

Nudge -- a Book Review
By
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Nudge by Richard H. Thaler and Cass Sunstein (Yale 2008) is a provocative book for mediators. That is not because it is about mediation; it is not. It is provocative because it discusses framing in a new and different way and because it confronts the purposeful influence on private choice that framing necessarily entails. Of course, it is also interesting because it addresses the public policy justification for the gentle push or “nudge” in the right direction – not to be confused with the Yiddish noodge (which means nag). That is of particular interest now because Cass Sunstein, a University of Law Professor and a colleague of Economics Professor Thaler at the time he wrote the book, is currently involved in counseling President Obama on just such policy as Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget.

Most of the current ADR text books used in law schools today have a section on the cognitive impediments to good decision-making and accurate evaluation of the Best Alternative to a Negotiated Agreement (BATNA – a term coined by Roger Fisher in *Getting to Yes*). *Nudge* begins with a discussion of some of these cognitive problems – biases and blunders --and how they influence private choice. The authors discuss three commonly used heuristics (problem solving techniques) described by Amos Tversky and Daniel Kahneman.

The first is anchoring, an initial reference point that in the absence of clear knowledge influences your conclusion. For example, an experiment in which students add 200 to the last three digits of their phone number and then answer the question in what year did Attila the Hun sack Europe yielded answers more than 300 years later from students who started with high anchors rather than low ones – even though they clearly know that their phone numbers have nothing whatever to do with the question.

Another cognitive impediment the authors discuss is availability – the likelihood of risk judged by how readily examples come to mind. For example people buy insurance for natural disasters in the aftermath of an earthquake but purchases decline as memory recedes. This cognitive bias also influences people to buy high and sell low.

The third heuristic is representativeness –incorrectly detecting patterns in random events, assuming that the coincidence of two events are more likely than one, or that a basketball player who is doing well will make his next shot.

To these, the authors add optimism and overconfidence -- leading over 90 percent of lawyers to think they are in the top 10 percent; loss aversion – the aversion to losing an object means the price we place on things we own is higher than the value we assign to buying the very same object. Finally, and perhaps most influential to the authors’ choice architecture is status quo bias. This is a tendency to stick with your current situation that for example leads people to fail to make a selection and end up with the default option.

Thus, Thaler and Sunstein would pick better defaults to nudge people into better choices. Their primary example is the default retirement choices for a 401(k) account.

Nudge justifies small, transparent defaults or influences – such as placing vegetables and fruits in the first display case in the school cafeteria to influence healthy eating -- based in part on the biases that will encourage poor choices or poor defaults to the detriment of all. The authors basically argue that the model of an all knowing economic person who will make the right choice deserves some revision in light of current brain science. But they also acknowledge that this is a form of paternalism. They call it libertarian paternalism because they are not eliminating the choice, just giving a nudge in a healthier or more economically sound direction and they are doing it transparently.

And it is in the discussion of libertarian paternalism and the recognition that framing most certainly is a nudge that the book may generate an interesting new analysis of the role of mediator. The Riskin categories of evaluative and facilitative mediation have influenced a generation of mediators. But the confrontation with the impact of framing as a form of choice architecture and a nudge to resolution that may or may not be transparent is an interesting and important contribution to the discussion of the work of mediators, even though that was not the intent of *Nudge*. The use of framing has an impact on neutrality. Thaler and Sunstein justify nudges when the outside agent is likely to be able to help an individual make a better choice. In their view this depends upon how hard the choices are. They believe the nudge is most justified for decisions that are difficult, complex, and infrequent and when the parties have few opportunities for learning. It would be hard to give a better definition of litigation. Read *Nudge* and join a dialogue on framing, transparency and the contribution of the mediator.

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