On the Inevitability of Nudging

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INTRODUCTION

Richard Thaler and Cass Sunstein have defended "nudging" people into making better choices. A nudge, they claim, "is 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."[1] A nudge, then, is a kind of intervention, but not a coercive one: "To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not."[2] Examples abound, from automatic enrollment in savings programs to the deployment of housefly images in urinals to reduce spillover.

In this paper, I want to assess a critical premise in the justification for nudging, which is that, in many cases, *there is no alternative* to nudging. Since there is no alternative to nudging, the argument goes, we should pick the best nudge available. Given this claim, nudging will occur whenever we pick a default rule for some social activity that we think will have predictable, positive effects on social or individual behavior. Once the choice architect becomes aware of his option set, he cannot avoid nudging. For example, a choice

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1. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 6 (2009).

2. Adrien Barton & Till Grüne-Yanoff, *From Libertarian Paternalism to Nudging—and Beyond*, 6 REV. PHIL. PSYCHOL. 341, 342 (2015).

architect at a firm is faced with the choice of nudging people into a 401k or requiring an opt-in. He has no other options. And if he indeed has no other options, then surely he should nudge people into a 401k with an opt-out policy.

Following some analysis of key concepts in their argument, we will be able to see that this *inevitability argument* is incorrect because Thaler and Sunstein are unclear about what feature of the choice architect's choice is inevitable. Once we clarify which actions are inevitable, the problem with the inevitability argument should be clear as well.

I will then modify the inevitability argument to focus on *moral* inevitability, where not nudging is *morally impermissible*, such that if one wishes to do *the right thing*, nudging is inevitable. To illustrate, I will examine cases where nudges initially appear inevitable *tout court*, but in fact are not. We will see that the lines of action that avoid nudging will sometimes be morally questionable. I will explore cases where a choice architect is *morally negligent* for failing to nudge. This revised moral inevitability argument is more plausible. However, it is only successful to the extent that one thinks the moral wrong in nudging is worse than the moral wrong in not nudging. For committed anti-paternalists, negligence might be morally superior to paternalistic nudging. The anti-paternalist might also go further and insist that, because paternalism is wrong, avoiding nudging is morally required and not morally negligent at all. So I end with a split verdict on the moral inevitability argument.

My argument proceeds in four parts. I begin by examining the idea of a nudge in light of the powerful criticisms offered by Daniel Hausman and Brynn Welch. Their criticisms convert nudging into *shaping*, which involves using the "flaws in human decision-making to get individuals to choose one alternative than another."[3] I argue that shaping must be deliberate. I then examine what the object of shaping is intended to be, and I come up with some examples. But, I claim, these examples need not count as shaping because choice architects have the option of deciding not to act on what we might call *shaping-reasons*, but instead to act on alternative considerations. This will make clear that nudging, or rather shaping, is almost always avoidable. I then transition to the revised inevitability argument that focuses on the idea of moral inevitability.

I. NUDGING AND SHAPING

Thaler and Sunstein appeal to two ideas: nudges and paternalism. Hausman and Welch expose both ideas as employed by Thaler and Sunstein as unclear. Thaler and Sunstein acknowledge that nudges are "not necessarily intended to benefit those whom they nudge."[4] They define a policy as paternalistic "if it tries to influence choices in a way that will make choosers better off, *as judged*

3. Daniel M. Hausman & Brynn Welch, *Debate: To Nudge or Not to Nudge*, 18 J. POL. PHIL. 123, 128 (2010).

4. *Id.* at 125.

by themselves."[5] So nudges are not always paternalistic. Thaler and Sunstein also claim that nudges tend to involve minimal costs, but they cite several examples that arguably involve major costs, such as requiring firms to publish "Toxic Release Inventories" which is a "nice example of a social nudge" but that would arguably incur massive costs via social ostracism.[6] Nonetheless, we can understand a nudge as leaving the choice set of the nudged unchanged; nudges should not make certain choices prohibitively costly. Consequently, Hausman and Welch conclude that, "nudges are ways of influencing choice without limiting the choice set or making alternatives appreciably more costly in terms of time, trouble, social sanctions, and so forth."[7]

Hausman and Welch also critique Thaler and Sunstein's conception of paternalism. Hausman and Welch argue that "whether agents agree that some intervention benefits them has nothing to do with whether the intervention is paternalistic." This is because "paternalism does not always aim to influence a choice," such as giving "a life-saving blood transfusion to an unconscious Jehovah's Witness, who has asked not to be transfused."[8] Sunstein and Thaler also claim that rational persuasion that attempts to realize the good of the advisee is paternalistic, which is odd.

In response to these problems, Hausman and Welch reconstruct the idea of nudging into the idea of shaping, which excludes persuasion and involves manipulation (understood non-pejoratively).[9] Shaping involves the "use of flaws in human decision-making to get individuals to choose one alternative rather than another."[10] Importantly, the notion of "using" flaws in human decision-making is fairly general. One might "use" flaws in bypassing the rational faculties of persons, or by correcting the flaws.[11]

Shaping can be paternalistic, and Hausman and Welch define paternalism as follows:

> A policy is paternalistic if and only if it aims to advance the interests of some person P either (a) via influencing P's choices by shaping how P chooses or limiting what P can choose or (b) by some means that will take effect regardless of what P does and against P's will.[12]

An act is paternalistic in virtue of "the aims with which one acts" rather than "the means one employs" or whether or not "one is successful." An example of

5. THALER & SUNSTEIN, *supra* note 1, at 5.
6. *Id*. at 191, 193.
7. Hausman & Welch, *supra* note 3, at 126.
8. *Id*. at 126–27.
9. Sunstein has clarified his notion of paternalism, though it still falls victim to some of Hausman and Welch's criticisms. *See* CASS R SUNSTEIN, WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM 55–71 (2014). For this reason, I stick with Hausman and Welch's idea of shaping.
10. Hausman & Welch, *supra* note 3, at 128.
11. I thank Robert Lepenies for this point.
12. Hausman & Welch, *supra* note 3, at 129.

a paternalistic shaping would be arranging cafeteria food so as to make less healthy options a bit harder to reach. Students are made better off by the arrangement, and the arrangement is intended to make them better off by exploiting their flawed decision-making.

From here on out, I will use the idea of a paternalistic shaping as the operative idea in nudge, as it is far clearer and more coherent than what Sunstein and Thaler offer.

II. MUST NUDGES OR SHAPING BE DELIBERATE?

Sunstein and Thaler think that nudging is inevitable. To determine whether this is so, we need to know whether *shaping* is inevitable. And to determine whether shaping is inevitable, we need to know whether shaping requires awareness and intentionality on behalf of the choice architect. The strict definition of a nudge does not require deliberate behavior, since a nudge is "any aspect of the choice architecture that alters people's behavior."[13] And Sunstein and Thaler even say that "[m]any real people turn out to be choice architects, most without realizing it."[14] More recently, Sunstein has acknowledged that "[t]here can be (and often is) choice architecture without choice architects."[15]

However, this characterization of the shaper is too broad. If on my morning bike-ride to work, I roll over a hidden sensor in the street that will set the default rule for my wife's 401k investment, I have not nudged or shaped my wife's behavior. In general, a nudge requires complex intentional states in the mind of the choice architect. At a minimum, the nudger must nudge according to the belief that she is not restricting the choice set of the nudged, and that she is not coercing the nudged. But for the nudges to be justified, the nudger must also believe (a) that the nudge, if successful, aligns the behavior of the nudged with the nudged person's own preferences, and (b) that the nudge will have generally good effects. Finally, the nudger should believe (c) that if she attempts to nudge, she will probably be successful, given the nudger's present evidence. All this is true of shaping as well.[16]

The general reason that shaping seems to require deliberate action is that it involves appealing to flaws in human decision-making, which requires that the choice architect exhibit some degree of awareness and deliberate choice. Below I will address the question of whether shaping is inevitable given that it must be intentional.

III. WHAT IS INEVITABLE?

Sunstein and Thaler tell us that sometimes we cannot avoid nudging, yet in defending this claim, they switch between it and the claim that we cannot avoid

13. *See supra* note 1 and accompanying text.
14. THALER & SUNSTEIN, *supra* note 1, at 3.
15. SUNSTEIN, *supra* note 9, at 118.
16. Yashar Saghai, *Salvaging the Concept of Nudge*, 39 J. MED. ETHICS, 487, 491 (2013).

something else. Consider: "The first misconception is that it is possible to avoid influencing people's choices. In many situations, some organization or agent *must* make a choice that will affect the behavior of other people. There is, in those situations, no way of avoiding nudging in some direction."[17] It is obviously true that we cannot always avoid affecting or influencing the choices of others. But *that's not even a nudge*, much less a shaping. So these two sentences equivocate.

Sometimes Sunstein and Thaler back off of their claim that *nudging* is inevitable, instead claiming that that *choice architecture* is inevitable: "Choice architecture and its effects cannot be avoided, and so the short answer is an obvious one, call it the golden rule of libertarian paternalism: offer nudges that are most likely to help and least likely to inflict harm."[18] And more recently, Sunstein has focused on choice architecture being inevitable: "Choice architecture is inevitable, and hence certain influences on choices are also inevitable, whether or not they are intentional or the product of any kind of conscious design."[19]

I agree with Sunstein that choice architectures are inevitable. Choice architects exist and they will have control of social practices that will shape what persons choose. More obvious still is that we cannot avoid the effects of those architectures when they are in place; otherwise, they would not count as architectures. In response, Sunstein and Thaler say that we should choose the nudges that are the best and avoid the bad ones. But why would the claim that the choice architect has an obligation to *nudge well* follow from the fact that we cannot avoid having choice architectures or their effects? It might follow from the fact that we cannot avoid having a *choice architect*, in conjunction with a premise requiring that we promote human welfare, but that is different from the mere existence of a choice architecture that may not have been deliberately constructed.[20]

Sunstein and Thaler make a still different claim that they seem to think is equivalent to the two claims above, "We have emphasized that default rules are inevitable—that private institutions and the legal system cannot avoid choosing them."[21] This is to claim that we must have a default rule, but that the existence of a default rule can have different *origins.* The rule might come from a nudge, or a shaping, but it might not.

Finally, the authors make a fourth claim, which might be true: "In many cases, some kind of nudge is inevitable, and so it is pointless to ask government

17. THALER & SUNSTEIN, *supra* note 1, at 10; *see also* SUNSTEIN, *supra* note 9, at 5.

18. THALER & SUNSTEIN, *supra* note 1, at 74. Sunstein stresses this above all in *Nudging and Choice Architecture. See* Cass R. Sunstein, *Nudging and Choice Architecture: Ethical Considerations*, 32 YALE J. ON REG. 1 (2015). In *Why Nudge?*, Sunstein claims that "[s]uch [choice] architecture is both pervasive and inevitable." SUNSTEIN, *supra* note 9, at 14.

19. SUNSTEIN, *supra* note 9, at 21, 118.

20. SUNSTEIN, *supra* note 9, at 118.

21. THALER & SUNSTEIN, *supra* note 1, at 88.

simply to stand aside. Choice architects, whether private or public, must do *something*."[22] It is true that nudgers *can* nudge once the choice architecture is present and the choice architect is in a position of power. Further, in some of those cases, the choice architect is committed to avoiding as much coercion as she can and knows about her ability to nudge or shape, even if she does not know them under those descriptions. So in the cases where (a) a choice architecture exists, (b) a choice architect controls the architecture, and (c) the choice architect is aware of available nudges, she *might* be forced to nudge. Though as Sunstein and Thaler elsewhere acknowledge, she might be able to avoid nudging by offering the nudged a "forced choice."[23]

Situations like this exist. For example, imagine that Reba is an employee of a human resources department at a university, and she must decide whether employees will have to opt in or opt out of a pension program. Suppose further that it would be a logistical nightmare to inform every one of their options to a degree sufficient for them to make an informed choice. In that case, Reba must decide whether to shape employees towards opting in or opting out. And since she presumably realizes both that opting in is better for employees and that opting in better satisfies the preferences of those employees, then she may well have a responsibility to engage in a shaping (towards opting in) rather than an unjustified shaping (towards opting out).

Now that we're clear on when nudging or shaping is inevitable, we can see that they are almost always avoidable. For instance, in our HR case, the bureaucrat *could* tackle the logistical nightmare of informing everyone of their options; it would just be very slow and costly. Alternatively, Reba could present them with a forced choice by insisting that they choose before becoming employed. One could argue that the forced choice, in virtue of being coercive, proves Sunstein and Thaler's point that the choice architect must intervene in some way. However, if new employees take the job voluntarily, then they may expressly agree to follow certain requirements as part of the job, such that they voluntarily submit to those requirements. So a forced choice can avoid nudging as well.

Further, and this is the key point, Reba could simply decide not to act on her knowledge of the flaws in human decision-making. That is, she could refuse to act on what we might call her *shape-based reasons*. What this would mean in practice is not hard to piece together. Reba might perform a general survey of new employees and decide to impose the pension policy that most new employees favor. Or perhaps she could simply copy the decisions of other firms based on information about how other, more successful firms function. She can set her nudge-based reasons aside; if so, she will not deliberately shape the choices of

22. THALER & SUNSTEIN, *supra* note 1, at 240.
23. THALER & SUNSTEIN, *supra* note 1, at 111–12.

others.[24]

An objector could argue that individuals would have great difficulty ignoring shape-based reasons. Reba must make an active choice to ignore what she knows about shaping, and her choice may be invariably suffused with that knowledge anyway. But people can compartmentalize their reasons. We have many social practices that involve segregating our reasons for action. Judges ask juries not to consider pieces of evidence in their decision-making. Employers are asked not to hire employees based on arbitrary factors like their race or gender. When we forgive and forget, we decide to suppress our resentment of the forgiven, despite the presence of lingering outrage. Compartmentalizing requires effort, but it can be done.

A better objection would be to argue that the choice architect would be *irresponsible* were she to ignore useful information in improving the well-being of employees at her firm. But that is just to suppose that she has a duty to act on nudge-based reasons, and that is precisely what critics of paternalism dispute. If paternalism is immoral, and acting on nudge-based reasons is paternalism, then one has a responsibility to ignore nudge-based or shape-based reasons so as not to be paternalistic.

IV. FROM INEVITABILITY TO COST-BENEFIT ANALYSIS?

So how might Sunstein and Thaler reply, assuming that they deploy the idea of shaping rather than nudging? I think they must press the objections I have already set aside. In particular, they could respond that, while not nudging is not *incoherent*, it is sometimes quite costly, so much so that nudging can be justified because it is, by and large, the more efficient way to make certain kinds of decisions that involve default rules. But this argument requires the presumption that the steep costs are not worth paying, and someone sufficiently opposed to paternalism would argue that we must pay the costs. An anti-paternalist will argue that high costs are worth paying in order to avoid doing something wrong, namely, acting paternalistically. Sunstein and Thaler will likely reply that paternalist action shouldn't be avoided at *all* costs. But while this is true, the benefits of nudging are usually modest enough that the committed anti-paternalist could argue that the costs of not nudging are not sufficient to justify paternalism.

If we set the anti-paternalist aside, it looks like the justification of nudging reduces to a cost-benefit analysis. But if the only basis for nudging is a

24. Jason Brennan raises the possibility that someone could be nudging or shaping if she did not intend to nudge, but knew that nudging was a foreseeable, if unintended, result of the choice architecture she had chosen. In that way, it would be more difficult to not nudge once she was aware of the fact that people would be "nudged" by her choices whether she intended to nudge or not. I do not think that unintended, but foreseeable consequences that have the same effect as a nudge counts as a nudge, since it was not intended by the choice architect. However, since the consequences are similar, these actions might raise concerns about moral negligence. I address worries about the moral negligence involved in not nudging below.

cost-benefit analysis, then nudging no longer realizes the ideal of *libertarian* paternalism. The cost-benefit analysis suggests that generic consequentialism has replaced respect for individual liberty as the ultimate evaluative principle.[25] There is no built-in commitment to liberty since liberty can be sacrificed for any other welfare-promoting state of affairs.

The only way forward, I think, is to argue that not nudging or not shaping is morally unavoidable rather than physically or institutionally unavoidable. I explore this possibility in what follows.

V. THE MORAL STATUS OF NOT NUDGING

In recent work, Sunstein seems aware that there are many cases in which nudging is not inevitable: "Though choice architecture and nudging are inevitable, some particular nudges are certainly avoidable."[26] He then gives some examples that are worth reviewing:

> A government might decide not to embark on a campaign to discourage smoking or unhealthy eating. It could ignore the problem of obesity. It could refrain from nudging people toward certain investment behavior. To that extent, it is reasonable to wonder whether government should minimize nudging. If we distrust the motives of public officials, or believe that their judgments are likely to go wrong, we will favor such minimization.[27]

Here Sunstein admits that government can refrain from nudging (as well as shaping) people towards investment behavior, eating, smoking, etc. So if we think that the nudge is morally problematic, on balance, then we can and should avoid the nudge. The same holds if we think the motives of public officials are impure.

In light of this admission, it looks like Sunstein has, at least in this passage, clandestinely given up the inevitability argument. But he implicitly supplements the argument by arguing that in many cases nudging is morally required: "many nudges . . . are defensible and even required on ethical grounds, whether we care about welfare, autonomy, dignity, self-government, fair distribution, or some other value."[28] This suggests an interesting new argument. While nudging is not inevitable, nudging is *morally better* than not nudging, such that not nudging isn't impossible, but morally prohibited. When we can choose between nudging and not nudging, some moral value renders not nudging *morally*

25. Here we can understand "libertarianism" as denoting a political commitment to respect individual liberty even when the consequences will be worse, overall. So libertarianism is understood in its deontological varieties.

26. Cass R. Sunstein, *Nudging and Choice Architecture: Ethical Considerations*, YALE J. ON REG. (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551264.

27. *Id.*

28. *Id.*

impermissible. In this way, nudging is *morally* inevitable because failing to nudge is morally forbidden.

To make this argument more concrete and effective, we need an example of a situation where nudging is morally inevitable because choosing not to nudge is morally worse than nudging well (and perhaps even worse than nudging poorly). Consider, for instance, the purportedly inevitable choice of candy and fruit placement in a grocery store.[29] Grocery stores often wear down the willpower of its customers by giving them lots of tasty options. So stores place candy bars in the checkout aisle rather than fruit. This looks like a kind of shaping; grocery stores are using flaws in human decision-making to get people to buy candy bars. Some would argue that in this case shaping is inevitable. Either we place the candy bars in the checkout aisle, engaging in bad shaping, or we place healthy food, like fruit, at the checkout aisle, and then place the candy, say, where the fruit was. No matter what we do, we have to put the food *somewhere*, so it is better to shape well than shape badly.

But of course, shaping isn't required in this case. Perhaps a grocery store manager, upon becoming acquainted with the flaws in human decision-making, decides that he wishes to avoid shaping altogether. As a result, he flips a coin in deciding his product placement each week. He may lose customers since they will have to do a bit more cognitive work to figure out where food is, but let's imagine he moves very few items. Were he to shape well, the grocer would place the candy in one of the first corridors in the store, and place fruit in the last, adding fresh fruit at the checkout aisle. However, imagine that our grocer decides that this product placement is paternalistic because it bypasses the rational agency of his customers. Each week he will flip the positions of fruit and candy, and leave everything else the same. In this way, he tries to avoid paternalistic behavior, and so respects his clients.

Initially, this seems to me to be an eligible third choice that does not count as a nudge or as shaping, so it is a bona fide alternative to shaping through food placement. I grant that it is an odd policy, but one can imagine the grocer doing so with good will because he is concerned not to disrespect or manipulate his customers. However, two people in conversation have suggested that flipping a coin would itself be morally problematic, and more morally problematic than shaping well. The reason is that the grocer is acting *negligently*. We can understand a choice architect as negligent when he imposes an unreasonable risk on another.[30] The complaint against the grocer, then, would go like this. Suppose some years later, a morbidly obese and diabetic former customer spoke with the grocer about product placement and discovered that the grocer has chosen where to place candy at random rather than placing it where people,

29. I thank Paul Gowder and David Faraci for discussion on this point.

30. Jules Coleman, Scott Hershovitz & Gabriel Mendlow, *Theories of the Common Law of Torts*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 22, 2003), http://plato.stanford.edu/archives/ win2015/entries/tort-theories.

including the obese man himself, would have made healthier decisions. In this case, we can imagine the obese man's frustration with the grocer because the grocer could have made a choice that would benefit people, but instead decided to ignore this easily accessible information that allowed him to help his customers make better choices, including the obese diabetic. In that case, the obese man accuses his grocer of failing to express proper care for his customers, including the obese man himself.

If people find this complaint a stretch, as I do, try an analogous one. Suppose that Reba, an employee at a large firm in Human Resources has the authority to decide the default 401k rule in her firm. She can either automatically enroll people, allowing them to opt out, or she can inform people of their options and encourage them to opt in. She knows full well that the first policy will leave employees with much more savings than the latter. However, suppose that Reba is a strident anti-paternalist and so does not want to shape employees in either direction. So she implements a random strategy. Reba writes a computer program that will enroll new employees at random, then informing them of their status. To make it voluntary, people are asked to agree to be subject to the algorithm when they (voluntarily) take the job. People who are chosen for enrollment are informed that they have been enrolled and that they may opt out, whereas people who are not chosen are informed that they have not been enrolled but that they may if they like. Reba does what she can to take the decision out of her hands. It is all up to the program she wrote, Reba thinks. Now imagine that Reba continues to use this algorithm for several decades, after which a number of employees affected by her algorithm retire. Imagine that neither John nor Sarah knew about the algorithm, but that they received different treatment. John was automatically enrolled, and Sarah was not. Now John has twice the 401k funds that Sarah does, since Sarah did not enroll. In this case, Sarah's life prospects have been affected by the algorithm and its writer, Reba. Of course, the blame lies largely with Sarah, who was expressly encouraged to enroll in the program but chose not to. But we can see that there is a sense in which Reba was flippant with the employees she was hired to take proper care of. Perhaps Reba was negligent, despite her scruples about avoiding paternalism. After all, she did not *force* John and Sarah to do anything by shaping them. In this case, then, it might seem inappropriate for Reba to regard avoiding paternalism as so important that she would decline to shape John and Sarah in ways that would prove massively beneficial for both of them, and without the cost of coercing them.

Now, did Reba "impose" a reasonable risk of injury on Sarah? Not really. Sarah could have avoided the risk at very low cost to herself. In fact, Reba's algorithm even informed Sarah of this very fact. So Sarah shoulders most of the blame. But does that mean that Reba is *blame free*? Perhaps not. Maybe Reba cared too much about avoiding paternalism out of respect for John and Sarah and displayed inadequate concern about their well-being. I can see a case for moral negligence here, even though Reba did not impose a reasonable risk on

John and Sarah. For Reba allowed them to take the risk of having poor retirement savings fully recognizing that they might be hurt due to flaws in their decision-making process.

So in the default retirement plan case, nudging and shaping are *not* inevitable. But shaping might be *morally* inevitable because failing to shape constitutes moral negligence. Reba and the grocer knew about easy, non-coercive methods to improve the welfare of their customers and fellow employees. Reba and the grocer could have easily employed those methods, and yet both chose not to do so. Perhaps this expresses sufficient lack of concern that engaging in libertarian paternalism would be justified. My sense is that the grocer does nothing immoral, but that Reba may be the proper subject of a complaint. Yet in the end, a lot will depend on how you think about the morality of paternalism. Strong anti-paternalists will hold that Reba acted rightly. She went out of her way to respect persons, including John and Sarah. But others will stress that nudging and shaping are typically non-coercive and impose very few if any costs of those being shaped, and so when a nudge or shape can avoid a big welfare loss, the choice architect must engage in it or be counted as morally negligent.

CONCLUSION: MORAL INEVITABILITY AS A PATH FORWARD

Sunstein and Thaler's defense of nudging requires admitting that "there is no such thing as a 'neutral' design." Again, according to Sunstein and Thaler,

> [T]he first misconception [about nudging] is that it is possible to avoid influencing people's choices. In many situations, some organization or agent *must* make a choice that will affect the behavior of other people. There is, in those situations, no way of avoiding nudging in some direction.[31]

My reply begins by replacing the idea of nudging with Hausman and Welch's notion of shaping, where choice architects use information about the flaws in human decision-making to get other humans to make particular choices. In many of Sunstein and Thaler's cases, not shaping is an option. Even in the case of pension-plan default rules—their strongest case—choice architects can decide not to nudge or shape either by imposing a forced choice on employees or by deciding not to act on shape-based reasons. In the default rule cases, choice architects can make their decisions on other bases. In later work, Sunstein seems to recognize this point, when he suggests that, sometimes, "choice architects . . . can self-consciously refuse to influence or alter people's choices . . . ."[32]

That said, there are cases where even these options are unavailable. So perhaps, every once in a while, a choice architect must engage in shaping. But Sunstein and Thaler need to vindicate a much stronger inevitability thesis if

31. THALER & SUNSTEIN, *supra* note 1, at 10.
32. SUNSTEIN, *supra* note 9, at 119.

they are to justify their policy program. *Nudge* is meant to justify a wide range of institutional interventions, but if we can show that nearly all nudges can be avoided nearly all of the time, then Thaler and Sunstein's justification for institutional intervention fails.

The better strategy is the one that Sunstein has begun to pursue in his latest writing, which is to admit that while nudging (or shaping) isn't *inevitable*, it is *morally* inevitable in that failing to nudge is not morally permitted. In the case of Reba in HR, Reba may not be morally permitted to write an algorithm that will randomly enroll new employees into their retirement pensions because she owes it to everyone to ensure that they are automatically enrolled and informed that they may opt out. This option is foreclosed because it is morally worse to allow financial harm to come to employees when Reba could have easily improved their decision-making in ways that employees would probably eventually appreciate. This argument is far from decisive, since its success will depend on just how bad libertarian paternalism is, morally speaking, but it is a considerable improvement on the original inevitability argument.