

lité peut être discutée à l'occasion d'un litige contre une décision individuelle qui s'y référerait»⁴⁵. Comment le juge pourrait-il affirmer cela si les lignes directrices ne constituaient pas un acte juridique? La justiciabilité de ce type de mesures, même si c'est une justiciabilité indirecte, conduit par conséquent à faire rentrer ces actes non contraignants dans la catégorie des actes administratifs unilatéraux.

La jurisprudence que nous venons d'analyser atteste que «le juridique ne se réduit plus à l'impératif»⁴⁶. De très nombreux actes administratifs, tout en étant des actes juridiques, sont ainsi dépourvus de caractère impératif. Par conséquent, l'acte administratif unilatéral n'est plus nécessairement un acte contraignant. On peut même dire qu'il l'est même de moins en moins. En effet, l'utilisation de cette manière de faire par l'Administration ne cesse de se développer, ce qui est de nature à «contribuer au renouvellement de l'État, par un élargissement de la gamme des moyens d'action des pouvoirs publics»⁴⁷. Selon le Conseil d'État: «L'administration y trouve de nouvelles marges de manœuvre et d'action, les usagers, de leur côté, sont placés dans une situation plus ouverte, disposant de solutions alternatives à la contrainte»⁴⁸. Cette situation nouvelle est l'illustration d'une certaine défiance des sociétés actuelles aux procédés de contrainte. Aujourd'hui, le droit apparaît peut-être moins comme un procédé contraignant que comme un procédé destiné à se protéger de la contrainte. Mais ceci est un autre sujet.

45 Conseil d'État, 18 octobre 1991, *Union nationale de la propriété immobilière*, n° 75831.

46 *W. Zagorski, op. cit.*, p. 59.

47 *Le droit souple, rapport précité*, p. 16.

48 *Ibid.*

Erik Longo

Beyond the Power of Constraint: The Contribution of Cognitive Sciences to Law-Making

1. Introduction

The idea for my contribution to this conference stems from a brief and quite self-evident argument: law is not always the way we normally conceive it, namely a set of 'constraints,' a limit or a restriction in our lives or an elaborate set of 'no statements' that steers our lives.¹ Furthermore, in law there is room for innovation and for the possibility of inducing people to make decisions based not merely on their fear of a sanction or their desire for a reward. Recognizing law as something more than a source of obligations and duties could help not only regulators to better decide and distribute resources, but also citizens to feel the law as a potential for their lives.²

One of the most prominent fields of innovation in law comes today from the findings of 'cognitive sciences' revealing the way in which the study of people's cognitive behaviour can be a source for improving effectiveness and enforcement of law.³

1 The idea of law as a constraint is at the roots of the development of the *État de droit* in France and Italy. For an understanding of the classic depiction of coercion in law see: *P. Costa, The Rule of Law: A Historical Introduction*, in *The Rule of Law: History, Theory and Criticism*, ed. P. Costa and D. Zolo (Dordrecht: Springer, 2007), 73–152; *L. Green, Law and Obligations*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. J. L. Coleman and S. Shapiro (Oxford: Oxford Univ Press, 2002), 514–15; *D. Galligan, Law in Modern Society* (Oxford: Oxford Univ Press, 2007), 142–55.

2 I owe the opportunity for broadening my idea of law as something more than a source of constraints to the reading of *A. Simoncini, Cos'è Il Diritto? Una Domanda «Persistente»*, in *La Lotta Tra Diritto E Giustizia*, ed. F. Ventorino, P. Barcellona, and A. Simoncini (Genova-Milano: Marietti 1820, 2008), 147–220.

3 The central project of this new way of understanding law is summarized by *T. S. Ulen, The Importance of Behavioral Law*, in *The Oxford Handbook of Behavioral Economics and the Law*, ed. Eyal Zamir and Doron Teichman (Oxford: Oxford University Press, 2014), 93–95. 'the study of law and behavior is distinctive because law seeks to intentionally shape people's behavior by reference to some measure of social good. This distinguishes it from fields based on manipulation for individual ends, such as advertising or marketing; from fields oriented on thought rather than behavior, such as much of philosophy; and, importantly, from other behavioral fields that are based on descriptive or evaluative treatments of behavior, such as anthropology, sociology, psychology, and economics, which do not necessarily seek to control what they study nor to engage in normative policy analysis.'

When studies of law move in this direction, they change their approach to the subject of investigation and enlarge the field of inquiry over the whole spectrum of mere conduct to go deeper into the intimate sphere of each individual, to the abyss of the cognitive processes.⁴

Cognitive findings constitute a challenge for rule-making since the aim of every regulation and legislation is the effective change of individual behaviour.⁵ Knowing the secrets of these practices and the way to incorporate them into law and regulation represents a way to improve rule-making processes.⁶

My goal here is to understand and explore this 'unorthodox' innovation by investigating its major quality, namely the transformation it produces in both the organization and the regulation of states. Of course, I do not intend to cover all the possibilities given by this discourse; rather I aim to draw a general overview of these instruments from the point of view of public law. Therefore, after a clarification of the problem from which these new instruments derive, I will discuss the so-called 'institutions' of behavioural law- and policy-making. Following this, I will describe how the regulatory process should change in order to admit evidence from the cognitive sciences. Finally, my purpose is to analyse the limits of this innovation from the point of view of legal theory.

2. Why Innovate Law and Regulation?

When you begin to study law – and particularly constitutional law – one of the most fascinating ideas that you learn is the tendency of every legal system to be flawless.⁷ In the ideal world created or supposed by scholars, legal rules are based on perfect information and strictly regulate social behaviour in its multiple forms, even following rapid mutations; norms reflect with a high degree of perfection the social, eco-

4 A. Tor, *The Methodology of the Behavioral Analysis of Law*, in: *Haifa Law Review*, 4 (2008).

5 J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009). See also Donald C Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, in: *Vanderbilt Law Review* 51, Nr. 6 (1998).

6 I intend here the words rule-making and law-making as quasi-synonyms. Even if in the Anglo-Saxon tradition law-making is broadly speaking the business of both parliaments and judges, I am using it specifically as the business of those who draft the laws and of those who instruct the draftsmen. For more see M. Zander, *The Law-Making Process*, 7th ed. (Oxford and Portland, Oregon, 2015).

7 This is mostly due to the influence of 'positivism' in the Italian legal academia. N. Bobbio, *Il Positivismo Giuridico. Lezioni Di Filosofia Del Diritto* (Torino, 1979).

nomic and political conditions of their time and are capable of steering people's lives in a way that no other instrument can do.⁸

However, this ideal world does not exist in practice. Laws and rules are imperfect and only seldom produce the outcome they promise. As legal scholars have recently proved, 'the lack of a clear, explicit, behavioural model inevitably generates contradictions in the law.'⁹

In addition to these challenges, there is another issue that is becoming progressively more evident at present: ruling this society has become increasingly challenging due to the increasing mix of social, economic, and technological factors.¹⁰ This profound transformation does not always interact well with traditional instruments in the hands of legislators and policy-makers. Classic organizations and instruments of regulation are considered against the evolution of society. Regulators and legislators are required to be smarter, enact simpler rules, minimize bad laws, regulate without curbing innovation, and reduce unnecessary burdens on the private sector.¹¹

These challenges make it much more difficult for legislators to mirror society and to effectively regulate entire sectors of life. At a time like this, dynamic legislative and regulative instruments must be sought so as to produce laws and rules that are effective and really hit the target set by regulators.

A quest for these instruments implies an understanding of the level of complexity of the workings of human behaviour and the way in which each rule performs in order to best achieve its aim.

Human behaviour is a key element of modern society and, consequently, one of the first aspects to investigate in order to understand how to regulate it. For a long time, cognitive scientists have been revealing the complexity of individual decision-making.¹² Indeed, for several reasons we do not always act as rational agents. This

8 L. Kaplow, *General Characteristics of Rules*, in *The Economics of Crime and Litigation*. Vol. 5 of *Encyclopedia of Law and Economics*, ed. Boudewijn Bouckaert and Gerrit DeGeest (Cheltenham, 2000).

9 A. Tor, *The Methodology of the Behavioral Analysis of Law*, *cit.* 239.

10 See R. Hassan, *Empires of Speed: Time and the Acceleration of Politics and Society* (Leiden: Brill, 2009); J. O McGinnis, *Laws for Learning in an Age of Acceleration*, in *William & Mary Law Review* 53, no. 2 (2011); H. Rosa, *Social Acceleration: A New Theory of Modernity* (New York: Columbia University Press, 2013).

11 It is possible to find a very complete array of these problems in the recent book by S. Ranchordás, *Constitutional Sunsets and Experimental Legislation. A Comparative Perspective* (Cheltenham, 2014).

12 A. Tversky and D. Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in: *Science* 185, no. 4157 (1974).

may be due to lack of information, deficit of cognitive capacity or self-control, and a series of heuristics and shorthand methods of using information.¹³

By representing how people actually make choices, cognitive sciences could help rule-makers and thus give them another tool able to reduce the risk of regulatory failure, which is induced either by a lack of consideration of behavioural limitations, or by the irrationality of human behaviour, or simply by the failure of mechanisms of coercion.¹⁴

3. Behaviourally Informed Law- and Policy-Making

The last ten years have witnessed an increasing effort made by many governments to deal with the challenge of how to effectively guide and control the behaviour of their citizens in order to reach the social, economic, and even cultural goals enshrined in their laws and regulations.

Influencing conduct for the public welfare is, of course, not a new task for governments. They accomplish this aim either directly, through sanctions, fear of a sanction or desire for rewards or indirectly, by changing the *attitudes* to the regulated behaviour.¹⁵ The economic crisis we are facing at this moment of time, as well as the transformation of the economy and the social acceleration driven by globalization and ICT,¹⁶ has highlighted the need to either transform or replace traditional strategies used to modify people's behaviour with other tools better suited for reaching objectives established by public policies.¹⁷

When a government designs a public policy it tries to achieve various goals: a strong economy, better education, security, health and so on. To reach these targets, governments employ many tools, including laws, punishments and regulations, taxes and subsidies, the provision of public services, information and even persuasion.

13 F. Di Porto and N. Rangone, Cognitive-Based Regulation: New Challenges for Regulators, in: *Federalismi.it*, no. 20 (2013).

14 D. Kahneman, *Thinking, Fast and Slow* (New York, 2012).

15 Paradoxically, this indirect path can work as a shortcut, particularly if the regulation changes attitudes to the underlying morality of the behaviour. If law succeeds in changing moral convictions, regulators must reduce the need to act on or even monitor regulated players. See K. Bilz and J. Nadler, Law, Moral Attitudes, and Behavioral Changes, in *The Oxford Handbook of Behavioral Economics and the Law*, ed. Eyal Zamir and Doron Teichman (Oxford, 2014), 241.

16 A. Simoncini, The Constitutional Dimension of the Internet: Some Research Paths, *EUI Working Paper LAW 2016/16* (2016), <http://ssrn.com/abstract=2781496>.

17 A. Oliver, From Nudging to Budging: Using Behavioural Economics to Inform Public Sector Policy, in *Journal of Social Policy* 42, no. 04 (2013).

Many of these tools are designed to influence changes in public behaviour and often have a paternalistic purpose.

Legal scholars have already learned that they cannot take as legally relevant only the behaviour of a 'rational individual.'¹⁸ Social scientists have revealed that the leading theory of human behaviour – rational choice theory (RCT), which was developed by economists in the 1950s and came into law through the rise of law and economics – has significant shortcomings.¹⁹ By using the theory of 'bounded rationality' conceived many years ago by Herbert A. Simon, behavioural analysis has shown that in decision-making the rationality of individuals is limited by the information they have, the cognitive limitations of their minds, and the finite amount of time they have to make a decision.²⁰ The characteristic of the judgment leads decision-makers frequently and predictably to deviate from the normative standards of strictly rational behaviour.

By considering only the 'rational individual' as the subject of rules, rule-makers tend to limit their judgment and capacity for decision-making, and consequently to make mispredictions and produce ineffective regulation and legislation. A more realistic view of human beings reveals that individuals make mistakes in their judgments and decision-making, and these faults should be considered during the preparation of laws and policies.²¹ The behavioural approach suggests that the incorporation of findings on human behaviour in legal studies could be very helpful for decision-makers in reaching the social goals they want to achieve. Behavioural analysis asserts, indeed, that the efficacy of the law depends on accounting for relevant patterns of human behaviour identified by experimental findings and evidence of legal importance. The behavioural analysis of law ventures to provide a better understanding of the innumerable interactions between legal rules and behaviour without commitment to any particular value system.²²

18 For a complete understanding of this argument see A. Tor, *The Methodology of the Behavioral Analysis of Law*, *cit.* 240–42.

19 Ulen, *The Importance of Behavioral Law*, 93.

20 The concept of 'bounded rationality' was originally developed by Herbert A. Simon in the article: Herbert Alexander Simon, A Behavioral Model of Rational Choice, in *The quarterly journal of economics* 69, no. 1 (1955). See also of the same author *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization*, 4 ed. (The Free Press, 1997). See also A. Tor, *The Methodology of the Behavioral Analysis of Law*, *cit.* 242. 'To survive and function in a complex world individuals use mental and emotional heuristics when making judgments under uncertainty; they also rely extensively on situational cues to guide their choices.'

21 C. Jolls, C. R. Sunstein, and R. Thaler, A Behavioral Approach to Law and Economics, in *Stanford Law Review* 50, no. 3 (1998).

22 See A. Tor, *The Methodology of the Behavioral Analysis of Law*, *cit.* 243.

Today, this task has become much more important than in the past. The growing number of policy issues where modifying human behaviour is very complex reveals that the effectiveness of traditional approaches may be limited without some additional tools and understanding of how citizens really behave. In areas of health, food, crime, welfare, environment, employment, and education governments and policy designers have felt the need for a more sophisticated understanding of the factors influencing human life. The behavioural analysis of the law and regulation has revealed that in order to design a policy in these areas it is necessary to have a better understanding of how the traditional normative tools can be supplemented by insights from behavioural change theory and evidence at the individual, interpersonal and community levels.

As a result, policy-makers seek out more sophisticated means by which they can both build more effective relationships between citizens and government and influence public behaviour – particularly with a view to increasing personal responsibility in areas like health and welfare, encouraging greater partnership between users of services and service providers or using information campaigns.²³

When compared with other tools, behaviourally informed strategies present more effective outcomes, often delivered for less cost, particularly if a longer-term time frame is taken to evaluate the costs and benefits.

The behavioural approach thus provides an ‘empirically-based middle ground’²⁴ between the theoretical abstractions of the rational-actor model and the implicit, intuitive, and unstructured view of human behaviour of traditional legal scholarship. Moreover, it helps policy-makers in general, and particularly legislators or lawmakers, to improve the toolbox of the instruments necessary to pursue their goals. Today, governments seek new instruments to motivate people to change their ‘«self and society»-harming behaviours, without imposing further regulations or bans on

23 Regulation of tobacco is a good example of a mix of tools imposed to discourage and discredit the consumption of cigars and cigarettes. Another example occurs when regulation tries to encourage breastfeeding. Governments could use both information campaigns and other rules that normalize the behaviour as natural (in workplace), and not a shameful activity to be hidden away. See *Bilz and Nadler, Law, Moral Attitudes, and Behavioral Changes*, 242.

Legal scholars have found that there are at least three tools used in regulation. The policy-maker can use: a) traditional ‘command and control’ tools (such as coercion, bans, authorizations) with the paternalistic aim of forbidding certain conduct in order to prevent errors; b) tools for empowering subjects in order to educate them to cope with errors (information); c) deregulation as a form of extreme non-paternalistic tool to maximize individual responsibility; d) behaviourally informed strategies for avoiding mistakes and (soft paternalism) gently helping people to achieve outcomes that they would reasonably attain. *N. Rangone, Errori Cognitivi e Scelte di Regolazione*, in *Analisi Giuridica dell'Economia*, no. 1 (2012).

24 *A. Tor, The Methodology of the Behavioral Analysis of Law, passim.*

either the general public or commercial organizations.²⁵ In this sense, there is a departure from the ordinary task of law since the best way to impose a certain conduct is precisely to let people be free to choose without imposing a determinate behaviour. Notably, these strategies are based on systematic and recurring behaviour observed using experiments and other instruments of social inquiry.

4. The ‘Institutionalization’ of Behaviourally Informed Policy-Making

One of the most important methods concerning behavioural change to emerge in recent times is the ‘nudge’ (or nudging) theory. *Nudge* is an audacious and profitable idea to describe the act of gently structuring the choices that people make in order to lead them towards particular outcomes. This theory was first applied with this connotation by an economist and a lawyer. As such, it is a hybrid concept originating from the encounter of these two branches of the social sciences.²⁶

The core idea of *nudge* derives from research in the cognitive sciences, which shows how it is possible to use the knowledge of reflective cognitive processes towards better decisions by presenting choices in different ways.²⁷ The term has been described as ‘any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any option or significantly changing their economic incentives.’²⁸ For this reason the two authors have labelled it as a form of ‘libertarian paternalism.’²⁹

Nudging was branded in the United States as a ‘third way’ between state interventionism and market driven norms. However, *nudge* is not a form of regulation, legislation or another word for economic incentives. Yet, *nudge* may have implications for regulatory policy and, as such, is potentially set to revolutionize the way in which policies are formulated and implemented.³⁰ It is commonly applied in sectors such as health, taxation, public transport and pensions.

25 *Oliver, From Nudging to Budgeting: Using Behavioural Economics to Inform Public Sector Policy*, 686.

26 *R. H Thaler and C. R Sunstein, Nudge. Improving Decisions About Health, Wealth, and Happiness* (New Haven & London, 2008).

27 With the word reflective I mean to indicate a type of decision-making process employed by humans that is slow and solid rather than fast and instinctive. See *Kahneman, Thinking, Fast and Slow*.

28 *Thaler and Sunstein, Nudge. Improving Decisions About Health, Wealth, and Happiness*, 8.

29 *C. R Sunstein and R. H Thaler, Libertarian Paternalism Is Not an Oxymoron*, in: *The University of Chicago Law Review* 70, no. 4 (2003). The motto of the book is ‘[c]hoosers are human, so designers should make life as easy as possible.’

30 This assumption is made by many authors when dealing with *nudge*. See *A. Alemanno and A. Spina, Nudging Legally: On the Checks and Balances of Behavioral Regulation*, in *International Journal of Constitutional Law* 12, no. 2 (2014): 430.

In this sense, the links between this idea and law are very important. *Firstly*, law and nudge share the same subject: behaviour. *Secondly*, law and nudge share partially the same lexis: words, like autonomy, freedom, and rationality, are values for both sides. *Thirdly*, the authors represent nudge as a relationship between a ‘nudger’ and a ‘nudgee’ when these interactions happen in a social and institutional environment made by laws and directed by political institutions.³¹ When looking at the effects of nudging we should not look only at what a nudge does or does not do to a *nudgee* (in terms of choice), but also whether the adoption of nudging as a policy impacts institutional structures (which then in turn impact persons)³².

As a consequence, *nudge* enlarges the array of state control devices. Legislatures and governments can use *nudging* as another way to achieve their aims; by using it they can alter the organization of the contexts, process and environment in which individuals make decisions.³³

Even if *nudging* theories are not a cure for every ill, their discovery and development significantly enlarges the range of behavioural informed tools in the hands of law- and policy-makers for the purpose of making the machine of government more effective and successful in producing expected results.

In my view, these new, fancy theories help law to face new and complex problems; they certainly venture to explore new perspectives in the study of law while contributing to blending our research with that of other disciplines, such as cognitive sciences and behavioural economics. However, theories like *nudge* reveal many drawbacks and shortcomings which I will talk about later.

Over the last seven years the insights of the book written by Sunstein and Thaler have been criticized by a very long list of scholars; at the same time, a vast number of governments have exploited this theory to incorporate behavioural insights into the creation of public policies.³⁴ It would be impossible to consider here the huge number of articles and reviews that have been written on this subject, even if later I will say something on this issue. It is much more interesting here to analyse some of the so-called institutional perspectives of *nudge*, which were first developed by the UK Government during the first mandate of the David Cameron Cabinet and then by

31 A. Barton and T. Grüne-Yanoff, From Libertarian Paternalism to Nudging – and Beyond, in: *Review of Philosophy and psychology* 6, no. 3 (2015).

32 R. Lepenies and M. Malecka, The Institutional Consequences of Nudging–Nudges, Politics, and the Law, in *Review of Philosophy and Psychology* 6, no. 3 (2015): 428.

33 One of the pioneering studies in this field is surely the chapter by R. J. Bonnie, The Efficacy of Law as a Paternalistic Instrument (paper presented at the Nebraska Symposium on Motivation, Lincoln, 1986).

34 C. R. Sunstein, The Council of Psychological Advisers, in: *Annual Review of Psychology* 67 (2014): 714 ss.

many other governments in the world, notably the US administration under the Barak Obama’s presidency.³⁵

In 2010, the UK coalition Government set up the ‘Behavioural Insights Team’ (BIT) as part of a movement away from command-based regulation and fiscal controls in favour of ‘smarter’ strategies that would use behavioural insights rather than rules or financial incentives to influence conduct.³⁶ The BIT – also called ‘Nudge Unit’ – was created as a small team of civil servants and academics based in the Cabinet Office tasked with advising the British government in non-coercive interventions to change public behaviour. In 2014, the BIT evolved from a unit of the UK government into a private company with a social purpose.³⁷

The BIT has released a vast number of reports representing not only the theoretical progress of behavioural informed policies, but also developments in such areas as health-related behaviour, personal energy saving, reducing tax fraud, job seeking and pensions³⁸ These reports are full of examples of purported nudges that have been proposed to the Government for implementation.³⁹

Partially due to the successes of BIT other nations, including the United States, have also established similar institutions.⁴⁰ On 15 September 2015, by Executive Order, President Barak Obama instituted the ‘Social and Behavioral Sciences Team’ (SBST) under the ‘National Science and Technology Council’ (NSTC) and directed Federal agencies to integrate behavioural insights into their policies and programmes.⁴¹ In the first year of activity, this institution produced a vast array of documents and studies, which are particularly important for the investigation of the link between policy goals and individual behaviour.⁴²

The establishment of ‘nudging units’ has more recently been planned by other countries: Australia, Canada, Columbia, Denmark, France, Germany, Israel, the Nether-

35 For the UK experience see P. John et al., *Nudge, Nudge, Think, Think: Experimenting with Ways to Change Civic Behaviour* (London, 2013). For the US experience see C. R. Sunstein, *Simpler: The future of Government* (New York, 2013).

36 R. Baldwin, From Regulation to Behaviour Change: Giving Nudge the Third Degree, in *The Modern Law Review* 77, no. 6 (2014): 833.

37 BIT is now partly owned by the Cabinet Office, the charity Nesta, and the employees of the same company. See for more details <http://www.behaviouralinsights.co.uk>

38 The BIT website includes many substantial successes. For a catalogue, see <http://www.behaviouralinsights.co.uk/publications/>.

39 For an analysis see Oliver, From Nudging to Budging: Using Behavioural Economics to Inform Public Sector Policy, 692–98.

40 The US have called the nudging unit ‘Social and Behavioral Sciences Team.’

41 The SBST is chaired by the Assistant to the President for Science and Technology.

42 For more details see <https://sbst.gov/assets/files/2015-annual-report.pdf>

lands, New Zealand, Norway, Singapore, South Africa, Turkey, and even Saudi Arabia.

Even at EU level, Commission offices have taken into consideration the development of behavioural informed policy-making.⁴³ In 2013 the 'Joint Research Centre' (JRC) published a report on 'Applying Behavioural Sciences to EU Policy-making,' which draws substantially (though not exclusively) on the experience gathered after three years of conducting behavioural studies in support of EU policy on consumers.⁴⁴ In 2015 the JRC published another report, which helps to design with more precision studies on behavioural sciences. The 'DG Justice and Consumers,' together with 'DG for Health and Consumer Protection' (SANCO) and the 'Executive Agency for Health and Consumers' (EAHC), have incorporated behavioural research in their policy-making and established procedures for *ex-ante* behavioural testing of the effectiveness and the enforcement of policy interventions.

The brief sketch of the institutional developments of 'nudging units' is helpful in supporting the idea that at this moment of time decision-makers need to incorporate behavioural insight in the design of public policies and in the protection of consumers from behavioural exploitation by firms.⁴⁵ The reading of these documents makes it clear that the task of devising these instruments necessitates economists, psychologists, sociologists, environmental lawyers, health experts and other professionals working together with specialists in these fields must strive to build up a complete awareness of a world which is much more complex than in the past.

Moreover, all these transformations are considerably affecting the conception of law and, climbing down this 'theoretical' slope, it is possible to see how they also influence the idea of many public law elements, such as the functions of the state, the making of governmental policies, as well as law-making, and the very elements of legal norms, like coercion.⁴⁶

43 In November 2010 the European Commission published the report on «Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective». See http://ec.europa.eu/consumers/archive/strategy/docs/final_report_en.pdf

44 R. van Bavel et al., «Applying Behavioural Sciences to Eu Policy-Making», in *JRC Scientific and Policy Reports* (2013).

45 Sunstein, The Council of Psychological Advisers, 716; S. Bhargava and G. Loewenstein, Behavioral Economics and Public Policy 102: Beyond Nudging, in *American Economic Review* 105, no. 5 (2015): 397–98.

46 M. D Adler, Bounded Rationality and Legal Scholarship, in *Theoretical Foundations of Law and Economics*, ed. Mark D. White (Oxford: Oxford University Press, 2008).

5. The Limits of These New Strategies

Even if the insights from the cognitive sciences are contributing to improving the law, caution is needed in taking the conclusions of behavioural informed regulation too far before successful results of the policies have been shown. Although behavioural law is promising a revolution in the understanding of law, the enthusiasm is mainly based on the reception of these theories among scholars and not by the use of it in practice. Within the legal academy, the use of the findings and evidence of behavioural sciences is having a very large impact particularly on the studies of law and economics.⁴⁷

Legal scholars, as well as economists and other social scientists, have strongly criticized the assumptions of behavioural law.⁴⁸ For example, the public discourse prompted by nudging and any form of behavioural informed rules has been focused on the problems of legitimacy. A great deal of academic attention has been paid to the philosophical, ethical and abstract implications of these interventions.⁴⁹ Concerns involve fears for autonomy, dignity, transparency, and moral development, as well as the risks of manipulation.⁵⁰

Partially deviating from the long list of criticisms of the use of cognitive sciences in law, I want to briefly address another important issue that is much more closely linked to the study of the function of law as guidance of human behaviour. This is related to the search for a new way through which law can force or induce individuals to avoid certain risks.

Modern theories of law have raised the question as to what extent the law should allow citizens' freedom of choice relating to risks, which may cause harm to them-

47 For a critique of these theories see S. Frerichs, False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics, in: *Journal of Consumer Policy* 34, no. 3 (2011).

48 Ulen, The Importance of Behavioral Law, 110.

49 A. Alemanno and A.-L. Sibony, eds., Epilogue: The Legitimacy and Practicability of Eu Behavioural Policy-Making (Oxford: Hart Publishing, 2015), 325–26.

50 See e.g. J. D Wright and Douglas H Ginsburg, Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty, in *Northwestern University Law Review* 106, no. 3 (2012); C. R. Sunstein, The Ethics of Influence: Government in the Age of Behavioral Science (Cambridge University Press, 2016); Alemanno and Spina, Nudging Legally: On the Checks and Balances of Behavioral Regulation; Alemanno and Sibony, Epilogue: The Legitimacy and Practicability of Eu Behavioural Policy-Making; Baldwin, From Regulation to Behaviour Change: Giving Nudge the Third Degree; Lepenies and Malecka, The Institutional Consequences of Nudging–Nudges, Politics, and the Law. See also the contributions in the volume of K. Mathis and A. Tor, eds., Nudging – Possibilities, Limitations and Applications in European Law and Economics (Switzerland: Springer, 2016).

selves.⁵¹ This phenomenon has been called 'legal paternalism.'⁵² There are different degrees of legal paternalism.⁵³ There is a *hard* or *strong* paternalism, occurring when law is used coercively to deprive individuals of choice, on the grounds that they cannot exercise that choice wisely. On the other hand, there is *soft* paternalism when freedom of choice is preserved, but the law is used to nudge individuals towards what is generally considered to be preferable conduct.

How can we decide between these two options? The process of rule-making and in general construction of governmental policies must take into consideration both these ways of inducing people to behave in a certain way.

As a result of the use of the insights from behavioural economics, legal scholars have noticed that this choice depends on a wide range of elements: not only related to the decision of the government or the political process, but also pertaining to the possibility of the irrational behaviour of persons (such as cognitive errors).

Public policy has often relied on the assumption of rationality when accounting for human conduct. This has generally been explained as contributing to the lack of effectiveness of laws or, worse, the difficulty of implementing a well-crafted policy.⁵⁴

For a public institution knowing deviation from rationality (the *real people*) in decision-making processes may be the secret for a fully implemented policy. As the theory of nudging reveals, proper understanding of human behaviour requires 'reality checks,' such as experiments and acquisition of statistical data.⁵⁵ Policy-makers must rely on evidence, and not on assumptions, where ideas about people's behaviour are first tested and then reassessed.⁵⁶

51 A. Ogas, The Paradoxes of Legal Paternalism and How to Resolve Them, in *Legal Studies* 30, no. 1 (2010): 62.

52 R. H Thaler and C. R Sunstein, Libertarian Paternalism, in *The American Economic Review* 93, no. 2 (2003). 'The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or in its extreme version, to guide them, whether they like it or not, toward their own good'. See Joel Feinberg, Legal Paternalism, in *Canadian Journal of Philosophy* 1, no. 1 (1971).

53 D. Husak, Legal Paternalism, in *The Oxford Handbook of Practical Ethics*, ed. H. LaFollette (Oxford, 2003).

54 Indeed, individuals tend to deviate from neoclassical assumptions of rationality and make decisions that can be considered as the product of errors. This awareness has many implications for regulatory policies and, as such, is potentially set to revolutionize the way in which policies are formulated and implemented. Alemanno and Spina, Nudging Legally: On the Checks and Balances of Behavioral Regulation, 430.

55 van Bavel et al., «Applying Behavioural Sciences to Eu Policy-Making», cit.

56 'With theoretical models of the social sciences being used to make behaviourally sound public law arguments, the emergence of empirical arguments was just a matter of time. The predic-

Therefore, when regulation seeks to change people's behaviour it must build a system for understanding recurrent cognitive errors, heuristics, and other biases that can alter the implementation of rules and their effectiveness. The need to collect evidence of this sort clearly emerges in the regulation of many public services and in particular in the legislation on consumer protection in financial markets and social services, such as healthcare. The institutionalization of behavioural studies in the design of public policy could represent the first step on the ladder of this improvement in law- and policy-making.

The use of *nudging*, as a way to deviate from the problems raised by relying on the rational-actor model, helps us to focus on the last critical point of behavioural informed law- and policy-making. It is common sense that the simple and explicit assumption of rational action enjoys the great benefits of predictability and tractability: one can predict how a rational actor will react to any given legal rule, institution or incentive. Law gains certainty from a clear and predictable behavioural model.

Erroneously one could think that by embracing the findings of the cognitive sciences law becomes increasingly vague, uncertain and generative of contradiction.⁵⁷ Importantly, the experimental findings do not show that human behaviour is chaotic and unpredictable. Quite the contrary, experiments in cognitive sciences demonstrate that humans behave in a similar way and that their choices are predictable.⁵⁸

Another reason why this is not true must be found outside the legal realm, because the relevant behaviour considered by legal rules is not a product of the law itself. Law takes into consideration human conduct, which is a cultural and social product, with reference to a moment of time and the specific place in which it occurs. Therefore, law needs the contribution of other disciplines, whose role is needed to single out the behaviour considered by legal rules.

6. Conclusions

I would like to make four comments to end my contribution to this conference. I can summarize the first three of them by recalling three examples of proof on which this work has helped to focus.

tions the theoretical models generate can be tested empirically, and with the law focusing on the decision of hard cases and real-life public policy, have led to behavioral extensions of the model, drawing on insights from cognitive and social psychology'. See E. V Towfigh, Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a «Doctrinal Turn»? , in *International Journal of Constitutional Law* 12, no. 3 (2014): 673-74.

57 A. Tor, The Methodology of the Behavioral Analysis of Law, 239.

58 D. Ariely, Predictably Irrational (New York: HarperCollins, 2009).

The first derives from one limit that I have already outlined in the previous section: law is not a self-sufficient discipline. Innovation in law has always been subject to input from other fields of knowledge. The social order plays an important role not only as the field where law is enforced, but as the way law is created.

The second is that better law- and policy-making should consider both evidence from other disciplines and try to design complex solutions for complex problems (theories of complexity). In this sense the aspiration of simplification in law-making is not realistic, since it tries to reduce something that cannot always be performed.

The third demonstrates that law-making cannot consider only rational man as the agent of law. *Nudge*, in particular, confirms that human behaviour, which moves preferences and choices, is context-dependent. Besides offering a richer and psychologically more plausible account of human conduct, a behaviourally informed law model is also likely to suggest a wider range of factors that influence behaviour and hence a wider range of possible levers by which behaviour might be modified. In this way, the broadened account is likely to prove more useful to policymakers and others seeking to influence behaviour at a more aggregate level.

However, in addition to these assumptions there is another issue regarding *nudging* strategies that is worth understanding and nailing down. Briefly speaking, what the *nudge* theory is exactly remains unclear for lawyers. Those who consider it simply as a new way to regulate or a new 'soft law' are making a big mistake.⁵⁹ Rather, *nudge* theory belongs to a new type of 'interpretative instruments' in the hands of governments for improving policy effectiveness.⁶⁰

Hence, *nudge* theory is simply a new tool, as well as the impact assessment or the measurement of burdens imposed by regulation, which helps the improvement of the regulatory process. Cognitive insights performed by experiments and other tools, which are able to gather empirical evidence, can help regulators to increase the chances that the pursued behaviour occurs.⁶¹ However, caution should be applied in

59 See A. Candido, La Nudge Regulation. Interpretazioni Dottrinali e Prime Applicazioni Pratiche, in *Amministrazione in cammino*, no. 7 (2012); E. Selinger and K. Powys Whyte, Nudging Cannot Solve Complex Policy Problems, in *European Journal of Risk Regulation* (2012).

60 Not by chance Cass Sunstein in the foreword to the book edited by Alberto Alemanno and Anne-Louise Sibony highlights that nudge can help government by giving a new instrument to cope with the burden of justification in designing new public policies. See C. R. Sunstein, Foreword: The Ethics of Nudging, in *Nudge and the Law: A European Perspective*, ed. A. Alemanno and A.-L. Sibony (Oxford, 2015), IX–XVII.

61 The argument is made also by *Towfigh*, Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a «Doctrinal Turn»; P. Cserne, Introduction: Legislation, Legal Episteme, and Empirical Knowledge, in *The Theory and Practice of Legislation* 1, no. 3 (2013).

the use of these instruments, such as nudge, since they are not always the best option when protected values are particularly sensitive, such as health, the environment, and safety. In these circumstances traditional instruments must be combined with innovative strategies in order to better define how to reach the goals of laws and regulation.

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