

## Nudging Corporate Compliance

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## **Nudging Corporate Compliance**

Todd Haugh

### **Abstract**

Companies are nudging. That is, they are using the tools of behavioral science as pioneered by behavioral economists and promoted by policymakers to steer employees toward welfare-maximizing options. While companies began nudging to increase employee health, safety, and financial literacy, choice architecture is now being used to make employees more ethical. “Behavioral ethics nudging” is seen as the future of corporate compliance because it offers an evidence-based, cost effective way to reduce the risks of respondeat superior liability. Amid that promise, however, lies a nagging unease. Behavioral ethics research demonstrates that ethical decision making is influenced, often subconsciously, by situational and social factors. When a company alters the conditions under which its employees make decisions, their ethical behavior can be changed without them knowing it. Thus, the intent of behavioral ethics nudging may be laudable—to increase employee ethicality and improve compliance—but it is also susceptible to becoming a tool of unwanted behavioral manipulation.

This Article undertakes the first detailed analysis of the role of behavioral ethics nudging in corporate compliance. Viewing the issue from an empirical and normative lens, it finds that while nudging offers important compliance opportunities, it must be implemented with caution. That is because nudging employees to be more ethical is conceptually distinct from governmental nudges popularized as a way of promoting public welfare. Companies that simply import public policy nudges into the workplace may find them wholly ineffective as a compliance strategy. Moreover, behavioral ethics nudging may violate deeply held notions of personal autonomy, especially when it surreptitiously capitalizes on employees’ cognitive irrationalities. While some autonomy costs may be justified under legal doctrines and consequentialist analysis, a significant question remains whether behavioral ethics nudges are ethical themselves. Drawing on this analysis, which is supported by extensive behavioral ethics research, the Article offers a simple framework companies can use when contemplating employing behavioral ethics nudging as part of their compliance regimes.

**Keywords:** nudge, nudging, behavioral ethics, behavioral economics, behavioral ethics nudging, compliance, corporate compliance, white collar crime, ethics, business ethics, behavioral science, moral psychology

### INTRODUCTION

Nudges, small design elements that structure the context in which choice is made, seem to be everywhere. In Flint, Michigan, members of the government’s Social and Behavioral Sciences Team recently met with community leaders to help create flyers asking families to note when, where, and how they planned to change their water filters.<sup>1</sup> Crafting the flyer as a type of pledge—in behavioral science terms, an implementation prompt—rather than a simple informational handout, nudged families to follow through, thereby reducing the harmful effects caused by the city’s lead contaminated water.<sup>2</sup> A group from the U.K. government’s Behavioral Insights Team sends letters to British doctors who are overprescribing antibiotics.<sup>3</sup> Just by highlighting that they are outliers compared to their peers, through what is called descriptive social norming, the doctors are nudged to prescribe less, which reduces antibiotic resistance among kids.<sup>4</sup> The Qatari government also has its own “nudge unit,” the purpose of which is to “positively appl[y] to an entire country and by extension, a whole region” the findings of behavioral science research.<sup>5</sup> The unit’s main domestic project is to help shape policy related to the country’s hosting of the 2022 FIFA World Cup.<sup>6</sup>

Although first conceived as a public policy tool, nudges are not limited to government. Because nudges are by definition simple interventions that have the ability to change behavior—possibly of many people at low cost—companies have also taken notice.<sup>7</sup> In fact, a number of the world’s most well-known companies have hired in-house behavioral scientists to develop nudges.<sup>8</sup> Google is perhaps best known for its attempts to use choice architecture to increase healthy eating. The company displays colorful photos and interesting facts about unpopular vegetables served at its cafeterias in an attempt to motivate employees to eat better.<sup>9</sup> Other companies

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<sup>1</sup> Sarah Stillman, *Can Behavioral Science Help in Flint*, NEW YORKER (Jan. 23, 2017), <http://www.newyorker.com/magazine/2017/01/23/can-behavioral-science-help-in-flint>.

<sup>2</sup> *Id.*

<sup>3</sup> THE BEHAVIOURAL INSIGHTS TEAM, UPDATE REPORT 2013-2015 16, [http://38r8om2xjhh125mw24492dir.wpengine.netdna-cdn.com/wp-content/uploads/2015/08/BIT\\_Update-Report-Final-2013-2015.pdf](http://38r8om2xjhh125mw24492dir.wpengine.netdna-cdn.com/wp-content/uploads/2015/08/BIT_Update-Report-Final-2013-2015.pdf). See also Hunt Allcott, *Social Norms and Energy Conservation*, 95 J. PUB. ECON. 1082, 1092–93 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> *SC Launches First ‘Nudge Unit’ in the Middle East*, Supreme Committee for Delivery & Legacy (Aug. 2, 2016), <http://www.sc.qa/en/news/sc-launch-first-nudge-unit-in-the-middle-east>.

<sup>6</sup> *Id.*

<sup>7</sup> Nudges are a tool of “choice architecture,” the practice of influencing choice by changing the manner in which options are presented, primarily through defaults and framing. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3–4, 6 (2008).

<sup>8</sup> See Fadi Makki, *Nudge Units Are Just the Tool for Effective Policy*, THE NAT’L (Jan. 9, 2017), <http://www.thenational.ae/business/economy/nudge-units-are-just-the-tool-for-effective-policy> (reporting that Bank of America, Facebook, Google, HSBC, HM Revenue & Customs, and Allianz have advertised and hired for behavioral scientists).

<sup>9</sup> Zoe Chance & Ravi Dhar, *Making the Best Choice the Easy Choice: Applying the 4Ps Framework for Behavioral Change at Google*, in THE BEHAVIOURAL ECONOMICS GUIDE 2016 94–95 (Alain Samson ed., 2016), <http://www.behavioraleconomics.com/BEGuide2016.pdf>.

use similar “private nudges” to increase employee wellness,<sup>10</sup> safety,<sup>11</sup> and financial literacy.<sup>12</sup> Many in behavioral science suggest that if the government can nudge for good, private companies should be doing the same.<sup>13</sup>

The use of private nudges to foster pro-social behavior seems particularly attractive in the context of corporate compliance. Because companies face broad *respondeat superior* liability for the acts of their employees, they have a significant interest in preventing unethical and illegal behavior.<sup>14</sup> Indeed, the first goal of any compliance program is to prevent corporate agents from violating the law. While this may be a top priority for companies, effectively managing compliance risk remains elusive. Large companies spend millions of dollars a year on compliance, some hiring “hundreds, and even thousands of compliance officers at a time,” yet most are unsure of how to best deter wrongdoing.<sup>15</sup> Despite a sustained focus on curbing bad corporate behavior over the past two decades, and a resulting boom in the compliance industry, corporate America is still searching for compliance strategies that are evidence-based, demonstrably successful, and cost effective.<sup>16</sup>

Enter *behavioral ethics nudging*, the private use of choice architecture specifically aimed at making employees more ethical.<sup>17</sup> This behavioral tool offers a new approach to foster ethical decision-making within

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<sup>10</sup> See *New Research Reveals a Simple “Nudge” that Significantly Increases Employee Health Engagement*, BUS. WIRE (June 13, 2011, 4:44 PM), <http://www.businesswire.com/news/home/20110613006812/en/Research-Reveals-Simple-“Nudge”-Significantly-Increases-Employee> (describing initiative at a large Midwestern utility firm using targeted mailings to nudge older or chronically ill employees to obtain flu shots).

<sup>11</sup> MAPI, *Just a Nudge: Behavioral Economics at the Office*, MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION (Feb. 1, 2016), <http://www.mapi.net/blog/2016/02/just-nudge-behavioral-economics-office> (describing OSHA pushing employers to publish information about workplace fatalities and serious injuries so as to nudge company-wide safety efforts).

<sup>12</sup> James Choiet al., *Small Cues Change Savings Choices*, National Bureau of Economic Research, Working Paper No. 17843, at 24–25, <http://www.nber.org/papers/w17843.pdf> (discussing a study finding that savings choices are significantly affected by anchoring, goal-setting, or savings threshold cues embedded in emails sent to employees about their 401(k) retirement plans).

<sup>13</sup> See Alberto Alemanno, *The Future of Behavioral Change: Public or Private Nudging?*, EUR. BRANDS ASS’N (May 6, 2015), [http://www.aim.be/uploads/member\\_news\\_documents/AIM-LectureBrochure\\_Nudging\\_FIN\\_WEB.pdf](http://www.aim.be/uploads/member_news_documents/AIM-LectureBrochure_Nudging_FIN_WEB.pdf); Linnea Gandhi, *So You Want to Jump on the “Nudging” Bandwagon? Start with your Employees*, MISBEHAVING BLOG (Dec. 29, 2015), <http://www.misbehavingbook.org/blog/2015/12/29/so-you-want-to-jump-on-the-nudging-bandwagon-start-with-your-employees> (advocating that companies should “jump on the nudging bandwagon” by starting with their employees to improve everything from savings rates to mental health).

<sup>14</sup> See Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1570–74 (1990) (discussing history of corporate liability based on doctrine of *respondeat superior*).

<sup>15</sup> Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077, 2105 (2016) (“In spite of all this effort, it remains difficult to demonstrate the effectiveness of the compliance function.”).

<sup>16</sup> See *id.* at 2102, 2106. See also Philip M. Nichols, *Maximizing Stakeholder Trust as a Tool for Controlling Corruption*, INT’L CENTRE FOR COLLECTIVE ACTION 1 (Oct. 2016), <http://collective-action.com/sites/collective.localhost/files/icca-may16-renov/collective-action-conference-2016-nichols.pdf> (discussing the difficulty of measuring compliance impact, especially positive corporate culture).

<sup>17</sup> Although this article originates the term “behavioral ethics nudging,” the concept has been minimally explored in management and legal scholarship. See John Beshears & Francesca Gino, *Leaders as Decision Architects: Structure Your Organization’s Work to Encourage Wise Choices*, 93 HARV. BUS. REV. 52, 52 (2015) (urging business leaders to become “decision architects” and claiming to have developed an “approach for structuring work to encourage good decision making”); Scott Killingsworth, *Behavioral Ethics: From Nudges to Norms*, BRYANCAVE.COM 3 (2017),

## Nudging Corporate Compliance

the corporation to lessen the compliance risk associated with employee wrongdoing. That nudges are easy to implement, have the potential for outsized impact, and are in vogue make them particularly appealing.<sup>18</sup> Not surprisingly, then, behavioral ethics nudging finds itself on the cutting edge of corporate compliance strategy. Some of America's largest and most respected companies see nudging as the future of their compliance initiatives.<sup>19</sup>

Amid that promise, however, lies a nagging unease. Behavioral ethics research tells us that a host of situational and social factors influence ethical decision-making.<sup>20</sup> Therefore, altering the conditions under which individuals make decisions can change their ethical behavior—this is the intellectual and empirical underpinning of behavioral ethics nudging. But behavioral science also tells us that much of our decision-making happens subconsciously, which means our behavior can be altered without us knowing it.<sup>21</sup> In fact, some of the most effective choice architecture operates “in the dark,” driving our behavior with little indication of its influence.<sup>22</sup> This has caused critics to question the ethics of nudging, particularly its impact on individual welfare, autonomy, and dignity.<sup>23</sup> The critiques have been largely overcome, at least as to public policy nudges, based on assertions that choice architecture is inevitable, consistent with democratic norms, and, if administered transparently and subject to public scrutiny, fully legitimate.<sup>24</sup>

However, these assertions lose much of their force when directed at *private* uses of choice architecture, specifically behavioral ethics nudging. While the intended use of nudges to increase employee ethicality may be laudable, it is also susceptible to becoming a tool of unwanted behavioral manipulation—assuming it can even achieve the goals of corporate compliance in the first place. Yet, if behavioral ethics nudging does significantly reduce unethical behavior within companies, it may be one of the most important advances in corporate compliance in decades—a unique tool in the fight against corporate wrongdoing benefiting employees, companies, and the public. Considering the stakes, and given that this issue has been largely ignored in business and legal scholarship, a detailed analysis of the role of behavioral ethics nudging in corporate compliance is warranted.<sup>25</sup>

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<http://ethicalsystems.org/content/behavioral-ethics-nudges-norms> (recognizing the role of nudges as a new compliance tool but questioning their effectiveness).

<sup>18</sup> Stillman, *supra* note 1, at 2.

<sup>19</sup> For example, JPMorgan is using proprietary software to monitor email and telephone communications of its traders. When it detects, through “predictive monitoring,” a future trade that may violate a legal or ethical rule, it nudges the trader to reconsider. Hugh Son, *JPMorgan Algorithm Knows You're a Rogue Employee Before You Do*, BLOOMBERG (Apr. 5, 2015), <http://www.bloomberg.com/news/articles/2015-04-08/jpmorgan-algorithm-knows-you-re-a-rogue-employee-before-you-do>.

<sup>20</sup> See, e.g., Robert Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) to Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 36 (2015).

<sup>21</sup> See Max H. Brazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. LAW SOC. SCI. 85, 91, 96 (2012).

<sup>22</sup> Luc Bovens, *The Ethics of Nudge*, in PREFERENCE CHANGE 217 (Till Grune-Yanoff & Sven Ove Hansson eds., 2009).

<sup>23</sup> See, e.g., Cass Sunstein, *The Ethics of Nudging*, 32 YALE J. REG. 413, 414 (2015) [hereinafter *Ethics*]; CASS R. SUNSTEIN, *THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE* 53 (2016); Karen Yeung, *Nudge as Fudge*, 75 MODERN L. REV. 122, 135 (2012).

<sup>24</sup> Sunstein, *supra* note 23, at 415.

<sup>25</sup> This article does not address the use of nudges and other behavioral marketing strategies by companies to influence consumer behavior. While the ethical boundaries of those practices are worth exploring, the focus here is on the intracorporate use of choice architecture for purposes of corporate compliance. For an introduction to the issue of behavioral

This article undertakes that analysis, evaluating the practice through both an empirical and normative lens. While behavioral ethics nudging offers important opportunities for compliance, it must be implemented with caution. That is because nudging employees to be more ethical is conceptually distinct from governmental nudges popularized as a way of promoting public welfare. Public policy nudges, which were created by behavioral economists seeking to align individual choice and rational self-interest, are much different than behavioral ethics nudges, which attempt to prevent people from acting self-interestedly.<sup>26</sup> As a result, companies that simply import public policy-style choice architecture into the workplace may find it wholly ineffective as a compliance strategy.

Moreover, behavioral ethics nudging may also violate employees' deeply held normative notions of personal autonomy. This is especially true for nudges that secretly harness the reactive decision-making process, steering ethical choice by capitalizing on cognitive irrationalities.<sup>27</sup> While some "autonomy costs" on employees may be justified under legal doctrines related to at-will employment and the principal-agent relationship, as well as through consequentialist analysis, there remains a significant question of whether these nudges are ethically appropriate. While that may be problematic in-and-of-itself, it generates a secondary concern that has deeper implications: companies that get behavioral ethics nudging wrong may actually undermine their larger corporate compliance efforts, thereby increasing unethical behavior and amplifying compliance risk. Put bluntly, behavioral ethics nudging may end up being a bad idea because of what it does not and should not do, requiring a reevaluation of its promise as a compliance panacea.

This article proceeds in three parts. Part I explains what nudges are and their genesis in behavioral science, as well as touching on how they so quickly rose to prominence as a public policy tool. Part II explores how nudges are being used in corporate compliance. In addition to identifying current uses of behavioral ethics nudging in leading companies, it also situates their use in light of the goals of compliance and the findings of behavioral ethics research. Part III addresses the implications of nudging corporate compliance, analyzing the issue from an empirical and normative standpoint. This analysis reveals significant impediments to companies effectively and ethically nudging their employees to be more ethical, especially when companies use high autonomy cost nudges, such as those that surreptitiously exploit cognitive irrationalities with little direct evidence that they increase employee ethicality. This part concludes with an ethicality matrix, a simple framework that companies can use when contemplating employing this cutting edge behavioral tool as part of their compliance regimes.

## I. THE RISE OF NUDGING

One of the most fascinating things about nudging, aside from the behavioral science at its core, is how quickly it has taken hold in government and business. Nudges were widely introduced only a few years ago, and they are now used to shape policy around the world; this suggests both their great ability to affect behavior and a confluence of social and political factors leading to their broad implementation. A discussion of this background is important for understanding how behavioral ethics nudges have become part of corporate compliance, and also how they are distinct from public policy nudges used by government.

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marketing, see Fiona Spotswood, Jeff French, Alan Tapp & Martine Stead, *Some Reasonable but Uncomfortable Questions About Social Marketing*, 2 J. SOC. MKT'G 163, 165 (2012).

<sup>26</sup> See Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 17 (Eyal Zamir and Doron Teichman eds., 2014).

<sup>27</sup> See Yeung, *supra* note 23, at 136–137.

### A. The Origin and Application of the Nudge

In 2008, behavioral economist Richard Thaler and legal scholar Cass Sunstein published their seminal book, *Nudge: Improving Decisions About Health, Wealth and Happiness*.<sup>28</sup> In what quickly became a bestseller, Thaler and Sunstein made the case for using choice architecture, the environment in which choice is made, to alter individual behavior.<sup>29</sup> According to them, deliberately structuring choice could help people make better decisions, benefiting themselves and society.<sup>30</sup> They encouraged choice architects, “those responsible for organizing the context in which people make decisions,” to frame choice in a manner that “alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”<sup>31</sup> Thaler and Sunstein collectively labeled these design features “nudges.”<sup>32</sup>

Although “nudge” now serves as a blanket term for all aspects of choice architecture, to qualify as a true nudge there are significant caveats.<sup>33</sup> For one, a nudge has to preserve freedom of choice to a large degree. As Sunstein puts it, “[i]f an intervention imposes significant material costs on choosers, it might of course be justified but it is not a nudge.”<sup>34</sup> This would preclude bans or mandates from being called nudges, as well as many other familiar legal and regulatory tools such as subsidies, taxes, fines, or criminal penalties.<sup>35</sup> While a nudge is free to “steer[] people in a particular direction,” it ceases to be one if it does not “allow them to go their own way.”<sup>36</sup> What is left for choice architects intent on changing behavior are tools such as reminders, warnings, prompts, anchors, frames, and default rules.<sup>37</sup>

Second, true nudges increase the welfare of the people being nudged. Although Thaler and Sunstein clearly contemplate that choice architecture may be used to do harm, under their conception an intrinsic quality of a nudge is that it intends to do good.<sup>38</sup> Of course this begs the question of who makes the determination of what is good and by what measure, but as a general matter, nudges are not to be “employed to sway people to make bad decisions they will later regret.”<sup>39</sup> The most basic way this is achieved, Thaler and Sunstein assert, is

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<sup>28</sup> THALER & SUNSTEIN, *supra* note 7.

<sup>29</sup> *See id.* at 3–4, 6 (explaining that choice architects should be “self-consciously attempting to move people in directions that will make their lives better”).

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 3, 6. Notably, Thaler and Sunstein recognized that employers are “important choice architects.” *Id.* at 6.

<sup>32</sup> *Id.* at 4.

<sup>33</sup> For example, there appears to be an entire genre of books dedicated to spiritual nudges, whereby decision making is structured by the Almighty. *See generally* AUTUMN SHIELDS, *LIVING YOUR LIFE ALIVE: LEARNING TO LISTEN AND FOLLOW YOUR INNER NUDGE* (2015) (providing examples of spiritual nudges influencing decision-making). We can safely assume this is not what Thaler and Sunstein had in mind.

<sup>34</sup> Sunstein, *supra* note 23, at 417.

<sup>35</sup> *Id.*; THALER & SUNSTEIN, *supra* note 7, at 6.

<sup>36</sup> Sunstein, *supra* note 23, at 417. Paternalistically not allowing someone to easily choose another path might be considered a “shove.” Richard J. Arneson, *Nudge and Shove*, 41 *SOC. THEORY & PRAC.* 668, 691 (2015).

<sup>37</sup> Sunstein, *supra* note 23, at 417, 428. For a more complete list of nudges, see Alian Samson, *Behavioral Science: Theory and Practice*, in *THE BEHAVIORAL ECONOMICS GUIDE 2015* 13–14 (Alain Samson ed., 2015), <http://www.behavioraleconomics.com/BEGuide2015.pdf>.

<sup>38</sup> Sunstein, *supra* note 23, at 417, 420; THALER & SUNSTEIN, *supra* note 7, at 239–41.

<sup>39</sup> Richard H. Thaler, *The Power of Nudges, for Good and Bad*, *N.Y. TIMES* (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/upshot/the-power-of-nudges-for-good-and-bad.html>. Again, notably, Thaler and



by designing nudges that help people make the decisions they otherwise would if they were to “pa[y] full attention and possess[] complete information, unlimited cognitive abilities, and complete self-control.”<sup>40</sup> Put another way, nudges aid us in becoming more like *homo economicus*, who always makes rational decisions in line with his long-term self-interests.<sup>41</sup> This benefits both the individual and society by increasing overall welfare.<sup>42</sup>

The qualifications for determining what is a true nudge are important because nudges are presented and justified by Thaler and Sunstein as part of a new “libertarian paternalism” movement.<sup>43</sup> As they explain it, libertarian paternalism is a “relatively weak, soft, and non-intrusive” form of paternalism that combines the features of traditional paternalism, which allows government and business to intervene in people’s lives to make them better off, with libertarian traditions that protect individual freedom of choice.<sup>44</sup> While the contradictions here are apparent, as is the expected chorus of critiques,<sup>45</sup> Thaler and Sunstein attempt to preempt them by defining their brand of paternalism narrowly: interventions that influence choices to make individuals better off, *as judged by themselves*.<sup>46</sup> This standard, coupled with the ease in which nudges can be avoided—recall they must be cheap and easy to ignore—allows for the argument that nudges are autonomy respecting.<sup>47</sup> At the very least, according to Thaler and Sunstein, nudges are less objectionable than other hard policy tools because they do not explicitly override people’s underlying preferences.<sup>48</sup>

Taken all together, the concept of nudging can best be encapsulated as follows:

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Sunstein highlight the special dangers of private nudges in this regard, although not of those directed at employees per se. See THALER & SUNSTEIN, *supra* note 7, at 239–40 (discussing private nudges aimed at consumers).

<sup>40</sup> THALER & SUNSTEIN, *supra* note 7, at 5.

<sup>41</sup> *Id.* at 6. See On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2106–07 (2008) for a detailed discussion of the difference between economic man and “the real ‘Human.’” See also Meredith J. Harbach, *Nudging Parents*, 19 J. GENDER, RACE & JUST. 73, 89–90 (2016). Of course, determining preferences is difficult and may lead to a number of empirical and normative concerns. See, e.g., Arneson, *supra* note 36, at 678; Yeung, *supra* note 23, at 128. For purposes of this article, it is assumed that making decisions as *homo economicus* is a positive for most people, and those peoples’ long-term preferences follow suit. These are significant assumptions and far from unassailable. See Riccardo Rebonato, *A Critical Assessment of Libertarian Paternalism*, 37 J. CONSUMER POL’Y 357, 364 (2014).

<sup>42</sup> See THALER & SUNSTEIN, *supra* note 7, at 5–6.

<sup>43</sup> *Id.* at 5.

<sup>44</sup> *Id.* Sunstein says elsewhere that libertarian paternalism is a “distinctive form of paternalism in the sense that it is at once a) soft and b) means-oriented.” Sunstein, *supra* note 23, at 433.

<sup>45</sup> A libertarian blog in the U.K. declared a “war on nudge” and many academics followed suit. Pelle Guldborg Hansen & Andreas Maaloe Jespersen, *Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy*, 4 EUR. J. RISK REG. 3, 3 (2013).

<sup>46</sup> THALER & SUNSTEIN, *supra* note 7, at 5. This might also be characterized as soft paternalism, which “involves intervention to prevent an agent from doing X, where the paternalist judges that, relative to the *agent’s own views* of his or her self-interest, the doing of X is in the agent’s interest.” Yeung, *supra* note 23, at 134. This does not address concerns raised by libertarians that the paternalist is the judge of the agent’s preference or that the agent’s preference is even knowable. *Id.* at 134–35.

<sup>47</sup> THALER & SUNSTEIN, *supra* note 7, at 6; Sunstein, *supra* note 23, at 438.

<sup>48</sup> See Yeung, *supra* note 23, at 134 (comparing soft paternalism with hard paternalism, defined as an “intervention to prevent the agent from doing X where the paternalist judges that, relative to the *paternalist’s view* of what is in the agent’s best interest, the doing of X is not in the agent’s interest”).

Nudges are simple interventions designed to promote desirable choices—such as compliance choices—by taking advantage of psychology . . . [including] a growing list of mental shortcuts, cognitive biases, and psychological quirks that subconsciously influence, and often sabotage, our decisions. Nudges are designed to either harness or neutralize these tendencies, and help us make better decisions, by subtly altering the decision-making process or the mental context in which the decision is made.<sup>49</sup>

While this conception is comprehensive, it fails to convey the import of nudges—how they actually impact decision-making and behavior in real life. Fortunately, there are many real life examples because nudges have been so widely adopted by government. As mentioned above, both the U.S. and U.K. governments have active “nudge units” charged with enhancing public policy through behavioral insights.<sup>50</sup> In addition to improving water filtration rates and reducing over-prescription of antibiotics, nudges have been used to increase 401(k) retirement savings, optimize stimulus spending, improve tax compliance, and lower youth alcohol consumption.<sup>51</sup>

A detailed look at the 401(k) example provides a more complete picture of how nudges operate. It turns out that enrolling in a 401(k) plan is an obstacle for many Americans, who on the whole do not save enough for retirement.<sup>52</sup> Eligible employees fail or delay enrolling in 401(k) plans for a host of reasons, although contributing offers significant tax benefits and matching employer funds. Be it from laziness, frivolousness, lack of knowledge, or lack of education, roughly thirty percent of eligible employees fail to enroll; therefore, they are under-saving for their retirement.<sup>53</sup> As Thaler and Sunstein put it, “[t]hese folks could clearly use a nudge.”<sup>54</sup>

Studies conducted by behavioral economists found that simply by changing the default enrollment provisions of 401(k) plans from “opt-in,” in which employees have to fill out forms and make investment choices to begin saving, to “opt-out,” in which employees are automatically enrolled but can elect to stop saving, enrollment rates increased to ninety-eight percent.<sup>55</sup> Structuring choice in this manner nudged employees to make the optimal decision, one that increased their welfare long-term.

In 2009, the Obama administration used these findings to create a package of regulations that encouraged employers to adopt automatic enrollment plans.<sup>56</sup> In effect, the government nudged companies to

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<sup>49</sup> Killingsworth, *supra* note 17, at 1 (citation omitted).

<sup>50</sup> See EXEC. OFFICE OF THE PRESIDENT: NAT’L SCI. AND TECH. COUNCIL, SOCIAL AND BEHAVIORAL SCIENCES TEAM 2016 ANNUAL REPORT, 1–2, <https://sbst.gov/download/2016%20SBST%20Annual%20Report.pdf> (outlining policy projects undertaken by behavioral sciences team) [hereinafter ANNUAL REPORT 2016]; UPDATE REPORT, *supra* note 2, at 1 (discussing the success of U.K.’s Behavioral Insights Team and the adoption of its practices around the world).

<sup>51</sup> Hansen & Jespersen, *supra* note 45, at 4. See also SUNSTEIN, *supra* note 23, at 28 (listing examples of nudges used around the world).

<sup>52</sup> THALER & SUNSTEIN, *supra* note 7, at 103, 106–07. This is not an undisputed claim, but studies show that employees believe they are not saving enough. And as Thaler and Sunstein demonstrate, the costs of under-saving are much greater than that of over-saving. *Id.*

<sup>53</sup> *Id.* at 107.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 109. Defaults are a classic tool of behavioral economists and specifically contemplated as nudges. *Id.* at 83–87. They are most effective when individual preferences are weak. See Chance & Dhar, *supra* note 9, at 94.

<sup>56</sup> Edmund L. Andrews, *Obama Outlines Retirement Initiatives*, N.Y. TIMES (Sept. 5, 2009), <http://www.nytimes.com/2009/09/06/us/politics/06address.html> (reporting on four new initiatives by the Obama administration, all based on behavioral research that encourages people to save in a systematic way).

nudge their employees, the result of which was increased saving rates.<sup>57</sup> In 2015, President Obama issued an executive order requiring all federal agencies to integrate behavioral science insights into the design of their policies.<sup>58</sup> Thus, in roughly seven years, nudges had gone from idea to implementation across all sectors of U.S. regulatory policy.<sup>59</sup>

## B. The Behavioral Science Behind Nudging

One of the reasons nudging has taken hold so quickly in policy circles should be obvious: it works incredibly well as a behavioral tool. Yet, at its essence, nudging is more of a repair than an enhancement. Nudging works as a policy tool because of our inherent cognitive quirks and limitations, flaws in our thinking that prevent us from deliberately and rationally reasoning our way through decisions—nudges help fix that.<sup>60</sup> But to merely call them a fix glosses over the behavioral science at the core of choice architecture. Understanding the science is critical for appreciating how, and to what extent, private nudges can impact ethical decision-making.

The behavioral science behind nudging begins with the groundbreaking work of Daniel Kahneman and Amos Tversky.<sup>61</sup> They found that individuals possess both intuitive and reasoning cognitive processes.<sup>62</sup> The intuitive, or System 1, process is “fast, automatic, effortless, associative, and often emotionally charged.”<sup>63</sup> Because it operates by associative memory, it is “governed by habit and therefore difficult to control or

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<sup>57</sup> See THALER & SUNSTEIN, *supra* note 7, at 115–17.

<sup>58</sup> ANNUAL REPORT, *supra* note 50, at i. The fate of that executive order, and indeed the entire Behavioral Sciences Team, is unclear under the new Trump administration. See Stillman, *supra* note 1.

<sup>59</sup> That there were two influential proponents of nudges working on both sides of the Atlantic during a time of great financial stress undoubtedly fueled the rise of the nudge movement. Thaler began formally advising then-Prime Minister David Cameron’s administration in 2010, coinciding with the height of the global recession. See Courtney Subramanian, ‘Nudge’ Back in Fashion at White House, TIME (Aug. 9, 2013), <http://swampland.time.com/2013/08/09/nudge-back-in-fashion-at-white-house/>. He had met with Cameron as early as 2008 to promote his theories. See Guy Adams, *First Obama, Now Cameron Embraces ‘Nudge Theory,’* INDEPENDENT (Aug. 11, 2010), <http://www.independent.co.uk/news/uk/politics/first-obama-now-cameron-embraces-nudge-theory-2050127.html>. In 2009, Sunstein was named the White House regulatory “tsar,” heading the Obama administration’s Office of Information and Regulatory Affairs. *Id.* In that role, he was charged with reviewing every new regulation the government issued. See Courtney Subramanian, ‘Nudge’ Back in Fashion at White House, TIME (Aug. 9, 2013), <http://swampland.time.com/2013/08/09/nudge-back-in-fashion-at-white-house/>. . See also Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 784 (2014).

<sup>60</sup> See Beshears & Gino, *supra* note 17, at 6 (stating that nudges are the solution for a series of systematic biases and cognitive faults).

<sup>61</sup> To put into perspective how groundbreaking their work was, Kahneman, a psychologist, was awarded the Nobel prize in economics. Stephanie Denning, *How Kahneman Won The Nobel Prize*, ECONOMIST (Dec. 28, 2016), <http://www.forbes.com/sites/stephanieldenning/2016/12/28/the-undoing-project-how-to-judge-a-book-by-its-cover/#7aa99a5a67d9>. He is one of the few non-economists to have received it. See Catherine Rampell, *Are Non-Economists Taking Over the Economics Nobel?*, N.Y. TIMES (Oct. 14, 2009), <https://economix.blogs.nytimes.com/2009/10/14/are-non-economists-suddenly-taking-over-the-economics-nobel/>.

<sup>62</sup> Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1450 (2003). This is also called “dual system theory.” Alian Samson, *Selected Behavioral Science Concepts*, in THE BEHAV. ECON. GUIDE 2016 106 (Alain Samson ed., 2016), <http://www.behavioraleconomics.com/BEGuide2016.pdf>.

<sup>63</sup> Kahneman, *supra* note 62, at 1451.

modify.”<sup>64</sup> This system of thinking, sometimes called the Automatic System, may not seem like thinking at all.<sup>65</sup> That is because a lot happens through System 1 all at once. The mind offers associations rapidly, one idea being evoked after another, all linked effortlessly.<sup>66</sup> The speed and ease in which System 1 operates means that “most of the work of associative thinking is silent, hidden from our conscience selves.”<sup>67</sup>

In contrast, the reasoning, or System 2, process operates much more slowly and carefully.<sup>68</sup> It is “serial, effortful, and deliberately controlled,” subject to logic and rules.<sup>69</sup> System 2 thinking, also referred to as the Reflective System, is engaged when we use thought in an organized manner; for example, when we solve a complex math problem, write a paragraph, or contemplate pros and cons to make a tough decision.<sup>70</sup> Not surprisingly, System 2 thinking requires significantly more cognitive load than System 1.<sup>71</sup> In fact, a person using their System 2 process at “full tilt” can only do so for a very short time.<sup>72</sup> All that effort is worth it, of course, because System 2 is how we thoughtfully deal with new tasks when there are no easy associations to make.<sup>73</sup> It is the type of thinking that gives us the “experience of agency, autonomy, and volition.”<sup>74</sup> The features of each thinking system are shown in Table 1.

**Table 1: Dual modes of thinking**

<b>System 1 – Automatic thinking</b>	<b>System 2 – Reflective thinking</b>
Associative	Deductive
Effortless	Effortful
Uncontrolled	Controlled
Fast	Slow
Emotional	Rule-following
Subconscious	Self-aware
Low cognitive load	High cognitive load

That is not to say that System 2 is better than its counterpart; both systems have their place. Because System 1 thinking is effortless and efficient, it is suitable for making the vast majority of our daily decisions—

<sup>64</sup> *Id.*

<sup>65</sup> THALER & SUNSTEIN, *supra* note 7, at 19.

<sup>66</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 52 (2011).

<sup>67</sup> *Id.* Kahneman suggests that the capabilities of System 1 include “innate skills that we share with other animals,” such as to perceive the world we live in, recognize objects, orient our attention, avoid losses, and fear things that may hurt us. *Id.* at 21–22.

<sup>68</sup> See Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177, 206 (2016).

<sup>69</sup> Kahneman, *supra* note 62, at 1451.

<sup>70</sup> THALER & SUNSTEIN, *supra* note 7, at 20.

<sup>71</sup> Sunstein, *supra* note 68, at 206.

<sup>72</sup> KAHNEMAN, *supra* note 66, at 31. If this sounds surprising, try the Add-1 game: at a steady rhythm, flip over a card with a four digit number on it, and then state the number in which each of the four digits is increased by 1 (5294 would become 6305). As Kahneman’s studies show, this brings participants to the limits of the cognitive abilities within a few seconds and “[f]ew people can cope with more than four digits.” *Id.* at 31–32.

<sup>73</sup> *Id.* at 36–37.

<sup>74</sup> Hansen & Jespersen, *supra* note 45, at 13; see also KAHNEMAN, *supra* note 66, at 21.

imagine if we had to make a deliberate choice for each one of our routine daily activities.<sup>75</sup> But for more important decisions, System 2 thinking is required to ensure a thoughtful, and likely more accurate, outcome.<sup>76</sup> The problem is that because of the greater cognitive load required to employ System 2, it is often supplanted by the less effortful System 1. This occurs because when overall mental effort is limited, which it always is in some way, effortful mental processes disrupt each other, while effortless ones “neither cause nor suffer much interference when combined with other tasks.”<sup>77</sup> Thus, reactive thinking tends to proliferate anytime we are under significant cognitive load.<sup>78</sup>

This last point hints at the perceived versus actual relationship between our dual modes of thinking. While most of us believe that we make decisions deliberately, the research tells us that can only be true for a small subset of decisions. Anytime our thinking is taxed by effort, rushed, or otherwise overwhelmed, we are susceptible to System 1 taking over.<sup>79</sup> Because this economy of mental processing is perpetually happening, the brain is continually offloading decision-making to System 1, leaving System 2 thoughtfully engaged in only the level of tasks it is able to manage.<sup>80</sup>

As such, the most we can hope for is that System 2 operates as a watchful monitor, kicking in when really important mental tasks arise or when it is needed to correct an error.<sup>81</sup> Studies show, however, that System 1 is the dominant mode of thinking—“most human decision making is done . . . by the unconscious system.”<sup>82</sup> This results in decisions, even important ones, that are subject to biases and heuristics based on past experience and limited information.<sup>83</sup> Even more troubling, when a decision is arrived at via the automatic system, we often support it *ex post* with the reflective system.<sup>84</sup> In other words, we use System 2 to justify our System 1 conclusions.

Not surprisingly, shifting modes of thought from one system to another can have profound effects on decision-making. This finding serves as the foundation of choice architecture and nudging. Returning to the 401(k) example, it illustrates how nudges can alter or harness a mode of thinking. For the vast majority of employees who failed to enroll in a savings plan, their System 1 thinking was dominant when confronted with

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<sup>75</sup> KAHNEMAN, *supra* note 66, at 36.

<sup>76</sup> THALER & SUNSTEIN, *supra* note 7, at 21–22. A good way to think about the interaction between the two systems is to picture a big dog running toward you. System 1 is likely “squawking” (maybe screaming) at you to run because the dog might hurt you. System 2 reminds you that most dogs are pets, and pets are generally friendly, so you should stay put. *See id.* at 21.

<sup>77</sup> Kahneman, *supra* note 62, at 1451. Kahneman puts this more colloquially, calling System 2 “lazy.” KAHNEMAN, *supra* note 66, at 44.

<sup>78</sup> *See* Beshears & Gino, *supra* note 17 at 4 (“As the cognitive energy needed to exercise System 2 is depleted, problems of bias and inadequate motivation may arise.”).

<sup>79</sup> KAHNEMAN, *supra* note 66, at 31, 41 (explaining that people who are “cognitively busy” are less able to control their System 1 impulses and are more likely to make selfish choices, use sexist language, and make superficial social judgments).

<sup>80</sup> Kahneman, *supra* note 62, at 1451–52.

<sup>81</sup> *Id.* at 1467. “One of the main functions of System 2 is to monitor and control thoughts and actions ‘suggested’ by System 1, allowing some to be expressed directly in behavior and suppressing or modifying others.” KAHNEMAN, *supra* note 66, at 44.

<sup>82</sup> Kahneman, *supra* note 62, at 1467.

<sup>83</sup> *See id.* at 1467 (citing experiments showing that “people mostly don’t think very hard and that System 2 monitors judgments quite lightly”).

<sup>84</sup> KAHNEMAN, *supra* note 66, at 45. A great example of this is how adamantly test subjects will argue that the surfaces in the “two tables” optical illusion are not the same length, even after measuring them. *See* THALER & SUNSTEIN, *supra* note 7, at 17–18.

the decision to enroll. They reacted to the prospect of opting in, which required significant thought about future retirement needs and complex investments, by ignoring the decision or delaying it. Essentially, their reflective system was already overtaxed (or became so when considering the enrollment process) and so the decision was left to the automatic system. Unfortunately, 401(k) enrollment is a task that requires a System 2 mind to complete.<sup>85</sup> Switching to the opt-out enrollment regime—flipping the default—altered the choice architecture so that the dominant System 1 thinking that was already automatically engaged actually helped employees save; in fact, a System 2 override was now required to *not* save for retirement.

Further, this nudge—indeed, all nudges—operates against the backdrop of an individual’s preferences. Employees falling prey to System 1 thinking, who were then nudged into enrolling in a 401(k) plan, are now acting consistent with their true preferences. That is because saving reflects their “deeper preference” for a comfortable retirement over their “shallow desire” to spend the money otherwise or waste it through inaction.<sup>86</sup> This renders the nudge valid in two ways. First is by effectively increasing the savings rates of those nudged according to Thaler and Sunstein’s “as judges by themselves” standard.<sup>87</sup> Switching the default simply helps individuals achieve the goals they have already formulated. Second is allowing those being nudged to easily overcome the choice architecture imposed upon them.<sup>88</sup> Employees are free to not save if they want; they only need to briefly use their System 2 thinking to fill out a form opting them out of the plan.

Using behavioral science in this way appears to offer a win-win—a small intervention helps individuals overcome cognitive obstacles inhibiting their sincere preferences, which when realized maximizes individual and societal welfare. It is easy to see why policymakers are so enamored with nudging—it offers real behavioral change at little or no cost and is highly scalable. This may be why some call nudging the “ultimate tool” of public policy.<sup>89</sup>

## II. BEHAVIORAL ETHICS NUDGING

It is often said that innovation flows from business to government, not the other way around.<sup>90</sup> However, in the case of nudging, policymakers have outshone business leaders. Yet many in business are now beginning to see opportunities for the application of choice architecture within their companies to improve employee health, financial wellbeing, strategic decision-making, and productivity.<sup>91</sup> Choice architecture has also found its way

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<sup>85</sup> THALER & SUNSTEIN, *supra* note 7, at 108.

<sup>86</sup> Yeung, *supra* note 23, at 134.

<sup>87</sup> THALER & SUNSTEIN, *supra* note 7, at 5, 109. Others dispute whether such a nudge is actually aligning decisions with preferences, as libertarian paternalism suggests, or is more akin to a hard, paternalistic shove. See Yeung, *supra* note 23, at 134.

<sup>88</sup> THALER & SUNSTEIN, *supra* note 7, at 6.

<sup>89</sup> Hansen & Jespersen, *supra* note 45, at 7. That it is politically noncontroversial also matters greatly. Thaler and Sunstein argue that tools of libertarian paternalism should appeal to Democrats and Republicans alike, pointing to some early bipartisan successes. See THALER & SUNSTEIN, *supra* note 7, at 13–14.

<sup>90</sup> In 1989, Peter Drucker, the famed management consultant, wrote an article for *Harvard Business Review* titled “What Business Can Learn from Nonprofits.” Lawrence Greenspun & Rick Wartzman, *What Business Can Learn from Government*, HARV. BUS. REV. (Jan. 12, 2015), <https://hbr.org/2015/01/what-business-can-learn-from-government>. The concept was so counterintuitive at the time “readers thought the magazine had made a huge typo; surely, it had gotten things backwards.” *Id.*

<sup>91</sup> See, e.g., MAPI, *supra* note 11 (stating that the “idea of prodding people into making better decisions is a beguiling idea gaining traction with governments and employers alike” and discussing examples of nudging within the corporation);

into corporate compliance, where private nudging would seem to be a natural fit—increased ethical decision-making reduces legal and regulatory risk, which is one of the primary aims of a compliance program.

But before evaluating corporate America’s use of choice architecture to improve employee ethicality—what this article terms behavioral ethics nudging—it is important to understand the goals of corporate compliance, what the burgeoning field of behavioral ethics indicates about the ethical decision-making process, and how companies are currently using behavioral ethics nudging in their compliance programs. Because, as will be seen, importing nudges from government to business is more complicated, and potentially more problematic, than corporate leaders, compliance professionals, and legal and business academics realize.

#### A. *The Goals of Corporate Compliance*

Corporate compliance can be thought of as “a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law.”<sup>92</sup> Put more succinctly, compliance is a set of processes companies use to ensure that employees “do not violate applicable rules, regulations or norms.”<sup>93</sup>

Together, these definitions make explicit two areas of focus for corporate compliance regimes. The first is deterring violations of law, which may be criminal or civil in nature.<sup>94</sup> On the criminal side, compliance officers build and administer programs to prevent violations of state and federal laws prohibiting mainstay economic crimes such as money laundering, bribery, antitrust, and fraud.<sup>95</sup> Because companies are responsible for the acts of their employees through *respondeat superior* liability, compliance efforts attempt to deter individual criminal behavior.<sup>96</sup> This includes regulatory violations, which often form the basis of concurrent criminal and civil liability.<sup>97</sup>

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Tanjim Hossain & John A. List, *The Behavioralist Visits the Factory: Increasing Productivity Using Simple Framing Manipulations*, 58 MGMT. SCI. 2151 (2012) (first field experiment using framing nudges to increase worker productivity).

<sup>92</sup> Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009).

<sup>93</sup> Geoffrey P. Miller, *The Compliance Function: An Overview* 1 (Nov. 18, 2014) (unpublished manuscript) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2527621](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527621)). Sean Griffith offers a more behavioral-focused definition: “[C]ompliance is the set of internal processes used by firms to adapt behavior to applicable norms.” Griffith, *supra* note 15, at 2082.

<sup>94</sup> *But see* Matthew C. Turk, *Regulation by Settlement*, at 9 (forthcoming 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2954047##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954047##) (arguing that current enforcement mechanisms collapse any meaningful distinction between white collar crime criminal and civil regulatory violations for corporations).

<sup>95</sup> *See* Griffith, *supra* note 15, at 2082.

<sup>96</sup> *See* Pitt & Groskaufmanis, *supra* note 14, at 1570–74. This liability is expansive. As one commentator put it, “The bottom line is that a corporation is criminally, strictly, and vicariously liable for whatever crimes corporate personnel commit on company time unless they are on a frolic and detour for their own exclusive, personal benefit.” Paul J. Larkin, Jr. & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7, 8 (2016). *See also* Burlington Ind., Inc. v. Ellerth, 118 S. Ct. 2257, 2266 (1998) (explaining the scope of tort liability for employer based on employee’s actions).

<sup>97</sup> For example, banks must comply with a host of regulations enforced by the Securities and Exchange Commission, the Federal Reserve, the Office of the Comptroller of Currency, and the Federal Deposit Insurance Corporation. *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 24 (1997) (“[I]n cases arising under the securities laws, and under many other regulatory regimes, there is often no distinction between what the prosecutor would have to prove to establish a crime and what the relevant administrative agency or a private plaintiff would have to prove to show civil liability.”). There are at least 10,000—but possibly upwards of 300,000—regulatory provisions that expose companies to overlapping civil and criminal liability. *See* Ellen S. Podgor, *Symposium on*

## Nudging Corporate Compliance

On the civil side, compliance officers are guarding against actions from both self-regulatory organizations (SROs) and private litigants. SROs act as the “private police officers” for their industries.<sup>98</sup> While these organizations do not have the explicit powers of a government agency, they can and do investigate and sanction members and their companies for rule violations.<sup>99</sup> In addition, compliance programs attempt to prevent employee violations of tort-based statutes and regulations concerning workplace harassment and discrimination, occupational health, privacy, environmental protection, and health care, which expose companies to significant financial penalties and costs through traditional private litigation.<sup>100</sup>

The second area of focus for corporate compliance regimes is norm generation. Compliance programs attempt to deter corporate wrongdoing by “generating social norms that champion law-abiding behavior.”<sup>101</sup> That behavior includes following external laws, but also refers to abiding by internal company rules and culture.<sup>102</sup> Norms fill the gaps left by more formal statutory and regulatory enforcement mechanisms by exerting reputational pressure on employees to forego wrongdoing.<sup>103</sup> Many consider norm generation to be the “ethical culture” aspect of corporate compliance, and a majority of companies see creating an ethical business culture as an overarching goal of their compliance programs.<sup>104</sup>

In order to achieve legal deterrence and positive norm-generation, compliance programs operate on various levels. One is education.<sup>105</sup> Compliance professionals start by explaining to employees what the applicable laws and company policies are and how to comply with them.<sup>106</sup> In essence, compliance education

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*Overcriminalization: Introduction: Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, n.10 (2012).

<sup>98</sup> William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 5 (2013).

<sup>99</sup> For example, the Financial Industry Regulatory Authority (FINRA) ordered Barclays Capital to pay more than \$13 million in restitution for failing to prevent “unsuitable switching” between mutual funds by its customers. See Press Release, FINRA, FINRA Sanctions Barclays Capital, Inc. \$13.75 Million for Unsuitable Mutual Fund Transactions and Related Supervisory Failures (Dec. 29, 2015), <http://www.finra.org/newsroom/2015/finra-sanctions-barclays-capital-inc-1375-million-unsuitable-mutual-fund-transactions>.

<sup>100</sup> See Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 467 (2008); Miller, *supra* note 93, at 11 (discussing the effect that private litigation has on compliance programs).

<sup>101</sup> Baer, *supra* note 92, at 960. A definition of norm-based compliance is “the processes by which an organization seeks to ensure that employees and other constituents conform to applicable norms.” GEOFFREY P. MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 3 (2014).

<sup>102</sup> *Id.*

<sup>103</sup> Baer, *supra* note 92, at 960. Social norms are often more powerful than legal proscriptions. See Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 438–39 (2003) (describing how norms expressed by Enron’s culture overrode internal rules and external laws).

<sup>104</sup> THOMSON REUTERS, *TOP 5 COMPLIANCE TRENDS AROUND THE GLOBE IN 2016* (2016), <https://risk.thomsonreuters.com/content/dam/openweb/documents/pdf/risk/infographic/top-5-compliance-trends-around-globe-2016-infographic.pdf> (stating that fifty-eight percent of businesses surveyed reported that building a culture of integrity was the ultimate goal of their compliance program); Griffith, *supra* note 15, at 2093–94, n.73.

<sup>105</sup> Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with the Law*, 2002 COLUM. BUS. REV. 71, 81 (2016).

<sup>106</sup> This is principally accomplished through the drafting of formal codes of conduct, corporate policies, and organizational procedures. Employees are then trained on these policies by compliance or human resources personnel, the aim being to ensure that employees can apply the policies to their day-to-day work. Baer, *supra* note 92, at 960; Griffith, *supra* note 15, at 2093; James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. 1, 9 (2013).



and training is “policy-setting” by the company to its employees.<sup>107</sup> Another level is monitoring, which is aimed at ensuring those corporate policies are understood and followed, and that any violations are quickly identified.<sup>108</sup> Monitoring can be both direct and indirect, everything from screening new hires for past instances of wrongdoing and company “fit” to formal performance reviews to hiring outside consultants and auditors to review transactions.<sup>109</sup> A third level is enforcement, which takes varied form based on the severity of the offense.<sup>110</sup> The most common punishment for a significant compliance violation is termination.<sup>111</sup> For serious wrongdoing, the threat of termination is just the beginning, however; cooperation by the company with a prosecutor or regulator exposes employees to formal censure, fines, debarment, and even prison.<sup>112</sup> The company may also incur liability for the employee’s acts, but that is dependent upon the circumstances of the violation, the extent of the company’s disclosure and cooperation, and a host of other factors.<sup>113</sup>

*B. Behavioral Ethics Insights into Corporate Wrongdoing*

In many ways, then, achieving the goals of corporate compliance is dependent on the behavior of individual officers, managers, and employees within the corporation. If they act in a law-abiding and ethical manner, the company will likely avoid criminal and civil liability.<sup>114</sup> This means that companies’ intent on creating robust

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<sup>107</sup> Baer, *supra* note 92, at 960.

<sup>108</sup> Langevoort, *supra* note 105, at 81; Miller, *supra* note 94, at 13.

<sup>109</sup> Langevoort, *supra* note 105, at 82; Miller, *supra* note 93, at 14; Griffith, *supra* note 15, at 2095. It is important to note that because private employers are not subject to many of the constitutional limitations placed on government, and employees generally do not have an expectation of privacy at work, company investigations may be onerous on employees. A company may read its employees’ emails, listen to their phone calls, monitor their Internet activity, videotape them, confiscate their work, and interview them without providing counsel or disclosing the company’s suspicion; and at the end of the investigation, all of the information gathered may be turned over to the government. *See* Miller, *supra* note 93, at 14–15.

<sup>110</sup> Miller, *supra* note 93, at 15; Griffith, *supra* note 15, at 2097.

<sup>111</sup> In fact, many consultants urge companies to “fire quickly” if there are any compliance lapses. Bruce Weinstein, *Hiring and Firing Lessons from the Toshiba Scandal*, FORTUNE (July 24, 2015), <http://fortune.com/2015/07/24/toshiba-hiring-firing/>. Such “zero-tolerance policies” increased during the post-Enron era. *See* Landon Thomas, Jr., *On Wall Street, a Rise in Dismissals over Ethics*, N.Y. TIMES (Mar. 29, 2005), <http://www.nytimes.com/2005/03/29/business/on-wall-street-a-rise-in-dismissals-over-ethics.html>.

<sup>112</sup> *See* Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 155–59 (2015) (recounting liability for Wall Street banker for offenses tied to the financial crisis).

<sup>113</sup> *See* Larkin, Jr. & Seibler, *supra* note 96, at 23 (discussing corporate liability for acts of agents and the six factors federal prosecutors are to consider when investigating and charging corporate wrongdoing under the Yates Memo). *See also* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)-(b) (setting forth elements of an effective compliance program).

<sup>114</sup> While that may be true as a theoretical matter, it is not always true as a practical one for large companies because liability flows up to the corporate entity so easily. “In fact, a corporation is liable even if its senior management was in the dark as to the individual’s conduct (e.g., a low-level employee working overseas) and company policy expressly prohibited what the employee did (e.g., bribing a foreign government official).” *Id.* at 8. Many argue that because there are so many regulations affecting business that can be criminally enforced, it is impossible for individuals, and therefore companies, *not* to violate the law. *See* Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 750–51 (2014) (discussing overcriminalization and the difficulty of the public to find and understand criminally enforced regulations).

compliance programs must develop the “skill [of] predicting human behavior.”<sup>115</sup> Behavior, as discussed above, is partly a product of which decision-making system—automatic or reflective—is operating for which tasks.<sup>116</sup> Accordingly, compliance may turn on whether companies can foster reflective ethical decision making within their organizations.<sup>117</sup> Unfortunately, most companies have little understanding of how their employees actually make ethical decisions, and even less understanding of how to use that information to achieve compliance goals.<sup>118</sup> The field of behavioral ethics provides significant insights, laying the foundation for behavioral compliance strategies, including behavioral ethics nudging.<sup>119</sup>

It is helpful to begin with some context, as behavioral ethics has both a very long and very short history. The concept of behavioral ethics is not new. Philosophers going back to Aristotle grounded their exploration of ethics in individual behavior.<sup>120</sup> Aristotle believed that we become ethical by undertaking ethical actions; that is, we build ethical character through habituation.<sup>121</sup> Since at least the dawn of Western philosophy, then, there has been a strong relationship between ethics and behavior.

As a distinct field of study, however, behavioral ethics has been around less than a generation. Robert Folger is credited with introducing the term roughly fifteen years ago and providing the field much of its early intellectual vigor.<sup>122</sup> But others also took up the mantle, focusing specifically on business behavioral ethics, which merged behavioral science and moral philosophy and applied it to business and management.<sup>123</sup> The field, particularly its business-focused strain, has grown to a point where its findings are now used regularly in business ethics scholarship and teaching, and are becoming more prevalent in legal scholarship.<sup>124</sup>

But what is behavioral ethics, exactly, and what does it tell us about ethical decision-making? In order to answer this question, it is critical to understand how the field defines itself. One of the early and more widely cited definitions is the study of “individual behavior that is subject to or judged according to generally accepted

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<sup>115</sup> Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING [1] (Jennifer Arlen ed., 2016) [hereinafter *Behavioral Compliance*]. Langevoort specifically ties the education and monitoring functions of compliance to behavior. *Id.*

<sup>116</sup> See *supra* Part I.B.

<sup>117</sup> *Behavioral Compliance supra* note 115, at 1; Scott Killingsworth, “C” Is for Crucible: Behavioral Ethics, Culture, and the Board’s Role in C-Suite Compliance, at 4, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2271840](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271840).

<sup>118</sup> Aspects of this topic have been explored by those in management for a number of years, but less so as to the specific connection between ethical decision-making and corporate compliance. *Behavioral Compliance, supra* note 115, at 1.

<sup>119</sup> “Behavioral compliance” is defined as the “design and management of compliance that draws from th[e] wider range of behavioral predictions about individual and organizational behavior.” *Id.* at 2.

<sup>120</sup> Marshall Schminke & Manuela Priesemuth, *Behavioral Business Ethics: Taking Context Seriously*, in BEHAVIORAL BUSINESS ETHICS 47, 72 (David De Cremer & Ann E. Tenbrunsel eds., 2012).

<sup>121</sup> S. Michael Halloran, *Aristotle’s Concept of Ethos, or If Not His Somebody Else’s*, 1 RHETORIC REV. 58, 61 (1982).

<sup>122</sup> Schminke & Priesemuth, *supra* note 120, at 72; Robert Folger, *Deonance: Behavioral Ethics and Moral Obligation*, in BEHAVIORAL BUSINESS ETHICS 123, n.2 (David De Cremer & Ann E. Tenbrunsel eds., 2012).

<sup>123</sup> See, e.g., David M. Messick & Ann E. Tenbrunsel, *Behavioral Research into Business Ethics*, in CODES OF CONDUCT 1, 10 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Linda Klebe Trevino, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601, 601–02 (1986).

<sup>124</sup> See Prentice, *Behavioral Ethics, supra* note 20, at 35; Jennifer K. Robbenolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013); Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 Fla. L. Rev. 87 (2014); Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015) [hereinafter, *Overcriminalization*]; Elizabeth Tippett, Charlotte S. Alexander & Zev J. Eigen, *When Timekeepers Software Undermines Compliance*, 19 YALE J.L. & TECH 1 (2017).

moral norms of behavior.”<sup>125</sup> A more focused definition, evidencing the field’s transition toward business, is a “scientific approach for studying perceptions of how we ought to treat one another in business-related matters and how such perceptions influence behavior.”<sup>126</sup>

This second explanation gets more to the heart of the matter, but to really understand what behavioral ethics is, it is necessary to take a practical approach. Jason Dana, George Lowenstein, and Roberto Weber offer the following: “The study of behavioral ethics . . . aims to understand how even well-intentioned people can sometimes behave unethically.”<sup>127</sup> This focus on understanding the how, as opposed to the why, of ethics is what provides the field its substantive niche. As such, behavioral ethics can best be described as the study of the “systematic and predictable ways in which individuals make ethical decisions and judge the ethical decisions of others.”<sup>128</sup> Critically, these ways are often “at odds with . . . our intuitive expectations and the goals of the broader society.”<sup>129</sup>

This final definition hints at the central finding of the many studies conducted under the behavioral ethics umbrella—that “cognitive heuristics, psychological tendencies, social and organizational pressures, and even seemingly irrelevant situational factors can make it more likely that good people will do bad things.”<sup>130</sup> In human terms, behavioral ethics research tells us that while most people are moral individuals intent on doing right, we are not as ethical as we think we are.<sup>131</sup>

Another way to look at this is that ethical decision making is limited in a significant way. Most people will make moral decisions in line with their ethical beliefs, but only to a point. Because of cognitive obstacles, which may be exacerbated by external factors, “many people are blind to their own unethical conduct”—we engage in unethical acts without even realizing it, acts that we would condemn upon further reflection.<sup>132</sup> The mechanisms by which this happens are many, but the general finding should not come as a surprise given our understanding of dual system thinking.<sup>133</sup>

Behavioral ethics researchers believe that self-interest is associated with the automatic system.<sup>134</sup> A majority of researchers also believe that individuals approach ethical decisions in a way that “grants System 1 the leading role,” causing those individuals to initially “prefer outcomes that benefit [them]selves.”<sup>135</sup> Only after

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<sup>125</sup> Linda K. Trevino, Gary R. Weaver & Scott J. Reynolds, *Behavioral Ethics in Organizations: A Review*, 32 J. MGMT. 951, 952 (2006).

<sup>126</sup> Folger, *supra* note 122, at 125.

<sup>127</sup> Jason Dana et al., *Ethical Immunity: How People Violate Their Own Moral Standards Without Feeling They Are Doing So*, in BEHAVIORAL BUSINESS ETHICS 202 (David De Cremer & Ann E. Tenbrunsel eds., 2012).

<sup>128</sup> Brazerman & Gino, *supra* note 21, at 90.

<sup>129</sup> *Id.*

<sup>130</sup> Prentice, *Behavioral Ethics*, *supra* note 20, at 36.

<sup>131</sup> See Minette Drumwright, Robert Prentice & Cara Biasucci, *Behavioral Ethics and Teaching Ethical Decision Making*, 13 DEC. SCI. J. INNOV. EDUC. 431, 433–36 (2015) (offering a primer on behavioral ethics).

<sup>132</sup> Prentice, *Behavioral Ethics*, *supra* note 20, at 39 (quoting Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 359 (2013)).

<sup>133</sup> See *id.* at 47 (identifying four steps to acting ethically and introducing behavioral reasons individuals will fail to take them); *Behavioral Compliance*, *supra* note 115, at 6–13 (reviewing “influences said to make cheating behaviors more likely”); Feldman, *supra* note 26, at 10–13 (providing a taxonomy of bounded ethical mechanisms).

<sup>134</sup> Feldman, *supra* note 26, at 8. See also Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 190 (2004).

<sup>135</sup> Feldman, *supra* note 26, at 8; Drumwright, et al., *supra* note 131, at 433. See also Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171, 179 (2004) (“While there is no question that people engage in moral reasoning, and that moral reasoning has the potential to alter moral judgment, these results suggest that moral reasoning in everyday

more reflection, when System 2 has been activated, do people “choose to behave in an ethically appropriate manner.”<sup>136</sup> Just as Kahneman and Trversky found in other contexts, behavioral ethics researchers have found that System 2 acts as an ethical monitor, jumping in to control the automatic self-interest each of us possess.<sup>137</sup> This monitoring function appears to work best when cognitive load is low and individuals are able to fully consider the ethical ramifications of a decision—these are the conditions in which we are most likely to act in a moral way.<sup>138</sup> When cognitive load is high, the automatic system may supplant the reflective, increasing the chance individuals will act according to their less ethical self-interest.<sup>139</sup> In other words, we are ethical, but only boundedly.<sup>140</sup>

It is important to pause here for a moment because the term “bounded” naturally raises the specter of behavioral economics.<sup>141</sup> This leads to a second question: How does behavioral ethics differ from behavioral economics, where the idea of nudging originated? This question makes sense given that both fields draw from the same intellectual and empirical roots, namely from the research surrounding dual system thinking.<sup>142</sup> That research demonstrates that human decision-making is not strictly rational, a critical finding supporting the work

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life is unlikely to be the critical cause of moral judgments, but instead suggest that moral judgments may be guided by the automatic evaluations[.]”.

<sup>136</sup> Feldman, *supra* note 26, at 8. *But see* David G. Rand et al., *Spontaneous Giving and Calculated Greed*, 489 NATURE 427 (2012) (finding that cooperation is intuitive and automatic, possibly because cooperative heuristics are developed in daily life where cooperation is typically advantageous).

<sup>137</sup> Kahneman, *supra* note 62, at 1467; Feldman, *supra* note 26, at 8.

<sup>138</sup> Feldman, *supra* note 26, at 8; Moore & Loewenstein, *supra* note 134, at 193.

<sup>139</sup> The most vivid example of this is the “Good Samaritan” experiment conducted at Princeton. The subjects were Princeton Theological Seminary students, who were told that they should prepare a short sermon that would be delivered later in a building nearby. Some of the students were then told that they were running late, and they should run to the other building; other students were told that they had plenty of time until their sermon needed to be delivered. As the various students walked or ran across campus, an assistant of the researchers “feigned sudden illness, slumping over, coughing and groaning.” Sixty three percent of the students who had been told there was no rush offered to help the seemingly ill assistant; only ten percent of the rushed students offered to help. “Even those students who had just finished preparing sermons on the parable of the Good Samaritan were more influenced by the experimenter’s instructions to hurry than by the ethical lesson of the story on which they planned to preach.” Rosa Brooks, *Lessons from Social Psychology for Complex Operations*, in STRATEGIC REALITIES IN IRREGULAR CONFLICT 5 (Franklin D. Kramer & Melanne Civic, eds., 2013).

<sup>140</sup> Prentice, *Behavioral Ethics*, *supra* note 20, at 39 (citing Herbert A. Simon, *Search and Reasoning in Problem Solving*, 21 ARTIFICIAL INTELLIGENCE 7, 21 (1983)); DAN ARIELY, THE HONEST TRUTH ABOUT DISHONESTY 18–20, 237 (2012) (describing the empirical support for the concept of bounded ethicality). Bounded ethicality has two aspects. One is the phenomenon described above wherein people engage in unethical acts without even realizing it based on the automaticity of self-interest. The other, which may work in conjunction, is when individuals rationalize their unethical acts. This process may happen consciously or subconsciously, before or after the bad act. What system of thinking this process uses is unclear (and may be variable), but its effect is the same—to allow unethical decision-making to occur in a less than fully reflective environment. *See* Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 101, 146–50 (2017) [hereinafter *Criminalization*] (discussing how rationalizations foster white collar crime and their role in undermining corporate compliance); Vikas Anand, Blake E. Ashforth & Mahendra Joshi, *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 ACAD. MGMT. EXEC. 39, 40–44 (2005) (same).

<sup>141</sup> W. Brian Arthur, *Designing Economic Agents that Act like Human Agents: A Behavioral Approach to Bounded Rationality*, 81 AM. ECON. REV. 353, 353 (1991).

<sup>142</sup> *See* KAHNEMAN, *supra* note 66, at 20–21; Kahneman, *supra* note 62, at 1450.

of behavioral economists.<sup>143</sup> The research also supports the work of behavioral ethics, which calls into question models of moral development suggesting that ethical decision-making follows a proscribed and linear path.<sup>144</sup>

But behavioral ethics is not merely an offshoot of behavioral economics—the disciplines have very different aims.<sup>145</sup> Behavioral economics is occupied with identifying the behavioral reasons that prevent people from realizing their rational self-interests.<sup>146</sup> The focus here is on suboptimal outcomes and how self-interest is undermined by predictable cognitive missteps.<sup>147</sup> Behavioral ethics seeks different answers. Its focus is on identifying the factors that prevent people from understanding that their actions are self-interested, and therefore may lead to unethical behavior.<sup>148</sup> Behavioral ethics acknowledges the “automaticity of self-interest” we all possess with regard to ethical decision-making, and then tries to determine what it is that blinds us to it.<sup>149</sup> This distinction will become critical when evaluating the behavioral compliance strategies, including behavioral ethics nudging, being used to promote ethicality within corporations.

### C. *Behavioral Ethics Nudging in Corporate America*

Although business leaders may be lagging behind policy makers regarding the use of pro-social choice architecture, the gap is closing quickly. Companies with cutting edge corporate compliance programs are currently, and increasingly, instituting behavioral ethics nudging in an attempt to prevent employee wrongdoing. The following provides a typology of private nudges being used within companies categorized by degree; that is, how intrusive the choice architecture is on the employees being nudged.<sup>150</sup>

*First-degree behavioral ethics nudges.* First-degree nudges are those that supply simple information to individuals or impart reminders.<sup>151</sup> They may also be called “deliberation nudges” because they encourage

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<sup>143</sup> See Kahneman, *supra* note 62, at 1469; *Behavioral Compliance*, *supra* note 115, at 1. See also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

<sup>144</sup> See Brazerman & Gino, *supra* note 21, at 86–87, 89. Behavioral ethics research calls into question the work of Jean Piaget, Lawrence Kohlberg, and James Rest, who all believed that ethical behavior is determined primarily by the “sophistication of a person’s moral reasoning,” which followed a progression of steps or schema. *Id.* See generally also JAMES R. REST, *MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY* (1986).

<sup>145</sup> *But see*, Killingsworth, *supra* note 17, at 2 (characterizing the field of behavioral ethics as a “spinoff” of behavioral economics).

<sup>146</sup> Feldman, *supra* note 26, at 7.

<sup>147</sup> *Id.* at 2–3. Behavioral economics also generally assumes self-interest appropriately and accurately drives motivation. *Id.* at 2; THALER & SUNSTEIN, *supra* note 4, at 7.

<sup>148</sup> Feldman, *supra* note 26, at 2; Brazerman & Gino, *supra* note 21, at 89, 91.

<sup>149</sup> Feldman, *supra* note 26, at 3, 7 (the “automaticity of self-interest” is one of behavioral ethics basic tenets).

<sup>150</sup> See Robert Baldwin, *From Regulation to Behaviour Change: Giving Nudge the Third-degree*, 77 MODERN L. REV. 831, 835 (2014). Intrusiveness here is primarily a function of impact on autonomy, which will be addressed in detail below. See *infra* Part III.A. Although it might seem premature to categorize nudges by a criteria not yet fully discussed, separating private nudges by impact on employees is the most straightforward. In addition to Robert Baldwin, who first used the degree classification system, a number of scholars have attempted to categorize nudges. See, e.g., Hansen & Jespersen, *supra* note 45, at 14–15 (discussing type 1 and type 2 nudges based on what thinking system the nudge targets); Yeung, *supra* note 23, at 130 (setting forth typology of nudges “according to the underlying choice architecture mechanism through which they are intended to work”); SUNSTEIN, *supra* note 23, at 31 (listing various categories of nudges based on the failure they are intended to address). Baldwin’s degree system combines aspects of various typologies, making it easier for compliance professionals to understand and use.

<sup>151</sup> Baldwin, *supra* note 150, at 835.

“active, reflective decisions.”<sup>152</sup> The most ubiquitous behavioral ethics nudge currently used by companies is a first-degree nudge: when employees are asked to read and affirm ethics-focused certifications before they engage in behavior that has historically created compliance risk.<sup>153</sup> For example, employees are often asked to fill out forms reporting things such as travel expenses or miles driven. Studies show that reminding employees of morality before they complete these types of forms significantly reduces dishonesty—truthful answers are more likely if the certification comes at the top of the form rather than the bottom.<sup>154</sup> This is because the placement of the certification prompts deeper reflection regarding the ethics surrounding the task at the “moment of truth.”<sup>155</sup> If the certification is at the bottom, the employee may have already dishonestly filled out the form before considering their ethical duties, which makes it difficult to correct the bad behavior.<sup>156</sup> This type of “just-in-time” compliance nudge was first used in the insurance industry, but is now considered standard practice in many companies.<sup>157</sup>

These type of first-degree certification nudges are also used to influence substantive acts by employees. For example, many companies require checklists and ethics-focused certifications before client funds are transferred, meetings with government officials are conducted, or competitive bids are issued.<sup>158</sup> International Paper provides its employees with a wallet card containing ethics related questions.<sup>159</sup> Although the delivery mechanism is somewhat different, the idea is the same—when acting on behalf of the company, employees will be reminded of the questions and contemplate their ethical obligations prior to taking action.

While certifications and wallet cards are decidedly low-tech, companies are also using more sophisticated first-degree behavioral ethics nudges as part of their compliance strategies. JPMorgan has pioneered the use of algorithmic software to monitor the email and telephone communications of its traders to ensure they “adhere to ‘personal trading rules’ and risk limits.”<sup>160</sup> While employee monitoring, even high-tech monitoring, has been a part of corporate compliance for years, JPMorgan’s efforts are noteworthy because the bank’s proprietary algorithms attempt to predict unethical or illegal trading behavior and stop it *before* it occurs. This so-called “predictive monitoring” uses technology that was created to combat terrorism.<sup>161</sup> Although details of the program are limited, it appears to use a series of computer-generated alerts to nudge traders if they are

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<sup>152</sup> Yeung, *supra* note 23, at 137.

<sup>153</sup> See Killingsworth, *supra* note 17, at 1 (describing this as “[p]robably the best known example of a compliance nudge”).

<sup>154</sup> *Id.* at 1.

<sup>155</sup> *Id.* See also ARIELY, *supra* note 140, at 39–53 (2012) (explaining the impact of asking participants to recall moral standard before engaging in behavior).

<sup>156</sup> Killingsworth, *supra* note 17, at 1. This is largely due to how individuals rationalize their unethical or illegal conduct. *Id.*; see also Haugh, *Criminalization*, *supra* note 140, at 146–50.

<sup>157</sup> Francesca Gino et al., *How Unethical Behavior Becomes Habit*, HARV. BUS. REV. (Sept. 4, 2014), <https://hbr.org/2014/09/how-unethical-behavior-becomes-habit>.

<sup>158</sup> See Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERS. SOC. PSYCHOL. BULL. 330, 344 (2011); Killingsworth, *supra* note 17, at 1.

<sup>159</sup> Gino et al., *supra* note 157.

<sup>160</sup> Portia Crowe, *JP Morgan Is Working on a New Employee Surveillance Program*, BUS. INSIDER (Apr. 8, 2015), <http://www.businessinsider.com/jpmorgans-employee-surveillance-program-2015-4>.

<sup>161</sup> Hugh Son, *supra* note 19. <http://www.bloomberg.com/news/articles/2015-04-08/jpmorgan-algorithm-knows-you-re-a-rogue-employee-before-you-do>.

“trending” towards violating a legal or ethical rule. Think of this as the certification nudge 2.0.<sup>162</sup> Other large financial institutions are developing similar programs.<sup>163</sup>

*Second-degree behavioral ethics nudges.* Second-degree behavioral ethics nudges go further by more directly targeting the dual system thinking process to shape behavior.<sup>164</sup> This could mean the use of a default or anchor that harnesses the dominant or reactive thinking process, or an alteration of the physical environment that requires mental effort to overcome.<sup>165</sup> The 401(k) automatic enrollment provision discussed above is an example of a second-degree nudge, as is a program by a large U.S. retailer that encourages its employees to have their prescriptions mailed to their homes instead of picking them up at the pharmacy.<sup>166</sup> In both cases, by switching a default, welfare maximizing behavior is made easier because it is aided by the behavioral inertia fostered by System 1 thinking—it is much easier to save for retirement and to take your medications when part, or all of the process, is automatically done for you.<sup>167</sup>

Bank of America piloted a program using a second-degree nudge that harnesses System 1 as to physical space. The bank monitored employees for six weeks with wearable sensors, tracking “where [they] went and who they talked to, [and] how the tone of their voice and the movements of their body changed.”<sup>168</sup> When the monitoring indicated that social employees were more productive, Bank of America changed the physical layout of its offices to increase casual interactions, nudging employees to informally socialize more.<sup>169</sup> Because studies show that increased employee satisfaction leads to increased organizational ethicality, all of these changes in choice architecture can be seen as behavioral ethics nudges.<sup>170</sup>

*Third-degree behavioral ethics nudges.* The final type of nudge “offers a yet more serious intrusion” on employees.<sup>171</sup> Third-degree nudges, which often take the form of a framing device, operate by inducing an associative response, “the nature and extent of [which] is not readily achieved by reflection” of the employee.<sup>172</sup>

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<sup>162</sup> See Timothy L. Fort et al., *The Angel on Your Shoulder: Prompting Employees to Do the Right Thing Through the Use of Wearables*, 14 NW. J. TECH. INTELL. PROP. 139, 148 (2016) (describing “haptic technology” and the use of wearable devices to nudge employee ethicality). See also, Roy Snell, *Compliance 2.0*, THE COMPLIANCE AND ETHICS BLOG (May 12, 2015), <http://complianceandethics.org/compliance-2-0/> (describing new generation of corporate compliance programs by the moniker “Compliance 2.0”).

<sup>163</sup> Credit Suisse is developing a compliance program with Palantir Technologies, a Silicon Valley tech company focused on data analysis for police and intelligence services. Jeffrey Vogeli, *Credit Suisse, CIA-Funded Firm to Target Rogue Bankers*, BLOOMBERG (Mar. 23, 2016), <https://www.bloomberg.com/news/articles/2016-03-22/credit-suisse-cia-funded-palantir-build-joint-compliance-firm>. The joint venture between the companies is a first for Palantir, and it will allow the company’s technology to reach throughout the financial and banking sectors. See Kara Scannell & Hannah Kuchler, *Palantir and Credit Suisse Join Forces to Target Rogue Traders*, FIN. TIMES., Mar 22, 2016, <https://www.ft.com/content/a385d4e0-f044-11e5-9f20-c3a047354386>.

<sup>164</sup> Baldwin, *supra* note 150, at 836 (“It is, nevertheless, the case both that such a nudge will shape an individual’s decision and that the target of the nudge would be capable, *on reflection*, of realizing that a nudge has been administered and assessing its broad effect.”).

<sup>165</sup> *Id.*

<sup>166</sup> Beshears & Gino, *supra* note 17, at 5.

<sup>167</sup> *Id.*

<sup>168</sup> Fort, et al., *supra* note 162, at 146 (citations omitted).

<sup>169</sup> *Id.*

<sup>170</sup> See Hian Chye Koh & El’fred H. Y. Boo, *The Link Between Organizational Ethics and Job Satisfaction: A Study of Managers in Singapore*, 29 J. BUS. ETHICS 309, 320 (2001) (linking job satisfaction and organizational ethics).

<sup>171</sup> Baldwin, *supra* note 150, at 836.

<sup>172</sup> *Id.*

An example of this type of nudge is the University of Arizona’s practice of hanging posters of fire alarms in testing rooms.<sup>173</sup> Research shows that visual cues such as these can trigger strong responses, lessening the occurrence of wrongdoing.<sup>174</sup> What distinguishes these third-degree nudges is that the mental reflection caused by the nudge is not focused on morality, but on the “emotive power associated with [the nudge].”<sup>175</sup> Test-takers feel they are under scrutiny and therefore cheat less.<sup>176</sup>

Although not yet being openly used in corporate compliance, high tech iterations of third-degree nudges are available. For example, researchers have found that participants’ responses to moral questions can be predicted by tracking the movement of their eyes.<sup>177</sup> When participants were prompted to respond to an ethics question, they often chose the response they happened to be looking at when receiving the prompt, a System 1-driven decision.<sup>178</sup> By manipulating what the participant was looking at based on their gaze, researchers found they could influence ethical decisions.<sup>179</sup> As the lead researcher stated, “The process of arriving at a moral decision is not only reflected in people’s eye gaze, but can also be *determined* by it.”<sup>180</sup> Thus, the technology exists that would allow a company to nudge its employees toward ethical choices by manipulating what flashes on their computer screen when they are faced with an ethical decision.<sup>181</sup> This could be done in milliseconds, with employees having no idea what was driving their decision-making.<sup>182</sup>

It is clear that behavioral ethics nudges are part of the future landscape of corporate compliance. They offer too much promise—a more effective way of mitigating compliance risk at less cost—for companies to ignore. It is also clear that companies are employing these nudges in different degrees of sophistication and intrusiveness. While identifying a typology of behavioral ethics nudges is helpful, it does not resolve this article’s motivating question: Is the use of behavioral ethics nudging in corporate compliance appropriate?

### III. EVALUATING BEHAVIORAL ETHICS NUDGING AS A COMPLIANCE STRATEGY

To answer that question, an analysis is required on two fronts. First, it must be determined whether behavioral ethics nudging is effective as a compliance tool; that is, does it achieve the goals of compliance. Second, it must be determined whether behavioral ethics nudging is itself ethical—even if it can be done, should it be done. This requires an evaluation of how private nudges impact employee autonomy, balancing autonomy costs against the

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<sup>173</sup> Gino, et al., *supra* note 157.

<sup>174</sup> Posters of eyes watching you also works, as does invoking the Ten Commandments, even if the individual being nudged is not religious. See Max Ernest-Jonesa et al., *Effects of Eye Images on Everyday Cooperative Behavior: A Field Experiment*, 32 EVOL. HUM. BEHAV. 172, 176 (2010); ARIELY, *supra* note 140, at 45.

<sup>175</sup> Baldwin, *supra* note 150, at 836.

<sup>176</sup> *Id.*

<sup>177</sup> Philip Parnaments, et al., *Biasing Moral Decisions by Exploiting the Dynamics of Eye Gaze*, 112 PNAS 4170, 4172 (2015).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Ellie Zolfagharifard, *How To Force Someone To Make The Right Choice: Study Says Our GAZE May Be All It Takes To Change Moral Decisions*, DAILY MAIL (Mar. 18, 2015), <http://www.dailymail.co.uk/sciencetech/article-2999433/How-force-make-right-choice-Study-says-GAZE-takes-change-moral-decisions.html> (emphasis added).

<sup>181</sup> Fort et al., *supra* note 162, at 150.

<sup>182</sup> For a glimpse into the future of using wearable technology to increase the ethicality of the “techno-connected employee,” see *id.* at 151–53 (using Morgan Stanley’s Code of Conduct as an example of how an employee could “receive prompts, information, and nudges that match with his employer’s expectations”).



ends achieved. What is evident from this two-pronged analysis is that while there may be opportunities for companies to use behavioral ethics nudging to effectuate compliance goals, there are also significant practical and ethical pitfalls.

A. *Evaluating the Effectiveness of Behavioral Ethics Nudging as a Compliance Strategy*

Evaluating the effectiveness of behavioral ethics nudging as a compliance strategy is largely an empirical inquiry. Given enough time and inventiveness in research design, behavioral scientists should be able to determine whether nudging employees to be more ethical is effective in meeting the two primary compliance goals of legal deterrence and positive norm-generation.<sup>183</sup> While lab experiments conducted on student participants suggest it may be, a lack of “real-life” field data and limited research as to long-term effects hinder any definitive conclusions.<sup>184</sup> This article will not resolve these shortcomings. Instead, it evaluates behavioral ethics nudging through an empirical lens, highlighting significant conceptual and practical obstacles regarding its efficacy.

1. Behavioral Ethics Nudges are Conceptually Distinct from Public Policy Nudges

The most fundamental concern with using choice architecture to make employees more ethical is one that has been almost entirely overlooked by business leaders and behavioral business ethicists: there is a conceptual difference between public policy nudges used by government and behavioral ethics nudges used within companies.

As explained above, governmental nudges are aimed at increasing individual and societal welfare by structuring choice to help people achieve their true preferences.<sup>185</sup> This makes sense given that the behavioral economists designing these nudges are focused on identifying and eliminating impediments to fulfilling rational self-interests.<sup>186</sup> For example, when a 401(k) plan’s default enrollment provision is structured as an opt-out, the choice architecture allows an individual’s natural tendencies (*i.e.*, allowing System 1’s low cognitive load thinking to dominate) to help them save more.<sup>187</sup> Saving more is that person’s “true preference,” and what they would have chosen if they had employed System 2’s high cognitive load thinking, the appropriate mode of thinking for the task.<sup>188</sup> The reason this particular nudge works so well as a public policy tool is that it helps people do what they deep down want to do anyway, and what they would have done, but for a cognitive obstacle.<sup>189</sup>

Behavioral ethics nudges are different. Unlike public policy nudges, behavioral ethics nudges cannot help people do what they want to deep down, because deep down people want to act in their own self-interest,

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<sup>183</sup> See Feldman, *supra* note 26, at 15 (discussing methodological limits to research regarding behavioral ethics and its general dearth).

<sup>184</sup> *Id.* at 15–17. See also Baldwin, *supra* note 150, at 844 (arguing that “there has emerged very little concrete evidence of the effectiveness of nudge strategies”).

<sup>185</sup> Yeung, *supra* note 23, at 134; Feldman, *supra* note 26, at 7.

<sup>186</sup> THALER & SUNSTEIN, *supra* note 7, at 5; Feldman, *supra* note 26, at 22.

<sup>187</sup> THALER & SUNSTEIN, *supra* note 7, at 107–08. See also *supra* Part II.B.

<sup>188</sup> Yeung, *supra* note 23, at 134.

<sup>189</sup> See Feldman, *supra* note 26, at 17 (“In other words, the nudge, at least in those more paternalistic contexts, works in part because it helps people achieve the goals they already have formulated.” (footnotes omitted)). This assumes that most people would prefer to act rationally in a manner that benefits them long term, and that the choice architect correctly identifies this preference. See Rebonato, *supra* note 41, at 364–66 (discussing the potentially problematic assumptions embedding in libertarian paternalism and its nudge structure).

which more often than not is antithetical to ethical action.<sup>190</sup> The automaticity of self-interest is baked into our DNA, and it drives our decision-making.<sup>191</sup> This understanding is consistent with the core finding of behavioral ethics research, which is *not* that we all want to act ethically, but fail to do so because of cognitive obstacles. The core finding of behavioral ethics is that we come up with many ways to delude ourselves—consciously and subconsciously—into thinking we are acting ethically, but in reality we are acting unethically, driven by self-interest.<sup>192</sup> Thus, a person’s true preference is to keep her self-perception as an ethical being intact while she acts self-interestedly to the contrary.<sup>193</sup>

What this means is that the choice architecture used to nudge 401(k) enrollees, and other similar public policy nudges designed by behavioral economists, will likely be ineffective when used to influence corporate ethicality. In fact, these nudges may not work at all. And to go a bit further, public policy nudges imported into corporations *cannot* work, or at least not in any sustainable way, because nudging employees toward their true preferences—the conceptual schema of popularized governmental nudges—would foster self-interested behavior that promotes unethical acts by employees. As Yuval Feldman puts it, “we are likely to encounter significant resistance to nudge-like approaches” when “the objective is to drive [people] away from their self-interest.”<sup>194</sup> In less measured terms, behavioral ethics nudges may be doomed from the start.

A counter to this argument is that the automaticity of self-interest may not be so automatic. A minority of researchers contends that automatic responses make people more cooperative than reflective ones.<sup>195</sup> If that is true, it could mean that our deep preferences are to benefit one another, which would suggest that pro-social nudges aimed at fostering group ethicality might be conceptually viable. While the “automaticity of cooperation” remains the minority view, it nonetheless may be the correct one.<sup>196</sup> Alternatively, there may be a way to reconcile the competing views.<sup>197</sup> Of course, none of this upends the core finding of behavioral ethics research, which demonstrates that “people tend to believe they are leading ethical lives while doing things that ethical people would not do.”<sup>198</sup> Until it is shown that this tendency is not indicative of our deeper preferences, behavioral ethics nudging will remain on precarious conceptual ground.

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<sup>190</sup> Feldman, *supra* note 26, at 7.

<sup>191</sup> See Moore & Loewenstein, *supra* note 135, at 195 (discussing evolutionary and cultural reasons self-interest is automatic, finding it “viscerally compelling, and often unconscious”); Drumwright, et al., *supra* note 132, at 433–34 (citing research suggesting that ethical decisions are made intuitively before the cognitive parts of the brain engage).

<sup>192</sup> Feldman, *supra* note 26, at 7, 17; Drumwright, et al., *supra* note 132, at 434.

<sup>193</sup> Feldman, *supra* note 26, at 17.

<sup>194</sup> *Id.*

<sup>195</sup> See Rand, et al., *supra* note 137, at 427 (proposing that cooperation is intuitive because cooperative heuristics are developed in daily life where cooperation is typically advantageous); Joshua D. Greene et al., *Patterns of Neural Activity Associated with Honest and Dishonest Moral Decisions*, 106 PROC. NAT’L ACAD. SCI. U.S. 12506, 12506 (2009) (showing individuals who behaved dishonestly exhibited increased activity in control-related regions of the prefrontal cortex, both when choosing to behave dishonestly and on occasions when they refrained from dishonesty, suggesting dishonest behavior is not a product of the automatic system).

<sup>196</sup> Feldman, *supra* note 26, at 8–9.

<sup>197</sup> *Id.* Feldman suggests that one way to reconcile the disconnect is that “being cooperative and dishonest serves people’s intuitive self-interest, especially in a social context, where appearing better seems to be the rational move from an evolutionary perspective.” *Id.*

<sup>198</sup> Drumwright et al., *supra* note 131, at 437.

2. The Conceptual Challenges of Behavioral Ethics Nudging Exacerbate its Inherent Practical Limitations

Once the conceptual disconnect between nudging and ethical decision-making is understood, many practical challenges of implementing behavioral ethics nudging as part of a compliance program become pronounced. One of the challenges is that behavioral ethics nudges must be crafted and delivered with exactitude if they are to have any hope of changing individual decision-making. Behavioral ethics research makes clear that a series of cognitive biases and heuristics affect ethical decisions.<sup>199</sup> While these cognitive obstacles are often described as “systematic and predictable,” that does not mean they are easy to determine, especially by business leaders or compliance officers untrained as behaviorists.<sup>200</sup> Yet these business leaders must identify situations where there is a known “psychological principle . . . that can be exploited to encourage good conduct, or that needs to be neutralized in order to reduce the motivation to misbehave.”<sup>201</sup> That is exceedingly difficult on its face.<sup>202</sup>

Even assuming the correct bias or heuristic at play in a particular ethical decision-making scenario is identified, situational factors, including social and organizational pressures, strongly influence individual behavior.<sup>203</sup> That means for any nudge to work, it must be “applied with surgical precision, in the right circumstances and at the right time.”<sup>204</sup> If the nudge is off just a little, it is unlikely to be effective. Accordingly, behavioral ethics nudging would seem to operate best in situations that are fairly predictable—both as to compliance risk and cognitive failures, such as in the financial sector, where there are many “highly replicable and very often automated” transactions.<sup>205</sup> This would allow for a compliance program to detect, predict, and consistently intervene in order to nudge positive employee behavior.

The problem is that these preconditions greatly limit the scope of effectiveness of behavioral ethics nudging. Nudging would likely be unable to influence the decisions of the first time, haphazard, or inventive corporate wrongdoer.<sup>206</sup> But more fundamentally, nudges are hampered by the unpredictability inherent in the complex decision-making process that leads to unethicity, which is precisely what behavioral ethics nudging seeks to influence.

The recent Wells Fargo scandal provides a good example. Although details are still emerging, it appears that many of the 5,200 employees, fired amid allegations that they improperly cross-sold financial products and created fake customer accounts, were pressured to do so by internal and external factors.<sup>207</sup> A number of former employees have come forward reporting that despite extensive training on the company’s code of conduct and banking regulations, and even explicit messages from headquarters to “not create fake bank accounts,” an

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<sup>199</sup> Prentice, *Behavioral Ethics*, *supra* note 20, at 36.

<sup>200</sup> Brazerman & Gino, *supra* note 21, at 90. If corporate leaders do attempt nudging their employees’ ethicality, they should seek the help of experts. See Todd Haugh, “*Cadillac Compliance*” *Breakdown*, 69 STAN. L. REVIEW. ONLINE 198, 204 (2017) (arguing that compliance teams should include a behavioral expert).

<sup>201</sup> Killingsworth, *supra* note 17, at 3–4.

<sup>202</sup> See Evan Selinger & Kyle Whyte, *Is There a Right Way to Nudge? The Practice of Ethics and Choice Architecture*, 5 SOC. COMPASS 923, 930 (2011) (positing whether choice architects can know “if a particular group of users in a particular set of circumstances will respond to the changes in the *meaning* of the choice architecture”).

<sup>203</sup> Killingsworth, *supra* note 17, at 3.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 4.

<sup>206</sup> See Todd Haugh, *Sentencing the Why of White Collar Crime*, 82 FORDHAM L. REV. 3143, 3150–60 (2014) (highlighting the idiosyncratic nature of three different crimes committed by business leaders).

<sup>207</sup> See Michael Corkery & Stacy Cowley, *Wells Fargo Warned Workers Against Sham Accounts, but ‘They Needed a Paycheck’*, N.Y. TIMES (Sept. 16, 2016), <http://www.nytimes.com/2016/09/17/business/dealbook/wells-fargo-warned-workers-against-fake-accounts-but-they-needed-a-paycheck.html>.

aggressive sales culture “honed over decades” overrode any explicit compliance measures.<sup>208</sup> One former personal banker explained that creating fake accounts “was like jaywalking”—everyone did it because “[t]hey needed a paycheck.”<sup>209</sup>

Under these conditions, could a behavioral ethics nudge have worked to eliminate wrongdoing? At first glance, this situation appears perfect for a first-degree, “just-in-time” certification-type nudge, in which employees are prompted to consider moral standards before opening additional employee accounts. The opening of an account is a highly replicable process, and a well-timed certification could serve as a consistent intervention. Yet a deeper look demonstrates that even if an employee had received the nudge perfectly, they would interpret it against the backdrop of their true preferences—here, to act unethically to save their job while telling themselves that it is necessary, everyone else is doing it, or that no one will really be harmed by their actions.<sup>210</sup> These are classic rationalizations employed by white collar offenders, and they act as powerful counters to any behavioral ethics nudges that reach employees.<sup>211</sup> Yet rationalizations are employee-specific and they may overlap and interact in a multitude of ways.<sup>212</sup> Moreover, they are partly a product of organizational factors outside employees’ control; therefore, the nudge may only be addressing one aspect of an exceedingly complex problem.<sup>213</sup> Although delivered with precision, the behavioral ethics nudge used here simply may have no effect given the varied and variable “social and organizational pressures . . . mak[ing] it more likely that good people will do bad things.”<sup>214</sup>

This leads to a second problem behavioral ethics nudging faces concerning its efficacy: the risk of mis-nudging. As an initial matter, the conceptual concern raised above suggests that all behavioral ethics nudges are mis-nudges in some sense, as they may fail to align individual decision-making with deeper preferences. But more practically, an employee’s response to a nudge may differ depending on many factors, including cultural ones.<sup>215</sup> For example, a nudge targeted at gift giving to lessen the risk of a Foreign Corrupt Practices Act violation may have very different effects on U.S. employees than those born and raised in countries where graft

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See Drumwright et al., *supra* note 131, at 434.

<sup>211</sup> See Haugh, *Criminalization*, *supra* note 140, at 146–49 (discussing eight most common white collar rationalizations and how they operate). The concern that counter nudges will develop is prevalent for all choice architecture. See THALER & SUNSTEIN, *supra* note 7, at 37–39, 239–41; Amir & Lobel, *supra* note 41, at 2116. See also Selinger & Whyte, *supra* note 202, at 925, 932 (identifying a series of counter nudges).

<sup>212</sup> See Haugh, *Criminalization*, *supra* note 140, at 149 (explaining that “rationalizations are not ‘one size fits all’ . . . [o]ffenders employ them in different degrees, combine them with other rationalizations, and use them at different times . . . specific to [their] circumstances”).

<sup>213</sup> See Baldwin, *supra* note 150, at 839 (“Nudges that are aimed at individuals, moreover, will not always prove effective when the undesirable behavior at issue is the product of collective processes and policies[.]”); Killingsworth, *supra* note 17, at 5 (arguing that the effectiveness of nudges will be limited because “many of the environmental elements that amplify compliance risks are standard features of the business setting”).

<sup>214</sup> Prentice, *Behavioral Ethics*, *supra* note 20, at 36.

<sup>215</sup> Baldwin, *supra* note 150, at 840; Selinger & Whyte, *supra* note 202, at 930.

is an accepted business practice.<sup>216</sup> When it comes to nudging, context—cultural and otherwise—matters greatly.<sup>217</sup>

While a mis-nudge may result in a compliance initiative falling flat, it could also have significant negative effects due to unintended consequences and opportunity costs.<sup>218</sup> A number of unintended negative results from nudging have already occurred in the public policy realm. Food labeled as “low fat,” a nudge that should reduce overall calorie consumption, has been shown to cause excessive eating.<sup>219</sup> Speeding warnings, such as signs flashing the miles per hour of an approaching car, cause some drivers to go faster.<sup>220</sup> Although there are no comparable studies as to behavioral ethics nudges, it is not difficult to imagine harmful mis-nudges occurring within corporations.<sup>221</sup> For example, an aggressive trader at JP Morgan who is prompted that they should reconsider a transaction because it is trending toward illegality may see this as a positive—a signal that they are operating close to the line where the most profits are to be made.<sup>222</sup>

This raises the additional concern of opportunity costs. If a company invests its limited resources in developing, testing, and refining behavioral ethics nudges as a central compliance strategy, it is likely reducing its development of other compliance tools.<sup>223</sup> This could mean a reduction in traditional education, monitoring and enforcement approaches, or less focus on positive norm-generation and corporate culture.<sup>224</sup> Either could be

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<sup>216</sup> See Thomas Donaldson, *Values in Tension: Ethics Away from Home*, HARV. BUS. REV. 1, 6 (1996) (“When cultures have different standards of ethical behavior—and different ways of handling unethical behavior—a company that takes an absolutist approach may find itself making a disastrous mistake.”). This concern would seem to be enhanced when the choice architect is ignorant of the culture in which the nudge is intended to operate. See Selinger & Whyte, *supra* note 202, at 931. In an example unrelated to employee ethicality, BMW attempted to use a woman’s voice as part of its onboard computer system to prompt speeding drivers to go slower. *Id.* at 930. While the nudge likely worked well in many places because audio warnings are behaviorally more effective when coupled with visual ones, it flopped in BMW’s home country because “German male drivers paid little attention to a female voice telling them to slow down[.]” *Id.* at 931 (quoting Thomas Pinch, *Comment on Nudges and Cultural Variance*, 23 KNOW. TECH. & POL’Y 487, 489 (2010)).

<sup>217</sup> See Selinger & Whyte, *supra* note 202, at 931 (suggesting that to properly nudge, choice architects would need to do “localized sociological and psychological studies”); Luc Bovens, *Nudges and Cultural Variance: A Note on Selinger and Whyte*, 23 KNOW. TECH. & POL’Y 483, 484 (2010) (explaining how behavioral bias, often a function of idiosyncratic cultural differences, can complicate nudge design and effectiveness).

<sup>218</sup> Of course, this problem is present with the implementation of traditional hard and soft compliance rules. However, those are likely to be more transparent and possibly easier to rectify. See Baldwin, *supra* note 150, at 843.

<sup>219</sup> *Id.*; Brian Wansink & Pierre Chandon, *Can “Low-Fat” Nutrition Labels Lead to Obesity?*, 43 J. MKT. RES. 605, 605-06 (2006) (finding that “all people—particularly those who are overweight—eat more calories of snack food when it is labeled as ‘low fat’ than when it is labeled as ‘regular’”).

<sup>220</sup> See Selinger & Whyte, *supra* note 202, at 932 (relating that a TomTom GPS device that flashes red and notes updated projected trip time when speeding occurs prompts some drivers to go faster).

<sup>221</sup> When BMW switched to a male voice for cars sold in Germany, the prompt worked better; yet, the change arguably promotes sexism. See *id.* at 931.

<sup>222</sup> Such employees may be “ill-intentioned and high capacity,” which some behavioral ethicists argue are especially difficult to nudge. Baldwin, *supra* note 150, at 842. However, these employees may be simply responding to traditional organizational incentives. *Id.*

<sup>223</sup> See Amir & Lobel, *supra* note 41, at 2122–23 (arguing that to apply nudges effectively, “there must be a continuous study as to whether the chosen design attains its intended effect, both at the micro and macro levels”).

<sup>224</sup> See Lynn S. Paine, *Managing for Organizational Integrity*, 72 HARV. BUS. REV. 106, 106, 109–11 (1994) (discussing rules-based compliance grounded in deterrence theory and its limitations); Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 135 (1999) (discussing Paine’s research and finding empirical support for her thesis).

problematic as compliance budgets are tight and compliance professionals are under constant pressure to show measurable results.<sup>225</sup> And as Scott Killingsworth points out, if all the conditions are met for there to be an effective behavioral ethics nudge, “you have to ask whether it might be easier to implement conventional ‘hard’ controls that simply prevent the conduct, or pointedly monitor for it.”<sup>226</sup> Given the many opportunities for mis-nudging to occur, traditional tools of compliance “probably beat[] trying to get inside the employee’s head so you can rewire his decision-making process.”<sup>227</sup> This argument, unlikely to be lost on cost-conscience upper-management, is strengthened if mis-nudging occurs too frequently.<sup>228</sup>

More empirical research is needed to determine whether behavioral ethics nudging will be fully effective in achieving the goals of compliance. As it stands, that seems unlikely given that companies, and those advising them, appear to be equating public policy and behavioral ethics nudges without understanding their conceptual and practical differences. If this leads to companies employing nudges that are severely limited in their effectiveness, it would be difficult to justify their use in corporate compliance.

### *B. Evaluating the Ethicality of Companies Using Behavioral Ethics Nudging as a Compliance Strategy*

Even assuming behavioral ethics nudging can overcome the conceptual and empirical challenges raised above, that does not answer the question of whether they should be used within the corporation. That question must be considered from a normative standpoint, one that balances the autonomy costs private nudges place on employees against the beneficial ends nudges may afford. If nudging is an effective tool in the effort to curb corporate wrongdoing, it may justify certain—even significant—levels of autonomy reduction among employees. This analysis necessarily blends legal and ethical considerations, resulting in a suggested framework allowing companies to evaluate the use of choice architecture to foster employee ethicality.

#### 1. The Autonomy Costs of Behavioral Ethics Nudging

To begin, much has been said regarding the ethics of nudging, specifically nudges promoted by government as a way to shape public policy. Scholars such as Karen Yeung,<sup>229</sup> Luc Bovens,<sup>230</sup> Robert Baldwin,<sup>231</sup> and others,<sup>232</sup>

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<sup>225</sup> See Griffith, *supra* note 15, at 2102, 2106.

<sup>226</sup> Killingsworth, *supra* note 17, at 4. A related issue is whether nudging might “risk crowding out the motivation of those [employees] intrinsically motivated.” Yuval Feldman & Orly Lobel, *Behavioral Tradeoffs: Beyond the Land of Nudges Spans the World of Law and Psychology*, at 26, [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2439179](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2439179).

<sup>227</sup> Killingsworth, *supra* note 17, at 4.

<sup>228</sup> A larger question remains regarding the impact mis-nudging has on employee perception of the legitimacy of their company’s compliance program. That question is addressed *infra* Part III.C.

<sup>229</sup> Yeung, *supra* note 23.

<sup>230</sup> Bovens, *supra* note 22.

<sup>231</sup> Baldwin, *supra* 150.

<sup>232</sup> See, e.g., Hansen & Jespersen, *supra* note 45; Calo, *supra* note 53; Rebonato, *supra* note 41, at 357; Daniel M. Hausman & Brynn Welch, *Debate: To Nudge or Not to Nudge*, 18 J. POL. PHIL. 123 (2010); John Hasnas, *Some Noodging About Nudging*, REGULATION, Summer 2016, <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2016/6/regulation-v39n2-2.pdf>; Kevin Vallier, *On the Inevitability of Nudging*, 14 GEO. J. L. & PUB. POL’Y 817 (2016). See also *Symposium: The Ethics of Nudging, Evaluating Libertarian Paternalism*, 14 GEO. J. L. & PUB. POL’Y 645 (2016) (collecting articles by various authors justifying nudging and libertarian paternalism, as well as providing alternative views).

have categorized and critiqued nudges, inviting a series of responses by Thaler and Sunstein.<sup>233</sup> While a review of that entire back-and-forth is too voluminous to undertake here, some of the highpoints of the debate are instructive.

The first is that nudges have the potential to negatively impact individual autonomy to a degree that renders them unethical. Even proponents of choice architecture acknowledge this; indeed, any discussion of nudges, and libertarian paternalism more generally, quickly turns to concerns over their potential to coerce in a way that impermissibly reduces individual autonomy.<sup>234</sup> The second is that non-transparency negatively impacts autonomy, insofar as nontransparent choice architecture is “highly vulnerable to abuse.”<sup>235</sup> Again, all agree that without meaningful monitoring of the choice architect and the methods used to steer decision-making, there is a high probability that autonomy will be negatively impacted.<sup>236</sup> Taken together, these concerns represent the potential autonomy costs of nudging.

In order to appreciate how nudging may impose autonomy costs, it is necessary to define autonomy. Although described somewhat differently by legal and business scholars, autonomy is “generally understood to refer to the capacity to be one’s own person, to live one’s own life according to reasons and motives that one takes to be one’s own and not the product of manipulative or distorting external forces.”<sup>237</sup> Put another way, autonomy allows actions that are guided by reasons an individual can “underwrite”; that is, reasons the individual can explain by reference to her own ideas and principles.<sup>238</sup> An autonomous decision, then, is one made by a “fully informed agent, arrived at through a process of rational self-deliberation, so that the agent’s chosen outcome can be justified and explained by reference to reasons that the agent has identified and endorsed.”<sup>239</sup> Thus, an act by government or a business that significantly curtails the autonomous decision-making of an individual is susceptible to attack on ethical grounds.

What type of nudges, be them governmental or private, significantly curtail autonomous decision-making? Pursuant to the definitions offered above, the most problematic nudges would be those “intended to work deliberately . . . to by-pass the individual’s rational decision-making processes in order to channel behaviour in the direction preferred by the choice architect.”<sup>240</sup> These “irrationality-exploiting” nudges are concerning because

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<sup>233</sup> See, e.g., Sunstein, *supra* note 20; Cass R. Sunstein, *Nudges, Agency, and Abstraction: A Reply to Critics*, 6 REV. PHIL. PSYCH. 511 (2015); Thaler, *supra* note 33; SUNSTEIN, *supra* note 20. Thaler and Sunstein preemptively address some concerns in their book. See THALER & SUNSTEIN, *supra* note 7, at 236–51.

<sup>234</sup> THALER & SUNSTEIN, *supra* note 7, at 11, 237; SUNSTEIN, *supra* note 23, at 17. *But see* Vallier, *supra* note 232, at 823–24 (suggesting that the justification of nudging “reduces to a cost-benefit analysis,” which means there is no “built-in commitment” to liberty or autonomy).

<sup>235</sup> Yeung, *supra* note 23, at 144.

<sup>236</sup> This reduction may occur over time, or all at once. *See id.* (citing Hausman & Welch, *supra* note 232, at 132); Rebonato, *supra* note 41, at 360 (“The weaker the ability to monitor, the more the electorate has to rely on the benevolence of the ruler.”).

<sup>237</sup> Yeung, *supra* note 23, at 135. Despite the “generally understood” modifier, there are many competing definitions of autonomy, all of which have their adherents. *See, e.g.*, Christian Schubert, *On the Ethics of Public Nudging: Autonomy and Agency* 9–10 (Faculty of Bus. Admin. and Econ., Univ. of Marburg, Joint Discussion Paper Series in Econ., No. 33-2015), <https://www.econstor.eu/bitstream/10419/125535/1/837886600.pdf> (highlighting two competing definitions impacting the ethics of nudges).

<sup>238</sup> Yeung, *supra* note 23, at 135 (citing Isaiah Berlin, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* (Henry Hardy & Roger Hausheer eds., 1998)).

<sup>239</sup> *Id.* Note, this sounds roughly similar to Thaler and Sunstein’s “as judged by themselves” standard for valid nudges. *See* THALER & SUNSTEIN, *supra* note 7, at 5.

<sup>240</sup> Yeung, *supra* note 23, at 135–36.

[they] entail not letting . . . actions be guided by principles that [an individual] can underwrite . . . [t]hey can be said to be irrational in so far as what is driving [the individual's] action does not constitute a reason for [their] action (i.e. not a feature of the action that [they] endorse as a feature that makes the action desirable).<sup>241</sup>

According to critics, nudges of this type are behavioral manipulation.<sup>242</sup> By exploiting an individual's tendency to act unreflectively via System 1 thinking, they are inconsistent with demonstrating respect for individual autonomy.<sup>243</sup> These are high autonomy cost nudges.

Of course, not all nudges exploit irrationality. In fact, many nudges could be considered “autonomy-respecting,” in that they are aimed at correcting cognitive defects and biases to promote more informed decision-making.<sup>244</sup> For example, choice architecture that helps individuals comprehend the full range of options available to them or slow down their reflective judgments may increase their ability to underwrite their choices.<sup>245</sup> These “deliberation tools” sit opposite irrationality-exploiting nudges, because rather than taking advantage of cognitive obstacles, they “appeal[] to individual reason.”<sup>246</sup> These are low autonomy cost nudges.

The level of autonomy costs is also affected by the transparency of the choice architecture being used—the greater the transparency, the greater the respect for autonomy. This flows from the earlier-stated definition of autonomous decision-making. It would be difficult to argue that a nontransparent nudge allows a “fully informed agent” to arrive at their decision “through a process of rational self-deliberation.”<sup>247</sup> All nudges have some weaknesses in this regard. Generally, when government acts to influence the public's behavior, usually through lawmaking or regulation, it is “open, discussed, and implemented after representative procedures have been followed.”<sup>248</sup> Public policy nudging is inherently more secretive, however. The process used to implement a nudge often comes from a government agent's decision, one that is not subject to advanced disclosure or debate.<sup>249</sup> While this does not necessarily mean all agency-created nudges are problematic—after all, most of how the government directs public action has some administrative tie-in—it does increase a nudge's potential to negatively impact autonomy.<sup>250</sup> This concern would appear to be amplified when companies privately nudge their employees.

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<sup>241</sup> *Id.* at 136 (citing Bovens, *supra* note 22, at 210) (emphasis added).

<sup>242</sup> Hansen & Jespersen, *supra* note 45, at 23; Bovens, *supra* note 22, at 208.

<sup>243</sup> Bovens, *supra* note 22, at 217.

<sup>244</sup> Yeung, *supra* note 23, at 137.

<sup>245</sup> *See id.* at 132–33 (suggesting that government information campaigns, mandatory disclosure laws, and mandatory cooling off periods are examples of autonomy respecting nudges).

<sup>246</sup> *Id.* at 137–38.

<sup>247</sup> *Id.* at 135.

<sup>248</sup> Baldwin, *supra* note 150, at 845.

<sup>249</sup> *See id.* (arguing that many nudges will “not demand legislation and may be triggered administratively”).

<sup>250</sup> Yeung, *supra* note 23, at 143–44; Rebonato, *supra* note 41, at 360. Thaler and Sunstein appreciate the concerns non-transparency raises. They address this by “endorsing” Rawls' publicity principle, which “[i]n its simplest form . . . bans government from selecting a policy that it would not be able or willing to defend publicly to its own citizens.” THALER & SUNSTEIN, *supra* note 7, at 244. As they explain the principle specific to public policy nudging, it is clear they deem transparency as a facet of respecting the chooser's autonomy. *Id.* at 245. *But see*, Baldwin, *supra* note 150, at 17 (arguing that Thaler and Sunstein are relying not on a Rawlsian notion of transparency, but on an “epistemic dimension of transparency,” (i.e., one in which a nudge and its potential behavioral change could “reasonably be expected to be transparent to the agent being nudged”).



Not to mention that nudges are most effective when the intervention is the least transparent to the person being nudged. In fact, alerting people to nudges may undermine their effectiveness entirely. For example, when you explain to drivers that the white lines painted on sections of Lake Shore Drive in Chicago are a visual trick intended to nudge slower driving, they may consciously ignore the trick the next time and speed as they did before the nudge was implemented.<sup>251</sup> The same thing might happen when you explain to employees why there are posters of fire alarms all over the office.<sup>252</sup> As Luc Bovens succinctly puts it, nudges “work best in the dark.”<sup>253</sup> That is true as an empirical proposition, and it also strengthens the normative claim that nontransparent nudges increase autonomy costs.

Proponents of nudges are likely to raise a series of objections at this point. While they might generally agree that autonomy costs increase as nudges become more exploitive of cognitive defects and less transparent, they would likely push back with at least two arguments.<sup>254</sup> One is that choice architecture is inevitable. A fundamental premise of libertarian paternalism is that “we are always being nudged, whether we like it or not and regardless of anyone intending it so.”<sup>255</sup> If nudges are an “inescapable feature of any decision-making context,” then it would be unreasonable to object to nudges that are easy to avoid and make people better off.<sup>256</sup> In other words, there are costs on autonomy regardless; nudges do not reduce it any more than necessary, and some even promote it.<sup>257</sup>

While the first part of this premise is likely true,<sup>258</sup> there is a difference between an intentional and accidental influence on decision-making and autonomy. Intentional influence by the choice architect creates some level of responsibility for the behavior sought.<sup>259</sup> If not, there would be no point in Thaler and Sunstein’s insistence that nudges be limited to those that increase the chooser’s welfare.<sup>260</sup> And while it may be the case that the choice architect’s influence is easy to overcome, that influence is deliberate nonetheless.<sup>261</sup> When one agent imposes their will over another—say, an employer attempting to shape an employee’s decision, even if it is ultimately in the employee’s interest—that impacts autonomy and creates the concomitant normative concern. That concern is not present to the same degree with the random influence of accidental choice architecture

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<sup>251</sup> See THALER & SUNSTEIN, *supra* note 7, at 37–39, 239–41; Selinger & Whyte, *supra* note 202, at 925.

<sup>252</sup> See Gino et al., *supra* note 157.

<sup>253</sup> Bovens, *supra* note 22, at 217.

<sup>254</sup> Sunstein, *Ethics*, *supra* note 23, at 420; THALER & SUNSTEIN, *supra* note 7, at 244.

<sup>255</sup> Hansen & Jespersen, *supra* note 45, at 9.

<sup>256</sup> *Id.* See also THALER & SUNSTEIN, *supra* note 7, at 10 (arguing that in many situations, some organization or agent must make a choice that will influence others’ behavior; there is “no way of avoiding nudging in some direction”).

<sup>257</sup> See Cass R. Sunstein, *Autonomy by Default*, 16 AM. J. BIOETHICS 1, 1 (2016) (arguing that many default rules, including those used as nudges, may promote autonomy by “giv[ing] people the freedom to focus on their most pressing concerns, and thus eliminate a kind of ‘bandwidth tax’”); SUNSTEIN, *supra* note 23, at 15.

<sup>258</sup> *But see* Vallier, *supra* note 232, at 818 (arguing nudging is not inevitable, functionally or morally).

<sup>259</sup> Hansen & Jespersen, *supra* note 45, at 10.

<sup>260</sup> Sunstein, *supra* note 23, at 417, 420; THALER & SUNSTEIN, *supra* note 7 at 239–41.

<sup>261</sup> Hausman & Welch, *supra* note 232, at 133. See also Vallier, *supra* note 232, at 820 (discussing the motivations of the nudger).

because there is no notion of responsibility.<sup>262</sup> While this does not render nudging unethical *per se*, it does forestall the assertion advanced by some that the “antinudge position . . . is a literal nonstarter.”<sup>263</sup>

The second argument is specific to behavioral ethics nudging: any concerns over autonomy costs are addressed through the principal-agent relationship and at-will employment.<sup>264</sup> The argument goes that the principal-agent relationship, in which there is “consent by one person to another that the other shall act on his behalf and subject to his control,” is fundamental to business.<sup>265</sup> The relationship imposes a duty on the agent not to act contrary to the principal’s direction.<sup>266</sup> This is foundational to all employer-employee relationships, which are a “species of agency.”<sup>267</sup> In addition, the employment-at-will doctrine establishes that, absent a contract to the contrary, no employment obligation exists between employer and employee—discharge and resignation are freely permitted.<sup>268</sup>

Accordingly, if a company wants to nudge its employees as part of a compliance program, it is free to do so.<sup>269</sup> The principal-agent relationship gives the company the discretion to direct its employees as it sees fit—certainly, nudging them towards more ethical decision-making, which benefits the employees and the company by reducing compliance risk, falls within this discretion. This, coupled with there being no employment obligations on the principal, means that companies may use behavioral ethics nudging without impacting employee autonomy; employees are always free to leave if they believe that being nudged falls outside the scope of their duties (and they are free to be terminated for any reason, including one related to advancing corporate compliance initiatives).

To be sure, this is a compelling argument when posed in the abstract, but it also suffers from limitations. Simply because a legal doctrine allows a company to take an action does not answer the normative question of whether the company *should* take it. As Tim Fort puts it, “law and ethics are not conterminous. That is, we don’t

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<sup>262</sup> Another way to look at this is that “one can at least avoid the *intentional* attempt to steer another agent in the way one wants her to act through aiming to exploit her biases and weaknesses.” William Glod, *How Nudges Often Fail to Treat People According to Their Own Preferences*, 41 SOC. THEORY & PRAC. 599, 608 (2015). In addition, accidental or random influences of choice architecture will be so variable and mis-targeted that they will likely be canceled or drowned out by accidental or random counter architecture, having much less impact in the aggregate than intentional nudges.

<sup>263</sup> THALER & SUNSTEIN, *supra* note 7, at 11.

<sup>264</sup> See Sami M. Abbasi et al., *Employment at Will: An Eroding Concept in Employment Relationships*, 38 LAB. L.J. 21, 22 (1987) (“Clearly, the rationale for the employment-at-will rule bears some kinship to the common law principal-agent relationship, which holds that the employee is an agent of the employer-principal and thus owes him the legal duty of obedience and loyalty.”).

<sup>265</sup> See RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 1958). See also Dennis P. Quinn & Thomas M. Jones, *An Agent Morality View of Business Policy*, 20 ACAD. MGMT. REV. 22, 24 (1995) (explaining principal-agent relationship as a normative business policy model in which management follows wealth maximizing interests of shareholders).

<sup>266</sup> RESTATEMENT (SECOND) OF AGENCY § 14 (AM. L. INST. 1958).

<sup>267</sup> 19 WILLISTON ON CONTRACTS § 54:1 (4th ed. 2016).

<sup>268</sup> Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MON. LAB. REV. 3, 3 (2001), <https://www.bls.gov/opub/mlr/2001/01/art1full.pdf>.

<sup>269</sup> Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL’Y REV. 381, 433 (2005) (“[h]iring creates an employer/employee relationship, which is a type of principal/agent relationship . . . [t]he basic elements of an agency relationship are that the principal has the right to direct the agent; the agent can bind the principal; the agent has a duty to act on behalf of the principal; and the relationship is terminable at will by either party”).

always meet our ethical obligations by complying with the law.”<sup>270</sup> This is even more true when attempting to equate law and autonomy—law is unfortunately not so attuned to ethical levels of autonomy costs.<sup>271</sup>

But even assuming legal compliance equates to ethicality, there are important limitations to the principal-agent and employment-at-will doctrines. While principals have considerable control in the relationship,<sup>272</sup> agents have rights as well as duties.<sup>273</sup> For example, principals have to follow the contract they made with their agents and compensate them for their work.<sup>274</sup> Additionally, employers are precluded from acting with impunity when it comes to employee rights. Just because an individual accepts employment, an employer is not free to terminate them under every circumstance.<sup>275</sup> Employees are protected in various ways by state and federal statutes and regulations, as well as state constitutions.<sup>276</sup> Instead of the principal-agent and employer-employee relationship being entirely one-sided, as they are often depicted, there is significantly more balance.<sup>277</sup>

This balance indicates that principal-employers operate in what might be described as a less-than-absolute zone in which they can legally act without considering their agent-employees. The same applies when companies consider using behavioral ethics nudging to influence their employees’ decision-making. While nudging may not be legally prohibited, and indeed may be protected under some doctrines, it is also not absolute.<sup>278</sup> Accordingly, companies must evaluate any proposed nudging to determine the autonomy costs it will impose on employees, as well as any other relevant legal and ethical factors.<sup>279</sup>

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<sup>270</sup> TIMOTHY L. FORT, *THE VISION OF THE FIRM: ITS GOVERNANCE, OBLIGATIONS, AND ASPIRATIONS 2* (2014).

<sup>271</sup> See M.N.S. Sellers, *An Introduction to the Value of Autonomy in Law*, in *AUTONOMY IN THE LAW 5* (Mortimer Sellers ed., 2008) (discussing confusion about autonomy as applied to law).

<sup>272</sup> Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U.L. REV. 535, 542 (2011) (explaining that essential feature of common law agency is that the principal retains the right to control the actions of the agent).

<sup>273</sup> See Deborah M. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1051–53 (2007) (setting out the duties of agents); RESTATEMENT (SECOND) OF AGENCY § 13 (AM. L. INST. 1958) (same).

<sup>274</sup> See Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969, 1981 (1987) (describing a consent theory of agency in which the principal is obligated to perform contract and compensate agent). Other rights of the agent may include the right to reimbursement, indemnification, cooperation, and safe working conditions.

<sup>275</sup> See John Bourdeau & Barbara J. Van Arsdale, *Wrongful Discharge*, 82 AM. JUR. 2d § 77 (2016).

<sup>276</sup> See Muhl, *supra* note 268, at 4–10 (describing public policy, implied contract, and covenant of good faith exceptions to employment-at-will doctrine under state and federal law).

<sup>277</sup> See Gary E. Murg & Clifford Scharman, *Employment at Will: Do Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329, 329–30 (1982) (a “surge of judicial intervention has threatened the continued legal validity of the employment-at-will rule and the traditional relationship between an employer and an employee.”).

<sup>278</sup> For example, using the behavioral tool of subliminal messaging to control employees’ actions would violate legal and ethical norms. See THALER & SUNSTEIN, *supra* note 7, at 244; SUNSTEIN, *supra* note 4, at 104. See also *Subliminal Messages Aimed at Employees*, ORLANDO SENTINEL (Sept. 27, 1987), [http://articles.orlandosentinel.com/1987-09-27/news/0150100014\\_1\\_subliminal-messages-hayden-businesses](http://articles.orlandosentinel.com/1987-09-27/news/0150100014_1_subliminal-messages-hayden-businesses) (describing California’s attempts to regulate subliminal messaging against without worker consent).

<sup>279</sup> Some may argue that employees acquiesce to behavioral ethics nudging if they accept employment at a company known to use aggressive compliance strategies. This argument seems particularly thin given the variety of nudges and their differing levels of intrusiveness. See *infra* Part II.C.

### 2. Balancing the Autonomy Costs of Behavioral Ethics Nudging Against the Ends Achieved

A second vein of analysis remains to be considered in conjunction with autonomy costs. Even if behavioral ethics nudging impinges significantly on employee autonomy, that does not necessarily foreclose it as an unethical compliance strategy.<sup>280</sup> Rather, each nudge must be “evaluated on a case-by-case basis in light of the broader context in which it is proposed.”<sup>281</sup> This is so because a nudge’s intended purpose helps the meaningful assessment of the “relationship between ends and means.”<sup>282</sup> In other words, the ethicality of a specific behavioral ethics nudge depends on the autonomy costs exacted on employees through its use (the means employed) weighed against its benefit to those same employees, the company, and society (the ends achieved).<sup>283</sup> This type of consequentialist analysis is critical when fully considering questions of ethicality.<sup>284</sup>

The sizable limitations on the effectiveness of behavioral ethics nudging—both conceptual and practical—have already been addressed, but the benefits of nudging have not.<sup>285</sup> Unfortunately, there is little real world data demonstrating that nudges increase corporate compliance.<sup>286</sup> Indeed, one of the primary criticisms of public policy nudging is that there is scant data supporting its efficacy.<sup>287</sup> Even so, any reduction in corporate wrongdoing through the use of nudging would likely be significant given the scope of the problem. Estimates are that between \$300 and \$600 billion in business revenues are lost each year to white collar crime.<sup>288</sup> And as the public was so vividly reminded during the financial crisis, those monetary losses translate into real human

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<sup>280</sup> Even opponents of nudges concede that “the autonomy-diminishing character of irrationality-exploiting nudges does not, in and of itself, warrant rejecting all nudge proposals as illegitimate.” Yeung, *supra* note 23, at 139.

<sup>281</sup> *Id.* at 138.

<sup>282</sup> *Id.*

<sup>283</sup> See Bovens, *supra* note 22, at 217; Yeung, *supra* note 23, at 139.

<sup>284</sup> See R.C. SEKHA, ETHICAL CHOICES IN BUSINESS 39–40 (2d ed. 2002) (describing consequentialist analysis, specifically utilitarianism, as “the guiding principle of much modern welfare economics” and locating it in the theories of Mill, Bentham, and Kant). Consequentialism is, of course, not the only ethical theory available to analyze, but it is one business leaders are familiar with and likely to undertake. *Id.* at 40 (discussing virtue ethics). It has been noted that Thaler and Sunstein’s work “pays heed to autonomy concerns in certain instances, but overall . . . is not meant to be an overarching philosophical theory, but a practical regulatory tool to effect change (i.e., embracing consequentialism).” Blake Chapman, *Why Nudge? The Politics of Libertarian Paternalism*, 5 EURO. J. RISK REG. 280 (2014).

<sup>285</sup> See *supra* Part III.A.1-2.

<sup>286</sup> So far, behavioral ethics research has been content with identifying the problems of bounded ethicality, and less interested in demonstrating how it may be used to actually stop bad corporate behavior. See Feldman, *supra* note 26, at 23. *But see*, Gino et al., *supra* note 157 (suggesting nudges can work to counteract bounded ethicality).

<sup>287</sup> See Feldman, *supra* note 26, at 17 (discussing methodological concerns); Selinger & Whyte, *supra* note 202, at 933 (relaying a story by *The Guardian* in which a U.K. Minister described nudges as “experimental and lacking in concrete evidence, but still worth exploring”).

<sup>288</sup> J. Scott Dutcher, *From The Boardroom To The Cellblock: The Justifications for Harsher Punishment of White-Collar And Corporate Crime*, 37 ARIZ. ST. L.J. 1295, 1298–99 (2005); Emily Stewart, *White-Collar Crime Costs Between \$300 to \$600 Billion a Year*, Valuewalk (July 9, 2015, 3:37 PM), <http://www.valuewalk.com/2015/07/white-collar-crime-stats/>. Some suggest it is closer to \$900 billion. See WSRP, *New Study Confirms the Prevalence and Cost of White Collar Crime*, WSRP (May 31, 2016), <http://www.wsrp.com/new-study-confirmsprevalence-cost-white-collar-crime/>.

suffering.<sup>289</sup> Accordingly, any measurable compliance improvements would likely tip the scale positively in a means-ends calculus.<sup>290</sup>

That said, generalizations about the benefits of behavioral ethics nudging only go so far. When evaluating the ethicality of companies employing a behavioral compliance tool on their employees, one that has the potential to manipulate, a “consequence sensitive evaluation” of the specific nudge is required.<sup>291</sup> Although there is no way to comprehensively assess all the behavioral ethics nudges currently being used in corporate compliance in this article, looking more closely at the few highlighted above is illustrative.<sup>292</sup>

A good place to start is with the ethics-focused certifications that are now all but standard within companies. These first-degree nudges would seem to be on the “mostly ethical” side of the ledger when balancing means-ends. They operate by reminding employees of their ethical duties, or morality more generally, before the employees take actions that have historically invited compliance risk.<sup>293</sup> This is both a transparent nudge and one that does not prey on the irrational decision-making of employees; in fact, the whole point is for employees to read a statement that triggers deeper System 2 thought about moral obligations. While it is true that the nudge is driving employees away from their true preferences—as all behavioral ethics nudges do—the benefits could be significant depending on the level of compliance risk (here, risk that has been identified based on historical data compiled by the company). Moreover, these nudges appear to be supported by lab results and real world application, although it is somewhat limited.<sup>294</sup>

A poster of a fire alarm in the employee lunchroom, a third-degree nudge, likely falls on the opposite, “mostly unethical” side of the ledger. While that may seem odd given how innocuous a poster would appear to be, the nudge being employed is problematic from both an autonomy cost and consequentialist perspective. The poster itself is highly transparent as a visual cue, but how it harnesses reactive thinking is not.<sup>295</sup> The nudge works by triggering the viewer’s System 1 process; a person sees a fire alarm and their brain processes it as danger, which causes hyper-vigilance.<sup>296</sup> Thus, the image exploits the non-deliberative and “irrational” thinking system.<sup>297</sup> The behavior desired by the choice architect—for the employee to not cheat—does not come from reflective consideration of ethical obligations, but from the evocation of emotion.<sup>298</sup> While it could be argued that the ends of decreasing wrongdoing justify the high autonomy costs imposed on the employee, that argument appears weak. Unlike the highly targeted certification nudge, a poster that an employee may or may not look at offers unspecified benefits. In fact, in order for this type of nudge to intervene to stop wrongdoing, posters would have to be almost everywhere, inviting a mis-nudge.<sup>299</sup>

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<sup>289</sup> See Eduardo Porter, *Recession’s True Cost Is Still Being Tallied*, N.Y. TIMES (Jan. 21, 2014), <https://www.nytimes.com/2014/01/22/business/economy/the-cost-of-the-financial-crisis-is-still-being-tallied.html>.

<sup>290</sup> See Matthew D. Alder & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 172–74 (1999) (providing examples of cost benefit analysis justifying intervention).

<sup>291</sup> Yeung, *supra* note 23, at 138. See also Hansen & Jespersen, *supra* note 45, at 23; Bovens, *supra* note 22, at 208.

<sup>292</sup> See *supra* Part II.C.

<sup>293</sup> See Gino et al., *supra* note 157.

<sup>294</sup> See *id.* (discussing use in the insurance industry); ARIELY, *supra* note 140, at 45–51 (discussion of use in insurance industry and with the IRS).

<sup>295</sup> See Bovens, *supra* note 22, at 215–16 (identifying “in principle token transparency” as the standard by which nudges should be judged).

<sup>296</sup> See Gino et al., *supra* note 157.

<sup>297</sup> Baldwin, *supra* note 150, at 836.

<sup>298</sup> *Id.*

<sup>299</sup> See *supra* Part III.A.2.

Finally, JPMorgan's predictive monitoring algorithm, also a first-degree nudge, albeit a significantly more intrusive one, likely falls somewhere in between. On the one hand, a program that monitors every aspect of an employee's actions with the purpose of identifying wrongdoing before it happens would seem to violate notions of individual privacy and autonomy.<sup>300</sup> Not to mention that the program's findings are inherently speculative regardless of the sophistication of the software. Yet, the actual nudge—here, likely an electronic warning or reminder of some kind—is transparent and intended to give the employee pause before acting. Like the ethics certification, the nudge works by alerting employees that their System 2 thinking needs to be engaged to complete the task. That is not irrationality exploiting, but rather a “deliberation tool” that might prevent a trader in the midst of a quickly moving transaction from reflexively committing wrongdoing.<sup>301</sup> In addition, means-ends analysis suggests the negative impacts on autonomy may be justified given the size of the potential harm and the precision of the intervention. Although undoubtedly an extreme scenario, a single trader recently lost his bank over \$6 billion by failing to follow internal rules, inviting criminal and civil investigations and liability for himself and his employer.<sup>302</sup> An algorithm that is able to identify a systemic compliance risk and then preemptively intervene in individual decision-making could change the landscape of corporate compliance for certain companies.<sup>303</sup>

### 3. The Possibility that Employees Perceive Behavioral Ethics Nudging as Ineffective and Unethical, Thereby Undermining Corporate Compliance

There is one final consideration when evaluating behavioral ethics nudges, which relates to both autonomy costs and means-ends analysis: there is a real risk that nudging may undermine existing corporate compliance strategies. It is well established that organizational legitimacy is critical to the success of corporate compliance programs.<sup>304</sup> If employees do not believe in the legitimacy of the compliance efforts or the company underwriting them, the program will have little effect.<sup>305</sup>

This concern is present with all compliance initiatives, but it may be heightened when companies employ behavioral ethics nudges that could be perceived by employees as ineffective or unethical. When employees view their compliance programs as failing to align with their values, as they might with high autonomy cost nudging, the resulting employee reactions “range from resentment, to an ‘us-versus-them’

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<sup>300</sup> See Crowe, *supra* note 160.

<sup>301</sup> Yeung, *supra* note 23, at 137.

<sup>302</sup> See Marion Dakers, *JP Morgan's 'London Whale' Trader Breaks His Silence*, TELEGRAPH (Feb. 23, 2016), <http://www.telegraph.co.uk/business/2016/02/23/jp-morgans-london-whale-trader-breaks-his-silence/> (reporting on large trades made in JP Morgan's London office that eventually lost the bank \$6.2 billion and led to penalties from four different regulators).

<sup>303</sup> See Killingsworth, *supra* note 17, at 4.

<sup>304</sup> See Tom R. Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 33 (2008); Tom R. Tyler & Steven L. Blader, *Can Business Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143, 1153 (2005); Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 333 (1999); Lynn S. Paine, *supra* note 224, at 111.

<sup>305</sup> Tyler et al., *supra* note 304, at 33 (demonstrating that procedural fairness, a primary aspect of organizational legitimacy, is critical in promoting employee commitment and compliance).

attitude towards management.”<sup>306</sup> Both reactions cause the “legitimacy of the program [to be] slowly chipped away.”<sup>307</sup>

Worse yet, illegitimacy may increase compliance risk by *creating* more corporate wrongdoing. This occurs because any perceived illegitimacy caused by an ineffective or unethical nudging program provides space for employees to rationalize their unethical or illegal conduct.<sup>308</sup> In this space, employees find “defenses” to the internal corporate norms and external legal rules that are fundamental to the compliance function.<sup>309</sup> Employees then internalize and incorporate these defenses into their own thought processes. Once this occurs, there is little to prevent an employee’s future unethical or even criminal conduct from going forward, regardless of the compliance regime in place. There simply is no normative “check” available to the employee because it has been rationalized away.<sup>310</sup> In other words, if not done with care, attempting to reduce compliance risk through behavioral ethics nudging may create behavior that undermines the entire compliance effort.<sup>311</sup>

### C. *A Basic Framework for Using Behavioral Ethics Nudging as a Corporate Compliance Strategy*

The above discussion makes clear that analyzing and categorizing behavioral ethics nudges with the purpose of determining their effectiveness and ethicality is a complex undertaking. In an attempt to simplify that process, this article provides a basic framework business leaders and compliance professionals may use when contemplating specific nudges.<sup>312</sup>

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<sup>306</sup> Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 968 (2012) (identifying “[p]otential side effects” of communications from management that it does not trust employees).

<sup>307</sup> David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 364 (2016).

<sup>308</sup> Haugh, *Criminalization*, *supra* note 140, at 139–42; Brazerman & Gino, *supra* note 21, at 93 (“[R]esearch has found that the more room a situation provides for people to rationalize their behavior, the more likely they are to behave unethically.”).

<sup>309</sup> Haugh, *Criminalization*, *supra* note 140, at 152.

<sup>310</sup> For an example of how this occurs in the context of would-be tax offenders, see Haugh, *Overcriminalization*, *supra* note 124, at 1226–29.

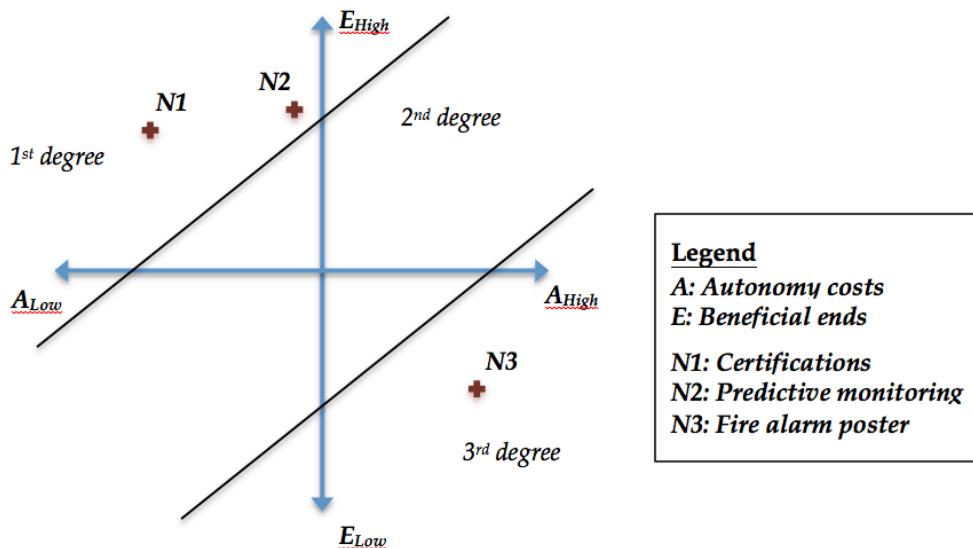
<sup>311</sup> This is no paper risk. The harms to corporate compliance programs stemming from perceived illegitimacy has been documented extensively in the context of overly aggressive monitoring and enforcement of company norms. *See, e.g.*, Langevoort, *supra* note 105, at 97–98 (discussing the work of social psychologist, Robert Cialdini, who predicts reduced employee morale and lower rates of compliance when companies “turn[] up the heat” on monitoring); *see also* Killingsworth, *supra* note 306, at 968 (discussing research that suggests command-and-control tactics such as aggressive monitoring cause employees to “live down” to the low expectations that are projected upon them”); Johann Graf Lambsdorff, *Preventing Corruption by Promoting Trust—Insights from Behavioral Science* 3, 3-5 (Univ. Passau, Working Paper No. V-69-15, 2015), [https://www.researchgate.net/publication/286441815\\_Preventing\\_Corruption\\_by\\_Promoting\\_Trust\\_-\\_Insights\\_from\\_Behavioral\\_Science](https://www.researchgate.net/publication/286441815_Preventing_Corruption_by_Promoting_Trust_-_Insights_from_Behavioral_Science) (discussing research finding that aggressive monitoring and signaled distrust in the workplace undermines workplace morale and creates suspicion between employees and management); Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 818–19 (2014) (same); Paine, *supra* note 225, at 111 (explaining that “[e]mployees may rebel against programs that stress penalties” and view compliance programs that do not address root causes of misconduct skeptically). This may be why some commentators suggest that the most beneficial aspects of behavioral ethics research are not to be gained at the individual level, but by committing “cognitive bias manipulations on a grand scale” through the promotion of positive group norms and cultural expectations. Killingsworth, *supra* note 17, at 6.

<sup>312</sup> It should go without saying that this framework is not intended to supplant considered analysis of autonomy costs and means-ends on a nudge-by-nudge basis. *See* Yeung, *supra* note 23, at 138 (arguing for the need for “context and

## Nudging Corporate Compliance

The construct is an *ethicality matrix*, which provides a visual representation of the autonomy costs and beneficial ends of behavioral ethics nudges. The matrix is depicted in Graph 1, below. Autonomy costs are aligned low to high ( $A_L$  to  $A_H$ ) on the horizontal axis. Beneficial ends are aligned low to high ( $E_L$  to  $E_H$ ) on the vertical axis. The diagonal lines indicate the rough areas corresponding to first-, second-, and third-degree behavioral ethics nudges.

**Graph 1: Ethicality matrix**



As a nudge increases in autonomy costs, either because it becomes less transparent or more directly harnesses cognitive irrationalities, it moves from low to high (left to right) along the  $A$  axis. As that same nudge is judged to have increasing benefits under a consequentialist analysis, it moves from low to high (up) the  $E$  axis. This places the nudge in one of four quadrants, with the upper left being the most ethical, and the lower right being the least ethical. The nudge also falls within one of the areas indicated by the diagonal lines, corresponding to the degree typology set forth above.<sup>313</sup>

By way of illustration, three behavioral ethics nudges currently being used in corporate compliance and which were analyzed earlier, are represented in Graph 1. The first-degree ethics-focused certification nudge ( $N1$ ) is placed in the upper left quadrant because it was deemed low in autonomy costs and high in potential benefits. So is JPMorgan’s first-degree predictive monitoring nudge ( $N2$ ). However, its autonomy costs are higher, as evidenced by its shift to the right along the  $A$  axis, but so are its potential benefits, as evidenced by its move up the  $E$  axis. The University of Arizona’s fire alarm poster ( $N3$ ), a third-degree nudge, finds itself in the lower right quadrant because of its high costs on autonomy and its unspecified benefits. A company considering a particular nudge may use this matrix to chart the quadrant in which a nudge falls, aiding the decision of whether to implement it as a compliance strategy.<sup>314</sup>

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consequence-sensitive evaluation” of nudges); SUNSTEIN, *supra* note 23 at 26 (warning against the “trap of abstraction” when evaluating nudging).

<sup>313</sup> See *infra* Part II.C.

<sup>314</sup> This approach is consistent with behavioral science research. Charting requires System 2 thinking—it is a deliberation tool—and visuals tend to be more “sticky” in our memory and perception. See Mark E. Haskins & James G. Clawson, *Making It Sticky: How to Facilitate the Transfer of Executive Education Experiences Back to the Workplace*, 25 J. MGMT.



## CONCLUSION

“Nudge for good.”<sup>315</sup> That is the advice Richard Thaler gives when he autographs his and Cass Sunstein’s best-selling book, which launched the nudge “revolution.”<sup>316</sup> That simple statement, which Thaler concedes is more of a plea than an expectation, encapsulates both the promise and pitfalls of public policy nudging.<sup>317</sup> The same could be said for private uses of choice architecture, particularly those aimed at improving employee ethicality, what this article has termed *behavioral ethics nudging*. Before a company can assess whether it is nudging its employees for good, however, it must understand how nudging works to harness decision-making, as well as the practical and ethical considerations surrounding the practice. This article has attempted to provide that analysis, from both an empirical and normative standpoint, along with a basic framework companies can use when considering employing choice architecture as part of their compliance programs. What the analysis makes clear is that the promise of behavioral ethics nudging is great, but so are the potential harms—to employees and the larger corporate compliance effort.

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DEV. 850, 859 (2006) (the principles of neurolinguistic programming suggest that people tend to favor visual, auditory, or kinesthetic learning channels).

<sup>315</sup> Thaler, *supra* note 39.

<sup>316</sup> Graham Lawton, *Nudge: How the Subtle Revolution Is Improving Society*, NEW SCI. (June 19, 2013), <https://www.newscientist.com/article/mg21829221-800-nudge-how-the-subtle-revolution-is-improving-society/>.

<sup>317</sup> Stillman, *supra* note 1.