

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

Yuval Feldman & Orly Lobel

I. Introduction

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

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

The purpose of this chapter is to present areas of behaviorally informed legal policy, in which the fuller picture of psychology is overlooked, and to suggest ways to move toward harmonization between the various behavioral-legal trends that have been extremely popular in recent years. The need for such integration exists because the current body of literature was developed independently and is plagued by incoherency. Most importantly, the lack of awareness of insights developed in other behavioral areas leads to very limited and sometimes inadvertent policy recommendations based on a partial view of the scope and potential of the various branches of psychology.

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

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

tradeoffs that are pervasively present in the adoption of regulatory solutions to social challenges.

II. Simply Simple: Recent Behavioral Initiatives

The range of initiatives that build on behavioral research is impressive. Insights into behavioral sciences, and how these insights can be used to affect people's choices, have recently become a top priority for governments around the world. In 2010, England set up the "Behavioural Insights Team," often called the "Nudge Unit," to apply these visions to public policy.¹ The EU has also established a task force which very recently published a guidelines report on how policy makers should use psychology when implementing behaviorally based legal policy in areas related to health and consumer choices.² In July 2013, news sources began to report that the White House was planning to assemble a similar team in the United States. According to a government document, the team would aim to "scale behavioral interventions that have been rigorously evaluated, using, where possible, randomized controlled trials."³ The document also laid out several policy initiatives that had already benefited, according to the White House, from implementation of these behavioral insights: increasing college enrollment and retention, getting people back to work, improving academic performance, increasing retirement savings, increasing adoption of energy efficient measures, and increasing tax compliance.⁴ The announcement of the creation of a behavioral policy team received criticism from those concerned about "big brother" and "nanny state" policies. And yet, the great interest in employing behavioral insights to law all across the world indicates a growing consensus among regulators about the validity and effectiveness of bringing behavioral economics into law. Leading behavioral economist, and member of the U.K.'s Behavioural Insights

¹CABINET OFFICE: BEHAVIOURAL INSIGHTS TEAM

<https://www.gov.uk/government/organisations/behavioural-insights-team> (last visited Nov. 1, 2013).

²JRS SCIENTIFIC AND POLICYREPORTS: Applying Behavioural Science to EU Policy-Making: http://ec.europa.eu/dgs/health_consumer/information_sources/docs/30092013_jrc_scientific_policy_report_en.pdf

³'BEHAVIORAL INSIGHTS TEAM' DOCUMENT, OBTAINED BY FOX NEWS,

<http://www.foxnews.com/politics/interactive/2013/07/30/behavioral-insights-team-document/> (last visited Nov. 1, 2013).

⁴*Id.*

Team, Richard Thaler sums up his advice for policymakers into two succinct points. First, if you want to encourage some activity, you need to make it easy; second, you can't create evidence-based policies without evidence.⁵ The initiatives adopted into policies vary considerably. Mostly the initiatives focus on setting consumer defaults and understanding choice architecture. Such initiatives consider ways in which immediate decision-making can be improved by packaging information and choices differently, for example by changing the set default to an opt-out rather than opt-in. In Sunstein's new book, *Simpler*, the reader gets a "brief guided tour" of such default manipulation and opt-in/opt-out structures.⁶ The examples provided in *Simpler* include the area of savings in which a change in the default of enrollment to an opt-out produces significant results on the participation rates of employees in pension plans. Similarly, with regard to health insurance, Sunstein reminds us that whether or not enrollment in a health care program is mandated, changing the default from having to be enrolled (whether or not it is required by law) to automatic enrollment makes a great difference in operationalizing the program. A classic third example of the impact of choice architecture in the welfare area is enabling more poor families to take advantage of their right to free school lunches by automatic enrollment.⁷ In the context of environmental policy, with the goal of reducing paper and saving more trees, creating a default presumption that most of us want to be paperless in payroll notifications and other bills will be more effective than having to fill out some paperwork to get the paperless process going.

Modern developments in the field of behavioral economics reveal the many ways in which human rationality is bounded. People take patterned shortcuts in their decision-making, which often veers the individual off the path of the typical rational and self-interested actor. An understanding of bounded rationality is important because lawmakers can create policies that improve efficiency by helping actors make more rational decisions that maximize their utility.⁸ A prime example of bounded rationality arises in

⁵ Richard H. Thaler, *Watching Behavior Before Writing the Rules*, N.Y. TIMES, July 8, 2012, at BU4.

⁶CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013)

⁷Id., p. 107 (2013)

⁸ Russell B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88(4) CAL. L. REV. 1051, 1075 (2000).

the context of public health, particularly with governments becoming increasingly concerned about overweight populations and obesity. For many years, the American federal government has attempted various campaigns aimed at improving public health (and of course, the benefits associated with that improved health such as lower healthcare costs). Basic rationality would predict that people who choose to eat healthy and exercise see the benefit of long-term health as more important than the benefit of the short-term happiness they might feel from unhealthy lifestyle habits. However, the research on bounded rationality reveals how aspects such as accessibility, willpower, presentation of the risks, and even such surrounding factors such as the type of music being played in the background at the gym or cafeteria may affect people's eating and exercising habits.⁹ Bounded rationality explains that the choices people make do not necessarily reflect their actual preferences. People may value long-term health as important and have a general desire to lose weight, but that does not necessarily translate into “successive action” because eating healthier and exercising are extremely difficult to sustain.¹⁰ Other factors, such as the human predisposition to prefer high-fat, high-calorie foods, a culture that promotes unhealthy eating and a sedentary lifestyle, as well as the perceived or actual higher cost of healthy foods also negatively impact the actor who wants to lose weight. Taking all of the behavioral research into account, lawmakers can enact policies that more accurately reflect the longer-term stated individual choices of living a healthy life. The cafeteria policy has served as a prime example of nudge-style policy. Shifting the order of choices available to kids in a cafeteria, by presenting first the healthier choices, creates the desirable effect of more kids choosing those fruits and veggies and filling up their tray with healthier choices before arriving to the fat loaded options.

A recent study conducted through combined efforts of experts in the legal and psychology fields about consumer fraud prevention helps provide another example of how irrationalities can be tackled by policy. The study analyzed the factors that affect consumers' vulnerability to fraud, examining consumer susceptibility to deception where an unusual contract clause is detected but the consumer is then persuaded to proceed with

⁹ Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112(2) PENN ST. L. REV. 529, 542 (2007).

¹⁰ Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112(2) PENN ST. L. REV. 529, 543 (2007)..

the deal.¹¹ The researches hypothesized that customers would be vulnerable to the deception of the opposite party through reassurances or explanations, even if those proffered explanations did not make sense.¹² The study revealed that of those participants who detected the inappropriate contract clause, 80% went on to sign the contract after a senseless explanation.¹³ The study's findings lend themselves to immediate policy suggestions for consumer fraud laws: for example, restricting the stages of explanation companies may provide to consumers and deeming "unfair" contracts even when the consumer proceeded to sign it in cases where an explanation was meaningless but impactful.¹⁴ Beyond fraud, studies on consumer behaviors lend themselves to insights about why so many consumers tend to over-spend often leading to paralyzing debt.

III. Contemporary Critiques of Behavioral Law and Economics

The common theme that threads across the contemporary initiatives is that people cannot be trusted to have the time, the energy, or good judgment to make the right decisions all the time. Therefore, they should be helped by designing the decision making environment in a way that prevents the poor decisions from happening. This approach has been criticized in the past on various grounds, mostly from perspectives on autonomy and paternalism. Since the nudge approach is perceived as being non-interventionist and merely corrective of cognitive failures, policies under the nudge umbrella in fact take on a very broad range of goals and spheres of regulation. With traditional regulatory approaches, there has been more controversy concerning the fields of regulation, for example, of personal well-being, healthy eating, savings and consumer financial choices. The psychology underlying the nudge approach has provided the policymaker with unconventional tools that enable intervention with presumably less controlling power.

¹¹ Jessica M. Choplin, Debra Pogrud Stark and Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 LAW & PSYCHOL. REV. 61 (2011).

¹²*Id.* at 62.

¹³*Id.* at 81.

¹⁴*Id.* at 95-101.

While nudges have been marketed as powerful triggers but non-interventionist, the assertion that policy based upon behavioral economics is simultaneously more effective and less interventionist than traditional command-and-control approaches is not without critique. A lively ongoing debate cautions against some of the main assumptions of the nudge approach. Most of the criticism about the contemporary behavioral policy base is philosophical in nature and asks about the implications of using insights from psychology to individual autonomy and choice. For example, Gregory Mitchell has argued that nudge approaches misuse the concept of libertarianism, subjugating “the liberty of irrational individuals to a central planner’s paternalistic welfare judgments.” Mitchell warns that nudges are in fact designed to capitalize on the irrational tendencies of private citizens to enable the paternalistic planner to direct their lives.¹⁵

The very term “libertarian paternalism” may have distorted much of the message about the significance and meaning of behavioral policy.¹⁶ The term attempts to suggest that, compared to traditional modes of command and control, using behavioral insights is less interventionist on the one hand and more individualistic and self-regarding on the other. Liberal democracies regulate behavior in a very large range of fields and in the sense of translating research into public policy, nearly any regulatory approach could be deemed paternalistic. However, this perspective obscures the ways in which welfare and well-being are part of a social collective project. Indeed, many interventions that draw on behavioral insights are concerned with third-party externalities and the need for central coordination.¹⁷ For example, risk taking, whether financial or physical, affects society as a whole and entails high costs if left to market regulation alone, as we have certainly seen in several cycles of recent economic crises.¹⁸ Employing behavioral insights also

¹⁵ Gregory Mitchell, Liberal Paternalism is an oxymoron, *Northwestern University Law Review*, Vol. 99, No. 3, 2005.

¹⁶ See also On Amir and Orly Lobel, *Stumble, predict, nudge: How behavioral economics informs law and policy*, 118(8) *COLUMBIA LAW REVIEW* 2098 (2008) .

¹⁷ On Amir and Orly Lobel, *Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research*, 1 *The European Journal of Risk Regulation* 17 (2012); San Diego Legal Studies Paper no. 12-094. See also On Amir and Orly Lobel, *Stumble, predict, nudge: How behavioral economics informs law and policy*, 118(8) *COLUMBIA LAW REVIEW* 2098 (2008) .

¹⁸ *Id.*

inevitably includes redistributive effects, what Colin Camerer and others have termed “asymmetric paternalism,” benefiting those who err more frequently in their judgment.¹⁹

Amir and Lobel have argued that in the political attempt to reach bipartisan commitment for policy, Nudge neglected to fully account for the range of regulatory solutions that must be employed given the insights of behavioral economics.²⁰ Instead, policymakers and thought leaders tend to narrow the regulatory tools to a small set of iconic choice architecture modules. Amir and Lobel argue that a better approach is to understand behavioral economics as aiding the regulator to expand the regulatory tool box, drawing on the broad spectrum from command-and-control through collaborative regulation to self-regulation that is offered by the new governance school of thought.²¹ More recently, Bubb and Pildes, continuing the critique of the non-interventionist theme that pervades behavioral law and economics, similarly argue that it is the combination of the “two seductive dimensions of [behavioral law and economics] – its appeal as social science and as politics” that are in tension, because the insights that come out of the behavioral social science in fact often require much more forceful regulatory solutions than the behavioral law and economics school of thought has been willing to advocate.²² Moreover, the nudge-style tools employed by policymakers are in fact stronger than behavioral law and economics scholars are willing to admit.²³ As will become clear in the next sections, we largely agree with this critique and expand it. We argue that it is in fact the breadth of behavioral insights and the depth of the field itself that present tensions in how to operationalize its insights. Next generation behavioral policies must decouple from an attachment to a particular set of solutions. It is clear that lessons from psychology can and should inform law and policy. However, “if policymakers are to

¹⁹ Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetric Paternalism*, 151 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1211, pp. 1211-1212 (2003).

²⁰ On Amir and Orly Lobel, *Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research*, 1 The European Journal of Risk Regulation 17 (2012); San Diego Legal Studies Paper no. 12-094. See also On Amir and Orly Lobel, *Stumble, predict, nudge: How behavioral economics informs law and policy*, 118(8) COLUMBIA LAW REVIEW 2098 (2008).

²¹ On new governance see generally, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342 (2004).

²² Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARVARD LAW REVIEW (forthcoming 2014); New York University Law and Economics Working Papers, Paper 352.

²³ “Moreover, somewhat ironically, the nudges recommended by BLE scholars are often not as light-touch as advertised. work in BLE has generally not subjected these tools to sufficient analysis to evaluate their effects” *Id.*, at p.11

become consumers of the discipline of judgment and decision-making, they must be wise consumers.”²⁴

Policymakers should take into account the wealth of knowledge developed in the social sciences as well as be attuned to differences between policy domains. Take for example the recent suggestions regarding Bloomberg’s intervention in the size of soda cups or changing the defaults in consumer credit card contracts by setting a lower sum of money as the default credit that a consumer will have. In such context, we are dealing with domains in which commercial firms have already created a nudge to consume more soda by playing with the sizes of the cups or by placing a really low sum of money of \$10 or \$15 in the credit bill one gets. In such situations, when corporate competitors market to consumers quite similar options and the consumer has little choice or input on the available sets of choices, the criticism about paternalism proves rather weak. In such contexts, providing more choices and designing the decision making environment seems indeed less interventionist than more direct forms of regulation, for example, in the case of soda bans, completely forbidding the sale of larger cups instead of requiring a delay on the decision of whether to upgrade the cup size, and still received the discount.

IV. Shifting the Debate: Expanding the Behavioral World

While the earlier critiques of behavioral engineering are highly important and need to be continuously deliberated, our approach here pushes forward the debates about the adequacies of behavioral law and economics in several new grounds²⁵. We take an insider’s stance, as researchers immersed in behavioral research. Our concern is primarily with the question of sustainability and commitment to the integration of behavioral sciences into law and policy. Our goal is first to expand the interface between psychology and law. Then, once the footprint of behavioral studies that contribute to policy is expanded, our second goal is to illuminate the tradeoffs between different types of

²⁴ On Amir and Orly Lobel, *Stumble, predict, nudge: How behavioral economics informs law and policy*, 118(8) COLUMBIA LAW REVIEW 2098, 2122 (2008).

²⁵ Compare also with the discussion of second order gap in Tor, Avishalom. "The methodology of the behavioral analysis of law." *Haifa L. Rev.* 4 (2008): 237.

solutions and to account for the relative costs and benefits of behavioral approaches in any given situation. We argue that if policy is to take psychology into consideration, a more informed analysis is required.

The need for an expanded and integrated approach to behavioral policy stems from the independent developments in each strand of the behavioral sciences, each of which have immense potential in contributing to better policy and many of which are absent for the most part from policy analysis. Most importantly, a narrow view of the world of law and psychology can lead to very limited and sometimes inadvertent policy recommendations. More often than not, contemporary behavioral policy approaches appear to be based on the partial view by legal scholars of the scope and potential of the various branches of psychology. There are no doubt important exceptions. In recent years, there are indications of expansion of the behaviorist lens as policymakers build on theories related to behavioral ethics, social norms, and social proof. Still, the expansion is slow and scattered, lacking a consistent discussion or systematic cohesive framework.

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

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

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

1. Dual Reasoning and Deliberation-Free Nudges

The concept of two systems of reasoning has gained popular recognition in Kahneman's book, *Thinking Fast and Slow* and it lies at the core of much of the research on behavioral law and economics.²⁶ The general concept differentiates between an automatic, intuitive, and mostly unconscious process (labeled System 1) and a controlled and deliberative process (labeled System 2).²⁷ An impressive body of research has been conducted in an attempt to compare the two types of decision-making systems in terms of the way they operate and in their efficacy. This line of research has shown in recent years that for certain tasks, such as visual tasks, System 1 leads to better performance relative to System 2 while in other tasks, such as those requiring greater analytics, System 2 outperforms System 1.²⁸ For the most part, behavioral law and economics takes a more critical approach of the functioning of System 2 and is relatively inclined to use biases associated with System 1 as a way to improve people's lives, for example, in the defaults set in "save more tomorrow" type plans or changing the default rules in credit card bills. While some of these reforms are effective and important, this regulatory lens of shifting

²⁶DANIEL KAHNEMAN: THINKING. FAST AND SLOW (2011)

²⁷ See also On Amir, A. Pocheptsova, R. Dhar, and R. Baumeister, Deciding Without Resources: Psychological Depletion and Choice in Context (2009) *Journal of Marketing Research*; Keith E. Stanovich and Richard F. West, Individual differences in reasoning: Implications for the rationality debate? *BEHAVIORAL AND BRAIN SCIENCES* (2000) 23, 645–726; Evans JST (2003). In *Two Minds: Dual-Process Accounts Of Reasoning Trends In Cognitive Sciences*, 7 (10), 454–459, A.P. Dijksterhuis, Maarten W. Bos, N. Loran, F. Nordgren, & Rick. B. van Baaren, *On making the right choice: The deliberation without attention effect*, 311(5763) *SCIENCE* 1005 (2006); Lobel, Orly and Amir, On, Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy, *Columbia Law Review*, Vol. 108, 2009; A.P. Dijksterhuis, & Loran, F. Nordgren, *A theory of unconscious thought*, 1(2) *PERSPECTIVES ON PSYCHOLOGICAL SCIENCE* 95 (2006); Daniel Kahneman, *A perspective on judgment and choice: Mapping bounded rationality*, 58(9) *AMERICAN PSYCHOLOGIST* 697(2003); Timothy D. Wilson, & Jonathan. W. Schooler, 60(2) *Thinking too much: Introspection can reduce the quality of preferences and decisions*, *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 181 (1991).

²⁸ See for example, Zohar Rusou & Dan Zakay & Marius Usher, *Pitting intuitive and analytical thinking against each other: The case of transitivity*, 20(3) *PSYCHONOMIC BULLETIN & REVIEW* 608 (2013).

decision-making from System 2 to System 1 has flattened the discussion without rigorous analysis of the costs and benefits of these shifts.

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

2. Deliberations and Decisions

The current behavioral regime focuses on getting people to the correct result with little need for deliberation.²⁹ The focus is on default rules, opt-outs, and designing simpler paths to a direct single “right choice.” Naturally, the process through which people get to the desired decision – be it save more money or donate more organs - becomes secondary to the actual optimal choice. The rationale behind this approach is clear: with growing knowledge of the fact that people are bad decision makers, who lack either the motivation or the cognitive abilities for making the right choices, less effort should be given to efforts such as increased access to information³⁰ and more effort should be made to ensure that consumers arrive at the “right” decisions concerning financial and health practices. This approach is problematic however because it overlooks important ways in which deliberation positively affects choices and commitment. The

²⁹ It should be noted that we are focusing here on individual deliberation. This should not be confused with the discussion on the role of public deliberation regarding the usage of nudges which we discuss in latter stages of the paper.

³⁰Omri Ben-Shahar & Carl E. Schneider, *The Failure Mandated Disclosure*, 159 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 647 (2011).

choice architecture approach neglects the behavioral implications for long-term perceptions and sustainability of policy.

In the following paragraphs, we will review some of the theories that emphasize the importance of deliberation in ensuring such sustainability. The notion of sustainability is a general weakness of much of the nudge approach. This is particularly surprising given the important research conducted by scholars such as Tyler and Darley³¹ on commitment and compliance. In practice, the knowledge about the effectiveness of the nudging theory in the long term is relatively limited.³² Moreover, many of the lab studies presently being used as a basis for the nudge approach demonstrate one-shot short term effects. For the most part, behavioral economics research consists of lab experiments which lack the rich social and organizational context of real market interactions and much of the effects being cited as the basis of changes in decision-making are measured within minutes or even seconds from the time participants were exposed to the stimuli.³³

An impressive and yet rather neglected body of psychology literature pertains to the importance of active participation of people in making decisions and the importance of voice and participation in shaping people's behavior in ways that are publicly desirable. Civic participation enhances and empowers citizens' feelings of efficacy and belief in their ability to be part of the democratic process.³⁴ Public policy that undermines the focus on awareness and deliberation and focuses more on supplementing personal judgment and active involvement may undermine these positive processes from happening.³⁵ Deliberation and awareness carry unique procedural benefits from an outcome perspective that take into account aspects such as sustainability and long-term commitment by people.

³¹ Tyler, Tom R., and John M. Darley. "Building a law-abiding society: Taking public views about morality and the legitimacy of legal authorities into account when formulating substantive law." *Hofstra L. Rev.* 28 (1999): 707.

³² Theresa M. Marteau, David Ogilvie, Martin Roland, Mark Suhrcke & Michael P. Kelly, *Judging nudging: can nudging improve population health?* 342 *BMJ* 263 (2011).

³³ see On Amir and Orly Lobel, On Amir and Orly Lobel, *Stumble, predict, nudge: How behavioral economics informs law and policy*, 118(8) *COLUMBIA LAW REVIEW* 2098

³⁴ Russell J. Diton, *Citizenship Norms and the Expansion of Political Participation*, 56(1) *POLITICAL STUDIES* 76(2008).

³⁵ 117- Edward L. Deci & Richard M. Ryan, *self-determination Theory: when Mind Mediates Behavior*, 1 *JOURNAL OF MIND & BEHAVIOR* 33 (1980); MYLES I. FRIEDMAN & GEORGE H. LACKEY, JR., *THE PSYCHOLOGY OF HUMAN CONTROL: A GENERAL THEORY OF PURPOSEFUL BEHAVIOR* (1991).

A related aspect of sustainability could be learned from the discussion on operational empowerment devices.³⁶ For example, field experiments show that people's decision whether to climb the stairs or use the escalator can be changed more effectively by coloring stairs in interesting ways compared with dissemination of information about the importance of exercising. And yet, such an insight is rather hard to scale. First, the idea that all building stairs will be painted to look like pianos or otherwise artful is unrealistic. Second, even if such an initiative would be pursued, it would likely be self-defeating, as the very results showing people's interest in walking up colorful stairs stem from their currently exotic nature. Hence, since it seems fair to estimate that there is a limit to the number of stairs that can be colored with piano painting, and there is a reason to believe that scarcity drives the interest, there is greater room for combining such nudges with deliberation that could enhance learning, internalization and consequently sustainability.

Beyond making each individual decision and ensuring the sustainability of optimal choices, it is worth considering another behavioral aspect associated with the optimal level of deliberation: regret aversion. A famous paper on the ability of parents to deal with consequences of their choices demonstrates the cost of deliberation and autonomy.³⁷ The study was done in a unique context – parents who needed to make abortion decisions regarding fetuses with minor medical issues. It was shown using a mix of qualitative and quantitative methods that the French parents had less autonomy and firmer doctor advice, relative to American parents who faced a similar dilemma, but with less authoritative advice from doctors. While the context is particular, it suggests a broader insight into post-decision-making processes that are affected by the type of input and deliberation that were put into the decision.

Relatedly, self-determination theories show that people are more satisfied when they have independent personal choices.³⁸ Lack of control in one's environment induces

³⁶ Discussed by Fabiana .. chapter __ in this book

³⁷Botti, S., Orfali, K., & Iyengar, S. S. (2009). Tragic choices: Autonomy and emotional responses to medical decisions. *Journal of Consumer Research*,36(3), 337-352.

³⁸Deci, E. L., & Ryan, R. M. (1985). *Intrinsic motivation and self-determination in human behavior*. New York: Plenum Publishing Co.

desperation and other unpleasant feelings.³⁹ For instance, elderly residents in nursing homes who were given control over routine choices lived longer and reported higher rates of well-being than residents who did not have control over the set of choices.⁴⁰ Additionally, another study hypothesized that in social settings one's control over her own outcomes could change her interpretation and, consequently, her preferences of the situation.⁴¹ The theory about the relationship between control and well-being seems to be straightforward.⁴² Thompson summarizes this relationship in the following way, “we feel better about ourselves, we are physically healthier, perform better under adversity, and are better able to make desired behavioral changes if we have a sense of behavioral control.”⁴³ The improvement in personal well-being through increased self-direction in our everyday activity aimed at achieving future goals (referred to as “the implicit agency of daily life”) is demonstrated in a myriad of contexts.

The literature on procedural justice describes the importance of the perception of fairness of policy for the parties' ability to accept the policy's outcomes.⁴⁴ The implications of procedural justice have been considered in the context of a range of legal fields.⁴⁵ The

³⁹Martin E.P Seligman, *Helplessness: On Depression, Development, and Death* (1975).

⁴⁰Ellen J. Langer and Judith Rodin, *The effects of choice and enhanced personal responsibility for the aged: A field experiment in an institutional setting*, 34 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 191 (1976) ; Judith Rodin and Ellen J. Langer, *Long-term effects of a control-relevant intervention with the institutionalized aged*, 35(12) JOURNAL OF PERSONALITY AND SOCIAL psychology 897 (1977).

⁴¹ShohamChoshen-Hillel. & IlanYaniv .*Agency and the construction of social preference: Between inequality aversion and prosocial behavior*, 101(6) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 1253 (2011).

⁴² Keith D. Markman, Igor Gavansky, Steven J.Sharman and Matthew N. McMullen*The impact of perceived control on the impregnation of better and worse possible worlds*, 21(6)PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 588 (1995);

Jerry M. Burger, *negative reactions to increases in perceived personal control*, 56(2) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 246 (1989).

Suzanne M. Miller, *why having control reduces stress: if I can stop the roller coaster, I don't want to get off*, in HUMAN HELPLESSNESS: THEORY AND APPLICATIONS71, 80 (Judy Garber & Martin E. P. Seligman eds. Academic Press 1980).

⁴³Suzanne C. Thompson, *Naturally Occurring Perception of Control: A Model of bounded flexibility*, in Control Motivation and Social COGNITION 74 (Gifford Weary et al eds., 1993) [hereinafter control motivation and social cognition].

⁴⁴ Miriam Erez and Revital Arad, *Participative Goal Setting: Social, Motivational and Cognitive Factor*,71(4) JOURNAL OF APPLIED PSYCHOLOGY 591 (1986).

⁴⁵For a general overview of the relationship between procedural and distributive justice see for example, TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990); 122- JOHN W. THIBAUT AND LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

literature suggests two key factors may increase one's sense of procedural justice: having a voice and having perceived control over the process.⁴⁶ Both types of processes require some level of awareness and deliberation by the individual prior to making their decisions. Of course, not all forms of participation are equal and important frontiers in the literature examine differences between mere technical participation and participation based on deliberative processes and cognitive effort. For example, Perez states that from current studies it seems unclear to what extent people's participation in online government projects has been able to produce deliberative processes.⁴⁷

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

For a thorough description of the important role of participation and procedural justice among the various justice theories, see JERALD GREENBERG, *THE QUEST FOR JUSTICE ON THE JOB: ESSAYS AND EXPERIMENTS* 23 (1995).

Tom R. Tyler, & Kathleen M. McGraw, *ideology and the interpretation of personal experience, procedural justice, and political quiescence*, 42(2) *JOURNAL OF SOCIAL ISSUES* 115 (1986).

⁴⁶For research on the relevancy of control over a process of increasing the sense of procedural fairness associated with it, see for example kwok Leung & Wai-Kwan Li, *Psychological mechanism of process control effects*, 75(6) *JOURNAL OF APPLIED PSYCHOLOGY*. 613 (1990) ; Jerald Greenberg and Robert Folger, *Procedural Justice, Participation, and the Fair Process Effect in Groups and Organizations* In: *BASIC GROUP PROCESSES* pp.235-256 (P. Paulus, Editor, 1983; Christopher P. Earley and E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52(6) *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 1148 (1987).

⁴⁷Oren Perez, *Open Government, Technological Innovation and the Politics of Democratic Disillusionment: (E-) Democracy from Socrates to Obama* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078741 (June 6, 2012).

participation and deliberation should be given more weight due to its effect on commitment to the decision over time.⁴⁸

Several new additions to nudge campaigns seem to adopt an understanding of the significance of process by focusing on community-based identity and encouraging citizens' participation. For example while most nudges in the context of smoking and drinking attempt to reduce awareness – hiding them from the public sphere, or requiring the invisibility of alcohol in public sphere by requiring a brown bag masking of the bottle, other approaches in the U.K attempt to increase awareness of how much other people really drink, because people generally over-estimate how much others drink.⁴⁹ In other contexts, people are provided with various ways to communicate to others the problems they see both in the consumer and government platforms. Very recently, Tyler et al. have suggested using procedural justice to improve people's following of medical recommendations.⁵⁰

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

1. Law's Meaning

Related to the tradeoff between the process and the outcome is the dual role of law - as directing behavior and serving an expressive function. The central point of

⁴⁸ In that context, compare the work of Eyal on form contracts, where he has demonstrated in a field research that the more involvement of people in the contracting process they are more likely to be committed to its performance. Eyal, Zev J. "When and why individuals obey contracts: experimental evidence of consent, compliance, promise, and performance." *The Journal of Legal Studies* 41.1 (2012): 67-93. Recently Cass Sunstein explicitly recognized that greater involvement in the process of making decisions is likely to increase one's identification with the decision. Pin cite from his paper of Cass Sunstein on the deciding by default, his specific words are as follows: "In addition, passive choice will, almost by definition, decrease choosers' feelings of identification with the outcome. In part for that reason, any kind of default rule, including a highly personalized one, may not create the kinds of motivation that can come from active choosing."

⁴⁹ Compare with Robert D. Cooter, Michal Feldman and Yuval Feldman, *The Misperception of Norms: The Psychology of Bias and the Economics of Equilibrium* 4(3) REVIEW OF LAW & ECONOMICS, http://works.bepress.com/robert_cooter/138 (2009) making the general argument regarding people over-estimation of unethicality and constrains on changing that view.

⁵⁰ Tom Tyler, Avital Mentovich and Sagarika Satyavada, *What motivates adherence to medical recommendations? The procedural justice approach to gaining deference in the medical arena*, Regulation and Governance, DOI: 10.1111/rego.12043(2013).

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

The literature on expressive law and on social meaning views law’s language and its visibility to the public as one of its most important tools.⁵¹ Making something into a law, by using certain words and contexts can shape the meaning of important concepts such as parenthood, safe driving, and good citizenship. The expressive function of the law can help people determine what the prevailing social norm is,⁵² how your behavior will be viewed if you violate the law, what is the best course of action when one needs to

⁵¹Almost two decades ago, Cass Sunstein wrote about the expressive function of law and defined the expressive function of the law as follows: “At least for purposes of law, any support for a statement should be rooted not simply in the intrinsic value of the statement, but also in plausible judgment about *its effect on social norms*” (emphasis added). See Cass R. Sunstein, , *On the Expressive Function of the Law*, 144(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 2021, 2045 (1996). It should be recognized that there are scholars who take on the language based approach to what expressive function of the law means. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1363 (2000) making a thorough discussion of the expressive function of the language of the law). In a comprehensive attempt to define the expressive function of the law, Anderson and Pildes propose the following: “Expression refers to the ways that an action or a statement (or any other vehicle of expression) manifest a state of mind.” See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1503, 1506 (2000).

⁵²See Richard H. McAdams, *An Attitudinal Theory of Expressive Law(New and Critical Approaches to Law and Economics)*, 79 OREGON LAW REVIEW 339 (2000). See alsoDharmikaDharmapala& Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5(1) AMERICAN LAW & ECONOMIC REVIEW 1 (2003).

coordinate her behaviors with others,⁵³ and what are the reputation costs at risk for engaging in certain behaviors.⁵⁴

The research on law and social science highlights the symbolic effects of law in society and on the role of legality in social change. Legality, wherever it is found, shapes cultural changes in society.⁵⁵ Scholars such as Anderson & Pildes⁵⁶ and Adler⁵⁷ also focus on language, recognizing the declarative and constitutive cultural powers of law. Within this tradition, legal scholars have suggested that when examining the effects of law, one should focus not only on its operational functions but also on its declarative purpose and responsibilities.⁵⁸ Laws influence people both by making authoritative

⁵³See Richard McAdams, *A Focal Point Theory of Expressive Law*, 86(8) VIRGINIA LAW REVIEW 1649, 1650-63 (2001). For empirical evidence see Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: Expressive Influence in an Experimental Hawk/Dove Game*, 2(1) JOURNAL OF EMPIRICAL LEGAL STUDIES 87, 87-96 (2005).

⁵⁴A typical example of the cost-related account of social norms can be found in Cooter's analysis: "With group pressures, an increase in an act's popularity lowers its cost. Imposing a non-legal sanction on someone often involves a risk of retaliation, which decreases as more people obey the norm. The risk of a non-legal sanction often increases as more people obey the norm, thus lowering the relative cost of conforming to the norm." (emphasis added), see Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86(8) VIRGINIA LAW REVIEW 1577, 1585 (2000). See also Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83(2) VIRGINIA LAW REVIEW 349, 352-361 (1997).

⁵⁵See generally, Orly Lobel, *Paradox of Extralegal Consciousness*, 120 Harv. L. Rev. 937 (2007). These studies consider the role of law in social change, symbolic politics, evolution of social values and the notion of "legal consciousness."

⁵⁶In a comprehensive attempt to define the expressive function of the law, Anderson and Pildes propose that: "Expression refers to the ways that an action or a statement (or any other vehicle of expression) manifest a state of mind." See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1503, 1506 (2000).

⁵⁷See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1363 (2000) for a thorough discussion of the expressive function of the language of the law. Adler thinks that the work of LEN scholars on norms cannot be defined as expressive, since they do not focus on the language of the law.

⁵⁸This approach has been used in a wide variety of legal doctrines. See Anderson & Pildes, *infra* note 41, at p. 1532 hold its most practical relevance in the contexts of employment and constitutional law where courts strike down laws that express unconstitutional purposes or attitudes. Other notable areas in which the expressive functions of the law have been taken into account include voting rights, see Richard Pildes & Richard Niemi, *Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92(3) MICHIGAN LAW REVIEW 483 (1993); laws regarding homosexuality, (see Wibren Van Der Burg, *The Expressive and Communicative Functions of Law*, 20(1) LAW & PHILOSOPHY 31 (2001)) especially with regard to signaling moral standing of the state through existing, though not enforced, laws and anti-discrimination laws. Another interesting and important area in which expressive theories of law have been featured is criminal punishment. Significant in this field is the work of Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83(2) VIRGINIA LAW REVIEW 349, 352-361 (1997). regarding the expressive meaning of criminal sanctions (For an historic perspective, see Joel Feinberg, *THE EXPRESSIVE FUNCTION OF PUNISHMENT* (1965)). This forms the foundation of his

statements and by reproaching them using the language of the law.⁵⁹ In other words, we use laws to affect social norms and to change judgments and behavior.⁶⁰ Language has an essential and creative role in social change.⁶¹

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

The original idea of the expressive concept of law was to lead people to internalize social norms, to recognize the wishes of the state, to understand what social practices should be abandoned, and to identify certain practices as shameful in the state. Following some of the writing on form contracts and snap legal decisions, it seems that the outcome of this line of research is to minimize unnecessary words and require as little attention as possible to what the law asks them to do. Hence, the simpler nudge approach not only limits the participation process of people in determining the decisions they take, as the previous argument has suggested, it also changes the function of law from shaping the social meaning of people's behavior to simply altering their decision, without the target of regulation knowing that the law is even operating in the background. Publicizing that the law is behind the choice architecture, especially in areas such as health, transactions, and consumerism, may even impede a person's ability to make mindless choices. Perhaps most globally, the idea of default design downplays our notions of law. It attempts to present itself as something different, not exactly law in an authoritative

theory highlighting the importance of shaming in criminal punishment. According to the shaming theory, fines and community service are problematic as criminal punishments because they carry no shaming factors.

⁵⁹Dov Fox & Christopher L. Griffin Jr, *Disability-Selective Abortion and the Americans with Disabilities Act*. UTAH LAW REVIEW 845 (2009).

⁶⁰Cass R. Sunstein, , *On the Expressive Function of the Law*, 144(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 2021, 2025 (1996).

⁶¹Elizabeth Mertz, E. *LEGAL LANGUAGE: Pragmatics, poetics, and social power*, 23 ANNUAL REVIEW OF ANTHROPOLOGY 435(1994).

way, not exactly regulation, but rather a design mechanism, a rule structure, a choice architecture. Psychologically, this masking of law has a cost.

2. Expressive Nudges

As suggested above, while legal scholarship is rich with understandings of the expressive function of the law giving it innovative mechanisms,⁶² the nudge approach seems to abandon this important literature. While we recognize the advantages of invisible law and choice architecture, it is our belief that even with greater focus on unaware decisions associated with this approach, making the law more visible to the public should not be downplayed without careful discussion.

Naturally, the focus on snap decisions has led to an abandonment of discussion on the expressive function of the law and social meaning which seems to be associated with public deliberation. However, what we try to suggest is that the focus on snap decisions might highlight a different view of what expressive law should mean behaviorally. Various lines of research in cognitive psychology show that choice of words can completely alter the meaning people assign to a situation, especially with limited awareness.⁶³ Shifting the focus of expressive law to research on framing effects can enrich and add important layers of sophistication for behaviorally based legal policy.⁶⁴

C. Trust vs. Voluntary Compliance

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

⁶² See Yuval Feldman, The expressive function of trade secrets law, *J. Empirical Legal Studies* (2009) for a review of many of the competing behavioral mechanisms to the expressive function of law.

⁶³ Elizabeth F. Loftus and John C. Palmer, *Reconstruction of automobile destruction: An example of the interaction between language and memory*. 13(5) *JOURNAL OF VERBAL LEARNING AND VERBAL BEHAVIOR*, 585 (1974).

⁶⁴ See for example Thomas E. Nelson, Zoe M. Oxley & Rosalee A. Clawson, *Toward a Psychology of Framing Effects* 19(3) *POLITICAL BEHAVIOR* 221 (1997).

voluntarily.⁶⁵ Research done by legal scholars like Lynn Stout⁶⁶ and Yochai Benkler⁶⁷ call for more sophisticated ways to enhance people's cooperation and contribution to public goods, suggesting that people will cooperate if you trust them to be cooperative and will become less cooperative if you treat them as self-interested individuals.⁶⁸ This notion of people's good nature is partly challenged by emerging research by scholars like Bazerman, Banaji, Ariely and Shalvi,⁶⁹ which suggests that good people do bad things.⁷⁰ The emerging picture of the human character is a far more complex one, in which people mostly seek to promote their own self-interest as long as they can feel good about themselves. According to this theory, by giving people the ability to choose how to behave, many good people might engage in self-deception mechanisms such as moral disengagement or elastic justification and exploit that trust to shirk, engage in dishonest behavior, or violate the law.

Elsewhere Feldman discussed the effects of legal ambiguity on the likelihood that people will behave in a desirable way.⁷¹ For example, Haisley and Weber⁷² find that people prefer to take ambiguous risks when the ambiguity allows them to justify unfair behavior. Dana et al.⁷³ find that people are less generous in situations in which they can

⁶⁵See for example Amartya Sen., *Rationality and freedom*. Harvard University Press, 2004; James C Cox. "How to identify trust and reciprocity." 46 (2) *Games and Economic Behavior* 260 (2004):

⁶⁶LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2010)

⁶⁷Yochai Benkler, *THE PENGUIN AND THE LEVIATHAN : HOW COOPERATION TRIUMPHS OVER SELF-INTEREST*(2011)

⁶⁸ See also Chou, Eileen Y., Nir Halevy, and J. Keith Murnighan. "The relational costs of complete contracts." *IACM 24th Annual Conference Paper*. 2011.

⁶⁹ For a review see Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economic*, OXFORD HANDBOOK OF BEHAVIORAL LAW AND ECONOMICS (Zamir and Teichman eds. Forthcoming 2014)

⁷⁰ Nina Mazar, On Amir and Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45(6) *JOURNAL OF MARKETING RESEARCH* 633 (2008);

Madan M. Pillutla, *When Good People Do Wrong: Morality, Social Identity, and Ethical Behavior*, in: *SOCIAL PSYCHOLOGY AND ORGANIZATIONS* pp. 353-370 (D. De Cremer, R. van Dijk, and J. K. Murnighan eds., 2011); James Hollis, *WHY GOOD PEOPLE DO BAD THINGS: UNDERSTANDING OUR DARKER SELVES* (2008); Mahzarin R. Banaji and Anthony G. Greenwald, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

⁷¹ Yuval Feldman and Henry E. Smith, *Behavioral Equity*, JITE 2014.

⁷² Emily C. Haisley and Roberto A. Weber, "Self-Serving Interpretations of Ambiguity in Other-Regarding Behavior," 68(2) *GAMES AND ECONOMIC BEHAVIOR*, 614 (2010).

⁷³ Jason Dana, Daylian M. Cain and Robyn M. Dawes, "What you Don't Know Won't Hurt me: Costly (but quiet) Exit in a Dictator Games" 100(2) *ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES*, 193 (2006).

appeal to moral ambiguity in explaining their actions. Similarly, Hsee⁷⁴ found evidence that people make choices that satisfy their preferences, if they can exploit existing ambiguity about which decision may complete the assignment. Feldman and Teichman⁷⁵ find that under conditions of legal ambiguity people will formulate a minimal interpretation of what the law or contracts requires from them. With the greater recognition of the nudge approach, that people make decisions without full awareness to the consequences of their behavior, more thought should be put into the question of people's nature and the effects of this decreased awareness on their interactions with compliance and the law.

The following behaviorally based dilemma further demonstrates these questions. On the one hand, researchers like Darley and Robinson⁷⁶ and Cooter⁷⁷ suggest that law should be aligned with people's moral norms to ensue voluntary compliance and support for government punishment. Governments need to maintain legitimacy by such alignment. At the same time, behavioral ethics teaches us that about the dissonance between peoples' need to promote their self-interest and their need to maintain their self-perception.⁷⁸ The kinds of behaviors that people are publicly negatively judged for are the types of behaviors that most regulatory schemes attempt to regulate (e.g. explicit racist comments). However, according to the views of behavioral ethics, we should be more worried as a society about violations which could be seen by ordinary people as justifiable (e.g. getting a non-monetary political support). The problem here is that from the classical law and norms literature (the first line of literature reviewed above) public support will be relatively minor for harsh enforcement especially against those violations.

⁷⁴ Christopher. K. Hsee, "Elastic Justification: How Tempting but Task-Irrelevant Factors Influence Decisions," 62(3) ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES, 330 (1995).

⁷⁵ Yuval Feldman and Doron Teichman "Are all Legal Probabilities Created Equal?" 84(4) NEW YORK UNIVERSITY LAW REVIEW, 980 (2009). *see also*: Yuval Feldman, "The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law," 35 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY, 11 (2011); Yuval Feldman, "Bounded Ethicality and the Law: A Proposed Framework for the Incorporation of Ethical Decision Making Research into Behavioral Law and Economics," in HANDBOOK OF BEHAVIORAL LAW AND ECONOMICS, (: E. Zamir and D. Teichman eds., Oxford University Press, forthcoming 2013).

⁷⁶ Paul H. Robinson & John Darley, *The Utility of Desert*, 91 NORTHWESTERN UNIVERSITY LAW REVIEW 453 (1997).

⁷⁷ Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86(8) VIRGINIA LAW REVIEW 1577, 1585 (2000)..

⁷⁸ *See* Nina Mazar, On Amir & Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45(6) JOURNAL OF MARKETING RESEARCH 633 (2008).

Let's consider for example the area of conflict of interests. Taking the first approach would suggest that law should punish those who engage in material conflict of interest, where it is possible to clearly show that money was the main reason for their violation. Such instances are much more likely to be seen as corrupted by the general public and hence focusing on them is likely to give the state the legitimacy it needs. Since most people would see such conflict of interest as violating moral norms, they would tend to support the public action. In contrast, according to the behavioral ethics approach, the greater risk to the public does not come from the most obvious and blunt conflict of interest (e.g. clear cut bribes), but rather from the more subtle ones⁷⁹, where many otherwise normative people are likely to prefer their interest, since they have more options to self-deceive themselves about the lack of wrong-doing in their behaviors.⁸⁰

An additional example is related to the tension between voluntary and mandatory compliance, an important area within the psychological literature investigates the interplay between extrinsic and intrinsic motivation.⁸¹ Intrinsic motivation is the sense of morality inherent within the individual while extrinsic motivation relies on incentives and rewards.⁸² Most generally, the crowding out literature suggests that when people attribute their behavior to external rewards, they discount any moral incentives for their behavior, thereby lowering the perceived effect of intrinsic motivation. As applied to the regulatory incentives, crowding out theory predicts that external incentives that utilize monetary rewards or punishments may undermine intrinsic motivations.⁸³ For instance, paying

⁷⁹See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS--AND A PLAN TO STOP IT* (2011), arguing that the corruption of good people is much more likely to harm the public in contrast to those obvious cases of corruption, where people can easily recognize the wrong doing associated with such acts.

⁸⁰See MAX BAZERMAN AND ANN TERBNUSSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* (2011).

⁸¹J.M. Harackiewicz & C. Sansone, *Rewarding Competence: The Importance of Goals in the Study of Intrinsic Motivation*, in *INTRINSIC AND EXTRINSIC MOTIVATION: THE SEARCH FOR OPTIMAL MOTIVATION AND PERFORMANCE* 79-103 (Sansone & Harackiewicz, eds. 2000); Edward L. Deci and Richard M. Ryan, *The "What" and the "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11(4) *PSYCHOLOGY INQUIRY* 227 (2000).

⁸²Edward L. Deci, Richard Koestner and Richard M. Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125(6) *PSYCHOLOGICAL BULLETIN* 627 (1999); Tim Kasser & Richard M. Ryan, *Further Examining the American Dream: Differential Correlates of Intrinsic and Extrinsic Goals*, 22 *PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN* 280 (1996).

⁸³See, e.g., Ernst Fehr & Simon Gächter, *Do Incentive Contracts Undermine Voluntary Cooperation?* Univ. of Zurich, Inst. for Empirical Research in Econ., Working Paper No. 34, Available at SSRN:

people in return for their blood might lead donors to view the event as a transaction rather than a charitable act, thereby eroding altruistic blood donations.⁸⁴

In a series of lab-based experiments, Deci found that tangible rewards undermine intrinsic motivation for a range of activities.⁸⁵ Many of the studies on the crowding out effect of incentives and on enforcement are summarized by Bowles.⁸⁶ Along those lines, Falk and Kosfeld⁸⁷ demonstrated this broader point using a principal-agent experiment in which participants could either let the agent decide the production amount or set a lower boundary. In settings in which a lower boundary was set, agents produced less than in those in which the principal left the decision about the production amount entirely in the hands of the agents. In *post hoc* questioning, agents said that they regarded the lower boundary as a sign of distrust and were therefore less cooperative. Building on this rich literature, policymakers must consider inadvertent consequences of mandatory top-down compliance requirements on the intrinsic ethical motivations that individuals have to comply voluntarily. The next section continues this inquiry with regard to the variances different individuals exemplify in their intrinsic and extrinsic motivations to act.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=313028; Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46(4-5) EUROPEAN ECONOMIC REVIEW 687, 724 (2002); Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137 (2003). For a general review see BRUNO S. FREY, *Not JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION* (1997); George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97(4) the QUARTERLY JOURNAL OF ECONOMICS 543 (1982); Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory: A Survey of Empirical Evidence* Ctr. for Econ. Studies & Info Inst. for Econ. Research, Working Paper No. 245 (2000) Available at SSRN: <http://ssrn.com/abstract=203330>.

⁸⁴RICHARD M. TITMUS, *THE GIFT OF RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971) arguing that monetary payments to givers of blood could diminish the amount of blood given voluntarily.

⁸⁵Edward L. Deci, Richard Koestner and Richard M. Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125(6) PSYCHOLOGICAL BULLETIN 627 (1999) See also Feldman (2011).

⁸⁵See also Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115(3) THE QUARTERLY JOURNAL OF ECONOMICS 791 (2000).

⁸⁶Samuel Bowles, "Policies Designed for Self-Interested Citizens May Undermine 'The Moral Sentiments': Evidence from Economic Experiments", 320(5883) SCIENCE 1605 (2008). See also Yuval Feldman, "The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law, [Symposium --For Love or Money]" 35 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 11 (2011).

⁸⁷Armin Falk and Michael Kosfeld, "The Hidden Costs of Control", 96(5) THE AMERICAN ECONOMIC REVIEW 1611(2006).

D. Universal vs. Targeted Nudges

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

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

People often vary in their internal level of commitments to ethical behavior.⁸⁸ Following the “W effect” described by Frey et al⁸⁹ with regard to magnitude, there is room to expect that with varying levels of intrinsic motivations among individuals, various sums of money will have a different effect on each subgroup. In a previous study, we demonstrated that those who were intrinsically motivated were not significantly affected by framing, while those who were low on intrinsic motivation, were affected by a type of extrinsic motivation.⁹⁰ A somewhat different finding regarding the differences in perception of incentives by those with high and low motivation comes from Perez and Feldman, demonstrating that those who were low on intrinsic motivation were more likely to prefer deposits to fines, while the opposite was true for those who were high on intrinsic motivation.⁹¹ These findings suggest that the level of intrinsic motivation significantly moderate the effect of extrinsic motivation, raising the following questions: Should a policy-maker collect these insights and target regulation differently with regard

⁸⁸ Yuval Feldman and Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality*, 88(6) TEXAS LAW REVIEW 1151 (2010).

⁸⁹See also Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115(3) THE QUARTERLY JOURNAL OF ECONOMICS 791 (2000).

⁹⁰In this case, intrinsic motivation was measured on a scale of environmental commitment as well as sensitivity to the distance from one's home to a recycling bin.

⁹¹See Yuval Feldman and Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality*, 88(6) TEXAS LAW REVIEW 1151 (2010).

⁹¹Yuval Feldman and Oren Perez, "How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement", 36(4) JOURNAL OF LAW AND SOCIETY 501 (2009).

to those who are internally committed and those who are not?⁹² A possible move in that direction could be seen in recent work by Porat and Strahilevitz, who have argued for an even more radical approach: calling for the creation of personalized default rules which will be based on the Big Five personality scale, tailored to people's "true" preferences.⁹³

The literature on cognitive depletion further gives us some clues as to how to understand the dilemma of targeted preferences. In a recent article, Amir and Lobel examine how different age groups process choices in relation to future risk planning in diverse decision-making environments. The article demonstrates across multiple experiments that when cognitive resources are available, older participants opt for more prudent financial and retirement choices, but that this pattern does not hold in situations when people's cognitive resources are depleted. The study finds an increased effect of resource depletion for older compared to younger participants. At a theoretical level, such findings suggest that some of the difference in risky financial choices between older and younger decision makers rests in the ability of each age group to override their intuitive and automatic responses to such decisions. At a policy tradeoff level, the study demonstrates how some nudge solutions will work better for some populations and be ineffective or even counter-productive with others. In another study on whistleblowing, Feldman and Lobel find gender differences in people's ethical commitment to compliance and social enforcement. Most importantly, these differences actively interact with the institutional and legal background rules. The kinds of law and psychology studies point to the problematic notion that a policymaker can simply chose a point of

⁹²While preparing the revised version of this draft, I came across a working paper by some of the leading regulation scholars (Cunningham, Kagan & Thornton) who similarly suggest that, "...those who are differently motivated are likely to respond very differently to a deterrence strategy. While it may be effective when applied to the recalcitrant and perhaps to reluctant compliers it will be counter-productive as regards corporate leaders ...and irrelevant to the incompetent." Nevertheless, they treat this challenge as too complex from a legal policy-making perspective. "[B]ut inspectors are for the most part, incapable of knowing the motivation of those they are regulating, with the result that a "pure" deterrence strategy may achieve very mixed results." [*ask Christine how should they be cited*]

⁹³ Ariel Porat and Lior Jacob Strahilevitz, "Personalizing Default Rules and Disclosure with Big Data", Coase-sandor Institute For Law and Economic Working paper no.634; Public Law and Legal Theory Working Paper no.418, University of Chicago (February 2013).

intervention without a deeper understanding about the interplay between identity-based characteristics and the policy solution.

V. A Spot on the Spectrum: Toward Schematic Solutions of Behavioral Tradeoffs

The tensions within the psychology literature reveal the need for a more nuanced regulatory framework and the expansion of the behavioral regulatory toolbox. Future work will need to create a fuller taxonomy of the areas of law where shifting the balance in one direction would be justified. As discussed above, different social challenges will point to different solutions on the spectrums of outcome/process; covert/expressive; mandatory/voluntary; targeted/universal. At times, the nature of the decision making, whether it involves a one shot choice or repeat over time behavior will help determine the spot on the spectrum. In contexts like a pension plan, in which once the decision has been made, people are less likely to reverse it, sustainability is less important and hence getting people to the right choice (outcome being the dominant focus) might be more important than in areas like health or nutrition, where choices need to be reaffirmed on a daily basis. Similarly, the dilemma about the expressive versus invisible law will also be dependent on context. In areas where the expertise of the state, its moral or consensual power, is highly relevant, using it might outweigh the costs of informing people that that the choice architecture presented to them is based on law. In social issues in which preferences for process are strong and the solutions contested, more weight should be given to process. Focusing on trust may be more important in areas that are difficult to monitor while focusing on directed regulation is desirable. With regard to the question of universality, focusing on the common denominator might be more important in areas in which the costs of mistakes are disproportionately large relative to the benefits of performing intrinsically. Since variation in motivations is likely to increase the chance of making mistakes and mistakes are costly, a greater analysis should be made in each context about the level of desirable compliance and its counter-costs. For example, in the context of trade secrets, one egregious leak may be detrimental to a company,⁹⁴ while with many

⁹⁴ At the same time, here too an overly broad definition of trade secrets and misappropriation can have detrimental consequences to innovation. ORLY LOBEL, TALENT WANTS TO BE FREE (2013); Yuval Feldman, *The Expressive Function of the Trade Secret Law*:

environmental protections, outcomes are important but they are mostly with regard to long-term and aggregate behaviors. While the ultimate goal may be to move as many people as possible to environmentally responsible behaviors, the costs of some private non-compliance are not very costly. In other words, in this context making few mistakes in motivations is not as costly since the effort is to increase the average recycling.

VI. Conclusion

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

Legality, Cost, Intrinsic Motivation and Consensus" 6(1) JOURNAL OF EMPIRICAL LEGAL STUDIES, 177 (2009).