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NUDGE-PROOF: DISTRIBUTIVE JUSTICE AND THE ETHICS OF NUDGING

*Jessica L. Roberts**

The Ethics of Influence: Government in the Age of Behavioral Science. By *Cass R. Sunstein*. New York: Cambridge University Press. 2016. Pp. ix, 202. $29.99.

Introduction

Nudges—factors that influence behavior while maintaining choice—are everywhere. And they can apparently get us to do all kinds of things that we might not ordinarily do,[1] like eat chicken livers,[2] wake up early,[3] or join a Facebook group for scrapbooking enthusiasts.[4]

According to Cass R. Sunstein,[5] one of the world's foremost scholars on nudging, nudges are "choice-preserving, low-cost tools" (p. 5) to influence behavior positively.[6] Nudges harness the power of choice architecture to influence people's decisions. Choice architecture refers to "the background

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1. Jeffrey J. Rachlinski, *How I Learned to Stop Worrying and Love Nudges*, 95 Tex. L. Rev. 1061, 1066 (2017) (reviewing *The Ethics of Influence*) ("Nudges can get millions to behave in ways that they otherwise would not.").

2. *See* Sarah Kershaw, *Using Menu Psychology to Entice Diners*, N.Y. Times (Dec. 22, 2009), http://www.nytimes.com/2009/12/23/dining/23menus.html (on file with the *Michigan Law Review*).

3. *See* Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness 44–45 (2008) (describing "Clocky," an alarm clock that forces people to get up in the morning by moving around the room, as a nudge).

4. *See* Barbara Ortutay & Michael Liedtke, *Facebook Wants to Nudge You into 'Meaningful' Online Groups*, Associated Press (June 22, 2017), https://www.apnews.com/713f8f66e88b45828fd62b1693652ee7 [https://perma.cc/8QUP-JQTP]. For an example of such a group, see *The Scrapbooking Club*, Facebook, https://www.facebook.com/TheScrapbookingClub/ [https://perma.cc/BT2X-49CZ].

5. Robert Walmsley University Professor, Harvard University.

6. In their blockbuster 2008 book *Nudge*, Sunstein and coauthor Richard Thaler defined nudges more neutrally, as "*any* aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives," not just those that do good. Thaler & Sunstein, *supra* note 3, at 6 (emphasis

conditions for people's choices" (p. 5). Our decisions do not occur in a vacuum. Take the seemingly simple decision of what to eat for lunch at a restaurant. The ways in which the restaurant presents the available choices—whether printing them on individual menus, listing them on a chalkboard, or having a server describe them—is the choice architecture behind your lunch order.

Not only are nudges ubiquitous, they are also inescapable. Because all choices have context, choice architecture is unavoidable.[7] The restaurant has to put the items on the menu in some order, and that order will affect what people decide to eat (p. 35). Insofar as it influences our behavior, even the weather is arguably a type of choice architecture (p. 35). When crafted intentionally, nudges capitalize on the reality that the circumstances under which people make decisions can have a powerful impact on what they decide.[8]

Yet it was only in the past ten years that governments attempted to realize the power of choice architecture. Ever since, nudging has been hailed as a sort of policy panacea, able to address some of society's stickiest problems—from the obesity epidemic to the energy crisis to the lack of retirement savings. President Obama jumped on the nudge bandwagon, establishing the White House's Social and Behavioral Science Team (p. 8) and issuing an executive order[9] requiring federal agencies to design and implement policies based on insights from behavioral economics and psychology. (Sunstein himself served as administrator of the White House Office of Information and Regulatory Affairs from 2009 to 2012.) The United States was not the first to engage in these efforts. Nudges as policy interventions have made a splash worldwide. The governments of other affluent, industrialized nations—mainly the United Kingdom, Germany, Australia, Denmark, Sweden, Canada, Singapore, Israel, the Netherlands, South Korea, and Mexico—have also embraced nudges to improve the lives of their citizens.[10]

While the Trump Administration may not keep President Obama's team and infrastructure intact, a complete move away from nudges of all kinds seems unlikely and shortsighted. Research shows surprisingly strong bipartisan support for many nudges.[11] Thus, in this era of extreme political divisiveness, nudges may actually represent an opportunity for consensus across party lines, making them more important now than ever as tools for policymaking. Whether you are on the left or on the right, nudges can help you

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added). In subsequent work, however, Sunstein has limited nudges to "initiatives that maintain freedom of choice while also steering people's decisions *in the right direction* (as judged by the people themselves)." Cass R. Sunstein, Why Nudge?: The Politics of Libertarian Paternalism 17 (2014) (emphasis added).

7. *See* Sunstein, *supra* note 6, at 16, 118; Thaler & Sunstein, *supra* note 3, at 3, 237.

8. Sunstein, *supra* note 6, at 14.

9. Appendix C, p. 214–16.

10. Pp. 8–9; *see also* Sunstein, *supra* note 6, 11–12.

11. Appendix A, p. 203–08.

get what you want. Perhaps nudges could offer solutions on such contentious issues as healthcare[12] and climate change.[13]

When used as policy interventions, nudges are based on the core insight of behavioral economics—that human beings do not always act in our own long-term best interests. We are subject to several well-documented cognitive quirks that lead us down the path of less than perfect decisionmaking.[14] Nudges can help people avoid what behavioral economists call "behavioral market failures" and, in the process, advance prosocial goals.[15]

In his latest book on the subject, *The Ethics of Influence: Government in the Age of Behavioral Science*, Sunstein takes a deeper dive into government efforts to nudge its citizens. Sunstein points out that, while for-profit companies, charities, and even self-help gurus readily employ nudges to influence behavior, when the state adopts these measures it can raise unique ethical concerns (pp. 13–15). So how do we know when a government's attempts to influence its citizens are ethical? As his framework, Sunstein offers four guiding values: (1) welfare, (2) autonomy, (3) dignity, and (4) self-government.[16] He argues that these four values should constrain governments and inform the actions of the ethical state.

Despite its theoretical elegance and flexibility, Sunstein's framework, like nearly all the literature on nudging, relies on one crucial and often unspoken assumption: people are "nudge-able."[17] In other words, they are susceptible to influence. But being nudge-able requires access to meaningful choices and the freedom to make those choices.[18]

Scholars outside the realm of behavioral economics have long recognized that the control we exert over our lives varies from person to person and from context to context, leaving some individuals with far fewer options. Put simply, we are not all equally autonomous. Any number of factors may limit our range of choices. For example, a food label indicating a product contains GMOs does little to affect the decision of a person who cannot

12. *See, e.g.*, Wendy Netter Epstein, *Nudging Patient Decision-Making*, 92 Wash. L. Rev. 1255 (2017); Wendy Netter Epstein, *The Health Insurer Nudge*, SSRN (July 20, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009823 [https://perma.cc/BQB3-4HLQ]. *See generally* Nudging Health: Health Law and Behavioral Economics (I. Glenn Cohen et al. eds., 2016).

13. Sunstein uses the examples of gray versus green energy throughout the book. *See, e.g.*, pp. 124, 159, 164, 172.

14. *See, e.g.*, Thaler & Sunstein, *supra* note 3, at 6–8.

15. *See* David A. Hyman & Thomas S. Ulen, *What Can PPACA Teach Us About Behavioral Law and Economics?*, *in* Nudging Health: Health Law and Behavioral Economics, *supra* note 12, at 59.

16. P. 3; *see also infra* Section II.A.

17. Although sometimes, it is explicit. *See* Thaler & Sunstein, *supra* note 3, at 37 (referring to people as "nudge-able").

18. For a similar argument I have made previously along with a coauthor, see Jessica L. Roberts & Leah R. Fowler, *How Assuming Autonomy May Undermine Wellness Programs*, 27 Health Matrix 101 (2017).

read. A grocery store that prominently features healthy foods will not encourage a person to buy more fruits and vegetables if she simply cannot afford them. A pension plan that automatically deducts from a lower-income worker's paycheck will funnel her money away from immediate necessities, such as food or rent, and could have little or no ultimate benefit because poverty shortens her life expectancy. While advocates of nudging might point out that she *could* opt out of the pension, the worker might not be aware of its detrimental impact, or her relative lack of free time and resources could make opting out significantly more challenging for her than an affluent person, a phenomenon known in economics as an "effort tax" (p. 175). Thus, some individuals may make decisions that do not further their long-term interests—not because of cognitive errors and biases but because of structural barriers and social constraints.

Because we are not all equally autonomous, we are not all equally nudge-able. In fact, some populations, particularly the most vulnerable among us, may even be "nudge-proof" in certain contexts. For members of these populations, no amount of subtle prodding or thoughtful construction of defaults will get to the desired result. This reality raises an important question: Is it ethical to adopt social policies that threaten to leave behind our citizens who are in the greatest need?

In all of the rich, ongoing discourse surrounding nudges and their ethics, to date no one has taken a close look at their distributional implications. This lack of scholarly attention represents a significant gap in the literature surrounding choice architecture. Failing to explicitly acknowledge that some people are nudge-proof threatens to erase them from the conversation, possibly leading to even greater inequalities in our already economically polarized nation.[19]

To his credit, Sunstein alludes to these concerns at various points throughout the book.[20] He does so, however, as part of his discussion of the four guiding values, particularly autonomy, dignity, and welfare. While Sunstein advocates convincingly for his four guiding values for ethical nudging, this Review argues that a fifth value—distributive justice—is equally important. Thus, it accepts Sunstein's framework and builds off of it to address the distributional implications of nudging. In so doing, I assert that, regardless of their Pareto impacts, nudges that fail to help the neediest citizens or that reduce those citizens' relative welfare are potentially ethically problematic. Importantly, I do not reject nudges outright, nor do I argue that distributive justice should be dispositive. Rather, I seek to encourage would-be nudgers to engage more deeply with distributional concerns.

The argument for considering the role of distributive justice in nudges proceeds in three parts. Part I describes why nudges can be effective and

19. *See* Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 22945, 2016), http://www.nber.org/papers/w22945 [https://perma.cc/X4YW-5HXM] (demonstrating the widening income gap in the United States).

20. *See infra* Section II.B.

desirable policy interventions. Part II turns to the ethics of nudging, outlining Sunstein's four-value framework and demonstrating how even seemingly ethical nudges can raise distributional concerns. Finally, Part III proposes distributive justice as a fifth value for ethical nudges and explores how consideration of this additional value can lead to nudges that improve the lives of all Americans.

I. What Nudges Are and Why Nudges Work . . . Sometimes

Nudges can include any number of interventions, such as default rules, disclosures, and warnings, and they can span a wide range of topic areas, like fuel efficiency, health care, and retirement savings.[21] Although, at first blush, it might seem that almost anything could count as a potential nudge, the term—as used by Sunstein—actually applies only to initiatives that have a particular set of characteristics and that operate in a specific way. Thus, before considering the ethics of nudges and their potential distributive implications, we need a working definition. So what is a nudge and why do nudges work?

A. *Why Nudges are Effective Policy Interventions*

As noted, nudges are "choice-preserving, low-cost tools" (p. 5) that encourage people to make better decisions. Maintaining the freedom to choose is essential to the nudging process. Sunstein explains that "[n]udges steer people in particular directions but also allow them to go their own way" (p. 20). Importantly, nudges are not mandates or bans.[22] They do not offer subsidies, nor do they impose significant costs (p. 21). Nudges must then be both cheap and avoidable. They do not bribe, mandate, or coerce.

Nudges attempt to steer people in the right direction (at least as perceived by the nudger—although Sunstein is adamant that true nudges will make people better off "as judged by themselves"[23]) by using observations about how human beings think and behave. Depending on the case, the right direction might mean avoiding harm to an individual (e.g., lowering health risk), conferring a benefit on an individual (e.g., encouraging retirement savings), or improving overall social welfare (e.g., increasing green-energy use).[24] In *The Ethics of Influence*, a GPS system functions as both an example of a nudge that guides people toward a desired destination and as a metaphor for nudging generally (pp. 27–28, 44, 49, 54–56, 60, 69). A GPS—like many other kinds of nudges—does not tell people their desired destination but instead suggests a route, which they are free to reject, that can get them to where they want to go (pp. 55–56).

21. Sunstein, *supra* note 6, at 12.

22. Thaler & Sunstein, *supra* note 3, at 6.

23. *Id.* at 5.

24. *See* p. 31.

One foundational tenet of nudging is that people are error prone and frequently act against their own long-term self-interests. Human beings can be shortsighted and impulsive.[25] For example, imagine a person who wants to lose weight is planning to have a yogurt for breakfast and then head to the gym. As she is getting ready to go, her friends text her that they are headed to a carb-heavy brunch with flowing mimosas. She—like many of us—might well be tempted to put that yogurt back in the fridge and save the workout for tomorrow. Is she being irrational? After all, she wants to lose weight, and certainly pancakes, champagne, and not exercising do not serve that goal. While being fit and thin might be her long-term preference, her short-term preference is to eat delicious food and have fun with her friends. Her decision is then not irrational per se. What then are her true preferences?[26] Economists would say that she is exhibiting "bounded rationality": her decision is rational in the moment yet does not serve her in the longer term.[27]

Short-term decisions, like choosing a boozy brunch over the gym, can add up, leading people either to act in a way that could harm them over time (e.g., a high-calorie diet) or to fail to act in a way that could benefit them over time (e.g., going to the gym).[28] These little deviations from our intended path constitute behavioral market failures. As Sunstein explains, behavioral market failures "occur when people make decisions that reduce their own welfare" (p. 19). After enough of these choices add up, people may ask themselves: How did I end up so far off from where I want to be?

It turns out that there are some clear answers to when—and why—human beings make choices that fail to serve our long-term goals. Research shows that people make self-defeating decisions under predictable sets of circumstances—when decisions test our self-control, when decisions are complex or difficult, when decisions do not provide the opportunity for us to learn from our previous choices, or when decisions are infrequent or unfamiliar.[29] Behavioral market failures may occur under these conditions because of normal human cognitive functioning. At least two different operating systems make up the human mind: "System 1, which is fast, automatic, and intuitive, and System 2, which is slow, calculative, and deliberative."[30]

25. *See* Thaler & Sunstein, *supra* note 3, at 9.

26. Scenarios like this one are precisely what makes the "as judged by themselves" standard so tricky. For more examples, see pp. 46–48.

27. *See* Sunstein, *supra* note 6, at 11. Some scholars also distinguish between first-order preferences and second-order preferences (*i.e.* preferences about preferences). Sunstein explains, "People might want to buy a lot of new clothes, or to watch a lot of television, but they might want not to want those things." P. 48.

28. Sunstein, *supra* note 6, at 35.

29. *See* Thaler & Sunstein, *supra* note 3, at 73–76.

30. P. 28; *see also* Thaler & Sunstein, *supra* note 3, at 19–22 (describing System 1 as an Automatic System that is "intuitive and automatic" and System 2 as a Reflective System that is "reflective and rational"); Sunstein, *supra* note 6, at 26–27 (describing differences between Systems 1 and 2). For more on Systems 1 and 2, see generally Daniel Kahneman, Thinking, Fast and Slow (2011).

System 1 can be immensely useful for the quick processing of small, frequent decisions. Yet System 1 can sometimes lead us astray. It may cause us to focus too much on the short-term (like our bruncher), to be unrealistically optimistic, or to misapprehend risk.[31] If people would instead engage with System 2 when making their decisions, they might have better long-term outcomes.[32]

Proponents of nudging like Sunstein believe that, as a matter of public policy, the government should intervene to attempt to remedy our behavioral market failures.[33] Nudges target those situations in which individuals are least likely to make the choice that best serves them.[34]

B. *Some Illustrative Examples*

In sum, nudges are a type of policy intervention, which influence behavior while preserving choice, in response to various self-defeating tendencies in human reasoning. Nudges can achieve their desired ends in a variety of ways. Sunstein explains: "Some nudges work because they inform people. Others work because they make certain choices easier; people often choose the path of least resistance. Some such nudges, such as default rules, work because of the power of inertia and procrastination. Some nudges work because of social influences" (p. 21). Given the seemingly endless opportunities to nudge and the numerous nudging strategies available to policymakers,[35] perhaps the best way to understand what constitutes a nudge and how nudges work is through some examples.

Throughout the book, Sunstein offers examples of the use of nudges by policymakers. Well-known nudges include requiring chain restaurants to post calorie labels, placing graphic warnings on packs of cigarettes,[36] and automatically enrolling people in savings plans but giving them the ability to opt out.[37] The Consumer Financial Protection Bureau's slogan "[k]now before you owe" appears to encourage clarity and simplification to allow consumers to comparison shop effectively[38] (p. 7).

Nudges can be broken down into at least two different categories: nudges that engage System 2 deliberation, like the calorie labels or financial

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31. P. 29; *see also* Sunstein, *supra* note 6, at 9, 154.

32. Sunstein, *supra* note 6, at 154.

33. Put differently, behavioral market failures justify government paternalism. *See id.* at 4–5, 16, 20, 22, 34–35, 164.

34. Thaler & Sunstein, *supra* note 3, at 72.

35. *Id.* at 157.

36. At least one federal court, however, has held such labels to be unconstitutional. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).

37. P. 121. Other "classic nudges" described in the book include avoiding tax evasion (appealing to conscience), smoking discouragement (graphic warnings), cafeteria (accessibility), energy conservation (social norms), and food labeling (disclosure. Pp. 136–37.

38. P. 7 (quoting *Know Before You Owe: Credit Cards*, CFPB, https://www.consumerfinance.gov/data-research/credit-card-data/know-you-owe-credit-cards/ [https://perma.cc/R5Z9-Y23F]).

information, and nudges that exploit System 1 automatic thinking, like the graphic cigarette warning or the automatic savings-plan enrollment. Sunstein calls nudges that trigger System 2 "educative nudges" or "boosts" (pp. 12, 30, 32). Boosts give people access to more information or increase their competence to allow them to make better choices on their own (pp. 30, 32). These kinds of motivating nudges can take several different forms, including disclosures, simplifications, warnings, reminders, social norms, and precommitment strategies (pp. 26–27). Alternatively, instead of overriding System 1 thinking, other forms of nudges enlist System 1 to their advantage. For instance, a graphic warning uses disgust to discourage a potentially detrimental decision, like buying a pack of cigarettes.[39] Defaults exploit the human tendency toward inertia (p. 30). They are the option we choose when we choose to do nothing. Because so many people will simply not act, defaults can have very powerful consequences.[40]

As a general matter, people tend to prefer nudges that rely on System 2 versus System 1 unless the System 1 nudge is clearly superior (pp. 140–41). Studies show that individuals are more comfortable with nudges that encourage deliberation than with nudges that exploit behavioral biases.[41] Even people who are categorically skeptical of nudges or who exhibit a strong desire for self-control do not oppose nudges that trigger System 2 (p. 147). System 1 nudges may also garner significant public support when they target other System 1 issues. For example, graphic warnings on cigarettes—which solicit a visceral reaction to overcome the myopic, short-term preference for a cigarette—were extremely popular (p. 122).

II. Ethical Nudging and Distributional Concerns

All kinds of entities can—and do—use choice architecture to influence behavior. Yet when the government exerts influence, those situations can raise unique ethical concerns (p. 1). Because choice architecture is inescapable and can carry clear benefits, Sunstein asserts that it is fruitless to ask *whether* nudging is ethical. Instead, we should consider *when* nudging is ethical (p. 12). *The Ethics of Influence* addresses the appropriate role for nudging in the ethical state. To guide public officials on the ethics of their actions, he introduces a novel four-value framework for evaluating potential nudges. Although Sunstein's approach is more theoretically nuanced and flexible than previous accounts, it is nonetheless incomplete. In particular, it neglects distributive-justice concerns.

39. P. 30; *see also* Sunstein, *supra* note 6, at 85.

40. Thaler & Sunstein, *supra* note 3, at 83 (describing default rules as "ubiquitous and powerful"); *see also* Sunstein, *supra* note 6, at 118.

41. Pp. 34, 157; *see also* Sunstein, *supra* note 6, at 150.

A. *Sunstein's Four-Value Framework*

In the past, much of the ethical discussion surrounding nudges was primarily concerned with two sometimes-complementary, sometimes-conflicting values: welfare (what is good for a person or for society[42]) and autonomy (personal agency[43]), and how both values relate to paternalism.[44] Economists, even behavioral ones, frequently measure welfare impacts using cost-benefit analysis.[45] Previous ethical discussions tended to focus on attempts to influence behavior to increase welfare without compromising autonomy.[46]

The framework Sunstein introduces, however, is more theoretically complex and versatile. He believes that ethical states should consider four key values: (1) welfare, (2) autonomy, (3) dignity, and (4) self-government (p. 3). Put differently, governments should give their citizens good lives, protect their citizens' freedom to choose, show respect for their citizens, and let their citizens govern themselves (p. 3). These four values dictate which actions governments can ethically take, including their ability to nudge (pp. 3–4).

While Sunstein may seem at times like a welfarist whose greatest concern is promoting positive outcomes (another reviewer even refers to Sunstein's approach in the book as "utilitarian"),[47] his theory is—at least as he presents it—value pluralist, albeit with an occasional emphasis on welfare. Because these different values he cites can be related, they might appear interdependent or derivative of one another. We have already explored the connection between welfare and autonomy. Likewise, serious violations of dignity will also impact welfare (p. 68).[48]

Regardless of these synergies, Sunstein does not identify one value (or values) as superior or inferior (p. 4). While at times linked, the four values remain independent for purposes of his analysis. While he clearly cares about welfare, Sunstein does not reduce affronts to dignity, autonomy, and self-government to mere factors in a welfare calculus (pp. 15–17). This value pluralism gives his framework depth it would not have if he had merely attempted to fold those values into a single account of welfare. Moreover,

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42. *Welfare*, Oxford Dictionary of Philosophy (2d rev. ed. 2008).

43. Sarah Buss & Andrea Westlund, *Personal Autonomy*, Stan. Encyclopedia Phil. (May 28, 2002) (updated June 10, 2013), https://plato.stanford.edu/archives/win2016/entries/personal-autonomy/ (on file with the *Michigan Law Review*).

44. *See, e.g.*, Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159 (2003).

45. *Id.* at 1190–93.

46. *Id.* at 1160 ("We propose a form of paternalism, libertarian in spirit, that should be acceptable to those who are firmly committed to freedom of choice on grounds of either autonomy or welfare.").

47. *See* Rachlinski, *supra* note 1, at 1072 (alluding to "Professor Sunstein's utilitarian approach").

48. Sunstein, however, maintains that "[a] good welfarist should also acknowledge that an offense to dignity is qualitatively distinct; by its very nature, it is a special sort of harm, a different kind of loss from the loss of (say) money or an opportunity to visit a beach." P. 68.

value pluralism could also have wider appeal than simple welfarism. If a nudge promotes one or more values without violating any of them, it would appear ethical (p. 11). Likewise, if a nudge violates one or more values without promoting any of them, it would appear unethical (pp. 3–4). These are the easy cases.

Nudges will certainly offer their fair share of easy cases for Sunstein's four-value framework. Value pluralism's strength is clear under these circumstances. People may very well have different ideas about which values matter and when (pp. 13–14). Instead of quibbling over theoretical concerns, policymakers can instead make progress "by seeing if some approaches compromise none of the values and can attract support from people who are committed to all of them, or who are uncertain of their relationship" (p. 4). For example, a good default rule that reflects most people's informed preferences will promote welfare while respecting autonomy and not offending dignity (p. 176). And assuming a democratically elected government, such a default would also uphold self-government. Thus, we need not agree on a single underlying moral or political philosophy to reach consensus that a given nudge is ethical or unethical.[49] Value pluralism is highly versatile.

There are, however, harder cases for value-pluralist ethical theories. The four values in Sunstein's taxonomy will inevitably conflict. As discussed, efforts to promote welfare could sometimes infringe on autonomy. Self-government might also at times undermine individual dignity (p. 4). Because no one value trumps the other, such cases are harder for value pluralism, and the ethics of the nudging will depend on the particular nudge and its context.

In addition to providing boundaries for ethical action, those same four values can also function as mandates that actually *require* the government to act. At times then, the ethical state will be called to action to assure it provides the kind of resources and infrastructure that allows its citizenry to lead good, autonomous, dignified, self-governing lives (pp. 3–4, 11, 201–02). It may not be enough then to simply *promote* those values; states must sometimes *enable* them. Under such circumstances, nudging becomes "ethically mandatory" (p. 201). According to Sunstein, a government that has the opportunity but fails to adopt nudges that promote welfare, autonomy, dignity, or self-government is not acting ethically (p. 201). In short, inaction can also raise problems for the ethical state.

B. *Distributional Concerns*

Sunstein's four-value framework offers a theoretically nuanced and flexible approach to discerning when government nudges are ethical. Yet even otherwise ethical nudges can raise distributional concerns.

49. *See* p. 52.

Importantly, nudgers must decide how to nudge. And different background conditions and different baselines for different populations lead to different "optimal" outcomes. Sunstein asks:

> [H]ow does the right savings rate change when people have to pay school loans or mortgages, or to pay for their children, young or old, healthy or not? And how does it change for people who earn $30,000 per year, or $60,000, or $100,000? And what is the impact of changing macroeconomic conditions? (pp. 193–94)

Context, therefore, matters when the government is trying to decide which course of action is best for its citizens.[50] The reality is that—despite the unblinking acceptance of nudges as effective policy interventions[51]—the same nudges do not work equally well for all citizens. Nudges in certain contexts can fail some of our most vulnerable citizens, either by leaving them behind or by harming them outright.

1. Leaving Vulnerable People Behind

One way for nudges to fail is to be ineffective. Responding to the low take-up rates of potentially highly beneficial programs is one of the reasons Sunstein gives for nudging in the first place (pp. 10–11). By neglecting the distributive effects of nudges, we may unwittingly be creating or perpetuating social disparities. Insofar as nudges are supposed to improve the lives of citizens, entrenching existing inequalities—or worse yet creating new ones—runs counter to the well-intentioned purpose of nudging.

These kinds of distributive justice concerns raised by nudges are not mere conjecture. For example, employer-provided wellness programs typically employ nudging strategies, such as group health challenges (attempting to create a positive herd mentality) and biometric screenings (providing health-related information as a potential "boost"), to encourage their employees to adopt healthier behaviors.[52] These tactics are undoubtedly intended to activate System 2 reasoning to lead to healthier decisions. While employers and health insurers are private entities, in drafting the Affordable Care Act, Congress included incentives for adopting wellness initiatives.[53] The government was thus nudging the nudgers. Studies have found, however, that wellness programs have more engagement and greater success for advantaged populations, including people who are already healthy, people who work at white-collar jobs, people who occupy management-level positions, and people who have obtained some higher education.[54] Sadly, lower-income Americans are simultaneously more likely to be in poor health (and

50. P. 194 (explaining that what constitutes the "best" contribution rate depends on context).

51. Rachlinski says, "Despite concerns about whether governments should use nudges, no one truly questions the efficacy of nudges. Nudges work." Rachlinski, *supra* note 1, at 1066.

52. *See* Roberts & Fowler, *supra* note 18, at 107–08.

53. *Id.* at 106–10.

54. *Id.* at 112.

thus in need of policy interventions) and less likely to be engaged in wellness programs.[55] Thus, even if employer-provided wellness programs can successfully engage System 2 for a significant portion of the population, they may still fail to successfully nudge certain disadvantaged groups. To make matters worse, successfully nudging the advantaged while leaving the disadvantaged behind threatens to exacerbate existing health disparities.

2. Generating Harm

In addition to merely failing to benefit vulnerable populations, nudges can also sometimes do them harm. Consider another example of nudging by employers: automatic enrollment in savings plans.[56] Sunstein cites research in the United Kingdom studying people's reaction to being automatically enrolled in a suboptimal savings plan with an unusually high contribution rate (pp. 174–75). The study found that the employees who were most likely to remain with the default had lower average salaries.[57] Put differently, lower-income employees are slower to opt out of unfavorable defaults than higher-income employees.[58] Sunstein notes that "[s]imilar findings have been made elsewhere, with growing evidence that those who are less educated, and less sophisticated, are more likely to stick with the default" (pp. 174–75). Sunstein calls the tendency of poorer people to stay with even detrimental defaults a "puzzling and somewhat troubling implication" (p. 175). The defaults could then have a regressive effect on poor people in some cases because those individuals both have less money to spend and are more likely to stay with a suboptimal default option (p. 175).

Sunstein recognizes these possible distributional consequences. Take for example a green-energy plan that costs more up front yet saves twice as much in the longer term.[59] In discussing a similar scenario, Sunstein explains that, even if the welfare calculus tips in favor of the green-energy option, "[i]f poor people would in fact be net losers but would not opt out, the argument for a green default is weakened" (p. 179). To account for the potential distributive-justice issues, Sunstein recommends exploring the need for subsidies or transparent opportunities to opt out (p. 179).

III. Nudge-Proof Populations and Distributive Justice

To recap, nudges are choice-preserving policy interventions designed to steer people in the right direction. According to Sunstein, a state that wishes to act ethically must consider at least four values when deciding whether to

55. *Id.*

56. Again, the government can nudge the employer to nudge the employee. *See* p. 121 n.15.

57. John Beshears et al., The Limitations of Defaults 3 (2010), http://www.nber.org/aging/rrc/papers/orrc10-02.pdf [https://perma.cc/2U5P-LLDX].

58. *Id.*

59. Sunstein includes a similar example on page 172.

nudge its citizens: welfare, autonomy, dignity, and self-government. Yet research shows that certain vulnerable populations, such as low-income individuals, may not be as responsive to nudging as their more privileged counterparts. These low take-up rates among those in greatest need could potentially exacerbate existing disparities, as well as produce independent harms. Greater attention to distributional concerns could thus lead to smarter nudges that could do even more good. To reap these benefits, we must first understand what renders some people "nudge-proof" and then consider the implications of nudge-proof populations for the ethical state.

A. *Why Are Some Populations Nudge-Proof?*

In their seminal 2008 book *Nudge*, Sunstein and his coauthor Richard Thaler make this assertion: "The bottom line, from our point of view, is that people are, shall we say, nudge-able."[60] But is everyone equally nudge-able? Under the right circumstances, all people might be coercible. They might even be manipulable. Nudges, however, are supposed to have a lighter touch. Despite the widespread popularity and proven effectiveness of nudges, research shows that they do not universally benefit everyone. Recall that lower-income employees were less likely to engage in employer-provided wellness programs and that "those who are less educated, and less sophisticated, are more likely to stick with the default" (p. 175). I propose that there is something about these populations that makes them immune to particular kinds of nudges. They are nudge-proof.

People can be nudge-proof in at least two ways. In the context of educative nudges, nudge-proof individuals lack the capacity to act on the information they receive from the boost. In the case of defaults, nudge-proof people will fail to opt out, even when the default is suboptimal. Arguably, in the latter context, the nudge is "working" in the sense that individuals are succumbing to the default option. The ability to opt out of a default is essential to the "choice-preserving" aspect of nudges. These populations are therefore nudge-proof because they have little to no choice to preserve. They could very much want to opt out of the default yet face significant prohibitive barriers. Both situations arise from external constraints on decisionmaking.

To understand why certain groups under certain circumstances are nudge-proof, we must go back to the reasons why nudges work in the first place. As discussed in Part I, nudges target suboptimal decisionmaking that is the result of cognitive quirks. Chapters in Thaler and Sunstein's book have titles like "Biases and Blunders," "Resisting Temptation," and "Following the Herd."[61] The assumption underlying the lion's share of scholarship on nudges is that the behavioral market failures that nudges seek to correct are the result of internal processing errors, which result from things like present bias, unrealistic optimism, loss aversion, inertia, automatic thinking, and guilt or peer pressure.

60. Thaler & Sunstein, *supra* note 3, at 37.

61. *See id.* at v.

Take Thaler and Sunstein's discussion of being overweight. They note that, given soaring obesity rates, it seems apparent that a majority of Americans are not making optimal eating choices.[62] The primary culprits that they identify for this trend are conformity or social influence (e.g., describing obesity as "contagious" because "you're more likely to be overweight if you have a lot of overweight friends")[63] and issues with self-control (e.g., offering the hint that "if you would like to lose weight, get smaller plates, buy little packages of what you like, and don't keep tempting food in the refrigerator").[64] Hence, a would-be nudger, like an employer-provided wellness program, might respond by adopting a weight-loss challenge that attempts to harness the herd mentality to promote weight loss, or it might opt to offer healthier options in its vending machines and on-site cafeteria. As I will discuss, one of these weight-loss nudges is clearly superior from a distributive-justice perspective.

The success of defaults also relies on certain assumptions about how people make decisions. The idea behind defaults is to pick the option that will nudge most people in the right direction while preserving choice through the opportunity to opt out. Sunstein proposes that people may stick with defaults—perhaps even bad ones—for a variety of reasons (pp. 169–73). Procrastination and inertia are significant reasons why defaults work.[65] Yet nudgers assume that people will accept a default only up until a point and then they will opt out. Sunstein asserts that "[i]f a default rule really makes people uncomfortable, they will reject it" (p. 174). He maintains that those situations will overcome inertia, loss aversion, and guilt (p. 174).

Assumptions about why people make the choices they do underlie both System 2 and System 1 nudges.[66] To be sure, it is tempting to blame self-defeating choices on our invariably flawed cognitive tendencies. For example, in his review of *The Ethics of Influence*, Jeffrey Rachlinski writes, "Poor individuals might feel that they need the savings that come with the dirty energy plan but procrastinate and lose out on the savings for long periods."[67] But, if instead of weighing the costs and benefits of gray versus green energy lower-income people are caring for their children or working second jobs, it hardly seems fair to characterize their behavior as procrastination. Many suboptimal decisions may in fact be the result of cognitive quirks like present bias and inertia. Sometimes, however, the root cause of behavioral market failures will be external—not internal—factors.[68]

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62. *Id.* at 7.

63. *Id.* at 55, 64.

64. *Id.* at 44.

65. P. 171 ("Studies of brain activity find that when decisions are complex and difficult, people are more likely to stick with the default.").

66. *See* p. 34.

67. Rachlinski, *supra* note 1, at 1069.

68. I originally made an argument along these lines with respect to wellness programs. *See* Roberts & Fowler, *supra* note 18, at 101.

In short, choice architecture assumes the ability to choose. That said, several factors can impinge on choice. Everyone does not have access to the same set of options. To use a common example, consider the lifestyle changes required to get in shape. It is far easier for a higher-income, single young professional who has a flexible schedule and lives in a posh apartment with a gym to work out regularly than for a lower-income, single parent who cannot afford childcare, who lacks transportation to a gym, and who lives in an unsafe neighborhood without decent sidewalks or green spaces. Imagine both these individuals work in the same company—albeit in very different positions—and are encouraged to participate in a physical activity challenge. Should we expect them to respond in the same way? As discussed, research already tells us that they will not.

Put another way, all individuals are not equally autonomous. Martha Albertson Fineman explains that autonomy has meaning only "in situations in which individual choices are not made impossible, constrained by inequalities, particularly those inequalities that arise from poverty."[69] Making good choices requires a certain baseline in terms of basic health, money, and time. This reality is not lost on Sunstein. He acknowledges that time and attention are scarce resources, the absence of which can limit autonomy (pp. 24, 61, 181). He even notes that one reason poorer people may stay with suboptimal defaults could be their relative lack of time: "One reason may be that low-income workers have a great deal to worry about and so are less likely to take the trouble to think through and to alter the default rule" (p. 175; footnote omitted).

But this reality is true for other kinds of resources as well. Economists frame these additional factors that can impede optimal decisionmaking as "effort taxes."[70] Sunstein explains that "[a]n 'effort tax' may seem especially high for, and have an especially large adverse effect on, people who are already facing a large number of difficult or life-stabilizing decisions and costs" (p. 175). If the effort tax gets too high, the suboptimal default could be the only practically available option.[71] Socioeconomic factors and structural barriers, not cognitive errors or biases, may be the true reason for the behavioral market failure.[72]

Take the observation from Thaler and Sunstein's early work that being overweight correlates with socializing with other overweight people.[73] Yes, perhaps part of the puzzle is in-group norms and herd mentality. Yet there could be other common denominators as well. Human beings tend to socialize with people who are in proximity to us, like family and neighbors, and so maybe the reason that certain social groups tend to be overweight is the result of a shared experience of living in a food desert without opportunities

69. Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency 30 (2004).

70. *See* p. 175.

71. *See id.*

72. Roberts & Fowler, *supra* note 18, at 116–19.

73. Thaler & Sunstein, *supra* note 3, at 55, 64.

for exercise. When nudges respond to behavioral market failures without providing the necessary infrastructure and resources, some members of the targeted group may well be rendered nudge-proof.

It is worth emphasizing that being nudge-proof is not a permanent status, nor is it a binary. It is situational and exists on a continuum. In studying why some nudges do not work, research has revealed that people with less income, sophistication, and education may not respond in the desired way to nudging.[74] Really, any group that faces disproportional burdens could be nudge-proof under the right circumstances, including women, people of color, and people with disabilities. Also, being nudge-proof in one context does not make someone nudge-proof across the board. A person who cannot afford fruits and vegetables may still read labels and opt to avoid GMOs in the food products she buys. She has been nudged in one way but not in the other. Finally, because being nudge-proof is the result of external factors, a change in circumstances—like a higher-paying job—may be enough to move a person from nudge-proof to nudge-able.

B. *Distributive Justice as an Independent Value*

Nudge-proof populations complicate the ethics of nudging. Distributive justice is a well-accepted ethical principle that requires the just distribution of benefits and burdens among members of society.[75] Being attuned to distributional concerns could lead to more effective nudging. Consequently, I advocate considering distributive justice in addition to welfare, autonomy, dignity, and self-government when assessing the ethics of nudging.

Although he does not address distributional concerns head on, Sunstein recognizes that an ethical state might want to promote fair distribution:

> Perhaps some people are poor and other people are rich, and perhaps that inequality reflects unfairness. Perhaps some people are subject to systematic inequality, perhaps because they lack decent opportunities, perhaps because they are disabled, perhaps because of the color of their skin. An ethical state might want to take steps to help. (p. 20)

Even in his very early work on nudging, Sunstein was sensitive to distributive justice.[76] Yet despite acknowledging the importance of distributional concerns, Sunstein does not treat distributive justice as an independent value in his four-value framework. Instead, he folds distributional issues into his analysis of autonomy and of dignity. For example, he writes, "People who are subject to violence, uneducated, or desperately poor cannot be autonomous, or cannot enjoy such autonomy as they may have. A dignified life

74. *See* p. 174–75.

75. Brian Caterino, *Distributive Justice*, Encyclopedia of Pol. Sci. (George Thomas Kurian et al. eds., 2011) http://dx/doi.org/10.4135/9781608712434 (on file with the *Michigan Law Review*).

76. *See, e.g.*, Thaler & Sunstein, *supra* note 3, at 242.

requires background conditions and social support" (p. 4). Likewise, he asserts that "[m]any nudges combat discrimination on the basis of race, religion, and sex, and help people who face severe economic deprivation; they promote dignity" (pp. 201–02). It would then not be fair to say that Sunstein's approach ignores distributive justice. His framework merely fails to give distributive justice specific attention on par with welfare, autonomy, dignity, and self-government.

From an ethical standpoint, issues of distributive justice can be particularly problematic when welfare is the primary guiding value. First, welfarists, for whom Pareto improvement is the gold standard of policy analysis, may not recognize widening disparities as ethically problematic. A Pareto improvement occurs when at least one person is made better off and no one is made worse off.[77] Thus, a nudge that successfully nudges advantaged populations while leaving behind disadvantaged individuals may still be Pareto improving. For example, requiring grocery stores to feature healthier options more prominently will not nudge people who cannot afford those items. The nudge-proof populations will then stay at their prenudge baselines, while the nudge-able populations—albeit perhaps slowly—reap the benefits of healthier food choices. If anyone in the population gets nudged, the result is a welfare gain.

But even Pareto-improving interventions can create or exacerbate social inequalities. Imagine that starting in the Middle Ages one single population was consistently left behind by interventions that made them no worse off but that moved everyone else, slowly over time, into the modern era. That population would have no indoor plumbing, a heightened risk of infectious disease, and a life expectancy of around thirty-one years of age.[78] A meaningful concept of distributive justice surely would not tolerate such an outcome.

The notion that inequalities may raise distributional concerns is not new. Some versions of distributive justice, including the one adopted here, require a baseline of equality. Perhaps most notably, renowned political philosopher G.A. Cohen argues that deep inequalities—regardless of their Pareto effects—violate distributive justice principles.[79] As one commentator puts it, "Justice requires equality, and Pareto improvements have nothing to do with equality, and thus nothing to do with justice."[80] If nudge-proof individuals do not stand to benefit from policy interventions—even if they are not outright harmed by them—and more affluent, nudge-able people enjoy increasingly better lives, we will further increase the gap between the haves and the have-nots. Once this gap gets sufficiently wide, distributive justice

77. Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* The Economics of Justice, 34 Stan. L. Rev. 1105, 1106–07 (1982) (book review).

78. *Health: A Millennium of Health Improvement*, BBC News (Dec. 27, 1998, 5:56 AM), http://news.bbc.co.uk/2/hi/health/241864.stm [https://perma.cc/R6H9-FHYL].

79. *See, e.g.*, G.A. Cohen, Rescuing Justice and Equality (2008).

80. Jonathan Quong, *Justice Beyond Equality*, 36 Soc. Theory & Prac. 315, 331 (2010) (reviewing Cohen, *supra* note 79).

issues arise. Unfortunately, our existing disparities are already quite alarming. Compared to its sister countries, the United States already falls dead last in terms of poverty and inequality indicators.[81] We must then ask ourselves whether it is ethical to adopt social policies that could leave behind our neediest citizens.

Moreover, even seemingly Pareto-improving events could actually result in welfare losses. Imagine walking into a room full of kindergarteners who each have a cookie and then giving an additional cookie to all but a handful of the children. Would the single-cookie havers—or their parents for that matter—find comfort in knowing that giving an additional cookie to their peers made them no worse off? Probably not. Humans are notoriously comparative thinkers. This is particularly true with respect to positional goods, whose value comes largely from the sense of social status that comes from possessing them (while others do not). For instance, how happy a person is with her house depends on how it compares to her neighbors' houses.[82] Consider that much of the acrimony surrounding the 2016 presidential election came from certain groups of Americans feeling that they had been left behind.[83] Hence, the idea that a policy intervention could move some people forward without impacting the welfare of those it neglects could be largely hypothetical. People may experience welfare losses when they believe that others are improving and they are not, even if they are no worse off.

Second, even in cases like the U.K. retirement savings study where vulnerable populations are clearly worse off (pp. 174–75), welfarist analysis falls short because it fails to fully capture distributional concerns. Utilitarian welfarism, which seeks to promote the greatest good for the greatest number,[84] notoriously masks distributional concerns. If enough of the population is even slightly better off but a handful of people are significantly worse off, the result could still be a net welfare gain sufficient to justify the policy intervention.

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81. David B. Grusky et al., *Executive Summary*, Pathways, 2016, at 5.

82. Thomas Aronsson & Andrea Mannberg, Positional Preferences for Housing: Income Taxation as a Second-Best Policy? 2 (2014), https://www.diva-portal.org/smash/get/diva2:739555/FULLTEXT01.pdf [https://perma.cc/G9K4-XAAN].

83. *See, e.g.*, Richard Fausset, *Feeling Let Down and Left Behind, with Little Hope for Better*, N.Y. Times (May 25, 2016), https://www.nytimes.com/2016/05/26/us/feeling-let-down-and-left-behind-with-little-hope-for-better.html (on file with the *Michigan Law Review*); Juana Summers, *The 'Forgotten Tribe' in West Virginia; Why America's White Working Class Feels Left Behind*, CNN (Sept. 20, 2016, 9:10 AM), http://www.cnn.com/2016/09/20/politics/election-2016-white-working-class-donald-trump-kaiser-family-foundation/index.html [https://perma.cc/ZZT4-QSSR]; Brian Wagner, *Democrats and the Plight of Rural America*, Huffington Post (Sept. 16, 2016), http://www.huffingtonpost.com/entry/democrats-and-the-plight-of-rural-america_us_57daddc1e4b053b1ccf29524 [https://perma.cc/F58N-L3VJ]; *Helping Rural America Catch Up*, N.Y. Times (Sept. 19, 2016), https://www.nytimes.com/roomfordebate/2016/09/19/prosperity-is-up-but-not-for-rural-america/invest-in-green-and-connected-jobs-and-opportunities-for-young-people [https://perma.cc/L7KX-SM98].

84. *See* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 5 n.1 (Clarendon Press 1907) (1789).

Consider the green-energy example. If a person cannot afford the initial investment, she will be unable to enjoy the savings down the line (p. 172). Moreover, if she tries to make those heightened payments, she might find herself deciding between electricity and food. While the green-energy plan might be a great option for most people and for the planet, it could be a terrible option for at least some people. In deciding to nudge people toward green energy, a utilitarian welfarist might look only to the overall environmental and savings impacts without appreciating that some individuals will be substantially worse off. Martha Nussbaum notes that, through the process of aggregating welfare, utilitarianism fails to explain "who has got the money and whether any of it is mine."[85]

Consequently, Sunstein's four-part ethical framework could benefit from an additional value: distributive justice. Value-pluralist models like Sunstein's leave room to consider additional values. As noted, he already engages with distributive justice at various times in *The Ethics of Influence*.[86] And distributive justice surely has autonomy, dignity, and even welfare implications. The full extent of the potential distributional issues may not be apparent from simply looking to these other values. Take a policy of prominently featuring health food at the grocery store. As noted, the result is likely a welfare gain for people who are nudge-able. Moreover, it would be strange to say that putting produce at the front of the store compromises autonomy because it fails to limit choice in any tangible way. Likewise, it does not offend dignity by undermining agency or failing to treat people as full persons. (Just for good measure, assuming people care about healthy eating and playing a part in selecting their public officials, self-government is also probably not implicated here.) Under Sunstein's framework then, the nudge would be unquestionably ethical. It promotes welfare and violates none of the other values.

Adding distributive justice to the picture creates an additional level of depth. It requires would-be nudgers to ask themselves, Is there a nudge that we could adopt that may better serve our goals? Of course, in a value pluralist framework, no single value is dispositive.[87] Thus, while the inability of some people to afford healthy food might implicate distributive justice, it does not mean that the grocery store nudge is unethical. After all, choice architecture is inevitable—the fruits and the vegetables have to go somewhere in the store—so we might as well use that reality to make an improvement even if it raises minor distributional concerns.

When adopting interventions, policymakers should also consider that some nudges actually promote distributive justice by removing structural barriers or narrowing disparities. In fact, some nudges might benefit vulnerable populations *more* than their privileged counterparts. Let's return to the employer responding to nudges from the government to improve the health

85. Martha C. Nussbaum, *Capabilities and Human Rights*, 66 Fordham L. Rev. 273, 281 (1997) (quoting Charles Dickens, Hard Times 56–57 (Oxford Univ. Press 1997) (1854)).

86. *See supra* text accompanying note 76.

87. *See* discussion *supra* Section II.A.

of its employees. We encountered two potential healthy eating nudges: (1) creating a weight loss challenge designed to use the herd mentality and (2) providing healthy options in the vending machines and cafeteria to rely on automatic thinking (it turns out most of us will eat what is in front of us).[88]

As explained, the weight-loss challenge could raise distributional concerns because all employees will not have access to the same eating and exercise options when they leave work. Of course, as explained above, the mere fact that only white-collar workers are the primary beneficiaries of these policies does not, in and of itself, render them unethical.

By contrast, making affordable—or better yet free—healthy snacks available to employees not only nudges them in favor of selecting those foods but actually creates a fairly distributed opportunity to make healthier eating decisions. Nudges that increase the opportunities to make better choices will enhance autonomy.[89] Autonomy-enhancing nudges could actually have a progressive (as opposed to a regressive) impact on certain populations. For instance, the employee who cannot afford healthy snacks on her own might derive a greater relative benefit from her employer's policy than her more affluent coworkers.

Defaults could also be used to promote distributive justice. Imagine a government program that took a modest donation from the tax returns of high-income individuals and put that money toward a local food bank. Defaults could also better serve distributive justice, as Sunstein has suggested (pp. 179, 185), by offering subsidies, making opting out relatively costless (pp. 161–62), and tailoring defaults to specific populations (p. 183). (But in making these adjustments, policymakers must be careful not to compromise the benefits of having a default in the first place.)

The idea of nudges with positive distributive effects is not merely wishful thinking. Some popular nudges, like automatic voter registration to improve turnout (p. 14) and raising the number of free testing reports that college hopefuls can send to schools to increase applications for lower-income students,[90] already function to promote distributive justice because they reduce the structural barriers certain populations will encounter in registering to vote and applying to college.

Of course, just as some nudges will not implicate welfare, autonomy, dignity, and self-government, not all nudges will raise distributive justice concerns. For example, defaulting printers to print double-sided to save paper (p. 163) appears to have no distributional impacts one way or another.

But regardless of whether a particular nudge violates distributive justice, promotes it, or has no effect, those conversations are worth having independent of Sunstein's four other values.

88. Thaler & Sunstein, *supra* note 3, at 43.

89. In other work, a coauthor and I have called these kinds of interventions "autonomy enhancing." Roberts & Fowler, *supra* note 18; *see also* Jessica L. Roberts & Dave Fagundes, *When Nudges Become Shoves: Distributive Justice, Libertarian Paternalism, and the HUD Smoke-Free Policy* (Sept. 18, 2017) (unpublished manuscript) (on file with the *Michigan Law Review*).

90. Sunstein, *supra* note 6, at 15.

Conclusion: From Nudge-Proof to Nudge-able

Cass R. Sunstein's *The Ethics of Influence* makes a significant contribution to the ongoing discussion surrounding nudges as policy interventions. When the government does the nudging, it can raise unique ethical concerns. Sunstein's simple yet elegant value-pluralist framework provides an important foundation for exploring the limits and the obligations of the ethical state with respect to nudging. He encourages policymakers to look to four key values—welfare, autonomy, dignity, and self-government—when considering whether to act. But even otherwise ethical seeming nudges can raise distributional concerns. Some people lack the resources or the opportunities to make better choices, and sticky defaults can do more harm than good for already disadvantaged populations. Consequently, in this Review, I have encouraged would-be nudgers to add a fifth value to their calculus: distributive justice. If we choose to incorporate distributive justice as an independent value alongside welfare, autonomy, dignity, and self-government, how would that change the analysis?

To start, certain nudges will not implicate distributive justice one way or another. Other nudges will, in fact, promote distributive justice by improving access to resources and narrowing disparities. And, of course, some nudges will threaten to undermine distributive justice, even if only slightly. Yet herein lies the beauty of a value-pluralist model. Policymakers will not decide in favor or against a given nudge on a single ethical consideration. Even nudges with potentially negative distributional impacts could still be ethical, all things considered.

These conversations are important. While one benefit of nudges is their relatively low cost to implement, they are not (despite suggestions to the contrary) costless.[91] Surely it cost taxpayers *something* when President Obama convened a group of thought leaders to discuss the power of nudges. After such meetings, policymakers and public officials must actually design and implement the nudges that are discussed. And later down the line, researchers and analysts will need to assess their effectiveness. Put simply, nudges have hidden costs. There is no such thing as a free nudge.

All policymakers must confront issues of resource allocation. When the government devotes time, money, and brainpower to certain kinds of nudges, it funnels those resources away from developing other policies. Some of the concerns outlined here are simply outside the scope of nudging. Widespread injustices, like income and health disparities, are larger social problems that nudges cannot hope to solve entirely. At a minimum, however, the government as an agent of the people has an obligation to consider the distributional consequences of its policies. Moreover, distributional concerns like the ones outlined here can be studied, understood, and addressed. Distributive justice should not be dispositive, but it should certainly join

91. *But see* Thaler & Sunstein, *supra* note 3, at 13 ("[M]any of those policies cost little or nothing; they impose no burden on taxpayers at all.").

welfare, autonomy, dignity, and self-government in the pantheon of values considered by the ethical state.