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# Nudging and the Safeguards of the Rule of Law

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## Abstract

Nudging is a policy tool that steers people’s behavior through noncoercive psychological pushes. This has consequences for people’s lives to varying degrees. For example, the nudge of a sticker of a fly in a urinal encourages peeing inside a urinal, while an organ donation default brings people to agree to donating their organs after their decease. Governments do not yet systematically examine which nudges have to be subjected to all safeguards of the rule of law—for example, parliamentary control, judicial review, or compliance with legal principles such as proportionality. This article argues that a legal doctrine is necessary to carry out this examination. Moreover, it contributes to the development of such a doctrine, using the approach of the European Court of Human Rights as a source of inspiration. The doctrine consists of a “de minimis” principle for nudges: Public institutions only need to ensure that a nudge complies with rule of law safeguards when the nudge has substantial consequences. In addition, the doctrine includes a criterion to determine which nudges have such substantial consequences. In particular, it is argued that a nudge should be subjected to at least some safeguards when it has a serious effect on people’s autonomy.

**Keywords:** Nudging; nudge; rule of law; safeguards; European Court of Human Rights; autonomy; “de minimis” principle; heuristics; behavioral science

## A. Introduction

Nudging is a popular policy tool that steers people’s behavior through non-coercive psychological pushes.<sup>1</sup> For example, a nudge can consist of placing healthy food on eye-level in a canteen. This intervention creates a small psychological push towards the behavior of buying healthy food because people are psychologically inclined to easily notice products at eye-level.<sup>2</sup> Currently, nudging is used by governments in countries all over the world, such as the United States, the United Kingdom, Australia, Canada, Denmark, France, Germany, the Netherlands, Peru, and Singapore.<sup>3</sup> In these countries, Behavioral Insights Teams (BITS) and nudge networks have been established that develop and implement nudges based on behavioral science insights regarding people’s psychological responses to the environment<sup>4</sup>—for example, their responses to different

<sup>1</sup>RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 6 (1st ed. 2008).

<sup>2</sup>*Id.* at 1–2.

<sup>3</sup>ZEINA AFIF, WILLIAM WADE ISLAN, OSCAR CALVO-GONZALEZ, ABIGAIL GOODNOW DALTON, BEHAVIORAL SCIENCE AROUND THE WORLD: PROFILES OF 10 COUNTRIES 6 (WBG, 2019).

<sup>4</sup>While a BIT consists of one organization which designs nudging policies for different branches of the government, a nudge network consists of experts on nudging who work for different branches of the government. *Id.*

ways of positioning products.<sup>5</sup> These nudges are not automatically subjected to rule of law safeguards, such as judicial review, parliamentary control, and compliance with legal principles, such as proportionality.<sup>6</sup> As Sunstein suggests, “much nudging occurs without involvement of the law.”<sup>7</sup>

In view of the current lack of “involvement of the law,” it has been argued that it would be desirable to more often apply rule of law safeguards to nudges.<sup>8</sup> For example, judicial review should correct a government when it uses a nudging policy in an improper way.<sup>9</sup> This is seen as necessary because public authorities exert power when they use nudging as a policy instrument, as nudges can influence people’s thought processes.<sup>10</sup> For example, nudges can encourage specific decisions by triggering unnoticed and uncontrollable psychological responses.<sup>11</sup> In such a case, people are encouraged to follow the push of a nudge instead of actively reflecting on their decision: The nudge bypasses their capacity for autonomous reflection.<sup>12</sup> Some authors contend that rule of law safeguards should prevent and counteract the usage of those nudges which have such a negative effect on people’s autonomy.<sup>13</sup>

At the same time, it has been suggested that nudges should not automatically be subjected to rule of law safeguards. Many nudges consist of seemingly innocent interventions to encourage “good” behavior, such as putting stickers of a fly in urinals to improve the cleanliness of public toilets, or putting smiling trash bins in railway stations to ensure that people throw their rubbish in them. Such nudges do not seem to pose a serious risk of misuse of public power, and rule of law actors, such as judges and parliaments, might not have the capacity to assess these small and non-coercive interventions.<sup>14</sup> Legal scholars have not yet determined, however, how public institutions can, on a case by case basis, distinguish between nudges that have to be subjected to rule of law safeguards, and nudges that do not have to be subjected to these safeguards.

In this Article, I argue that a legal doctrine is necessary to systematically assess which nudges have to be subjected to rule of law safeguards to prevent and counteract improper use of nudging policies. More concretely, such a doctrine should allow for a distinction to be made between nudges based on whether they have substantial consequences. Nudges with substantial consequences should be subjected to at least some rule of law safeguards to ensure that these nudges are not used in a wrong way, while nudges without substantial consequences should not be subjected to these safeguards.

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<sup>5</sup>For more on how nudges can trigger specific psychological responses to physical aspects of the environment, such as the positioning of products, see Gareth J. Hollands, Giacomo Bignardi, Marie Johnston, Michael P. Kelly, David Ogilvie, Mark Petticrew, Andrew Prestwich, Ian Shemilt, Stephen Sutton and Theresa M. Marteau, *The TIPPME Intervention Typology for Changing Environments to Change Behaviour*, 1 NAT. HUM. BEHAV. 1, 21(524) (2017).

<sup>6</sup>For more on these safeguards, see generally Alberto Alemanno & Alessandro Spina, *Nudging Legally: On the Checks and Balances of Behavioral Regulation*, 12 INT’L J. CONST. L. 429 (2014); Mark Schweizer, *Nudging and the Principle of Proportionality: Obligated to Nudge?*, in NUDGING – POSSIBILITIES, LIMITATIONS AND APPLICATIONS IN EUROPEAN LAW AND ECONOMICS 93, 100–02 (Klaus Mathis & Avshalom Tor eds., 2016).

<sup>7</sup>Cass. R. Sunstein, *Nudges, Agency, and Abstraction: A Reply to Critics*, 6 REV. PHIL. & PSYCH. 511, 524 (2015).

<sup>8</sup>See generally Alemanno & Spina, *supra* note 6; Anne S. Van Aaken, *Judge the Nudge: Legal Limits in the EU*, in NUDGE AND THE LAW 95 (Alberto Alemanno & Anne-Lise Sibony eds., 2015); Robert Lepenies & Magdalena Malecka, *The Institutional Consequences of Nudging – Nudges, Politics, and the Law*, 6 REV. PHIL. & PSYCH. 427 (2015); Christopher McCrudden & Jeff King, *The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism*, in CHOICE ARCHITECTURE IN DEMOCRACIES 67, 136 (Alexandra Kemmerer, Christoph Möllers, Maximilian Steinbeis & Gerhard Wagner eds., 2015).

<sup>9</sup>Alemanno & Spina, *supra* note 6, at 452.

<sup>10</sup>*Id.*

<sup>11</sup>John Beshears, James J. Choi, David Laibson & Brigitte C. Madrian, *The Limitations of Defaults* 10–11 (Nat’l Bureau of Econ. Rsch., Working Paper No. RRC NB10-02, 2010).

<sup>12</sup>See Daniel M. Hausman & B. Welch, *Debate: To Nudge or Not to Nudge*, 18 J. POL. PHIL. 123, 128 (2010); Luc Bovens, *Real Nudge*, 3 EUR. J. RISK REGUL. 43, 43–44 (2012). See generally Van Aaken, *supra* note 8.

<sup>13</sup>Van Aaken, *supra* note 8, at 107–11; Alemanno & Spina, *supra* note 6, at 431.

<sup>14</sup>Schweizer, *supra* note 6, at 100–02; Sunstein, *supra* note 7, at 525.

Moreover, I contend that the approach of the European Court of Human Rights (ECtHR) can serve as a source of inspiration for a legal doctrine that distinguishes between nudges based on their consequences. More specifically, the legal doctrine presented in this Article focuses on the consequences that nudges can have for people's autonomy, while including the following elements of the ECtHR's approach: The "de minimis" principle, the notion of the core of fundamental rights, and the criterion of the seriousness of the interference.<sup>15</sup> This is a useful approach—as I will further explain in Section D—because a partial analogy can be drawn between the goals of the European Convention on Human Rights (ECHR) and the goals of legal institutions who need to assess nudges, such as national parliaments or national courts. Both the ECtHR and such institutions must efficiently deal with their scarcity of resources, and they have to counteract potential misuse or abuse of governmental practices which affect people's autonomy.<sup>16</sup>

The argument proceeds as follows. Section B discusses in more detail what nudging is. Based on an examination of the debate on nudging and rule of law safeguards, Section C demonstrates that it is useful to develop a doctrine for determining which nudges should be subjected to rule of law safeguards. Sections D and E offer a first start of the development of such a doctrine, using the above-mentioned elements of the approach of the ECtHR as a source of inspiration. More concretely, the doctrine will involve that rule of law safeguards have to apply to nudges when they affect people's autonomy in a serious way because these nudges have substantial consequences and can thus be misused. Section F will offer a conclusion.

## B. What is Nudging?

### I. The Definition of Nudging

The word "nudge" literally means a light poke or push, and the policy tool of nudging is generally defined as a subtle psychological push.<sup>17</sup> A more specific definition of nudging is, however, necessary to conceptually distinguish it from other regulatory techniques that also exert psychological influence, such as mandates, bans, and taxes. Such a definition was developed by Thaler and Sunstein. According to them, nudging is "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid."<sup>18</sup>

On the one hand, this definition provides a positive explanation of what nudges are: "[A]ny aspect of the choice architecture that alters people's behavior in a predictable way."<sup>19</sup> The phrase "choice architecture" refers to the context in which people make decisions. According to Thaler and Sunstein, people's behavior can be predictably influenced by using psychological knowledge on how people usually respond to specific aspects of this context. For example, the choice context of a restaurant involves, among other things, the design of the restaurant menu. People are psychologically inclined to choose the first or the last option on such a restaurant menu.<sup>20</sup> Restaurant owners can use this knowledge to predictably influence and nudge which options people will choose, for instance by placing the most expensive or healthiest options on top or at the bottom of the menu.<sup>21</sup>

<sup>15</sup>A sidenote is that, besides the approach of the ECtHR, other legal approaches might also function as a source of inspiration for a legal doctrine for the assessment of nudges. This Article only goes as far as claiming that the approach of the ECtHR can be a particularly useful source of inspiration for a doctrine by which rule of law actors can determine which nudges should be subjected to rule of law safeguards.

<sup>16</sup>See *infra* Section C on why rule of law actors who assess nudges aim to counteract abuse of power and to deal with scarcity of resources. See *infra* Section D on why the ECtHR has these aims.

<sup>17</sup>THALER & SUNSTEIN, *supra* note 1, at 4.

<sup>18</sup>*Id.* at 6.

<sup>19</sup>*Id.* at 6.

<sup>20</sup>Eran Dayan & Maya Bar-Hillel, *Nudge to Nobesity II: Menu Positions Influence Food Orders*, 6 JUDGMENT & DECISION MAKING 333, 339 (2011).

<sup>21</sup>*Id.* at 339.

On the other hand, Thaler and Sunstein’s definition of nudging excludes “forbidding any options or significantly changing [people’s] economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid.”<sup>22</sup> In other words, the target of the nudge must be able to easily ignore the nudge, without risking sanctions or financially disadvantageous consequences.<sup>23</sup> This means that nudges are not coercive measures such as commands and prohibitions, from which people cannot deviate without risking sanctions. Likewise, nudges are not significant financial incentives, such as taxes, because people cannot deviate from taxation without risking a financial penalty.<sup>24</sup>

While the above-discussed definition is generally used as a starting point in the literature on nudging, it has also been criticized for being very broad.<sup>25</sup> Any aspect of the choice architecture can be a nudge; according to Thaler and Sunstein, even phenomena such as the weather can amount to a nudge because the weather influences how people behave.<sup>26</sup> This is not in line with how most scholars discuss nudging, however. They use the verb “to nudge”<sup>27</sup> which implicitly presupposes that nudging is a purposeful activity, and that someone is deliberately doing the nudging.<sup>28</sup> It has therefore been proposed to incorporate in the definition of nudging that it is an *intentional* attempt to influence people’s behavior.<sup>29</sup> An advantage of this definition is that it becomes clearer how nudges relate to the concept of ethical responsibility: If nudges are intentionally used, then the people who engage in nudging are responsible and can be held accountable for the consequences of these nudges.<sup>30</sup>

From a legal perspective, too, the element of intentionality can be considered a useful addition to Thaler and Sunstein’s definition of nudging. Legal scholars are primarily interested in how humans regulate other humans, especially through the use of laws.<sup>31</sup> This means that these scholars have little reason to be interested in unintentional phenomena such as the influence of the weather on our behavior; a definition of nudging that includes a phenomenon such as the weather does not serve their research purposes. They have more reason to be interested in whether and how policymakers, in a state government under the rule of law, deliberately choose to regulate people’s behavior through nudges instead of, or in addition to, traditional rules or bans.<sup>32</sup>

For this reason, my working definition of nudging adds the element of intentionality to Thaler and Sunstein’s conception of nudging. In addition to this, two clarifying remarks should be made. First, this Article investigates only public nudges because it is solely concerned with public actors. Consequently, the term nudging will be used to refer to public nudging only, even though it is

<sup>22</sup>THALER & SUNSTEIN, *supra* note 1, at 5.

<sup>23</sup>*Id.*

<sup>24</sup>Thaler and Sunstein’s definition of nudging does not count financial measures as nudges, but an exception is when a financial measure does not consist of a *significant* financial incentive. For example, a canteen can nudge people to buy a product by lowering its price from 1 euro to 99 cents. The reason the financial incentive is not significant is that the difference between 1 euro and 99 cents is too small to have a substantial economic effect on people’s budgets. A financial measure can thus only count as a nudge when its real financial effects are negligible.

<sup>25</sup>This Article limits itself to discussing a criticism on Thaler and Sunstein’s definition that—as I will explain—should be considered by legal scholars. For an overview of other criticisms and adaptations of this definition, see Luca Congiu & Ivan Moscati, *A Review of Nudges: Definitions, Justifications, Effectiveness*, 36 J. ECON. SURV. 188, 193–95 (2022).

<sup>26</sup>CASS R. SUNSTEIN, *THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE* 35 (Adrien Barton & Till Grüne Yanoff eds., 2016).

<sup>27</sup>THALER & SUNSTEIN, *supra* note 1, at 4, 67, 128.

<sup>28</sup>Pelle G. Hansen, *The Definition of Nudge and of Libertarian Paternalism – Does the Hand Fit the Glove?*, 7 EUR. J. RISK REGUL. 155, 170 (2016).

<sup>29</sup>*Id.* at 171. In other words, passive governmental policies which leave existing choice contexts intact do not fall under the definition of nudging.

<sup>30</sup>Pelle G. Hansen & Andreas M. Jespersen, *Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy*, 4 EUR. J. RISK REGUL. 3, 10 (2013).

<sup>31</sup>For more on the relation between law and regulation, see Julia Black, *Critical Reflections on Regulation*, 27 AUSTL. J. LEG. PHIL. 1, 22–26 (2002).

<sup>32</sup>See *infra* Section C for further explanation on why legal researchers should investigate this issue.

acknowledged that private actors can also use nudging techniques. Second, this Article does *not* assume that nudges always meet the requirements of libertarian paternalism. This is an ideology that has been developed by Thaler and Sunstein to explain, among other things, how nudges should be used. The paternalistic aspect demands that nudges enable the individual to choose in their own interest; the libertarian aspect requires nudges to be non-coercive and to leave room for freedom of choice.<sup>33</sup> Libertarian paternalism has become closely associated with the concept of nudging, and some contributions primarily discuss nudging from the perspective of this ideology.<sup>34</sup> Public institutions, however, do not necessarily design and use nudges in line with libertarian paternalism. For example, climate nudges can psychologically encourage an individual to show climate friendly behavior, even if this behavior is not in their (direct) interest.<sup>35</sup> Therefore, it makes more sense to presume that nudges will sometimes be designed in accordance with libertarian paternalism than to presuppose that this is true for every nudge.

## II. The Psychology of Nudging

The definition of nudging does not determine which kind of psychological knowledge policymakers should use to design nudges. Leading theories on the psychology of nudging have, however, been heavily influenced by the heuristics and biases program: An accumulation of psychological insights on cognitive heuristics and biases which the authors Kahneman and Tversky started to develop in the 1970s.<sup>36</sup> According to this program, the model of the rational *homo economicus* does not adequately describe how humans make decisions.<sup>37</sup> Humans do not constantly engage in effortful rational reflection, but tend to make decisions in accordance with heuristics: Intuitive cognitive rules that people use to guide their responses to the environment, often automatically and unconsciously.<sup>38</sup> For example, people tend to prefer avoiding losses than avoiding missing gains, loss aversion;<sup>39</sup> people assess the probability of an uncertain event by the ease with which they can remember occurrences of that event, availability;<sup>40</sup> and the intensity of emotions can guide people's judgements on issues such as the probability of a disaster or whether they should donate money for public goods, affect heuristic.<sup>41,42</sup>

<sup>33</sup>THALER & SUNSTEIN, *supra* note 1, at 5.

<sup>34</sup>See generally McCrudden & King, *supra* note 8; see also Hausman & Welch, *supra* note 12.

<sup>35</sup>Helena Siipi & Polaris Koi, *The Ethics of Climate Nudges: Central Issues for Applying Choice Architecture Interventions to Climate Policy*, 13 EUR. J. RISK REGUL. 218, 223–25 (2022).

<sup>36</sup>An alternative to Kahneman and Tversky's heuristics and biases program is Gigerenzer's theory on ecological rationality. For more on Gigerenzer's theory and on his critique about the use of the heuristics and biases program to design nudges, see generally Gerd Gigerenzer, *On the Supposed Evidence for Libertarian Paternalism*, 6 REV. PHIL PSYCH 361 (2015); Peter M. Todd & Gerd Gigerenzer, *Environments That Make Us Smart: Ecological Rationality*, 16 CURRENT DIRECTIONS PSYCH. SCI. 167 (2007).

<sup>37</sup>The phenomenon that human beings cannot live up to the ideal of the rational *homo economicus* has also been called "bounded rationality"—a term introduced by Simon. For more on bounded rationality and on how Kahneman uses the term, see generally HERBERT A. SIMON, *MODELS OF MAN* (1st ed. 1957); Herbert A. Simon, *Behavioral Economics*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (Esteban Perez Caldentey, Barkley J. Rosser Jr. & Matias Vernengo eds., 2018); Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCH., 697 (2003).

<sup>38</sup>Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases: Biases in Judgments Reveal Some Heuristics of Thinking Under Uncertainty*, 185 SCI. 1124, 1124 (1974).

<sup>39</sup>Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263, 268 (1979).

<sup>40</sup>Tversky & Kahneman, *supra* note 38, at 1127.

<sup>41</sup>Kahneman, *supra* note 37, at 710; Paul Slovic, Melissa L. Finucane, Ellen Peters & Donald G. MacGregor, *The Affect Heuristic*, 177 EUR. J. OPERATIONAL RSCH. 1333, 1333 (2007).

<sup>42</sup>For an overview of different heuristics, see generally Andrea Ceschi, Riccardo Sartori, Joshua Weller & Annamaria Di Fabio, *Dimensions of Decision-Making: An Evidence-Based Classification of Heuristics and Biases*, 146 PERS. INDIVIDUAL DIFFERENCES 188 (2019); Keith E. Stanovich, Maggie E. Toplak and Richard F. West, *The Development of Rational Thought: A Taxonomy of Heuristics and Biases*, 36 ADVANCES CHILD DEV. & BEHAV. 251 (2008).

Heuristics are often triggered by cues from the choice context. For example, the availability heuristic can be triggered by the visual cue of seeing a car accident: People who have just seen a car accident judge the probability of such an accident higher than normal because they can easily retrieve memories of the accident.<sup>43</sup> This intuitive way of thinking takes less time and energy than conscious rational reflection—than consciously calculating the exact probability of a car accident, for example.<sup>44</sup> At the same time, following heuristics can lead to biases—systematic cognitive mistakes.<sup>45</sup> People systematically estimate the probability of a car accident at too high of a rate when they have just seen one, for instance.<sup>46</sup> Such mistakes can sometimes be corrected if people consciously reflect on their intuitive responses to the environment, but because of their limited cognitive resources, people will not have the time and energy to do this all the time.<sup>47</sup> In other words, people will not always be able to resist the inclination to follow heuristics, even though this may have disadvantageous consequences for them.

Nudges consist of tweaks in the choice context that influence people's heuristics and biases in two different ways. First, nudges can encourage people to give in to the intuitive and automatic inclination to follow heuristics.<sup>48</sup> For example, a public institution can apply a default option unless people actively choose another option—for example, a public institution can automatically enroll people in a pension scheme, unless they actively choose the option of not being enrolled in such a scheme.<sup>49</sup> In such a case, people will tend to leave the standard option unchanged because of the heuristic of inertia: People are inclined to postpone or avoid decisions which deviate from the status quo, and in this case, the status quo is that the standard option applies.<sup>50</sup>

Second, and by contrast, nudges can correct biased decision-making by encouraging conscious rational reflection. For example, people can underestimate the risks of careless driving because of an overconfidence bias: They may believe that they are good at driving and will not cause accidents when they glance at their phones while sitting behind the steering wheel, even though in reality they are distracted and, therefore, do not pay sufficient attention to the road. An informational campaign about the numbers of casualties resulting from using a phone while driving can nudge people to overcome this bias by encouraging them to actively reflect on the statistics.<sup>51</sup> Even though such an informational campaign might incorporate some cues which activate intuitive thinking,<sup>52</sup> its *main* goal is to steer behavior by stimulating rational reflection.<sup>53</sup>

<sup>43</sup>Tversky & Kahneman, *supra* note 38, at 1127.

<sup>44</sup>*Id.*

<sup>45</sup>For an overview of different biases, see sources cited *supra* note 42.

<sup>46</sup>Tversky & Kahneman, *supra* note 38, at 1127.

<sup>47</sup>Kahneman, *supra* note 37, at 711–12.

<sup>48</sup>People's capacity for intuitive thinking, including their inclination to follow heuristics, is also referred to as system 1, or type 1, processing. Stanovic and West have distinguished this kind of processing from people's capacity for rational reflection—also called system 2, or type 2, processing. Leading theories on nudging, such as the theory developed by Thaler and Sunstein, often use the dual processing terminology. This Article does not strictly follow this terminology, but it does acknowledge a rough distinction between intuitive and reflective thought. For more on the distinction between system or type 1 processes and system or type 2 processes, see generally Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, 23 BEHAV. BRAIN SCI. 645 (2000); Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSPS. ON PSYCH. SCI. 223 (2013).

<sup>49</sup>SUNSTEIN, *supra* note 26, at 9.

<sup>50</sup>Besides inertia, other heuristics can sometimes also contribute the effectiveness of the default option. For more on this, see John M. Jachimowicz, Shannon Duncan, Elke U. Weber & Eric J. Johnson, *When and Why Defaults Influence Decisions: A Meta Analysis of Default Effects*, 3 BEHAV. PUB. POL'Y 159, 172–173 (2019).

<sup>51</sup>This example has been derived from SUNSTEIN, *supra* note 26, at 30.

<sup>52</sup>An information campaign is never completely neutral. It frames information by making some information more salient than other information—for example, it makes information about the health risks of a specific activity more salient than information about possible pleasurable consequences of the same activity. Thus, information campaigns may trigger the specific intuitive tendency to more easily notice and act on environmental cues which are salient.

<sup>53</sup>See SUNSTEIN, *supra* note 26, at 30. See also Viktor Ivankovic & Bart Engelen, *Nudging, Transparency, and Watchfulness*, 45 SOC. THEORY & PRAC. 1, 17 (2019).



While there are nudges which trigger heuristics *and* nudges which encourage rational reflection, the heuristics and biases program of Kahneman and Tversky implicitly provides arguments in favor of the first type of nudges. According to the program, people do not always have sufficient time and energy for the effortful activity of rational reflection.<sup>54</sup> Therefore, nudges which encourage this type of reflection might fail because people do not always have the cognitive resources for this activity.<sup>55</sup> For example, financial campaigns may fail when they encourage rational reflection on how to pay debts because people with debts are often too tired to engage in this type of reflection.<sup>56</sup> Nudges which trigger heuristics are, at least in theory, not ineffective in this way because following heuristics costs little effort.<sup>57</sup> Thus, this Article focuses on examining nudges which trigger heuristics because these nudges are implicitly favored by the heuristics and biases program, although it is acknowledged that nudges can also encourage rational reflection.

Finally, it is important to note that the heuristics and biases program suggests that people's heuristics are constantly triggered by environmental cues.<sup>58</sup> This means that, in practice, policymakers engage in nudging as soon as they design choice contexts while using some knowledge on people's psychological responses to the environment. In other words, policymakers can hardly avoid using nudges which trigger heuristics.<sup>59</sup> It is precisely for this reason that the question arises as to what extent legal control mechanisms are needed to ensure that nudges are not being used in a legally impermissible way.<sup>60</sup>

## C. The Debate on Nudging and Rule of Law Safeguards

### 1. An Overview of the Debate on Nudging and Rule of Law Safeguards

In the legal literature, scholars disagree on whether nudges are sufficiently subjected to legal control, and more specifically to rule of law safeguards. These safeguards are presupposed to consist of requirements and procedures which prevent and counteract misuse and abuse of public power.<sup>61</sup> For instance, the safeguard of judicial review counteracts misuse and abuse by requiring that there be a possibility to review governmental actions in judicial procedures, while the safeguard of legality does so by demanding that governmental actions be based on foreseeable and accessible laws.<sup>62</sup> Various public institutions, here called "rule of law actors," are responsible for ensuring that governmental policies are held to respect these safeguards. Most notably, such "monitoring" rule of law actors are courts, parliaments, ombudspersons, and advisory bodies. Moreover, executive governmental organizations can sometimes contribute to subjecting their own policies to rule of law safeguards indirectly—for example, when a governmental organization asks an ombudsperson for advice and gives adequate follow-up to it.

<sup>54</sup>Kahneman, *supra* note 37, at 698.

<sup>55</sup>For this reason, Sunstein explicitly suggests that governments should also use defaults and other nudges which trigger heuristics. SUNSTEIN, *supra* note 26, at 64–67.

<sup>56</sup>Nadja Jungmann & Tamara Madern, *Duurzame verbetering van gezond financieel gedrag. Droom of werkelijkheid?* 20 (Neth. Sci. Council for Gov't Pol'y, Working Paper No. 23, 2016), <https://www.wrr.nl/publicaties/working-papers/2016/06/30/duurzame-verbetering-van-gezond-financieel-gedrag.-droom-of-werkelijkheid>.

<sup>57</sup>There is, however, disagreement on how effectively these nudges can influence behavior in a real-life choice context—outside the laboratories where psychologists conduct their experiments on the effectiveness of nudging. For more on this, see Stefano DellaVinga & Elizabeth Linos, *RCTS to Scale: Comprehensive Evidence from Two Nudge Units*, 90 *ECONOMETRICA* 81, 94 (2022).

<sup>58</sup>These cues may be related to direct perception of the environment—for example, visual or auditive cues—or they may be conceptual—for example, a phrase or text. Kahneman, *supra* note 37, at 698.

<sup>59</sup>SUNSTEIN, *supra* note 26, at 35–36.

<sup>60</sup>Alemanno & Spina, *supra* note 6, at 445.

<sup>61</sup>*Id.* at 431; McCrudden & King, *supra* note 8, at 136.

<sup>62</sup>For an overview of different procedural safeguards which might apply to nudging, see generally Alemanno & Spina, *supra* note 6.

Some nudges are already subjected to legal safeguards. For instance, the safeguard of legality applies to nudges which are embedded in legislation, such as default options for standard terms and conditions of contracts that are laid down in private law rules.<sup>63</sup> So far, however, and generally speaking, rule of law actors have not considered it necessary to subject all nudges to the full range of rule of law safeguards, as nudges are seen as a more “innocent” regulatory technique than, for instance, mandates and bans.<sup>64</sup> While mandates and bans are coercive, nudges are not: People are free to deviate from the psychological push of a nudge.<sup>65</sup> Because there appears to be less risk for improper use of power, there seems to be less need to offer rule of law guarantees. Nonetheless, some authors have argued that rule of law actors should do more to ensure that rule of law safeguards also apply to nudges.<sup>66</sup> In their view, nudges still come down to an exertion of power, even though they are non-coercive.<sup>67</sup> In other words, nudges can have substantial consequences in that they can significantly influence decisions and behavior.<sup>68</sup> For example, the nudge of a graphic picture of an ill person on a cigarette package has encouraged at least some of its targets to—temporarily—stop smoking.<sup>69</sup> If a nudge can successfully influence decisions and behavior in this way, then it could also be used in an improper or even abusive way. In this regard, Alemanno and Spina have suggested that legal scholars should develop “smart legal mechanisms to control governmental ‘smart thinking’ [nudging].”<sup>70</sup>

To further illustrate how nudges can be used to exert power, legal scholars discuss a criticism on nudging that originates from ethical debates: That nudges can bypass, or be in tension with, the value of autonomy.<sup>71</sup> More concretely, autonomy can be negatively affected by nudges in two different ways.<sup>72</sup> First, nudges can bypass people’s capacity for autonomous rational reflection.<sup>73</sup> For instance, a medical nudge can encourage a patient to agree with undergoing surgery by presenting information about the risks of the surgery in terms of survival rate instead of mortality rate. Such a nudge triggers people’s automatic and unconscious inclination to more easily choose an option which is framed in a positive way.<sup>74</sup> This affects autonomy because when people give in to such an inclination they do not autonomously reflect on whether they want to undergo the surgery.<sup>75</sup>

<sup>63</sup>Sunstein, *supra* note 7, at 513.

<sup>64</sup>For example, in the United Kingdom, the Prime Minister approved of the establishment of a Behavioral Insights Team (an institution which develops nudging policies), without officially delegating any rule making capacities. This means that the safeguard of legality did not apply to the establishment of the Behavioral Insights Team: The Behavioral Insights Team was not based on laws created through parliamentary procedures. See McCrudden & King, *supra* note 8, at 131–32.

<sup>65</sup>THALER & SUNSTEIN, *supra* note 1, at 6.

<sup>66</sup>See generally Alemanno & Spina, *supra* note 6; Van Aaken, *supra* note 8; Lepenies & Malecka, *supra* note 8; McCrudden & King, *supra* note 8; PAULINE WESTERMAN, *OUTSOURCING THE LAW* 129 (2018).

<sup>67</sup>Alemanno & Spina *supra* note 6, at 443–44; Sofia Ranchordas, *Nudging Citizens Through Technology in Smart Cities*, 34 INT’L. REV. L. COMPUT. TECH. 254, 268 (2020).

<sup>68</sup>Alemanno & Spina, *supra* note 6, at 431.

<sup>69</sup>McCrudden & King, *supra* note 8, at 85.

<sup>70</sup>Alemanno & Spina, *supra* note 6, at 455.

<sup>71</sup>*Id.* at 431; Ranchordas, *supra* note 67, at 267–70.

<sup>72</sup>In discussions on nudging, autonomy is often understood as an overarching concept: Different definitions of autonomy can refer to different aspects of this value. Overviews of these discussions mention two central, and broadly distinguishable, aspects of autonomy which nudges can negatively affect through their psychological influence: The capacity for autonomous rational reflection and volitional autonomy. This paragraph and the next will further discuss how nudges affect these aspects. For more on this, see generally Andreas T. Schmidt & Bart Engelen, *The Ethics of Nudging: An Overview*, 15 PHIL. COMPASS 1 (2019); Anastasia Vugts, Mariëtte Van Den Hoven, Emely De Vet & Marcel Verweij, *How Autonomy is Understood in Discussions on the Ethics of Nudging*, 4 BEHAV. PUB. POL’Y 108 (2020).

<sup>73</sup>For an overview of the discussions about the negative effects of nudging on autonomous rational reflection—sometimes also called rational agency or practical reasoning—see Schmidt & Engelen, *supra* note 72, at 5; Vugts et al., *supra* note 72, at 116.

<sup>74</sup>Thomas Ploug & Søren Holm, *Doctors, Patients, and Nudging in the Clinical Context—Four Views on Nudging and Informed Consent*, 15 AM. J. BIOETHICS 29 (2015).

<sup>75</sup>For different versions of the argument that nudges that trigger sensitivity to framing and to other heuristics can bypass autonomous rational reflection, see *id.* at 34. See also Hausman & Welch *supra* note 12, at 128; Bovens, *supra* note 12, at 43, 44; Van Aaken, *supra* note 8, at 95.



Second, nudges can be in tension with volitional autonomy.<sup>76</sup> Volitional autonomy requires that people base their behavior on preferences which are interrelated with one's sense of self or identity.<sup>77</sup> Nudges can be in tension with volitional autonomy when, without thinking it through, people follow a nudge instead of basing their decisions on preferences which are interrelated with their identity.<sup>78</sup> For example, a nudge can encourage students to live healthier, which is not in line with the identity of students who consider consuming large amounts of alcohol or fast food as a fundamental part of their student lifestyle.<sup>79</sup> If these nudges successfully encourage long term changes in behavioral patterns, they might even change aspects of people's identities and related preferences because engaging in certain behaviors is seen as necessary to establish and maintain one's sense of self.<sup>80</sup>

Regardless of these impacts on individual autonomy, there are scholars who disagree with the argument that more should be done to subject nudging to rule of law safeguards.<sup>81</sup> Governments constantly design choice contexts which influence, and thus nudge, people's behavior.<sup>82</sup> Rule of law actors such as courts and parliaments might not have the capacity and resources to assess the permissibility of all nudges which are part of these public choice contexts. For example, the judiciary might not have the resources to examine the permissibility of every nudge that citizens might want to contest through a lawsuit.<sup>83</sup> It is thus regarded as unrealistic to ask from rule of law actors that they subject many more nudges to legal safeguards.

Moreover, some authors regard increasing the level of rule of law protection as unnecessary. More concretely, they argue that one should not exaggerate the concern that governments can misuse their power through nudging.<sup>84</sup> Properly designed nudges are non-coercive<sup>85</sup> and many nudges only achieve a very small amount of behavioral change; very often people are able to ignore the psychological push of a nudge.<sup>86</sup> Thus, as Sunstein has suggested, "much nudging occurs without the involvement of law, and in free societies, *properly so*."<sup>87</sup>

The authors who suggest that nudges are unlikely to be misused have also discussed the worry that nudges can interfere with people's autonomy. Sunstein, for example, has admitted that nudges can be in tension with autonomy because nudges sometimes bypass people's capacities for autonomous reflection, and because nudges are not always in line with people's individual preferences or identity.<sup>88</sup> He emphasizes, however, that nudges can benefit autonomy when this value is conceptualized differently: Nudges can foster autonomous freedom of choice because they do not close off options, in contrast to other regulatory techniques such as mandates and bans.<sup>89</sup> In addition, other scholars have argued that the importance of the potential negative effects of nudges on autonomy should not be overestimated. Removing public nudges cannot guarantee

<sup>76</sup>This definition of volitional autonomy has been loosely based on Schmidt's and Engelen's definition of this concept, while adding an emphasis on the concept of identity. The reason for this addition is that the concept of identity has received attention in ethical discussions on nudging, as Vugts and her colleagues point out. For an overview of the discussions about the negative effects of nudging on volitional autonomy (sometimes also called self-constitution), see Schmidt & Engelen, *supra* note 72, at 4–5; Vugts et al., *supra* note 72, at 116–119.

<sup>77</sup>Schmidt & Engelen, *supra* note 72, at 4; Vugts et al., *supra* note 72, at 118.

<sup>78</sup>Hausman & Welch, *supra* note 12, at 128; Luc Bovens, *The Ethics of Nudge*, in 42 PREFERENCE CHANGE 207, 212–14 (Till Grüne-Yanoff & S.O. Hansson eds., 2009).

<sup>79</sup>Robert Baldwin, *From Regulation to Behaviour Change: Giving Nudge the Third Degree*, 77 MOD. L. REV. 831, 846 (2014).

<sup>80</sup>Bovens, *supra* note 78, at 212–14.

<sup>81</sup>Sunstein, *supra* note 7; Schweizer, *supra* note 6; Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 798–801 (2014).

<sup>82</sup>Sunstein, *supra* note 7, at 525.

<sup>83</sup>Schweizer, *supra* note 6, at 100–02.

<sup>84</sup>Sunstein, *supra* note 7, at 525.

<sup>85</sup>See generally Calo, *supra* note 81.

<sup>86</sup>Schweizer, *supra* note 6, at 109.

<sup>87</sup>Sunstein *supra* note 7, at 524 (emphasis added).

<sup>88</sup>SUNSTEIN, *supra* note 26, at 65.

<sup>89</sup>*Id.* at 67; Calo, *supra* note 81, at 791.

fully autonomous decisions because decisions are constantly influenced by random or commercially designed cues from the environment.<sup>90</sup> Moreover, some contend that many nudges only have a small effect on human behavior, which means that they will have a small or even negligible effect on people's autonomy.<sup>91</sup>

## II. The Need to Systematically Distinguish Between Nudges

Both sides of the debate on nudging and rule of law safeguards present valuable insights. On the one hand, governments exert power through nudging, which means that nudges can have substantial consequences for people's lives and that nudges can be used in an improper way. People may lack the time and energy to resist the psychological push of a nudge, and more specifically the push to follow a heuristic—that is, an intuitive cognitive rule—even if following this heuristic has unwanted consequences for them.<sup>92</sup> For that reason, it can be maintained that nudges should be subjected to at least some rule of law safeguards. A specific form of power exertion through nudging which deserves to be examined in this regard, is the potential effect of nudges on the value of autonomy. As has been discussed in the above, even proponents of nudging, such as Sunstein, admit that this effect can occur.<sup>93</sup>

On the other hand, it is reasonable to suggest that many nudges do not pose a serious risk of power abuse. Indeed, nudges such as putting a smiling trash bin in a local park, or a sticker of a fly in the urinal of a bathroom of a public school, or painting walls in a soothing color in a public waiting room, can hardly be considered a substantial threat to people's autonomy. These nudges are not only non-coercive and probable to have a small effect on people's behavior, but they also have only minor consequences for the lives of individuals. Requiring to fully subject these kinds of nudges to the safeguards of the rule of law, or even to only some of these safeguards, can be argued to be both unrealistic and disproportionate. The institutions tasked with giving practical shape to the various safeguards have limited capacity, time, and resources,<sup>94</sup> while nudges with minor consequences are almost everywhere, as was explained in Section B.

The arguments presented in this debate raise the question of whether an intermediate position is feasible: Can ways be found to enable rule of law actors to prevent or counteract misuse and abuse of power through nudging, without being overwhelmed by the large number and the wide-ranging variety of nudges? It is argued here that this can be done by developing a doctrine with standards that can be used to distinguish between nudges that have to be subjected to all, or at least some, rule of law safeguards, and nudges that do not have to be subjected to any rule of law safeguards. More concretely, such a doctrine should enable rule of law actors to distinguish between, on the one hand, nudges which pose a risk of misuse because they have substantial consequences for individuals, and on the other hand, nudges for which misuse is unlikely because they have only minor consequences for the lives of individuals. For example, rule of law actors should be enabled to distinguish between a smiling trash bin in a local park and a propagandic nudge that heavily influences people's political views. Nudges with substantial consequences, such as the propagandic nudge, arguably must be subjected to all, or at least some, safeguards of the rule of law. By contrast, it is submitted that nudges which are unlikely to be misused do *not* have to be

<sup>90</sup>Schweizer, *supra* note 6, at 101; Tom Bouwman, Nudging in het contractenrecht ter bescherming van zwakkere partijen, 150–51 (April 21, 2023) (Ph.D. dissertation, Utrecht University) (on file with author); Thomas RV Nys & Bart Engelen, *Judging Nudging: Answering the Manipulation Objection*, 65 POL. STUD. 199, 206–07 (2017).

<sup>91</sup>Yashar Saghai, *Salvaging the Concept of Nudge*, 39 J. MED. ETHICS 487, 489–91 (2013); Schmidt & Engelen, *supra* note 72, at 5.

<sup>92</sup>See *supra* Section B (explaining why people cannot always resist the tendency to follow heuristics).

<sup>93</sup>SUNSTEIN, *supra* note 26, at 65.

<sup>94</sup>See generally Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L. J. 422 (2012); Kaare Strøm, *Rules, Reasons and Routines: Legislative Roles in Parliamentary Democracies*, 3 J. LEGIS. STUD. 155 (2007); NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001) (discussing the limited capacity of, for example, courts and parliaments).

subjected to these safeguards. In this way, rule of law actors can protect people against misuse of power, without having to accomplish the unrealistic task of intensively evaluating and offering a full range of rule of law protection in relation to all nudges.

In addition to this, the doctrine could help rule of law actors examine the extent of the risk of misuse of a nudge, which, in turn, could support them in deciding on which specific rule of law safeguards the nudge should be subjected to. For example, they could decide that some nudges should be fully subjected to demanding safeguards such as legality and judicial review, while other nudges simply should be subjected to the watch of an ombudsperson or to principles of good administration.

## D. Using the Approach of the ECtHR as a Source of Inspiration

### I. Why Use the Approach of the ECtHR?

In the previous section, I argued that rule of law actors need a doctrine to help them determine which nudges should be subjected to at least some rule of law safeguards. Here, I submit that such a doctrine does not have to be developed from scratch because existing legal approaches can be used as a source of inspiration. More specifically, I propose to look at three elements of the approach of the European Court of Human Rights (ECtHR): The “de minimis” principle, the notion of the core of fundamental rights, and the criterion of the seriousness of the interference.<sup>95</sup>

This is a useful approach—as the following subsections further illustrate—because a relevant analogy can be drawn between the goals of the ECtHR and the goals of the rule of law actors who need to assess nudges. Both the ECtHR and the beforementioned rule of law actors have as their objective to prevent misuse of power and must efficiently deal with their scarcity of resources.<sup>96</sup> Moreover, there is—as the next sections will further illustrate—a partial resemblance between the type of legal mechanisms which the ECtHR uses to achieve its objectives, and the type of mechanisms which rule of law actors need to assess nudges. For example, the ECtHR applies a “de minimis” principle to determine which cases have to be subjected to the safeguard of international judicial review, while rule of law actors need a mechanism by which they can assess which nudges have to be subjected to various legal safeguards.<sup>97</sup> Also, the ECtHR examines the core of fundamental rights and the seriousness of the interference to point out when a governmental action, in a potentially problematic way, interferes with values such as autonomy. Likewise, rule of law actors need a mechanism by which they can point out when the use of a nudge is potentially problematic because it has substantial consequences for people’s autonomy.<sup>98</sup>

It must be noted here, however, that only a *partial* analogy can be drawn between the approach of the ECtHR and the type of doctrine which is necessary for the assessment of nudges. In some respects, the approach of the ECtHR will differ from the type of approach which rule of actors need to assess nudges. In particular, the ECtHR has obviously developed its approach in the context of (ex post) judicial review, while many rule of law actors who have to assess nudges are not concerned with judicial review, but are involved in legislation, holding a government accountable for its acts, or advising, ex ante, on the permissibility of nudges. Thus, a doctrine for determining when rule of law safeguards ought to be applied to nudges cannot literally copy the legal mechanisms which are developed by the ECtHR. Instead, it can only make use of those

<sup>95</sup>A sidenote is that, besides the approach of the ECtHR, other legal approaches might also function as a source of inspiration for a legal doctrine for the assessment of nudges. This Article only goes as far as claiming that the approach of the ECtHR can be a particularly useful source of inspiration for a doctrine by which rule of law actors can determine which nudges should be subjected to rule of law safeguards.

<sup>96</sup>See *supra* Section C (discussing why rule of law actors who assess nudges aim to counteract abuse of power and to deal with the scarcity of resources); GERANNE LAUTENBACH, THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS 213 (2014) (elaborating on why the ECtHR also has these aims).

<sup>97</sup>See *supra* Subsection C.II.

<sup>98</sup>See *supra* Subsection C.III.

aspects of the ECtHR's approach that can contribute to an accurate assessment of nudges, and it should adapt aspects of the approach of the ECtHR whenever necessary.

In view of the above, the next subsections examine how the ECtHR uses the “de minimis” principle, the notion of the core of fundamental rights, and the criterion of the seriousness of the interference to assess complained-of practices, and they discuss how rule of law actors can use aspects of these legal mechanisms to assess nudges. A final caveat is that the focus will be on developing a doctrine by which rule of law actors can determine whether they should subject a nudge to at least some rule of law safeguards, and not on developing a doctrine by which they can determine which specific safeguards should apply. The scope of this Article is too limited to also discuss the latter topic.

## II. The “De Minimis” Principle

The “de minimis” principle entails that a court does not have to consider trifles (*de minimis non curat praetor*).<sup>99</sup> In 2010, the “de minimis” principle was laid down in the Convention as an admissibility criterion,<sup>100</sup> but previously the ECtHR had already referred to this principle in various cases.<sup>101</sup> The ECtHR uses the “significant disadvantage” requirement of article 35(3)(c) ECHR as a main standard to determine whether a case is concerned with trifles: According to this provision, cases are inadmissible if the supposed violation of Convention rights has not significantly disadvantaged the applicant.<sup>102</sup> For example, the financial losses of the applicant are not always substantial enough for a complaint to merit the Court's attention.<sup>103</sup>

The use of the “de minimis” admissibility criterion has been criticized because the ECtHR does not systematically apply a clear set of standards to determine when exactly an applicant suffers a significant disadvantage; moreover, the ECtHR tends to apply the principle in a formalistic way, which means that cases are often declared inadmissible for procedural reasons, even though the applicants might have suffered from misuse of government power.<sup>104</sup> At the same time, the “de minimis” principle could, at least in theory, help resolve the problem that the ECtHR does not always have the time and resources to timely consider cases because of its extensive caseload.<sup>105</sup> If cases are declared inadmissible when they are concerned with trifles, this should leave the ECtHR with more capacity to efficiently and timely consider important cases.<sup>106</sup>

My suggestion is that on a similar footing, rule of law actors should develop a kind of “de minimis” principle for nudges. Such a principle can be used to determine whether to subject a nudge to rule of law safeguards, in partial analogy to how the “de minimis” principle is used by the

<sup>99</sup>Lyudmyla Deshko, *Application of Legal Entities to the European Court of Human Rights: A Significant Disadvantage as the Condition of Admissibility*, 24 CROAT. INT'L RELS. R. 84, 87 (2018).

<sup>100</sup>EUR. CONV. ON H.R., Protocol No. 14.

<sup>101</sup>Deshko, *supra* note 99, at 87.

<sup>102</sup>Exceptions are when respect for human rights requires examining a case, and when domestic procedures fail to give proper consideration to the case. In these cases, the ECtHR will examine a case, even though an applicant might not have been significantly disadvantaged. See Dinah Shelton, *Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights*, 16 HUM. RTS. L. REV. 303, 310 (2016).

<sup>103</sup>Nikos Vogiatzis, *The Admissibility Criterion Under Article 35(3)(b) ECHR: A 'Significant Disadvantage' to Human Rights Protection?*, 65 INT'L COMPAR. L.Q. 185, 189 (2016).

<sup>104</sup>Shelton, *supra* note 102, at 318–20; Janneke H. Gerards & Lize R. Glas, *Access to Justice in the European Convention on Human Rights System*, 35 NETH. Q. HUM. RTS. 11, 20–21, 25 (2017); Lize R. Glas, *From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?*, 20 HUM. RTS. L. REV. 121, 149 (2020); Zuzanna Godzimirska, Aysel Küçüküsu & Salome Ravn, *From the Vantage Point of Vulnerability Theory: Algorithmic Decision-Making and Access to the European Court of Human Rights*, 40 NORDIC J. HUM. RTS. 235, 240–41 (2022); Cosette D. Creamer & Zuzanna Godzimirska, *Trust, Legal Elites, and the European Court of Human Rights*, 45 HUM. RTS. Q. 628, 638–39 (2023).

<sup>105</sup>Linos-Alexandre Sicilianos, President of the European Court of Human Rights, Speech at the Opening of the Judicial Year (Jan. 31, 2020), in ANNUAL REPORT OF THE EUROPEAN COURT OF HUMAN RIGHTS, 2020, at 15; Deshko, *supra* note 99, at 85.

<sup>106</sup>Gerards & Glas, *supra* note 104, at 149.

ECtHR to determine whether or not to subject a complained-of practice to the safeguard of international judicial review. More concretely, this means that rule of law actors do not have to consider trifle cases of nudging—such as putting a fly sticker in a urinal or placing a smiling trash bin in a public park—in partial resemblance to how the ECtHR does not need to examine insignificant cases raised by applicants. In this way, a “de minimis” principle for nudges can contribute to resolving a problem which was also discussed in Section C, which is that rule of law actors do not have the time and resources to consider all nudges. The idea is that if these actors do not have to consider nudges which are (or will be) concerned with trifles, they have more time and resources left to consider nudges which (will) have substantial consequences for their targets.

Rule of law actors cannot, however, literally copy the way in which the ECtHR uses the “de minimis” principle. As mentioned above, the ECtHR does not use a clear set of criteria to determine when to apply the “de minimis” principle, and the Court has been shown to apply the principle in a rather formalistic manner.<sup>107</sup> Rule of law actors should, on the contrary, develop a clear set of criteria by which they can determine when to apply a “de minimis” principle for nudges. As was suggested in Section C, these criteria should enable rule of law actors to distinguish between two categories of nudges. First, there is a category of nudges that have substantial consequences, for example, because of their effects on autonomy. This means that the “de minimis” threshold is reached and, consequently, these nudges have to be subjected to at least some safeguards of the rule of law. Second, there is a category of nudges for which substantial misuse is unlikely because they have only minor consequences for the lives of individuals. Application of the “de minimis” principle implies that these nudges do not have to be subjected to the safeguards of the rule of law.

### III. Distinguishing Between Nudges Based on Whether They Have Substantial Consequences

The application of the “de minimis” standard as discussed above implies that a distinction can be made between nudges based on whether they have substantial consequences or not. The next subsections contribute to the development of a criterion that rule of law actors can use to make this distinction, again using the approach of the ECtHR as a source of inspiration. In particular, the following elements of its approach are considered: The notion of the core of fundamental rights, and the criterion of the seriousness of the interference. As will become clear, these elements are, among other things, concerned with pointing out those cases of misuse of governmental power which have substantial consequences, and which may easily infringe on the value of autonomy. This is precisely the type of power misuse that might happen through nudging and that rule of law safeguards should prevent, as the debate discussed in Section C has shown. A caveat is that the next subsections will not develop a full set of standards by which every nudge with substantial consequences can be singled out. Instead, the more modest aim is to offer a first contribution to the development of such a set of standards.

#### 1. The Core of Fundamental Rights and the Seriousness of the Interference

The “core” or essence of fundamental rights consists of the central values which the ECtHR considers to underly the European Convention of Human Rights (ECHR), which are dignity, autonomy, pluralism, democracy, and the rule of law.<sup>108</sup> On the one hand, the ECtHR more intensively reviews a case when these values are clearly affected.<sup>109</sup> For instance, limitations of

<sup>107</sup>*Id.*; Godzimirska, Kūćuksu & Ravn, *supra* note 104, at 240–41; Creamer & Godzimirska, *supra* note 104, at 638–39.

<sup>108</sup>JANNEKE H. GERARDS, *GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 272–77 (2d ed. 2023).

<sup>109</sup>More intensive review can, for example, mean that the ECtHR more closely examines all of the facts of a case, while less intensive review can require the ECtHR to leave the assessment of the facts to the domestic authorities and courts. See Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, in 14 *CAMBRIDGE Y.B EUR. LEGAL STUD.* 381, 390 (2012).



press publications are intensively reviewed because these limitations affect the value of democracy, which is considered to be the core of the right to freedom of expression.<sup>110</sup> On the other hand, the ECtHR less intensively reviews a case where the central values are unaffected, and only the so-called periphery of a fundamental right is affected.<sup>111</sup> Indeed, the ECtHR might even conclude that a complained-of practice does not interfere with a fundamental right at all when it is too far removed from the central values underlying the Convention.<sup>112</sup> For example, the Court judged that a ban on hunting did not affect the value of personal autonomy because hunting was not considered to contribute to crucial aspects of one's personal development or identity.<sup>113</sup> In line with this, the Court decided that a ban on hunting did not interfere with the right to privacy, of which autonomy is considered to be an underlying value.<sup>114</sup>

The ECtHR also often examines whether a complained-of practice affects the core of fundamental rights, while simultaneously investigating the criterion of the seriousness of the interference.<sup>115</sup> This criterion suggests that complained-of practices which do not seriously affect a fundamental right should be less intensively reviewed.<sup>116</sup> The absence of such a serious effect can even lead the Court to conclude that there is no interference in cases where, in first instance, the central values which underly the ECHR seem to be affected.<sup>117</sup> For example, the ECtHR ruled that there was no infringement on the right to freedom of religion when the faith of a Romanian prisoner was wrongly registered as Orthodox-Christian instead of Jewish.<sup>118</sup> In this case, the faulty registration might in first instance seem to affect the value of pluralism, which underlies the right to freedom of religion, because the true faith of the prisoner was not acknowledged in the registration documents. Nonetheless, the Court ruled that there was no interference with a fundamental right because the complaint of the applicant was only theoretical in nature: The prisoner had not shown that the wrong registration restricted, in any serious or practical way, his ability to practice his religion.<sup>119</sup>

## 2. Fundamental Values and Seriousness of the Interference as Criteria to Determine the Need for Rule of Law Safeguards for Nudges

In line with the abovementioned considerations, my suggestion is that rule of law actors can examine whether a nudge needs rule of law safeguards in a way which is partially analogous to how the ECtHR examines whether a practice seriously interferes with the core of fundamental rights. This approach can proceed in two steps. First, rule of law actors can examine whether a nudge has or will have a potentially negative effect on values, in partial resemblance to how the ECtHR examines whether a complained-of practice interferes with the values that underlie the Convention. As part of this examination, rule of law actors can consider the ethical insight that

<sup>110</sup>The Sunday Times v. United Kingdom (No. 1), App. No. 6538/74, para. 65 (Apr. 26, 1979), <https://hudoc.echr.coe.int/?i=001-57584>; The Observer and the Guardian v. United Kingdom, App. No. 13585/88, para. 59 (Nov. 26, 1991), <https://hudoc.echr.coe.int/?i=001-57705>.

<sup>111</sup>Aaron A. Otrovsky, *What's So Funny About Peace, Love, And Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimizes International Human Rights Tribunals*, 1 HANSE L. REV. 47, 48 (2005).

<sup>112</sup>See Janneke H. Gerards, *The Prism of Fundamental Rights*, 8 EUR. CONST. L. REV. 173, 190, 195–96 (2012) (discussing why the ECtHR should not consider cases where the affected interest is far removed from the core of fundamental rights).

<sup>113</sup>Friend, the Countryside Alliance and Others v. United Kingdom, App. no. 16072/06, paras. 40–43 (Nov. 24, 2009), <https://hudoc.echr.coe.int/eng?i=001-96372>.

<sup>114</sup>See Christine Goodwin v. United Kingdom, App. No. 28957/95, para. 90 (July 11, 2002), <https://hudoc.echr.coe.int/?i=001-60596> (discussing autonomy as an underlying value of the fundamental right to privacy).

<sup>115</sup>Janneke H. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EUR. L. J. 80, 108 (2011).

<sup>116</sup>Gerards & Glas, *supra* note 104, at 19.

<sup>117</sup>JANNEKE H. GERARDS, *THE SCOPE OF ECHR RIGHTS AND INSTITUTIONAL CONCERNS IN SHAPING RIGHTS IN THE ECHR* 84, 89 (Eva Brems & Janneke H. Gerards eds., 1st ed. 2013).

<sup>118</sup>Mariş v. Romania, App. No. 58208/14, paras. 28–29 (Dec. 29, 2020), <https://hudoc.echr.coe.int/eng?i=002-12985>.

<sup>119</sup>*Id.*



nudges can negatively influence autonomy in two ways: Nudges can bypass autonomous rational reflection when they trigger people's heuristics, and nudges can be in tension with volitional autonomy when people follow a nudge instead of basing their decision on their individual identity and interrelated preferences.<sup>120</sup>

For example, rule of law actors might judge that autonomy is affected by the nudge of the organ donation default, which registers people as organ donors after they have deceased, unless they actively choose otherwise.<sup>121</sup> As was mentioned above, this type of nudging is effective because it triggers people's automatic and unconscious inclination to follow the heuristic of inertia: People tend to postpone or avoid decisions which deviate from the status quo and, in this case, the status quo consists of the standard option.<sup>122</sup> This means that the default bypasses people's capacity to autonomously reflect on decisions. Moreover, people will not base their decision on whether they want to donate their organs on their own identity and preferences if they follow the default without thinking this through. Thus, the default does not only bypass autonomous reflection but is also in tension with people's volitional autonomy.<sup>123</sup>

Second, rule of law actors can investigate the seriousness of the effect of a nudge on values, in partial resemblance to how the ECtHR investigates whether a complained-of practice has a serious effect or consists of a serious interference. The nudge of the organ donation default can be seen to have serious effects on autonomy. This default bypasses autonomous rational reflection in a substantial way because empirical research shows that the default very effectively triggers people's heuristics.<sup>124</sup> Moreover, this default has a severe effect on volitional autonomy because thoughtlessly following the default means that people do not base their decision about organ donation on their own identity, even though physical integrity is considered to be a crucial aspect of identity or physical sense of self.<sup>125</sup>

There are, however, also nudges which do not seem to affect autonomy in a serious way. For instance, a nudge can consist of drawings of pink footsteps with white edges on the floor which lead towards the stairs, and which encourage the employees of an office to take the stairs instead of the elevator.<sup>126</sup> Such a nudge encourages people to act on an automatic inclination to follow the footsteps, and thus it bypasses their capacity to autonomously reflect on whether they want to take the stairs. At the same time, the nudge does not seem to affect people's autonomous reflection in a

<sup>120</sup>See *supra* Section C.I (discussing why nudges can influence autonomy in these ways).

<sup>121</sup>Kyle P. Whyte, Evan Selinger, Arthur L. Caplan & Jathan Sadowski, *Nudge, Nudge or Shove, Shove—The Right Way for Nudges to Increase the Supply of Donated Cadaver Organs*, 12 AM. J. BIOETHICS 32, 34 (2012).

<sup>122</sup>See Jachimowicz, Duncan, Weber & Johnson, *supra* note 50, at 172–73 (discussing how, besides inertia, other heuristics can sometimes also contribute to the effectiveness of the default option).

<sup>123</sup>While the nudge of the organ donation default bypasses certain aspects of the autonomy of potential organ donors, the absence of such a default can have a negative effect on the autonomy of patients who are in need of an organ transplant. When people are not an organ donor unless they actively choose to be so, fewer people donate their organs than when the beforementioned default is being implemented. This means that some patients might need to wait very long for an organ transplant, which means they stay severely ill or deteriorate even more in their health. Often, these patients have less opportunity than other people to autonomously realize their own preferences. For example, ill people who are in need of a transplant might have difficulty realizing preferences such as studying at a university or doing their dream job because they are often less mobile and have less energy than healthy people. This Article remains neutral on the ethical question of whether the need to foster the autonomy of patients who need a transplant is sufficient to justify the usage of the organ donation default, even though such a default might negatively affect the autonomy of potential organ donors. Instead, the focus lays on the legal question whether such a nudge should be subjected to the safeguards of the rule of law or not.

<sup>124</sup>See generally M. Usman Ahmad, Afif Hanna, Ahmed-Zayn Mohamed, Alex Schindwein, Caitlin Pley, Ingrid Bahner, Rahul Mhaskar, Gavin J. Pettigrew & Tambi Jarmi, *A Systematic Review of Opt-out Versus Opt-in Consent on Deceased Organ Donation and Transplantation (2006-2016)*, 43 WORLD J. SURGERY 3162 (2019) (assessing the effectiveness of organ donation).

<sup>125</sup>See generally Amanda L. Gyllensten, Lisa Skär, Michael Miller & Gunvor Gard, *Embodied Identity—A Deeper Understanding of Body Awareness*, 26 PHYSIOTHER. THEORY PRAC. 439 (2010) (discussing the interrelation between identity and bodily integrity).

<sup>126</sup>Andreas Åvitsland, Ane Kristiansen Solbraa & Amund Riiser, *Promoting Workplace Stair Climbing: Sometimes, Not Interfering is the Best*, 75 ARCHIVES PUB. HEALTH 1, 3 (2017).

serious way because, according to empirical research, this intervention does not effectively encourage people to act on the inclination to follow footsteps.<sup>127</sup> Moreover, this nudge does not have any serious effects on fundamental aspects of people's identities and preferences. Even though taking the stairs might relate in some way to people's preferences, it is not comparable with the seriousness with which the decision of donating one's organs relates to one's identity and preferences. Thus, rule of law actors do not have to judge the nudge of pink footsteps to be a serious interference with people's autonomy.

Once rule of law actors have examined whether a nudge affects or will affect values such as autonomy in a serious way, they can use this information to determine whether rule of law safeguards should apply. On the one hand, nudges that have substantial consequences because they seriously affect or will affect autonomy, or other core values, should be subjected to these safeguards. This means that the "de minimis" threshold for nudges is reached. On the other hand, nudges that do not have substantial consequences because they do not seriously affect nor will affect autonomy or other core values, should not be subjected to these safeguards. Thus, the "de minimis" principle for nudges should apply.

### E. Sub-Criteria to Determine the Seriousness of the Interference

As discussed in Section D, it will be useful for rule of law actors to determine whether a nudge can or does seriously affect core values. This still leaves the question unanswered as to how rule of law actors can know whether a nudge interferes or will interfere with a value such as autonomy in a serious way. Here, too, the ECtHR's approach can serve as a source of inspiration. The Court has developed several sub-criteria to further examine the seriousness or severity of the interference, for instance, in cases of environmental damage and nuisance.<sup>128</sup> Again, however, it should be noted that the Court has not yet developed such criteria for cases where nudging seems to infringe on core values, which means that only a partial analogy can be drawn between the approach of the ECtHR and the way in which rule of law actors need to assess nudges.

Bearing in mind that the ECtHR has not yet examined nudges for their compatibility with Convention rights, this section examines ethical, psychological, and legal literature to explore two sub-criteria that rule of law actors can use to investigate the seriousness of the interference of a nudge with autonomy. More concretely, the following sub-criteria will be developed: 1) How difficult is it for nudges to resist the psychological push of a nudge; and 2) how closely does the nudged behavior relate to people's identities? As I will further explain, these sub-criteria determine the seriousness of the interference of a nudge with the two beforementioned conceptions of autonomy: Autonomous reflection and volitional autonomy.

#### I. Resistibility of the Psychological Push

First, the seriousness of the interference of a nudge with autonomous rational reflection depends on how difficult—or easy—it is for people to resist the psychological push of a nudge.<sup>129</sup> In other words, how much effort does it require for people to oppose the influence of a nudge if they want to deviate from it?<sup>130</sup> The resistibility of nudges has been extensively discussed in the context of nudges which trigger heuristics, that is, intuitive cognitive rules which people use to guide their

<sup>127</sup>*Id.* at 5.

<sup>128</sup>GERARDS, *supra* note 117, at 103.

<sup>129</sup>Some authors suggest that nudges are always easy to resist because nudges must be easy to avoid, according to Thaler and Sunstein's definition. This interpretation of their definition excludes default options because these nudges are often difficult to resist. This Article does not follow this interpretation because most authors—including Thaler and Sunstein themselves—do presuppose that default options are nudges. For more on nudges and resistibility see generally Saghai, *supra* note 91.

<sup>130</sup>*Id.* at 489.

decisions, often automatically and without awareness.<sup>131</sup> As was explained above, these nudges bypass people's capacity for autonomous rational reflection because they encourage people to follow heuristics without thinking this through. For example, when nudges constantly present a certain choice as a social norm, people may find it harder to independently reflect on whether they want to make that choice.<sup>132</sup> How much harder they find it to engage in independent reflection depends on how effectively or successfully the nudge can trigger their heuristics. If the nudge is not effective at all in triggering heuristics, then it will not significantly interfere with people's reflective capacities either. For this reason, the effectiveness of nudges is sometimes described as a double-edged sword: The more effectively a nudge triggers heuristics, the more serious or severe its effect on autonomy becomes.<sup>133</sup>

Rule of law actors who examine the seriousness of the effects of a nudge on autonomous reflection should thus investigate how effectively the nudge triggers or will trigger heuristics. During this examination, rule of law actors should study the most recent psychological research on the effectiveness of nudging. For example, many public nudges have not turned out to be as effective as psychologists initially thought.<sup>134</sup> In lab experiments, nudges seemed to quite successfully change people's behavior—a result which may have been caused by publication bias.<sup>135</sup> In real-life situations, by contrast, nudges often encouraged only a small or even negligible amount of behavioral change.<sup>136</sup> An exception is the default option, which is a standard option that applies unless people actively choose otherwise. In general, a default option does successfully steer people's decisions,<sup>137</sup> which means that it will also successfully bypass people's capacity for autonomous reflection.

Furthermore, rule of law actors should be aware that the effectiveness of a specific type of nudging can vary, depending on the specific context in which policymakers or legislative bodies are using it. Although generally, nudges may be less effective in practice than in the lab, they can still achieve substantial success in changing behavior when they are implemented in the right kind of context.<sup>138</sup> In those cases, nudges also have a substantial effect on autonomous reflection. Moreover, the target group of a nudge can also influence its effectiveness, and thus its effects on autonomy. For instance, it has been shown that people with a lower income are slower to opt-out of a financially unfavorable default than people with a higher income.<sup>139</sup>

In those cases where nudges have an effect on people's behavior, the degree of transparency of a nudge may also influence how difficult it is to resist its psychological influence and, therefore, how strongly such a nudge would interfere with people's autonomous rational reflection. The concept "degree of transparency" refers here to how much information people are given about a nudge:

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<sup>131</sup>Besides triggering heuristics, nudges can also encourage rational reflection, as was explained in Section B.II. The resistibility of nudges which encourage rational reflection has, however, not received much attention in discussions on nudging and autonomy. The reason for this lack of attention is that nudges which encourage rational reflection do not seem to infringe on autonomy, even though they might be hard to resist, because rational reflection is presupposed to be an autonomous capacity. See THALER & SUNSTEIN, *supra* note 1, at 65.

<sup>132</sup>Hausman & Welch, *supra* note 12, at 128.

<sup>133</sup>Schmidt & Engelen, *supra* note 72, at 5.

<sup>134</sup>Dennis Hummel & Alexander Maedche, *How Effective is Nudging? A Quantitative Review on the Effect Sizes and Limits of Empirical Nudging Studies*, 80 J. BEHAV. EXP. ECON. 47, 55–56 (2019); DellaVinga & Linos, *supra* note 57, at 112.

<sup>135</sup>Hummel & Maedche, *supra* note 134, at 54; DellaVinga & Linos, *supra* note 57, at 104–12.

<sup>136</sup>DellaVinga & Linos, *supra* note 57, at 114.

<sup>137</sup>Hummel & Maedche, *supra* note 134, at 56.

<sup>138</sup>For example, the nudge of making healthy food more salient by presenting it in a more visible position in a store can, but does not always, increase the number of people who buy this food. See Ellen van Kleef, Kai Otten & Hans CM van Trijp, *Healthy Snacks at the Checkout Counter: A Lab and Field Study on the Impact of Shelf Arrangement and Assortment Structure on Consumer Choices*, 12 BMC PUB. HEALTH 1, 6 (2012); Floor M. Kroese, David R. Marchiori & Denise T. D. de Ridder, *Nudging Healthy Food Choices: A Field Experiment at the Train Station*, 38 J. PUB. HEALTH 133, 135–36 (2015).

<sup>139</sup>Jessica L. Roberts, *Nudge-Proof: Distributive Justice and the Ethics of Nudging*, 116 MICH. L. REV. 1045, 1056 (2018); Beshears, Choi, Laibson, Madrian, *supra* note 11, at 10–11.

Can people know about the nudge? Is the nudge clearly visible? Are they given insight into how the nudge creates its psychological push? Are they aware of the intentions with which policymakers have implemented the nudge?<sup>140</sup> The less information people have about a nudge, the less input they have for a reflective process on whether they want to follow it. For example, the nudge of subliminal advertising works through unconscious psychological stimuli and is designed with the purpose not to be noticeable to targeted persons. If these targeted persons do indeed not notice the nudge, they will also not notice the opportunity to autonomously reflect on their decision instead of thoughtlessly obeying the nudge. For this reason, subliminal advertisement is considered as severely interfering with people's autonomy.<sup>141</sup> Thus, rule of law actors who investigate the seriousness of the interference of a nudge with autonomous rational reflection should also heed the degrees of transparency concerning how much information people are given about a nudge.

## II. How Closely Does the Nudged Behavior Relate to People's Identities

Second, volitional autonomy can be more or less seriously affected by nudges, depending on how closely the nudged behavior relates to people's identities. As was mentioned above, volitional autonomy requires that people base their behavior on preferences that are interrelated with one's sense of self or identity.<sup>142</sup> Nudges can be in tension with volitional autonomy when, without thinking it through, people follow a nudge instead of basing their decisions on preferences which are interrelated with their identity.<sup>143</sup> A realistic conception of volitional autonomy does not, however, require that people constantly engage in behaviors which express their identity and interrelated preferences.<sup>144</sup> Some behaviors are considered as much more closely related to people's identities than other behaviors. For example, religious practices such as praying are broadly acknowledged by academic scholars as closely related to people's identities,<sup>145</sup> while this is not true to the same extent for peeing inside a urinal. For this reason, a nudge which encourages prayer seems to affect volitional autonomy in a more serious way than a sticker of a fly in a urinal.

Nevertheless, some people may experience how they pee in a urinal as closely relating to their identity, for example, because such a bathroom behavior could contribute to their sense of self as a male.<sup>146</sup> Rule of law actors that want to examine how closely nudged behavior relates or will relate to people's identities therefore face the problem that this concept is subjective. Different people develop a different identity, and they will also differ in which behaviors they consider as closely relating to their identity.<sup>147</sup> For this reason, every nudge could encourage behavior which closely relates to people's identities and could thus potentially affect their volitional autonomy in a serious way.

Using the ECtHR's case law as a source of inspiration, rule of law actors could resolve the abovementioned problem by developing objectified standards on how closely certain behaviors relate to people's identities. The Court explicitly acknowledges identity as a core aspect of

<sup>140</sup>Hansen & Jespersen, *supra* note 30, at 15–18.

<sup>141</sup>Bovens, *supra* note 78, at 216–17; THALER & SUNSTEIN, *supra* note 1, at 102.

<sup>142</sup>Schmidt & Engelen, *supra* note 72, at 4; Vugts et al., *supra* note 72, at 118.

<sup>143</sup>Hausman & Welch, *supra* note 12, at 128; Bovens, *supra* note 78, at 212–14.

<sup>144</sup>As was explained in Section C.I., full autonomy is not realistic because people often base their behavior on cues from the environment, which means they cannot constantly base their decisions on their identity or sense of self.

<sup>145</sup>See, e.g., Pamela E. King, *Religion and Identity: The Role of Ideological, Social, and Spiritual Contexts*, 7 APPL. DEV. SCI. 197, 200 (2003); Peter J. Hemming & Nicola Madge, *Researching Children, Youth and Religion: Identity, Complexity and Agency*, 19 CHILDHOOD 38, 44 (2011); Renate Ysseldyk, Kimberly Matheson and Hymie Anisman, *Religiosity as Identity, Toward an Understanding of Religion from a Social Identity Perspective*, 14 PERS. SOC. PSYCHOL. REV. 60, 63 (2010).

<sup>146</sup>Ruth Barcan, *Dirty Spaces: Communication and Contamination in Men's Public Toilets*, 6 J. INT'L WOMEN'S STUD. 7, 15 (2005).

<sup>147</sup>Eric T. Olson, *Personal Identity*, THE STAN. ENCYC. OF PHIL. (June 30, 2023), <https://plato.stanford.edu/entries/identity-personal/>.

autonomy,<sup>148</sup> using the term identity to refer to one's sense of self, and presupposing that autonomous behavior is based on one's sense of self.<sup>149</sup> Moreover, it has decided on several cases in which the central issue was whether the applicants should be allowed to act on personal preferences or desires which seemed to be based on their identity.<sup>150</sup> In these cases, the ECtHR does not examine whether a behavior contributes to someone's subjective sense of self, but instead develops an objective perspective on whether behaviors relate to people's identities, and if so, how closely they do so.

For example, the ECtHR has suggested that living in a caravan closely relates to the identity of Travelers, considering that Travelers have a long tradition of nomadic living which requires living in transportable homes.<sup>151</sup> Similarly, the Court has contended that having children closely relates to the identity of parents, which makes sense because it becomes impossible to establish this identity without having children.<sup>152</sup> In another case on parenthood, it has been implied by the ECtHR that receiving assistance from health professionals while giving birth at home somewhat closely relates to the identity of parents, but not as closely as having children as such.<sup>153</sup> Parents can establish the details of their identity more independently when they can choose to receive this assistance from health-professionals, but their ability to establish their identity as a parent does not directly depend on this choice.<sup>154</sup> Moreover, the ECtHR sometimes even decides that a behavior does not relate to people's identities at all. As was mentioned above, hunting wild animals with hounds was found not to contribute to developing one's identity. Although some people find hunting personally fulfilling from a subjective perspective, this does not mean that these people need to engage in this activity to establish an autonomous identity.<sup>155</sup>

The discussion of the case law shows that the ECtHR succeeds in developing an objectified perspective on whether complained-of practices relate to people's identities, and if so, how closely. In a similar fashion, rule of law actors could develop a perspective on how closely nudged behavior relates to people's identities. More concretely, they could examine whether the nudged behavior relates closely, somewhat closely, or not at all—in a legally relevant way—to people's identities. Once rule of law actors have developed such a perspective, they could use it to assess how seriously a nudge affects volitional autonomy.

Before moving on to the next subsection, it should be pointed out that a varying outcome of the application of both sub-criteria discussed above—that is, resistibility of the nudge, and the closeness of nudged behavior to identity—can influence how seriously a nudge interferes with autonomy as such. For example, some nudges encourage behavior which closely relates to identity, but are very easy to resist—for example, the nudge of a public poster campaign can aim to encourage organ donation, without exerting much psychological pressure on people's decision-making process. Such a campaign counts as a significant attempt to influence people's volitional autonomy because organ donation closely relates to people's physical identity. Nonetheless, the nudge would have caused a much more serious effect on autonomy if the nudge would have been difficult to resist and would have successfully bypassed people's autonomous reflective process on whether they want to become organ donors.

<sup>148</sup>Christine Goodwin v. The United Kingdom, App. No. 28957/95, para. 61 (July 11, 2002), <https://hudoc.echr.coe.int/?i=001-60596>.

<sup>149</sup>Pretty v. United Kingdom, App. No. 2346/02, paras. 65–66 (Apr. 29, 2002), <https://hudoc.echr.coe.int/?i=001-60448>.

<sup>150</sup>See the next paragraph for an overview of these cases.

<sup>151</sup>Chapman v. United Kingdom, App. No. 27238/95, para. 73 (Jan. 18, 2001), <https://hudoc.echr.coe.int/?i=001-59154>; Winterstein a.o. v. France, App. No. 27013/07, para. 142 (Oct. 17, 2013), <https://hudoc.echr.coe.int/?i=001-126910>; Hirtu a.o. v. France, App. No. 24720/13, para. 70 (May 14, 2020), <https://hudoc.echr.coe.int/?i=001-202442>.

<sup>152</sup>Evans v. United Kingdom, App. No. 6339/05, para. 71 (Apr. 10, 2007), <https://hudoc.echr.coe.int/?i=001-80046>; A, B and C v. Ireland, App. No. 25579/05, para. 212 (Dec. 16, 2010), <https://hudoc.echr.coe.int/?i=001-102332>.

<sup>153</sup>Ternovsky v. Hungary, App. No. 67545/09, paras. 22–26 (Dec. 14, 2010), <https://hudoc.echr.coe.int/fre/?i=001-102254>.

<sup>154</sup>*Id.*; Gerards, *supra* note 115, at 88–89.

<sup>155</sup>*Friend*, App. No. 16072/06 at paras. 40–41, 43.

Vice versa, nudges can have different scores on both sub-criteria because they may be difficult to resist but encourage behavior which does not deeply affect people's identities. For example, a default option can be difficult to resist, but if it concerns automatically subscribing people to a free magazine with news items on their neighborhood (with a possibility to unsubscribe by sending an e-mail), the impact on their identity will be negligible. The default option bypasses people's capacities for autonomous reflection in a serious way because it encourages people to act on unreflective and automatic responses to the environment. At the same time, this default would cause a much more serious effect on autonomy as such if it would encourage behavior which closely relates to people's identities—for example, organ donation—and which thus has a serious effect on volitional autonomy. The next subsection will further discuss whether rule of law actors should subject a nudge to rule of law safeguards when the outcome of the application of the sub-criteria varies.

### III. Interpreting the Outcome of Applying the Sub-Criteria

As was mentioned above, rule of law actors can determine the seriousness of the interference of a nudge with autonomy by applying two sub-criteria. First, they can examine the resistibility of the nudge. This sub-criterion determines how seriously a nudge affects (or will affect) autonomous rational reflection. Second, they can examine how closely the nudged behavior relates to people's identities. This sub-criterion determines how seriously a nudge affects (or will affect) volitional autonomy. After the rule of law actors have applied the sub-criteria to the nudge, they should determine whether the effects of the nudge on autonomy as such are sufficiently serious to warrant additional safeguards. Accordingly, in that situation the “de minimis” principle for nudges should *not* apply.

My contention is that a nudge does not have to cause an extremely serious effect on autonomy to count as an intervention which may be misused in a problematic way, and which should be subjected to at least some legal safeguards. Nudges which have a *somewhat* serious effect on autonomy can also bring a risk of misuse of power because they still (potentially) have substantial consequences for people's lives. More concretely, the term “somewhat serious effect” means that a nudge could have had a much more serious effect on autonomy if it would have been designed differently, but that nonetheless the nudge can still relate to people's autonomy in a potentially problematic way.

In what follows, three categories will be discussed of nudges which could count as having a somewhat serious impact on autonomy. These categories can serve as a guideline that helps rule of law actors to examine whether a nudge can be misused in a problematic way, even though the nudge does not consist of a very serious interference with autonomy. At the same time, these rule of law actors should consider all circumstances of the case—taking particular account of the context in which a nudge is used—during their examination of a nudge, while pre-designed categories cannot anticipate every possible circumstance which might cause a nudge to have a potentially deep impact on autonomy. Therefore, the three categories discussed below provide only a rough indication of nudges which have a somewhat serious effect on autonomy.

The first category consists of nudges that have a somewhat serious effect on autonomy because *both* sub-criteria—the criterion of resistibility and the criterion of how closely the nudged behavior relates to identity—point towards such an effect. For example, the nudge of a public advertisement can encourage mothers to give birth at the hospital because death of the fetus or newborn baby is less likely to occur when the mother gives birth at the hospital than when she gives birth at home.<sup>156</sup> At the same time, the public advertisement can have a small effect on the

<sup>156</sup>Jonathan M. Snowden, Ellen L. Tilden, Janice Snyder, Brian Quigley, Aaron B. Caughey and Yvonne W. Cheng, *Planned Out-of-Hospital Birth and Birth Outcomes*, 373 N. ENGL. J. MED. 2642, 2647 (2015).



percentage of mothers that choose a hospital birth.<sup>157</sup> Such a nudge is somewhat difficult to resist for at least some of its targets because of its effect, which means the nudge has a somewhat serious effect on autonomous reflection. Moreover, the nudge encourages behavior which somewhat closely relates to people's identities, presupposing that rule of law actors agree with the ECtHR that the desire to give birth at home instead of the hospital relates somewhat closely to identity. This means that the nudge has a somewhat serious effect on volitional autonomy.

The second category involves nudges that have a somewhat serious effect on autonomy because only one sub-criterion—the sub-criterion of resistibility—points towards such an effect. For example, the nudge of the smiling trash bin could be designed in such a way that it is very hard to resist: People's heuristics will be triggered in such an effective manner that meaningful autonomous reflection on whether they want to follow the nudge becomes very difficult. Rule of law actors might decide that such a nudge does not encourage behavior which closely relates to people's identities, and that such a nudge does thus not affect volitional autonomy in a serious way. At the same time, the nudge appears to have a strong effect on people's autonomous rational reflection, which may justify stating that it has at least a somewhat serious effect on autonomy.

The third category includes nudges that have a somewhat serious effect on autonomy because only one sub-criterion—the sub-criterion of how closely the nudged behavior relates to identity—points towards such an effect. These nudges encourage behavior that relates closely, or somewhat closely, to identity, but they are easy to resist. For example, a nudge can consist of the online activities of internet commentators, who defend certain political views on behalf of the government to persuade people to believe these views. At the same time, it may be clear that it is rather easy to recognize and resist such a nudge.<sup>158</sup> On the one hand, such a nudge affects political views, which are closely related to identity.<sup>159</sup> In such a case, the nudge consists of a serious attempt to influence volitional autonomy. On the other hand, this type of influencing may be easy to resist because it does not have a measurable effect on people's behavior. This means that the capacity of autonomous rational reflection is not bypassed in any serious way. It can be concluded that such an ineffective political nudge has a somewhat serious effect on autonomy as such.

Typical nudges which do not fall under the abovementioned categories are smiling trash bins (with a normal effect size), attractive staircases, flies in urinals, and blue logos.<sup>160</sup> Such nudges do not encourage behavior closely relating to people's identities and thus do not seriously affect volitional autonomy. Moreover, these nudges are presumably easy to resist because, according to empirical research, they are in general not very successful in triggering heuristics to encourage behavioral change.<sup>161</sup> Even if these nudges trigger heuristics with some effectiveness, they do not seem to consist of a potentially problematic influence on autonomy as such. People can decide to use some of their mental energy to engage in autonomous rational reflection instead of following these nudges. Furthermore, even if people do not reflect on what they should do, the impact on their autonomy is not such as to constitute a risk for substantial misuse of government power.

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<sup>157</sup>Psychologists can empirically measure whether a nudge has no, a small, a medium, or a large effect on people's behavior. The larger the effect of the nudge, the more people change their behavior as a consequence of a nudge. See generally FREDERICK J. GRAVETTER & LARRY B. WALLNAU, *STATISTICS FOR THE BEHAVIORAL SCIENCES* (10th ed. 2016) (discussing how psychologists can measure the size of the effect of measures such as nudging).

<sup>158</sup>This type of nudging was part of an unsuccessful attempt of the Chinese government to influence the political views of Chinese citizens. See generally Rongbin Han, *Manufacturing Consent in Cyberspace: China's "Fifty-Cent Army"*, 44 J. CURRENT CHINESE AFFS. 105 (2015).

<sup>159</sup>See generally Christopher J. Devine, *Ideological Social Identity: Psychological Attachment to Ideological In-Groups as a Political Phenomenon and a Behavioral Influence*, 37 POL. BEHAV. 509 (2015) (discussing the interrelation between identity and political views).

<sup>160</sup>Blue logos of organizations are supposed to nudge people to perceive a company as being competent. Empirical findings show that the color blue can sometimes indeed increase perceived competence. Lauren I. Labrecque & George R. Milne, *Exciting Red and Competent Blue: The Importance of Color in Marketing*, 40 J. ACAD. MKTG. SCI. 711, 716 (2012).

<sup>161</sup>Hummel & Maedche, *supra* note 134, at 23; DellaVinga & Linos, *supra* note 57, at 112.

For this reason, rule of law actors do not have to subject these nudges to the safeguards of the rule of law: The “de minimis” principle for nudges can be applied.

## F. Conclusion

Nudges vary substantially in how they affect behavior. While the nudge embodied by a sticker of a fly in a urinal encourages peeing inside a urinal, the nudge of the organ donation default very effectively brings people to agree to donating their organs after their decease.<sup>162</sup> This Article has argued that rule of law actors, such as courts and legislators, should use a legal doctrine to examine which nudges they should subject to at least some rule of law safeguards. This Article has also contributed to the development of such a doctrine, using the approach of the ECtHR as a source of inspiration.

On the one hand, the doctrine consists of a “de minimis” principle for nudges: Because rule of law actors have limited capacity, it has been argued that full rule of law guarantees only need to be offered when nudges have substantial consequences and can thus exert power in a problematic way. On the other hand, the doctrine consists of a standard by which it can be examined which nudges constitute a risk for problematic misuse of power. If nudges have serious effects on core values, then there is a risk for improper use and their introduction should be surrounded by at least some safeguards of the rule of law. In Section E, further sub-criteria have been developed that can be used to estimate the risk for improper use, which are related to the seriousness of the interference of a nudge with the core value of autonomy. While these sub-criteria have not been designed to determine with exact precision when a nudge interferes with autonomy in a potentially problematic way, they can serve as rough guidelines which help to identify the need for safeguards.

In this regard, this Article focused on the effects of nudges on autonomy because the ethical and legal literature on nudging revolves around these effects. It is important to note that on top of these, there might be other effects which deserve legal consideration. For instance, a nudge can negatively affect the value of equality if it targets only specific groups of the population—such as overweight people or smokers.<sup>163</sup> Similarly, a nudge can negatively affect the value of privacy if policymakers have designed the nudge while using large collections of data about their targets.<sup>164</sup> Based on the doctrine set out in the present Article, future research could lead to developing legal mechanisms that enable rule of law actors to examine which nudges affect equality, privacy, or other values in such a serious way that they are potentially abusive. The ECtHR’s examination of the seriousness of the interference of complained-of practices with core values could again serve as a source of inspiration. If a nudge turns out to affect a core value in a substantial manner, then the “de minimis” threshold for nudges is met, and the nudge should be subjected to at least some rule of law safeguards.

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<sup>162</sup>See generally Ahmad, *supra* note 124 (discussing the effectiveness of organ donation).

<sup>163</sup>Alemanno & Spina, *supra* note 6, at 452.

<sup>164</sup>Ranchordas, *supra* note 67, at 265–67.