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# Should We Nudge Informed Consent?<sup>1</sup>

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Critics argue that nudge theory manipulates rather than respects the informed consent of patients. Cohen (2013) convincingly argues that this criticism falls short of the mark. But we might go one step further: nudges are not only defensible, there are also inescapable. Cohen's defence should be more robust and recognize the importance of context and unavoidable framing effects. The question is not whether nudges are acceptable, but rather how they might be better employed to improve informed consent and public policy.

This Open Peer Commentary will explain the inevitability of nudging. A respect for informed consent is to respect choices within context. We can improve our efforts to support and improve informed consent, but we cannot act independently of contextual factors. So long as we must choose within context, we are subjected to nudges. We should not ask whether or not to nudge, but how best to nudge instead.

## Nudges and choices

A central objection to the use of so-called “nudges” is that any interference with the decision-making of patients requires satisfactory justification. Richard Thaler and Cass Sunstein (2008, 235-52) respond to this objection through two different responses. The first claims that nudges are not an unacceptable interference. This is because patients must possess no fewer

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<sup>1</sup> Forthcoming in *American Journal of Bioethics*

choices: nudges should not constrain the number of choices we can make, but rather help shape the context where choices are made. Thaler and Sunstein use the example of the school cafeteria redesigned so that children select items for lunch that are healthier for them without reducing their choices (2008, 1-2). They argue that schoolchildren will make different choices where items are rearranged: children will be more likely to choose healthier foods if near the entrance and at eye-level than if towards the exit or difficult to reach. Their choices are no fewer, but the context is changed to help facilitate better choices. Similarly, nudges in health care should provide no fewer choices, but rather aim to provide a context where benefits may be more likely.

It might be argued that securing the same, if not more, possible choices do not change the fact that nudges are designed to affect the choices we make. Nudges might be employed to ensure patients become more likely to choose options that agree with the recommendations of their medical professionals. The problem is that nudges might appear to manipulate the choices patients make rather than merely improve the information required to enable informed consent. Thaler and Sunstein claim this need not be problematic where nudges are constructed in a transparent manner and lead to improvements in well being. Where choosers are made aware that proposals are designed to lead to particular results, then this is thought to ensure sufficient publicity and respect for individual choice (Thaler and Sunstein 2008, 244-45). Public institutions should not be secretive about their recommendations. However, it might be claimed that this does not guarantee transparency and not least because greater openness about recommended choices might turn “libertarian” paternalism to paternalism *simplicitor*. What guarantees can be put in place to ensure this threshold of transparency is secured? And might these guarantees be framed in ways that further ground nudges rather than merely alert the public to the use of nudges? Thaler and Sunstein nor Cohen offer any concrete steps to ensure that transparency will have this function.

Improved well being is understood as what patients believe will make them better off “as judged by themselves” (Thaler and Sunstein 2008, 5). Thaler and Sunstein argue: “If our proposals help people save more, eat better, invest more wisely, and choose better insurance plans and credit cards – in each case only when they want to – isn’t that a good thing?” (2008, 236). The problem is the potential manipulation of individual decision-making through exploitation of rationality: if our choices are manipulated, then this will undermine autonomy and render informed consent out of reach (Blumenthal-Barby and Burroughs 2012, 5; O’Neill 2002). Cohen (2013) argues that no such manipulative exploitation need be present. This is because nudges are designed in light of our rational decision-making rather than provide some alternative to it. Nudges enhance, not inhibit, autonomy.

But consider how this works. Nudges are employed to better ensure individuals choose options that cohere with public policy goals, such as improving decisions about health. Nudges are required, in part, because individuals often choose poorly. Thaler and Sunstein are explicit: nudges are designed for human beings and not perfectly rational beings (2008, 7-9). If human rationality did not require manipulation, then nudges might be irrelevant. Instead, we nudge to promote some options over others. Nudges do not so much as improve individual autonomy as they help shape choice structures to secure better outcomes – outcomes judged as better by those who shape the context within which choices are made and the individuals who choose. So the question is not whether nudges manipulate decision-making, but instead whether this may be justifiable. For Thaler and Sunstein as well as Cohen, nudges are not an unacceptable interference.

Condemned to Nudge?

This position obscures a deeper truth. The second response of Thaler and Sunstein to the objection that nudges are an unacceptable interference is their claim that nudges are “inevitable” and “no choice lacks a context” (2008, 236). Cohen (2013) argues similarly for the “inescapability” that choices are made within contexts. He claims that there is no such thing as a value-neutral presentation of facts, citing research by Kirklin (2007). For Cohen, nudges are inescapable and, thus, “morally required” (2013, forthcoming).

Cohen’s position is problematic. The issue is not about whether there is a value-neutral presentation *of facts* as it is whether we can provide a value-neutral presentation *of anything*. Choices are always made within a context. It is clear that the presentation of the context may influence the choices made within that context. Nudges are not merely inescapable, but we might say that we are condemned to nudge.

It is untrue to say that the unavoidability of nudging is evidence for their moral requirement. For example, every human being is mortal and will eventually die: death is unavoidable, but this does not entail its moral requirement. Nudging is not morally required because it is inescapable, but its morality is also inescapable, too. The way we frame information and its context for patients to secure informed consent cannot be value-neutral. On the contrary, the informational narratives we tell frame contexts in particular ways that may influence choice.

There is no option to provide only the facts, but leave the normative evaluation to patients. This is because there is inescapable normative evaluation of the facts themselves in determining which deserve recognition and which can be omitted. Some elements become privileged over others and communicated in an informational narrative which is itself value-laden rather than value-neutral. The problem cannot be the absence of value-neutrality because such a goal is unrealistic and unachievable. Perhaps any informational narrative is

potentially problematic, but our option cannot be to avoid empowering patients to make informed decisions because they may be influenced however subtly by how issues might be framed. Instead, we must confront the truism that information is rarely, if ever, value-neutral. To be condemned to nudge is not to welcome manipulation, but to clarify the importance of context in any setting for securing public policy goals. We nudge, but we must become more open to the ever-presence of nudging in any informational context and how to ensure that the nudges we permit are not counterproductive to patient autonomy and other important values, such as capabilities and well being (Brooks 2012).

### Conclusion

Critics argue that nudge theory manipulates rather than respects the informed consent of patients. This Open Peer Commentary agrees with Cohen that this criticism often falls short of the mark. The standard reply is to argue that nudges are defensible, but they are also inescapable. Decisions under conditions of informed consent are made in context through the use of informational narratives which privilege some facts and issues over others. We should not ask whether or not to nudge, but how best to nudge instead. Nudges are neither to be avoided or welcomed, but rather to be acknowledged and put to best use for the good of patients and their view about their individual well being.

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