



Empiricism and Private Law: Behavioral Research as Part of a Legal-Empirical Governance Analysis and a Form of New Legal Realism

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Abstract

The article deals with the role of empirical – in particular of behavioral – research for the law. The following questions will be answered: What is the position of behavioral legal research in the larger spectrum of legal and non-legal disciplines, like governance research, neo-classical economic analysis of law, legal sociology, and traditional legal doctrine? Does behavioral legal research merely employ empirical descriptive methods or does it contain specific normative theories? Which are the risks of empirical legal and behavioral research? Which are the relevant research questions in the area of private law as opposed to public law? It is argued that behavioral legal research should not be reduced to a mere economic analysis approach to law, but be rather placed in the broader concept of a “legal-empirical governance analysis” (LEGA).

Der Aufsatz beschäftigt sich mit der Rolle empirischer – insbesondere “behavioraler” – Forschungen für die Rechtswissenschaften. Die folgenden Fragen werden beantwortet: Welche Position nimmt behavioral-rechtswissenschaftliche Forschung innerhalb des Spektrums juristischer und nicht-juristischer Disziplinen ein, wie zB gegenüber der Governance-Forschung, der neo-klassischen ökonomischen Analyse des Rechts, der Rechtssoziologie und der traditionellen Rechtsdogmatik? Verwendet behavioral-rechtswissenschaftliche Forschung bloß empirische deskriptive Methoden oder umfasst sie spezifische normative Theorien? Was sind die Risiken von empirisch-rechtswissenschaftlicher Forschung? Was sind die relevanten Forschungsfragen im Bereich des Privatrechts (im Vergleich zum Öffentlichen Recht)? Es wird argumentiert, dass behavioral-rechtswissenschaftliche Forschung nicht zu einer bloßen ökonomischen Analyse des Rechts reduziert werden,

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sondern in das breitere Konzept einer „empirisch-rechtswissenschaftlichen Governance-Analyse“ (LEGA) integriert werden sollte.

Subjects: empirical research; behavioral legal research; governance; behavioral law and economics; economic analysis of law; legal realism.

To look beyond the law into its social, economic, psychological, cultural and political contexts does not mean to depreciate law and legal doctrine or to risk its foundations.¹ To engage in interdisciplinary research may mean all of the following: challenge, chance, widening, risk, and burden. The most recent interdisciplinary trend in legal research which currently enjoys a high degree of popularity among governments and legislators in the US and in the EU is “behavioral research”, most often conducted by economists as (experimental) “behavioral economics” in the context of markets.

This article will elaborate on the following questions:

- I. What is the position of behavioral legal research in the larger spectrum of legal disciplines and of law-related non-legal disciplines: What is, for instance, its relationship to governance research, to neo-classical economic analysis of law, to legal sociology, and to traditional legal doctrine?
- II. Does behavioral legal research merely employ empirical descriptive methods or does it contain specific normative theories? In case of normativity: What is its main orientation?
- III. Which are the risks of empirical legal and behavioral research?
- IV. Which are the relevant research questions in the area of private law as opposed to public law?

I. In chapter I, I will argue that behavioral legal research and behavioral economic research are only two components of a larger concept of a “legal-empirical governance analysis” (LEGA). This governance analysis examines problem solving, decision making, organization and control on the basis and within the framework of law from an interdisciplinary perspective. The behavioral branch of the analysis concentrates on the psychological processes of individual decision making in the context of legal rules, taking into account a variety of (non-legal) decision influencing factors like for example: personal characteristics, characteristics of the situation, social norms, and cultural patterns. This type of study often

¹ For an excellent account of the debate between “doctrinalists” and “multi-disciplinarians” in the US and in Europe see Rob van Gestel and Hans-W. Micklitz, *Why Methods matter in European Legal Scholarship*, 20 EUROPEAN LAW JOURNAL 292 (2014): The authors argue correctly that doctrinal legal research plays an important role in (a critical approach to) EU law and is not rendered irrelevant by multi-disciplinary “law and ...” research. They deplore the increasing instrumentalisation of law and legal research and the decreasing attention for methodology. See also ROB VAN GESTEL, HANS-W. MICKLITZ, AND MIGUEL POIARES MADURO, *METHODOLOGY IN THE NEW LEGAL WORLD*, EUI Working Papers LAW 2012/13.

overlaps in part with the studies of behavioral economists who analyze individual decision making in an economic context, but it cannot be reduced to a behavioral economic analysis of law. Behavioral legal research does not exclude or impair other strands of legal-empirical research which concentrate more or exclusively on social, political, institutional or cultural contexts. LEGA – and behavioral legal research as one of its parts – can be interpreted as a form of “new legal realism” in the sense of *Nourse* and *Shaffer*: The new legal realists propose additional or alternative research concepts to classical (formalist) approaches: like isolated doctrinalism and neo-classical economic analysis of law.

II. Behavioral research as applied to law could, in theory, assume a value-neutral descriptive standpoint. In reality, authors most often place it in a normative and political context. It is possible and recommendable to make both elements of the research – the empirical and the normative – transparent and discuss them separately. Apart from the particular methodology of “emergent analytics”, the normative theories endorsed by behavioral scholars are not a consequence of their empirical findings. The political conflicts tackled by the legal system form the basis of normative theories, these conflicts remain the same. The contributions of behavioral empirical research to normative theories can be seen as rather indirect and comparatively small. The discovery of particular weaknesses of individuals which influence their decision making processes in a negative way seems to prove that people are more vulnerable than traditional law – sticking to its *homo economicus* model – assumed. This empirical finding delivers an additional argument in favor of theories that advocate strong state regulation of markets in order to prevent harm to these individuals or the economy. Behavioral empirical research has shed new light on some questions crucial for normative theories, like: What is an “informed decision”? What is a “free decision”? It thus gives us the chance to re-open the normative debate on the right version of paternalism on an interdisciplinary level. A closely linked debate – also freshly inspired by recent behavioral research – is the debate about the role and the value of economic models (which ones?) for the law.

III. In chapter III, I will argue that our enthusiasm about new research questions should not blind us for the risks and burdens of empirical research and its “application” to the law. Many studies conducted from a psychological or economic perspective do not allow for conclusions on law oriented decision making. Psychological studies often employ artificial settings that might provoke different behavior than in legal reality. Strong normative theories might render empirical research self-referential causing the false impression of “scientific” proof of the researchers’ normative agenda. The danger of “reductionism” (reducing law to only one dimension) can be overcome by connecting behavioral research to a broader legal-empirical governance analysis. The considerable costs and the time-consuming nature of legal-empirical research call for a thorough cost-benefit analysis which works with realistic predictions of the possible scientific or knowledge gains.

IV. In contrast to the two pole analysis in public law of the relationship between the regulating state and the citizen, behavioral research in private law should expand its perspective to (at least) three agents: the government, and the two parties to a private law relationship. It has to be noted that “wrong” decisions of contracting parties are not only caused by biases and other decisional inadequacies (rooted in the citizens’ brains) but also by the market situation (e.g. asymmetric lack of information) or by the other party of a contract who abuses her dominant position to the detriment of the weaker party. One group of research questions deals with the normative models of citizens widely used in private law: like the model of the informed average consumer or of the ordinary merchant. The areas of unfair commercial practices regulation and competition law are in their normative approaches largely depending on such normative models of market actors and, therefore, offer ample space for behavioral legal research. The currently most examined and most popular research question in private law is: How can state regulation help citizens or weaker parties (e.g. consumers) in exercising their private autonomy more in their own interest, thus overcoming dangers that are created by themselves, by the market situation or by the other market actors. The potential of reducing, framing, anchoring, standardizing information and warnings, of using new interactive electronic information schemes, or of creating safe standardized default contracts is doubtlessly great. Research in this area should also include the questions of how the notions of “freedom of decision” and “knowledge” are constructed by the law and whether these legal constructs are in reasonable proximity of the decisional reality of people. What is the role of ignorance, what is the role of heuristics in decision making? In private law, there are two human actors to be influenced – or “nudged” – in their behavior: Authors tend to neglect the question of how to nudge enterprises into behaving more fairly to weaker parties. In cases like unfair clauses in standard contract terms, irresponsible lending, or usury loans autonomy based soft instruments (information, nudges) might stay relatively ineffective. At this point, we need mandatory legislation which prohibits grossly unfair contractual relations (enforced by interest organizations or state authorities). The research question for behavioral legal analysis in that respect is: Where are the behavioral limits of soft instruments which are as cleverly designed as possible, i.e. in accordance with the latest “behavioral insights”? This goes to the middle of the paternalism debate (chapter II).

V. I will conclude with an overall positive evaluation of the chances and expected gains of a type of “behavioral legal research” which is not merely a behavioral economic analysis of law. If placed in the broader concept of LEGA and combined with a realistic awareness of all its risks and limitations, this type of research is likely to provide new and helpful insights for scholars, judges and legislators in the field of private law.

I. Behavioral Legal Research in its Broader Context of Other Disciplines: Governance and New Legal Realism

Before the advent of legal realism in the 1920ies² and of economic analysis of law in the 1970ies³, legal research in the United States spent a life of splendid isolation in its realm of legal doctrine and formalism which was not connected to other disciplines like economics, sociology, or political sciences. In Europe, where the influence of legal realism and law and economics never was as strong as in the United States – neither in the legislative process nor in academic writing and teaching – the tradition of “doctrinal isolation” is still the prevailing reality. Presently, this prevailing reality in European legal thought is facing a new and very serious attack: behavioral research, governance research, and other movements that connect the law (public and private, procedural and substantive) to various types of empirical research. Though “behavioral economics” and “governance theory” have been the most prominently discussed and most attractive movements in the last 10 years for the European legislator and European researchers, those two approaches must be seen in the context of the whole of empiricist research that was and is about to be conducted in connection with the law.

In their famous article of 2009 *Nourse and Shaffer*⁴ described a movement in – primarily US American but also European – legal research which they called “new legal realism”. As the old legal realism was a reaction to 19th century’s doctrinal formalism, the new realism is seen as a reaction to neo-classical economic analysis of law as its formalist (though also instrumentalist) counterpart. Neo-classical law and economics avoids human psychology, social, historical and institutional contexts, which new legal realists want to re-introduce.⁵ According to the authors, both old and new formalism have a neo-liberal orientation, whereas old and new realists are rather inclined to the other side of the political spectrum (i.e. are in favor of more government intervention for social and public interests).⁶

Nourse and Shaffer develop the following taxonomy of new legal realist movements:⁷ One school is the “behaviorists” – comprising the “attitudinal model” of political scientists (studying the behavior of judges) and “behavioral economics”. A second school, the “contextualists”, conducts empirical studies of the “law in action”, i.e. of law and behavior in their social contexts.⁸ The third school, called the “institutionalists”, is convinced that the pursuit of all goals is shaped by complex institutional processes. Among these, the proponents of

² BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUMBIA LAW REVIEW 431 (1930).

³ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1972); (7th ed. 2007).

⁴ Victoria Nourse and Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?* 95 CORNELL LAW REVIEW 61 et seq. (2009).

⁵ Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 74 (2009)

⁶ Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 96 (2009).

⁷ Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 76 et seq. (2009).

⁸ The authors observe that empirical legal studies “have exploded in the legal academy” in the US in the years between 1999 and 2009 [Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 93 (2009)].

“new governance theory” search for innovative problem-solving methods for law creation and implementation and oppose a court-centric, rights-focused approach to law.⁹ The institutionalist supporters of the “anti-domination model” replace the traditional model of the autonomous rational actor by the “vulnerable” actor. In their “vulnerability analysis” they focus on structures and institutions instead of individual actions.¹⁰

Different schools of new legal realism emphasize different aspects or perspectives of a problem (for instance psychological processes, social influences, different structures or institutions) or analyze different scenarios (for instance the behavior of judges, the behavior of consumers or businesses). They share, however, certain characteristics: the concern for the law in reality (“law in action”) operating in a complex system of various institutions and influences; a constructivist approach; multi-disciplinary research; a combination of normative theories and empirical research. The agenda of legal research is broadened: It is not the only task of legal research to develop doctrines that guide the application and interpretation of existing legal rules in courts, but it can also supply empirical data of the “law in action” and, thus, provide guidance for future action of law makers or appliers of law on the basis of thorough and comprehensive analysis of decision making processes and human behavior.

The common characteristics of new legal realism can be integrated in a broad concept of “governance analysis” (not coinciding with the “new governance theory” mentioned supra) which is an analytical method rather than a normative theory with a certain political orientation or a certain set of values. In that respect, it differs from normative concepts of “good governance” like the concepts used by the IMF and the World Bank¹¹ (for evaluating the performance of national governments). It is also not identical with “governance” in the sense of the EU Commission’s White Paper published in 2001¹² (trying to promote voluntary modes of governance at the expense of compulsory regulation), though the EU’s White Paper on Governance can be considered a (normative) strand of the broader analytical governance concept developed in this article. I would like to call this concept “legal-empirical governance analysis” (LEGA). Behavioral legal research and behavioral economic research are only two components among many others in this analysis. LEGA examines processes of problem solving and decision making, as well as organization and

⁹ Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 88 (2009).

¹⁰ Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 89, 111 (2009).

¹¹ See for instance Ngaire Woods, *The Challenge of Good Governance for the IMF and the World Bank Themselves*, 28 WORLD DEVELOPMENT 823 (2000); Ved P. Nanda, *The “Good Governance” Concept Revisited*, 603 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 269 (2006).

¹² COMMISSION, EUROPEAN GOVERNANCE – A WHITE PAPER, OJ 12 October 2001, C 287/1; Joanne Scott and David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUROPEAN LAW JOURNAL 1 (2002); Ludger Radermacher, *The European Commission’s White Paper on European Governance: The Uneasy Relationship between Public Participation and Democracy*, 3 GERMAN LAW JOURNAL (2002) available online at www.germanlawjournal.com; Burkard Eberlein and Dieter Kerwer, *New Governance in the European Union: A Theoretical Perspective*, 42 JOURNAL OF COMMON MARKET STUDIES 121 (2004); Kenneth A. Armstrong, *The Character of EU Law and Governance: From “Community Method” to New Modes of Governance*, 64 CURRENT LEGAL PROBLEMS 179 (2011).

control on the basis and within the framework of law¹³ from an interdisciplinary perspective. The actors subjected to the analysis are citizens and market participants as well as legislators, judges and administrative officials. The prescriptive as well as descriptive disciplines (usually) involved are law and legal theory, economics, psychology, sociology and political science.

The behavioral branch of LEGA concentrates on the psychological processes of individual decision making (by law makers, judges, market participants, citizens) in the context of legal rules, taking into account a variety of (non-legal) decision influencing factors like for example: personal characteristics, characteristics of the situation,¹⁴ social norms, or cultural patterns. In the last decades, many hitherto unknown characteristics of human behavior have been revealed in great detail by scientists. The behavior departs considerably from the model of the rational selfish "economic man" widely used in economics and in law. Cognitive and behavioral psychology assisted by neuroscience show for instance that human decision making is influenced by numerous stable and practically relevant "biases" and "heuristics" of judgment. Moreover, people's preferences usually depend on a time factor and people may pursue goals other than maximizing their own benefit.

Micro-economics have since long been working on – from their perspective – adequate reactions to these findings: The economic models were partially corrected and brought closer to reality. A new discipline of economics – "behavioral economics" – was established. Behavioral and neuroscientific marketing research takes advantage of the particular characteristics of human decision making processes with the goal of increasing the turnover of enterprises. In law, researchers¹⁵ and law makers¹⁶ are just about to catch up:¹⁷

¹³ German authors speak of "normgeprägtes Entscheiden" – norm oriented decision making: see Wolfgang Hoffmann-Riem, *Governance als Perspektivenerweiterung in der Rechtswissenschaft*, 1 AUSTRIAN LAW JOURNAL 6 (2014).

¹⁴ Jan Crusius, Femke van Horen, and Thomas Mussweiler, *Why Process Matters: A Social Cognition Perspective on Economic Behavior*, 33 JOURNAL OF ECONOMIC PSYCHOLOGY 677 (2012).

¹⁵ The legal aspects of behavioral research were first discussed in US literature. Publications by European authors are still relatively rare. US: among many others see Christine Jolls, Cass R. Sunstein, and Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STANFORD LAW REVIEW 471 (1998); CASS R. SUNSTEIN (ed.), *BEHAVIORAL LAW AND ECONOMICS* (2000); RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGES: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (2008); Cass R. Sunstein, *Empirically Informed Regulation*, 78 UNIVERSITY OF CHICAGO LAW REVIEW 1349 (2011); Christine Jolls and Cass R. Sunstein, *Debiasing Through Law*, 35 JOURNAL OF LEGAL STUDIES 199 (2006); Russell B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science. Removing the Rationality Assumption*, 88 CALIFORNIA LAW REVIEW 1051 (2000); Russell B. Korobkin, *What Comes After the Victory for Behavioral Law and Economics*, UNIVERSITY OF ILLINOIS LAW REVIEW 1653 (2011). In Europe see for instance: GERD GIGERENZER AND CHRISTOPH ENGEL (eds.), *HEURISTICS AND THE LAW* (2006); CHRISTOPH ENGEL, MARKUS ENGLERTH, JÖRN LÜDEMANN, AND INDRA SPIEKER (eds.), *RECHT UND VERHALTEN* (2007); HOLGER FLEISCHER AND DANIEL ZIMMER (eds.), *DER BEITRAG DER VERHALTENSÖKONOMIE (BEHAVIORAL ECONOMICS) ZUM HANDELS- UND WIRTSCHAFTSRECHT* (2011); Alberto Alemanno, On Amir, Luc Bovens, Adam Burgess, Orly Lobel, Kyle Powys Whyte, and Evan Selinger, *Nudging Healthy Lifestyles – Informing Regulatory Governance with Behavioral Research*, 3 EUROPEAN JOURNAL OF RISK REGULATION (2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005672; Alberto Alemanno and Alessandro Spina, *Nudging Legally. On the Checks and Balances of Behavioral Regulation*, 12 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 429 (2014); ANNE-LISE SIBONY AND ALBERTO ALEMANNI (eds.), *NUDGING AND THE LAW: WHAT CAN EU LEARN FROM BEHAVIORAL SCIENCES?* (forthcoming).

Can the human-law-interface be improved by rendering the law more “ergonomic”? With other words: Can legal steering instruments, legal arrangements or new forms of law enforcement be developed which are more effective because they take better account of the particularities of human behavior? Some speak of “smart regulation” meaning legal rules that take advantage of this detailed “scientific” (empirically acquired) knowledge about human behavior in order to reach their regulatory goals more smoothly and effectively.

This is, of course, only one part of the larger picture of problem solving by law (and its examination by LEGA). Legal rules are not the only factors that influence people’s behavior. Many legal rules cannot be seen simply as “instrumental”. Not all problem solving by law involves (exclusively) individual decisions of citizens: For instance consumer organizations or the government might be better able to tackle an issue than individuals exercising their private autonomy would.¹⁸ Though the approach of many behavioral studies of law is clearly instrumental, such studies do not exclude a broader governance analysis concept. Behavioral research, contextualism and institutional analysis are mutually inclusive.¹⁹

Behavioral legal research often overlaps in part with the study of economic decisions of market participants (or market rule makers) by behavioral economists. Until today, a lot of behavioral research has been and is being conducted by economists, comparatively little by legal scholars. The temptation for the latter to simply refer to behavioral economic research and thereby (tacitly) import economic models, economists’ thinking and an

¹⁶ See the “Behavioral Insights Team” in the US <http://inudgeyou.com/> established by the Obama administration in 2013 (collaborating with Harvard University’s “Behavioral Insights Group”) and the “Behavioral Insights Team” in the UK <http://www.behaviouralinsights.co.uk/> established by the Cameron administration in 2010; Burgess, *„Nudging’ Healthy Lifestyles: The UK Experiments with the Behavioral Alternative to Regulation and the Market*, 3 EUROPEAN JOURNAL OF RISK REGULATION 1 (2012) <http://ssrn.com/abstract=2005672>; in Germany the Merkel administration established a behavioral insights group (in the “Stab Politische Planung, Grundsatzfragen und Sonderaufgaben” of the “Bundeskanzleramt”) in 2014; in 2014 the OECD established a behavioral unit in its Network of Economic Regulators. For the field of consumer protection see: OECD, CONSUMER POLICY TOOLKIT 42 et seq. (2010) <http://www.oecd.org/sti/consumer/consumerpolicytoolkit.htm>; BETTER REGULATION EXECUTIVE AND NATIONAL CONSUMER COUNCIL, WARNING TOO MUCH INFORMATION CAN HARM (November 2007); OFCOM (regulator for UK communications industries), A REVIEW OF CONSUMER INFORMATION REMEDIES (March 2013); VERBRAUCHERZENTRALE BUNDESVERBAND, INFORMATION GUT, ALLES GUT? EMPFEHLUNGEN FÜR WIRKSAME INFORMATIONEN (November 2011); NATALI HELBERGER, FORM MATTERS: INFORMING CONSUMERS EFFECTIVELY, STUDY COMMISSIONED BY BEUC (September 2013); the EU Commission finances interdisciplinary research projects in order to enhance the effectiveness and quality of its legislation (see for instance the FP7 project „CORPUS” dealing with sustainable consumer policy (food, traffic, housing) and the FP7 project „iFamily” dealing with health policy).

¹⁷ For a rather recent overview of government activities connected with behavioral research around the globe see Cass R. Sunstein, *The Council of Psychological Advisers*, 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496438.

¹⁸ Sabine Frerichs, *False Promises? A Sociological Critique of the Behavioral Turn in Law and Economics*, 34 JOURNAL OF CONSUMER POLICY 289 (2011).

¹⁹ Christoph Engel and Gerd Gigerenzer, *Law and Heuristics: An Interdisciplinary Venture*, in GERD GIGERENZER AND CHRISTOPH ENGEL (eds.), HEURISTICS AND THE LAW 1, 7, 14 (2006).



exclusively economic perspective on the law is considerable. Thus, the danger for behavioral legal research to become a new version of economic analysis of law is evident.²⁰

This development towards a “behavioral economic analysis of law” or “behavioral law and economics” is, however, not an inevitable consequence of a behavioral (i.e. an empirical psychological) approach to the “law in action” as a basis for the development of recommendations for legal and institutional change. Where behavioral legal research is seen as part of the much wider concept of LEGA, it is clear that not only economic goals and perspectives can count. Widening the analysis (towards LEGA) involves two steps: (One) Behavioral legal research will be accompanied and supplemented by other strands of empirical research which concentrate more or exclusively on social, political, cultural, or other institutional contexts. (Two) Empirical psychological studies of human behavior, in particular of decision making, can and should (where this seems possible) themselves integrate such contexts by taking into account additional variables that influence people’s behavior and psychological processes (apart from legal rules, personal and situational characteristics) like social norms, cultural patterns, political affiliations, education and family background etc.

II. Does behavioral legal research merely employ empirical descriptive methods or does it contain specific normative theories?

Behavioral legal research can, in theory, assume a value-neutral descriptive standpoint if it sticks to its empirical observations and separates them completely from normative assumptions and concepts used by its interpreters. In reality, authors most often place their behavioral legal studies in a normative and political context.²¹ The political agenda pursued is in some cases neo-liberal: According to those liberal authors, new freedom preserving “softer” instruments of state regulation and self-regulation (private ordering) shall be preferred over traditional hard paternalist intervention.²² According to other authors, the newly discovered structural behavioral weaknesses of market actors (as well as of law makers and judges) can be viewed as an additional justification of existing mandatory state

²⁰ Sabine Frerichs, 34 JOURNAL OF CONSUMER POLICY 289 (2011).

²¹ For the difficulty of separating descriptive and normative elements in behavioral research see: Brigitta Lurger, *Gerechtigkeitskonzepte für ein europäisches Vertragsrecht und Instrumente zu ihrer Umsetzung*, in STEFAN ARNOLD (ed.), GRUNDLAGEN EINES EUROPÄISCHEN VERTRAGSRECHTS, 101, 121 et seq. (2014); Brigitta Lurger, *Selbstverantwortung versus Solidarität im Vertragsrecht*, in STUDIENGESELLSCHAFT FÜR WIRTSCHAFT UND RECHT (ed.), SELBSTVERANTWORTUNG VERSUS SOLIDARITÄT IM WIRTSCHAFTSRECHT 159, 166 et seq. (2014).

²² OREN BAR-GILL, SEDUCTION BY CONTRACT 32 (2012); Cass R. Sunstein, *Nudges vs. Shoves*, 127 HARVARD LAW REVIEW FORUM 210, 211 et seq. (2014) argues that even though mandatory rules may be preferable in some cases, freedom preserving soft regulation (as for instance nudging) in most cases shows more benefits and is less costly than alternative approaches. For convincing evidence that really effective information can be more costly and almost equally intrusive as alternative approaches see NATALI HELBERGER, FORM MATTERS: INFORMING CONSUMERS EFFECTIVELY, STUDY COMMISSIONED BY BEUC 5 (September 2013).

regulation or as a justification of additional or stricter state regulation.²³ This latter view coincides with the political orientation of some other schools of legal realism, for instance with “vulnerability analysis”. The recommendations of neo-liberal behavioral scholars partly coincide with the recommendations made by neo-classical economic analysis of law:²⁴ Autonomy preserving modes of governance (like self-regulation, information policy, and default rules) are to be preferred over direct government intervention by mandatory legal rules. In other cases, the political background of a behavioral study is not directly addressed and left for the detective’s nose of the critical reader to be revealed.

Two questions arise: Which of the two legal-political directions is to be preferred? Is there any compelling argument derived from behavioral empirical research or the famous “behavioral insights”²⁵ that points in the one rather than in the other direction? I will introduce the answer to these questions by a short analysis of a widely supported school of behavioral law and economics: the so-called “libertarian paternalism”, and by pointing to the concept of “emergent analytics” according to which the initial study of reality may influence the ensuing adoption of a normative theory.

“Governance” (like the EU Governance in the Commission’s White Paper)²⁶ and behavioral research in law and economics, like *Thaler* and *Sunstein’s* “libertarian paternalism”,²⁷ are often associated with the promotion of “soft” forms of governance, “soft” forms of influencing and steering people’s behavior, which are considered preferable to traditional compulsory “hard” regulation for various reasons. Replacing “hard” by “soft” instruments of governance is often supposed to increase not only the effectiveness (with respect to the relevant regulatory goal pursued: as for instance consumer protection), but also the freedom of choice of the citizens concerned (autonomy preserving) and to lower the overall costs for the economy.²⁸ Words often used in that context are for instance: private governance, private ordering, voluntary standards of performance, nudges, defaults, or “behaviorally informed” instruments and rules.

²³ Ryan Bubb and Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 *Harvard Law Review* 1593 (2014); Brigitta Lurger, in STEFAN ARNOLD (ed.), *GRUNDLAGEN EINES EUROPÄISCHEN VERTRAGSRECHTS* 101, 122 (2014); SARAH CONLY, *AGAINST AUTONOMY* (2012); Omri Ben-Shahar and Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 647 (2011); Brigitta Lurger, in *STUDIENGESELLSCHAFT FÜR WIRTSCHAFT UND RECHT* (ed.), *SELBSTVERANTWORTUNG VERSUS SOLIDARITÄT IM WIRTSCHAFTSRECHT* 159, 176 (2014).

²⁴ Christine Jolls, Cass R. Sunstein, and Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in CASS R. SUNSTEIN (ed.), *BEHAVIORAL LAW AND ECONOMICS* 13, 30, 51 (2000) point out that the behavioral law and economics approach is not as radical as the neo-classical law and economics approach in rejecting every type of mandatory paternalistic intervention, which they call “reflexive antipaternalism”.

²⁵ See FN 16.

²⁶ COMMISSION, *EUROPEAN GOVERNANCE – A WHITE PAPER*, OJ 12 October 2001, C 287/1.

²⁷ Richard H. Thaler and Cass R. Sunstein, *Libertarian Paternalism*, 93 *THE AMERICAN ECONOMIC REVIEW* 175 (2003); Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism is not an Oxymoron*, 70 *UNIVERSITY OF CHICAGO LAW REVIEW* 1159 (2003); Richard H. THALER AND CASS R. SUNSTEIN, *NUDGE* (2008); Richard H. Thaler and Cass R. Sunstein, *Preferences, Paternalism, and Liberty*, 59 *PHILOSOPHY SUPPLEMENT* 233 (2009); Cass R. Sunstein, *Empirically Informed Regulation*, 78 *UNIVERSITY OF CHICAGO LAW REVIEW* 1349 (2011); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 *YALE LAW JOURNAL* 1826 (2013).

²⁸ See the discussion in FN 22.

“Libertarian paternalism” is considered by its creators a “Third Way” which reconciles neo-liberal (liberty) and more interventionist (paternalism) approaches to law.²⁹ “Choice architects can preserve freedom of choice while also nudging people in directions that will improve their lives”. But is “behaviorally informed” soft or libertarian paternalism really the solution to all the problems mentioned? Does it dissolve the tension between freedom and protection and settle the conflict between economic efficiency and other societal goals of regulation?

Libertarian paternalists assume that there is a gap between the decisions actually made by individuals being subject to cognitive biases and other decisional inadequacies and the choices they would have made as rational unbiased decision makers. Their cognitive defects are considered to be a particular type of market failure, the “behavioral market failure”,³⁰ which has to be corrected by government intervention. These cognitive mistakes are, according to Sunstein,³¹ “firmly rooted” in “system one” of the human brain, whereas the – presumptive or real – “rational self” of individuals is situated in “system two”.³² Libertarian paternalists use behavioral research establishing the existence of human biases and other cognitive mistakes not only as a justification for state intervention, but also as a basis for designing new instruments which steer people’s behavior more effectively in the desired direction: by taking advantage of these weaknesses or by correcting them otherwise.

“Libertarian paternalism”³³ has been criticized by authors in various respects. The most important points of critique are, in my view, the following:

1. Libertarian paternalists do not present a clear concept of the role of autonomy in their normative theory: The notion of “nudges” comprises a large range of instruments (including for instance default rules, disclosure, warnings, anchoring, framing).³⁴ Some of them are more, others are less transparent. Nudges are only effective in influencing people’s behavior if people follow them consciously or unconsciously. Nudges are only freedom preserving if it is a realistic scenario for people to opt out (thus not following the nudge). In addition, opting out is only possible where nudges are transparent. Thus, government

²⁹ RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE* 252 (2008).

³⁰ Cass R. Sunstein, 122 *YALE LAW JOURNAL* 1826, 1842 et seq. (2013): The “behavioral market failures” discussed by Sunstein are the following: present bias and time inconsistency, ignoring shrouded (but important) attributes (importance of salience), unrealistic optimism, and problems with probability.

³¹ Cass R. Sunstein, 122 *YALE LAW JOURNAL* 1826, 1842 et seq. (2013).

³² For the (debated) distinction between two processes of thinking which have neuropsychological correlates in different brain areas see for instance DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 19 et seq. (2011); Matthew D. Lieberman, *Social Cognitive Neuroscience: A Review of Core Processes*, 58 *ANNUAL REVIEW OF PSYCHOLOGY* 259 (2007); Jonathan St. B. T. Evans, *Dual-Processing Accounts of Reasoning and Judgment, and Social Cognition*, 59 *ANNUAL REVIEW OF PSYCHOLOGY* 255 (2008): system one is fast, automatic, frugal and unconscious, system two is slow, deliberate, controlled, conscious and needs a lot of capacity.

³³ See also ROBERT NEUMANN, *LIBERTÄRER PATERNALISMUS* (2013).

³⁴ See the list of „nudges“ (called „freedom-preserving tools“) in the Appendix of Cass R. Sunstein, *The Council of Psychological Advisers* (2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496438.

intervention by nudging cannot be both effective and freedom preserving. It is freedom preserving if people are free not to follow the nudge. Where they do not follow the nudge, nudging is not effective. Effective nudging depends on a majority of people not making use of their choice to resist the nudge.³⁵ Libertarian paternalists who insist on effective nudges risk being criticized for their restriction of party autonomy by neo-liberals. Libertarian paternalists who insist on the freedom to opt out risk being criticized for the ineffectiveness of their recommended regulation.

2. Libertarian paternalists do not present a clear concept of the yardstick for their interventions and of the preferences of people: Nudged people do not follow their initial preferences, but the preferences recommended by the government, which are said to be the preferences of their (fictitious) "rational selves". Who determines what the "rational self" really wants? Who tells us what people, if they were rational, would think is good for them?³⁶ Can system one driven decisions never be the rights ones? Are they only right where people succeed in resisting a nudge (by opting out and refusing to be nudged) or are they still wrong in this case?³⁷ When is it legitimate to restrict private autonomy of decision making and when not?³⁸

3. Where businesses try to manipulate people's subconscious, it is the government's task to forbid or define the limits of such strategies. But what if governments themselves engage in nudging people without them even noticing it? The result of such government intervention is the same as the result of "hard" regulation, which forbids certain behavior and allows other. Both regulatory techniques, therefore, share the dependency on the quality and legitimacy of the normative choice by the government (to restrict certain behavior and to support other). Only the way to the shared result differs: Outright prohibitions are transparent for everyone and may be debated or criticized in public, and later on, as a consequence, be changed by the legislator. Invisible nudges leave the nudged without awareness of the intervention, in the first place. This may inhibit public discussion and legislative change. Thus, a hidden ("behavioral") intervention may be considered even more disruptive of individual autonomy than traditional outright prohibitions.³⁹

4. By concentrating on nudges (which leave an – though sometimes unrealistic – element of choice for the citizen) libertarian paternalists narrow their analysis and do not deal with cases where mandatory rules and prohibitions may be preferable to any other type of regulation and to non-regulation for certain reasons. They do not signalize readiness to link their agenda to a broader analytical concept as, for instance, the one described supra

³⁵ Riccardo Rebonato, *A Critical Assessment of Libertarian Paternalism*, 37 JOURNAL OF CONSUMER POLICY 357, 370 (2014); Ryan Bubb and Richard H. Pildes, 127 HARVARD LAW REVIEW 1593, 1616 (2014).

³⁶ Wolfgang Kerber, *Soft Paternalismus und Verbraucherpolitik* 11 et seq. (2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497426.

³⁷ Ryan Bubb and Richard H. Pildes, 127 HARVARD LAW REVIEW 1593, 1625 (2014).

³⁸ Riccardo Rebonato, 37 JOURNAL CONSUMER POLICY 357, 374, 378, 388 (2014).

³⁹ Riccardo Rebonato, 37 JOURNAL CONSUMER POLICY 357, 360, 392 (2014).

(LEGA).⁴⁰ They are, however, closely linked to one discipline – economics: Libertarian paternalists endorse and need the neo-classical concept of rationality.⁴¹

5. This, of course, invites another critique: Legal analysis should not be made (exclusively) dependent on normative economic theories and economic models. The model of economic man, having been abandoned by many behavioral economists, should not be revived by the hybrid construct of “rational self” in law. The use of system one of the brain does not always produce a mistake that has to be corrected, but may – depending on the situation – lead to “good”, i.e. “ecologically rational”, decisions.⁴² If the use of system one in decision making is both omnipresent and not always detrimental, how can it be considered a “market failure” (again an economic concept!) which means an *exception* to the ordinary situation of a well-functioning unregulated market? Perhaps we should rather abandon the traditional neo-classical economic models and develop a new theory which is better able to integrate the normal every day cases of biased and heuristic decision making and is better able to address all the needs, tasks and particularities of problem solving by law (without being restricted to the economic efficiency perspective).⁴³

My conclusions with respect to libertarian paternalism are: Libertarian paternalists have a strong normative agenda and make no attempt to separate descriptive and normative parts of their research. They can be seen as an example for the observation that, in the work of many authors, behavioral research and normative theories are closely intertwined. Their claim that behavioral research will lead to a reconciliation of old normative conflicts like the one between autonomy and (paternalistic) state intervention is not entirely convincing. They do not show that empirical behavioral research holds any compelling arguments for either more freedom preserving or more intrusive regulatory instruments, but borrow their respective arguments from normative economic analysis of law. The impression sometimes created that “nudges” are always less costly and economically more efficient than other types of regulation is not correct. It is the great merit of libertarian paternalists to have brought legal instruments closer to the reality of people’s lives and behavior, thus, providing a basis for the development of improved legal instruments in some areas of regulation like health, consumer, and environmental protection. And they have stirred a renewed and most welcome discussion on paternalism in legal regulation which brings together economists and legal scholars.

⁴⁰ Kerber, therefore, suggests integrating the idea of preferring soft instruments over hard regulation into a broader concept of governance: Wolfgang Kerber, *Soft Paternalismus und Verbraucherpolitik* 19 (2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497426.

⁴¹ Riccardo Rebonato, 37 *JOURNAL CONSUMER POLICY* 357, 362 (2014).

⁴² Peter M. Todd and Gerd Gigerenzer, *Simple Heuristics That Make Us Smart*, 23 *BEHAVIORAL AND BRAIN SCIENCES* 727 (2000) 727; Peter M. Todd, *How Much Information Do We Need?* 177 *EUROPEAN JOURNAL OF OPERATIONAL RESEARCH* 1317 (2007); GERD GIGERENZER, *GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS* (2007); Gerd Gigerenzer, *Why Heuristics Work*, 3 *PERSPECTIVES ON PSYCHOLOGICAL SCIENCE* 20 (2008); Gerd Gigerenzer and Henry Brighton, *Homo Heuristicus: Why Biased Minds Make Better Inferences*, 1 *TOPICS IN COGNITIVE SCIENCES* 107 (2009).

⁴³ Brigitta Lurger, in *STUDIENGESELLSCHAFT FÜR WIRTSCHAFT UND RECHT* (ed.), *SELBSTVERANTWORTUNG VERSUS SOLIDARITÄT IM WIRTSCHAFTSRECHT* 159, 164 et seq. (2014).

The idea that descriptive behavioral findings may change only the means employed in legal regulation whereas existing goals may remain intact intends to preserve the behavioral legal research's relative normative neutrality.⁴⁴ But in reality, goals and means are often influencing each other.⁴⁵ Legal rules ("means") are more complex creatures than mere instruments to reach a single regulatory goal. *Nourse* and *Shaffer* describe the method of "emergent analytics" by which empirical research is used as a process of "discovery" for a theory or a normative agenda.⁴⁶ In this conception the empirical research directly influences the prescriptive or normative theory adopted by the researchers at a later stage of their work. *Purnhagen* uses a similar method in his behavioral analysis of EU Internal Market Law.⁴⁷ Thus, emergent analytics is a different type of example for a close link between descriptive empirical methods and the normative theories employed by scholars engaged in legal-empirical research.

The relation between empirical findings about people's behavior and normative concepts (like for instance the model of the average consumer or the average business woman), which refer to expected behavior of people, can be examined from still another perspective: Normative models of persons are abstract and generalizing concepts. They do not simply reflect the characteristics of concrete people involved in a legal transaction. They are primarily expressions of the regulatory approach endorsed by the legislator and the courts. "Rational egotists" as guiding normative model will necessitate different rules and regulation for their market behavior than "biased and confused" market participants who also care for the interests of others. But, in a second step, on the control level of the constitution and of human rights, lawyers have to ensure that their normative models stay in reasonable proximity to reality: The legislator assuming exaggerated vulnerability of average weaker parties (like employees, consumers, and tenants) risks violating the freedom rights of stronger contract parties (employers, businesses, landlords). The legislator assuming exaggerated rationality and wisdom of average market actors risks violating its constitutional duties of protecting weaker contract parties.

As a consequence, the psychological empirical findings reflecting the characteristics of people's behavior may influence normative models on two levels: on the constitutional control level, where the link to reality is decisive, and on the level of the regulatory approach of ordinary law which depends on the person model adopted. In my view, the discovery of people's biases, bounded rationality and social motivation, as opposed to their previously presumed unbounded rationality and selfishness can lead to only one

⁴⁴ Florian Möslein, *Privatrechtliche Regelsetzung, Governance und Verhaltensökonomik*, 1 AUSTRIAN LAW JOURNAL 140 (2014).

⁴⁵ "Only when we recognize that certain means are available to us do we discover goals which had not occurred to us before": Joas describing the work of Dewey [Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 84 FN 85 (2009)].

⁴⁶ Victoria Nourse and Gregory Shaffer, 95 CORNELL LAW REVIEW 61, 84 et seq. (2009).

⁴⁷ KAI PURNHAGEN, WHY DO WE NEED RESPONSIVE REGULATION AND BEHAVIORAL RESEARCH IN EU INTERNAL MARKET LAW? Wageningen Working Papers in Law and Governance, Law and Governance Group 2014/05.

conclusion on the level of normativity: Weaker contract parties, but also enterprises and citizens in general, need more support and protection by the government, by soft or hard regulation, but not less – as compared to the unrealistic model of the rational *homo economicus*.⁴⁸

My answers to the initial questions posed in this chapter are the following: The basis of behavioral legal research is descriptive empirical studies. Every attempt to make these studies useful or applicable in a legal governance context (including their initial conception) links the empirical methods to normative preconceptions, theories and agendas. It is possible and recommendable to make both elements of the research – the empirical and the normative – transparent and discuss them separately. Some approaches of behavioral legal studies focus on the improvement of legal rules (means) while trying to keep the regulatory goals untouched, other approaches openly pursue a normative agenda or look for inspiration for normative theories in empirical findings. The normative theories endorsed and the values defended by behavioral scholars are not a direct consequence of their empirical findings. The political conflicts tackled by the legal system (autonomy versus intervention, freedom versus social protection and distributive justice) are the basis of these normative theories, these conflicts remain the same.

The contributions of behavioral empirical research to normative theories can be seen as rather indirect and comparatively small. The discovery of particular weaknesses of individuals which influence their decision making processes in a negative way seems to prove that people are more vulnerable than traditional law – sticking to its *homo economicus* model – assumed. This empirical finding delivers an additional argument in favor of theories that advocate strong state regulation of markets in order to prevent harm to these individuals or the economy. And behavioral empirical research has shed new light on questions crucial for normative theories, like: What is an “informed decision”? What is a “free decision”? It thus gives us the chance to re-open the normative debate on the right version of paternalism on an interdisciplinary level. A closely linked debate – also freshly inspired by recent behavioral research – is the debate about the role and the value of economic models and of which economic models for the law. In both debates empirical behavioral research may provide us with more precise and informed arguments.

⁴⁸ Ryan Bubb and Richard H. Pildes, 127 HARVARD LAW REVIEW 1593, 1598 (2014): They argue that the detection of human deficiencies in decision making (by psychological research) cannot lead to the conclusion (drawn by libertarian paternalists) that freedom of choice must be preserved (by soft regulatory techniques like nudging), but rather to the contrary.

III. Which are the risks of empirical legal and behavioral research?

The enthusiasm that interdisciplinary perspectives revealing interesting new research questions might cause in legal scholars might blind us for the limitation and risks of legal-empirical research, which will, therefore, be briefly mentioned in this chapter.

1. A lot of behavioral empirical research with respect to human decision making was either conducted from a psychological or an economic perspective and did not involve legal rules as a factor of the analysis. Reference to such empirical research is fraught with a lot of dangers for legal scholars. It must first be established if and why such studies might allow conclusions for the law, at all.

2. The limits of possible conclusions to be drawn from psychological studies and experiments for the “law in action” are still critical in cases of empirical studies which focus on the role of legal rules in the decision making process. Apart from perhaps field studies, empirical studies most often create highly artificial settings for the individuals under examination. It is, therefore, difficult or impossible to argue that the results of these studies would be the same in real life confrontation of individuals with the relevant decisional problem or the relevant legal rule(s).

3. Another risk of empirical-legal research is called “scientism”:⁴⁹ The importance and difficulty of a clear distinction of the descriptive and the prescriptive part of behavioral legal research was already discussed in the previous chapter. The risk of scientism is greater for those forms of legal-empirical research which start with a strong normative theory. The value of the empirical methods, especially quantitative methods, might be overestimated. Empirical results might be misinterpreted as scientific value-neutral proof of the initial normative assumptions. The self-referentiality of the conception of the empirical study might have been overlooked: The study was designed already under influence of the normative theory. Emergent analytics and under-theorized forms of empirical research evade this risk.⁵⁰

4. Another risk of the so-called “law and ...” research is “reductionism”:⁵¹ Law might be reduced to only one dimension, the one represented in the “and”-discipline, for instance to its psychological or to its economic dimension. Behavioral law and economics was particularly criticized for focusing only on individual psychological processes and the law’s influence on individual choice while excluding the institutional, social and cultural dimensions of governance problems. Thus, for instance culturally shaped preconceptions (e.g. from the US) might distort the results of behavioral studies completely unnoticed by the researchers themselves.⁵² This reductionism can be avoided by integrating behavioral

⁴⁹ Victoria Nourse and Gregory Shaffer, 95 *CORNELL LAW REVIEW* 61, 117 (2009).

⁵⁰ Victoria Nourse and Gregory Shaffer, 95 *CORNELL LAW REVIEW* 61, 119 et seq. (2009).

⁵¹ Victoria Nourse and Gregory Shaffer, 95 *CORNELL LAW REVIEW* 61, 116 (2009).

⁵² Sabine Frerichs, 34 *JOURNAL OF CONSUMER POLICY* 289 (2011).

legal research in a broader legal-empirical governance analysis (LEGA) as the one described in the first chapter of this article. In addition, psychological studies conducted by behavioral legal researchers can attempt to include institutional, social, cultural and other factors as variables in their examination of human decision making.

5. As a last problematic point the considerable costs and burdens of empirical research must be mentioned. Bearing in mind that behavioral research can only make limited contributions to governance problems and is not an over-all miracle cure for all legal problems, a thorough cost-benefit analysis, which works with realistic predictions of the possible scientific or knowledge gains, must be conducted before engaging into time and money consuming empirical studies. Lawyers in practice as well as legal academics routinely work with their every-day experience of human behavior as one of their most important tools. Costly empirical studies should, if possible, avoid replicating in their results what is already a well-established part of such every-day knowledge and experience.

IV. Which are the relevant research questions in the area of private law as opposed to public law?

Behavioral research, in private as well as in public law, may follow two different paths: It can focus on the decision making of judges, administrative officers, and the members of legislative bodies or it can focus on the decision making of citizens. I will deal only with the last possibility here, the decisions of citizens, and ask how legislation and court decisions can best accommodate the empirical findings of psychology about the characteristics of human decision making in private law.

The classical decisions of citizens analyzed by behavioral law and economics authors are decisions concerning the citizens' health, their financial situation and sustainable consumption (for instance energy economy). The relationship under examination is the one between the state and the citizen: Citizens are about to make "*wrong*" decisions: i.e. decisions which they will regret later on and/or which do not reflect what they want and/or which cause personal or financial harm to them. How can governmental action prevent citizens from acting against their own interests? This is a classical situation of paternalism. The spectrum of possible state action under examination ranges from information policy and various (other) "nudges" to outright prohibitions and should also take into account the institutional and contextual perspective of other organizations, people, or social norms potentially influencing citizens' decisions.

It is important to note at this point that "wrong" decisions in that sense are not only caused by biases and other decisional inadequacies – rooted in the *citizens' brains* – but also by

the *market situation* (e.g. asymmetric lack of information) or by the *other party* of a contract who abuses its dominant position to the detriment of the weaker party.⁵³ These aspects of information and power asymmetry with respect to another (stronger) contract party, which constitute an *external* threat to the quality of decision making of a citizen, are often neglected in behavioral law and economics analysis. The reduction of the analysis to the two pole relationship between the regulating state and the citizen is certainly justified when dealing with problems of public law. But it is distorting for the analysis of private law relationships in which at least three agents are relevant: the regulating state and the two citizens.

In addition, as mentioned in chapter III supra, the behavioral analysis of private law relationships should not be limited to “nudges” as *instruments of regulation*,⁵⁴ nor to legal rules aiming at influencing the decision making of individual parties while exercising their private autonomy. Where information policies and information duties as well as various (other) nudges do not work, *mandatory rules* and prohibitions must be considered. Where influencing individual behavior and private enforcement of individual rights do not work, *other institutional solutions* must be taken into account, like collective enforcement by interest (stakeholder) organizations or public enforcement. These collective and public activities might in their turn influence individual decisions to enter into a contractual relationship or to engage in some other commercial activity.

1. One group of research questions deals with the *normative models* of citizens widely used in private law: like the model of the informed average consumer or of the ordinary merchant. These models are, for example, employed to determine the objective meaning of (legally relevant) declarations (like for instance a contract offer), to determine the standard of care required by law, to determine when a commercial practice is deceptive, or to determine which kind of information has to be provided in which form to weaker parties. Where empirical behavioral research seems to provide evidence that people (consumers as well as businesses, though probably to a different degree) are easier mistaken, or are acting in a less controlled and less rational manner in certain situations than assumed before, a corresponding correction of the normative model could be considered desirable, if there are no other reasons speaking against such a change. The areas of unfair commercial practices regulation and competition (anti-trust) law are in their normative approaches largely depending on such normative models of market actors and, therefore, offer ample space for behavioral legal research. The same applies to consumer law.

⁵³ Wolfgang Kerber, *Soft Paternalismus und Verbraucherpolitik* 14 (2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497426.

⁵⁴ Ryan Bubba and Richard H. Pildes, 127 *HARVARD LAW REVIEW* 1593, 1632, 1658, 1673 (2014): for the particular cases of retirement savings, consumer credit and fuel economy regulation.

2. The currently most examined and most popular research question in private law is: How can state regulation help citizens or weaker parties to exercise their private autonomy more in their own interest, thus overcoming dangers that are created by themselves (brain functioning), by the market situation (lack of information) or by the other market actors (businesses). The potential of reducing, framing, anchoring, standardizing information and warnings, of using new interactive electronic information schemes including short videos, of creating safe standardized default contracts (and the like) is doubtlessly great. Research in this area should also include the questions of how the notions of “freedom of decision” and “knowledge” are constructed by the law and whether these legal constructs are in reasonable proximity of the decisional reality of people. Is the role of knowledge and information overestimated by the law? In situations of time-constraint, accepting the ignorance and not taking the time to gather information may be the only way to a “good” (“environmentally rational”) decision. In these situations, but presumptively also in many others, the factors decisive for our “free” decisions to enter into a contract or not are shaped not so much by rationality and knowledge, but rather by heuristics, trust, habit, overall impressions, culture etc. *Ben-Shahar* and *Schneider* argue in their article on the failure of mandated disclosure that information duties in favor of consumers are completely overestimated and do not help or protect them at all.⁵⁵ How can legal regulation aiming at improving “free” decision making adapt to this type of empirical findings?

3. In contract law, informing and nudging a weaker party that the regulator wants to protect from making “wrong” decisions (see supra) in the frame of exercise of private autonomy is only one aspect of the situation. Firstly, there are two human actors to be influenced – or “nudged” – in their behavior: But yet nobody seems to analyze the question of how to *nudge enterprises* into behaving more fairly and regarding with respect to the weaker party. Secondly, one danger for weaker contract parties is not their behavioral weakness but *stronger parties* who try to abuse their superior knowledge and power. The ability of autonomy based soft instruments (information, nudges) to avert (stronger party) risks of that kind from weaker parties easily reaches its limits. What if neither sophisticated warnings nor defaults (probably aiming at influencing the behavior on both sides) are able to prevent a “bad” (grossly imbalanced or unfair) contract? The classical (potential) examples of such situations are: unfair clauses in standard contract terms (“boilerplate”),⁵⁶ irresponsible lending, usury loans, violations of the principle of good faith and fair dealing, and unconscionability.

The answer is simple and already well known to European legislators (not entirely also to the US legislators): Here we need mandatory legislation which prohibits and eliminates

⁵⁵ Omri Ben-Shahar and Carl E. Schneider, 159 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 647 (2011).

⁵⁶ See Eva M. Tscherner, *Can behavioral research advance mandatory law, information duties, standard terms and withdrawal rights?* 1 AUSTRIAN LAW JOURNAL 150 et seq. (2014) with further references.

grossly unfair contractual relations and which is enforced by interest organizations or state authorities, not only the individual weaker party herself. The research question for behavioral legal analysis in that respect is: Where are the behavioral limits of autonomy preserving soft instruments of regulation which are as cleverly designed as possible (by framing, salience etc) in accordance with the latest “behavioral insights”? Considering the empirical results about their in/effectiveness, the normative question of when to resort to more intrusive forms of regulation has to be posed. This goes to the middle of the paternalism debate, which will not be settled by some kind of empirical evidence or the other, as I already argued in chapter II supra. But empirical behavioral research can provide us with some additional more precise and informed arguments in the debate.

V. Conclusion

A number of pitfalls and shortcomings of “behavioral legal research” can be avoided by placing it into the broader concept of “legal-empirical governance analysis” (LEGA) and by distinguishing it from a merely behavioral economic analysis of law. Behavioral legal research necessarily contains descriptive and normative elements which should be kept as transparent and as much apart as possible. Current behavioral empirical findings do not necessitate a particular normative theory, though they seem to support a stronger regulatory approach more than neo-liberal concepts. My deliberations lead me to an overall positive evaluation of the chances and expected gains of this type of research. If placed in the broader concept of LEGA and combined with a realistic awareness of all its risks and limitations, it is likely to provide new and helpful insights for scholars, judges and legislators in the field of private law.