

**Abstract booklet**

**NUDGES AND NORMATIVITIES  
AT THE CROSSROADS OF LAW AND PUBLIC POLICY**

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**'Nudging and Rationality: How Governments Should Treat Less Than Rational Citizens' by Bart Engelen (Tilburg University, The Netherlands):**

The literature on nudging has rekindled normative and conceptual debates surrounding the definition and justification of paternalism. An oft-heard criticism is that paternalistic nudges display a particularly inappropriate attitude from liberal governments towards their citizens. Even disregarding the question how government can know what people's well-being or preferences consist in (the *goal* of paternalistic nudges), this criticism focuses on the techniques involved (the *means* of paternalistic nudges). By exploiting our irrational psychological mechanisms, nudging governments manipulate their citizens and treat them as children or as puppets on strings (Wilkinson 2013). The problem is thus not that nudges steer citizens in the wrong direction but that such steering itself insufficiently respects their rational decision-making capacities. Nudges are manipulative, bypass and pervert people's rational capacities and thereby undermine their agency and autonomy (Hausman & Welch 2010). According to Waldron (2014), this is why nudging is "an affront to human dignity (...) in the sense of self-respect". As adults, we do not accept such a condescending attitude from most of our peers, let alone from our government. In this paper, I analyze these criticisms and deflate most of them.

First, I go into the different conceptions of (ir)rationality that feature in the arguments of both nudging enthusiasts and critics. Does the fact that nudges tap into non-deliberative psychological mechanisms and biases make people less rational or more rational (because nudges steer people to act in ways that they reflectively judge best)? In order to assess such claims, I distinguish between rival conceptions of rationality: 'economic rationality' (in terms of expected utility maximization), 'reflective rationality' (in terms of reflective judgements) and 'reason-based rationality' (in terms of reasons) (Bovens 2009; Broome 2013; Hurley 2011). I critically assess to what extent different nudging techniques undermine, pervert, bypass, support or promote people's rationality in the different meanings of that term. Only in some cases, I argue, does it make sense to condemn nudges for making people less rational than they are or should be.

Second, I examine which attitude liberal governments should take towards those citizens who may turn out to be less than fully rational. I argue that government has every right and reason to treat us as we are, not as we think we are or as we ideally are. If one cares about respecting and promoting people's rationality in a relevant sense – which I certainly do – one should welcome nudging policies instead of dismissing them as infantilizing or condescending. This holds for people when they are less than fully rational, which basically means all of us at least some of the time. Here, the crucial distinction is that between process-oriented and outcome-oriented conceptions of rationality. Outcome-oriented conceptions only specify that people's behavior should outwardly conform to some ideal of rationality. Process-oriented conceptions are more demanding, since they also specify how that behavior should come about (belief and preference formation, practical reasoning, ...) (Barton & Grüne-Yanoff 2015; Hurley 2011). Nudges, I argue, can only promote people's outcome-oriented rationality. If people's decisions are caused by non-rational processes and if nudging plays into these processes to make the resulting decisions outwardly conform to decisions caused by rational processes, then nudging 'scaffolds' and thus promotes outcome-oriented rationality without undermining process-oriented rationality. Often, such a second-best solution is the only option that is likely to work.

In *some* circumstances then, *some* nudging techniques are legitimate tools for liberal governments to prevent citizens from harming themselves. Even so, I believe that some concerns – for example about the long-term impact of such policies on agency (Reiss 2013) – remain and should be addressed properly.

**‘Making Sense of Liberty in Nudge Theory’ by Viktor Ivanković (Central European University, Budapest, Hungary):**

Libertarian paternalism endorses the influence of people's choices through nudges, aspects of the choice architecture that alter people's behavior in ways that are predictable, but not limiting, in that they are cheap and easy to avoid in cognitive terms (Thaler and Sunstein 2008: 6). The empirical background for the notions of ‘influence’, ‘predictability’, and ‘cheap and easy avoidance’ are derived from dual process theory in psychology, which argues for a distinction between two processes relevant for making decisions. System 1 is implicit and automatic, and we hardly ever revise it even if we attempt to do so, while System 2 is where our reflective cognition supposedly lies. In advocating the usage of nudges, libertarian paternalists point out that neither a spontaneously emerging choice context nor deliberate design is ever “neutral” with regard to our automatic cognition (Thaler and Sunstein 2008: 3), meaning that our automatic processes always pull us in one direction or another. Nudges are then argued for on the basis of improving our choices, i.e. allowing us to automatically choose what we would also choose reflectively, while retaining liberty. My aim in this paper is to offer an account of how we should understand the concept of liberty in a world in which it turns out that many of our decisions are due merely to our automatic cognitive processes. Additionally, if liberty is supposed to underpin libertarian paternalism and grant it normative salience, what kind of liberty is libertarian paternalism hoping to promote, and is it adequately *about* liberty?

If choice contexts and designs come with varying degrees of cognitive costs, one suggestion might be that we should start understanding liberty as a strictly *scalar* value. This position would claim that contexts, in which it is particularly costly to choose an option in cognitive terms, expose agents to positions where they have less liberty than when they are faced with options which bear little cognitive cost. Alternatively, one might argue liberty is *binary* due to a threshold of “easy resistibility” (Saghai 2013), which ensures people’s reflective processes can overcome the automatic ones, and may serve as a sufficient condition for preserving liberty. However, setting a threshold of easy resistibility may carry its own practical difficulties, as the susceptibilities of people to cognitively loaded choice contexts and nudges, as well as their capacities to resist them, may not be on a par.

I claim in the paper that understanding liberty purely as a state of no-coercion is a non-starter. Individuals who are heavily influenced by cognitive costs which are almost impossible to overcome hardly seem to enjoy more liberty than those who are coerced. A mere *preservation* of liberty then, in the sense of there being no coercion, means that a state of no coercion is hardly about liberty. This would mean that libertarian paternalists should be committed not only to promote states of affairs which are not coerced, but those states of affairs (and only those nudges) in which individuals suffer less cognitive cost than in the original state of affairs. Once again, we run into practical difficulties: how do we assess the cognitive costs of nudges, and is it not obvious that certain nudges in the real world do nothing for alleviating the cognitive costs of original states of affairs?

Finally, the paper revisits manipulation and its relationship with liberty. How do we accommodate manipulative nudges which bear small and resistible cognitive costs into a theory about liberty? Are attempts at manipulation, although easily resistible, still infringements of liberty, or are they violating some other moral principle?

I argue that the understanding of liberty in libertarian paternalism is not updated to the psychological theory it upholds. I also claim that most nudges in the real world may not be able to convincingly promote liberty in a way a psychologically informed theory of liberty would be committed to.

**‘Pro-social nudges and the manipulation of information’, by Stéphane Lemaire (Rennes 1 University, France):**

In this paper, I focus on the specific problems that pro-social or moral nudges may raise. At first sight, it might be thought that these nudges are more acceptable. After all, moral or pro-social goals often justify the exertion of pressure either to foster good actions, to prevent wrongdoings or even to correct wrongdoers. In particular, one accepts that wrongdoings may allow in some circumstances the State to interfere coercively or to introduce extra-costs as incentives. Hence, why should soft nudges with pro-social aims be forbidden ?

In addition, one may wonder why we should not facilitate right or good actions? The goal seems especially worthwhile if we consider the unlucky ones for whom doing the good or the right is harder (Cf. Williams « Moral luck ») and the potential benefits of such pro-social nudges.

On the other hand, the justification of pro-social nudges cannot rest on the idea that they contribute to the ends of the nudged person since, precisely, they regard others. Moreover, manipulation must intuitively be avoided. Finally, as Bovens (2009) has rightfully noticed, it must be assessed whether the nudges under consideration have negative effects on the long run counterbalancing their positive short term effects.

The aim of the paper is to precisify how these reasons should be balanced given the different types of nudges which may be implemented in order to reach pro-social aims.

In order to do so, I first offer a systematic categorization of nudges. I distinguish nudges as informational, in terms of the sensory presentation of the options, and finally in terms of the necessary means to select options. Notice, however, that this is not to say that some nudges may not belong to several of these categories.

Second, I undertake a systematic assessment of each category of nudges when they have pro-social aims in relation to the problem of manipulation.

In particular, I argue that the selection of information should be avoided because it has long term damaging effects that exceed its short term positive ones. Although the selection of information is part of any kind of communication, a government or one of its agencies should not offer biased information in order to nudge citizens for two reasons. First, the biased aspect of the information will be discovered at some point (and this must be possible) and the nudge will lose most of its effect. Certainly, the State may at this point change its nudging strategy. However, this will merely trap the State in an arms race which will be lost in the end because nudging strategies are limited. Second and more damagingly, it will prompt the legitimate impression that the State is not trustworthy and tries to manipulate its citizens. I will show that there are plenty of evidence toward this second empirical thesis and that this provides a very strong argument against this type of pro-social nudges. Moreover, this will contribute to damage the adherence of citizens to the functioning of the State, a threat that is very serious in our present time for democracies.

On the contrary, I will show that the two other categories of nudges—those that play on the sensory presentation of options and on the actions that are required to their selection— are much more acceptable insofar as they don't trigger a damaging suspicion of manipulation. However, one must notice that they are not new means to influence people. With regard to the sensory presentation of options for example, they are nothing other than permissible advertisings.

### **'Behavioural Policy-Making: A Roadmap', Anne-Lise Sibony (Université Catholique de Louvain, Belgium):**

This paper seeks to address two issues the call for papers touches upon.

First, it offers a clarification of the relationships between nudges, decision-making and norms. When it comes to using behavioural insights in the policy sphere, the central concept, is behavioural policy-making, not nudges. This is important because behaviourally-informed policies may well rely on traditional command-and-control rather than on choice-preserving tools generally associated with nudging. In other words, using behavioural insight to devise public interventions that will effectively influence behaviour does not necessarily go together with new forms of normativity.

Second, turning to the question of what type of normativity may be imbedded in nudges (or, more broadly, in behaviourally-informed public interventions), I will take the typology proposed by Robert Baldwin as a starting point.<sup>1</sup> This seems fitting as Baldwin, along the lines suggested in the call for paper, writes that nudges are based on normative premises that clash with the premises of other instruments. He distinguishes 3 degrees of nudges. His distinction is based on how much nudges of each type restrict individual autonomy. This, in turn, says Baldwin, links directly with legitimacy of public nudging.

- First degree nudges are 'mere' but smart provisions of information, such as timely reminders. They prompt reflection and do not reduce autonomy and hence are not considered problematic.
- Second degree nudges include the most typical nudges, such as default settings. More generally, Baldwin defines this category as any intervention that leverages biases or heuristics but can be detected and circumvented by the targeted individuals if they think about it, making it possible to opt-out of a default or otherwise refuse the nudge. Baldwin considers these nudges mildly problematic.

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<sup>1</sup> Robert Baldwin, From Regulation to Behaviour Change: Giving Nudge the Third Degree, 77 Modern Law Review, 2014/6, pp. 831-857.

- Third degree nudges are those that shape decisions and preferences in a manner that is 'resistant to unpacking' (by system II). They amount to 'manipulation' because they harness emotional power to neutralise reflection. They constitute the clearly problematic kind.

While I do not disagree with Baldwin's attempt at categorising nudges according to their effect on autonomy, I will argue that the assessment of nudges in terms of legitimacy requires a more careful look at what really restricts autonomy. I will propose an avenue for further investigation, along the following lines: in the same way as a restriction of competition is assessed in light of the kind of competition that could reasonably be expected on market at hand, a restriction of of autonomy should be assessed in light of the deliberation that could reasonably be expected for the decision at hand. I will argue that not all nudges reduce autonomy and propose a different categorization. In my view, nudges – or other behavioural interventions – that influence the content of a decision but do not influence how the decision is made (in auto-pilot or deliberatively) do impact choice, but do not significantly impact autonomy. Interventions that prompt a change of navigation system (from system I to system II or vice-versa) on the other hand do significantly impact autonomy. They tamper with a fundamental – if generally implicit – meta choice of navigating certain decisions intuitively and saving our limited deliberative strengths for other decisions. This dimension of autonomy, the protection of the meta choice of how to make certain choices, has received little attention and I will argue that it should be taken into account in a classification of nudges.

**'L'inégale diffusion des nudges dans différents champs d'action publique (les cas des politiques de santé publique, d'environnement et d'éducation financière)', by Henri Bergeron (Sciences Po, Paris, France):**

Cette présentation n'entend pas apporter de conclusions définitives permettant de comprendre pourquoi des instruments d'action publique s'inspirant des théories du nudge n'ont pas tous connu le même succès dans différents champs. Elle entend cependant former des hypothèses a) sur les conditions institutionnelles et politiques qui permettent de comprendre pourquoi des théories, aux fondations somme toute anciennes, connaissent un succès politique significatif (quoiqu'inégal) aujourd'hui ; b) sur les types de mécanismes qui permettent de rendre compte de la pénétration sélective de pareils instruments dans différents champs d'action publique. Elle tentera enfin de critiquer l'entendement rudimentaire des déterminants des comportements individuels que ces théories contribuent à former

**'L'Union européenne et le *nudging*' by Alberto Alemanno (HEC Law School):**

Cette présentation part du constat qu'au contraire des Etats-Unis, le débat concernant l'introduction d'interventions de type *nudge*, dans l'élaboration des politiques publiques a été, en Europe, ignoré. L'Union européenne et quelques-uns de ses Etats membres tels le Royaume-Uni ou les Pays-Bas semblent néanmoins s'ouvrir depuis peu à cette technologie réglementaire. Sa contribution a pour ambition d'expliquer les raisons de ce récent engouement européen pour le *nudge*, d'identifier les efforts accomplis aux niveaux institutionnel et méthodologique pour le développer, d'en présenter les premières timides réalisations aussi bien au niveau de l'Union européenne qu'au niveau national et, enfin, d'en discuter les principales difficultés. Cette étude arrive à la conclusion qu'au niveau européen la justification présidant à l'emploi du *nudge*, n'est pas vraiment de nature paternaliste tel que c'est la cas aux Etats-Unis mais plutôt politique dans la mesure où l'utilisation de cette technologie de pouvoir pourrait avoir un impact sur la répartition des compétences entre l'Union européenne et ses Etats membres et l'auteur de conclure « si des approches fondées sur la science comportementale étaient capables de contribuer à réduire l'action de l'UE – en limitant sa portée ou l'impact qu'elle est perçue avoir sur la vie quotidienne des citoyens – au bénéfice des États membres, cela pourrait faciliter le succès de ces approches dans l'Union Européenne. »

**'Utilisation des sciences cognitives dans l'élaboration et la mise en œuvre des politiques publiques', by Faisal Naru and Filippo Cavassini (OCDE)**