

A RESPONSE: WHAT’S IN A NUDGE?

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INTRODUCTION

This Essay offers some brief comments on Professor Sunstein’s very fine survey project, “Do People Like Nudges?,” which appeared recently in the *Administrative Law Review*.¹ The survey is deeply imbedded in Sunstein’s ongoing project of elaborating and defending the nudge concept,² an idea that has been enormously influential over the past decade and a half.³ My commentary necessarily engages both the survey and that larger project. To preview, my central take on both the project and the survey’s contribution to it, is that if anything they have been too modest. Researchers who want to push behavioral economics beyond the bounds of what Sunstein has been inclined to defend may need to be careful to distinguish their projects from his, including by taking the simple but important step of using different words for the objects of their studies.

From the early days of the *Nudge* project, there was a sense—at least among commentators on the left—of a certain frustration with the project’s limited scope.⁴ Instead of exploring the potential for behavioral economics to open new options in the regulation of virtually any social problem, Sunstein and Thaler seemed determined to focus instead only on a project of convincing regulation skeptics. Again and again, they debate the “legitimacy” of nudging, particularly with respect to regulations that aim to protect

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1. Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177 (2016).

2. *E.g.*, RICHARD THALER & CASS SUNSTEIN, *NUDGE* (rev. & expanded ed. 2009).

3. *See* RHYS JONES ET AL., *CHANGING BEHAVIOURS: ON THE RISE OF THE PSYCHOLOGICAL STATE* vii–xii (2013).

4. On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2127–32 (2008); Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 919 (2010). For more recent commentary along these lines, see, Frank Pasquale, *Why “Nudges” Hardly Help*, ATLANTIC (Dec. 4, 2015), <https://www.theatlantic.com/business/archive/2015/12/nudges-effectiveness/418749/>.

individuals against harms to themselves.⁵ On those relatively few occasions (and one must use relative terms to describe the output of the indefatigable Sunstein) where they explore the regulation of externalities, they again appeal mostly to regulatory skeptics, invoking nudges as a regulatory tool that everyone can embrace, regardless of political commitments, because—they say—nudges carry no costs.⁶

One goal of my commentary here, then, is to attempt to show how this focus has tended to close off some of the revolutionary implications of the nudge, and potentially even to unnecessarily cloud policy analysis. Limiting nudges only to policies that have no subjective cost omits a wide array of potentially important tools. Further, if we take seriously both the zero-cost claim⁷ and Sunstein’s suggestion that disclosure policies meet that restriction, we run the risk of overlooking serious costs, especially opportunity costs, of disclosure.

The zero-cost limit is all the more puzzling given that it does not seem necessary to Sunstein and Thaler’s argument. “Paternalistic” regulation—protecting people from their own bad decisions—can be justified under standard economic analysis, whether nudges are costly or not.⁸ For example, we may believe that individuals hold conflicting sets of preferences, and that the transaction costs of mediating between them may prevent preference-maximizing outcomes. The transaction-cost approach does raise the question of how best to measure preferences in situations of internal conflict, but that is in good measure already the routine stuff of regulatory design.

Sunstein appears to eschew this kind of argument because he wants to frame nudges as a “soft” paternalism that does not need rigorous cost-benefit analysis.⁹ Expanding on work by Ryan Bubb and Richard Pildes, I argue that any policy choice—including the option to simply let “the market” have its way—is always a potentially costly endeavor.¹⁰ Realistically, making some choices crowds out or affects others, no matter how “soft” or market-oriented the option we select. There are, or should be, no short cuts.

5. CASS R. SUNSTEIN, WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM 123–62 (2014) [hereinafter SUNSTEIN, WHY NUDGE?]; Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. REG. 413 (2015); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

6. *E.g.*, THALER & SUNSTEIN, *supra* note 2, at 6, 8, 252–54.

7. By the “zero-cost” claim, I mean the position Thaler and Sunstein adopt that nudges should carry costs that “are close to zero.” *Id.* at 252.

8. *See infra* text accompanying notes 20–25.

9. *See* SUNSTEIN, WHY NUDGE?, *supra* note 5, at 17–18.

10. Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1616–25 (2014) (pointing out that default savings rules may reduce welfare for individuals who would have saved more than default).

In any event, because different policy-makers and theorists may have differing views on what best justifies and instantiates the uses of behavioral economics in regulation, I also suggest more careful terminology.¹¹ Many researchers have tended to use nudge as a shorthand for behaviorally-informed policies, such as default rules, without noting that the policy they study would fail to meet Sunstein and Thaler's criteria.¹² That leaves us with potentially competing and incommensurable claims about the properties of nudges. I offer instead a more careful, if less concise or euphonious, taxonomy.

Bringing these ideas back to the study at hand, I think "Do People Like Nudges?" tells us both less and more than Sunstein suggests. Many of the survey questions deal with simple disclosures, such as "calorie labels" and a "public education campaign" on "distracted driving."¹³ The fact that respondents appreciate the value of disclosure, I argue, should not do much to increase our confidence that they will equally appreciate other kinds of policy tools. At the same time, the possibility that respondents either value self-control techniques offered through such policies as graphic warnings on cigarette labels,¹⁴ or view the experience of having to look at those labels as carrying low expected subjective harms, has important implications. These factors should play a central role in "choice of instruments" analysis, and the survey provides evidence in favor of graphic warnings over some potential alternatives.

I. A NUDGE IS...

Nudges, as they were first explained by Sunstein and Thaler, seemed like a straightforward concept with two key definitional components. First, a nudge is a design feature that imposes "close to zero" cost on those who encounter it.¹⁵ Often, the cost is as trivial as the stroke of a pen: Do you want to donate your organs after death? Check this box if no. Second, the nudge is surprising in its effectiveness.¹⁶ That is, from a standard rational-actor economic model, a cost-free design feature should not change outcomes. Due to the foibles of human cognition, however, many of these cost-free features in fact change behavior.¹⁷ A government nudge is then just the intentional

11. See *infra* text accompanying notes 81–101.

12. See *infra* text accompanying notes 80–82.

13. Sunstein, *Do People Like Nudges?*, *supra* note 1, at 224.

14. *Id.*

15. SUNSTEIN, *WHY NUDGE?*, *supra* note 5, at 143; THALER & SUNSTEIN, *supra* note 2, at 252–54.

16. SUNSTEIN, *WHY NUDGE?*, *supra* note 5, at 85–86; THALER & SUNSTEIN, *supra* note 2, at 7–8, 255 (distinguishing between the behavior of "Econs" and "Humans," and noting that nudges rely on "*seemingly* small features") (emphasis added).

17. Brian Galle, *Tax, Command . . . Or Nudge?: Evaluating the New Regulation*, 92 *TEX. L. REV.*

use of a cost-free design feature to change human behavior.

That is not how other behavioral economists now appear to have understood the nudge concept. Instead, what they seem to have in mind is an instrument whose subjective cost may be large, but fleeting.¹⁸ When this momentary cost is weighed against an actor's other preferences, it may be that use of the instrument on net improves that person's well-being.¹⁹ For example, most of the time, I want to have money available for retirement. At the moment I must sit down and plan how to save; however, I find the process extraordinarily burdensome, and so I do not do it. But I will later wish that I had, and I will wish that for all the years of my retirement. Thus, a policy (which these economists often call a "nudge") that flips the default and forces me to incur a large but momentary cost to opt out of savings better maximizes the sum of all my preferences over time.²⁰

Sunstein and Thaler reject this approach. Instead, they assert that the cost of opting out of a default retirement plan is zero or close to it, when measured from the proper perspective.²¹ Costs, they suggest, should be assessed from a careful and reflective distance, not in the moment.²² At any time when the pen is not in our hands, we will recognize that the cost of checking an opt-out box is trivial.

This definition is in some ways curious because it is not necessary to defending nudges against the charge of paternalism. Classic economic analysis, dating to Mill, and Locke before him, says that government should not regulate to prevent humans from self-harm.²³ Since government cannot see inside our heads to know what we really want, it should rely on "revealed preferences."²⁴ If I choose not to save for retirement, it must be that that is what I want, and government should let me, unless by doing so, I impose costs on others. Many behavioral economists accept this argument, but simply say that a compelled savings policy would better maximize revealed preferences.²⁵ By observing what humans do, we have seen that *most* of the time

837, 854–59 (2014) [hereinafter Galle, *Tax, Command . . . Or Nudge?*].

18. See Markus Haavio & Kaisa Kotakorpi, *The Political Economy of Sin Taxes*, 55 EUR. ECON. REV. 575, 578 (2011); B. Douglas Bernheim & Antonio Rangel, *Toward Choice-Theoretic Foundations for Behavioral Welfare Economics*, 97 AM. ECON. REV. 464, 467 (2007); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 246–47 (1998).

19. Zamir, *supra* note 18, at 246–47.

20. *Id.*

21. THALER & SUNSTEIN, *supra* note 2, at 12.

22. *Id.*; see SUNSTEIN, *WHY NUDGE?*, *supra* note 5, at 108–10.

23. See JOHN STUART MILL, *ON LIBERTY* 9 (Kathy Casey ed., 2002) (1859); JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* Ch.9 §§ 123–31 (1690).

24. See generally Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference*, 15 *ECONOMICA* 243 (1948).

25. See Bernheim & Rangel, *supra* note 18, at 467; Ted O'Donoghue & Matthew Rabin,

they act as though they want to save. That makes the policy revealed-preference maximizing.

In essence, as I develop elsewhere, the economists' argument is similar to the one advanced by Ronald Coase.²⁶ There are two warring impulses in our heads, just as in Coase's framework there are warring neighbors. The savings default, like property rights in Coase's framework, helps to overcome the inability of those two sets of preferences to negotiate to a stable agreement.

Sunstein and Thaler instead argue that the momentary impulses we exhibit should not count in the utility framework—that is, the cost of frustrating those impulses is close to zero. Again, they count only “objective” preferences reached after “cool” deliberation. This is a defensible position, but it opens them to the criticism that it arbitrarily privileges one neighbor over another.²⁷ The preferences of the hot-tempered, short-sighted part of the brain are, arguably, still real preferences. By choosing one neighbor over another, critics have repeatedly asserted, Sunstein & Thaler make exactly the kind of value judgment that Mill urged governments to avoid.²⁸

Why, then, do Sunstein and Thaler—Sunstein, especially, in his writings in the wake of the *Nudge* book—stick so resolutely to their position, when another good argument without this vulnerability is at hand? Only they can say for sure, of course, but it may be because Sunstein uses the zero-cost definition not only to defend against charges of paternalism, but also to finesse the need for cost-benefit analysis. In general, Sunstein is a fierce defender of cost-benefit analysis not only for intellectuals but also for use within bureaucracies.²⁹ He argues that in many contexts government regulation cannot be justified in light of its private costs, and that regulatory mechanisms must be in place to assure that most rules meet this cost-justification threshold.³⁰ He has said repeatedly, however, that nudges, because they impose minimal burdens, need not clear the bureaucratic (or, apparently, intellectual) hurdles of the cost-benefit analysis process.³¹

Optimal Sin Taxes, 90 J. PUB. ECON. 1825, 1829 (2006); Zamir, *supra* note 18, at 247, 253.

26. See Brian Galle, *The Problem of Intra-Personal Cost*, 17 YALE J. HEALTH POL'Y L. & ETHICS, at 13 (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767868 [hereinafter Galle, *Intra-Personal Cost*].

27. See Riccardo Rebonato, *A Critical Assessment of Libertarian Paternalism*, 37 J. CONSUMER POL'Y 357, 370 (2014).

28. *Id.*

29. *E.g.*, CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 99–132 (2002).

30. *Id.*

31. See SUNSTEIN, WHY NUDGE?, *supra* note 5, at 17–18.

These definitional commitments seem to have led the nudge debate in directions that, in my view, have proven to be unproductive. As I explore elsewhere, the availability of nudges as an alternative to more traditional regulatory tools has major potential implications even within a standard cost-benefit framework.³² Sunstein's reluctance to engage on this front has meant that nearly a decade after *Nudge's* publication, the overwhelming response has been repeated cycles of debate over whether nudges are really costless—as suggested by the fact that the survey I address here is also collected in Sunstein's recent book on the “ethics of influence.”³³

Turning this discussion back to the survey, the definitional problem arises in several different ways. First, I will argue, the survey seems to neglect the essentiality of the “surprising” prong. In fairness, that is to be expected, as the definitional role surprise plays in nudge theory has gotten almost no attention in the literature. Second, the limited definition and scope Sunstein apparently sees for nudges may have led him to underplay some potentially quite important interpretations of his survey result.

II. ...IS [INFORMATION] A NUDGE?

One of the great strengths of the survey is the wide range of government policies it examines, but that also proves a potential weakness. For the most part, in summarizing his results, Sunstein pools respondent attitudes towards all the policies when he makes analytical claims about the public's attitude towards nudges, such as “most Americans were also supportive of multiple efforts to use choice architecture to promote public health and environmental protection.”³⁴ The trouble is that many of these policies are not, under Sunstein and Thaler's definition, nudges at all.

What they are instead is information. Many of the surveyed policies simply provide respondents with new facts, such as public education campaigns on childhood obesity or distracted driving, and mandatory labels for GMOs and high salt levels.³⁵ After absorbing this new information, the recipient is left to decide for herself whether and how it should affect her choices. In contrast, many nudges provide information of a kind, but do so in a way that leads the individual to act, or that frames their choices in a way

32. See Galle, *Tax, Command . . . Or Nudge?*, *supra* note 17, at 859–93; Galle, *Intra-Personal Cost*, *supra* note 26, at 27–47.

33. See CASS R. SUNSTEIN, *THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE* 116–58 (2016); see generally Doug Husak et al., *Symposium, The Ethics of Nudging: Evaluating Libertarian Paternalism*, 14 *GEO. J.L. & PUB. POL'Y*, 645 (2016); Christian Coons & Michael Weber, *INTRODUCTION*, IN *PATERNALISM: THEORY AND PRACTICE* 1, 15–23 (Christian Coons & Michael Weber eds., 2013).

34. Sunstein, *Do People Like Nudges?*, *supra* note 1, at 188.

35. *Id.* at 187–89.

that would be costly for them to set aside. For instance, Sunstein and Thaler offer the example of painted lines on a roadway that grow closer together, giving the illusion of greater speed; this tends to lead drivers to slow down.³⁶ Contrast the painted lines with a sign saying, “safe speed on this curve: 30 mph.”

Information is not a nudge because its effect is not surprising from a rational-choice perspective. In most classic rational-actor models, individuals rationally lack information even about key decisions, such as whom to elect President.³⁷ Gathering and processing information is costly.³⁸ A rational calculus may conclude that costly investments in information, with uncertain payoff, do not have positive expected value, especially for risk-averse actors.³⁹ Further, information is often a public good, so that (depending on the costs of and marginal return on additional data) it can be rational to free-ride on the information-gathering of others.⁴⁰

Put another way, free information is a carrot, not a nudge.⁴¹ It is simply a valuable transfer from the regulator to us, like a town fireworks display, or Supplemental Nutrition Assistance Program (SNAP) benefits, or a monthly check to support a universal basic income. Making use of the carrot may not be costless, as information can still be difficult to process or useless without additional context. But new data can move our decision-maker closer to achieving her preferences without her having to pay for that incremental step.

This distinction undermines what seems to be at least an implicit aim of the survey. In asking, “Do People Like Nudges?” Sunstein appears to ask, “do people engaged in cool and abstract reflection think nudges are costly?”⁴² He is, in other words, offering an empirical test of the Sunstein and Thaler definition of a nudge. It is an imperfect test, as most empirical tests must be. Survey respondents who give positive answers may simply report that these policies produce desirable results on net (i.e., the economists’ definition of nudge), rather than reflect on whether the intervention alone is costly—

36. SUNSTEIN, *WHY NUDGE?*, *supra* note 5, at 38–39.

37. See Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 146–49 (1957).

38. See JONATHAN BARON, *THINKING AND DECIDING* 54 (3d ed. 2000).

39. See John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669, 671 (1996); Roy Radner, *Bounded Rationality, Indeterminacy, and the Theory of the Firm*, 106 ECON. J. 1360, 1363 (1996).

40. See Downs, *An Economic Theory of Political Action in a Democracy*, *supra* note 37, at 146.

41. Cf. Alan Schwartz, *Regulating for Rationality*, 67 STAN. L. REV. 1373, 1375–76 (2015) (noting case for subsidized information).

42. See Sunstein, *Do People Like Nudges?*, *supra* note 1, at 183 (“most people do not share the concern that nudges . . . should be taken as . . . an objectionable interference with autonomy.”).

though by contrasting nudges with similar “mandates,” Sunstein is able to get at respondents’ senses of the relative costs of the two mechanisms. In any event, purely informational policy interventions do not test this proposition at all, because we already know the answer: information is useful. By pooling together informational policies with others that have potentially negative and unpredictable impacts, the survey may over-inflate the average attitude towards policies that contain real surprises.

Pure information policies also seem to lack another component of “surprising” policies. Critics of the *Nudge* book complain that the vision of nudging offered raises potential for government corruption and anti-democratic manipulation.⁴³ If nudges are hard to detect, critics say, they may also be hard for citizens to monitor.⁴⁴ My view is that this claim is considerably overstated, and certainly is not unique to nudges; the modern regulatory state already is designed to reduce the danger of citizen alienation from a system of enormous complexity and opacity.⁴⁵ In any event, some citizens might hold the critics’ view, and it would be useful to test this point empirically. Survey responses on pure informational or disclosure policies do not offer us a clean identification of citizen preferences on this front.

But these are quibbles that could probably be resolved with simple regression testing of the disclosure and non-disclosure groupings. I argue that lumping information together with other nudges, in the way Sunstein does, raises other and more troubling problems as well.

First, it is perilous to omit disclosure approaches from cost-benefit analysis. Again, by categorizing information together with other nudges, Sunstein implicitly asserts that information is costless, and could be implemented without careful weighing of costs and benefits. Let us put aside the costs of gathering and sharing information, as there is no suggestion from Sunstein that he thinks these administrative costs should be neglected for any nudge.

Instead, as Omri Ben-Shahar and Carl Schneider have argued, information can be damaging to individuals who receive it or to society.⁴⁶ As they point out, in some cases, partial information could be worse than none.⁴⁷ For instance, FDA rules requiring labeling of fat and other nutrients have for many years omitted data on sugar content.⁴⁸ Evidence suggests this failure

43. *E.g.*, Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 151 (2006).

44. *Id.*

45. *See generally* Galle, *Intra-Personal Cost*, *supra* note 26, at 17–27.

46. OMRI BEN-SHAHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 170–73 (2014). My points in this paragraph suggest harms in addition to those suggested by Ben-Shahar & Schneider.

47. *Id.* at 175.

48. Diana R.J. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 TULANE L. REV. 815, 838–39 (2015).

may have lead consumers to substitute sugar for fat, potentially contributing to the U.S. crises of obesity, diabetes, and kidney shortage.⁴⁹ More generally, as Joshua Mitts shows, partial information can crowd out complete disclosure, leading to sub-optimal outcomes in some cases.⁵⁰ Over-disclosure can also be dangerous. Since information processing is costly, low-value information may distract from or conceal important detail, as anyone who has ever answered or received responses to a document-request subpoena knows well.⁵¹ Finally, in some cases information can unravel markets that rely on mutual ignorance to prevent moral hazard, as in the cases of money markets or some health-insurance pools.⁵² In all these instances, we should treat information like any other regulatory instrument: with due care for both the potential good and harm it can create.⁵³

Second, I agree with Ben-Shahar and Schneider that the suggestion that information is costless may contribute to an impulse to substitute disclosure for other forms of regulation.⁵⁴ Intellectually, the temptation of a (putatively) costless replacement for instruments that otherwise carry difficult tradeoffs will always beckon.⁵⁵ Bureaucratically, a resource-constrained agency (and that is all of them) will naturally incline towards a policy that frees it from the thousands of hours of staff time that serious cost-benefit analysis usually entails. And that is not even mentioning the chance to escape the yoke of some supervisory regulator that might enforce cost-benefit processes. Sunstein, to be fair, does not argue directly for either of these outcomes, but they are the natural implications of his syllogism.

49. Gross L. et al., *Increased Consumption of Refined Carbohydrates and the Epidemic of Type 2 Diabetes in the United States: An Ecologic Assessment*, 79 AM.J. CLINICAL NUTRITION 774 (2004); see also Brian Wansink & Pierre Chandon, *Can “Low-Fat” Nutrition Labels Lead to Obesity?*, 43 J. MKTG RES. 605 (2006) (reporting that consumers may over-eat in response to low-fat labels). For an overview of the effects of food labeling generally, see Ellen van Kleef & Hans Dagevos, *The Growing Role of Front-of-Pack Nutrition Labeling: A Consumer Perspective on Key Issues and Controversies*, 55 CRITICAL REVS. IN FOOD SCI. & NUTRITION 291 (2013).

50. Joshua Mitts, *Mandated Simplicity in Securities Disclosure* (working paper, 2017).

51. For a review, see Thomas W. Jackson & Pourya Farzaneh, *Theory-Based Model of Factors Affecting Information Overload*, 32 INT'L J. INFO. MGMT. 523 (2012).

52. See Bengt Holmstrom, *Understanding the Role of Debt in the Financial System* (Bank for Int'l Settlements, Working Paper No. 479, Jan. 2015), <http://economics.mit.edu/files/9777> (explaining how mutual ignorance prevents moral hazard in money markets).

53. Cf. Daniel Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 651, 654–55 (2012) (suggesting need for experimentation in design of optimal disclosure systems).

54. BEN-SHAHAR & SCHNEIDER, *supra* note 46, at 173–74.

55. See, e.g., SUNSTEIN, *WHY NUDGE?*, *supra* note 5, at 17 (“[I]t is usually best to use the mildest and most choice-preserving forms of intervention.”).

III. THE NUDGE WITH THE THORNS

Sunstein's preference for viewing nudges as "costless" may also explain why his summary of the survey's implications overlooks some potentially major policy lessons. Specifically, I argue that the survey gives us some important data on just how costly nudges might be, which can be a critical factor in evaluating them as policy tools. The survey does not cleanly distinguish between two possible interpretations, but each interpretation has some good news for would-be nudge architects.

First, just a few more words on the costliness of nudging. In summarizing the study results, Sunstein notes that among the less-popular policies were default rules that forced individuals to opt out of donating their organs or paying to offset their carbon production.⁵⁶ He concludes from these results that "choice architects should not produce losses."⁵⁷ Evidently, the implication is that other survey questions did not involve policies that "produce losses."

This is a problematic claim for a number of reasons. Some I have already noted: it opens the nudging enterprise to ongoing complaints that nudge proponents are arbitrarily excluding some preferences, some senses of "loss" from their calculus. Bubb and Pildes point out that in heterogeneous populations, a nudge—like any policy instrument—can potentially point some people in the wrong direction.⁵⁸

More than that, though, the suggestion that many nudges are costless neglects opportunity costs. In some cases, pursuing policy via nudge will displace or diminish government reliance on other tools. Just to take a simple example, a number of countries require tobacco merchants to display "graphic images" of the disturbing physical toll of smoking on tobacco packaging.⁵⁹ Use of these images has reduced not only smoking but also tobacco

56. Sunstein, *Do People Like Nudges?*, *supra* note 1, at 203.

57. *Id.* at 203–04.

58. Bubb & Pildes, *supra* note 10, at 1625–26; *see also* Galle, *Tax, Command . . . Or Nudge?*, *supra* note 17, at 880; Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207, 224–25 (2006) (explaining how framing can lead people to make the wrong choices).

59. *See, e.g.*, AUSTRALIAN GOV'T DEP'T OF HEALTH, HEALTH WARNINGS (Dec. 20, 2016), <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-warn#reg> (last visited Oct. 10, 2017) (explaining that health warnings, including graphic health warnings, "are required on all tobacco product packaging for retail in Australia"); David Hammond, *Health Warning Messages on Tobacco Products: A Review*, 20 TOBACCO CONTROL 327, 327 (2011) ("More than 30 countries have . . . adopted the [World Health Organization's Framework Convention on Tobacco Control] recommendation for pictorial warnings that cover at least half of the package.").

tax revenues.⁶⁰ Quite possibly this is a worthwhile exchange, but deciding the point one way or the other is in fact a challenging policy question whose answer should sweep in empirics, economic theory, and moral values.⁶¹ The claim that nudges are “costless” neglects the economic, and often political, reality that nudges exist alongside and affect the utility of other potential policy tools.⁶² Whatever tools we use for rigorous policy analysis, whether it be cost-benefit analysis or something else, we should apply them to nudges, too.

For example, I have shown how policymakers can compare nudges to more traditional policy instruments and decide which instrument makes the most sense for a given policy problem.⁶³ Both taxes and nudges, for instance, give regulated parties the option to disregard the government’s preference at some cost. Taxes bring in money when that happens, though, and may also be better at revealing information that is important to regulators. Nudges, on the other hand, may reduce the extent to which regulated parties are discouraged from work or innovation, or encouraged to engage in wasteful regulation-evading behaviors. When it comes to regulating externalities, such as carbon emissions, I argue that nudges often lose out to taxes, but there are some interesting exceptions.⁶⁴ For “internalities,” or harms to self, nudges are often plausible contenders as the best policy choice, though frequently in combination with other sets of tools.⁶⁵

Sunstein’s survey results offer important evidence for policymakers who plan to apply these kinds of analyses. A key finding is that respondents fairly consistently prefer nudge-type interventions over more traditional regulation that shares the same goals, and this appears to hold even if we omit purely informational nudges.⁶⁶ I see three possible explanations for this outcome, of which at least two would tend to support the usefulness of nudges as policy tools.

Two closely-related explanations deal with how respondents view the costs of resisting a nudge. From a rational-choice perspective, if a nudge is equally effective in changing behavior as a more traditional policy, then the subjective costs of resisting the nudge must be the same as the costs of resisting the

60. U.S. NAT’L CANCER INST. & WORLD HEALTH ORG., THE ECONOMICS OF TOBACCO AND TOBACCO CONTROL 1, 218 (2016), https://cancercontrol.cancer.gov/brp/tcrb/monographs/21/docs/m21_complete.pdf (last visited Oct. 10, 2017).

61. Galle, *Intra-Personal Cost*, *supra* note 26, at 45–48.

62. *Cf.* BEN-SHAHAR & SCHNEIDER, *supra* note 46, at 170–73 (suggesting that disclosure may reduce the efficacy of other consumer-protection statutes).

63. Galle, *Tax, Command . . . Or Nudge?*, *supra* note 17, at 859–93.

64. *Id.* at 884–94.

65. Galle, *Intra-Personal Cost*, *supra* note 26, at 1, 40–47.

66. Sunstein, *Do People Like Nudges?*, *supra* note 1, at 204–05.

other policy.⁶⁷ If a \$5 (per pack) tobacco tax and a “graphic image” are equally effective in cutting smoking, we would infer that the subjective cost of the graphic images is \$5 per pack. Why, then, do respondents prefer the nudge? Perhaps, like Sunstein and Thaler, they simply do not believe that the momentary impulses that make nudges work should count as harms. From a dispassionate perspective, looking at disturbing pictures of esophageal cancer should not matter much (though it turns out that doing so is nonetheless effective in disrupting some of the psychological processes that lead to smoking).⁶⁸

Alternately, respondents may just be very bad at “affective forecasting.” That is, they are bad at predicting how costly it will feel to be nudged. If so, they are in good company, as many studies now show poor affective forecasting is common across many decisional contexts.⁶⁹

Either way, these interpretations would tend to support the use of nudges in many instances. I have shown in my earlier analysis that a key aspect of the “choice of instruments” is the extent to which the regulator’s policy changes behavior other than what’s regulated—whether it reduces incentives to work hard, say, or encourages the use of cash to avoid tax collection.⁷⁰ Individuals who report that they do not see nudges as likely to be costly are also probably not planning their lives to avoid the nudge, reducing these kinds of potential distortions.

A third explanation for the survey responses, as Sunstein suggests, is that people have a taste for autonomy or “choice-preserving” policies that they feel is vindicated by nudges more than other policies.⁷¹ If so, that preference should certainly weigh in policy-makers’ choice of how to regulate. The survey predominantly tests nudge-type interventions against “mandates,” however,⁷² making it hard to know whether individuals have similar preferences as between nudges and taxes. Since most policy commentators already believe that taxes are choice-preserving and that they are superior to mandates,

67. See Louis Kaplow & Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 AM. L. & ECON. REV. 1, 9 (2002) (arguing that responses to policies reveal subjective preferences).

68. Hammond, *supra* note 59, at 329–34. On the underlying mental process, see George Loewenstein, *A Visceral Account of Addiction*, in GETTING HOOKED: RATIONALITY AND ADDICTION 235, 237–47 (Jon Elster & Ole-Jørgen Skog eds., 1999).

69. Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting: Knowing What to Want*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 131, 133–34 (2005); see also Simine Vazire & Matthias R. Mehl, *Knowing Me, Knowing You: The Accuracy and Unique Predictive Validity of Self-Ratings and Other-Ratings of Daily Behavior*, 95 J. PERSONALITY & SOC. PSYCH. 1202, 1212 (2008) (reporting about one-fourth of respondents accurately predict future behaviors).

70. Galle, *Tax, Command . . . Or Nudge?*, *supra* note 17, at 859–84.

71. Sunstein, *Do People Like Nudges?*, *supra* note 1, at 200–01.

72. See *id.* at 228–32 (listing survey questions).

it would be useful to know whether respondents make distinctions between taxes and nudges on this basis.⁷³

Under any of the three interpretations, a survey respondent's preference for the nudge-type policies can be either good or bad news from a political economy perspective. Of course, in any instance where nudges are the most efficient outcome, it is helpful that the public shares the economic view. On the other hand, if alternatives are clear economic winners, and nudges might potentially crowd out the superior alternatives, public "tastes" for nudging can be an obstacle to good policy. This is similar to the story Ben-Shahar and Schneider tell about the political economy of disclosure policy, which they suggest has displaced more-effective rules in some cases.⁷⁴

But there is also a third hand. Suppose nudges are not the best policy, but they are politically achievable while the first-best policy is not. Thaler and Sunstein make this argument in favor of environmental nudges.⁷⁵ I argue, however, that it is also critical to think carefully about the incentive effects of publicly embracing rules that favor second-best policies solely because they are more easily enacted.⁷⁶ For instance, imagine that tobacco sellers knew that nudges were less effective than taxes, and knew that by popularizing a nudge alternative they could forestall an increased tax. Acceptance of the second-best, more-popular nudge might then create incentives (for the tobacco sellers, and others like them) that would in the long run tend to push us farther and farther from the best policies.

Finally, it is also worth emphasizing another, more easily-interpreted result of the survey: people like many policies that could be described as "paternalistic," whether implemented by nudge or otherwise.⁷⁷ Sunstein notes that this finding is consistent with prior literature.⁷⁸ These data tend to support the argument, mentioned earlier, that regulating self-harms can be efficient even under traditional rational-actor models of regulation.⁷⁹ The survey evidence suggests that individuals know that they have competing preferences, and know that without government assistance the transaction costs of enacting a binding deal between the competing sets of impulses will

73. Gloria E. Helfand et al., *The Theory of Pollution Policy*, in HANDBOOK OF ENVIRONMENTAL ECONOMICS 249, 251, 287 (Karl-Göran Mäler & Jeffrey R. Vincent eds., 2003); Kaplow & Shavell, *supra* note 67, at 4.

74. BEN-SHAHAR & SCHNEIDER, *supra* note 46, at 173–74.

75. THALER & SUNSTEIN, NUDGE, *supra* note 2, at 190–91.

76. See, e.g., Brian Galle, *The Tragedy of the Carrots: Economics and Politics in the Choice of Price Instruments*, 64 STAN. L. REV. 797, 840–46 (2012) (arguing carrots create perverse long-run incentives for bad actors to resist reform).

77. Sunstein, *Do People Like Nudges?*, *supra* note 1, at 186, 200–04.

78. *Id.* at 200–04.

79. Galle, *Intra-Personal Cost*, *supra* note 26, at 40–42.

be prohibitive.

IV. . . .BY ANY OTHER NAME

As I hope this discussion of the survey has shown, use of the term “nudge” has come to mask some important policy differences. Researchers now regularly make claims about nudges—that people like them, that they “hurt,” that they can be “fudged,” which “direction” to employ them—without necessarily making clear to the reader exactly which policies are covered by the analysis.⁸⁰ Do all of these papers embrace the Sunstein and Thaler restriction on costly nudges? No, it appears in most cases, but in others it is unclear.⁸¹ Definitional uncertainty can raise serious problems of “external validity”: how much does a survey about disclosure tell us about pension savings design? Does the design of a health insurance pool tell us anything meaningful about where to display junk food in the cafeteria? Sometimes the differences are just matters of nuance, but nuance can matter enormously in instrument design.⁸²

What should researchers do instead? One route, of course, is to eschew labels and simply study one policy at a time. But generalizations are important to social science. They can save time and intellectual energy, provide predictions for new policies that resemble those already studied, and offer analogical insights and possibilities. We therefore likely want still to talk about categories of regulatory instrument, so long as when we do, we define the content of those categories in ways that are analytically useful.

I have tried to set out a more nuanced set of analytic categories for regulatory instruments.⁸³ In addition to dividing policies between those that are “surprising” and those that operate on traditional rational-actor principals, I also suggest a few other dichotomies, dividing our choices along lines that historically have been important points of dispute among scholars of instrument design. Thus, one categorical divide might separate instruments that transfer wealth between individuals from others that don’t, a key distinction in criminal-law scholars’ preference for fines over incarceration. Carrots are

80. See Jacob Goldin, *Which Way to Nudge? Uncovering Preferences in the Behavioral Age*, 125 YALE L.J. 226 (2015); Benjamin R. Handel, *Adverse Selection and Inertia in Health Insurance Markets: When Nudging Hurts*, 103 AM. ECON. REV. 2643 (2013); Ho, *supra* note 53. *But cf.* Lee Anne Fennell, *Willpower Taxes*, 99 GEO. L.J. 1371, 1415 (2011) (distinguishing between “a small nudge” and a “forceful shove”). In fairness to Goldin, he is careful to define at least the scope of the behavioral problem he addresses, and distinguishes between a “pure nudge” and others. Goldin, *supra* note 80, at 226.

81. See *supra* note 80 and accompanying text.

82. See generally Helfand et al., *supra* note 73.

83. The points in this paragraph are set out in Galle, *Tax, Command . . . Or Nudge?*, *supra* note 17, at 848–53.

transfers that enrich the recipient, sticks those that impoverish. Some policies are “priced,” in the sense that they are denominated in dollars, while others are not. This is important to scholars who believe that the use of priced policies gives us more information about private costs of compliance. A further distinction is the divide between “ex ante” instruments, which take effect before or at the time of some regulated action, and “ex post” instruments, which have their bite afterwards.

Nudges can usefully be fit into this framework. A typical nudge, such as an opt-out retirement savings plan, could also be categorized as an *ex ante*, transferless, unpriced, and surprising stick.⁸⁴ What it loses in parsimony, it gains in comparability with other policies. Analytically, there is not much difference between an opt-out savings plan and a mandate for savings. Both would not transfer money between parties, would take effect at the time the decision to save would be made, and would not be denominated in dollars. This puts the burden on opt-out proponents to explain why the opt-out is more desirable than a mandate.

The answers that an opt-out proponent likely would offer suggest that there may be one or two other categories to add to the framework. A key difference between opt-outs and mandates is that opt-outs are often “asymmetric.”⁸⁵ Asymmetric policies have subjective costs that are strongly correlated with the marginal social benefit of compliance.⁸⁶ Some people don't save enough for retirement because they find filling out the requisite paperwork annoying. Presumably, these same folks will also find it annoying to file forms that would opt them out of a default that required them to save. The default would not much bother people who do not mind paperwork, but these were the workers who needed little incentive anyway.

Many of the policies Sunstein and Thaler describe as nudges are asymmetric, but there is not perfect overlap between the two. There does not seem to be any obvious asymmetry in their converging highway lines example, nor in their proposals to let individuals commit now to contributing to a charity out of their next paycheck.⁸⁷ Are individuals who are most affected by pre-commitment more likely to pick the best charities?⁸⁸

In the other direction, asymmetric policies can crop up even within a fully

84. *Id.* at 852–53.

85. See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 UNIV. PA. L. REV. 1211, 1219–23 (2003).

86. See *id.* at 1219–20.

87. THALER & SUNSTEIN, NUDGE, *supra* note 2, at 37–39, 229–30.

88. More generally, I have shown that asymmetry is rarely a feature of surprising instruments aimed at externality correction, since it is unlikely that the social costs of the externality are related to the externality-producer's susceptibility to the instrument. Galle, *Tax, Command . . . Or Nudge?*, *supra* note 17, at 880.

rational-actor framework, especially in cases where individuals are liquidity-constrained or otherwise have incentives to favor short-term over long-term interests. Term-limited public officials and households that expect to relocate to another jurisdiction are examples. These groups may tend to neglect the long-run interests of their community, to the overall detriment of society—for instance, by failing to establish a reserve fund for future fiscal emergencies. But these same folks are good candidates for a “save more tomorrow” plan, in which they commit (without cost, from their subjective point of view) the community to savings at a later date.⁸⁹

A second way in which Sunstein and Thaler would likely distinguish a savings mandate from an opt-out is by arguing that the opt-out is “choice preserving.”⁹⁰ That is, they say that a key feature of nudges is that, unlike the one-size-fits-all mandate, nudges allow individuals with strong preferences for a contrary outcome to still be satisfied.⁹¹ As the economist Ed Glaeser has observed, taxes (and, presumably, other policies I would call priced transfers) can also have this feature.⁹²

While I think there is potentially something useful in this distinction between “choice-preserving” policies and others, it needs refinement. For one, the idea of “choice” is a slippery one, not yet clearly defined by any commentator in this context.⁹³ How costly can the cost of defying the regulator be before we say that an option no longer preserves “choice”? Ten percent of household income? Fifteen percent? One day in jail? A year? Thaler and Sunstein propose, without much elaboration, a dividing line somewhere on the path from “tiny to small” costs.⁹⁴ The “choice preserving” label does not currently distinguish clearly between many policies.⁹⁵

89. Brian Galle & Kirk J. Stark, *Beyond Bailouts: Federal Tools for Preventing State Budget Crises*, 87 IND. L.J. 599, 631–33 (2012).

90. THALER & SUNSTEIN, NUDGE, *supra* note 2, at 188, 251–53.

91. *Id.*; SUNSTEIN, WHY NUDGE?, *supra* note 5, at 19.

92. Glaeser, *supra* note 43, at 150; *see also* THALER & SUNSTEIN, NUDGE, *supra* note 2, at 188 (acknowledging this point).

93. Sunstein acknowledges this point. SUNSTEIN, WHY NUDGE?, *supra* note 5, at 53–54.

94. THALER & SUNSTEIN, NUDGE, *supra* note 2, at 251.

95. Sunstein attempts to dodge this problem by suggesting that nudges, being close to costless, preserve more choice than any tax alternative. SUNSTEIN, WHY NUDGE?, *supra* note 5, at 53–54, 57–58. This is not a useful distinction for those who are open to the possibility of including all revealed subjective preferences in an individual’s utility function. In other words, if we think that refusal to fill out retirement paper-work reveals a real subjective cost (albeit one that is heavily outweighed by the individual’s longer-term preferences), we would be unwilling to accept Sunstein’s claim that nudges are meaningfully different from taxes. Sunstein may recognize this counter-argument, as well. At points in his recent work, he acknowledges the possibility that defaults may impose “psychic” costs that “could move an intervention

The definition of “choice preserving” also seems a bit slippery as it has actually been applied by Sunstein and Thaler. For example, when New York City proposed a restriction on the size of soda cups, Professor Thaler tweeted that the proposal was a “BAN [sic], not a nudge,”⁹⁶ and Sunstein similarly writes that “the ban [was] not ... a mere nudge.”⁹⁷ That is puzzling. The cup-size rule was close to costless in a rational-choice framework (just get up and get a refill), but evidence suggested it might be surprisingly effective at reducing sugar intake.⁹⁸ Further, it preserved the relevant choice for consumers: how much soda to drink. True, it limited the size of the cup,⁹⁹ but aside from maybe a handful of customers who had trouble grasping small objects, that was not likely an important preference for anyone. The duo might as readily have said that their own proposal in favor of “open stairwells”¹⁰⁰ was a “ban, not a nudge,” since it denied feng shui consultants the option of concealed steps. But, of course, the real preference that is in play is whether to walk or ride the elevator, not the placement of a curtain wall. In other words, to describe a policy as “choice preserving” we must usually have a theory of which choices are relevant to the choosers.

Still, Sunstein and Thaler clearly are on to something important, and I think it relates closely to a difference that commentators formerly saw between mandates and taxes. Until 2002 or so, there was a widely-held belief that mandates were superior to taxes in the case where the risk of excess externality production was very serious.¹⁰¹ Usually, we are happy to allow a person with unusually high costs of compliance to pay her pollution tax and emit the pollution; it would be socially inefficient to ask her to pay \$120 to prevent pollution that causes \$100 of harm. By preserving her choice to pay

along the continuum toward hard paternalism.” *Id.* at 57. He then proposes that “for purposes of taxonomy,” it may make more sense to distinguish nudges from other interventions based on whether they impose “material costs.” *Id.* at 60. I find this distinction potentially helpful, but it is not reflected clearly in “Sunstein, *Do People Like Nudges?*,” where, as I suggested before, Sunstein appears to imply that policies like the graphic tobacco images are costless. Sunstein, *Do People Like Nudges?*, *supra* note 1, at 178–79.

96. Richard H. Thaler (@R_Thaler), TWITTER (May 31, 2012, 3:06PM), https://twitter.com/r_thaler/status/208273339507150849 (last visited Oct. 10, 2017).

97. SUNSTEIN, *WHY NUDGE?*, *supra* note 5, at 76.

98. See my summary of the evidence in Galle, *Tax, Command . . . Or Nudge*, *supra* note 17, at 885–87.

99. SUNSTEIN, *WHY NUDGE?*, *supra* note 5, at 78 (asserting that “[f]or choosers who sought soda in large containers, the ban would affect their ends . . .”).

100. See THALER & SUNSTEIN, *NUDGE*, *supra* note 2, at 4 (explaining that “[o]pen stairwells . . . may produce more workplace interaction and more walking.”).

101. This view, summarized throughout the remainder of the paragraph, is still reported in some undergraduate public finance textbooks. *E.g.*, JONATHAN GRUBER, *PUBLIC FINANCE AND PUBLIC POLICY* 143–46 (3d ed. 2011).

instead of complying, we increased social welfare. But suppose that we are not sure the harm is really only \$100. What if it is nuclear waste, and the harm might be \$1 million? Then, the conventional wisdom argued, we should use mandates instead, so as to eliminate the possibility that some polluters would emit nuclear waste rather than pay a \$100 tax.

This argument was built on the assumption, however, that taxes were always “linear.”¹⁰² A linear tax is imposed at the same rate per unit (say, per ton of pollution) no matter by whom or where emitted. In 2002, Kaplow and Shavell showed that this assumption of linearity was doing all the work in the intellectual argument for mandates.¹⁰³ A tax whose rate could freely vary could duplicate a mandate, just by increasing the tax to an excruciating rate once the polluter hit a certain undesirable threshold.

A better way to think about “choice preserving” instruments, then, is to describe the degree to which their budget schedule is either linear or kinked. A classic mandate is very steeply kinked: the price for emitting is zero up to a threshold, then rises to infinity with the next unit produced. There are, though, an infinite variety of intermediate policies, with the costs imposed by regulation rising gently or sharply, increasing or decreasing, or combinations of these over different ranges of the schedule. So describing the shape of the budget schedule is a more precise and more flexible concept than simply whether a policy is “choice preserving” or not. It also avoids the murky question of “choice,” as well as the slippery semantic issue of whether limiting some aspects of the choice environment count as “bans” or not.

Realistically, the term “nudge” is not going away—nor should it. Sunstein and Thaler have done us an enormous service in popularizing new, behaviorally-informed policy instruments, and in explaining their power to achieve results that were not possible with other tools. Using the term “nudge” as a shorthand for all these non-traditional policies is both useful and inevitable. When it comes to more careful policy analysis, however, we should be more precise. At minimum, other researchers who work with nudges should be clear whether they intend to include policies that might, in fact, impose non-zero subjective costs. My suggestion is it may also be useful to further specify the exact features of a policy that is under consideration, so as to highlight the important ways in which it differs from alternative choices.

102. Kaplow & Shavell, *supra* note 67, at 7–10.

103. *Id.*