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The Right to Be Nudged?

Rethinking Social and Economic Rights in the Light of Behavioral Economics

Varun Gauri

WORLD BANK GROUP
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Strategy and Operations Team
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Abstract

Social and economic and rights are incorporated into many national constitutions, and courts in many countries are effectively and legitimately enforcing them. However, the large majority of rights rulings addresses the cost of goods and services and focuses exclusively on access. There is now strong evidence that internal, psychological factors limit the enjoyment of social and economic rights, and that nudges and other behavioral insights can increase welfare and support rights fulfillment. These facts suggest there exists a right to be nudged, or at least a duty to use behavioral insights in the provision of social and economic goods and services. The evidence suggests that a shift in choice architecture that shifts the burden of proof to the state in social and economic rights cases, the simplification of procedures for program eligibility and signup, the establishment of agencies to balance private advertising, the promotion of medications adherence, efforts to change student beliefs about learning, and opt-out savings programs are particularly promising.

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Rethinking Social and Economic Rights in the Light of Behavioral Economics[1]

Varun Gauri

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The Right to Be Nudged?

Rethinking Social and Economic Rights in the Light of Behavioral Economics

Many countries over the past three decades have begun to view social and economic rights (SE rights) not merely as legitimate aspirations, the ultimate targets of current policies, but as concrete and enforceable standards against which empowered courts can review and change policy. Courts have been active in several domains of SE rights. They have, for example, required the provision of midday meals in all public schools in India, the development of more rational and inclusive health insurance in Colombia, coordination on the part of municipalities and other agencies to clean up the Riachuelo in Argentina, the eligibility of non-nationals to social grants in South Africa, and the near tripling of educational expenditures in Indonesia (Bergallo, 2011; Langford, Cousins, Dugard, & Madlingozi, 2013; Shankar & Mehta, 2008; Yamin, Parra-Vera & Gianella, 2011; Susanti 2008).

In all these cases, the courts have focused on increasing access to social and economic goods, including food, clean water, health care, income, and schools. Providing access is, of course, important for the enjoyment and fulfillment of rights. But often, it is not enough. The purpose of the right to education, for instance, is not to get "butts in seats," or increase enrollment, but to produce learning and human capital (Pritchett, 2009). A secure right to education entails not only a place in a school but an environment and a set of processes and social interactions supportive of student learning (World Bank, 2018). Often, students face subtle or less evident barriers that prevent them from taking advantage of those processes and interactions. These include possessing or acquiring the documentation and filling out the paperwork necessary to enroll, channeling attention on lessons when in attendance, feeling motivated to learn and doing homework, and filtering out and refraining from socially disruptive behavior.

Similarly, access to health insurance is not an end in itself. Rather, it mitigates the impact of one obstacle, the cost of health goods and services, in the chain of events that increase life expectancy and reduce morbidity. To enjoy the right to health, an individual must typically be able to recognize the need for health care, seek treatment and/or preventive services when necessary, obtain high quality care and services, absorb medical information, and comply with clinical protocols. There are also "social determinants," including status inequality, that affect the enjoyment of the right to health (Wolff, 2012). These other events, which take place in time both prior to and after obtaining access, are crucial for enjoying the rights to education and health but have almost entirely escaped the attention of the courts that have issued SE rights rulings.

A court ruling that mandates the zero-cost provision of a social or economic good does not assure utilization of the good. There could be transportation costs associated with obtaining the good. People might lack information about the good's availability or utility in a given context. There are also subtler psychological and social bottlenecks: distrust of vaccines or unfamiliar procedures or providers (Gauri and Khaleghian, 2001); implicit or explicit discrimination on the part of health care providers, teachers, or fellow students (Shepherd, 2011); a shortage in the

cognitive bandwidth necessary to absorb and act on information (Mullainathan and Shafir, 2013); the lack of a belief or aspiration that one's life could be any different (Tanguy, Stefan, Orkin, & Alemayehu Seyoum, 2014); a mental model of the world in which certain health or education services are believed to be dangerous or proscribed (Datta & Mullainathan, 2014); and social norms militating against a new behavior (Jacoby & Mansuri, 2011; LIMRA, 2016; Nguyen et al., 2017; Sunstein, 1996). Again, in many contexts these are important bottlenecks to the secure attachment to SE rights; but they are almost never the targets of judicial rulings on SE rights.

It seems that the background model of behavior for most courts issuing SE rights rulings has been a version of *homo economicus*. To secure education rights, courts have typically mandated lowering the cost of a good or service (e.g., providing free schooling). Courts have assumed that individuals then will calculate the positive utility of the good and consume it (e.g., they attend school and learn when there).

Most right to health cases in countries such as Colombia, Brazil, and Costa Rica are claims for free or low-cost health products and services (e.g., free cancer drugs) (Gloppen & Roseman, 2011). Here the typical assumption is that patients will get the pharmaceuticals and then take them regularly, in the prescribed doses, and return to the provider if side effects or other complications arise. That is what a rational consumer would do. Right to information rulings, which constitute a significant share of health rights cases in many countries, including Colombia, similarly draw on a *homo economicus* model. If provided information, individuals will understand, absorb, and act on it.

But more than three decades of research in behavioral economics, cognitive psychology, social psychology, sociology and related disciplines has shown that individual behavior is more complex. Most decision making is best modeled not as the calculation and maximization of utility but as the application of a variety of heuristics and mental models to social as well as individual preferences (Kahneman, 2011; Thaler 2015; Ariely, 2010; World Bank 2014). Recognizing this, governments around the world have established behavioral science units ("nudge units") to improve policy on the basis of more scientific models of human decision making (Thaler & Sunstein, 2009; Halpern, 2015; Afif et al 2018). Court rulings on SE rights, however, have lagged in their use of behaviorally informed policy making.

This paper advances an argument that behavioral economics and related disciplines: a) provide new targets for social and economic rights; b) offer new remedies for courts, especially with regard to assuring compliance with SE rights rulings; c) have implications for international human rights doctrine; and d) may entail a "right to be nudged."

New targets for social and economic rights claims

Perhaps the most robust finding in applied behavioral economics can be expressed succinctly: decision making is psychologically costly; as a result, individuals often make choices that do not serve their own interests. Individuals exhibit significant inertia in their decision making even

when presented with information that a different choice would have higher expected value. The selection of the default option, which corresponds to an individual's election when she does not make an active choice, is therefore crucial. Automatically enrolling individuals as organ donors when they do not make a choice to donate or not donate, while leaving them the freedom to opt out, significantly increased the pool of eligible organ donors in Europe (Johnson & Goldstein, 2003). Similarly, most U.S. firms now automatically enroll new employees in retirement savings plans (Thaler & Benartzi, 2004), a policy that increases net retirement savings much more than subsidies to save, and at significantly lower cost (Chetty, Friedman, Leth-Petersen, Nielsen & Olsen, 2014). Policy design choices like these, regarding the "choice architecture" individuals face, have also been used to increase savings as salaries increase ("auto-escalation"), increasing donations to charity, food consumption choices, and the medical tests clinicians routinely offer (Downs, Loewenstein & Wisdom, 2009; Goswami & Urminsky, 2016;Taylor & Buttenheim, 2013; VanDerhei & Lucas, 2010). The default option is particularly important for poor individuals because the position of financial scarcity and preoccupation reduces fluid intelligence and weakens self-control, leaving even less "bandwidth" available for decision making (Mani, Mullainathan, & Shafir, 2013). Although courts have occasionally considered default entitlements to social and economic rights, most government programs worldwide place the burden of proof for establishing eligibility on individuals, rather requiring governments to demonstrate ineligibility.

In Colombia, women and newborn children receive constitutional protections. Individuals can file human rights protections (*tutelas*) with any judge. In one case, the Constitutional Court of Colombia ruled that employers owe pregnant mothers and lactating women special protections. In another, it held that terminating employment during pregnancy or within three months of birth creates a presumption of gender discrimination and places the burden of proof on the employer once a tutela is filed (Gostin et al 2017). This changes the default entitlement, thereby clarifying the employment and health rights of Colombians, and shifts the burden of proof to the party that possesses more "bandwidth" to consider these issues.

In a case in the Supreme Court of Argentina, involving the health and habitability needs of a mother and child in Buenos Aires, a judge argued that in circumstances of "strict scrutiny" and core needs, there is a presumption that policies are unreasonable and unconstitutional, and that "the burden of proof is reversed and the State must demonstrate that it took into account the order of the priorities of the national Constitution and that resources were allocated according to that ordering." (Botero and Brinks, forthcoming) Shifting the burden of proof in social and economic rights cases (both the burden to produce evidence and the burden to persuade) shifts the decision architecture in litigation, making it easier for disadvantaged litigants. It is consistent with what is known regarding the relative cognitive scarcity between litigants and the state or corporate defendants.

Relatedly, simplifying enrollment procedures for government cash transfer and anti-poverty programs could help poor individuals substantially. Typically, media cover and political incentives lead governments to be more vigilant regarding errors of inclusion in these programs than errors of exclusion (Lindert and Vincensini, 2010). As a result, paperwork and bureaucratic

procedures for program signup are often high, preventing many eligible individuals from taking advantage of programs from which they could benefit. Simplifying signup procedures could improve the cost-effectiveness and reach of nutrition, cash transfer, and other anti-poverty programs (Sunstein, 2013; Devoto, Duflo, Dupas, Parienté & Pons, 2012; Fujiwara, 2015). The psychological and cognitive barriers to program sign-up have the same effect as high financial cost or limited geographic access – they limit access for needy and eligible individuals. As a result, it would be reasonable for courts to examine the extent to which constitutional SE rights require simplification.

In many consumer markets, it is in the interest of private firms to make decision making complex for consumers. Confusion and complexity make it hard to make new decisions, and to resist the temptation of, say, a payday loan or junk food (Gini et al 2014). Many governments now subject food labels, borrowing costs, pharmaceutical benefits and risks, and tobacco and alcohol consumption to disclosure requirements; but there is a market equilibrium that leads food and beverage producers, drug companies, and financial firms to make those disclosure requirements unnecessarily hard to understand (Akerlof & Shiller, 2015). SE rights could improve welfare by developing and requiring benchmarks for disclosure simplification on the part of private firms.

Many if not most SE rights cases around the world involve access to pharmaceuticals and other health care services and treatments (Yamin & Gloppen, 2011; Gauri & Brinks, 2008). To our knowledge, courts reviewing SE rights claims have not considered the question of treatment adherence. For instance, in South Africa, the TAC case (Langford et al., 2013) required the government to provide nevirapine, a drug that lowers the risk of mother-to-child transmission of HIV. Studies in South Africa have found non-adherence to nevirapine, a potentially life-saving drug for infants, in the range of 20-25% among pregnant women who had been offered the free drug (Ngandu, 2014; Peltzar, Mlambo, Phaswana, Mafuya, & Ladzani, 2010). There exist a number of interventions for improving drug adherence, including text reminders, small incentives, monitoring and feedback (including text reminders), and reduced dosing (Linnemayr, Stecher, & Mukasa, 2017). These interventions could significantly increase the fulfillment of health rights at a modest marginal cost, relative to the prices of the pharmaceuticals courts have ordered government and health insurers to provide. They could play an important role in fulfilling the right to health.

The Supreme Court of India has interpreted the Constitution to include a right to education and issued rulings to spur the government to implement policies to improve educational quality (Shankar & Mehta, 2008). Many of these cases involve the availability of school places or the assignment of teachers. The Court has occasionally required education of a given quality (in one case, the court simply mandated that students must pass the middle standard exam within 14 years (Shankar and Mehta, 2008), but for the most part the Court has focused almost exclusively on inputs rather than the psychological and social barriers to learning. A number of cases have supported affirmative action in schools and universities, but there are concerns that students at the intersection of marginalized groups (e.g., female and low caste) may not benefit from these programs (Cassan, 2019). Similarly, the Indonesian Constitutional Court issued a series of three rulings requiring the government to comply with minimal expenditures for education that are

written into the constitution (Susanti, 2008), but those rulings had little impact on primary and secondary school quality and student achievement (World Bank, 2013).

The reasons disadvantaged students fare worse in schools involve a complex array of factors and certainly include issues of access, infrastructure, and trained and motivated teachers. In addition, there are interventions, rooted in social psychology and behavioral science, that could improve educational outcomes at relatively low cost. These include automatically enrolling parents in high-frequency, actionable information on their child's school achievement (Bergman, Lasky-Fink, & Rogers, 2017). They also involve the beliefs and mental models students bring to school. Including the idea of reframing ability and intelligence as malleable, rather than fixed, increased student test scores in Peru significantly, yielding the equivalent of four months of additional learning at a cost of $0.20 per student (Outes, Sanchez, & Vakis, 2017). There are also proven techniques for overcoming stigma. Helping minority students in the United States resist their own self-stereotyping improved grades, with the result that they were more likely to graduate from college, relative to students in a control group, years later (Yeager, Purdie, Vaughns, Hooper & Cohen, 2017).

Public health is another area where behavioral interventions can address SE rights. The Indian Supreme Court has issued rulings limiting the availability of alcohol and restricting space for the consumption of tobacco (Shankar & Mehta, 2008; Yamin & Gloppen, 2011). One review found that "the large evidence base from Stage II randomized clinical trials [using cognitive behavioral therapy] indicates a modest effect size with evidence of relatively durable effects, but limited diffusion in clinical practice, as is the case for most empirically validated approaches for mental health and addictive disorders" (Carroll & Kiluk, 2017). There is suggestive evidence that group therapy may be also useful in smoking cessation (Stead, Carroll & Lancaster, 2017).

The Supreme Courts of Argentina and India have been involved in a number of cases regarding pollution, factory emissions, cookstove conversion, and environmental health (Bergallo, 2011; Mehta & Shankar, 2008). Again, insights from behavioral sciences and behavioral economics might contribute to remedies in these cases. Benchmarking consumers' energy and water consumption to their neighbors can sustainably lower energy and water use (Allcott & Rogers, 2014; Datta et al., 2015; Brick, De Martino & Visser, 2017). Behavioral interventions can be useful for enhancing the uptake of clean cooking stoves (Rosenthal et al., 2017).

On nutrition, the Supreme Court of India issued a landmark ruling on the right to food, converting eight food distribution schemes into constitutional requirements and setting up a Commission to monitor their implementation and expansion (Parmar & Wahi, 2011). Effective behavioral interventions to increase birthweight and reduce malnutrition include the use of personal coaching for breastfeeding promotion (Leite, Puccini, Atalah, Alves Da Cunha, & Machado), mass media campaigns in Uganda (Gupta, Katende & Bessinger, 2004), peer groups to encourage breast feeding in Nigeria (Flax, et al., 2017), triggering social norms with the use of Community Led Total Sanitation in India and Indonesia (Cameron, Olivia & Shah, 2019; Patil et al., 2014), making chlorine dispensers salient (Kremer, Miguel, Mullainathan, Null, & Zwane, 2011), coaching for early childhood stimulation in Jamaica (Gertler et al, 2014), and micro-incentives for vaccine completion in India (Banerjee, Duflo, Glennerster & Kothari, 2010).

In sum, there is now convincing evidence that interventions rooted in behavioral economics and behavioral science could play a significant role in SE rights fulfillment. Yet courts have, for the part, not referred to or explored these interventions in their rulings.

Compliance

Courts have limited enforcement powers in constitutional rulings against the state. As a result, the problem of non-compliance in SE rights rulings looms large (Langford, Rodríguez-Garavito & Rossi, 2017). The principal mechanisms for ensuring compliance with human rights rulings are publicity and transparency (Chitalkar & Gauri, 2017; Gauri Staton Vargas, 2015). Although many aspects of publicity are outside the control of judges, others are not. In Costa Rica, clearly written orders were 8% more likely to be complied with than vaguely written orders (Gauri Staton Vargas, 2015). The Indian Supreme Court, most notably in the right to food and forest protections streams of cases, has appointed commissioners to oversee compliance with its orders; but even in that case, media attention and publicity have played a significant role in generating compliance (Chitalkar & Gauri, 2017). The SCI has at times acknowledged this challenge and required state media to broadcast and disseminate its rulings (Parmar & Wahi, 2011). The Colombian Constitutional Court has similarly held public hearings, directed investigations, developed indicators, and compelled reporting, intervening over several years, to support compliance with Sentencia T-075 (2004), which called the government's efforts to address the crises of internally displaced persons an "unconstitutional state of affairs." South African courts, in cases involving housing, water, and other urban services, have engaged the state in a meaningful dialogue on the terms of appropriate policy by requiring the development of "reasonable" policies and reporting back (Dugard, 2013; Langford, 2013).

Insights from behavioral economics and the behavioral sciences more broadly suggest novel approaches when courts aim to strengthen compliance with SE rights rulings. First, it is possible to make the implicit targets of SE rights more explicit. When disadvantage takes the form of hidden, psychic constraints, such as low and unrealistic aspirations, stereotypes, implicit discrimination, or trauma, those phenomena might be directly targeted and monitored in SE rights rulings. For instance, although IDPs in Colombia who benefited from Sentencia T-025 were struggling with trauma, disempowerment, and discrimination, and although the court implicitly addressed those problems by requiring the equitable provision of health, education, and housing, the 174 indicators that the Court's monitoring commission adopted, and assessed through 10,433 surveys, included no direct measures of discrimination, stigma, aspirations, or trauma (Rodriguez-Garavito & Rodríguez-Franco, 2015). Behavioral scientists are now able to measure psychological bottlenecks to rights fulfillment directly. Courts could draw the attention of policy makers to them by adopting them as the intended outcomes of SE rights rulings.

Second, to enhance compliance, courts could require the state to report progress towards rights fulfillment in more salient ways – in media advertisements or social media, for instance, to raise the public salience of SE rights fulfillment. Visually salient displays (e.g., a clock indicating how many days of water remain during a drought) can capture the public consciousness and spur enforcement (World Bank, 2015).

International human rights doctrine

General Comment 14 of the UN Economic and Social Council, Committee on Economic, Social, and Cultural rights is a widely cited standard for assessing the fulfillment, not only of the "right to the highest attainable standard of health," but of ESC rights more generally.[2] The Comment provides four benchmarks for assessing whether the right to health has been fulfilled: Availability, Accessibility, Acceptability, and Quality. (The framework is sometimes referred to as AAAQ.) Fist, "functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party." These include public health inputs, such as potable drinking water and sanitation, as well as health care services. Second, these goods and services must be accessible to all, especially the most vulnerable and marginalized sections, which entails physical and safe access, economic affordability, and knowledge regarding health services issues. Third, health facilities, goods, and services "must be respectful of medical ethics and culturally appropriate." Finally, they must be scientifically and medically appropriate and of good quality.

These standards for the fulfillment of health rights do not address internalities – the intra-psychic barriers to decision making and behavior, in this case the utilization of health goods and services. As discussed above, when individuals attach a large weight to the present moment, relative to the future, the immediate pain of adhering to a medical regime might outweigh the expected health benefits down the line.[3] Worldwide, between 25%-50% of patients do not take treatment as recommended. In the U.S., treatment non-adherence has been associated with 125,000 deaths, 10% of hospitalizations and costs up to $289 billion annually (Zullig et al., 2018). There exist a set of interventions and policies that have been demonstrated to improve adherence. There appears to be no basis, apart from the mental model of "rational" human behavior or a "reasonable person" used in international human rights law, why those interventions could not be the subject of SE rights claims.

Noncommunicable diseases, such as obesity, cardiovascular disease, diabetes, smoking, and metabolic syndrome, are extremely widespread and important public health concerns worldwide, causing over 70 percent (40 million) of the 56 million global deaths in 2015 (WHO, 2015). Certain forms of nutrition labeling, peer group conversations among adolescents, social incentives and recognition, tailored messaging, and commitment contracts can improve diet choices (Bryan, Karlan & Nelson, 2010; Gilliland et al., 2015; Story, Lytle, Birnbaum & Perry, 2002; Variyam, 2008). If those findings turn out to be robust, those too might be the object of SE rights claims.

The background model of the patient or the individual in human rights law has been a person whose dignity and autonomy are deprived by lack of resources or state violations. In reality, human decision making is less deliberative than policy makers and human rights theorists have

[2] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL

[3] Other psychological mechanisms could also explain difficulties of treatment adherence, including limited self-control, attentional deficits, and the failure to develop implementation intentions.

assumed. To the AAAQ framework mentioned above, we propose adding that the fulfillment of health rights requires that health facilities, goods, and services are also "behaviorally informed." The same standard would apply not only to health care goods and services but to SE rights more broadly.

The right to be nudged?

In some ways, the "right to be nudged" is an odd concept. Rights are often conceived as moral or legal claims that, when violated, require a response on the part of a duty holder. Constitutional SE-rights-violation claims usually begin when the individual whose rights are violated, or her representatives, press a claim in court, though sometimes the claims begin in administrative agencies, with courts serving as a backstop. What is odd about a "right to be nudged" is that an individual capable of recognizing the value of a nudge, and then filing and sustaining a claim in a court or administrative agency, likely possesses the wherewithal and the psychological resources to make decisions in her own interest. To take an extreme case, why would a person go to court to demand a text reminder to take her medicine when she could more easily, and at lower cost, set up an alarm reminder on her smart phone?

There are three levels at which this is a curious concept. First, the returns to litigation for a claimant arguing that her right to be nudged has been violated are likely to be negative. As a result, even if courts were to acknowledge the existence of a right to be nudged, one would not expect to see many such claims in court. But the absence of litigation does imply that the right should not exist. For instance, although the right to health entails public health measures and not only health care (indeed, in some ways the right to health may be more efficiently fulfilled through public health measures than through treatment), most litigation regarding the right to health involves pharmaceuticals and health goods and services. There are relatively few cases, worldwide, on sanitation and potable water, vaccination, and air quality. The reason for this is that these cases are extremely complex to litigate, and the returns for any one litigant to press public health claims are low (Brinks and Gauri, 2014). Some public health cases do reach the courts. These are usually taken up by NGOs, who pool resources and make claims on behalf of thousands of litigants/beneficiaries. The same could be true for the right to be nudged.

Second, pressing a claim also requires some sophistication about the self-control, attentional, and other "deficits" that get in the way of one making decisions in one's best interest. Economists argue that most individuals are not "sophisticated" about their internalities (Bryan, Karlan & Nelson, 2010). More educated, older, and higher income individuals are more likely to possess this sophistication. As a result, the kinds of problems most likely to be litigated under a right to be nudged are those involving the concerns of those of the higher socio-economic classes.

Third, rights are usually conceived as demands that a person's autonomy, agency, or dignity be respected. When a person presses a human rights claim, that action provides prima facie evidence that the claimant possesses agency and therefore deserves respect. On the other hand, if a litigant were to claim in court that he lacks the social or psychological resources to make decisions in his own interest, and that the state or some other duty holder owes him those social or psychological resources, he might come close to acknowledging his own lack of autonomy.

And unlike cases involving access to services or resources, or protection against rights violations, he might have to argue that the lack of autonomy is not an accident of circumstances, the result of an accident of the social class into which he was born, for instance, but is intrinsic. Although psychologists have contended for some time that automatic, only partly conscious thinking guides much of human behavior (Stanovich and West, 2000; Kahneman, 2011), human beings as well as legal systems have a stake in the assumption of autonomy. For these reasons, it could be awkward, perhaps embarrassing or even demeaning, for individuals to claim the right to be nudged.

These considerations suggest that it may be more useful to conceptualize the right to be nudged as duty on the part of the state to implement policies that address internalities than as a "subjective right" to be granted or respected when individuals claim it. Courts on their own could use nudges as instruments to fulfill SE rights in their rulings. Line ministries, cognizant of the relevance of the rights, could incorporate them in policy design, perhaps as an element in human rights-based-approaches to development. NGOs could press the right to be nudged on behalf of classes of litigants, such as disadvantaged individuals for whom program sign-up unnecessarily taxes cognitive bandwidth.

What duties would fall to the state under the right to be nudged? First, there would be an obligation to implement *effective* nudges. There is value in in subjecting any government policy to the scrutiny of cost-benefit analysis (Sunstein, 2018). Assessing the effectiveness of behaviorally informed policies is also important because they are new and sometimes controversial approaches, they sometimes trade losses in autonomy against gains in welfare, and they can work in one context but not another precisely because the main finding of behavioral economics is that decision making is contextual. These are not unusual concerns and are to varying degrees concerns with policy making in general. There now exists a significant body of evidence demonstrating that behaviorally informed policies can improve welfare at relatively low cost (World Bank, 2015). But the government's duty to implement nudges would involve ongoing assessment of their effectiveness, and adaptation to lessons learned from monitoring and evaluation.

Second, there would be a duty to disclose and deliberate upon behaviorally informed policy making. All policy making is subject to the democratic burdens of transparency and accountability. Policies implemented under the right to be nudged would be no different. There is, moreover, evidence that disclosing nudges does not undermine their effectiveness (Loewenstein & Chater, 2017).

More practically, what does this entail? In the countries where SE rights are constitutionally delineated and enforced by courts, I believe that, based on the existing evidence, the following dimensions of the right to be nudged are worthy of consideration. First, in cases involving eligibility for benefits from government programs, it is worth examining the circumstances under which the burden to provide evidence should shift to the state and other targets of SE rights litigation. Especially for poor individuals, the time, informational, and attentional costs entailed in proving eligibility are high and arguably violate SE rights in some circumstances. Second, in some jurisdictions, there might be a constitutional duty on the part of governments and other

service providers to make program signup as simple as possible. This could also involve duties to broadcast and advertise information regarding deadlines and procedures. Third, governments might have a duty to establish agencies that effectively regulate the disclosure of information regarding nutrition, as well as information regarding financial products for consumers, borrowers, and investors. Private firms face a widespread and predictable incentive to make service contracts and consumer information complex; as a result, government might face a duty to constrain firm behavior in those sectors. Fourth, governments might be subject to a duty to implement and study programs involving automatic, opt-out enrollment for savings programs, medications adherence, and learning beliefs – the domains of behaviorally informed policy making in which substantial evidence has accumulated (Beshears, Choi, Laibson & Madrian, 2008; Lester, Mott & Chui, 2016; Madrian & Shea, 2001).

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