

A Must-Read on Health Care Nudges

Author : Elizabeth Weeks Leonard

Date : September 5, 2017

[Nudging Health: Health Law and Behavioral Economics](#) (I. Glenn Cohen, Holly Fernandez Lynch & Christopher T. Robertson eds., 2016).

Nudging Health: Health Law and Behavioral Economics is essential reading for anyone interesting in moving the health reform ball forward. The insights are especially important amid United States lawmakers' persistent emphasis on individual responsibility and market-based solutions for health care. In their edited volume, esteemed authors I. Glenn Cohen, Holly Fernandez Lynch, and Christopher T. Robertson draw together canonical threads of legal theory, applying them to timely, essential health law and policy topics. The forty-five essays included in *Nudging Health* explore various ways that behavioral science may be applied to nudge health law and policy in the direction of better health and better health care spending. The book builds on a deep and provocative foundation of earlier scholars, including Kenneth Arrow, Cass Sunstein, and Richard Thaler.

Anyone who has spent even a little time around health law and policy is well aware that neoclassical economic models fail to accurately depict modern health care. Viewed through that lens, health care is a highly imperfect market, as Kenneth Arrow's timeless 1963 essay, [Uncertainty and the Welfare Economics of Medical Care](#), describes. Arrow accurately depicts a market characterized by, among other features: the uncertain nature of demand for health care; imperfect information and information asymmetries between buyers (patients) and sellers (health care providers); distorted trust, or fiduciary, relationships between health care providers and patients; barriers to entry and other supply limits on medical care; and third-party payment (insurance) leading to moral hazard and pooling of unequal risks.

More recently, legal theorists have questioned the accuracy of the neoclassical economic model in law and policy generally, observing that, even in less flawed markets, individuals often fail to act as rational "[homo economicus](#)." Applying cognitive psychology and behavioral economics, those theorists observe various ways in which individuals make choices based on reasons other than maximizing their own welfare, rely on various shortcuts and heuristics in decision-making, and operate under limited willpower and self-control. Cass Sunstein's 1998 edited volume, [Behavioral Law and Economics](#), provides an authoritative survey of those insights, noting various implications for legal analysis and policymaking across contexts, including taxation, labor and employment law, voting, corporate governance, personal injury law, and constitutional law.

Building on that volume and decades of research on behavioral law and economics, Sunstein in 2009 joined with University of Chicago colleague Richard Thaler to publish [Nudge: Improving Decisions About Health, Wealth, and Happiness](#). *Nudge* became a best-seller in both academic and trade presses, introducing the concepts of "libertarian paternalism" and "choice architecture" to the public through numerous detailed, salient examples. The book takes issue with the rational actor model, which generally presumes that individuals will make decisions that promote their own best interests. Under this model, paternalistic policies, such as mandatory seatbelt laws, are disfavored, on the theory that individuals should be permitted to make their own decisions as long as those choices do not directly harm others. Behavioral law and economics points out the problems with relying on the expectations underlying the rational actor model, revealing the various ways in which individuals may act *other than* for their own best interests. Thus enters Sunstein & Thaler's notion of "libertarian paternalism," which

accepts the various predictable ways in which individuals err in their judgment and allows for greater government involvement in shaping individual choice.

The approach advocated by Sunstein and Thaler is called [choice architecture](#), referring to the way that choices are packaged and presented to consumers, thus influencing decisionmaking. For example, simply placing “green” healthy labels, and “red” unhealthy labels, on food in the cafeteria line may influence diners’ choices, without limiting their autonomy. Likewise, some email programs, such as Gmail, send users a pop-up reminder if the text mentions an attachment but none has actually been attached. Changing default rules also operates as choice architecture. For example, workers might be automatically enrolled in, and required to take steps to opt out of, employer-sponsored health insurance, instead of being required to take steps to sign up for those benefits. Or we might address the shortage of donor organs by adopting a presumed consent rule, instead of requiring individuals to affirmatively opt-in to becoming a donor.

Those and additional suggestions are explored in-depth in *Nudging Health*. The book opens with an introduction by Sunstein himself, laying out the essential theoretical framework. What follows is a masterful collection of in-depth discussions and specific examples, including the use of penalty nudges via the Affordable Care Act’s individual mandate and employer shared responsibility payments; reward nudges via financial incentives for individuals’ adopting healthy behaviors, or physicians’ prescribing lower-cost generic or follow-on drugs; default rules around end-of-life care and surrogate decision-makers, as well as the aforementioned automatic insurance enrollment; choice architecture to guide consumers’ decisions among health insurance plans, and physicians’ recommendations around treatment alternatives; and strategies to address other cognitive biases, including patients’ unchecked deference to physicians’ recommendations.

The book does not, however, does not operate as an untempered valentine to the behavioral law and economics school of thought. Rather, a number of the contributors offer critical, skeptical, or cautionary notes about the theory’s ability to operate effectively in health care. Criticisms include the possibility that choice architecture may be overly coercive, obscure individuals’ true preferences, backfire with unintended results, serve social aims at the expense of individual rights, or be the result of law- and policymakers’ own biases and judgment errors. Including those voices gives the overall volume greater credibility and balance than if the book had neglected them. In sum, *Nudging Health* deserves its own place in the cannon of health law and policy, and health economics, literature. I anticipate that the conversations and suggestions that it sparks will find their way into many important academic and lawmaking circles.

Cite as: Elizabeth Weeks Leonard, *A Must-Read on Health Care Nudges*, JOTWELL (September 5, 2017) (reviewing **Nudging Health: Health Law and Behavioral Economics** (I. Glenn Cohen, Holly Fernandez Lynch & Christopher T. Robertson eds., 2016)), <https://health.jotwell.com/a-must-read-on-health-care-nudges/>.