

Choosing How We Make Choices

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Cass R. Sunstein, [The Ethics of Influence: Government in the Age of Behavioral Science](#) (Cambridge Univ. Press, 2016).

[Cass Sunstein](#)'s thoughts about the ethics of regulation are of more than theoretical interest. He served as Administrator of the White House Office of Information and Regulatory Affairs and has successfully championed the use of behavioral sciences in policy design. "Nudge," which he coauthored with Richard Thaler, describes the use of choice architecture, or the background conditions for people's choices, to improve outcomes. Sometimes outcomes are improved from the standpoint of others, as in environmentally-friendly defaults. Sometimes nudges are intended to improve outcomes for the very people (apparently) making the choices.

[The Ethics of Influence](#) takes on the objections raised against nudging. Nudging requires that someone decide the direction in which people should be nudged. Nudging can be opaque or even manipulative. Nudging can be a really creepy way for elites within the state to control private individuals, under the radar. The book takes on these potential problems directly and systematically. In part, it parses out benign from insidious nudging. Sunstein simply rejects most of the worst examples and allows that there are domains of private decision-making where nudging is simply inappropriate altogether. He distinguishes nudges that exploit cognitive defects in order to direct people toward behaviors that they would reject from nudges that prompt deliberation and choice.

His distinctions are useful. But as defenses they are not always reassuring, since one wonders who will draw lines in practice (it cannot always be Professor Sunstein himself) and one worries that the enormous and obscure power of nudging might lend itself to expansive application. In fact, it might be useful to redirect some of the scholarly attention presently focused on the minds of the nudged to that of the psychology of nudgers and other regulators.

Many critiques of nudging are not limited to what Sunstein would regard as its abuses. General critiques question the picture of human agency at the center of choice architecture. There is unease with the ability of regulators to engineer behavioral outcomes without ever owning up to a clear mandate.

One of the important strengths of the book is that Sunstein takes these lines of critique seriously and presents them generously. He rejects a concept of manipulation that would attach to most of the regulatory measures that he would endorse but he adopts in its place a credible conception of manipulation as an effort to influence people's choices without sufficiently engaging or appealing to their capacity for reflection and deliberation. He doubts most nudging can be characterized as manipulative on these terms.

I have not offered many examples of the kinds of nudging he has in mind; the ones of particular interest here concern the background rules for contracts, especially contracts in the employment and consumer contexts. Although the book is obviously not interested exclusively or even primarily in contract law, Sunstein observes early on that "the common law of contract . . . is a regulatory system, and it will nudge, even if it allows people to have a great deal of flexibility." (P. 35.) Contract law is not a spontaneous system of private ordering. Contracts are incomplete and courts rely on default rules. Default rules are nudges.

Perhaps the most powerful point Sunstein makes in favor of nudging is the idea that in many cases, there is no alternative to nudging. The question is rather whether people should be nudged deliberately and cautiously, with system-awareness about the effects of a regulatory rule. One can try to argue in favor of less calculating nudges—eg

majoritarian defaults that are intended to reconstruct parties' preferences—but Sunstein is persuasive that such inadvertent pushes are likely to be plagued with many of the same problems associated with regulatory nudging, and we have no reason to assume that spontaneous orders will be benign. People always make choices under background conditions that compromise our picture of what free choice entails.

It might be that it what is most disturbing about nudging as a regulatory tool is the human predicament on which it depends, and not the nudging itself. We cannot blame Sunstein for that. And if the most unsettling aspect of nudging is the lack of self-awareness that this regulatory tool projects onto (or merely observes of) private individuals, its greatest appeal may be the great self-awareness it demands of regulators. I am less optimistic than Sunstein that regulators can achieve clarity of purpose and successfully walk the line between legitimate and manipulative choice architecture. But readers are likely to be persuaded that this architecture should be deliberate and subject to scrutiny. As individuals, we might not be able to make our contracting choices with full awareness of how those choices are framed, or we might not wish to exhaust ourselves by internalizing that perspective. We might have a better shot at regulating the regulators, or collectively setting the terms by which our individual choices are framed. Politically accountable nudging might be another opportunity to exercise agency collectively in the face of unavoidable limits to individual agency.

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