after receiving feedback about their energy consumption).

tight on money, and consider opting out, but the flyer contains a picture of a drowning polar bear. Feeling bad for the pathetic creature, you put the materials aside and decide to think about it later. Your water bill also tells you that you use more water than 36% of your neighbors. A yellow smiley face accompanies this statistic—better than the median! Cool, you think, showering with your spouse is paying off.

All this nudging has made you thirsty, so you reach for a beer before settling down to watch the election returns. Beer was more fun without the mandated picture of a decayed liver that now accompanies all alcoholic beverages,⁷ but you decide it is worth the loss of expected life (thirty minutes, according to the label) to down a cold one. You turn on the TV, which advises you that taking a twenty-minute walk before settling in on the couch will increase your expected life. It will do this again in an hour if you keep watching. Frowning, you nevertheless settle in to see if the nation will elect a president who can find more ways to improve your life.

Welcome to the Republic of Nudge. Relative to years past, its citizens are thinner, vote in greater numbers, die less often in traffic accidents, save more for retirement, impose a smaller carbon footprint, and suffer from fewer chronic diseases like cancer and diabetes. They eat their vegetables, pay their bills on time, contribute to charity, and save for tomorrow. They do not smoke, waste energy, or take out payday loans. Are they happy? They have a little less fun, on average, but the unhappiness that arises from serious illness and poverty in old age afflicts fewer of their numbers, so aggregate happiness is higher. Even though the Republic has implemented nudges that address obesity, personal-financial mismanagement, and climate change, its top behavioral scientists are, as yet, unable to keep its citizens from engaging in some of life's biggest mistakes. Notably, the Republic of Nudge still suffers from racial discord, a nagging crime rate, and a 50% divorce rate. Its leaders, seemingly unable to nudge themselves, also still embroil the nation in international entanglements—costing the nation in blood and treasure—and continue to underfund urban schools and infrastructure.

What do you think of the Republic of Nudge? Many aspects are admirable. It avoids many mandates common to its paternalistic neighbor, the United States of No. The United States of No bans smoking, mandates retirement contributions, fines its citizens for failing to vote, imposes a sugary-beverage tax, and maintains a nationwide constraint on the consumption of fossil fuels. The Republic of Nudge regards such intrusions as unnecessary intrusions on personal liberty. The Republic of Nudge resorts to mandates, taxes, and fines only when a careful assessment of less intrusive nudges seem not to have the desired effect on its citizens' behavior.

7. Adoption of this regulation would require overturning *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*, 696 F.3d 1205 (D.C. Cir. 2012).

The foundations of the Republic of Nudge arose from collaboration between law professor Cass Sunstein and behavioral economist Richard Thaler.⁸ These scholars initially ushered in the era of nudging with a discussion of policies that they labeled “libertarian paternalism.”⁹ The concept of libertarian paternalism is easily illustrated with data on eating patterns in cafeterias. Sunstein and Thaler noted that careful research indicated that people in cafeteria lines are more apt to select a dessert when the desserts are located at the beginning of the lunch line than at the end.¹⁰ They reasoned that if the cafeteria managers were interested in facilitating healthy eating habits (as might be the case for the cafeteria at a large company, which might want to lower its health insurance premiums), they could simply move the dessert to the end of the line—after the salads and other low-fat, low-calorie options.¹¹ This would reduce overall consumption of dessert while still providing it to those diners who truly love dessert so much that they will eat it no matter where it is (or perhaps those who exercise often and can manage the extra calories well). Moving dessert is paternalistic, as the manager is trying to induce a particular behavior, but also libertarian, as it preserves the option of eating dessert.¹²

A few years later, these same authors memorialized and expanded their libertarian paternalism approach into the book *Nudge*.¹³ As the comedian George Carlin once opined, concise labels carry more of a punch,¹⁴ and the idea took off. The core concept behind nudging is designing the environment in which people make choices so as to facilitate decisions that enhance well-being. Hard prohibitions are not nudges. Neither are traditional economic

8. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

9. *Id.* at 1190–91 (discussing libertarian paternalism in the context of employee savings plans and noting that those “nudged” in the direction of saving via an opt-out program tend to be better off).

10. Sunstein and Thaler discuss this example. *Id.* at 1184. Studies of nudges involved in eating are numerous. See generally BRIAN WANSINK, *SLIM BY DESIGN: MINDLESS EATING SOLUTIONS FOR EVERYDAY LIFE* (2014) (suggesting strategies for optimizing “eating environments” for less and better eating). For a study specifically discussing the location of desserts and healthier alternatives, see Norbert L.W. Wilson et al., *Food Pantry Selection Solutions: A Randomized Controlled Trial in Client-Choice Food Pantries to Nudge Clients to Targeted Foods*, 38 J. PUB. HEALTH ADVANCE ACCESS 1, 2–6 (2016) (proving that placing protein bars in the front of the dessert line nudges some people to make a better dessert choice).

11. Sunstein & Thaler, *supra* note 8, at 1166, 1184.

12. *Id.* at 1184.

13. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

14. George Carlin opined that referring to combat stress as “shell shock” rather than “post-traumatic stress disorder” would likely focus more attention on the difficulties suffered by some veterans. Ilona Meagher, *A George Carlin Classic on Combat PTSD*, PTSD COMBAT (Jan. 13, 2008, 11:27 AM), <http://ptsdcombat.blogspot.com/2008/01/george-carlin-classic-on-combat-ptsd.html> [https://perma.cc/5YV4-ABBB].

tools like taxes and incentives.¹⁵ The idea behind a nudge is not to avoid bribes and penalties, but to create an environment in which wise choices can flourish. The book spawned hundreds of academic papers, many with experimental tests for various nudges in a wide range of areas.¹⁶

More importantly, numerous governments began recruiting behavioral scientists to their ranks to invent and to implement nudges. As the introduction to Professor Sunstein's spirited defense of the use of nudging by governments, *The Ethics of Influence: Government in the Age of Behavioral Science* ("*Ethics of Influence*") notes:

In recent years, "nudge units," or "behavioral insight teams," have been created in the United States, the United Kingdom, Germany, and other nations. All over the world, public officials are using the behavioral sciences to protect the environment, promote employment and economic growth, reduce poverty, and increase national security.¹⁷

Professor Sunstein himself was appointed to the position of administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget in President Obama's first term.¹⁸ Although the position lacks a catchy title, it consists of overseeing all major federal regulations in the United States.¹⁹ While we do not truly live in the Republic of Nudge (not yet, anyway), Sunstein's position injected "nudging" squarely into administration policy. This influence culminated in the adoption of Executive Order 13,707, which encourages federal agencies to identify opportunities to alter federal programs to take advantage of potential nudges that might improve welfare.²⁰

In *Ethics of Influence*, Professor Sunstein addresses the concerns raised by the growing use of nudges by governments. One can quibble at the outset that addressing ethical concerns now is a bit like an ethical discussion of whether to create an atomic weapon after 1945, but that would be unfair. Professor Sunstein has addressed ethical concerns about nudging from the outset.²¹ This volume is best understood as part of a series of books Professor

15. SUNSTEIN, *supra* note 1, at 21.

16. See, e.g., Max Ernest-Jones et al., *Effects of Eye Images on Everyday Cooperative Behavior: A Field Experiment*, 32 EVOLUTION & HUM. BEHAV. 172, 177 (2011) (suggesting that images displaying eyes have a high potential for nudging observers towards cooperative behavior).

17. SUNSTEIN, *supra* note 1, at 21.

18. *Id.*

19. See Office of Mgmt. & Budget, *Office of Information and Regulatory Affairs (OIRA) Q&A's*, WHITE HOUSE (Nov. 2009), https://www.whitehouse.gov/omb/OIRA_QsandAs [<https://perma.cc/FX4K-WFX4>] (explaining how OIRA vets agency regulations using cost-benefit analysis).

20. Exec. Order No. 13,707, 80 Fed. Reg. 56365, 56365 (Sept. 18, 2015).

21. Sunstein & Thaler, *supra* note 8, at 1199-201.

Sunstein has authored on nudging;²² it represents an effort to consolidate his responses to ethical critiques.

Despite concerns about whether governments should use nudges, no one truly questions the efficacy of nudges. Nudges work. They sometimes work extremely well. Professor Thaler's retirement-saving nudge, "Save More Tomorrow," for example, is a highly effective mechanism to increase retirement savings.²³ Although nudging might not be as effective as mandates,²⁴ Professor Sunstein has no difficulty with mandates when the evidence shows that nudges are not effective enough.²⁵ But nudges alone can be surprisingly powerful.

Therein lies the ethical concern. Nudges can get millions to behave in ways that they otherwise would not. Is it appropriate for a government to direct its citizens' choices in the ways that nudges allow? Prohibitions, incentives, and mandates are all well-recognized tools of government, of course. So what could be wrong with less intrusive alternatives? The most common objection is that they treat citizens like children. The comparison between the concept of "choice architecture" and a Montessori school is strangely compelling. Montessori classrooms are designed to guide children into learning by making educational tasks look like games.²⁶ The classroom structure enables kids to make choices that facilitate their education. The kids are not told to do math at particular times designated by the teacher, the "math work" is simply laid out in an available part of the room and described in a way to make it attractive. The Republic of Nudge, in a sense, is a big Montessori classroom. The structure of the society is designed to facilitate desirable conduct.

22. In addition to NUDGE, *supra* note 13, itself, see generally CASS R. SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE (2015); CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013); and CASS R. SUNSTEIN, WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM (2014).

23. Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164, S185 (PAPERS IN HONOR OF SHERWIN ROSEN: A SUPPLEMENT TO VOLUME 112) (2004).

24. See Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1598 (2014) (arguing that behavioral-law-and-economics policy directives, like increased disclosure, do not always effectively override the tendency of individuals to make poor decisions).

25. SUNSTEIN, *supra* note 1, at 5 ("To be sure, coercion has an important place, even in the freest societies.").

26. According to the American Montessori Society:

Components necessary for a program to be considered authentically Montessori include multiage groupings that foster peer learning, uninterrupted blocks of work time, and guided choice of work activity. In addition, a full complement of specially designed Montessori learning materials are meticulously arranged and available for use in an aesthetically pleasing environment.

Introduction to Montessori Method, AM. MONTESSORI SOC'Y, <http://amshq.org/Montessori-Education/Introduction-to-Montessori> [<https://perma.cc/7TSY-VPLH>].

The essence of the critique is thus that the government should do more to educate its citizens to make well-informed choices, rather than simply structure the choice to guide them with a hidden benevolent hand.²⁷ Professor Sunstein has heard this argument many times before and marshals powerful replies. The response begins with the observation that educational programs are often not effective.²⁸ Importantly, they are ineffective for predictable reasons. Well-designed nudges respond to defects in how people reason and behave. Consider that automatic-enrollment retirement plans work well because of the nature of procrastination. Without automatic enrollment, people commonly fail to sign up for economically beneficial retirement plans, even though they intend to do so and recognize their benefits. The reason is that they are rationally myopic.²⁹ It takes time to understand the retirement plan and complete the paperwork. The benefit of being enrolled in the plan accrues slowly over time. The costs of waiting one more day is perhaps only a few dollars in retirement savings that will be realized years later, whereas the cost in time and effort to complete the paperwork is immediate and notable. Each day, it thus feels reasonable enough to put off the trouble of signing up yet another day. Understanding the benefits of signing up for the retirement plan does not ameliorate the problem of myopia. Indeed, a full understanding might make the problem worse, as the informed beneficiaries know that each day of delay costs them very little.³⁰ Automatic enrollment thus addresses a human weakness, thereby working more effectively for the beneficiary.

The failure to embrace environmentally friendly behaviors provides a similar example. Many people say they favor the use of renewable energy, even when it is somewhat more expensive than fossil fuel energy sources.³¹ If utilities offer cheaper dirty energy as a default, then consumers might procrastinate and delay switching to their preferred green option. Loss aversion might also make the default sticky.³² When people make choices, they are attentive to departures from the status quo—and especially attentive to a loss from such departure.³³ By switching to green energy, people can

27. SUNSTEIN, *supra* note 1, at 33.

28. *Id.* at 34.

29. See Ted O'Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 Q.J. ECON. 121, 149 (2001) (explaining that people procrastinate when the costs of delay are low and complete tasks when the costs of delay seem high).

30. *Id.*

31. See Cass R. Sunstein & Lucia A. Reisch, *Automatically Green: Behavioral Economics and Environmental Protection*, 38 HARV. ENVTL. L. REV. 127, 135 (2014) (describing a study that compared the number of Germans who said they would use green energy if presented with the choice to the number of Germans who actually chose to use green energy).

32. SUNSTEIN, *supra* note 1, at 172.

33. See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 1983 APA Award Addresses, 39 AM. PSYCHOLOGIST 341, 342 (1984) (explaining why people are reluctant to bet for equal stakes).

satisfy their desire to help the planet; switching to a more expensive form of energy highlights the extra cost. But consider if the default is the more expensive, green energy choice with an option to switch to save money by switching to the less expensive dirty energy. People process the savings as a gain. Sacrificing a foregone gain is less compelling than avoiding a loss.³⁴ Hence, more people are apt to pursue an environmentally friendly strategy when green energy is a default. As with the problem of procrastination, the problem is not lack of information.

For both the problem of procrastination and loss aversion, the ethical concern that the Republic of Nudge infantilizes its citizens fades somewhat. Its citizens are not suffering from a lack of information that can be cured with an educational campaign. In fact, the government is not even trying to get them to change their preferences. Rather, the government is simply trying to arrange the structure of choice so as to allow citizens to act on preferences that they already possess, in spite of cognitive limitations.

Neither is the Republic of Nudge treating its citizens as objects to further governmental goals. Professor Sunstein is careful throughout to maintain a deep respect for the “nudged.” The nudges he lauds most vigorously facilitate the expression of individual preferences.³⁵ People get more of what they actually want in an environment that helps them make choices. Indeed, Executive Order 13,707 says nothing about directing behavior. It simply directs agencies to identify ways to make government programs more user-friendly.³⁶

Human-factors analysis provides a helpful analogy. Imagine you are designing a cooktop for an appliance company.³⁷ The cooktop has four burners—two in front and two in back. The four control knobs run from top to bottom on the right-hand side. The control knobs can correspond to the burners they control in any configuration. You could design the cooktop so that the back control knob governs the front-right burner (the one most commonly used), but that would be foolish. Users will intuitively believe that the front-right burner is governed by the closest control knob (and likely also expect the back-left burner to be governed by the backmost control). It strikes no one as infantilizing the user of the cooktop to design the stove with an intuitive set of controls. Neither is it infantilizing to design a program to facilitate the expression of preferences for retirement savings or environmental quality.

34. SUNSTEIN, *supra* note 1, at 172 (“[L]oss aversion may have an especially significant effect, certainly in the case of green defaults.”).

35. *Id.* at 11.

36. Exec. Order No. 13,707, 80 Fed. Reg. 56365, 56365 (Sept. 18, 2015).

37. The example comes from DON NORMAN, *THE PSYCHOLOGY OF EVERYDAY THINGS* 75–79 (1988).

The cooktop example also illustrates the truly bullet-proof argument Professor Sunstein makes to defend the ethics of nudging. Defaults—and hence nudges—are inevitable.³⁸ Sunstein cites this contention to brand arguments against the ethics of nudging as “pointless.”³⁹ Someone must make a choice about where to put the dessert, which control governs which burner on the cooktop, whether a new employee defaults into a retirement plan, and whether a public utility offers green or dirty energy as a default choice. Defaults are inevitable. Should they not be chosen in a way that facilitates choices that benefit the decision makers?

Behavioral economics is thus the genie that has been loosed from the bottle. Without any understanding of the consumptive consequences of the location of dessert in the cafeteria line, the choice of where to put dessert is unimportant. The understanding of how procrastination works, how loss aversion influences behavior, and countless other phenomena of judgment and choice, however, renders the choice meaningful. A cafeteria manager who recognizes that more desserts get eaten when placed at the front of the line inevitably makes a choice that has consequences for the diners’ health. How can one then defend putting the dessert first? Once a government agency recognizes that an unnecessarily complex form deters citizens from obtaining free health care for children or the Earned Income Tax Credit, it becomes difficult to see any ethical case for retaining the complexity.

Some nudges require a more robust defense. Setting green energy as a default instead of cheaper dirty energy, for example, demands some greater justification. In the cafeteria, everyone is slightly better off (or much better off, depending upon how much they struggle with their weight) by having dessert at the end where it remains available as a choice that imposes no additional costs on those who still want dessert (everyone still has to walk through the same line). Changing energy plans, however, requires effort, and people delay opting out of the default plan even if they prefer something else. Poor individuals might feel that they need the savings that come with the dirty energy plan but procrastinate and lose out on the savings for long periods. Furthermore, the time and effort in switching plans imposes a cost on everyone who switches. Before a government can justify imposing a green default (or a dirty one, for that matter), it must assess the benefits of setting green energy as the default in terms of the savings on those who would otherwise have to switch to green against the harm imposed on those who would switch to dirty energy. This cost-benefit analysis is manageable but might be challenging. A government agency that mistakenly concludes that the benefits of green energy outweigh its costs might end up imposing a costly, undesirable default. So long as the government can reasonably assess the relative attractiveness of the two options to its citizens and assess the

38. SUNSTEIN, *supra* note 1, at 15–16.

39. *Id.* at 15.

transaction costs of switching and the consequences of procrastination, then an ethical government should try to identify the best default.

The nudges that create the greatest ethical concerns are those in which the government is making a clear effort to induce behavior contrary to people's preferences. Suppose the government knows that more people prefer dirty energy to green energy, but it would like more consumers to use green energy. Would setting green as a default be acceptable? The answer depends on why the government favors green energy. If dirty energy imposes some externality that is not borne by the consumers or the producers, then the nudge would be morally acceptable, so long as the harm that the externality poses exceeds the costs to the consumers who are induced by the nudge to use the disfavored alternative. Indeed, the nudge might be a more acceptable choice than a tax or regulatory mandate that forces dirty energy to clean up. Taxes and mandates can be more regressive than a green default, as they impose costs on consumers with regard to their wealth.⁴⁰ So long as poorer consumers spend the time and effort needed to opt out (a questionable, but measurable assumption), then regressive effects can be avoided or at least minimized.

But what about nudges in which the government has a moral claim of its own to make? Imagine that Professor Sunstein loses his bid for the presidency of the Republic of Nudge, and a social conservative like Ted Cruz takes control of the administrative state. The Cruz administration dislikes abortion.⁴¹ Unwilling to wait for judicial appointments to the Supreme Court that would overturn *Roe v. Wade*⁴² and allow his administration to push a prohibition on abortion through Congress, President Cruz wants to reduce the number of abortions. Along with a favorable Congress, he passes an anti-abortion nudge requiring that all women seeking an abortion view an ultrasound of the fetus and listen to its beating heart.⁴³ Each woman must also get counselling on adoption—specifically she is paired with a family who agrees that they will adopt her baby. She must then be shown a projected image of what her baby will look like at six months, five years, and then at age eighteen. Are such nudges justified in a country in which a majority favors legalized abortion (and yet which elected Ted Cruz)? What about

40. Compare SUNSTEIN, *supra* note 1, at 179 (proposing financial subsidies and making opt out “both salient and clear” as ways to solve any distributional issues with a green default nudge), with Arik Levinson, *Energy Efficiency Standards Are More Regressive than Energy Taxes: Theory and Evidence* 2 (NBER Working Paper No. 22956, 2016), <http://faculty.georgetown.edu/aml6/pdfs&zips/RegressiveMandates.pdf> [<https://perma.cc/9JTA-6DHJ>] (stating that “energy taxes like carbon and gas taxes are regressive . . . and efficiency standards are also regressive”).

41. This is (obviously) a hypothetical, at least at the moment.

42. 410 U.S. 113 (1973).

43. Several states have similar requirements. See *Requirements for Ultrasound*, GUTTMACHER INST. (Feb. 1, 2017), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> [<https://perma.cc/ARY9-8MU4>] (describing states in which women are required to or are given the option to view a fetal ultrasound before undergoing an abortion).

nudges that automatically change a woman's last name to that of her husband (subject to opt out)?⁴⁴ What about nudges that automatically send gun-permit applications to all adults, along with instructions on how to purchase an inexpensive firearm and obtain lessons on proper use and handling of a gun? What about forcing all high school seniors to meet with a military recruiter and affirmatively decline military service? The Republic of Nudge can look very different with the outcome of just one election.

Professor Sunstein has a clear response to these concerns. He contends that society is in no danger of being nudged too hard to the right (or left, for that matter). Professor Sunstein reports a wide range of survey data indicating that people disfavor nudges that run contrary to their underlying attitudes.⁴⁵ If his data are right, then strong nudges on abortion would face a great deal of political opposition in a country that favors abortion rights. Indeed, he specifically tested the favorability of nudges related to abortion and to changing women's last names. Although opposition to these nudges was greater among self-reported Democrats than Republicans, a large number of Republicans would oppose an extreme abortion nudge.⁴⁶ A behaviorally informed, socially conservative administration would have to first find a way to change the political landscape underlying these issues before it could advance these kinds of policies.

This defense paints nudges as yet another tool of government—no more objectionable than mandates or taxes. A democratic government that is trying to create a moral order that most of its citizens disfavor has all of these tools at its disposal but is wrong to try to use them beyond its political mandate. Indeed, when one contrasts nudges with prohibitions and taxes, nudges seem quite defensible. As Professor Sunstein puts it, “if freedom and welfare matter, coercion is often best avoided.”⁴⁷ Nudges allow an opt out and thus burden individual liberty far less than more heavy-handed measures. To be sure, nudges can be so overbearing that they might be considered just as repressive as prohibitions. Consider, for example, the efforts by the state of Alabama during the 1950s to publish the names and addresses of members of the National Association for the Advancement of Colored People.⁴⁸ One can argue this nudge was designed to induce people to withdraw from the organization (since membership clearly risked extreme reprisals), but the Supreme Court had no difficulty seeing this as imposing an unreasonable

44. Professor Sunstein discusses this nudge. SUNSTEIN, *supra* note 1, at 127. The remaining “nudges” in this paragraph are hypothetical.

45. *See id.* at 116–58 (elaborating on empirical data regarding people's approval of nudges).

46. *Id.* at 127, 133.

47. *Id.* at 5.

48. *NAACP v. Alabama*, 357 U.S. 449, 451–52 (1958).

burden on association rights.⁴⁹ Extreme abortion nudges might also be viewed as unduly burdensome on an individual woman's right to choose.⁵⁰

Therein lies the core of the defense of nudges as a simple tool of government that can be justified on utilitarian grounds. For those more concerned with personal liberty without regard to utilitarianism, nudges can be defended as less burdensome than the instrumentalities that governments already use to coerce behavior.

The argument still needs a little cleaning up. Some object that all of this nudging would leave an infantilized populace, unable to learn to make choices on its own. Intuitively, the best way to learn is by doing, and so making decisions should make us better decision makers.⁵¹ Learning requires feedback, and thus making bad choices in settings in which the adverse consequences are limited can perhaps be a valuable experience.⁵² Hard evidence that would provide direct support of this thesis is hard to come by, however. Professor Sunstein notes that reliance on GPS navigation systems (which he identifies as a nudge)⁵³ likely reduces users' facility with maps.⁵⁴ Beyond that example, studies in which people fall prey to a cognitive mistake and then learn to identify and to avoid their mistakes are scarce.⁵⁵ We have no way of knowing whether the citizens of the Republic of Nudge really will grow into feeble decision makers.

In any event, under Professor Sunstein's utilitarian approach, the concern that people will lose their ability to make good choices would merely constitute another factor in the costs and benefits of nudging.⁵⁶ Before imposing a nudge, a sound government would consider the extent, if any, to which it reduces aggregate decision-making skill among its intended beneficiaries. The cost-benefit analysis for such a concern would be especially challenging because the problem lies in the cumulative effect of many nudges. Identifying the nudge that broke the camel's brain might prove to be impossible. But so long as hard evidence that a government is truly

49. *Id.* at 462.

50. See SUNSTEIN, *supra* note 1, at 133 (noting that voters considered the "values of choosers" when evaluating nudges).

51. See Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1622–23 (2006) (expressing concern with interventions that inhibit "the development of the regulated parties' decision-making skills").

52. For a review, see *id.* at 1627–33.

53. SUNSTEIN, *supra* note 1, at 20 ("A GPS device nudges . . .").

54. See *id.* at 60 ("[U]se of the GPS can make it harder for people to know how to navigate the roads.").

55. Klick & Mitchell, *supra* note 51, at 1625–26 provide the most assertive arguments supporting the idea that people must be allowed to make mistakes so as to learn. Although they articulate a theoretical framework to support the point, *id.* at 1627–41, they provide no examples that relate to any of the specific nudges Professor Sunstein endorses.

56. SUNSTEIN, *supra* note 1, at 62 (assessing whether "the costs of education justify the benefits").

harming decision-making skills does not emerge, then the concern is merely hypothetical. And if such evidence did emerge, it would provide the means for assessing this additional cost in the analysis.

A more difficult objection lies in considering the more expansive implications of nudging. If nudging people towards better choices is morally sound, then an ethical government should also consider restricting the use of nudges from the private sector that undermine social welfare. Madison Avenue must find Professor Sunstein's description of nudges amusingly modest. Lacking the coercive authority needed to force people to buy their products, virtually all of marketing consists of nudges. Tobacco companies conveyed images of independent thinking in their advertisements precisely to counteract reasoned warnings.⁵⁷ Supermarkets make bread in-store, placing bakeries near the entrance, precisely to kick-start shoppers' appetites.⁵⁸ Furthermore, they arrange their soup in a random order because people buy more soup that way than when soup is arrayed alphabetically.⁵⁹ Retail clothing stores know that their customers most commonly turn right upon entering the store and so place items they want to move on the immediate right of the entrance.⁶⁰ Real estate agents show undesirable houses to potential homebuyers before taking them to homes that they truly want to sell so as to make the target homes look better by contrast.⁶¹ The socially undesirable nudges in the financial industry are now so well recognized that they have spawned their own regulatory body as a response—the Consumer Financial Protection Bureau.⁶² And retailers everywhere set their prices to end in a “9” so as to encourage sales.⁶³

57. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1489–92 (1999) (documenting the tobacco industry's behind-the-scenes control and manipulation of “independent” scientists and journalists).

58. Rebecca Rupp, *Surviving the Sneaky Psychology of Supermarkets*, NAT'L GEOGRAPHIC: THE PLATE (June 15, 2015), <http://theplate.nationalgeographic.com/2015/06/15/surviving-the-sneaky-psychology-of-supermarkets/> [https://perma.cc/59NF-U3VL].

59. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 748 & n.545 (1999).

60. See Malcolm Gladwell, *The Science of Shopping*, GLADWELL.COM (Nov. 4, 1996), <http://gladwell.com/the-science-of-shopping/> [https://perma.cc/A39F-H33N] (discussing the “Invariant Right,” the theory that human beings prefer to keep to the right when walking or entering new places, and its utilization by various corporations).

61. ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 14 (rev. ed. 1993).

62. See Adam C. Smith & Todd Zywicki, *Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection* 13–15 (Mercatus Ctr., George Mason Univ., Working Paper No. 14-06, 2014) (detailing the motivations for creating the Consumer Financial Protection Bureau).

63. See Bradley J. Ruffle & Ze'ev Shtudiner, *99: Are Retailers Best Responding to Rational Consumers? Experimental Evidence*, 27 MANAGERIAL & DECISION ECON. 459, 459, 461 (2006) (noting the ubiquity of retail prices ending in “99” and acknowledging that such practice may be directly related to consumer purchases). See generally Eric T. Anderson & Duncan I. Simester, *Effects of \$9 Price Endings on Retail Sales: Evidence from Field Experiments*, 1 QUANTITATIVE MARKETING & ECON. 93 (2003) (discussing the existing research on the ubiquity of prices ending in nine and conducting field experiments to measure the practice's effectiveness).

Unlike the nudges that Professor Sunstein endorses, these private nudges are not tested with cost–benefit analysis to ensure that they further overall well-being. It seems unlikely that any of them would survive cost–benefit analysis. Marketing nudges are intended for the private benefit of the companies that create them, not for the public good. These nudges do not make us thinner or healthier. They induce us to eat too much, smoke too much, and spend too much.⁶⁴ They often appeal to our basest intuitions and distract us from rational decision making.⁶⁵ Restricting such nudges is thus perhaps a much more serious undertaking than creating new nudges. Long before the Republic of Nudge tries to facilitate green energy, for example, it could reduce overall consumption enormously (and hence conserve energy) by forcing retailers to refrain from many of the more devious marketing strategies. Mandating that gas stations state prices that are divisible by ten cents could reduce fuel consumption far more than efforts to induce consumers to buy more fuel-efficient cars. Professor Sunstein’s data show that people somewhat dislike nudges that trigger misleading intuitions.⁶⁶ But he only tests public nudges.⁶⁷ Surely private nudges are just as objectionable. In short, the arguments that support the ethical grounds on which the Republic of Nudge can found its system justify a much more robust set of restrictions on product marketing than the Consumer Financial Protection Bureau and the Federal Trade Commission have ever imagined.

Furthermore, the nudges that Professor Sunstein endorses hardly scratch the surface of bad judgment. Nudges that facilitate retirement savings are apt to make the upper-middle class save more for retirement, but a majority of the American public currently report living “paycheck-to-paycheck” and have no extra wealth to save (today or tomorrow).⁶⁸ For many Americans, the real financial problem is that they lack enough education to obtain the kind of employment in which they can benefit from a little nudging. The choices they made in their youth—to drop out of high school, to have a child at a young age, not to attend college, or to commit crimes that made them difficult to employ—undermine their well-being much more than the issues that the suggested nudges can address. Most people needed nudges (or shoves) when they were young. Although Professor Sunstein tells us that nudging can demonstrably reduce rates of smoking and obesity, thereby

64. See *supra* notes 57–59 and accompanying text.

65. See SUNSTEIN, *supra* note 1, at 94 (explaining that certain advertisements cause consumers to “use their emotional reactions”).

66. *Id.* at 119.

67. See *id.* at 122–23, 126, 128–29 (testing American attitudes toward nudges such as educational campaigns, environmental and public health policy, and manufacturing labels).

68. Angela Johnson, *76% of Americans Are Living Paycheck-to-Paycheck*, CNN MONEY (June 24, 2013), <http://money.cnn.com/2013/06/24/pf/emergency-savings/> [https://perma.cc/YWU5-6FYS].

saving many lives,⁶⁹ the decision to abuse illegal drugs or alcohol has vastly more negative consequences. And what about marriage? Many marriages end unhappily in divorce, thereby imposing a universe of unpleasant consequences on the couple and any children they might have had together. Given the nearly ludicrous degree of optimism expressed by couples about the likelihood of divorce (99% of betrothed couples assert that they are less likely to get divorced than the average couple),⁷⁰ cognitive error clearly plays an enormous role in the decision to marry. If nudging its citizens to use green energy is ethically defensible, then why does the thought of a government that nudges its citizens on the most crucial choices—the ones in which the costs of bad choices are the greatest—give pause?

And therein lies the primary ethical concern with nudging. The nudges that Professor Sunstein discusses are all defensible. But it is the totality of nudging that raises ethical hackles. Do we really want to live in the Republic of Nudge? Does the description at the outset feel comfortable? And if so, does a more robust program to remedy life's more challenging choices seem attractive? I suspect that to most of us, it does not. We simply do not want our government thinking the way that the Republic of Nudge thinks. Perhaps we do not want our lives to be channeled so neatly all the time in every little corner of our existence. Oddly, we tolerate it at the supermarket and shopping malls. For better or worse—and it is probably worse—we like to see advertisements with attractive people, like to smell bread at the supermarket, and probably even like to sort through soup (although I personally find deliberately disorganized soup aggravating). It is hard to document an orderly, ethical argument for this messy, destructive ecological landscape that we inhabit. But too much public order gnaws at the soul in a way that is hard to capture.

To be sure, we do not live in the Republic of Nudge. Nor are we likely to do so anytime soon. Too many people resonate with Ronald Reagan's assertion that the nine most terrifying words in the English language are: "I'm from the government, and I'm here to help."⁷¹ We do live in the marketplace of nudge, and we will likely continue to do so for some time. The society saturated with healthy nudges that the opening paragraphs of this Book Review describe would require more than one executive order. It would demand a rethinking from the ground up as to government's purposes.

69. SUNSTEIN, *supra* note 1, at 59.

70. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (reporting that the median response of those about to be married was 0% when assessing whether they personally would get divorced).

71. This quote is commonly attributed to Ronald Reagan. *The President's News Conference: August 12, 1986*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=37733> [https://perma.cc/JJ9B-VX83].

In the political and social world in which we currently exist, Professor Sunstein's arguments win the day. The kinds of nudges that have become commonplace are apt to pass muster on cost-benefit grounds and on political acceptability. His survey data shows as much.⁷² And perhaps they provide a needed counterweight to the many nudges marketers employ, even as they make some aspects of a complex world more user-friendly. Government agencies will also curb some of the more extreme nudges in the marketplace—the ones that are easily identifiable as errors and as detriments to our economic well-being.⁷³ Critics will doubtless persist, but it is perhaps the nudge-saturated landscape that may lie ahead in some distant future that they fear the most. Professor Sunstein can perhaps best respond by engaging more with the limits of ethical nudging. This book makes a good start in showing that some kinds of nudges are politically unacceptable. The use of a limited array of nudges as a standard tool of government agencies is probably here to stay. The future should perhaps explore more of these limits to satisfy those who worry that they will someday wake up in the Republic of Nudge.

72. See *supra* note 67 and accompanying text.

73. The use of cartoon characters such as “Joe Camel” in cigarette advertisements, for example, draws excessive attention from children and thus facilitates marketing tobacco to kids. Hanson & Kysar, *supra* note 57, at 1481–82. The use of teaser rates by credit cards, which takes advantage of biases associated with “anchoring,” also takes heavy advantage of cognitive errors. See Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1376 (2004); see also Linda Sapadin, *The Anchoring Effect: How It Impacts Your Everyday Life*, PSYCHCENTRAL (July 24, 2013) <https://psychcentral.com/blog/archives/2013/07/27/the-anchoring-effect-how-it-impacts-your-everyday-life/> [<https://perma.cc/D82E-ZLB7>].