Behavioural Tradeoffs:
Beyond the Land of Nudges
Spans the World of Law and Psychology

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Introduction

The most dramatic developments in 21st century policy come from neither the field of economics nor from law, but from psychology. In July 2013, the United States government announced plans to form a ‘Behavioral Insights Team’. A similar behavioural insights team has operated in the United Kingdom since 2010, and other initiatives are quickly forming across Europe and elsewhere around the world. The hope is that government in all its regulatory and policy arms will learn how to subtly shape people’s behaviour and choices. In the United States, new initiatives in both state and federal departments have already adopted insights from the behavioural field, attempting to make public policy more effective and, at the same time, less disruptive and coercive.¹ The contemporary regulatory state aims to use psychology to make people pay their taxes on time, eat healthier, save more, waste less, work harder, study longer, and be more philanthropic. In the broadest and most ambitious terms, law will draw on psychology to improve society as a whole.

Behavioural engineering has been most recently popularised by the idea of nudges, associated with the book by that name by Cass Sunstein and Richard Thaler². Nudges, referring to small cognitive bias driven adjustments to the decision-making process, represent, however, only a sliver of the insights revealed in the fascinating new body of interdisciplinary studies in law, economics, and psychology. In fact, the wealth of studies in the past few decades is so mind boggling that it is easy to see why it seems simpler to avoid the breadth and complexities of psychological knowledge and focus merely on a relatively narrow set of lessons. And yet, like everything in life, without considering the complexities, initiatives become flat and often fail.

The purpose of this chapter is to present areas of behaviourally informed legal policy in which the fuller picture of psychology is overlooked and to suggest ways to move toward a more meaningful integration between the various behavioural-legal trends that have been extremely popular in recent years. The lack of coherence between the different sub literatures is pervasive and related to the fact that each one strand of research was developed separately. Most importantly, the lack of awareness of insights developed in areas of behavioural research, which are less known to legal scholars, leads to very limited

² Richard Thaler, and Cass Sunstein, Nudge: The gentle power of choice architecture. (New Haven, Conn.: Yale, 2008).
and sometimes inadvertent policy recommendations based on a partial view of the scope and potential of the various branches of psychology.

In earlier years, when law and policy were based on a traditional view of rational choice, which assumes that people make deliberative choices to maximise their interests, there was no room for an understanding of behavioural tradeoffs. By contrast, in recent years, as policymakers have become increasingly committed to incorporating the science of human behaviour into law, we can no longer legitimately (nor effectively) consider only a handful of aspects of human behaviour. Naturally, for any given policy initiative, there will be limited resources and knowledge which will require some simplification and certain tradeoffs between conflicting behavioural insights. But, these tradeoffs need to be generated through awareness and reflection. We hope that by recognising the breadth and depth of the psychological literature it will be possible to create a behavioural policy which will address the full meaning and potential of behavioural law and policy.

The chapter proceeds as follows. Section II briefly introduces recent policy initiatives in both Europe and the United States to demonstrate the breadth and scope of the behavioural brush over policy. Section III analyses some of the earlier critiques of the adoption of behavioural research into policy, which focus on the validity, generalisability and translatability of the behavioural insights into policy in action, and the legitimacy of the policy initiatives from a normative perspective. Section IV then shifts the focus to the narrowness of the literature that has been adopted by government and offers a fuller picture of the fields of behavioural research that must shape the policymaker’s toolbox. Once the enriched vision of behavioural law is introduced, section V proposes a framework for better-informed and sustainable policy. We offer a new taxonomy of the tradeoffs that are pervasively present in the adoption of regulatory solutions to social challenges.

**Simply Simple: Recent Behavioural Initiatives**

The range of initiatives that build on behavioural research is impressive. Insights into behavioural sciences, and how these insights can be used to affect people’s choices, have recently become a priority for governments around the world. In 2010, the UK government set up the ‘Behavioural Insights Team’, often called the ‘Nudge Unit’, to apply these visions to public policy. In July 2013, news sources began

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3Cabinet Office: Behavioural Insights Team’, available at: (www.gov.uk/government/organisations/behavioural-insights-team (last accessed 1 November 2013); The Behavioural insights team has been privatised in Feb 2014
to report that the White House was planning to assemble a similar team in the United States. According to a government document, the team would aim to ‘scale behavioural interventions that have been rigorously evaluated, using, where possible, randomised controlled trials’. The document also laid out several policy initiatives that had already benefited, according to the White House, from implementation of these behavioural insights: increasing college enrollment and retention, getting people back to work, improving academic performance, increasing retirement savings, increasing adoption of energy efficient measures, and increasing tax compliance. The announcement of the creation of a behavioural policy team received criticism from those concerned about ‘big brother’ and ‘nanny state’ policies. And yet, the great interest in employing behavioural insights to law all across the world indicates a growing consensus among regulators about the validity and effectiveness of bringing behavioural economics into law. Leading behavioural economist and advisor to the U.K.’s Behavioural Insights Team, Richard Thaler, sums up his advice for policymakers into two succinct points. First, if you want to encourage some activity, you need to make it easy; second, you cannot create evidence-based policies without evidence. The initiatives adopted into policies vary considerably. Mostly the initiatives focus on setting consumer defaults and understanding choice architecture. Such initiatives consider ways in which immediate decision-making can be improved by packaging information and choices differently, for example, by changing the set default to an opt-out rather than opt-in. In Sunstein’s new book, Simpler, the reader gets a ‘brief guided tour’ of such default manipulation and opt-in/opt-out structures. The examples provided in Simpler include the area of savings in which a change in the default of enrollment to an opt-out produces significant results on the participation rates of employees in pension plans. Similarly, with regard to health insurance, Sunstein reminds us that whether or not enrollment in a health care program is mandated, changing the default from having to be enrolled (whether or not it is required by law) to automatic enrollment makes a great difference in operationalizing the program. A classic third example of the impact of choice architecture in the welfare area is enabling a greater number of low-income families to take advantage of their right to free school lunches through automatic enrollment. In the context of environmental policy, with the goal of reducing paper and saving more trees, creating a default
presumption that most of us want to be paperless in payroll notifications and other bills will be more effective than having to fill out some paperwork to get the paperless process going.

Modern developments in the field of behavioural economics reveal the many ways in which human rationality is bounded. People take patterned shortcuts in their decision-making, which often veers the individual off the path of the typical rational and self-interested actor. An understanding of bounded rationality is important because lawmakers can create policies that improve efficiency by helping actors make more rational decisions that maximise their utility.9 A prime example of bounded rationality arises in the context of public health, particularly with governments becoming increasingly concerned about overweight populations and obesity. For many years, the American federal government has attempted various campaigns aimed at improving public health (and of course, the benefits associated with that improved health such as lower healthcare costs). Basic rationality predicts that people who choose to eat healthy and exercise see the benefit of long-term health as more important than the benefit of the short-term happiness they might feel from unhealthy lifestyle habits. However, the research on bounded rationality reveals how aspects such as accessibility, willpower, presentation of the risks, and even surrounding factors such as the type of music being played in the background at the gym or cafeteria may affect people's eating and exercising habits.10 Bounded rationality explains that the choices people make do not necessarily reflect their preferences. People may value long-term health as important and have a general desire to lose weight, but that does not necessarily translate into ‘successive action’ because eating healthier and exercising are extremely difficult to sustain.11 Other factors, such as the human predisposition to prefer high-fat, high-calorie foods, a culture that promotes unhealthy eating and a sedentary lifestyle, as well as the perceived or actual higher cost of healthy foods also negatively impact the actor who wants to lose weight.12 Taking all of the behavioural research into account, lawmakers can enact policies that more accurately reflect the longer-term stated individual choices of living a healthy life. The cafeteria policy13 has served as a prime example of nudge-style policy. Shifting the order of choices available to kids in a cafeteria, presenting the healthier choices first creates the desirable effect

11 ibid 543.
12 See Chapter X, Alberto Alemanno on Behavioural Policymaking in Public Health.
13 Nudge (2008) supra note ___ “A school cafeteria might try to nudge kids toward good diets by putting the healthiest foods at front”
of more kids choosing those fruits and veggies and filling up their tray with healthier choices before arriving to the fat loaded options.\textsuperscript{14}

A recent study conducted through combined efforts of experts in the fields of law and psychology about consumer fraud prevention helps provide another example of how irrationalities can be tackled by policy. The study analysed the factors that affect consumers’ vulnerability to fraud, examining consumer susceptibility to deception where an unusual contract clause is detected but the consumer is then persuaded to proceed with the deal.\textsuperscript{15} The researchers hypothesised that customers would be vulnerable to the deception of the opposite party through reassurances or explanations, even if those proffered explanations did not make sense.\textsuperscript{16} The study revealed that of those participants who detected the inappropriate contract clause, 80\% went on to sign the contract after a senseless explanation.\textsuperscript{17} The study’s findings lend themselves to immediate policy suggestions for consumer fraud laws: for example, restricting the informal stages where companies may interact with consumers in order to convince them to overlook an inappropriate contract clause and deeming contracts ‘unfair’ even when the consumer proceeded to sign it in cases where an explanation was meaningless but impactful.\textsuperscript{18} Beyond fraud, studies on consumer behaviours lend themselves to insights about why so many consumers tend to spend beyond their means often leading to paralysing debt.

I. Contemporary Critiques of Behavioural Law and Economics

The common theme that threads across the contemporary initiatives is that people cannot be trusted to have the time, the energy, or good judgment to make the right decisions all the time. Therefore, they should be helped by designing the decision-making environment such that it prevents the poor decisions from happening. This approach has been criticised in the past on various grounds, mostly from perspectives on individual autonomy and paternalism.\textsuperscript{19} With traditional regulatory approaches, there has been more controversy concerning the fields of regulation, for example, of personal well-being, healthy eating, savings and consumer financial choices. The psychology underlying the nudge approach


\textsuperscript{15} Jessica M Choplin, Debra Pogrund Stark and Jasmine N Ahmad, ‘A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications’ (2011) 35 Law & Psychol Rev 61

\textsuperscript{16} Choplin, Pogrund, and Ahmad, cited at footnote 13, at 62

\textsuperscript{17} Choplin, Pogrund, and Ahmad, cited at footnote 13, at 81

\textsuperscript{18} Choplin, Pogrund, and Ahmad, cited at footnote 13, at 95-101

\textsuperscript{19} For a recent discussion of the problems associated with this, please see Riccardo Rebonato, \textit{Taking Liberties: A Critical Examination of Libertarian Paternalism} (Palgrave Macmillan 2012)
has provided the policymaker with unconventional tools that enable intervention with presumably less controlling power. While nudges have been marketed as powerful triggers but non-interventionist, the assertion that policy based upon behavioural economics is simultaneously more effective and less interventionist than traditional command-and-control approaches is not without critique. A lively ongoing debate cautions against some of the main assumptions of the nudge approach. Most of the criticism about the contemporary behavioural policy base is philosophical in nature and asks about the implications of using insights from psychology to individual autonomy and choice. For example, Gregory Mitchell has argued that nudge approaches misuse the concept of libertarianism, subjugating ‘the liberty of irrational individuals to a central planner's paternalistic welfare judgments’. Mitchell warns that nudges are in fact designed to capitalise on the irrational tendencies of private citizens to enable the paternalistic planner to direct their lives.20

The very term ‘libertarian paternalism’ may have distorted much of the message about the significance and meaning of behavioural policy.21 The term attempts to suggest that, compared to traditional modes of command and control, using behavioural insights is less interventionist on the one hand and more individualistic and self-regarding on the other. Liberal democracies regulate behaviour in a very large range of fields and in the sense of translating research into public policy, nearly any regulatory approach could be deemed as taking some responsibility from the individual’s need to gain information on his own. However, this perspective obscures the ways in which welfare and well-being are part of a social collective project. Indeed, many interventions that draw on behavioural insights are concerned with third-party externalities and the need for central coordination.22 For example, risk taking, whether financial or physical, affects society as a whole and entails high costs if left to market regulation alone, as we have certainly seen in several cycles of recent economic crises.23 Employing behavioural insights also inevitably includes redistributive effects, that Colin Camerer and others have termed ‘asymmetric paternalism’, benefiting those who err more frequently in their judgment.24

Amir and Lobel have argued that in the political attempt to reach bipartisan commitment for policy, Nudge neglected to fully account for the range of regulatory solutions that must be employed given the

23 ibid.
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insights of behavioural economics.\(^\text{25}\) Instead, policymakers and thought leaders tend to narrow the regulatory tools to a small set of iconic choice architecture modules. Amir and Lobel argue that a better approach is to understand behavioural economics as aiding the regulator to expand the regulatory toolbox, drawing on the broad spectrum from command-and-control through collaborative regulation to self-regulation that is offered by the new governance school of thought.\(^\text{26}\) More recently, Bubb and Pildes have characterised this problem of Nudge-style prescriptions being too narrowly focused on choice-architecture as a “trimming of their sails”, in which behavioural law and economics cuts off a range of options because of ideological preference for seemingly non-interventionist proposals. Bubb and Pildes, continuing the critique of the non-interventionist theme that pervades behavioural law and economics, similarly argue that it is the combination of the ‘two seductive dimensions of [behavioural law and economics] – its appeal as social science and as politics’ that are in tension, because the insights that come out of the behavioural social science in fact often require much more forceful regulatory solutions than the behavioural law and economics school of thought has been willing to advocate.\(^\text{27}\) Moreover, the nudge-style tools employed by policymakers are in fact stronger than behavioural law, and economics scholars are willing to admit.\(^\text{28}\) As will become clear in the next sections, we largely agree with this critique and expand it. We argue that it is in fact the breadth of behavioural insights and the depth of the field itself that present tensions in how to operationalise its insights. Next generation behavioural policies must decouple from an attachment to a particular set of solutions. It is clear that lessons from psychology can and should inform law and policy. However, as Amir and Lobel argue, ‘if policymakers are to become consumers of the discipline of judgment and decision-making, they must be wise consumers’.\(^\text{29}\)

Policymakers should take into account the wealth of knowledge developed in the social sciences as well as be attuned to differences between policy domains. Take for example the recent dietary related suggestions regarding NYC former mayor - Michael Bloomberg’s intervention in the size of soda cups,


\(^{28}\) ‘Moreover, somewhat ironically, the nudges recommended by BLE scholars are often not as light-touch as advertised….. work in BLE has generally not subjected these tools to sufficient analysis to evaluate their effects’ ibid 11.

barring super-sized cups,\textsuperscript{30} or changing the defaults in consumer credit card contracts by setting a lower sum of money as the default credit that a consumer will have to pay at the end of each month. In such context, we are dealing with domains in which commercial firms have already created a nudge to consume more soda by playing with the sizes of the cups or by placing a really low sum of money of $10 or $15 in the credit bill one receives. In such situations\textsuperscript{31}, when corporate competitors market similar options to consumers that have little choice or input on the available sets of choices, the criticism about paternalism proves rather weak. In such contexts, providing more choices and designing the decision making environment seems indeed less interventionist than more direct forms of regulation, for example, in the case of soda bans, completely forbidding the sale of larger cups instead of requiring a delay on the decision of whether to upgrade the cup size, and still receive the discount derived from the previous purchase of soda.

\section*{II. Shifting the Debate: Expanding the Behavioural World}

While the earlier critiques of behavioural engineering are highly important and need to be continuously deliberated, our approach here pushes forward the debates about the adequacies of behavioural law and economics in several new grounds.\textsuperscript{32} We take an insider’s stance, as researchers immersed in behavioural research. Our concern is primarily with the question of sustainability and commitment to the integration of behavioural sciences into law and policy. Our goal is first to expand the interface between psychology and law. Then, once the footprint of behavioural studies that contribute to policy is expanded, our second goal is to illuminate the tradeoffs between different types of solutions and to account for the relative costs and benefits of behavioural approaches in any given situation. We argue that to take psychology into consideration, a more informed analysis is required.

The need for an expanded and integrated approach to behavioural policy stems from the independent developments in each strand of the behavioural sciences, each of which have immense potential in contributing to better policy and many of which are absent for the most part from policy

\textsuperscript{30} This ban on the maximal size of cup, was struck down by the New York State Court of Appeals on June 26\textsuperscript{th} 2014. Michael M Grynbaum, ‘New York’s Ban on Big Sodas Is Rejected by Final Court’ The New York Times (New York, 26 June 2014)

\textsuperscript{31} Compare with the concept of “counter-nudging” discussed in the introduction to this book at p.

\textsuperscript{32} For an alternative view of these trade-off please see the discussion of ‘second order gap’ in Avishalom Tor, ‘The methodology of the behavioral analysis of law’ (2008) 4 Haifa L Rev 237
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analysis. Most importantly, a narrow view of the world of law and psychology can lead to very limited and sometimes inadvertent policy recommendations. More often than not, contemporary behavioural policy approaches appear to be based on the partial view by legal scholars of the scope and potential of the various branches of psychology. There are no doubt important exceptions. In recent years, there are indications of expansion of the behaviourist lens as policymakers build on theories related to behavioural ethics, social norms, and social proof. Still, the expansion is slow and scattered, lacking a consistent discussion or systematic cohesive framework.

In what follows, we demonstrate our argument through some of the most basic behavioural trade-offs, which we expose in the current behavioural analysis of law literature. We show how, when push comes to nudge, some of the most celebrated recent behavioural policy suggestions can be in tension with central law and social science insights. We focus on an initial list of policy trade-offs that exemplify how the balance between the competing theoretical literatures is offset by the over emphasis of one angle of the pendulum. The typology of four tradeoffs includes:

1. Outcome vs. Process
2. Invisible vs. Expressive Law
3. Voluntary Compliance vs. Monitoring
4. Universal vs. Targeted Nudging

A. Outcome v. Process: Toward the Integration of Sustainable Deliberative Processes

1. Dual Reasoning and Deliberation-Free Nudges

The concept of two systems of reasoning has gained popular recognition in Kahneman’s book, *Thinking Fast and Slow* and it lies at the core of much of the research on behavioural law and economics. The general concept differentiates between an automatic, intuitive, and mostly unconscious process (labeled System 1) and a controlled and deliberative process (labeled System 2). An impressive

33 For example, calling for limiting the freedom of contract due the various cognitive biases, ignoring the psychological advantages of giving people the freedom to choose. For an elaboration of that point see Yuval Feldman, ‘Control or Security: A Therapeutic Approach to the Freedom of Contract’ (2002) 18 Touro L Rev 503-819
34 Daniel Kahneman, *Thinking, Fast and Slow* (Macmillan 2011)
body of research has been conducted in an attempt to compare the two types of decision-making systems in terms of the way they operate and in their efficacy. This line of research has shown in recent years that for certain tasks, such as visual tasks, System 1 leads to better performance relative to System 2 while in other tasks, such as those requiring greater analytics, System 2 outperforms System 1.\textsuperscript{36} For the most part, behavioural law and economics takes a more critical approach of the functioning of System 2 and is relatively inclined to use biases associated with System 1 as a way to improve people’s lives, for example, in the defaults set in ‘save more tomorrow’ type plans or changing the default rules in credit card bills. While some of these reforms are effective and important, this regulatory lens of shifting decision-making from System 2 to System 1 has flattened the discussion without rigorous analysis of the costs and benefits of these shifts.

These shifts become salient when observing the impact that heuristics and biases research has had on policy and when considering the interplay between Systems 1 and 2. The imbalance is most striking when considering the neglected role of deliberation in contemporary policy approaches. On an individual level, nudge approaches largely assume that the desired outcomes in our daily decisions can be directed without deliberation through default design. On the public level, the role of law in influencing public understandings of the social and the moral meaning of behaviours – good and bad – is sidestepped in favour of a view of the law as a useful tool in simplifying decision-making processes. Little attention is given for the interactive and dynamic understandings and identification with the law that follow from people’s interactions with law and policy.

2. Deliberations and Decisions

The current behavioural regime focuses on getting people to the correct result with little need for deliberation.\textsuperscript{37} The focus is on default rules, opt-outs, and designing simpler paths to a direct single ‘right choice’. Naturally, the process through which people get to the desired decision – be it to save more money or to donate more organs – becomes secondary to the actual optimal choice. The rationale behind

\textsuperscript{36} See for example, Zohar Rusou, Dan Zakay, and Marius Usher, ‘Pitting intuitive and analytical thinking against each other: The case of transitivity’ (2013) 20 Psychonomic Bulletin & Review 608.

\textsuperscript{37} It should be noted that we are focusing here on individual deliberation, which should not be confused with the discussion on the role of public deliberation regarding the usage of nudges, which we discuss in latter stages of the paper.
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This approach is clear: with growing knowledge of the fact that people are bad decision makers, who lack either the motivation or the cognitive abilities for making the right choices, less attention should be given to tools such as increased access to information and more effort should be made to ensure that consumers arrive at the “right” decisions concerning financial and health practices. This approach is problematic however because it overlooks important ways in which deliberation positively affects choices and commitment. The choice architecture approach neglects the behavioural implications for long-term perceptions and sustainability of policy.

In the following paragraphs, we will review some of the theories that emphasise the importance of deliberation in ensuring such sustainability. The lack of sustainability is a general weakness of much of the nudge approach. This is particularly surprising given the important research conducted by scholars such as Tyler and Darley on commitment and compliance. In practice, the knowledge about the effectiveness of the nudging theory in the long term is relatively limited. Moreover, many of the lab studies presently being used as a basis for the nudge approach demonstrate one-shot short-term effects. For the most part, behavioural economics research consists of lab experiments which lack the rich social and organizational context of real market interactions and much of the effects being cited as the basis of changes in decision-making are measured within minutes or even seconds from the time participants were exposed to the stimuli.

An impressive and yet rather neglected body of psychology literature pertains to the importance of active participation of people in making decisions and the importance of voice and participation in shaping people’s behaviour in ways that are publicly desirable. Civic participation enhances and empowers citizens’ feelings of efficacy and belief in their ability to be part of the democratic process. Public policy that undermines the focus on awareness and deliberation and focuses more on supplementing personal judgment and active involvement may undermine these positive processes from happening. Deliberation and awareness carry unique procedural benefits from an outcome perspective that take into account aspects such as sustainability and long-term commitment by people.

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40 Theresa M Marteau and others, ‘Judging nudging: can nudging improve population health?’ (2011) 342 BMJ 263
A related aspect of sustainability could be learned from the discussion on operational empowerment devices.\textsuperscript{44} For example, field experiments show that people’s decision whether to climb the stairs or use the escalator can be changed more effectively by colouring stairs in interesting ways compared with dissemination of information about the importance of exercising.\textsuperscript{45} And yet, such an insight is rather hard to scale. First, the idea that stairs in all buildings should look like pianos or be otherwise artfully painted is unrealistic. Second, even if such an initiative would be pursued, it would likely be self-defeating, as the very results showing people’s interest in walking up colourful stairs stem from their currently exotic nature. Hence, since it is seems fair to estimate that there is a limit to the number of stairs that can be coloured with piano painting, and there is a reason to believe that scarcity drives the interest, there is greater room for combining such nudges with deliberation that could enhance learning, internalization and consequently sustainability.

Beyond making each individual decision and ensuring the sustainability of optimal choices, it is worth considering another behavioural aspect associated with the optimal level of deliberation: regret aversion. A famous paper on the ability of parents to deal with dire consequences of their choices demonstrates the cost of deliberation and autonomy.\textsuperscript{46} The study was done in a unique context – parents who needed to make abortion decisions regarding fetuses with minor medical issues. It was shown using a mix of qualitative and quantitative methods that the French parents had less autonomy and firmer doctor advice, relative to American parents who faced a similar dilemma, but with less authoritative advice from doctors. While the context of the described study is particular, it suggests an additional consideration – the post-decision-making feeling of responsibility by American parents, which is affected by their great level of discretion and amount of deliberation that were put into the decision, relative to the French parents.

Relatedly, self-determination theories show that people are more satisfied when they have independent personal choices.\textsuperscript{47} Lack of control in one’s environment induces desperation and other unpleasant feelings.\textsuperscript{48} For instance, elderly residents in nursing homes that were given control over

\textsuperscript{45} See Fabiana Di Porto and Nicoletta Rangone, cited at footnote 31 at XX
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routine choices lived longer and reported higher rates of well-being than residents that did not have control over the set of choices. Additionally, another study hypothesised that in social settings one's control over her own decisions could change her interpretation and, consequently, her preferences of the situation. The theory about the relationship between control and well-being seems to be straightforward. Thompson summarises this relationship in the following way, ‘we feel better about ourselves, we are physically healthier, perform better under adversity, and are better able to make desired behavioural changes if we have a sense of behavioural control’. The improvement in personal well-being through increased self-direction in our everyday activity aimed at achieving future goals (referred to as ‘the implicit agency of daily life’) is demonstrated in a myriad of contexts.

The literature on procedural justice describes the importance of the perception of fairness of policy for the parties’ ability to accept the policy’s outcomes. The implications of procedural justice have been considered in the context of a range of legal fields. The literature suggests two key factors may increase one’s sense of procedural justice: having a voice and having perceived control over the process. Both types of processes require some level of awareness and deliberation by the individual

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54 For a general overview of the relationship between procedural and distributive justice see for example, Tom R Tyler, Why People Obey The Law (Yale University Press 1990); John W Thibaut and Laurens Walker, Procedural Justice: A Psychological Analysis (Lawrence Erlbaum Associates 1975)
prior to making their decisions. Of course, not all forms of participation are equal, and important frontiers in the literature examine differences between mere technical participation and participation based on deliberative processes and cognitive effort. For example, Perez states that, from current studies, it seems unclear to what extent people’s participation in online government projects has been able to produce deliberative processes.56

Given the importance of both process and outcome – achieving outcomes and deepening the involvement of people in a deliberative process – the next step is to realise that different social challenges will point to the varying ways to draw the balance between considerations that sometimes conflict. Here, we merely argue for a more prudent and nuanced approach to using behavioural sciences. Such an approach asks to what extent overcoming processes and obtaining desired outcomes is more important than triggering active individual involvement in making the decision in a particular policy context. There may be situations when a one-shot decision sustains a long-term outcome. For example, in decisions like saving for pension or organ donations, once the decision is made, the default becomes sticky enough to sustain a lifetime result. In those cases, we may conclude that a commitment mechanism driven by deliberative processes is of lesser importance. In contrast, in contexts such as consumerism, fiduciary duties, contract performance, health and dietary decisions, in which commitment is needed, the role of participation and deliberation should be given more weight due to its effect on commitment to the decision over time.57

Several new additions to nudge campaigns seem to adopt an understanding of the significance of process by focusing on community-based identity and encouraging citizens’ participation. For example, while most nudges in the context of smoking and drinking attempt to reduce awareness – hiding them from the public sphere, or requiring the invisibility of alcohol in public sphere by requiring a brown bag masking of the bottle, other approaches in the U.K. attempt to increase awareness of how much other

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57 In that context, compare the work of Eigen on form contracts, where he has demonstrated in a field research that the more involvement of people in the contracting process they are more likely to be committed to its performance. Zev J Eigen, ‘When and why individuals obey contracts: experimental evidence of consent, compliance, promise, and performance’ (2012) 41.1 The Journal of Legal Studies 67-93. Recently Cass Sunstein explicitly recognised that greater involvement in the process of making decisions is likely to increase one’s identification with her decision. ‘In addition, passive choice will, almost by definition, decrease choosers’ feelings of identification with the outcome. In part for that reason, any kind of default rule, including a highly personalized one, may not create the kinds of motivation that can come from active choosing’ Cass R Sunstein, ‘Deciding By Default’ (2013) 162 University of Pennsylvania Law Review 1, 51.
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people really drink, because people generally over-estimate how much others drink. In other contexts, people are provided with various ways to communicate to others the problems they see both in the consumer and government platforms. Very recently, Tyler and others have suggested using procedural justice to improve people’s following of medical recommendations.

B. Invisible Nudges vs. Expressive Law: Life Isn’t a Cafeteria

1. Law’s Meaning

Related to the tradeoff between the process and the outcome is the dual role of law – as directing behaviour and serving an expressive function. The central point of tension between expressive law and the nudge approach concerns the visibility of law. Under expressive law theory, law should be made public thereby triggering various expressive mechanisms to reflect, as well as to change, the norms and values of the particular society. Under a nudge approach, the law operates behind the scenes, in the background of private decision-making, serving to facilitate individual choices. These two approaches can conflict – in the first, law is front and centre as the driving force behind the social change, while in the second, the law operates under cover. From a psychological standpoint, there are key differences between such deliveries of the law. Under one approach, the law is majestic, authoritative, and engaging. Under the other, the law is hidden and coy. Law’s global message of authority is vastly different under each approach.


The literature on expressive law and on social meaning views law’s language and its visibility to the public as one of its most important tools. Making something into a law, by using certain words and contexts, can shape the meaning of important concepts such as parenthood, safe driving, and good citizenship. The expressive function of the law can help people determine what the prevailing social norm is, how your behaviour will be viewed by others if you violate the law, what is the best course of action when one needs to coordinate her behaviours with others, and what are the reputation costs at risk for engaging in certain behaviours.

The research on law and social science highlights the symbolic effects of law in society and on the role of legality in social change. Legality, wherever it is found, shapes cultural changes in society. Scholars such as Anderson and Pildes, and Adler also focus on language, recognizing the declarative

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63 The assumption being that in a democratic state, laws represent the preferences of people regarding what is a desirable behavior. This assumption is often challenged in reality as for example while most countries have a tax code, there is a huge variation in the perceived normative desirability of those people who evade taxes across different countries.


65 A typical example of the cost-related account of social norms can be found in Cooter’s analysis: ‘With group pressures, an increase in an act’s popularity lowers its cost. Imposing a non-legal sanction on someone often involves a risk of retaliation, which decreases as more people obey the norm. The risk of a non-legal sanction often increases as more people obey the norm, thus lowering the relative costs of conforming to the norm’. (emphasis added), see Robert Cooter, ‘Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms’ (2000) 86 Virginia Law Review 1577, 1585. See also Dan M. Kahan, ‘Social Influence, Social Meaning, and Deterrence’ (1997) 83 Virginia Law Review 349, 352-361


67 In a comprehensive attempt to define the expressive function of the law, Anderson and Pildes propose that: “Expression refers to the ways that an action or a statement (or any other vehicle of expression) manifest a state of mind.” See Elizabeth S Anderson and Richard H Pildes, ‘Expressive Theories of Law: A General Restatement’ (2000) 148 University of Pennsylvania Law Review 1503, 1506

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and constitutive cultural powers of law. Within this tradition, legal scholars have suggested that when examining the effects of law, one should focus not only on its operational functions but also on its declarative purpose and responsibilities. Laws influence people both by making authoritative statements and by reproaching them using the language of the law. In other words, we use laws to affect social norms and to change judgments and behaviour. Language has an essential and creative role in social change.

In contrast, the nudge approach tends to push for focusing on simplicity and flattening of policy messages. The law needs to be almost unnoticed. People do not even need to know that a given action is unlawful or undesirable since, under the nudge approach, the role of law is not to shape people’s values, but to create a choice architecture. Choice architecture will lead people to make the right choices with as limited as possible deliberation and awareness to the fact that they are making a choice as well as to the fact that the law is behind these initiatives.

The original idea of the expressive concept of law was to lead people to internalise social norms, to recognise the wishes of the legislator, to understand what social practices should be abandoned, and to identify certain practices as shameful. Following some of the writing on form contracts and snap legal decisions, it seems that the outcome of this line of research is to minimise unnecessary words and require as little attention as possible to what the law asks them to do. Hence, the simpler nudge approach not only limits the participation process of people in determining the decisions they take, as the previous argument has suggested, it also changes the function of law from shaping the social meaning of people’s actions.

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69 This approach has been used in a wide variety of legal doctrines. See Anderson and Pildes, cited at footnote 41, at 1532 hold its most practical relevance in the contexts of employment and constitutional law where courts strike down laws that express unconstitutional purposes or attitudes. Other notable areas in which the expressive functions of the law have been taken into account include voting rights, Richard Pildes and Richard Niemi, ‘Expressive Harms, 'Bizarre Districts,’ and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno’ (1993) 92 Michigan Law Review 483; laws regarding homosexuality, (Wibren Van Der Burg, ‘The Expressive and Communicative Functions of Law’ (2001) 20 Law & Philosophy 31) especially with regard to signaling moral standing of the state through existing, though not enforced, laws and anti-discrimination laws. Another interesting and important area in which expressive theories of law have been featured is criminal punishment. Significant in this field is the work of Dan M Kahan, ‘Social Influence, Social Meaning, and Deterrence’ (1997) 83 Virginia Law Review 349, 352-361 regarding the expressive meaning of criminal sanctions (For a historic perspective, see Joel Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 The Monist 397). This forms the foundation of his theory highlighting the importance of shaming in criminal punishment. According to the shaming theory, fines and community service are problematic as criminal punishments because they carry no shaming factors.


behaviour to simply altering their decision, without the target of regulation knowing that the law is even operating in the background. Publicizing that the law is behind the choice architecture, especially in areas such as health, transactions, and ‘consumer affairs’ may even impede a person’s ability to make mindless choices. Perhaps most globally, the idea of default design downplays our notions of law. It attempts to present itself as something different, not exactly law in an authoritative way, not exactly regulation, but rather a design mechanism, a rule structure, a choice architecture. Psychologically, this masking of law has a cost, which the rich literature on expressive law discussed below, has documented.

2. Expressive Nudges

As suggested above, while legal scholarship is rich with understandings of the expressive function of the law giving it innovative mechanisms,73 the nudge approach seems to abandon this important literature. While we recognise the advantages of invisible law and choice architecture, it is our belief that even with greater focus on unaware decisions associated with this approach, making the law more visible to the public should not be downplayed without careful discussion.

Naturally, the focus on snap decisions has led to an abandonment of discussion on the expressive function of the law and social meaning which seems to be associated with public deliberation. However, what we try to suggest is that the focus on snap decisions might highlight a different view of what expressive law should mean behaviourally. Various lines of research in cognitive psychology show that choice of words can completely alter the meaning people assign to a situation, especially with limited awareness.74 Shifting the focus of expressive law to research on framing effects can enrich and add important layers of sophistication for behaviourally based legal policy.75

C. Trust vs. Voluntary Compliance

The next tradeoff embedded in the new behavioural based legal policy relates to levels of trust in people’s good nature. One of the most important deviations from rational choice models was related to

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the recognition of people’s ability to cooperate voluntarily. Research done by legal scholars like Lynn Stout and Yochai Benkler calls for more sophisticated ways to enhance people’s cooperation and contribution to public goods, suggesting that people will cooperate if you trust them to be cooperative and will become less cooperative if you treat them as self-interested individuals. This notion of people’s good nature is partly challenged by emerging research by scholars like Bazerman, Banaji, Ariely and Shalvi, which suggests that good people do bad things. The emerging picture of the human character is a far more complex, one in which people mostly seek to promote their own self-interest as long as they can feel good about themselves. According to this theory, by giving people the ability to choose how to behave, many good people might engage in self-deception mechanisms such as moral disengagement or elastic justification and exploit that trust to shirk, engage in dishonest behaviour, or violate the law.

Elsewhere Feldman discussed the effects of legal ambiguity on the likelihood that people will behave in a desirable way. For example, Haisley and Weber find that people prefer to take ambiguous risks when the ambiguity allows them to justify unfair behaviour. Dana and others find that people are less generous in situations in which they can appeal to moral ambiguity in explaining their actions. Similarly, Hsee found evidence that people make choices that satisfy their preferences, if they can exploit existing ambiguity about which decision may complete the assignment. Feldman and Teichman

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82 Yuval Feldman and Henry E Smith, ‘Behavioral Equity’ (2014) 170 JITE 137
84 Jason Dana, Daylian M Cain and Robyn M Dawes, ‘What you Don’t Know Won’t Hurt me: Costly (but quiet) Exit in a Dictator Games’ (2006) 100 Organizational Behavior and Human Decision Processes 193
find that under conditions of legal ambiguity people will formulate a minimal interpretation of what the law or contracts requires from them. With the greater recognition of the nudge approach, that people make decisions without full awareness to the consequences of their behaviour, more thought should be put into the question of people’s nature and the effects of this low degree of awareness on their interactions with compliance and the law.

The following behaviourally-based dilemma further exemplify this concern. On the one hand, researchers like Darley and Robinson\(^7\) and Cooter\(^8\) suggest that law should be aligned with people’s moral norms to ensue voluntary compliance and support for government punishment. Governments need to maintain legitimacy by such alignment. At the same time, behavioural ethics teaches us about the dissonance between people’s need to promote their self-interest and their need to maintain their self-perception.\(^8^9\) The kinds of behaviours that people are publicly negatively judged for are the types of behaviours that most regulatory schemes attempt to regulate (e.g. explicit racist comments). However, according to the views of behavioural ethics, we should be more worried as a society about violations, which could be seen by ordinary people as justifiable (e.g. getting a non-monetary political support). The problem here is that from the classical law and norms literature (the first line of literature reviewed above) public support will be relatively minor for harsh enforcement especially against those violations.

Let’s consider, for example, the area of conflict of interests. Taking the first approach would suggest that law should punish those who engage in a material conflict of interest, where it is possible to clearly show that money was the main reason for their violation. Such instances are much more likely to be seen as corrupt by the general public and hence focusing on them is likely to give the state the legitimacy it needs. Since most people would see such conflict of interest as violating moral norms, they would tend to support the public action. In contrast, according to the behavioural ethics approach, the greater risk to the public does not come from the most obvious and blunt conflict of interest (e.g. clear cut bribes), but rather from the more subtle ones,\(^9^0\) where many otherwise normative people are likely to

\(^7^8\) Decision Making Research into Behavioral Law and Economics’ in Eyal Zamir and Doron Teichman, Oxford Handbook of Behavioral Law and Economics (Oxford University Press 2014)(forthcoming)
\(^8^8\) ROBERT COOTER, ‘DO GOOD LAWS MAKE GOOD CITIZENS? AN ECONOMIC ANALYSIS OF INTERNALIZED NORMS’ (2000) 86 VIRGINIA LAW REVIEW 1577, 1585
\(^9^0\) Lawrence Lessig, Republic, Lost: How Money Corrupts Congress--and a Plan to Stop It (Grand Central Publishing 2011), arguing that the corruption of good people is much more likely to harm the public in contrast to those obvious cases of corruption, where people can easily recognise the wrong doing associated with such acts.
prefer their own self-interest, since they have more options to self-deceive themselves about the lack of wrong-doing in their own behaviours.\textsuperscript{91}

An additional example is related to the tension between voluntary and mandatory compliance, an important area within the psychological literature investigates the interplay between extrinsic and intrinsic motivation.\textsuperscript{92} Intrinsic motivation is the sense of morality inherent within the individual while extrinsic motivation relies on incentives and rewards.\textsuperscript{93} Most generally, the crowding out literature suggests that when people attribute their behaviour to external rewards, they discount any moral incentives for their behaviour, thereby lowering the perceived effect of intrinsic motivation. As applied to the regulatory incentives, crowding out theory predicts that external incentives that utilise monetary rewards or punishments may undermine intrinsic motivations.\textsuperscript{94} For instance, paying people in return for their blood might lead donors to view the event as a transaction rather than a charitable act, thereby eroding altruistic blood donations.\textsuperscript{95}

In a series of lab-based experiments, Deci found that tangible rewards undermine intrinsic motivation for a range of activities.\textsuperscript{96} Many of the studies on the crowding out effect of incentives and

\textsuperscript{91} Max Bazerman and Ann Terbnussel, \textit{Blind Spots: Why we Fail to Do What’s Right and What to Do About it} (Princeton University Press 2011)


\textsuperscript{95} Richard M Titmus, \textit{The Gift of Relationship: From Human Blood to Social Policy} (1971) arguing that monetary payments to givers of blood could diminish the amount of blood given voluntarily.


\textsuperscript{96} Uri Gneezy and Aldo Rustichini, ‘Pay Enough or Don’t Pay at All’ (2000) 115 The Quarterly Journal of Economics 791
on enforcement are summarised by Bowles.\textsuperscript{97} Along those lines, Falk and Kosfeld\textsuperscript{98} demonstrated this broader point using a principal-agent experiment in which participants could either let the agent decide the production amount or set a lower boundary. In settings in which a lower boundary was set, agents produced less than in those in which the principal left the decision about the production amount entirely in the hands of the agents. In \textit{post hoc} questioning, agents said that they regarded the lower boundary as a sign of distrust and were therefore less cooperative. Building on this rich literature, policymakers must consider inadvertent consequences of mandatory top-down compliance requirements on the intrinsic ethical motivations that individuals have to comply voluntarily. The next section continues this inquiry with regard to the variances different individuals exemplify in their intrinsic and extrinsic motivations to act.

\textbf{D. Universal vs. Targeted Nudges}

The fourth tradeoff concerns heterogeneity and the understanding that a one choice fits all architecture will be off the mark for certain populations. When we focus on the lowest common denominator, we decrease uncertainty and ensure minimal compliance, but we also risk crowding out the motivation of those intrinsically motivated.

How much effort should one put on attempting to determine what is the true motivation or specific cognitive abilities of the regulated population? Should the variation in motivations lead to a focus on the motivation that works across the board or should targeted regulation apply, differentiating between diverse groups of people according to their levels of commitment and motivation to comply?

People often vary in their internal level of commitments to ethical behaviour.\textsuperscript{99} Following the ‘W effect’ described by Frey and others\textsuperscript{100} with regard to magnitude, there is room to expect that with varying levels of intrinsic motivations among individuals, various sums of money will have a different effect on

\textsuperscript{100} Uri Gneezy and Aldo Rustichini, ‘Pay Enough or Don't Pay at All’ (2000) 115 The Quarterly Journal of Economics 791
\textsuperscript{94} In this case, intrinsic motivation was measured on a scale of environmental commitment as well as sensitivity to the distance from one’s home to a recycling bin.
each subgroup. In a previous study, we demonstrated that those who were intrinsically motivated were not significantly affected by framing of incentives, while those who had less intrinsic motivation were more likely to be affected by extrinsic motivation.  

A somewhat different finding regarding the differences in perception of incentives by those with high and low motivation comes from Perez and Feldman, demonstrating that those who were low on intrinsic motivation were more likely to prefer deposits to fines in recycling contexts, while the opposite was true for those who were high on intrinsic motivation. These findings suggest that the people’s level of intrinsic motivation significantly moderates the effect of extrinsic motivation on behaviour, raising the following question: Should a policy-maker collect these insights and target regulation differently with regard to those who are internally committed and those who are not? A possible move in that direction could be seen in a work by Porat and Strahilevitz, who have argued for an even more radical approach: calling for the creation of personalised default rules which will be based on the Big Five personality scale, tailored to people’s contractual preferences.

The literature on cognitive depletion further gives us some clues as to how to understand the dilemma of targeted preferences. In a recent article, Amir and Lobel examine how different age groups process choices in relation to future risk planning in diverse decision-making environments. The article demonstrates across multiple experiments that when cognitive resources are available, older participants opt for more prudent financial and retirement choices, but that this pattern does not hold in situations when people’s cognitive resources are depleted. The study finds an increased effect of resource depletion for older compared to younger participants. At a theoretical level, such findings suggest that some of the difference in risky financial choices between older and younger decision makers rests in the ability of

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103 While preparing the revised version of this draft, I came across a working paper by some of the leading regulation scholars (Cunningham, Kagan & Thornton) who similarly suggest that, ‘…those who are differently motivated are likely to respond very differently to a deterrence strategy. While it may be effective when applied to the recalcitrant and perhaps to reluctant compliers, it will be counter-productive as regards corporate leaders …and irrelevant to the incompetent’. Nevertheless, they treat this challenge as too complex from a legal policy-making perspective. ‘[B]ut inspectors are for the most part, incapable of knowing the motivation of those they are regulating, with the result that a “pure” deterrence strategy may achieve very mixed results’. [ask Christine how should they be cited]

each age group to override their intuitive and automatic responses to such decisions. At a policy tradeoff level, the study demonstrates how some nudge solutions will work better for some populations and be ineffective or even counter-productive with others. In another study on whistleblowing, Feldman and Lobel find gender differences in people’s ethical commitment to compliance and social enforcement. Most importantly, these differences actively interact with the institutional and legal background rules. The kinds of law and psychology studies point to the problematic notion that a policymaker can simply choose a point of intervention without a deeper understanding about the interplay between identity-based characteristics and the policy solution.

III. A Spot on the Spectrum: Toward Schematic Solutions of Behavioural Tradeoffs

The tensions within the psychology literature reveal the need for a more nuanced regulatory framework and the expansion of the behavioural regulatory toolbox. Future work will need to create a fuller taxonomy of the areas of law where shifting the balance in one direction would be justified. As discussed above, different social challenges will point to different solutions on the spectrums of outcome/process; covert/expressive; mandatory/voluntary; targeted/universal. At times, the nature of the decision making, whether it involves a one shot choice or repeat over time behaviour will help determine the spot on the spectrum. In contexts like a pension plan, in which once the decision has been made, people are less likely to reverse it, sustainability is less important and hence getting people to the right choice (outcome being the dominant focus) might be more important than in areas like health or nutrition, where choices need to be reaffirmed on a daily basis. Similarly, the dilemma about the expressive versus invisible law will also be dependent on context. In areas where the expertise of the state, its moral or consensual power, is highly relevant, using it might outweigh the costs of informing people that the choice architecture presented to them is based on law. In social issues in which preferences for process are strong and the solutions contested, more weight should be given to process. Focusing on trust may be more important in areas that are difficult to monitor while focusing on directed regulation is desirable. With regard to the question of universality, focusing on the common denominator might be more important in areas in which the costs of mistakes are disproportionately large relative to the benefits of performing intrinsically. Since variation in motivations is likely to increase the chance of making mistakes and mistakes are costly, a greater analysis should be made in each context about the level of desirable compliance and its counter-costs. For example, in the context of trade secrets, one egregious
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leak may be detrimental to a company, while with many environmental protections, outcomes are
important but they are mostly with regard to long-term and aggregate behaviours. While the ultimate
goal may be to move as many people as possible to environmentally responsible behaviours, the costs of
some private non-compliance are not very high. In other words, in this context making few mistakes in
motivations is not as costly since the effort is to increase the average recycling.

Conclusion

This chapter aims to demonstrate the importance of an enriched perspective of law and psychology
research for next generation behavioural legal policies. We argue that often nudge style approaches
overemphasise certain behavioural insights while ignoring others. The result is that that many legal
interventions advocated by behavioural law and economics are based on a tunnel vision that obscure the
wealth and complexities of contemporary behavioural research and may result in inadvertent effects.
Even when accounting for all aspects of the behavioural landscape, an informed and integrative
policymaker must take into account inherent tradeoffs between these conflicting psychological effects.
Such balancing should be based not only on theoretical understanding but also on a combination of
empirical research and normative considerations, which will consider the context of the specific reform
at hand. It is our belief that by working through these behavioural tradeoffs, it is possible to generate a
more sophisticated and enriched use of behavioural economics in legal policy.

105 At the same time, here too an overly broad definition of trade secrets and misappropriation can have detrimental
consequences to innovation. Orly Lobel, Talent Wants to be Free (Yale University Press 2013); Yuval Feldman, ‘The
Empirical Legal Studies 177