A *NUDGE* TO MEDIATE: HOW ADJUSTMENTS IN CHOICE ARCHITECTURE CAN LEAD TO BETTER DISPUTE RESOLUTION DECISIONS

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INTRODUCTION

Mediation often trumps adjudication.[1] Various studies demonstrate that parties who resolve certain disputes via mediation are frequently better off financially and emotionally when compared to their adjudicating counterparts.[2] This is old news.[3]

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[1] This paper uses the term "adjudication" as a catch-all for dispute resolution methods that involve a third-party disposing of the conflict by imposing a solution on the disputants. Accordingly, arbitration, administrative hearings, and traditional civil litigation are all referred to under the umbrella of "adjudication" in this paper.

[2] *See, e.g.*, Jeanne M. Brett, et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION JOURNAL 259 (1996) (reviewing 449 mediation cases handled by four major ADR providers and determining that "[mediation cost] far less than arbitration, took less time, and was judged a more satisfactory process than arbitration."). Mediation has been even been praised as a way to resolve disputes about mediation itself. *See* Gregory Firestone, et al., *Successful Mediation of a Family Court Rule on Domestic Violence and Mediation*, 42 FAM. CT. REV. 128, 134-35 (2004) (recounting the successful use of mediation to resolve a dispute over family court mediation rules).

[3] Old news is not necessarily unchallenged news. Some commentators argue that mediation can amplify bargaining power disparity between the parties. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075-78 (1984) (describing how ADR methods, including mediation, lack the benefits of judicial protection of weaker parties and the public at large). Others believe mediation is sometimes harmful due to a lack of mediator neutrality. *See generally* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (observing that mediator bias can be especially harmful because of her perceived neutrality). Still others attack the cost-efficiency of mediation. *See* James S. Kakalik, et. al., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE

So if mediation is often superior to adjudication, why do parties by and large select adjudication over mediation?[4]

Advocates of mediation typically answer this question by asserting that the public suffers from imperfect information as to the benefits of mediation.[5] This answer is premised on the well-trod assumption that people are rational utility maximizers.[6] When rational utility maximizers get good information, they make good decisions.[7] If disputing parties elect to adjudicate in a situation where mediation would have better suited their needs, they must have had suboptimal information about mediation and adjudication. Accordingly, the mediation movement has attempted to provide the public with better information about mediation's virtues.[8]

REFORM ACT v, xxvii-xxxiv (1996). Yet these critiques are conspicuous minorities when compared with the wealth of pro-mediation studies. *See supra* note 2.

[4] For example, a 1996 survey of the use of ADR services in Los Angeles showed that when public disputes (those filed in court) and private disputes (those handled by independent ADR providers) were aggregated, about 1% of those disputes were resolved via mediation. Elizabeth Rolph, et al., *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles*, 1996 J. DISP. RESOL. 277, 285, 301 (1996). The situation does not improve much in Europe, where voluntary mediation programs typically garner 2% of disputes once they reach the courts. *See* Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 90 (2005).

[5] *See, e.g.*, Tracy Carbasho, *Mediation Council of Western PA to Hold Panel Discussions for General Public*, LAWYERS JOURNAL, Sept. 26, 2008 at 4 (quoting a mediation advocate as saying "[p]anel discussions regarding mediation are important to educate the public on mediation, how and where it can be used, and what the benefits of using it are . . . I believe members of the ADR community and other interested parties need to do a better job of promoting, marketing, and advertising ADR, and also educating the public on ADR.").

[6] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 3-4 (6th ed. 2003) (describing self-interest as the touchstone characteristic of the rational utility maximizer).

[7] *See id.*

[8] *See* Part I *infra* for a discussion of the prevailing techniques used to induce parties to mediate.

But perhaps this is a doomed strategy. In their recent book, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, behavioral economist Richard H. Thaler and regulation expert Cass R. Sunstein argue that individuals often make suboptimal decisions not because of suboptimal information, but because of irrational biases and cognitive errors.[9] Employing an approach that seeks to honor both libertarian and paternalistic values, Thaler and Sunstein assert that the way to overcome decisional biases and errors is to alter the context in which choices are presented – the "choice architecture." For example, people are much more likely to select a default method over an alternative that requires an affirmative step. Switching the default with the alternative is an example of choice architecture alteration.[10] When policymakers adjust choice architecture, they "nudge" people away from suboptimal decisions caused by biases and errors while preserving the individual's decisional autonomy.[11]

This paper suggests that parties in conflict suffer from irrational biases and cognitive errors when deciding between mediation and adjudication. An adjustment in choice architecture is therefore necessary to "nudge" disputing parties towards optimal decisions.[12] Specifically, the paper will argue that mediation should be a default dispute resolution procedure for certain types of conflicts. When mediation replaces adjudication as the default dispute resolution method, parties will choose to mediate more often because they will be less susceptible to the irrational biases and cognitive errors which lead to suboptimal decisions to

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[9] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 17-39 (2008).

[10] *Id.* at 83-87.

[11] THALER & SUNSTEIN, *supra* note 9, at 82-83.

[12] This paper is not an empirical examination of choice theory and dispute resolution. The paper merely points out similarities between the types of decisions Thaler and Sunstein deem ripe for choice architecture adjustments and decisions about which dispute resolution method to use. The proposal is an acceptance of Thaler and Sunstein's invitation to fashion libertarian paternalist solutions for policy areas not discussed in *Nudge* or their other work. *See* THALER & SUNSTEIN, *supra* note 9, at 229 (inviting others to suggest new applications of libertarian paternalism).

adjudicate instead of mediate. This "libertarian paternalist"[13] solution is also uniquely suited to mediation because it will increase the use of mediation while preserving mediation's core value of party self-determination. Disputing parties retain the choice between mediation and adjudication – only the context in which they make that choice changes.

Part I briefly examines court-annexed mediation to establish the context in which parties often choose suboptimal adjudication over optimal mediation. Part II introduces the Thaler and Sunstein libertarian paternalism concept and explores two irrational biases and one cognitive error which likely distort the decision between mediation and adjudication. Part III demonstrates the challenge of fixing these biases and errors and concludes that a default switch is the most appropriate choice architecture alteration for the dispute resolution method decision.

I. BACKGROUND: COURT-ANNEXED MEDIATION

Parties choose between mediation and adjudication at many points before or during the life of their conflict.[14] But nowhere is that choice more crystallized than when the parties enter a courthouse that offers both mediation and adjudication. Court-annexed mediation programs therefore provide a unique window into the biases and cognitive errors affecting disputing parties. To understand these biases and errors, it is first necessary to understand the context in which they occur.

A. *The Birth of Court-Annexed Mediation*

Mediation has existed alongside adjudication for centuries. Guilds, trade unions, and religious institutions have long preferred to resolve disputes consensually with the help of a third-party

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[13] "Libertarian paternalism" is the name Thaler and Sunstein give the philosophy of "nudging" people toward optimal decisions via alterations in the context in which choices are presented. THALER & SUNSTEIN, *supra* note 9, at 13-14. For a full discussion of libertarian paternalism, see Part II.A *infra*.

[14] For example, parties might choose to use mediation over adjudication or vice versa via a pre-dispute agreement.

neutral.[15] In the United States, mediation remained mostly a private affair until the late 1970s.[16]

As America became increasingly litigious in the mid-to-late 20th Century, legal policymakers began to think that alternative dispute resolution ("ADR") methods might be superior to traditional litigation for some of the conflicts finding their way into court.[17] The modern court-based American ADR movement, in which mediation shares top billing with arbitration, can trace its genesis to the legendary Pound Conference in 1976, organized by Chief Justice Warren E. Burger.[18] In addition to a substantial number of lawyer jokes, the Pound Conference produced arguably the most important idea in 20th Century ADR scholarship: Frank E. A. Sander's Multi-Door Courthouse.[19]

Sander's proposal radically departed from the litigation-only approach employed by virtually all American courts in the mid-1970s. Instead of a "single-door" courthouse where litigation is the sole option, Sander argued that courts should transform themselves into dispute resolution centers which match each dispute to the most appropriate resolution method.[20] The Multi-

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[15] *See generally* JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT (2004) (reviewing the extraordinarily long and diverse history of ADR and mediation); F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695 (2000) (primarily discussing the long history of papal mediation).

[16] A notable exception to this was the federal government's use of mediation as early as 1888 in railroad disputes. Federal agencies went on to implement mediation in labor disputes throughout the early and mid-20th Century. *See* Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 678, n. 17 (2003) (detailing the federal government's use of mediation).

[17] *See* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 301-16 (1996) (reviewing the lead up to and aftermath of the Pound Conference).

[18] *See id.*

[19] Frank E.A. Sander, *Varieties of Dispute Processing*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *in* 70 F.R.D. 111 (1976).

[20] *See id.* at 131.

Door Courthouse gave birth to the plethora of so-called "court-annexed" ADR methods employed by judicial systems all over the United States today.[21] Now a trip to an American courthouse can mean participation in arbitration, litigation, mediation, or a host of other derivative processes.[22]

B. *Voluntary versus Compulsory Court-Annexed Mediation Regimes*

Court-annexed mediation manifests itself in two different ways. Sometimes courts provide mediation as a voluntary opt-out of the litigation process.[23] These voluntary regimes see mediation as distinct from the adjudicatory process. The problems inherent in these opt-out programs are explored in detail in Part II.B *infra*.

But other times court systems mandate mediation. These compulsory programs seem to view mediation as a component of the litigation process.[24] In many state and federal courts, civil litigants must mediate prior to requesting a dispositive ruling from a judge.[25] Participation in mediation is a threshold requirement to access traditional adjudication.

For mediation fans, the advantage of the compulsory system is obvious: parties mediate more often. Yet this practice comes with at least three substantial costs. First, when mediation is seen as part and parcel of the litigation process, as mandatory mediation often is, parties and mediators tend to unnecessarily

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[21] *See* Stempel, *supra* note 17.

[22] *See generally* Brett, *supra* note 2.

[23] *See* Barendrecht & de Vries, *supra* note 4, at 115 ("Currently, the best thing disputants can hope for is neutral suggestions by courts to opt out of the default [generally court litigation].").

[24] *See, e.g.*, Alvin L. Zimmerman, *Mediation – A Historical Perspective*, HOUSTON LAWYER, Sept./Oct. 2007 at 43 (reviewing the Texas mandatory mediation procedure in which a judge, as part of the pre-trial process, can order mediation).

[25] *See* Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 372-82 (2001) (compiling state mandatory mediation statutes and reviewing the federal courts' seemingly unfettered power to implement whatever ADR programs they wish).

focus on legal issues.[26] This robs disputing parties of the opportunity to come up with creative, extralegal resolutions. Second, oftentimes judges serve as mediators in these mandatory sessions only to turn around and adjudicate the same case if the parties do not reach a settlement. This dual role presents serious impartiality problems because the mediator/judge and the disputing parties will suffer from role confusion in both the mediation and adjudication stages.[27] Third, there is the broader question as to whether mandatory mediation is an oxymoron. Some argue that because self-determination is at the heart of mediation, compulsory participation is perverse and can translate into undue pressure to settle.[28]

Court-annexed mediation thus stands at an unhappy crossroads. When mediation is offered as a voluntary alternative to adjudication, parties irrationally fail to participate as discussed in Part II.B *infra*. But when courts make mediation mandatory, they risk diluting its potency. A third way is needed to avoid these pitfalls.

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[26] *See generally* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008) (arguing that when mediation is considered part of the adjudicatory process, parties are less likely to engage in interest-based discussions).

[27] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 433-34 (1982) (arguing that judges who mediate cases should not adjudicate those same cases).

[28] *See* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 572 (1997) (reviewing common critiques of mandatory mediation but concluding, based on an empirical study, that mandatory mediation does not yield substantially different outcomes than voluntary mediation).

II. LIBERTARIAN PATERNALISM AND THE DECISION TO MEDIATE

Why must courts ever *mandate* mediation? If mediation is so beneficial, why do disputing parties largely fail to *voluntarily* participate?

This Part examines the dichotomy between government compulsion and individual autonomy in order to introduce the Thaler/Sunstein libertarian paternalism approach to policymaking. After laying this foundation, the Part goes on to argue that the decision to mediate requires the intervention of what Thaler and Sunstein call a "nudge" in order to achieve optimal results. To support this assertion, the Part highlights two irrational biases and one cognitive error which likely impair optimal decisions about dispute resolution methods.

A. *Paternalists, Libertarians, and Libertarian Paternalists*

Policy debates tend to be structurally similar. Whether the topic is health care, the regulation of financial markets, or government-provided dispute resolution, two opposing philosophies consistently appear: paternalism and libertarianism.

1. Paternalists

Paternalists argue that part of the government's role is to compel people to behave optimally.[29] Government, paternalists contend, is in the best position to determine which individual actions are best for the community as a whole – particularly in areas like dispute resolution where the government already plays an integral role. Paternalists therefore tend to be comfortable with mandatory mediation programs because they have no problem with the government converting an optimal voluntary process into a compulsory process.

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[29] For a good update on the rather complex state of paternalism today, see Claire A. Hill, *Anti-Anti-Anti-Paternalism*, 2 N.Y.U. J. L. & LIBERTY 444 (2005).

2. Libertarians

Libertarians, on the other hand, argue that government mandates cannot produce optimal results. Because the government operates outside of the market, its policy decisions can never achieve the efficiency, flexibility, and innovation that the market produces.[30] It follows that since the free market depends on basically unfettered individual choice, government services, including dispute resolution, should be as limited in scope as possible and entirely non-compulsory. The Anglo-American adjudication system therefore suits libertarians nicely. Private lawyers do most of the work and the system only enforces a select group of rights. If adjudication is not optimal for some disputing parties, they are free to select some other private dispute resolution method.

3. Econs and Humans

Thaler and Sunstein argue that the libertarian and paternalist positions are both flawed because both rely on false assumptions about human behavior. Most 20th Century economic theory, according to Thaler and Sunstein, assumed people to be *homo economicus*, or "economic man."[31] A *homo economicus*, or "Econ" for short, is an individual with extraordinary intelligence and willpower. Thaler and Sunstein describe an Econ as someone that "can think like Albert Einstein, store as much memory as IBM's Big Blue, and exercise the willpower of Mahatma Gandhi."[32] In different ways, libertarianism and paternalism each rely on the idea that decision-makers are Econs. Libertarians believe market actors are Econs while paternalists think government regulators are Econs.

But the field of behavioral economics reveals that we live in a world not of Econs but of *homo sapiens*, or "Humans."[33]

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[30] For an equally interesting report on what libertarians are thinking about right now, see Jonathan Wolff, *Libertarianism, Utility, and Economic Competition*, 92 VA. L. REV. 1605 (2005).

[31] THALER & SUNSTEIN, *supra* note 9, at 6.

[32] *Id.*

[33] Thaler and Sunstein use the proper noun "Human" to refer to the economic actor posited by behavioral economics, a practice continued in this paper. *See id.* at 6-8.

While Econs are rational utility maximizers who make optimal decisions whenever they are presented with perfect information, Humans are, well . . . human. Due to irrational biases and cognitive errors, they predictably fail to make optimal choices even when they have all the facts.[34]

Armed with this insight, Thaler and Sunstein challenge the libertarian narrative. Because the free market consists of Humans, not Econs, we should not hold up the market as an ultimate source of efficiency. On the contrary, given the predictable irrationality of Humans, we ought to expect market failures whenever Humans suffer from biases or errors in making free market choices. In the interest of optimization, government should intervene in the market to help Humans eliminate these biases and errors in order to make better choices.[35]

But Thaler and Sunstein also take issue with paternalism. Paternalists, Thaler and Sunstein assert, correctly point out that government should have a role in bringing about optimal behavior. But what paternalists fail to recognize is that the government is made up of Humans, not Econs. Because every government policy is constructed by Humans, every government policy is subject to the distorting irrational biases and cognitive errors held by Humans who happen to be policymakers.[36]

In sum, Thaler and Sunstein's critique of both libertarianism and paternalism leads to this conclusion: When Humans suffer from irrational biases or cognitive errors, the government should intervene to correct those biases and errors in order to create more optimal behavior. But the government must intervene in such a way that the irrational biases and cognitive errors of Humans in the market are not simply replaced by the irrational biases and cognitive errors of Humans in government. How can policymakers achieve such a seemingly impossible goal?

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[34] *See id.* at 7.
[35] *See id.* at 76-80.
[36] *See id.* at 80.

4. Libertarian Paternalism

At the risk of hubris, Thaler and Sunstein contend that they have partially solved the old conflict between paternalism and libertarianism. In *Nudge* and elsewhere,[37] Thaler and Sunstein introduce a concept they paradoxically term "libertarian paternalism." The idea is simple: It is possible to respect libertarian values of free choice while implementing measures that paternalistically help people make better decisions. Libertarian paternalism is libertarian in that it preserves the individual's power to choose. But it is paternalistic because it allows the government to steer people toward "better" decisions. To accomplish this third way, libertarian paternalism "nudges" decision-makers toward optimal choices by altering the context in which they encounter options – the "choice architecture."[38]

Libertarian paternalism expresses itself exclusively through alterations in choice architecture.[39] Proper choice architecture makes good decisions easy to make. A libertarian paternalist policymaker first asks what a particular Human or group of Humans wants but is unable to obtain. Depending on the context, that might be enough savings to retire, a slimmer figure, or a peaceful resolution to a troubling dispute.[40] This answer is deemed the optimal result – the goal. The policymaker then determines what irrational biases and/or cognitive errors cause the Human to make choices which do not achieve the stated optimal goal. Finally, the policymaker alters the choice architecture in which the Human encounters options in order to make the optimal choice easy to select in light of the Human's biases and errors. The result is that the Human retains her decisional autonomy but now has a significantly better chance of achieving her own goals thanks to the

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[37] *See id.* at 4-6; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

[38] *See generally* THALER & SUNSTEIN, *supra* note 9.

[39] THALER & SUNSTEIN, *supra* note 9, at 81-100.

[40] There are obviously a multitude of complications that come with determining what any group of Humans "wants." Accordingly, choice architecture adjustments should focus on desires that (1) can be empirically demonstrated and (2) are consistently under-realized. The desire for peaceful, collaborative conflict resolution is one of those desires and is thus ripe for a choice architecture alteration. *See* Brett, et. al., *supra* note 2.

"nudge" provided by the altered choice architecture. The fact that the Human retains her ability to freely choose mitigates the risk of that the policymaker's own irrational biases and cognitive errors will trap the Human in a suboptimal system.[41]

B. *Why Disputing Parties Need a Nudge via Adjustments in Choice Architecture*

In *Nudge*, Thaler and Sunstein survey the behavioral economics literature and choice theory to identify irrational biases and cognitive errors that lead to suboptimal decisions, even when decision-makers have perfect information.[42] Alterations in choice architecture can help reduce the number of suboptimal results biases and errors produce. Many of the distorting influences Thaler and Sunstein explore in the context of financial planning, health decisions, and consumer activity also negatively impact choices about how to handle conflict.

Irrational biases and cognitive errors regarding which dispute resolution method to employ help explain how mediation can be simultaneously lauded, well-publicized, and yet underutilized.[43] Specifically, and as discussed *infra*, Humans probably suffer from the irrational availability bias, the status quo bias, and an overconfidence cognitive error when they decide between mediation and adjudication. These biases and errors mean that mediation participation cannot increase solely through dissemination of information as to mediation's benefits – perfect

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[41] *See* THALER & SUNSTEIN, *supra* note 9, at 81-83.

[42] *See id.* at 1-14.

[43] This is not to say that parties in conflict make suboptimal decisions about adjudication and mediation *only* because of irrational biases or cognitive errors. Maurits Barendrecht and Berend R. de Vries have argued that ADR is utilized at suboptimal levels because the decision of what dispute resolution process to use is often a proxy for the dispute itself. This phenomenon leads to deadlocks about which process to use. Naturally, the default process becomes "sticky." Because litigation is the default, it is utilized more than ADR. *See* Barendrecht & de Vries, *supra* note 4. This paper reaches a similar conclusion by focusing on the decisional processes of each party in conflict rather than their failure to come to agreement on a non-default dispute resolution process in the midst of a conflict.

information cannot always overcome irrational biases and cognitive errors. As discussed in Part III, these distorting biases and errors might be mitigated or even remedied through an alteration in the choice architecture surrounding the decision of whether to mediate or adjudicate.

1. Availability Bias

When Humans encounter an idea over and over again, they tend give that idea an irrational amount of weight in their decision-making processes.[44] This phenomenon is called the "availability bias."[45] To illustrate, Thaler and Sunstein point to the early days of commercial air travel when brokers sold flight life insurance policies at airports.[46] At that time, travelers suffered from an extreme availability bias caused by news reports of plane crashes – they were much more familiar with the idea of plane disasters than with the idea of plane non-disasters. While an Econ would calculate her odds of death by dividing the number of plane crashes she saw on the news last year by an estimated amount of successful flights during the same period and deem the flight life insurance to be an extremely suboptimal purchase, a Human would simply conclude that air crashes happen a lot and buy the policy in order to be safe rather than sorry. Because Humans significantly outnumbered Econs, the policies sold like hotcakes.[47]

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[44] *See* THALER & SUNSTEIN, *supra* note 9, at 24-25; Paul Slovic, et al., *Decision Processes, Rationality, and Adjustments to Natural Hazards*, *in* PAUL SLOVIC, THE PERCEPTION OF RISK 1-31 (2000) (describing the increase in insurance purchases following disasters).

[45] *See* THALER & SUNSTEIN, *supra* note 9, at 24-25. The availability bias may even be at work in this paper. In the introduction, I provided an example of choice architecture as the switching of a default option with an alternative option to promote selection of the alternative option. This paper ultimately proposes a default switching scheme. My hope is that because the reader is more familiar with default switching than other possible choice architecture alterations not mentioned until the end of the paper, she will look more favorably on the default switching solution.

[46] *See id.* at 17-39.

[47] *See id.*

Humans likely suffer from an availability bias when deciding to mediate or litigate.[48] They are much more aware of rights-based resolution methods like adjudication than interest-based resolution methods like mediation.[49] Television dramas, news programs, and even advertisements celebrate adjudication. Consensual resolutions that preserve relationships, distribute resources efficiently, or satisfy underlying emotional needs are neither public nor all that compelling.[50] Zero/sum outcomes in adversarial contexts are simply more interesting and naturally receive more attention.

Availability bias warps a Human's ability to make an optimal decision in choosing between mediation and adjudication. This is particularly true when a Human decides whether to pursue mediation in a court-annexed context. Even *pro se* parties feel familiar with the adjudication process via the media and thus will be less likely to participate in an unknown process, regardless of whether or not they are provided with good information about the potential benefits of mediation. Like the early air travelers who irrationally chose to insure themselves against an extremely unlikely event, disputing parties select adjudication over mediation simply because adjudication is culturally pervasive.

2. Status Quo Bias

Humans oppose change. In deciding between a default and an alternative, Humans tend to choose the default option.[51] Even

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[48] I have been careful to classify this and other specific claims that have yet to be proven empirically as merely probable based on choice research in related areas.

[49] *See* Riskin & Welsh, *supra* note 26, at 867 ("[I]n the public imagination, courts provide a unique function as the public forum that can best discover the details of an individual case . . .").

[50] *See* James E. McGuire, *Mediation in Fiction: A Grail Quest*, DISPUTE RESOLUTION MAGAZINE, Summer 2007, at 24 ("But at this moment in history, I report that mediation is not yet in the mainstream of our literary conscience. To the extent that the literature of any age reflects back the society and historical context in which it was written, mediation does not yet appear to be an integral part of that fabric.").

[51] *See* THALER & SUNSTEIN, *supra* note 9, at 83-86; William Samuelson & Richard J. Zeckhauser, *Status Quo Bias in Decision Making*, 1 JOURNAL OF RISK AND UNCERTAINTY 7 (1988).

when armed with perfect information that shows an alternative to be better than a default, Humans often select the default because of this irrational bias. As evidence of this phenomenon, called the "status quo bias," Thaler and Sunstein point to the extraordinary amount of planning television executives put into determining the order in which programs air. Because these executives understand the status quo bias, they know that a large portion of the 8 p.m. program's audience will irrationally continue watching the channel into the 9 p.m. program instead of exploring alternatives on other stations.[52] The success of the 9 p.m. program thus depends on the success of the 8 p.m. program.[53]

What makes the decision to continue watching the same channel into the 9 p.m. hour so remarkable is the tiny cost of exploring alternatives. All that is necessary to investigate alternative, perhaps superior, content on others channels is to press a button on the remote control or consult a television timetable. While an Econ would quickly calculate that the possibility of a better program justifies this miniscule cost, a Human watches the 9 p.m. show without looking at what else is available. The Human irrationally favors the option that requires no change.[54]

Humans are likely subject to the status quo bias when they decide between mediation and adjudication. In the United States, adjudication is the default dispute resolution process. After all, most of the world knows mediation as an *alternative* dispute resolution method. Thus, Humans automatically, and irrationally, choose adjudication over mediation even when the costs of exploring mediation are nominal.

3. Overconfidence Error

Humans tend to be overconfident about their chances of success.[55] They believe that their personal odds are better than

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[52] This phenomenon is also a function of a Human's irrational avoidance of loss, even when avoiding a loss means missing out on a gain. *See* THALER & SUNSTEIN, *supra* note 9, at 33.

[53] *See id.* at 35.

[54] *See id.*

[55] *See id.* at 31-33.

those similarly situated. For example, Thaler and Sunstein highlight a study of entrepreneurs who were asked to judge their likelihood of success. Most answered that their own chance of success was 90 percent but that other ventures in similar circumstances stood only a 50 percent likelihood of success.[56]

This phenomenon is well-documented in the dispute resolution literature.[57] Both plaintiffs and defendants routinely choose to adjudicate because of unrealistic optimism about their chances of winning.[58] These suboptimal decisions to adjudicate often lead to spectacular zero/sum losses for overconfident Humans. The problem of overconfidence is so prevalent that in court-annexed mediation, mediators spend an extraordinary amount of time "reality testing" the disputing parties to be sure they understand what sorts of things the judge will require to rule in their favor.[59]

This erroneous confidence likely makes it difficult for a Human to select an appropriate dispute resolution method. In order to induce the parties in conflict to select mediation over adjudication, a mediation advocate must provide evidence that mediation is not just better than adjudication in reality, but better than adjudication in the optimistic fantasy world from which the parties derive their expectations of success. Thus, providing the overconfident party with perfect information about the benefits and drawbacks of various dispute resolution procedures cannot induce her to make an optimal decision. The overconfident Human needs more than perfect information in order to make a good choice.

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[56] *See id.* at 32; Arnold C. Cooper, et al., *Entrepreneurs' Perceived Chances for Success*, 2 JOURNAL OF BUSINESS VENTURING 3, 97-108 (1988).

[57] *See, e.g.*, MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 49 (1992) (explaining that once parties hold certain beliefs, they tend to only seek out information which confirms those beliefs).

[58] *See id.*

[59] Admittedly, this is a personal anecdotal observation. But in the roughly 30 cases I have mediated in a court-annexed setting, I have spent approximately 20 percent of the time asking why the parties believe they will prevail in front of a judge.

III. PROPOSAL: MEDIATION AS A DEFAULT DISPUTE RESOLUTION METHOD

As discussed *supra*, the decision between mediation and adjudication is likely distorted by irrational biases and cognitive errors. These distortions mean that the decision is ripe for an adjustment in choice architecture in order to bring about more optimal results. In *Nudge*, Thaler and Sunstein set forth a number of choice architecture alterations aimed at optimization in decisions about everything from paint to retirement savings.[60]

This Part considers the appropriateness of a few choice architecture adjustments. This limited exploration reveals that offsetting the biases and errors involved in the decision to mediate or adjudicate is rather thorny. The Part ultimately concludes that a switch in the default dispute resolution method is the nudge best suited to produce optimal decisions by parties in conflict.

A. *Potential Nudges*

1. Expect Error

When Humans consistently make a particular suboptimal choice, decisional systems should be designed to expect that error and alert Humans to the mistake as quickly as possible.[61] Consider the "fasten seat belt" message that cars give their drivers when they fail, irrationally, to buckle-up.[62] Or the "look right" messages painted on the street at all major London intersections to help American tourists avoid being hit from the right while erroneously looking for oncoming traffic to their left.[63] Both of these not-so-subtle nudges help Humans to overcome their own irrationalities and errors immediately after they make a suboptimal decision based on those irrationalities and errors.

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[60] *See generally* THALER & SUNSTEIN, *supra* note 9.
[61] *See id.* at 87-89.
[62] *See id.* at 88.
[63] *See id.* at 90.

A similar "expect error" nudge in the decision between mediation and adjudication would likely prove ineffective. The nudge might manifest itself as a warning after a complaint is filed informing the parties that adjudication is often a bad choice and that they should consider mediating. But the success of the fasten seatbelt and London crosswalk "expect error" nudges depends on a Human immediately realizing that her decision was suboptimal. Because of the overconfidence error in particular, parties in conflict will be slow to concede that their decision to adjudicate was the wrong one. An "expect error" message in the dispute resolution context would thus fail to increase the optimal use of mediation.

2. Mapping

Good choice architecture allows Humans to "map" the connection between a particular choice and their welfare after that choice.[64] Take ice cream shops. The variety of flavors is often mind-boggling. How can anyone know whether flavor A is better than flavor B? To help solve this problem, many ice cream shops allow customers to sample flavors before purchase to better "map" the relationship between their choice of flavor and their welfare after that choice.[65] An informed ice cream purchaser is a happy one.[66]

There is no obvious "mapping" possibility for dispute resolution decisions.[67] In contrast to the free sample in the ice

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[64] *See id.* at 91-94.

[65] *See id.* at 91-92.

[66] Those familiar with classical economic theory will notice the similarity between mapping (a behavioral economics concept) and correcting information dissymmetry (a classical economics concept). But mapping differs from mere correction of information dissymmetry in that it ties the introduction of information to a particular option and is not concerned with equalizing information between parties. Mapping says, "learn more about this particular ice cream flavor by trying it." A correction of information dissymmetry says "learn as much about ice cream as the person selling you the ice cream."

[67] An arguable exception to this statement is the practice of arbitration/mediation. In this method, the third-party neutral begins the session as an arbitrator, conducts an arbitration, and makes a decision. She then seals that decision in an envelope without sharing it with the parties. Next, she becomes a mediator and conducts a mediation. The parties have the option of

cream shop, no program can give disputing parties a realistic taste of the adjudication process. Even efforts aimed at education about the workings of the legal system cannot replicate the stakes, emotions, and pressure involved in real adjudication. And when parties enter the process, getting out is not easy. Claim preclusion and non-appealable arbitration decisions mean that the decision to adjudicate is often final. Only repeat players in the adjudication system are able to map the relationship between their choice to adjudicate and their eventual welfare.[68] Because there is no way to provide parties in conflict with a realistic taste of the adjudication process, an adjustment in choice architecture through mapping is unfeasible.

B. *The Right Nudge: A Switch in the Default Dispute Resolution Method*

The examination of "expect error" and "mapping" nudges *supra* illustrates the unique challenge dispute resolution decisions present. "Expect error" nudges are not sufficient to overcome the overconfidence error. "Mapping" nudges do not work because there is no way to give disputing parties a taste of adjudication. The dispute resolution method choice architecture requires a more significant adjustment in order to produce optimal decisions.

For certain types of conflicts, mediation should replace adjudication as the default dispute resolution process offered by

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resolving their dispute via mediation or reverting to the secret arbitration award. But this process has become widely disfavored because of the pervasive role confusion it inevitably produces. *See* Lon L. Fuller, *Collective Bargaining and the Arbitrator*, *in* COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 8, 29-30, 32-33 (Mark L. Kahn ed., 1962) (arguing that combining arbitration and mediation is inappropriate because each employs practices that should never mix). Accordingly, arbitration/mediation's costs likely outweigh its benefits as a mapping device for disputing parties.

[68] "Repeat players" are successful in dispute resolution because they enjoy the benefits of mapping. They can effectively map how their decision to mediate or adjudicate will affect their welfare later on. "One shot" players do not have this ability and therefore make comparatively worse choices. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOCY. REV. 95 (1974).

court systems.[69] In order to adjudicate, one party would have to affirmatively opt-out of the mediation process. This is simply a reverse version of the dominant adjudication default scheme in place today. Of the nudges Thaler and Sunstein discuss in *Nudge*, a switch in the default dispute resolution process is the choice architecture alteration most likely to produce optimal decisions among parties in conflict. Specifically, this innovation will mitigate the availability bias, the status quo bias, and the overconfidence error that likely lead to suboptimal decisions to adjudicate instead of mediate.

Defaults are powerful. Because of the pervasive and irrational status quo bias, Humans select defaults not necessarily because they are optimal, but because they do not require an affirmative act.[70] Thus when an alternative becomes a default, Humans automatically behave differently. To illustrate, Thaler and Sunstein examine a 2003 study regarding organ donation. Participants were asked to imagine that they recently moved to a new state. The first group was told that the state law required residents to *opt-in* to become organ donors. 42 percent opted-in and became organ donors. The second group was told that the state law presumed that residents consented to organ donation unless they *opted-out*. Amazingly, 82 percent became organ donors by declining to opt-out.[71] In both scenarios, all that was required to opt-in or opt-out was the click of a computer mouse. When the default changed, so did participant behavior -- radically.[72]

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[69] Delaware's compulsory ADR program for claims less than $100,000 recently adopted such a default switching nudge. Before this change, there was no default – parties had to affirmatively choose either arbitration or mediation. Likely due to the overconfidence error and the availability bias, parties overwhelmingly selected arbitration over mediation. But now mediation is the default process. Once this new policy has a chance to take root, the statistics on mediation use should provide a convenient test for the effectiveness of this choice architecture adjustment. *See generally* Joshua W. Martin III, Sarah E. DiLuzio, and Suzanne M. Hill, *Recent Changes to Compulsory Alternative Dispute Resolution in the Superior Court*, 10 DEL. L. REV. 199 (2008).

[70] *See supra* note 51 and accompanying text.

[71] *See* THALER & SUNSTEIN, *supra* note 9, at 177-78.

[72] *See id.*

A default switch is the best choice architecture alteration for dispute resolution decisions because it counteracts the biases and errors that afflict parties in conflict. First, as noted, when mediation becomes the default choice, the status quo bias will work in its favor. Parties in conflict will mindlessly, but often optimally, select mediation over adjudication merely because it will not require an affirmative step. Second, mediation as a default will mitigate the availability bias as parties become more familiar with the idea of going to mediation instead of going to adjudication. Third, mediation will mitigate the effects of the overconfidence error because it will orient parties away from rights-based adjudication and towards interests-based mediation. Disputing parties will be less likely to engage in erroneous calculations about their odds of success in adjudication if they do not consider adjudication to be the primary arena for dispute resolution.

Court systems should provide mediation as a dispute resolution default for those parties most affected by decisional biases and errors.[73] As demonstrated in the mapping example *supra*, repeat players, such as lawyers, are best able to map the relationship between the selection of a particular dispute resolution method and ultimate welfare in order to overcome biases and errors.[74] Conversely, *pro se* parties often have little ability to predict whether their choice of dispute resolution method will meet their needs. Double *pro se* cases thus seem to be the most ripe for a mediation-as-default regime.

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[73] This conclusion is very much in agreement with the fictional mediator and judge in Robert A. Baruch Bush's "imaginary conversation." *See* Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES, 1-6, 12 (1990). Mediation as default is precisely the proposal offered by the fictional mediator in Bush's hypothetical conversation. But the proposal, and libertarian paternalism generally, also adopts the fictional judge's conclusion that optimal "private" results often translate into optimal "public" results. Happy people make good citizens. *See id.* Thus, to the extent irrational biases and cognitive errors prevent good decisions to mediate, correcting those biases and errors through default switching is move for the public, not just private, good.

[74] *See* Galanter, *supra* note 68 and accompanying text.

This is not a costless move. If mediation replaces adjudication as a dispute resolution default for certain cases, significant changes will be necessary in the court system. Courts will need more mediators and more space for sessions. But we should also keep in mind the costs inherent in leaving adjudication as the default dispute resolution method. As Thaler and Sunstein point out, it is impossible for the government to *avoid* structuring choice.[75] The question is whether we will impose the suboptimal results of poor choice architecture on individual Humans or whether we as a society will absorb the incidental costs of nudging Humans towards optimal decisions through costlier choice architecture. Given the importance of dispute resolution, policymakers should err toward the latter.

CONCLUSION

Irrational biases and cognitive errors can explain the dissonance between mediation's rave reviews and poor utilization. Replacing adjudication with mediation as the default dispute resolution method will likely counteract these distorting influences. A mediation default will thus lead to more mediation without infringing on party self-determination. But without a nudge toward mediation, most Humans will continue to miss out on the benefits of interest-based dispute resolution.

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[75] *See* THALER & SUNSTEIN, *supra* note 9, at 10.