Book Review

Nudge and the Law

Alberto Alemanno and Anne-Lise Sibony (Eds.)
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In *Nudge and the law*[1] Alemanno and Sibony have gathered together an important set of contributions to the debate about "behaviourally informed regulation" (Alemanno and Sibony, Chapter 1). The volume is divided in four parts,[2] with a foreword by Cass Sunstein (that it is fair to say could have been presented as another chapter of the book). Alemanno and Sibony introduce the reader to the themes of *Nudge and the law* in chapter 1 and also take stock in a final chapter.

Nudge and European Law would have arguably been another appropriate title for the volume. The main thrust of the volume is in fact the (successful) attempt to offer a European perspective on what "law can learn from behavioural science" (Alemanno and Sibony, Chapter 14). Accordingly, all chapters have joined in the two-fold effort of moving from an up-to-date selection of the literature, which is then applied specifically to EU sources, institutions and problems. The book is therefore a valuable reference point for European scholars interested in the interplay between legal systems and behavioural sciences. First, for those already interested in the subject, the volume is surely a worthy contribution to the ongoing debate. Second, for those desiring to broaden the scope of their research by integrating it with

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[1] To date *Nudge and the law* has not been published and I am thankful to the Editors and the publisher for allowing me to read it in preview. The shortcoming of this privilege is that page numbers are not confirmed yet. Therefore when quoting or referring to an essay in the volume, I refer only to the name of the Author (for the Editors also to the chapter given that they wrote two of them).

[2] The volume is structured as follows: foreword and chapter 1; Part I: Integrating Behavioural Sciences Into EU Lawmaking, chapters 2-4; Part II: Debiasing Through EU Law and Beyond, chapters 5 and 6; Part III: The Impact of Behavioural Sciences and EU Policies, chapters 7-11; Part IV: Problems with Behavioural Informed Regulation, chapters 12-14.

behavioural insights, *Nudge and the law* presents itself as a credible access source.

This result is achieved in two ways. On the one hand, Alemanno and Sibony focus on 'labelling issues' in chapters 1 – that is "definitional issues aimed at characterising the precise boundaries of behavioural action and its relationship with the nudge movement". These labels regard mainly the name of the discipline and a taxonomy of nudges along the dimension of the relation between public and private intervention. In chapter 14 the Editors then offer an original contribution to the behavioural discussion *about* the concept of autonomy and make salient the major results of the essays collected in the volume. On the other hand, the collected papers discuss the "legitimacy and practicability" of behaviourally informed regulation[3] as well as its "impact ... on specific EU policies" (Alemanno and Sibony, Chapter 1). This makes the volume a valuable source also for scholars and practitioners not (yet) interested in interdisciplinary approaches. In *Nudge and the law* they will find a wealth of normative claims regarding the interpretation and reform of existing (mainly, but not necessarily only) EU sources in several branches of the law.

In what follows, I highlight and discuss (what I consider) the main themes of the book. In the pursuit of this goal, the review is structured as follows: Sections 1-4 comment on the core insights of *Nudge and the law* while Section 5 criticises two specific claims; finally, Section 6 focuses on research topics suggested by the volume.

1. Labelling the Research Field

Since humans' scarce mental bandwidth[4] is attracted by salient information, labels are an important behavioural regulatory tool. Given that electors, legal practitioners and researchers are humans, labels are important for governments and scholarly debates too. The Editors consider several potential labels – law and psychology, behavioural law and economics, behavioural analysis of law, and law and emotions – but ultimately prefer law and behavioural sciences.

[3] These two lines of inquiry answer the following two questions formulated by the Editors: "when is it legitimate for States to use psychology to inform policy? ... how can behavioural insights in practice be incorporated in the decision making processes?".

[4] On this notion, see below, Section 3.

"Law and behavioural sciences" is a convincing name for the research field discussed in the volume. Alemanno and Sibony adopt it since it is "ideologically neutral and descriptively accurate". I would add a further reason. It stresses the fact that not only psychology but also other social sciences are welcome in the developing framework. The only requirement for participating in the debate is the burden of arguing that it matters for a regulatory practice.[5]

Although I agree with the claim, I did not find entirely convincing the discussion regarding the other potential labels. First, the Editors reject "law and psychology" and "behavioural law and economics" even if they can arguably be conceived of as sub-topics of law and behavioural sciences.

As Alemanno and Sibony observe, "law and psychology" focuses on the psychology of "judges, jurors, witnesses and criminals". However, it seems fair to claim that some of the contributions to *Nudge and the law* discuss issues related to these topics or to connected ones: chapters 2 and 6 focus on the psychology of regulators, while chapter 5 deals with experts and biases. Unless one is willing to draw a strong distinction between judges and policy-makers on the one hand, and witnesses and expert-witnesses on the other hand, these contributions are tokens of law and psychology. Moreover, in other chapters one finds insights that can be framed in terms of "law and psychology". For example, Feldman and Lobel claim that trust "may be important in areas that are difficult to monitor"; one can see its potential implications for the repression of crimes like corruption.

Regarding "behavioural law and economics", the Editors are certainly right in that this name is to a relevant extent entrenched in the US scholar "market dominated by law and economics". Nevertheless, the risk is throwing out the child with the bath water. By rejecting the expression "behavioural law and economics" one may lose sight of the relevance of economic theory for the regulation of market behaviour. Several contributors use economic concepts in their essays, and even the Editors refer to behavioural market failures in order to explain the concept of counter-nudges.[6] In order to part from a US-biased perspective while maintaining a connection with economic theory, a potential solution could be to use the expression "law and market behaviour".

The next candidate the Editors reject is "behavioural analysis of law". This expression allegedly suffers of the following "inaccuracy": "it is not the law

[5] See below, Section 6.
[6] See below, Section 2.

that is analysed with the tools of behavioural science. Rather it is human behaviour (*i.e.*[7] facts, not law) that is scrutinized in light of behavioural concepts". I consider this claim wrong. The Editors themselves identify the central theme of the volume with "the legal implications of the emergent phenomenon of behaviourally informed intervention". This is particularly relevant for the chapters from 7 to 11, reflecting on "the impact that behavioural sciences may have on specific EU policies". Clearly, the focus is not only on facts but also on the law.[8] "Behavioural analysis of law" appears to be an adequate label for the discipline.[9]

Finally, the Editors state that "law and behavioural sciences" is a sub-topic of "law and emotions". On the ground of the literature they refer to, it is not entirely clear what can be identified as emotion and what cannot. However, "emotion" is different from but works "in concert with cognition".[10] Therefore, it appears accurate to state that emotions cannot account for all behavioural concepts. For example, anchoring, framing and information overload seem independent from emotions. If this is the case, "law and behavioural sciences" is not fully reducible to a sub-topic of "law and emotions".[11]

To conclude, "law and behavioural sciences" is an accurate label for the discipline. But so it is also "behavioural analysis of law". "Law and psychology" is a sub-topic of "law and behavioural sciences", and to it belong the essays in Part II and some discussions spread in other contributions to the volume. "Behavioural law and economics" – once lightened of its US-inherited connotations – and (probably with more accuracy) "law and market behaviour" are labels for another important sub-topic of law and behavioural sciences. Arguably, all the essays grouped in Part III belong to this sub-topic.

2. Nudges and Counter-Nudges

[7] All emphases in quotations are in the originals.

[8] In addition, (Maroney, 2006) is the source the Editors quote as reference for "law and emotion", of which "law and behavioural sciences" would be a sub-topic. The subject matter of law and emotion is identified by Maroney with the "emotional aspects of our substantive and procedural law". This confirms the weak force of the argument against the label "behavioural analysis of law".

[9] Interestingly, the co-extension of "law and behavioural sciences" and "behavioural analysis of law" is similar to the co-extension between "law and economics" and "economic analysis of law".

[10] (Maroney, 2006, p. 122) quoting (Bandes, 1999).

[11] However, this type of reduction seems to be used by Di Porto and Radaelli.

In *Nudge and the law* there is no agreement on what a nudge is.[12] The core elements of the concept are being (i) a behaviourally informed intervention and (ii) choice-preserving.[13] As Alemanno and Sibony point out in the first chapter, it is "ambiguous whether the mere provision of information or incentives can qualify as nudges". In this respect, their own conceptual framework seems capable of offering some guidance.

The Editors present four categories of nudge-related concepts: private nudge, public nudge, counter-nudge and pure public nudge. Private nudges are simply nudges made by private actors. They can be made in the interest of the nudgee or of the nudger. In the second case, there is an "exploitation of biases by market forces". In addition, a private nudge may consist of a manipulation (or more neutrally, an alteration) of preferences. As regards the relation between nudges and public entities, the narrative of the Editors starts observing that "(l)aw meets nudges ... in two sets of circumstances": counter-nudges and public nudges. They "both ... constitute instances of behaviourally informed regulation". Counter-nudges consist in the regulation of private nudges and often "require the intervention of the law". With public nudges, instead, "public entities ... seek to nudge citizens into certain behaviour". In the more specific case of pure public nudges, "the intention (is) to either help people correct errors they may be subject to ... regardless of theirs exploitative use by market forces or to alter their preferences".

The expression pure public nudge suggests the existence of impure public nudges. Arguably, impure public nudges are part of counter-nudges. For instance, when countering exploitation by market forces, a public nudge would not be pure in that it would respond to a private nudge. The framework can be further enriched with the concept of mandated nudges, which Alemanno and Sibony mention only in a footnote. With this concept, they solve the ambiguity determined by the use of the expression counter-nudging by Baldwin.[14] The Editors explain that Baldwin's "counter-nudging" refers to "the possible reaction of uncooperative regulated businesses who are compelled by regulation to nudge consumers in a certain way that runs contrary to corporate interests". Actually, the example made in the footnote – checking the ID of consumers for enforcing a minimum age selling alcohol requirement – is not a nudge but a mandate. Nonetheless, the points they make are: first, that in both

[12] Definitions are given by Sunstein, Alemanno and Sibony, van Aaken and Perez.
[13] On the second point, see below, Section 3.
[14] (Baldwin, 2014).

cases we are in the realm of the regulation of private or contractual autonomy; second, with a 'Baldwin's counter-nudge', the firm reacts to a mandated nudge – that is a duty to nudge imposed by a public entity on a private actor in the interest of the nudgee. To the contrary, according to Alemanno and Sibony's use of the expression "counter-nudge", mandated nudges are at the same time an impure public nudge (an therefore a counter-nudge) and a private nudge.

The analytical framework the Editors introduce allows them to point out two important differences between pure public nudges and counter-nudges. First, pure public nudges can be justified only in terms of welfare enhancement, while counter-nudges also in terms of autonomy preservation. This implies different standards of scrutiny when evaluating the legitimacy of the regulation. Second, a pure public nudge is likely to be "implemented through administrative practices and does not always require legislation". To the contrary, a counter-nudge "tends to take the form of classic command and control rules" and therefore it is not necessarily a nudge.

I would also add a third, conceptual claim. It is related to the doubts concerning whether or not – and if so, to what extent – information and monetary incentives are included in the concept of nudge. The claim is grounded in the argument that if a certain practice is considered a private nudge (or a behavioural market failure) the relevance for it of monetary incentives and information helps clarifying the concept of nudge in general. Some private nudges exploit a mixture of monetary incentives and cognitive biases. For example, consider rebates and low upfront-fees followed by a steep increase in fees. These are monetary incentives, but behavioural insights suggest that they require scrutiny from a consumer protection perspective. The former raises concerns in presence of inertia, while the latter in presence of over-optimism.[15] Similarly, in the context of pure public nudges, Feldman and Lobel point out how the framing of monetary incentives in the context of recycling regulation as deposit or fine affects compliance to a sensible extent. The case in favour of considering information as part of nudges is even stronger. The way information is framed and what kind of information is disclosed is fundamental for some egregious tokens of behavioural market failure. Actually, if one were to deny the relevance of information for nudges, one would also have to deny the concept of choice architecture, with the consequence that the conceptual framework of law and behavioural sciences

[15] See the contributions by Sibony and Helleringer and by Zuiderveen Borgesius.

would arguably collapse. In this regard, it is not surprising that the EU regulation of consumer contracts and financial services is considered (at least partially) behaviourally informed by Sibony and Helleringer and by van Cleynenbreugel.

The outcome of the previous analysis is that a tool giving monetary incentives or information can be considered a nudge provided that it is likely to be effective only when interacting with at least one cognitive bias (or more neutrally, behavioural trait).

3. Autonomy and the Artificial Truncation

Economic rational choice theory, if taken to be an accurate description of reality, offers an easy case against paternalism.[16] If one assumes time-consistent utility maximizing behaviour and the exogeneity of preferences to the (socio-)economic system, individuals cannot be manipulated: they become the optimal and not only "the best judges of ... their ends" (Sunstein).

Behavioural sciences question all these assumptions of economic rational choice theory. Hence, paternalism should become legitimate from a welfarist perspective, at least in principle (Sunstein). Also from an autonomy perspective, the situation should be similar, once the pervasiveness of private nudges is taken into account. Behavioural insights make sound plausible Galbraith's analogy between consumer choice and a squirrel running on a wheel.[17] That is to say, it is hard to find value or meaningfulness in a preference when it is the result of an exploitative or manipulative private nudge.

Even among the behaviourally educated contributors to *Nudge and the law* there is some reluctance to adopt such a perspective.[18] This reluctance is the core of the "artificial truncation thesis" according to which some behavioural scholars show a "tautological precommitment to freedom of choice, in face of the overpowering empirical evidence they themselves offer".[19] In particular, the problem consists in failing to take into account first the idea of a choice

[16] On paternalism in *Nudge and the law*, see below, Section 7.

[17] (Galbraith, 1976, p. 127).

[18] See in particular van Aaken' essay, but also the chapters by Sunstein, Di Porto and Rangone and finally Cserne.

[19] (Bubb, Pildes, 2014, p. 1628). It might appear surprising to list Sunstein among the targets of this critique, but see below, Section 3. Moreover, already Bubb and Pildes charged Sunstein of artificial truncation.

architecture socially determined and second the problem of information overload.

Two contributions to *Nudge and the law* attempt to conceptualise autonomy while taking into account choice architecture and information overload. Carolan and Spina focus on the relationship between privacy and autonomy in the context of EU data protection policy while Alemanno and Sibony offer a general framework. Both contributions claim to offer neither a complete nor a conclusive account on such a complex issue as the understanding of autonomy, and they should not be read as such. It seems that the correct perspective for looking at them is as an effort to make explicit the main implications of those behavioural concepts ignored by economic rational choice theory and artificially truncated by some behaviourally informed scholars.

Carolan and Spina argue that the traditional conception of privacy as "the right to be let alone" is "concerned with ... mere secrecy" and rests on the idea of an "individual in isolation". However, this "negative conception of autonomy" ignores that autonomy has a "social dimension". This dimension manifests itself in the ability of some private and public entities "to monitor and compile information about the behaviour and attitudes of consumers and citizens ... far beyond what could have been envisaged even two decades ago". In their view, the challenge is to move to a system enhancing "positive autonomy" by "tak(ing) the steps to create the conditions for the individual to act autonomously *within society*".

Alemanno and Sibony call for a general reflection on the "relationship between autonomy and deliberation in the light of the notion of 'choice architecture' and that of 'mental bandwidth'".[20] Explicitly criticising van Aaken for taking a reductionist view of the behavioural conceptual framework, the Editors argue that the benchmark for evaluating "what counts as a restriction of private autonomy on the part of public authorities should take into account what can reasonably be expected of humans making a decision in a given context". Rather than focusing on some deliberation-grounded notion of autonomy, they suggest a "procedural view of autonomy". According to it, the

[20] "Mental bandwidth" is an expression drawn from (Mullainathan, Shafir, 2013). Although not explicitly defined neither in the original source nor by Alemanno and Sibony, "mental bandwidth" refers to the limited cognitive capacities at one's disposal. It seems therefore accurate to consider it the human trait causing information overload. If the previous claim is correct, mental bandwidth is roughly synonymous to what Alemanno and Sibony call scarcity of attention.

main normative preoccupation should be "respecting individual differences in the way people manage their limited 'mental bandwidth'". Therefore, regulation needs to be justified when it interferes with the second-order choice about which mental mode – System 1 or System 2[21] – guides behaviour. Conversely, the interference with preferences should not be as carefully scrutinized as the one between mental modes "because 'preferences' are a construct ... often not deeply ingrained and because they are often the product of market forces".

These two contributions take adequately into account choice architecture and information overload when discussing autonomy. The problem under consideration is summarised by Alemanno and Sibony in the following passage:

> As a matter of fact, not all decisions are equally deliberative. Normatively, it is not equally important that all individual decisions be taken more reflectively. [...] As we cannot realistically decide everything in life in a deliberative manner,[...]the focus should shift to when and how we accept to be assisted or influenced in our decision making, either by private or public intervention. (Alemanno, Sibony, Chapter 14)

In this regard, the core policy goal is that of "increasing navigability". Alemanno and Sibony adopt a version of this concept which is different from the one presented by Sunstein in his foreword. The comparison between the respective views confirms the value of Alemanno and Sibony's contribution. For Sunstein, increasing navigability aims at "making it easier for people to get to their preferred destination". The concept rests on the idea of individual preferences. As seen, Alemanno and Sibony conceive of preferences as less important than the mental mode an individual uses in a certain context. Accordingly, they states that "(n)udges improve navigability in life: they do not awaken rationality but do not *reduce* the sphere of deliberation either". Although Sunstein praises Alemanno and Sibony's analysis, the difference remains. On the one hand, Sunstein is favourable to the idea that often behaviourally informed interventions "affect behaviour in instances where, in all likelihood, no deliberation would have taken place". On the other hand, in the immediately following paragraph, he quotes his co-authored best seller *Nudge* and states that "(w)hen third parties are not at risk, and when the

[21] In this regard, it must be mentioned that Perez and Cserne express brief skeptical or critical views over this distinction.

welfare of choosers is all that is involved, the objective of nudging is to "influence choices in a way that will make choosers better off, *as judged by themselves*"". Simply put, one is left to wonder how the "as judged by themselves" criterion fits with those cases when "in all likelihood, no deliberation would have taken place".

In the light of the foregone analysis, Sunstein's approach raises two problems in comparison with Alemanno and Sibony's one. First, given that often there is no individual judgment, often individual judgment cannot be the normative standard. Second, by grounding his normative claim in individual judgment, Sunstein does not take adequately into account that preferences are to some extent determined by social and market forces (not to mention that individuals are to some extent biased).

4. Fallibilism and Behaviourally Informed Regulation

The volume offers different views about the use of behavioural sciences by regulators and courts in the EU. The core message is that something has been already done, but there is great potential for improvements either by revising legislative procedures and substantive law, or with the interpretative activity of courts and scholars, or finally by training and the elaboration of guidelines on how to conduct a behavioural analysis.

The issue of the reliability of behavioural insight for policy-makers is important and it faces many challenges, as several chapters in the volume discuss.[22] The general idea is that a holistic approach based on different tools (lab and field experiments, surveys, reviews of the literature, randomised test controls and ex-post evaluation) should guide the regulatory process. The risk is that of setting epistemic standards for the use of behavioural insights practically tantamount to a rejection. After all, "incomplete evidence is arguably better than no evidence", as Cserne observes.

The essays in Part II deal with the uncomfortable fact that not only citizens but also experts and policy-makers suffer from cognitive biases. In both essays the Authors consider how to deal with biases by considering techniques that impact on either System 1 or System 2. Quite tellingly in my view, they both end up stressing more "pedagogic experiments" and ex-post evaluations and

[22] See the contributions by Di Porto and Rangone, Quigley and Stokes, Perez, Dunlop and Radaelli and finally Cserne.

making an appeal to the reflexive mental mode rather than to techniques hinging upon the functioning of the automatic mode. There is good reason for this. When a policy-maker intervenes to increase navigability for its addressees it can be argued that – setting aside the problem of value judgments – the policy-maker benefits from the use of experts and the gathering of data. Therefore, its decisions are grounded in superior knowledge. However, when we find ourselves at the fringe of knowledge or have to decide according to the best of knowledge, it is hard to see how one could rely on automatic responses.

Dunlop and Radaelli also argue that at EU level there is a bias against non-intervention. As they summarize the problem, "the overall mis-diagnosis of non-interventionist options may result from the application of legal principles, inaccuracies in economic analysis contained in [the impact assessment process], or the wider political roots of the EU regulatory state". Their narrative is interesting in itself, but also because it shows two problems. The first is theoretical while the second is practical. First, their claim is presented as a fact for most of the paper and only at the end it is made explicit that it is just an hypothesis that "should show up in the behaviour of ... officers". In this regard, a careful reading of the analysis shows how the hypothesis rests on the interplay between the literature on "the various biases that underpin the illusion of control" and a traditional "policy-making literature (that) has always pointed towards the limits of policymaking and policymakers". The point that I want to make is that this creates a tension in the analysis. Behavioural insights are nested in public choice theory, which arguably created its explanations of bureaucratic behaviour under rational choice theory assumptions and, in particular, self-interest. It 'turns out' that individuals have other-regarding preferences and, at the same time, the market – due to behavioural market failures – is not such a safe place as it used to be considered before behavioural insights. If this is the case, the non-intervention bias is a less plausible hypothesis than Dunlop and Radaelli's analysis suggests.

The second, practical problem is that advocating less regulation – admittedly a simplification of their claim – reduces the importance of ex-post evaluation for the obvious reason that if there is no intervention there cannot be any evaluation of its effects. This problem to a certain extent can be eased by the use of randomised control trials, as other contributors point out.[23]

[23] See the contributions by Di Porto and Rangone and by Perez.

Regarding the choice of which regulatory tool is to be used, it is important to emphasise how soft regulatory tools allow policy-makers to adopt rules gradable according to the degree of confidence they have over the soundness of their own analysis. This consideration is present in *Nudge and the law*, but as an implicit thread between different chapters. Imagine you are the choice architecture of a school cafeteria and you have to choose between offering cakes or apples to the students. If you are completely sure that the apples make them better off, you may decide to mandate their consumption (obviously, without buying cakes at all). A softer solution would be not to mandate apples while still refusing to offer cakes. The lower your degree of confidence in what the best solution is, the softer behaviourally informed regulation allows you to be: you can use the "intermediate" option of raising "transaction costs strategically ... thereby making the default stickier" (Zuiderveen Borgesius), or a non-sticky default, or you can inform your costumers of the advantages of eating apples and require them to choose. Consistently with this view, Alemanno observes that "when the target group is too diverse or the domain of choice is familiar, active choice ... might be a more sensible choice than default rules".

The taxonomy just sketched shows how some critiques of default rules miss the point. Quoting Willis, Di Porto and Rangone state that a default may have the problem of being potentially slippery – "that is not sticky, or ... less sticky than it was intended to be"[24] – or not being opted out by "those who are better off outside the default". In the first case, the policy-maker has learned something about the preferences of its addresses. This allows it to update its stock of empirical knowledge. In other terms, we are in the realm of ex-post evaluation. In the second case, the Authors assume that the policy-maker has a high degree of confidence about its discernment of the interest of the addresses and their heterogeneity. If this is the case, the problem is that it chose the wrong regulatory tool.

To sum up, law and behavioural sciences stresses on the one hand the importance of evidence-based policies and ex-post evaluation, and on the other hand offers to policy-makers a more nuanced set of regulatory tools. This allows for an improvement in the ways legal systems deal with their own fallibilism. From this perspective, it is accurate to consider this discipline an heir of Legal Realism.[25]

[24] (Willis, 2013, p. 1157, fn 3).
[25] (Nourse, Shaffer, 2009).

5. Two Claims Made in *Nudge and the Law*: A Critique

In a volume of wide scope as *Nudge and the law* it is normal to find claims and arguments that raise *prima facie* doubts. Since it would not be feasible to discuss them convincingly – also because often they rest on assumptions about the behaviour of regulators and their addressees – I focus on two claims that are of general interest for the themes of the volume. The first is on the relation between public nudges and the concept of law. The second regards how, and why, national courts are likely to enforce behavioural inspired regulation.

The first criticized claim is made independently in the chapters of Part IV. It suggests that nudges challenge the common understanding of the law: "running counter the idea of law as a normative guidance, techno-regulation is in tension with a certain normative ideal embodied in law" (Cserne). The problem is that "law should be made public thereby triggering various expressive mechanisms to reflect, as well as to change, the norms and the values of the particular society. Under a nudge approach, the law operates behind the scenes" (Feldman and Lobel). I first narrow the scope of this thesis with two conceptual claims and their interplay and second offer a normative argument for rejecting it.

First, the thesis under scrutiny is over-inclusive in that it fails to take into account the possibility of using nudges as supporting instruments of already existing duty imposing norms. Used in this way, nudges are nothing but an additional enforcement technique. Consider some examples. The "Don't Mess with Texas" case is particularly instructive from this perspective.[26] In Texas, the duty not to litter, supported by a fine, was largely ineffective. At this point, the Don't Mess with Texas campaign steps in. The existing set of sanctions was supplemented – not substituted – by the campaign. The result was an increase in the effectiveness of the norm. Similarly, informing about the tax-payment rate does not imply that a duty to pay taxes does not exist. Also Cserne's example of road-bumbs and his focus on physical barriers in general are accountable in this way. Fences, walls, locked doors, safes, borders, etc. do not have any implication on the existence of a prohibition to trespass, steal, illegally immigrate, etc. Actually, Cserne's inclusion of nudges in the broader category of techno-regulation demonstrates how nudges can conceptually be

[26] (Sunstein, Thaler, 2008, p. 60).

easily accommodated in the ordinary toolkit used for making duties (and therefore rights) more effective.

The second conceptual claim relates to the connection between the expressive function of law and pure public nudges. As seen, one of the aims of this kind of behaviourally informed intervention is to alter individual preferences. To the extent that the expressive function of law aims "to reflect, as well as to change, the norms and the values of the particular society", there is a relevant overlap between the two – unless one provides an argument for distinguishing preferences from norms and values in terms of motivational capacity. Given that there is wide consensus in the book about the capacity of social norms to modify preferences, this argument would be difficult to make in the context of *Nudge and the law*. It follows that the difference between behaviourally informed intervention aiming at altering preferences and "law" in the sense used by Feldman and Lobel is about the way in which preferences are shaped.

As an example, one might think of behaviourally designed energy-bills.[27] Arguably, people do not have a duty to save energy. As long as they pay the bill, there is no problem. Still, one might want to consider the positive effect for the economic system of energy savings. Utilities in general are important scarce resources and several initiatives (advertisements, monetary incentives, product standardization) are generally used for reducing consumption. In this regard, a behaviourally designed energy-bill is another tool available in a pre-existing toolkit justified by a public interest. It seems therefore that we are in the area of what Cserne calls "governance mechanisms". Admittedly, this clarification about the nature of the instrument does not reject the "behind the scene" charge. Yet one is left to wonder in what sense a behaviourally designed energy-bill works behind the scene. It appears reasonable that this pure public nudge works in the following way: by knowing that other people are consuming less, the nudgee is suggested to think whether he could reduce his consumption. If so, there is not much happening behind the scenes.

To sum up, in the light of the first conceptual argument, in order for the concern about law's normative guidance to be grounded, nudges have to be used in the absence of a duty to behave in a certain way. Even when such a duty does not exist, the second conceptual argument holds that a distinction, if any, can exist only regarding the way in which preferences are modified.

[27] Discussed by the contributions collected in Part I.

Be this as it may, the most challenging argument for the thesis under scrutiny is normative. It comes from a remark made by several Authors in the volume, namely, that legitimacy concerns about behaviourally informed regulation can be met as long as there is an open, transparent and public discussion. This suggests that it is important to distinguish two phases. During the first, behaviourally informed techniques have to be public. This is the phase ending with the enactment of the regulation. Notably, the information created in this phase is likely to remain public even afterwards. In the second phase, the individual is subject to the influence of the behaviourally inspired regulation. Even admitting that the influence is less salient than with more traditional tools, similarities seem strong enough to reject the thesis under comment.

The second criticized claim is made by van Cleynenbreugel. The Author finds that EU financial services regulation is mildly behaviourally informed. However, he fears that national laws will "ten(d) to maintain and reverse any behavioural tendencies that would already have been going on at the EU level". This claim is very strong, albeit weakly supported. It would be indeed an important line of research to assess the extent to which in a specific (branch of a) legal system – and ultimately in the legal systems of all the Member States – the individual is conceived of as economically rational. Nonetheless, the research would need to be an extensive analysis of the law in practice in courts and administrative bodies that the Author does not – and arguably, in a single chapter, could not – provide. Moreover, this reconstruction conflicts with the standard understanding of the core of EU consumer policy, the so-called information paradigm. The rational consumer has been a sword used to put forward the Single Market (Sibony and Helleringer). By assuming a non-fully-rational consumer, national laws created barriers to market integration. According to van Cleynenbreugel, to the contrary, the rational consumer is a shield (that is likely to be) used by national judges to deflect the behavioural blows coming from European institutions. The problem is that it cannot be both. Either national law requires a rationalization of its conception of the economic agent or this conception needs to be behaviouralised.

6. Suggestions for Future Behaviourally Inspired Researches

As illustrated, Alemanno and Sibony have claimed that the concept of autonomy is not adequately discussed in the behaviourally informed literature. While agreeing with this claim, autonomy is not the only under-researched concept in the behavioural theoretical framework.

First, an indeed close topic to autonomy calling for further behavioural studies is that of paternalism. Especially taking the view that what matters more is not the trade-off between respect for one's will and welfare but between his allocation of mental bandwidth and increasing his navigability, there is a shift of focus that arguably shall have effects on our understanding of paternalism.

Second, the concept of externality also requires deeper analysis.[28] Externalities offer a justification for regulation which is different (alternative or concurrent) from autonomy. Therefore, without a clarification of the concept, the normative foundations of law and behavioural sciences remain unstable. This implies the risk of 'noisy' normative discussions: it might happen that different scholars criticise or support a regulatory tool by either referring to autonomy or externalities; or some might support it on the grounds of autonomy while others criticise it because of its externalities. Setting aside the unavoidable indeterminacy of language, in the former case the problem might consist in the adoption of different conceptions of the normative standard. To the contrary, in the latter case of conflict the problem might be the lack of a meta-criterion for determining which standard ought to prevail in case of conflict.

A particularly important externality is related to heterogeneity. Individuals are different, namely, in terms of preferences, wealth, education, cognitive capacities. Therefore, regulating a heterogeneous group is likely to have distributional effects. The vast majority of contributions to *Nudge and the law* recognise the relevance of the phenomenon without engaging in its normative analysis. Albeit not a normative claim, Alemanno suggests that "understanding the behaviour of the most vulnerable and socially deprived members of society would also seem to be priority areas of investigation". This claim seems compatible with the principle of protection of the weaker party, which would offer a relevant starting point for the discussion about regulation and heterogeneity.[29]

[28] See van Aaken's essay.

[29] See (Wilhelmsson, 2004), in particular p. 714, observing how traditional information duties "from the point of view of distributive justice, ... are problematic, as they tend to improve the position of strong consumers, whilst offering little help to the more vulnerable ones".

Another undiscussed concept is that of efficiency. There are only rare references to the maximization of welfare and societal welfare in the volume. Admittedly, both Pareto efficiency and wealth maximization rest on individual preferences (in the latter case as expressed through one's willingness to pay).[30] Therefore, questioning the normative meaningfulness of individual preferences should also call for a reconsideration of these efficiency concepts. The only interesting use of efficiency is made by Feldman and Lobel: "(a)n understanding of bounded rationality is important because lawmakers can create policies that improve efficiency by helping actors make more rational decisions that maximise their utility". The interest stems for the circumstance that individual utility maximization is not obviously consistent with the traditional law and economics ultimate normative standard, namely, the maximization of some sort of aggregate value.[31]

Related to the meaning of efficiency there is also a gap in the content of *Nudge and the law*. That is, among the chapters gathered in Part III there is none focusing on competition law. A chapter on this topic would have fit in Part III, especially if one is convinced that the essays therein fall in the sub-topic of law and market behaviour. Besides, since competition is one of the main policies of EU law, a discussion on behavioural competition law would have been desirable for offering a whole European perspective on behaviourally informed regulation.[32]

As last point, I would stress the final "s" in law and behavioural sciences. Psychology, on its own as well as in a constructive dialogue with economics, is not the only behavioural science. Indeed, one of the common threads between virtually all chapters of the volume is the claim that culture and social norms matter for the discussion of behaviourally inspired regulation. It follows that sociological and anthropological studies, even if not explicitly discussed in *Nudge and the law*, find in this book an invitation to join in. It is up to the scholars in these – and other potentially relevant – disciplines to contribute to a more accurate understanding of human behaviour and its regulation.

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[30] On the former see (Trebilcock, 1991, pp. 241-248) while on the latter see (Dworkin, 1980).

[31] This topic cannot be analysed here for two reasons. First, as just argued, it falls outside the scope of *Nudge and the law*. Second, it is more relevant for law and economics than for law and behavioural sciences.

[32] Please note that can find a useful list of references regarding competition law and behavioural sciences in footnote 2 of Sibony and Helleringer's chapter.

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