

SYMPOSIUM ON LIMITATIONS OF THE BEHAVIORAL TURN IN INTERNATIONAL LAW

NORMATIVE ASPECTS OF NUDGING IN THE INTERNATIONAL SPHERE

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The use of nudges—“low-cost, choice-preserving, behaviorally informed approaches to regulatory problems”¹—has become quite popular at the national level in the past decade or so. Examples include changing the default concerning employees’ saving for retirement in a bid to encourage such saving; altering the default about consent to posthumous organ donation to increase the supply of organs for transplantation; and informing people about other people’s energy consumption to spur them to reduce theirs. Nudges are therefore used to promote the welfare of the people being nudged, and of society at large. However, the use of nudges has sparked a lively normative debate. When turning to the international arena, new arguments for and against nudges can be raised. This essay focuses on the normative aspects of using nudges in the international arena.

Nudges in the International Arena

In the international sphere, nudges can be used as a regulatory tool, to influence state behavior—either by nudging individuals who are vested with political power directly, or by nudging the public at large, which in turn influences policy-makers indirectly. International nudges can be initiated by major countries, by international organizations, or by NGOs.

In a recent article, we analyzed several examples of nudges in the international arena.² One example is *opt-out arrangements in treaties*. Numerous behavioral studies have documented a default effect: once an option is set as the default, it often becomes the reference point for people’s decisions—which in turn triggers the omission and status quo biases.³ The result is a “sticky” default, which people tend not to opt out of. When the negotiators of treaties wish to increase the adoption of a certain arrangement, they can designate it as the default, and make the option of opting out of the default less conspicuous.⁴

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¹ Cass R. Sunstein, *Nudges.Gov: Behaviorally Informed Regulation*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 719, 719 (Eyal Zamir & Doron Teichman eds., 2014).

² Doron Teichman & Eyal Zamir, *Nudge Goes International*, 30 EJIL 1263 (2019).

³ See, e.g., Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 66 Q. J. ECON. 1149 (2001) (pensions); Russell B. Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998) (contractual negotiations). See also EYAL ZAMIR, *LAW, PSYCHOLOGY, AND MORALITY: THE ROLE OF LOSS AVERSION* 101-09 (2015).

⁴ Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT’L L. 309 (2013). See also Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT’L L. J. 421, 463-68 (2014).

Another example is *goal setting*. Even without accompanying incentives, once a goal is set, it serves as a reference point, such that failing to attain it is viewed as a loss.⁵ Setting a goal motivates people to focus on the task at hand, and to exert more effort. Goals have been shown to improve outcomes in various areas.⁶ A key example in the international context is the UN Millennium Development Goals, which set targets in spheres such as poverty reduction, education, infant mortality, and gender equality.⁷ Another example is the system of non-binding self-imposed goals in the sphere of climate change, established by the Paris Agreement of 2015.⁸

Deadlines are also occasionally used to prompt action that is expected to benefit the actor and society at large.⁹ In the context of negotiation, studies have found that agreements are often reached at the last minute before the deadline.¹⁰ Deadlines can therefore help the parties reach an agreement. This observation is widely reflected in diplomatic practice.¹¹ Thus, it was found that of the eleven countries that opted not to sign the Chemical Weapons Convention shortly after it was opened for signature, four signed it in the final month before it came into effect.¹²

Finally, people tend to judge their position in relation to the positions of others. The desire not to be at the bottom of the distribution, to be above average, or to ascend to the top, can be a powerful driver of human behavior.¹³ Accordingly, social comparisons have been used as a means of promoting energy efficiency at the household level.¹⁴ In the international sphere, a common tool is *ranking*. Thus, the United States combats international human trafficking through the annual *Trafficking in Persons Report*.¹⁵ The ranking of countries in this context has had a strong impact on the measures taken by some countries to fight trafficking.¹⁶

The General Debate About Nudges

Since nudges do not curtail people's choices, one might surmise that they would be less controversial than mandates that are backed by sanctions. However, with the expanding use of nudges by governments, a lively debate has arisen over their legitimacy and effectiveness. The leaders of the nudge movement, Richard Thaler and Cass Sunstein, have argued that when the state nudges people to behave in a certain way for their own benefit, such

⁵ See Chip Heath et al., *Goals as Reference Points*, 38 COGNITIVE PSYCHOL. 79 (1999); Edwin A. Locke & Gary P. Latham, *Building a Practically Useful Theory of Goal Setting and Task Motivation: A 35-Year Odyssey*, 57 AM. PSYCHOL. 705 (2002).

⁶ See Locke & Latham, *supra* note 5 (work productivity); Matthew Harding & Alice Hsiaw, *Goal Setting and Energy Conservation*, 107 J. ECON. BEHAV. & ORG. 209 (2014); DEP'T FOR BUS., INNOVATION & SKILLS, *WOMEN ON BOARDS: FIVE-YEAR SUMMARY* (2015).

⁷ See generally Diana Szekeres, *The United Nations Millennium Development Goals*, 18 JURA 198 (2012).

⁸ See Robert Falkner, *The Paris Agreement and the New Logic of International Climate Politics*, 92 INT' AFF. 1107, 1111 (2016).

⁹ See Eyal Zamir et al., *It's Now or Never! Using Deadlines as Nudges*, 42 LAW & SOC. INQUIRY 769 (2017).

¹⁰ See, e.g., Alvin E. Roth et al., *The Deadline Effect in Bargaining: Some Experimental Evidence*, 78 AM. ECON. REV. 806 (1988); Ching-to Albert Ma & Michael Manove, *Bargaining with Deadlines and Imperfect Player Control*, 61 ECONOMETRICA 1313 (1993).

¹¹ See MARCO PINFARI, *PEACE NEGOTIATIONS AND TIME: DEADLINE DIPLOMACY IN TERRITORIAL DISPUTES* (2013); G. R. BERRIDGE, *DIPLOMACY: THEORY AND PRACTICE* 55–60 (5th ed. 2015); Jean Galbraith, *Deadlines as Behavior in Diplomacy and International Law*, in *INTERNATIONAL LAW AS BEHAVIOR* 19, 24–25, 35–36 (Harlan Grant Cohen & Timothy Meyer eds., 2021).

¹² Galbraith, *supra* note 11, at 25.

¹³ See generally *HANDBOOK OF SOCIAL COMPARISON: THEORY AND RESEARCH* (Jerry Suls & Ladd Wheeler eds., 2010).

¹⁴ See, e.g., Ian Ayres et al., *Evidence from Two Large Field Experiments that Peer Comparison Feedback Can Reduce Residential Energy Usage*, 29 J. L. ECON. ORG. 992 (2013).

¹⁵ See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 25–29 (2017).

¹⁶ Teichman & Zamir, *supra* note 2, at 1276–78.

measures are compatible with libertarianism.¹⁷ In response, critics of nudges have argued that such policies infringe on individual liberty. Specifically, nudges are manipulative, since they exploit peoples' cognitive limitations rather than engage them as deliberative rational agents.¹⁸ Arguably, exploitation of imperfections in human judgment and decision-making—such as the omission bias—undermines people's control over their choices, and is therefore more threatening to their autonomy than overt coercion. One possible response to this objection is that the use of nudges can be, and often is, transparent.¹⁹ Another response is that mundane choices are often made without conscious deliberation, and trying to force people to contemplate them would likely be futile. In such cases, one choice architecture or another is inevitable, so it is preferable to adopt the architecture that is more likely to produce self-beneficial choices.²⁰

Ultimately, nudges aimed at helping people make self-benefiting decisions are indeed paternalistic to some extent. There is probably no point in trying to persuade extreme libertarians to embrace nudges. However, there is much to be said in favor of paternalism from both consequentialist and deontological perspectives. Paternalism is often efficient.²¹ And while it infringes on liberty, this infringement is often justifiable on grounds of hypothetical, tacit, prior, anticipated, or subsequent consent,²² on grounds of second-order preferences,²³ and—from a moderate deontological perspective—whenever the good outcomes of paternalism exceed a certain threshold.²⁴ In fact, practically all legal systems include numerous paternalistic norms. Whether nudges aim to protect people from others (as they often do) or from themselves, policy-makers should not be deterred from using this technique. Some support for this conclusion may be found in public surveys that found that people do approve of governmental use of nudges.²⁵ However, one should concede that this approval varies across different types of nudges and different societies; and in any event, public surveys do not resolve normative questions.

Another critique has been made from the opposite direction.²⁶ To make their suggestions politically more palatable, proponents of libertarian paternalism have often disregarded the behavioral findings that suggest that nudges are often unsuccessful. For example, default rules are largely ineffective in transactional contexts where suppliers do their best to shift consumers out of the default. Similarly, there is no point in forcing individuals to make decisions (or nudging them to decide, by setting a deadline) when they lack the necessary expertise or information to make a rational and informed decision. Finally, when mistaken decisions are likely to have devastating consequences—such as being killed in a motorcycle crash for not wearing a helmet, or people living in extreme poverty because they did not save for old age—the only sensible legal reaction may be to preclude such decisions altogether.

¹⁷ See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211 (2003).

¹⁸ Till Grüne-Yanoff, *Old Wine in New Casks: Libertarian Paternalism Still Violates Liberal Principles*, 38 SOC. CHOICE & WELFARE 635, 636 (2012); Christopher McCrudden & Jeff King, *The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism*, in CHOICE ARCHITECTURE IN DEMOCRACIES 75, 104–10 (Alexandra Kemmerer et al. eds., 2016).

¹⁹ Hendrik Bruns et al., *Can Nudges Be Transparent and Yet Effective?*, 65 J. ECON. PSYCHOL. 41 (2018).

²⁰ CASS R. SUNSTEIN, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* 144–51 (2014).

²¹ Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998).

²² See, e.g., DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE* 45–94 (1986).

²³ Zamir, *supra* note 21, at 242–44.

²⁴ EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 313–47 (2010).

²⁵ See, e.g., William Hagman et al., *Public Views on Policies Involving Nudges*, 6 REV. PHIL. & PSYCHOL. 439 (2015); Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177 (2016).

²⁶ See Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014); McCrudden & King, *supra* note 18, at 81–92.

Moreover, the adoption of nudges might crowd out political motivation to create more stringent regulation. That is, the availability of nudges on the political menu might hamper policy-makers' ability or motivation to promote the first-best necessary regulation that entails limiting the choice set that people have.²⁷ Consequently, low-cost and choice-preserving nudges may end up substituting for much needed and more effective measures—such as mandates and taxes—simply because they are an easier political option.²⁸ Thus, for example, the ability to agree on non-binding goals within the Paris Agreement may have undermined the political will to push forward more aggressive measures needed to combat climate change. And while the framework created in the Paris Agreement might be better than an alternative of no agreement, current climate research suggests that this framework has failed to reduce carbon emissions sufficiently.²⁹ Moreover, inasmuch as the arguments mentioned above in support for paternalism lend support for *legal mandates*, they actually weaken the case for nudges.

Normative Aspects of Nudges in the International Arena

At the international level, the case for using nudges is considerably stronger than at the national level—for at least two reasons. First, unlike the national arena, in the international one, there is, as yet, no central legislative body, and the enforcement mechanisms of existing customary international law and treaty law are generally rather weak. Consequently, while at the national level the basic tripartite choice is between compulsory rules, nudges, and doing nothing, in the international arena only the latter two options are usually available. Nudges in the international sphere are therefore less vulnerable to the criticism that they are not intrusive enough. Moreover, non-binding commitments may possibly shift the reference point, thereby eventually leading to binding commitments.

Second, without delving into the thorny philosophical debate of whether corporate entities possess autonomy, normative judgment, and moral agency, concerns over harm to individual autonomy are less relevant when nudges are used to influence the behavior of countries and organizations, rather than individuals.³⁰ This is particularly true in settings where nudges are used only after governments have explicitly consented to their use (e.g., the Paris Agreement). Hence, international nudges are generally less vulnerable to the accusation that they are disrespectful of autonomy.³¹ But when nudges are used to sway individuals without their knowledge—as is the case when negotiators set defaults in international treaties to influence the ratification decisions—this may be viewed as disrespectful of autonomy and as incompatible with the desirable division of roles between the professional and the political levels. Similarly, when nudges target states' representatives, such as negotiators, they arguably create a wedge between the targeted individuals and the principals whose interests they represent.

It should be acknowledged, however, that the limited political accountability in the context of international governance may weigh against international nudges. A key aspect of the legitimacy of nudges at the domestic level stems from viewing them as a type of collective binding mechanism created through a democratic process.³² But

²⁷ See David Hagmann et al., *Nudging out Support for a Carbon Tax*, 9 NATURE CLIMATE CHANGE 484, 488 (2019).

²⁸ See EYAL ZAMIR & DORON TEICHMAN, *BEHAVIORAL LAW AND ECONOMICS* 177 (2018).

²⁹ See Mark Roelfsema, *Taking Stock of National Climate Policies to Evaluate Implementation of the Paris Agreement*, 11 NATURE COMM. 2096 (2020).

³⁰ Of course, external interventions in countries' sovereignty may implicate their autonomy, since hegemonic powers dictate global policies. The controversy surrounding the market-based economic policies dictated by the Washington Consensus is a case in point. See Charles Gore, *The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries*, 28 WORLD DEV. 789 (2000).

³¹ Arguably, when nudging at the international level induces governments to adopt policies that adversely affect their citizens' autonomy, the autonomy concern is important, after all. However, the adopted policies need not adversely affect autonomy—and when they do, the issue is not with nudging at the international level.

³² Gebhard Kirchgässner, *Justification and Possibilities of Soft Paternalism*, in CHOICE ARCHITECTURE IN DEMOCRACIES, *supra* note 17, at 229, 232.

international policy-makers are relatively less accountable to the public than domestic politicians.³³ The World Bank, for example, may implement nudges that affect the lives of individuals around the globe—while most of those individuals have no meaningful influence on the decisions of the World Bank. Since nudges offer a new and powerful tool to such unaccountable players in the international arena, they might be viewed as less legitimate. And when one state nudges another state unilaterally, as is the case when the United States adopts various rankings, the ability to speak of a collective decision-making process is even further curtailed.

Conclusion

Nudges have emerged into the international sphere as a viable regulatory tool that affects the conduct of countries. While nudges are not a first-best solution to many global problems, they may still serve as a practical response in many contexts. Furthermore, the normative claims levied against nudges at the national level appear to have less weight once the debate shifts to the international arena.

Given the relative novelty of international nudges, a significant number of questions remain for future research. One issue that we leave for future research is the use of nudges by international organizations with a view to changing the behavior of *individuals*, rather than national governments. Much like governments, a growing number of international organizations have created behavioral units whose goal is to create nudges that promote their policy goals. Examples include the UN's Behavioural Initiative, the World Health Organization's Technical Advisory Group on Behavioural Insights and Sciences for Health, and the World Bank's Mind, Behavior, and Development Unit.³⁴ Currently, these initiatives are focused on designing nudges and implementing them in collaboration with different countries. This framework offers significant advantages, given the economies of scale associated with designing a nudge, and does not pose a unique challenge from the normative perspective discussed in this essay. However, to the extent that international organizations will delve into the project of directly nudging individuals in a bid to steer their choices, the normative analysis becomes more tenuous given the lack of accountability of international organizations, as discussed in this essay.

³³ See Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EURO. J. INT'L L.* 1 (2006).

³⁴ For an overview, see WORLD BANK, *BEHAVIORAL SCIENCE AROUND THE WORLD: VOLUME TWO – PROFILES OF 17 INTERNATIONAL ORGANIZATIONS* (2020).