

Newcastle Law School
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Behavioural Science in Law & Policy: Evidence, Ethics, & Expertise



Law, Innovation,
and Society

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Behavioural economics, and behavioural science more generally, has become an increasingly salient aspect of modern policy debates. Despite the current enthusiasm amongst governments and policy-makers for behavioural approaches, there are potential problems with the use of the behavioural sciences to formulate public policy, many of which remain underexplored. This workshop brought together papers from a range of different disciplinary, regulatory, and practical perspectives to examine the potential benefits and pitfalls of behavioural science as applied to policy.

The workshop was focused around three core themes: Evidence, Ethics, and Expertise. Speakers presented on the debates surrounding the existence of empirical evidence for people's irrationality, including evidence for biases and an unwarranted reliance on heuristics, which is often used as the justification for 'nudge' techniques. Presenters also questioned the normative foundation for the use of these techniques, in law and in ethics. Finally, presenters discussed the policy-making process in terms of what is counted as evidence and who is granted the authority of expertise to make behavioural policy decisions, as well as the complexity of doing truly interdisciplinary work in academia and in policy.

This report provides a summary of the presentations in each session, as well as some of the themes that emerged from discussions on the individual sessions and the workshop as a whole. While presenters approached the topic of behavioural insights in policy development from different angles, the broad consensus at the end of the day was that these should be approached and implemented with caution. Presenters agreed that much more research on behaviourally-informed policy's effectiveness over time and impact on people's welfare is needed. Presenters also largely agreed that the application of behavioural insights was not a straight-forward exercise, and tended to raise very important ethical, legal, and empirical questions. There was further consensus that behavioural sciences will continue to evolve and to inform policy in advanced democracies, and that as the field moves forward other disciplines will be required to test, verify, critique, and surveil the translation of behavioural insights into policy.

Session 1 – Matters of Principle & Practice: Ethics & the Behavioural Sciences

Christian Schubert began this session by arguing that the ethics of nudging are still unclear, and that nudges are not yet safe to use in policy. This is because of three problems, Schubert said: definition, implementation, and justification. Because of the problems surrounding definition, there is a risk that real-world bureaucrats could slip into pseudo-nudging, in a progressively more 'psychocratic' form of government. The first definitional problem is focused on key normative notions involved in nudge, and specifically on welfare. Thaler and Sunstein's account implies an informed preference or

‘preference purification’ version of welfare, which measures what one would want if one had unlimited resources to dedicate to decision making. This model maintains *homo economicus* as the normative role model, even though real individuals always depart from this model. Most nudges capitalise on people’s preferences for convenience, and sometimes nudges seem necessary for navigating the real world of complex decisions. The possible extension of introducing nudges is a constant discouragement of active choice and the outsourcing of responsibility for decisions. If we value personal responsibility and agency, however, then Schubert suggests that rather than implement a wide program of decision substitution, public policy should focus on the task of facilitating individual preference learning. This involves the life-long process of acquiring and trying out new desires, whose development over time is a key element of personal identity.

In the second presentation in this session, Magdalena Malecka and Robert Lepenies discussed the intersection of nudges, politics, and law. In their work, they contrast nudging with legal norms, and determine that living in a world of nudges is problematic because our collective capacity to self-legislate is undermined. This is due to two fundamental characteristics of the instrument (nudge): that it is (a) non-cognitive and (b) non-normative. Malecka and Lepenies identified three interrelated problems: (1) who decides what behavioural science wants society to do, 2) the inseparability of nudges from libertarian paternalism, and 3) the problem of promoting pro-self versus pro-social attitudes. These problems all concern the form that institutions take, insofar as institutions can work instrumentally or through legal norms. The instrumental method of nudge involves creating a change of context in the environment to which people react. While normative institutions are codified and publicly scrutable, instrumental institutions work by extra-legal, administrative means. It is very difficult to see nudges, and this raises diachronic issues. The best way to combat the diachronic issues in nudges is to have them expire, so that the nudges have to be debated publicly. This also deals with the non-cognitive nature of nudges, by bringing them into conscious awareness through discussion. Malecka and Lepenies argued that nudges are either extra-legal or non-legal because they are mostly not legal norms; they are not requirements to behave in a particular way as laws are. As such, they are a distinct way of governing; a manifestation of changes in governance structures in advanced democracies. They are part of the transformation of the public sector through the spread of markets, and the related dispersion of state power. By changing the technique of governance, we are giving up the political function of governing through laws.

Nudges are not legal norms – they are either extra-legal or non-legal.

The third presentation, by Leonhard Lades, presented empirical work focussed on combining data with the ethics of what is good and bad about nudges. The ‘behavioural economics revolution’ in economics gave us nudge, Lades argued, but took away the revealed preference approach as a means to identify what makes people better off. Economists have adopted *ad hoc* criteria to evaluate behaviour as a result of the behavioural economics shift. The welfare standard proposed by Thaler and Sunstein, that nudges influence people toward what is good for them “as judged by themselves,” is based on individual preferences, though it is unclear what people are judging about. Behavioural welfare economics is in trouble right now, Lades claimed, and requires a new welfare standard. Lades’ work suggests a tool to evaluate the welfare effects of nudges based on four criteria. The tool looks at changes in: (1) choice (using the revealed preference approach), (2) decision utility (the significance of the power a nudger might have to change our preferences is often neglected), (3) experienced utility, and (4) the decision-making process (could it be more rational or autonomous?). This tool can be used to observe behaviours and evaluate choices in different scenarios. It was tested using everyday happiness, by measuring what people want in everyday

life, their decision making processes, and observing choices. What Lades and his team observed is that people are less happy when they have a self-control failure. A policy intervention that reduces self-control failures could reduce negative affect.



Prof. James Davey (University of Southampton) presents on designing law in commercial markets

Session 2 - The Regulatory State in the Behavioural Era

Fabiana Di Porto presented work conducted with Nicoletta Rangone, which argues that there has been an increase in cognitive-based regulations in the European Union, but cognitive science should be included in regulation only when there is a relevant behavioural element to address. Eventually, a non-cognitive-based regulation may fail to achieve its goal because of the behaviour of the target population. This leads Di Porto and Rangone to advocate for a principle of proportionality regarding including cognitive science in regulations: we can include behavioural insights in a policy only if there is a consistent risk of failure of the policy without these insights. This follows from the intervention ladder concept (adapted from that used by the Nuffield Council on Bioethics): one can only intervene in another's autonomy with the least intrusive regulation that will be effective, and leaving the most autonomy intact. Di Porto said that this complements other elements of empowerment: educating people, increasing their cognitive capabilities, and overcoming their emotional responses. These elements would be truly de-biasing and choice preserving, and would involve no economic incentives.

In the second presentation of this session, Katy King presented work about market failures resulting in 'internalities:' costs to oneself by not getting better plans, deals, rates, or providers for various utilities and services. King presented a new vision for market regulation via behavioural science research: to set criteria, collect and publish data, design remedies, and test these continually. King argued that we could be using information, such as complaints, customer review websites, trends, and mystery shopping, to identify and understand market failures. Once we know where the failures are sourced, we can consider behavioural remedies, such as: simple heuristics; smart and timely heuristics, like forced choice on contract renewal notices; collaborating with

price comparison websites; or facilitation of low friction complaining, to make it very easy for consumers to complain about something. For all of these remedies, we need to test and reiterate. Things like overdraft warnings, automatic switching of phone or energy companies, and pairing financial advice with behavioural tools ('if, then' plans) could remove externalities resulting from failures in the market.

In the final talk in Session 2, James Davey presented his work on designing law in commercial markets, specifically commercial insurance. The law is divided into consumers and commerce, and commerce is the whole range of businesses, from small shopkeepers to multi-national corporations. Davey said that Law Commissions could look at politically-neutral law reform. These bodies can use default-rules analysis to identify the effects of policy interventions in commercial law, and these can be used to measure behavioural influences. In most of contract need to think more about how default rules work in the real world, through socio-legal research. We also need to remember that law-making is an on-going process. Insurance law principles were established in the 1780s and codified in 1906. The Law Commission is not well resourced, so the law around this and other areas doesn't get updated regularly, and when it does, the Law Commission is asked to do it with a minimal budget. To test and implement better law, a more robust and properly resourced Commission is needed.

Session 3 – Translating Behavioural Science into Law & Policy: Problems, Pitfalls, & Solutions

The focus of behavioural health policy is on the “usual suspects” of public health

In the first presentation in this session, Kathryn MacKay and Muireann Quigley argued that the focus of behavioural health policy is limited to an individual focus, and the 'usual suspects' in public health. These are what the WHO considers the top modifiable risk factors for chronic disease: smoking, alcohol consumption, physical activity, and obesity. Though the behavioural sciences have the ability and scope to look at other factors, many fields within them look at individuals as the locus of change. This focus, combined with the individual-focus of liberal democratic states, means that when behavioural findings are imported into policy, the paradigm of individual responsibility is underscored. This also means that policy and research from behavioural sciences and policy and research about the social determinants of health are passing by each other. These two areas of research occupy two almost distinct spheres within various academic literatures. The concern with this is that by not taking account of the macro-level social determinants of health, policies which draw on the behavioural sciences will fail to make any real headway in tackling the root causes of ill-health and health inequalities. The focus on individual behaviour change allows the continuation of individual blame for negative health outcomes, and ignores the systemic nature of many health determinants. MacKay and Quigley further argued that behavioural science research faces two challenges: (1) issues of replicability and (2) bias within the selection process for evidence to support certain claims. Thus, policymakers must be careful when basing public policy on this research.

Nicky Priaux and Martin Weinel next presented work examining the problem of expertise in law; in particular, the problem of having adequate behavioural expertise for law-making and legal academics. They argued that the impact of external knowledge on law as a discipline is very limited. A bad law (piece of legislation) can be repealed, but law as a discipline or activity (the study and practice of law) is not really affected in any way even when such a thing happens. This is framed as a problem of interdisciplinarity – law is insulated from and unresponsive to knowledge and developments in other fields. The problems in interdisciplinary work are many, and law is guilty of borrowing from

other fields, including from the behavioural sciences, without sufficient understanding. There are a number of traps for the unwary in interdisciplinary work, and Priaulx and Weinel think that even when we are aware of these, we cannot avoid them. According to a sociological theory of expertise, one gains expertise via extensive immersion in a field and contact with the field's experts. It is difficult (potentially impossible) for a person who works in one field, and is perhaps an expert in their field, to gain expertise in another field. At best, it may be possible to gain 'primary-source knowledge,' which one gains by reading primary journal articles and engaging with the literature. This is a problem for law and policy, when concepts that have been thoroughly defeated in their home fields survive in fields that borrow the concept without sufficient expert knowledge (e.g. Tort law's continued use of hedonic adaptation).



Kathryn MacKay (University of Birmingham) and Prof. Muireann Quigley (Newcastle University) present on the role of the behavioural sciences in exacerbating health inequalities

In the final presentation of the session, Peter John argued for the diffusion of knowledge in bureaucracies through innovation, connections to citizens, and responsive bureaucrats. This would be based on the wide application of behavioural economics, fostering knowledge translation, ease of understanding, and entrepreneurialism. This requires policy moves greater than placing defaults; John argued that all policy tools are informational now and that there is an informational element to everything government does. There have been various experiments of bottom-up nudges from citizens to bureaucrats, such as sending letters asking about attendance at certain meetings, and it seems to increase bureaucrat attendance; the feeling that one's behaviour is being observed by someone, that one is accountable, could improve bureaucrat responsiveness. John has a dream about rigorous, behaviourally-informed social science and policy interventions, and a more citizen-responsive method of governance. John wondered if perhaps the enthusiasm for nudge is too great, and whether consultancies moving into this are undermining the 'publicness' of nudge's offering. Many nudges

provide weak policy treatments, and they are likely also to weaken over time with fading effects. We tend not to test this, he said, and we ought to.

Emerging Themes from Workshop Discussions

Agency and Notions of the Self in Nudges

Nudge-based policies can come into conflict with efforts to promote personal agency. Academic literature is beginning to examine the role that nudge could play in supporting this agency, and worries have emerged that policy and technology are pushing us toward certain desired behaviours at the cost of our capacity to make choices. According to the model that says that the decisions we make are a part of our identity-forming experiences, nudge influences could undermine the experiences that make one the person that one is, impeding the development of personal identity.

There is an important distinction between nudges that push us toward a specific decision (such as food consumption) versus nudges that assist us with tasks (that give us time, or make processes easier) without materially pushing us toward a choice. Some nudges introduced in the United States were presented as examples of those which may be safe to use insofar as they are improvements upon things that the government is doing anyway. For instance, behavioural interventions that streamline processes for government programs could be beneficial for people's welfare. Simplifying access in such a way could even enhance people's agency. Making something or some choice automatic by setting defaults is not the same, however, because it means that a person is not making a decision at all. Implementing defaults is a way of removing decisions, and the impact of this is an area requiring further study.

Relatedly, behavioural science theories appear to imagine the self as being fragmented or multiple; one commenter observed that certain studies seem to assume that one has an observant inside oneself, observing oneself doing one's behaviour. This notion of a separation of selves is a very Western understanding of the self. This is especially relevant as much of the policy that is created using evidence from behavioural science research is focused on encouraging individual behaviour change, and thus takes an individual focus. From a methodological perspective, research that identifies causes at the individual level may have more explanatory power. However, this prompts us to ask at which level we should look for the mechanisms of influence. While individuals are responsible to some degree for certain health behaviours, other behaviours must be addressed at the collective or regulatory level.

Influence and Regulation

A crucial part of the debate around nudges is centred upon the legitimacy of government action and of the use of particular policy tools. Deeper investigations into the nature of different behavioural influences within the wider body of legal or regulatory approaches, including where nudge fits with theories of regulation, have been missing from debates so far. Policymakers tend to defend nudges by saying that people like them, and therefore they have public support. There is a need for empirical work on nudge policies and their success conditions, including why they are introduced in different countries and for different goals. There is a research need to explore in which contexts, countries, and fields these nudges work, and whether nudge is crowding out other kinds of policy solutions. This work should be done empirically, to see what's actually happening in the policy arena.

Recognising the need for this kind of research highlights the worry that governments are involved in a process of radical incrementalism away from debated legislation and

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regulation. When certain nudges have been applied in the past, they have led to some inappropriate interventions. Some mental health applications of behavioural research, for example, should really never have happened. When the BIT was fully part of the UK government (before becoming a public-private partnership) there was more governmental oversight, which means more political accountability (at least in theory). The privatisation of BIT means that such accountability is lost, and this has important ramifications for the legitimacy of their policies.

There is ongoing work on combining behaviourally-derived policies with other means and modes of regulating. For example, there may be a way to have genuine citizen collaboration, which could involve openly examining the ethical implications of the use of behavioural science on public policy. Policy co-design with citizens tends not to be done in behavioural sciences, but it could be. One of the paradoxes of nudge is that policy makers have the same cognitive biases that the citizens have, and which are the target of nudge-based correction. We can imagine a radical agenda, potentially, where citizens harness the same nudge techniques to influence policy-makers.

However, in the implementation of regulation, governments have a vast amount of discretion, which in principle could face the objection that certain regulatory approaches (including behavioural approaches) are not subject to adequate legal oversight or the usual/necessary decision-making processes. It may thus be impractical to say that every kind of government policy, including nudges, requires democratic input and *ex ante* control for legitimacy. Yet, nudges mostly concern things like welfare and the public good. Issues of personal welfare and public goods involve judgments about values, and therefore should be decided by legislation rather than as the execution of already-decided norms. Because of the way that some behavioural techniques operate (that is, discreetly and without being openly communicated), greater focus ought to be placed on government decisions to use them.

Expertise and Interdisciplinarity

Research in some sub-fields of behavioural science is facing what some have called a crisis of reproducibility. There are important questions yet to be answered about the reproducibility of psychological results, the applicability to all segments of society or across different societies of research findings, and about the fundamental assumptions that form the research questions in behavioural psychology and economics. Furthermore, the work of adapting research from the behavioural sciences into policy, and evaluating these policies, faces a lack of appropriate expertise. There are important questions to be asked about types of knowledge and expertise needed to create robust evidence-based policy in this area (including questioning the privileging of economic expertise in relevant debates).

There is a clear need for policymakers to be engaged with real information and careful constructions of concepts, rather than simplified versions designed for popular or non-expert consumption. But frequently research results have to be made overly-certain for policymakers if they are going to have impact or be taken up in policy. This is a problem because when applied in policy, economics and psychology raise big questions of law and ethics. The right balance and amount of interdisciplinary expertise, however, may be extremely difficult to achieve, simply by virtue of the difficulty of achieving expertise tout court.

It seems that many of the big social issues we are currently facing, like climate change and poverty, require us to try to form interdisciplinary groups of experts to propose solutions. Translating skills and knowledge into social action is a dilemma facing academics and policymakers. It may be that a group of experts in legal reform is

required, and to have a range of techniques for regulatory evaluation. A balance of methodologies could reveal better results, and calls for people trained within both law and econometrics. Further, we need ways of educating people, training across disciplines, and bringing expertise together in academic departments or research centres. This is required if we are to tackle the problems facing large and consistently neglected sections of society.



Prof. Nicky Priaux and Dr. Martin Weinel (both of Cardiff University) explain the various levels of expertise, and the challenge in achieving expert-level understanding

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