

2010

Nudge, Choice Architecture, and Libertarian Paternalism

Pierre Schlag
University of Colorado

Follow this and additional works at: <http://repository.law.umich.edu/mlr>



Part of the [Administrative Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913 (2010).
Available at: <http://repository.law.umich.edu/mlr/vol108/iss6/5>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NUDGE, CHOICE ARCHITECTURE, AND LIBERTARIAN PATERNALISM†

*Pierre Schlag**

NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS.
By *Richard H. Thaler & Cass R. Sunstein*. New Haven and London: Yale
University Press. 2008. Pp. x, 282. \$26.

INTRODUCTION

By all external appearances, *Nudge* is a single book—two covers, a single spine, one title. But put these deceptive appearances aside, read the thing, and you will actually find two books—Book One and Book Two.

Book One begins with the behavioral economist's view that sometimes individuals are not the best judges of their own welfare. Indeed, given the propensity of human beings for cognitive errors (e.g., the availability bias) and the complexity of decisions that need to be made (e.g., choosing prescription plans), individuals often make mistakes. Enter here the idea of the nudge—the deliberate effort to channel people into making the selections that are best for them. The key thing about a nudge is that it's noncoercive and there's always an opt out.

The nudge is an idea that ought to appeal to many people on the political spectrum. The basic idea is that institutions, including the government, inevitably structure the choices that people make (Cass Sunstein¹ and Richard Thaler² aptly call this a "choice architecture"). Their idea is that we might as well be thoughtful about how to structure our choice architectures. Choices are being driven by choice architecture anyway, so why not do a good job of it as opposed to a bad job or no job at all in structuring the thing?

This is the gist of the first book. Understood as an idea about how to improve government delivery of services, Sunstein and Thaler's theory is really hard to fault.³ They have aptly described a way of thinking about government programs and regulation that could well improve the delivery of

† © 2009 Pierre Schlag. All rights reserved.

* Byron R. White Professor of Law, University of Colorado. My thanks to Scott Moss for his comments on a prior draft.

1. Office of Information and Regulatory Affairs Administrator; Felix Frankfurter Professor of Law, Harvard Law School.

2. Ralph and Dorothy Keller Distinguished Service Professor of Behavioral Science and Economics, University of Chicago.

3. Sunstein and Thaler's prescriptions extend beyond government to all manner of institutions. But the great bulk of their work pertains to government. In this Review, I have confined my thoughts accordingly.

government services. “Choice architecture” could even become part of the new regulatory lexicon; it’s evocative and it’s smart. And they’ve operationalized it (which is an important thing given Cass Sunstein’s current job description as head of OIRA—Office of Information and Regulatory Affairs).⁴

Then there’s Book Two. This book is also about nudge. Nudge on steroids. This is the book where Nudge—the insight about how to improve delivery of services—turns into the full-fledged ideology that Sunstein and Thaler call “libertarian paternalism.” In its libertarian moment, libertarian paternalism eschews command-and-control regulations in favor of regimes designed to allow individuals to “go their own way.” In its paternalist aspect, libertarian paternalism nonetheless allows the government to structure the regime with a view to achieving set government goals. The defining characteristic of this ideology (besides its origins in Nudge) is a persistent drive to find the middle ground between libertarians and paternalists, Democrats and Republicans. This is what makes Book Two different: In Book Two, Sunstein and Thaler are not simply interested in correcting for cognitive error or improving the choice architecture of government programs, but in displacing ideological competitors on the right and the left. They are quite deliberately looking to flesh out that elusive “Third Way.”

Book Two is a pretty far cry from Book One. True, Sunstein and Thaler are still aiming for moderation with libertarian paternalism—trying to find “the middle way,” as it were. But they’re pretty assertive about it. Call it assertive centrism.⁵

Book One and Book Two are not unrelated, but it will be part of my central point here that the not inconsiderable virtues of Book One (the Nudge) do not transpose easily into Book Two (Libertarian Paternalism). Part of the reason is that the spectrum on which libertarian paternalism registers—one defined by Republicans and Democrats—is just not all that interesting. Sunstein and Thaler are perhaps right to claim that we are tired of the needless polarization between Republicans and Democrats. But my guess is that we will also be tired of approaches that do little more than mediate between the two. The big problem then with libertarian paternalism is not that it is an oxymoron (something that Sunstein and Thaler explicitly acknowledge and address) but that it lies on the axis defined by its parent conceptions.

BOOK ONE: THE NUDGE

Imagine along with Sunstein and Thaler a tribe of “Econs.” These are people who are unfailingly adept at making decisions for themselves. They

4. Consider the announcement by Peter Orszag, head of the OMB, endorsing Cass Sunstein’s approach. Office of Management and Budget Blog, <http://www.whitehouse.gov/omb/blog/09/04/20/NudgingAlong> (Apr. 20, 2009, 19:33 EST).

5. Cf. Ronald Dworkin, *Looking for Cass Sunstein*, N.Y. REV. BOOKS, April 30, 2009 (reviewing CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* (2009)) (describing Sunstein’s approach to constitutional law as “aggressive modesty”).

are at the very least better at it than third parties (most notably, that third party known as “government”). Econs are incarnations of the familiar econ-textbook persona known as the rational utility maximizer. According to Sunstein and Thaler, the problem with Econs is that, for the most part, they don’t exist. Turns out that the world is populated mostly with “Humans.” These are people who make predictable and recurring cognitive mistakes.

Humans are known to chronically underestimate the time it takes them to finish projects (the planning fallacy). They have a tendency to stick with the status quo even when it’s not in their interest (inertia). They routinely assess risk based on the most recent, most salient, most accessible examples of those risks (availability bias). They estimate probabilities based on the degree to which the event is deemed as representative of the category (representativeness). In short, they make precisely the sorts of cognitive errors (there are many more) that hundreds of studies by psychologists and behavioral economists have diagnosed and documented over the last several decades.⁶

Based on this wealth of knowledge, Sunstein and Thaler recommend that government and other institutions take these errors into account in formulating programs and policies. Their idea is to nudge people (push them a little) into making the decisions that are right for them.

How should institutions do that? Enter here the idea of “choice architecture.” With regard to many decisions that people make, they are offered a menu of options. This holds true for choosing food in cafeteria lines as well as for the selection of savings plans and much more. Sunstein and Thaler’s idea is that whoever is in charge of the choice architecture (the cafeteria supervisor or the government) should frame the choices so as to lead most of the Humans to make the choices that are right for them.

How does one do that? Well, start with their example of how not to do it. Imagine, for a moment, the perennially distracted law professor down the hall. Come this May, there is a damned good chance (you know this) that he will forget to choose a health plan. Being a good colleague, you will remind him of course, but chances are he will forget anyway. Now, if the default rule (the rule that applies unless another option is deliberately chosen) is no plan, the law professor will be in trouble. The “no plan” default rule is plainly a bad one. Better to pick as a default some health plan (the cheapest one? the one last year?) than none at all. This is a nudge. In fact, this kind of nudge is the mother of all nudges—the default rule. Picking smart default rules is a key way of nudging people.

But the *default rule* is hardly the only form of nudge available. There are a number of basic strategies for dealing with cognitive errors.

One approach is to *bypass* and even *enlist* cognitive errors. Take employment savings plans, for instance. People say they want to save, but then fail to follow through. They’re subject to a loss-aversion error: they don’t want to see their paychecks reduced. What to do? Well, Thaler and others

6. Sunstein and Thaler have compiled an impressive and very useful bibliography. See pp. 263–82.

have developed a “save more tomorrow” program, which enlists people to commit themselves to a series of savings contributions timed with pay raises in the future. In this way, people don’t see their paychecks go down, and thus the “loss aversion error” is *bypassed*. Meanwhile, inertia is on the side of saving as opposed to not, and thus the “status quo bias” is *enlisted* to help reach the right choice.

Another way to nudge people is to *counteract* the impetus for the cognitive errors. One example here is the “cooling off” period, which allows consumers to renege on big purchases within a limited number of days. The idea is to allow consumers to decide rationally on their purchases outside the reach of high pressure sales people or the momentary lure of temptation.

Yet another way to nudge people is to *prime* them into making the right choices. If you want people to vote, for instance, call them up the day before and ask them whether they intend to vote. Studies show that positive responses to that question increase the likelihood that they will actually vote.

Still another form of nudge is simply to *provide information* that could be useful in making choices. Sunstein and Thaler believe it’s useful to compel better information disclosure in everything from mortgages to car sales. The point is to allow people to “RECAP”—record, evaluate, and compare alternative prices.

There are lots of ways to nudge people, and part of the appeal of Sunstein and Thaler’s book is the multiple contexts in which they talk about nudging: speeding on curved roads, retirement plans, mortgages, medical treatment options, car buying, and so on. None of it is terribly earth shattering. But it’s interesting. And after going through so many examples, the reader (you or I) becomes trained in recognizing possibilities for nudging. Through sheer repetition and priming, we have been nudged.

So who could disagree with all this?⁷ I mean, here Sunstein and Thaler have come up with an operationalized set of suggestions for improving the delivery of government services.⁸ Surely, if government is to deliver services such as health care and the like, it would be desirable to avoid the waste wrought by cognitive errors. Smart choice architectures can do that, and if

7. There’s Judge Posner, of course. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (criticizing the early Jolls, Thaler, and Sunstein behavioral law and economics work). And there’s Gerg Gigerenzer as well. He is among those who challenge the received learning on cognitive errors and biases as based on an inadequate model of rational decision-making contexts. According to Gigerenzer, the cognitive-error and biases literature is based on studies that presuppose probabilities of correct outcomes. This research methodology thus presupposes reference points that are often unavailable in actual rational decision-making situations. When tested in “real world” situations, the heuristics that supposedly lead to “errors” and “biases” are revealed to be fast, frugal, and useful. For elaboration, compare D. Kahneman & A. Tversky, *On the Reality of Cognitive Illusions: A Reply to Gigerenzer’s Critique*, 103 PSYCH. REV. 582 (1996), with Gerg Gigerenzer, *On Narrow Norms and Vague Heuristics: A Reply to Kahneman and Tversky*, 103 PSYCH. REV. 592 (1996). For a general discussion of “fast and frugal” heuristics, see GERG GIGERENZER ET AL., *SIMPLE HEURISTICS THAT MAKE US SMART* (1999).

8. Many of the suggestions (as well as the general approach) were developed in prior articles. See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

Sunstein and Thaler are right, many choice architectures can push people to the right choices without constraining freedom of choice (or at least, not very much).

There is something appealing about all this and I think it has to do with the avoidance of waste. An unthinking choice architecture that simply “maximizes choices” is bound to lead the Humans, even if not the Econs, astray. Anticipating what people want or care about most seems sensible—at least if you’re already committed to allowing them to choose. Meanwhile, if you can help the Humans without preventing the Econs from making their preferred choices, where’s the harm? The benefits of nudging seem to be very large and the costs very small—which is precisely Sunstein and Thaler’s key point.

Is nudging then unexceptionable? Well, . . . no. A few problems or challenges come to mind: (1) What to optimize? (2) When is a nudge a shove? (3) Should we prefer experts? and (4) When do we nudge?

What to optimize? One problem is that Sunstein and Thaler are not entirely clear about what we are trying to optimize when we are called on to nudge people. Early on, they talk about what people “would actually *want*” (p. 12; emphasis added). At another point they talk about people’s “*self-interest*” (p. 203; emphasis added). And at still another point they say that “[a]s usual, the place to start is with people’s *actual goals and intentions*” (p. 224; emphasis added). But want, self-interest, and actual goals and intentions are not self-evidently the same thing. If you have any doubts, assume you’re a law professor and think about what you might *want* to do this summer (sky’s the limit), and compare it to your *stated goals and intentions* (your summer stipend request) and also to your *interest* (long-term career objectives). My guess is that there may be a bit of disjuncture. Sometimes, of course, the difference between wants, stated goals and intentions, and interest will be inconsequential. Think again, for instance, of the distracted professor down the hall. It’s a pretty easy call that he should not end up with no health plan regardless of whether we are concerned with his wants, interests, or goals and intentions. But not all nudging decisions are going to be that easy, and some precision in defining the object of our optimization might be helpful. Still no big deal.

When is a nudge a shove? This, as Sunstein and Thaler say at the end, is a tricky matter (p. 251). We are dealing with a spectrum—everything from voluntary release of information to compelled-disclosure requirements aimed at facilitating boycotts (p. 191). Some nudges land harder than others. One suspects, for instance, that those who are blacklisted as a result of compelled-disclosure requirements will view the requirements as coercive, not a nudge at all. But so it goes: This is what happens when you bring in perspective. Someone’s nudge is someone else’s compulsory mechanism. And it may well turn out too that a “nudge-in-action” will be more coercive than “a command and control regulation-in-the-books.” Still no big deal.

Should we prefer experts? As partisans of behavioral economics, Sunstein and Thaler definitely believe that choice architects can make life better for Humans, even if not for Econs. But they’ve looked only at one side of

the equation. Yes, human beings are sometimes prone to cognitive error, but what about the choice architects—the experts? Somehow Sunstein and Thaler have failed to ask this question in any serious way.⁹ What they have not looked at is whether *experts* are themselves prone to cognitive errors—including cognitive errors induced by their roles and identities as experts or by the character of their expertise. That Humans make mistakes is neither here nor there unless we know something about the fallibility rates of the experts who (1) are diagnosing the ostensible errors and (2) will use their own judgment to correct for those errors. Then too, in any truly interesting choice-architecture problem there will be a variety of experts and expert frames that can be brought into play. So the obvious question: Should there be a frame of frames? And which experts get to write the master script—the lawyers, the economists, the scientists? Or should we retreat from the question and opt for a hopefully benign chaos where the various expert types have to fight it out—or perhaps nudge each other? This is kind of an unfair point (because no one else seems to have a very good solution) but the problems in our time rarely come in the shape of a single frame for a single nudger-in-chief.¹⁰ Our bureaucratic circumstances and expertise-driven culture entail the presence and the contest of multiple frames. (More on that later.)

When do we nudge? Now this too is a difficult issue. Nudging, according to Sunstein and Thaler, is the thing to do when it is most likely to help the Humans and least likely to hurt the Econs (p. 72). When do Humans most need help?

Well, when decisions are difficult, when feedback is generally lacking, when people have difficulties understanding their choices, when choice is fraught, when temptation looms (and so on) (pp. 72–80). This is a helpful answer. But it answers only a narrow “when to nudge?” question. There is a much broader “when to nudge?” question to be confronted, however, and it is this: when is a problem one of choice architecture and when is it instead one that involves other functions—say distributional choices over wealth and rights, the promotion of values and norms, investment in coordination systems . . . and so on. Choice architecture is often inextricably intertwined with these more transparently political questions. One can even wonder just how often will one come across a function that is comprised purely of choice architecture?

Oddly, Sunstein and Thaler have somehow managed to overlook this issue. In their examples, they have often framed problems as simply self-evident matters of choice architecture. This works pretty well for Book

9. They do recognize that the potential benefits of nudging depend on “the ability of the Nudgers to make good guesses about what is best for the Nudgees.” P. 247. They recognize as well that “we need to be worried about incompetence and self-dealing on the part of the Nudgers.” P. 248. What they fail to consider are the potential defects of “expertise” as a *form* of knowledge. For elaboration, see Pierre Schlag, Commentary, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997).

10. HARRY COLLINS & ROBERT EVANS, *RETHINKING EXPERTISE* 69–76 (2007) (describing different epistemological bases for various forms of expertise and raising the meta-expertise question about how to identify valid expertise).

One—where all we are talking about is improving the delivery of a service (cafeteria food, savings plans) that *we have already agreed to provide* to an end user. It works less well when we confront transparently political and legal questions where conflicting interests and activities are at stake. This brings us to Book Two.

BOOK TWO: LIBERTARIAN PATERNALISM

In Book Two, Sunstein and Thaler tackle problems with the same strategy—create incentives, disclose information, let people go their own way: in short, nudge. But while the strategy is the same, the nature of the problems is not. We are no longer talking about correcting for cognitive errors, but rather about creating entitlement regimes. And the rationale has changed as well: we're no longer just talking about waste avoidance, but about reaching compromise that might satisfy both libertarians and paternalists.

Now how does this happen? In part it's an issue of framing: From the very beginning, Sunstein and Thaler present their book in terms of how a service provider should structure choices for an end user. Most of their examples in the beginning of the book involve situations where we have a service provider and an end user. Importantly, the decision *has already been made to provide the service* (e.g., cafeteria food, a road next to a lake, a four-burner stove, a retirement-savings plan, etc.). The only remaining question is how best to structure the provision of the service given the characteristics of the user population. In other words, through their very framing of the issue Sunstein and Thaler have already sidelined a great deal of political and value concerns that might animate disagreement over how to structure a regime. We've already decided that the issue is one of choice architecture.

Many legal problems, however, do not frame easily in that way. They involve bilateral or multilateral relations between “cooperative antagonists”—i.e., employers–employees, consumers–producers, tenants–landlords, and so on. In these kinds of situations—where activities and interests are in important ways opposed—questions other than “choice architecture” are likely to feature prominently: Who gets the entitlement? What entitlement? What are the relevant party identities? What are the relevant product/service markets? What third parties are affected?¹¹ Sunstein and Thaler do not deal with these kinds of issues. And as a result, it's not clear that nudges will always or even generally be preferable to prohibitions, inalienability rules, command and

11. It's fair to say that economic thinkers in law have not always been terribly attentive to these aesthetic–political questions. For elaboration, see Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661 (1989); Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1076–77 (2002). Ronald Coase, by contrast, cautioned early on about the importance of aesthetics to economic analysis. R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 43 (1960) (endorsing his mentor Frank Knight's admonition that “problems of welfare economics must ultimately dissolve into a study of aesthetics and morals”).

control, and the like.¹² Similarly, it's not clear that "choice architecture" is the right framing.

To grasp the point, consider what Sunstein and Thaler have to say about how nudges and choice architecture might "help save the planet." Sunstein and Thaler note that most of the time, when government has sought to protect the environment or to control the harmful effects of pollution, they have done so through command-and-control strategies. Noting that these strategies have sometimes helped (the air today is much cleaner as a result of emissions control), Sunstein and Thaler nonetheless contend that the strategies "look uncomfortably similar to Soviet-style five-year plans, in which bureaucrats in Washington announce that millions of people have to change their conduct in the next five years." (p. 184). In short, the strategies look and feel coercive. And so in keeping with their preference for nudges, Sunstein and Thaler then suggest that incentivizing nudges in the form of cap and trade or taxes on pollution may be better than strict command-and-control measures.

O.K.—but that leaves an important question: is libertarian paternalism the right form of analysis? Sunstein and Thaler write the following:

Especially when compared with command-and-control systems, economic incentives have a strong libertarian element. Liberty is much greater when people are told, "You can continue your behavior, so long as you pay for the social harm it does" than when they are told, "You must act exactly as the government says." Companies much prefer cap-and-trade systems to rigid government commands, because such systems allow more freedom and impose lower costs." (p. 186)

Now, the problem I want to focus on here is not the endorsement of cap and trade per se, but rather the supporting argument. The problem is that Sunstein and Thaler's talk of "freedom of choice" obfuscates the main reason to use cap and trade. The main reason to use cap and trade is that it will be more efficient: companies will have different cost-control capacities with regard to carbon emission. We shouldn't lose track of that. Sunstein and Thaler are aware of this: "A central advantage of such a [cap-and-trade] system is that it would ensure that reductions would be made by those who could do so most cheaply." (p. 188). Right exactly. That's the argument—not this vague talk about "freedom of choice" that can serve only to muddy up the analysis, particularly as Sunstein and Thaler look only at one side of the equation (the polluter's choices).

And that brings up a more serious problem: In a post-Hohfeld, post-Hale, post-Coase world, this "freedom of choice" analysis is incomplete.¹³ Where there is friction or conflict between two or more activities, interests,

12. I tend to stick with the agnosticism of Coase, who opined that the firm, government, or the market might each be an appropriate mechanism depending on the circumstances. Coase, *supra* note 11, at 18.

13. See *id.*; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

or parties, you simply cannot say that “liberty is much greater” under your preferred regime merely because that regime increases one side’s liberty. In conflictual situations where interests are opposed, you simply cannot make any claims whatsoever about whether there is a net liberty increase without looking at *how all the affected parties* are impacted. Nor can you—on pain of making the classic cognitive error called “anchoring”—say that a move from a command-and-control to a nudge regime has a strong libertarian element without specifying for whom.

Where climate change is concerned, choice architecture may not be the right rubric. One tip off is that some of the most interested parties—future generations—are not invited to the table to make any choices at all. What matters for them is how successful we are (and at what cost to them) in forestalling climate change.¹⁴ Their freedom of choice is basically whatever they have left over after we have exercised our freedom of choice. What matters to them in terms of their “freedom of choice” is whether what we have done in the present generation works or not.

Now the problem is not that cap and trade is always or generally inferior to command and control or tax measures (one would need to know something about specific context as well the substantive content of the cap and trade, the tax, and command-and-control options). Rather the point is, you simply cannot tell by *the form* of a regulation—i.e., its degree of “nudginess”—whether it is going to be more or less restrictive of liberty than the other options. The reason is simple: what may look like a nudge when we are talking about two parties (carbon producers and environmentalists) may look like command and control once we take into account third-party effects (future generations), externalities (local victims), technological constraints (temporal irreversibilities), and so on.

I wouldn’t make such a big deal out of this except that there is a huge difference between applying nudges in contexts that we agree call for choice architecture (e.g., cafeteria lines) and nudges in contexts that inevitably involve opposed interests and coercion (e.g., climate change). And the thing is that a lot of the problems that Sunstein and Thaler discuss—school choice, malpractice waivers, gay marriage—are of the latter variety. If libertarian paternalism is to be a viable candidate for addressing these latter kinds of problems, then it is going to have to answer the question why we should approach these problems in “choice architecture” terms rather than in the other ways. Not only have Sunstein and Thaler failed to answer this question, they have not posed it at all.

Perhaps then we ought to look more closely at the way in which Sunstein and Thaler have framed their presentation of choice architecture and libertarian paternalism. This will allow us to see what is appealing about the ideas as well as what is not. Here I want to resort to the idea of deep

14. What matters for future generations in cap and trade is the level at which the cap is effectively set plus whatever wealth savings are accrued for them by virtue of the regime’s being one of cap and trade (as opposed to, say, a simple carbon tax).

framing.¹⁵ There are two deep frames that are important to the rhetorical appeal of this book, but also limit its scope and reach. Importantly, the two deep frames conflict.

The first frame is a rhetorical device designed to elicit assent: libertarian paternalism is presented as the moderate alternative to two extremes (*laissez-faire* on the right and command and control on the left). Those who have followed Sunstein's elaboration of "incompletely theorized agreements" and "theoretical minimalism" will recognize this rhetorical device and his instinct for the middle of the road: the idea is to find the overlapping consensus, the largest common denominator, the middle ground. The appeal of the device is twofold. First, it has the feel of *realpolitik* insofar as it addresses the ideologies of actual political actors (think here, as Sunstein and Thaler suggest, of Democrats and Republicans). Second, it has the aura of evenhandedness: everyone gives in a little on their ideological commitments and (nearly) everyone is made better off.

But the apparent symmetry of this rhetorical device is belied by a second frame—an ideological one. As a matter of form most of Sunstein and Thaler's book is addressed to libertarians—explaining to them why they should get off their dime and accept a light touch of paternalism here and there. The book is a sustained effort to justify departures from a certain set of parallel baseline positions. To wit:

From Classical Microeconomics to Behavioral Economics;

From Econs to Humans;

From the "Maximize Choice" Mantra to Nudging;

From Libertarianism to Libertarian Paternalism.

In our political culture, the move from libertarianism to paternalism is arguably a move to the left.¹⁶ But to the question of why not move farther left Sunstein and Thaler don't have much of an answer. They invoke their desire to increase liberty and "to allow people to go their own way" (p. 249). That particular answer is strikingly unpersuasive in Sunstein and Thaler's book for two reasons. First, as already mentioned, it's simply not cogent to make claims about net increases in liberty resulting from a particular program or protocol without looking at all the effects on all the implicated parties and activities. Second, assessing increases in liberty would seem to require that we know something about what kind of liberty is implicated. Unfortunately, Sunstein and Thaler leave their conception radically under-theorized. The most one can tell is that for Sunstein and Thaler, liberty equals freedom of choice.¹⁷ This is not a particularly deep account of lib-

15. A deep frame can be activated through a metaphor or an image or a rhetorical device. What is key to the deep frame is that it is sufficiently nonobvious to the author and reader and sufficiently repetitive that it structures (nudges?) their thinking in ways of which they remain unaware.

16. And arguably not when we are concerned with the social-conservative agenda.

17. See pp. 248–49.

erty¹⁸—and furthermore, Sunstein and Thaler tell us nothing about how or how much we are to value freedom of choice in any particular context. And that's a problem because evidently, Sunstein and Thaler would like us to value it a lot. As to why persons on the left should move right from their paternalist norms, I don't believe Sunstein and Thaler have much to say—principally because they don't address arguments to their left.

Indeed, it is one of the small frustrations of this book that while it offers the middle way—or even more grandly, the Third Way—it doesn't provide much of a political frame for situating its proposal. Indeed, while it is quite clear that Sunstein and Thaler aim to find the middle ground between libertarians and paternalists, in the end it's not clear what libertarianism and paternalism actually are. This is what they tell us: Libertarians believe in the actuality of the rational utility maximizer. They celebrate freedom of choice and are unwilling to give it up even in exchange for considerable welfare benefits. As for paternalists, their ideology is even less filled out in this book. We know this much: They are willing users of command-and-control regulations. They are not afraid of mandates, and they are willing to use government to protect people from their own bad choices.

These are very (very) thin positions. They are gestures. They are far too formal, too disconnected from their substantive contexts, to allow you or I to sign up for either side. “I like command and control” or “I’m a freedom of choice guy”—these are not mature political positions.¹⁹ They have the ring of the *a priori*. And they don't take seriously what they sacrifice.

What about, “I’m a nudge guy.” Is that a serious position—intellectually and politically speaking? It is appropriate in some circumstances no doubt, and for this we should thank Sunstein and Thaler for having pointed it out so well. But as a kind of political or intellectual ideology—I’m a nudge guy? Is this a serious political position or is it instead a technique of governance trying to be something more?

Toward the very end of their book, Sunstein and Thaler write the following:

With respect to government, we hope that the general approach might serve as a viable middle ground in our unnecessarily polarized society. The twentieth century was pervaded by a great deal of artificial talk about the possibility of a “Third Way.” We are hopeful that libertarian paternalism offers a real Third Way . . . (p. 252)

Is this really the Third Way? Hard to tell.

18. As a matter of political justification, a nontrivial conception of freedom of choice must be redeemed in an account of what kinds of choices matter. For obvious reasons, quantity of choice is neither here nor there.

19. I know this sounds like an insult, but I mean it more as a diagnosis. Every political position has flaws (e.g., romanticism, utopianism, corruption, cynicism, etc.). It is important to be able to recognize and talk about the flaws *specific* to a particular position.

PARTING THOUGHTS

Nudge begins with the metaphor of the cafeteria supervisor as a choice architect. The book ends by proclaiming itself as the Third Way. One can be skeptical of that claim (as I have been). But what if instead, we take the implicit equation seriously? What if the Third Way—the triumph of technocracy as it were—turns out to be politics as cafeteria?

What does one say about this? One reaction (and I believe I have said this) is that if you're going to have a cafeteria, then you might as well have a well-administered one. Nudge helps. Considerably.

But does politics come down to cafeteria? Is that all there is?

Well, maybe so and maybe that's a good thing too. The twentieth century is replete with disastrous examples of what more heroic versions of politics can bring.

So, maybe the government should be a cafeteria? Perhaps. It would be more reassuring, though, if life on the outside (the so-called private sector) were not itself a megacafeteria.

So is it cafeteria all around then? If so, one could well come to wonder: What's the point? Keep the human protoplasm satisfied?

Why? To what end?

This too is a possible reaction to *Nudge* and the intellectual-cultural moment it represents. *Nudge* is not alone. Of late, we have seen the publication of a number of these cream-colored, one-idea books that exude the same sort of clever contentedness.²⁰ They're smart, but thin. By design. Pomo management science. Tastes great. Less filling. Like *Nudge*, they make me want to reach back for my high modernists—something more redemptive, more critical, or at least less shallow—maybe Hannah Arendt on politics.²¹ Or perhaps Adorno and Horkheimer on the “administered world.”²² Or maybe Foucault on “governmentality.”²³ But something.

20. Citations omitted. Go to your local bookstore.

21. See HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

22. See MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., Stanford Univ. Press 2002).

23. MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE OF FRANCE, 1978–1979*, 215–316 (2008).