

Nudging and Other Regulatory Techniques, September 2014

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I INTRODUCTION

- Focus of presentation springs off title of session “Nudging *and Other Regulatory Techniques*”
- The “nudge” can be a very useful tool in the policymaker’s repertoire
 - BUT its advocates are sometimes overly optimistic about its effectiveness
 - AND it needs to work with other interventions as part of the “regulatory mix” to achieve policy goals.¹
- Very interested in the regulation of consumption; most examples drawn from that context
- Alberto’s address is a terrific primer: full of information and insights

II THE NUDGE: NOT NEW BUT NEW EMPHASIS

- [comment on Alberto’s explanation of the nudge]
- Search for innovative and less intrusive ways to achieve policy goals ongoing for some time.
 - “New Governance” – work of Salamon and others²
 - Shift in paradigm of public programs
 - Centerpiece no longer agencies and “command and control” laws
 - Rather variety of tools – the “regulatory mix” – to achieve various goals
 - Canadian federal government and work on instrument choice³
- Lots of “historical” examples of the nudge – even if not so labelled
 - Class Actions
 - opt in/opt aspect of “choice architecture” discussed in context of nudges out of class members, eg, pension plans

¹ These notes, in part, are based on W.A. Bogart *Permit But Discourage: Regulating Excessive Consumption* (New York: Oxford University Press, 2011)[PBD] Ch.2 and W.A. Bogart *Regulating Obesity: Government, Society, and Questions of Health* (New York: Oxford University Press, 2013) [RO] Ch.1.

² L. Salamon and O. Elliott eds *The Tools of the New Government* (Oxford: Oxford University Press, 2002)

³ P. Eliadis, *Foundation Paper: Instrument Choice in Global Democracies* (2002)

- but much debated feature of class actions and treatment of class members when class actions being designed in Canada over the last several decades
- Combatting Drinking and Driving⁴
 - Don't Drink and Drive – Educational campaigns led by grassroots organizations, such as MADD. using a pithy phrase to warns against the hazards of drunk driving
- Campaign Against Smoking – Several Examples⁵
 - Public education efforts warning against dangers of cigarettes
 - Mandatory warnings on packages
 - NOTE: What's a nudge for consumers may need to be command and control for industry
 - Placement of cigarettes behind closed doors; not displayed in any way.
- Gambling⁶
 - Education efforts directed at problem gambling “Know your limit – Play within it”
- But such strands of preserving people's choice while influencing their decisions in non-invasive ways were brought together by Thaler and Sunstein⁷
 - In labelling and promoting the nudge they draw upon the many insights of behavioral economics - that people aren't always rational and often act on incomplete information and knowledge of the consequences.
 - It's that labelling and promoting of the concept for which they deserve much credit

III SOME LIMITS OF NUDGES

- Nudges potential are considerable [comment on Alberto]
- Should be viewed within the larger policy context and be part of the “regulatory mix”

⁴ Bogart, *PBD*, note 1, Ch 1

⁵ *Ibid*, Ch. 2

⁶ *Ibid*, Ch. 7

⁷ Thaler and Sunstein *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008)

- Thaler and Sunstein and Sunstein in his very recent books⁸ often cite examples of the nudge that highlight its limitations
 - Credit Markets⁹
 - Offer information program – RECAP [Record, Evaluate and Compare Alternate Prices] – as response to subprime market – turned into a fiasco in fall 2008 because of deregulation of banks and credit system
 - NOTE: Compare Canadian approach of tight regulation of banks and credit system and praise it received during 2008 crisis and thereafter.
 - Motorcycle Helmets¹⁰
 - Clear majority of states once had laws requiring wearing of motorcycle helmets
 - By 2007 only about 20 states still had that requirement – “individual choice” and “personal freedom” had prevailed
 - Nudge – “solution” – extra insurance and driving courses?
 - 600 Calorie Selections¹¹
 - Restaurant in Washington touted as nudging people towards better eating with 600 calorie options
 - No evidence of how frequently those options selected
 - No evidence of what, if any difference, such selections make in terms of overall eating habits [issues of substitution etc.]

IV NUDGES – YES – BUT AS PART OF THE “REGULATORY MIX”

- Does Thaler’s and Sunstein’s “libertarian paternalism” resonate as strongly in this society?
- If not, we may more easily see nudges, as useful, but as only one part of the “regulatory mix”
 - Smoking – drop from about 50% of adults smoking to about 20% attributable to nudges: see above

⁸ Sunstein, *Simpler – The Future of Government* (New York: Simon & Schuster, 2013) and *Why Nudge?* (New Haven: Yale University Press, 2014)

⁹ Thaler and Sunstein, *Nudge*, note 7, 93, 132-138 discussed by Bogart, PBD, note , 65-70.

¹⁰ Thaler and Sunstein, *ibid*, 232-33 discussed by Bogart, RO, note 1, 32-34

¹¹ Sunstein, *Why Nudge?*, note 8, 1, 2, 15, 17, 51.

- But nudges acting together with many other regulatory tools, eg, taxes, prohibitions of sales to minors, restriction of advertising, banning of smoking in public places. tort litigation against tobacco companies etc.
 - *And “regulatory mix” acting in concert with shifting norms* – away from smoking as glamorous to a filthy, dangerous, and expensive habit.¹²
- 600 Calorie Selections
 - See above: How often are they actually selected? When they are do they make any difference in overall diet?
 - In any event only a part of the necessary “regulatory mix” to promote nutritious eating and active lifestyles: taxes on junk food, restrictions on salt and fat in prepared foods, subsidies for the poor so they can buy healthier foods, vouchers to promote exercise etc¹³
 - Consider Quebec’s restriction of advertising to children and the demonstrated impact it had had in lowering consumption of junk food among francophone kids.¹⁴
 - NOTE: How do nudges work for children? In terms of regulation of consumption we often start with command and control, eg, they can’t buy or be sold cigarettes. Our goal here is often protection. How should we nudge kids?

V **NORMATIVITY – CRITICAL FOR EFFECTIVENESS (BUT THE SUBJECT OF ANOTHER CONFERENCE)**

- Normativity – Relationship between law and norms¹⁵
- Critical to effectiveness of policies
- Regulation and shifting norms acting – more or less – in concert
 - Dropping smoking rates: see above
 - Addressing obesity [HEALTH] – Shift from obsession with calories to embrace of nutritious eating, active lifestyle, and acceptance of bodies in a variety of shapes and sizes.

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¹² Bogart, *PBD*, note 1, Ch.2 58-61 and Ch.3.

¹³ Bogart, *RO*, note 1, Part III Healthy Consumption, Active Living, and the Regulatory State

¹⁴ *Ibid*, 137-39

¹⁵ Bogart, *PBD*, note 1, Ch.3.