Nudging Financial Decisions: Protecting Weaker Parties while Promoting Autonomy

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INTRODUCTION

Discussing new challenges to consumer and commercial law in the decade after the global financial crisis—as was the general aim of the 19th Biennial Meeting of the International Academy of Commercial and Consumer Law—provokes us to take a clear stand in the debate on efficacious protection when making financial decisions on the one hand and the value of party autonomy on the other hand. People are not always capable of making financial decisions that are in their own best interest, as is evidenced by insights from

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behavioral science.[1] Does this mean that an individual's will should sometimes be disregarded when it comes to financial decisions? Or must that person's will always prevail?

Finding the right balance between efficacious protection and respect for autonomy is at the core of consumer law and nowadays also an important issue in the field of commercial law due to the increase of attention for the protection of small businesses.[2] What is sometimes overlooked in the discussion about protection and party autonomy is that these two are brothers in arms. The one cannot do without the other: consumer protection aims at empowering weaker parties, something which cannot be done without taking the consumer's will (that is, the consumer's autonomy) into account; and to be able to act autonomously, weaker parties need the conditions to do so—the conditions that protection aims to provide. This is true for all fields in which consumer law and commercial law operate, but especially for financial decisions. Financial decisions not only require a good, albeit hard to obtain, understanding of financial products, but can also have major consequences for individuals, like over-indebtedness. This article argues that striving for more efficacious protection for financial decisions not only *should*, but also *can* simultaneously ensure respect for consumer autonomy.

In order to do this, we discuss the way private law evolves in paragraph 2. We argue that the evolution of private law has to be perceived as a process of waves, not always going in the same direction and often relying on old solutions. Then, in paragraph 3, we provide an overview of the waves that (European) contract law has experienced in the past two centuries. After discussing the challenges that knowledge from behavioral science pose for the regulation of financial decisions in paragraph 4, we will analyze, based upon the overview of the evolution of contract law, how the law should respond to these challenges in paragraph 5. In paragraph 6 we focus on one particularly promising response: the use of nudging strategies. Paragraph 7 concludes.

I. THE EVOLUTION OF PRIVATE LAW: A CONTINUING PROCESS OF WAVES

Debating new challenges to consumer and commercial law asks for bringing the evolution of private law into sharp focus. Only by looking at the bigger picture, does it become possible to get a deeper understanding of the challenges we face and to look for solutions. One of the most common pitfalls when thinking of the evolution of private law is that one imagines a linear progress. The historic development of private law, however, shows that its evolution must be perceived as a process of waves. Continuous back-and-forth motions can be uncovered between the recognition of different legal principles and different legal solutions.[3] Within the civil law tradition, the generation of waves can be explained by four determinants.[4]

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1. *See e.g.* V. Mak & J.J.A. Braspenning, *Errare Humanum Est. Financial Literacy in European Consumer Credit Law*, 35 J. OF CONSUMER POL'Y 321-325 (2012).

2. M.H. Hesselink, *SME's in European Contract Law, in* THE FUTURE OF EUROPEAN CONTRACT LAW: ESSAYS IN HONOR OF EWOUD HONDIUS, 358 (K. Boele-Woelki & F.W. Grosheid eds., 2007); H.N. SCHELHAAS, COMMERCIELE CONTRACTANTEN – CONSISTENTER DIFFERENTIEREN? 27-30 (2018).

3. A. PITLO, HET SYSTEEM VAN HET NEDERLANDSE PRIVAATRECHT, 56 (1995); A.L.M. Kierse, R. Renting & M.B.M. Loos, *Introduction: the Waves of Contractual and Tortuous Liability, in* WAVES IN CONTRACT AND LIABILITY LAW IN THREE DECADES OF IUS COMMUNE, 2 (A.L.M. Keirse & M.BM. Loos eds., 2018,).

4. *Id.* at 2-4.

To begin, extra-legal motives often play a major role in legislation. Legislation is hardly ever drafted solely with a view on substantively better laws, which is something that obstructs a linear progression.[5] For example, the great codifications of the late eighteenth and nineteenth centuries in Western Europe primarily aimed at reaching more unified states, not better laws, per se.[6]

Second, qua substances, codified law is — as a rule— more or less a continuation of the law as it has been developed in case law and legal literature.[7] Therefore, codifications tend to have a conservative effect on the law. As they pin down the doctrines that have been achieved by case law and legal scholarship, they obstruct—at least, to some extent—law's natural development through case law and legal scholarship. This also holds true for contemporary EU legislation. For example, the current European Product Liability Directive is criticized for slowing down the development of the law in the field of product liability.[8]

Furthermore, the law often needs external stimuli to achieve the right effect. This is independent of the appreciation of the content of the law. It takes time for the law to settle down. It takes awareness and social acceptance of the new solution brought by legislation. Think of the unfair standard terms regulations. It took a very long time before the standard of the new rules was lived up to and even nowadays these rules are still being breached—in practice companies still use invalid standard terms. On the one hand, practice tends to react to new law, but not always in the desired way. On the other hand, lawmakers often draft changes of the law under the silent presumption of unchanged circumstances. But circumstances change all the time, especially when there is new regulation. After all, regulations know their own dynamics and they change the context. Therefore, new laws have side effects and disturb a linear development.

Finally, another truism should be taken into account: change often meets resistance. Take, for instance, the body of consumer law that emerged under EU legislation contributing to consumer protection in the European context. Almost every change to this protection, either towards paternalism or freedom of contract, is criticized for being either too paternalistic or not enough.[9] This dynamic of action and reaction is characteristic for the evolution of private law and explains its evolution in waves.

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5. P.A.J. VAN DEN BERG, CODIFICATIE EN STAATSVORMING: DE POLITIEKE EN POLITIEK-THEORETISCHE ACHTERGRONDEN VAN DE CODIFICATIE VAN HET PRIVAATRECHT IN PRUISEN, DE DONAUMONARCHIE, FRANKRIJK EN NEDERLAND, 1450-1811 (1996); P.A.J. van den Berg, *De Paradox Van Codificatie: Over De Gevolgen Van Codificatie In Europa Voor De Rechtsvinding*, 163 RECHTSGELEERD MAGAZIJN THEMIS 195 (2002).

6. *See generally* P.A.J. VAN DEN BERG, THE POLITICS OF EUROPEAN CODIFICATION. A HISTORY OF THE UNIFICATION OF LAW IN FRANCE, PRUSSIA, THE AUSTRIAN MONARCHY AND THE NETHERLANDS (2007); P.A.J. van den Berg, *Politics Principles and the Law; Or How a European Codification Will Affect Our Law,* 2 HANSE L. SCH. CAHIER 107 (2002).

7. Think, for instance, of the writings of Pothier that greatly influenced the French *Code Civil.*

8. EUROPEAN PRODUCT LIABILITY: AN ANALYSIS OF THE STATE OF THE ART IN THE ERA OF NEW TECHNOLOGIES 687 (P. Machnikowski ed. 2016).

9. *See e.g.* M.B.M. Loos, *Volledige Harmonisatie Van Het Europese Consumentenrecht: Voorzichtigheid Geboden!*, 2 TIJDSCHRIFT VOOR CONSUMENTENRECHT & HANDELSPRAKTIJKEN 33-36 (2009); H.N. Schelhaas, *Volledige harmonisatie: goed voor de Europese consument?,* 2 NEDERLANDS TIJDSCHRIFT VOOR BURGERLIJK RECHT 35 (2009); J.M. Smits, *Full Harmonization of Consumer Contract Law? A Critique of the Draft Directive on Consumer Rights*, 18 EUR. REV. OF PRIVATE LAW 5 (2010); O.O. Cherednychenko, *Freedom of Contract in the Post-Crisis Era: Quo Vadis?*, 3 EUR. REV. OF CONTRACT LAW 391-392 (2014).

II. THE WAVES OF CONTRACT LAW

One of the main goals of Contract Law is to empower individuals to pursue their own vision of a distinctively human life.[10] To achieve this goal, contract law requires party autonomy to be respected, which is its guiding principle.[11] In the past two centuries, the way contract law has given meaning to this guiding principle has changed. Not in a linear way, but in waves.

Portalis, one of the drafters of Napoléon's *Code Civil,* declared in 1804 that "*en général, les hommes doivent pouvoir traiter librement sur tout ce qui les intéresse.*"[12] Within contract law, this perception of what makes people flourish was expressed through the recognition of freedom of contract, which allows persons to, within certain boundaries, contract with who they want, about what they want, and how they want.[13] Because contract law also allows persons to enforce these freely-made contracts, it granted all individuals an equal opportunity to realize their own life goals. The development that has led to this type of contract law in which the ego—the self—was the point of departure has been interpreted by Maine as "the movement from status to contract."[14]

After the rise of mass production in factories, it turned out that the formal equality that contract law offered through freedom of contract did not truly empower individuals to pursue their own vision of a distinctively human life.[15] The reason for this was that several material inequalities existed between so-called weaker parties—such as consumer, employees, and tenants—and so-called stronger parties—such as major companies. Inequalities like a lack of bargaining power and a lack of information made it hard for weaker parties to enter into contracts that truly served their interests. In order to mitigate this effect of freedom of contract and to restore the inequalities, from the end of the nineteenth century onwards, legislators have been enacting mandatory statutory provisions that protect weaker parties. This process, also referred to as the socialization of contract law, has been interpreted by various scholars as a movement back from contract to status.[16] However, within this context, 'status' does not refer to one's position within society anymore, but to one's relation with a co-contracting party.[17] At first, only natural persons were seen as weaker parties, but nowadays there is also an increase of attention for the protection of small businesses. Some argue that small businesses have—to some extent—the same weaknesses as natural persons and should therefore also be protected, especially when it comes to financial decisions.[18]

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10. J.M. SMITS, ADVANCED INTRODUCTION TO PRIVATE LAW, 115 (2017).

11. W. Flume, *Rechtsgeschäft und Privatautonomie*, *in* HUNDERT JAHRE DEUTSCHES RECHTSLEBEN: FESTSCHRIFT ZUM HUNDERTJÄHRIGEN BESTEHEN DES DEUTSCHEN JURISTENTAGES 1860-1960 135 (E. von Caemmerer, E. Friesenhahn, E. & R. Lange eds., 1960).

12. "*In general, men must be able to deal freely with everything that interests them.*" J.E.M. Portalis, DISCOURS PRELIMINAIRE 177 (1804); *see also* S. STIJNS, VERBINTENISSENRECHT: BOEK 1 37 (2005); P. WERY, 1 DROIT DES OBLIGATIONS 109-110 (2010).

13. Cherednychenko, *supra* note 9.

14. H.S. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 170 (2012).

15. C. Sieburgh, *Western Law of Contract*, *in* EUROPEAN PRIVATE LAW: A HANDBOOK 172 (M. Bussani & F. Werro eds., 2009); C.J.H. Jansen, *Tussen autonomie en solidariteit: contractsvrijheid in de 19e eeuw, in* PRIVAATRECHT TUSSEN AUTONOMIE EN SOLIDARITEIT 133 (M.W. Hesselink, C.E. du Perron & A.F. Salomons eds., 2003).

16. *See e.g.* E.F. Albersworth, *From Contract to Status*, 8 AM. BAR ASS'N J. 17 (1922); M.A. LOTH, DWINGEND EN AANVULLEND RECHT 63-64 (2009).

17. *See* LOTH, *supra* note 16.

18. *See* Hesselink, *supra* note 1; *see* SCHELHAAS, *supra* note 2; *see generally* I.P.M.J. JANSSEN, DE

The mandatory provisions that have been enacted to protect weaker parties initially mainly consisted of prohibitions that limited freedom of contract. For example, several standard terms became subject to annulment in contracts between consumers and businesses. Because these prohibitions set freedom of contract aside in the interest of the individual—and sometimes also in the interests of society at large—this type of protection can be categorized as paternalistic.[19] Later, legislation was enacted which required mandatory provisions aimed at protecting weaker parties through protection mechanisms like information duties, warnings, and cooling-off periods. Nieuwenhuis categorized these protection mechanisms as fraternalistic: they do not restrict freedom of contract, but try to provide weaker parties the opportunity to optimize their decisions.[20] The idea that providing information—or at least providing the opportunity to acquire information—is the best way to optimize the decisions of weaker parties, has been referred to as the "information paradigm."[21]

In sum, the meaning of party autonomy in contract law started with egoism: the idea that to act autonomously one only needs freedom of contract. Contract law then evolved to paternalism: the idea that to act autonomously a restriction of freedom of contract is sometimes necessary. And subsequently it has turned into fraternalism: to act autonomously one needs freedom of contract and the opportunity to optimize decisions.

III. THE INFORMATION PARADIGM AND AUTONOMY GAPS

The wave which we currently occupy is heading towards paternalism again. The financial crisis led to more intrusive regulation of financial products, at least within the EU. These regulations limit freedom of contract and move away from the information paradigm.[22] In itself, this shift away from the information paradigm makes sense when viewed from the perspective of the behavioral science. The information paradigm assumes that weaker parties make rational decisions if they have all relevant information available.[23] However, insights from behavioral science show that, in reality, people only have a bounded rationality because they unconsciously rely on shortcuts or rules of thumb, so-called heuristics, to make judgments and decisions.[24] Using heuristics is generally useful as it avoids cognitive overload, but it also makes people vulnerable—or in contract law terminology: weak— as these heuristics cause systematic errors, or "biases," in individuals' thinking.[25] For instance, the availability heuristic causes people to structurally judge the probability that an event will

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CIVIELRECHTELIJKE ZORGPLICHT VAN DE BELEGGINGSDIENSTVERLENER JEGENS DE NIET-PARTICULIERE CLIENT (2017).

19. G. Dworkin, *Defining Paternalism*, *in* PATERNALISM: THEORY AND PRACTICE 25 (C. Coons & M. Weber eds., 2013).

20. J.H. Nieuwenhuis, *Paternalisme, Fraternalisme, Egoïsme: Een Kleine Catechismus Van Het Contractenrecht*, 35 NEDERLANDS JURISTENBLAD 2256 (2009); A.L.M. Keirse, *Fraternalisme en trouw aan het gegeven woord, in* CONTRACTEREN 105 (2009).

21. A. Oehler & S. Wendt, *Good Consumer Information: The Information Paradigm at its (Dead) End*, 2 J. OF CONSUMER POL'Y, 179 (2017).

22. Cherednychenko, *supra* note 9.

23. A. Oehler & S. Wendt, *supra* note 21; W.H. Van Boom, I. Giesen & A.J. Verheij, *Inleiding: een handboek voor de civiloloog-privatist, in* CAPITA CIVILOLOGIE: HANDBOEK EMPIRIE EN PRIVAATRECHT 1 (2013).

24. H.A. SIMON, MODELS OF MAN, SOCIAL AND RATIONAL: MATHEMATICAL ESSAYS ON RATIONAL HUMAN BEHAVIOR IN A SOCIAL SETING (1957); D. KAHNEMAN, THINKING, FAST AND SLOW (2011).

25. D. KAHNEMAN, *supra* note 24; D. ARIELY, PREDICTABLY IRRATIONAL, (2008); A. Tversky & D. Kahneman, *Judgement under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

occur based on how easy an example of that event comes to their mind. People therefore erroneously ignore other, more relevant, information when assessing the probability of an event.

This discrepancy between how the information paradigm assumes weaker parties act and how people act in reality causes so-called "autonomy gaps."[26] Autonomy gaps occur when the assumed capacity individuals have to act autonomously does not correspond to their actual capacity to do so. Within the Netherlands, over half a million household have problematic debts.[27] Before the financial crises contract law already had mechanisms like information duties to protect consumers against their own lack of understanding when making financial decisions, however, these mechanisms did not actually prevent consumers from making financial decision that were not in their best interest. This is probably due to the fact that, as research has shown, these protection mechanisms assume more cognitive capacities than consumers have in reality.[28] This autonomy gap is not only problematic for individuals, but also for society as a whole. It is problematic for individuals because problematic debt diminishes one's ability to pursue his or her own vision of a distinctively human life. It is problematic for society as a whole because it incurs high costs upon society, for example due to unpaid bills to business and utilities.[29] Moreover, in Europe, there have been liability claims against financial service providers.[30] Not only is the handling of such claims costly, but the end result of such claims is almost always unsatisfactory: the weaker party must bear the cost of poor financial decisions or the liable counterparty. Either way, this decreases spending, which also has a direct effect upon society.[31]

IV. PATERNALISM AND THE INCORPORATION OF INSIGHTS FROM BEHAVIORAL SCIENCE

Insights from behavioral science thus shows that the protection mechanisms of the information paradigm should be improved in order to truly prevent poor financial decisions and to empower individuals to pursue their own vision of a distinctively human life. In that light, the current wave back towards paternalism is understandable but unsatisfactory: it will again lead to the autonomy paradox. The autonomy paradox refers to the idea that in order to achieve autonomy one needs paternalistic protection, which itself limits autonomy.[32] To better understand how this autonomy paradox manifests itself within contract law and how it can be resolved, it is useful to distinguish between two conceptions of freedom: negative

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26. J.H. Anderson, *Vulnerability, Autonomy Gaps and Social Exclusion, in* VULNERABILITY, AUTONOMY, AND APPLIED ETHICS 49 (C. Straehle ed. 2016).

27. W. TIEMEIJER, EIGEN SCHULD? EEN GEDRAGSWETENSCHAPPELIJK PERSPECTIEF OP PROBLEMATISCHE SCHULDEN 19 (2016).

28. J.J.A. BRASPENNING, EEN GEDRAGSWETENSCHAPPELIJK PERSPECTIEF OP DE CONSUMENTENKREDIETOVEREENKOMST (2017); C. DE JAGER, CONSUMENTENBESCHERMING DOOR INFORMATIE? (2018).

29. W. TIEMEIJER, *supra* note 27 at 13.

30. *See for an illustration of the problems related to these claims* B. VAN HATTUM, DE AFWIKKELING VAN ZORGPLICHTCLAIMS: EEN ONDERZOEK NAAR HET ADEQUATER OPLOSSEN VAN AFFAIRES RONDOM RETAIL PRODUCTEN EN DIENSTVERLENING OP DE FINANCIËLE MARKTEN 19-21 (2018).

31. A.L.M. KEIRSE, SCHADEVOORKOMINGSPLICHT. RAPPORTAGE OVER DE MOGELIJKHEDEN VAN DE SCHADEVOORKOMINGSPLICHT VIA HET AANSPRAKELIJKHEIDSRECHT IN HET KADER VAN HET PROGRAMMA BEWUST OMGAAN MET VEILIGHEID 55 (2017).

32. H. BLOKLAND, FREEDOM AND CULTURE IN WESTERN SOCIETY 8 (2016).

freedom and positive freedom.[33] The negative conception of freedom defines freedom as noninterference with individuals' decision making: the greater the sphere in which someone can act without intervention, the greater one's negative freedom. In contrast, the positive conception of freedom defines freedom as taking control over one's life: acting upon self-chosen desires. Negative freedom is thus about how many options are available to someone, while positive freedom is about choosing the right option for the right reason.[34] Initially, negative freedom and positive freedom were perceived as two fundamentally opposing conceptions of freedom, however, now most scholars perceive them as interconnected conceptions of freedom.[35] Although positive freedom is usually seen as a more worthy conception of freedom for a state to promote than negative freedom, it is also seen as the riskier conception. It has been argued that promoting positive freedom easily turns into value-loaded measures that do not respect individuals' negative freedom— the possibility to pursue their own vision of a distinctively human life without interference.[36]

The fraternalistic element in contract law pursues both a positive and negative conception of freedom simultaneously: a positive conception by using protection mechanisms such as information duties and a negative conception by recognizing the principle of freedom of contract. Typically, contract law pursues these two conceptions of freedom in a way that avoids a clash between the two. For example, information duties only aim at informing weaker parties, not making decisions for them, as that would restrict negative freedom. However, the current wave towards paternalism promotes positive freedom in such a way that it restricts negative freedom by distorting the balance between the two conceptions of freedom that fraternalism has achieved—albeit with inefficacious protection.

V. NUDGING AS AN ALTERNATIVE

It may be possible to choose between the two conceptions of freedom through "nudging." Also referred to as "libertarian paternalism" and "choice architecture," nudging uses knowledge from behavioral science to predictably steer individuals' decisions in a particular direction without restricting their freedom of choice.[37] Nudging may be thought of like GPS: it helps people navigate to their self-chosen destination, which reflects the positive conception of freedom, but simultaneously allows people to choose their own route, which reflects the negative conception of freedom.[38] The textbook example of nudging is changing one's default decision to the option that generally makes people better off. Such a default effectively steers people into choosing that option while it simultaneously allows them to choose differently.[39] When individuals must opt-in to enroll in retirement saving plans, many simply never get around to it. Using a nudge in this situation by setting the default to

33. I. Berlin, *Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY 118 (1969).

34. I. Carter, *Positive and Negative Liberty, in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY para. 1 (E.N. Zalta ed. 2018),

35. C. Taylor, *What's Wrong with Negative Liberty?, in* 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 211 (1985).

36. I. Berlin, *supra* note 33.

37. R.H. THALER & C.R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

38. C.R. SUNSTEIN, THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE 20 (2016).

39. E. Johnson & D. Goldstein, *Decisions by Default, in* THE BEHAVIORAL FOUNDATION OF PUBLIC POLICY 417 (E. Sharif ed. 2013).

automatic enrollment dramatically increases the number of people who save for their retirement, but simultaneously allows them not to do so.[40] Providing information also counts as a nudge but, as already pointed out, not every type of information automatically nudges people. In general, information first needs to be simplified in order to truly help people make decisions, otherwise the required cognitive effort that is needed to understand the information is too high.[41] Other ways of providing information can also improve decision-making. A very effective way to improve decision outcomes is providing a social reference point. For example, a descriptive norm such as "75% of the hotel guests have reused their towel" stimulates reuse of towels much better than informing people about the environmental consequences of not reusing towels.[42] Another example of a nudge is providing feedback. Making individuals' behavior visible to themselves, such as their spending or energy use, also influences their decisions because such information is often disconnected form the actual decision making process—whether one buy's the shoes or not, or whether one turns up the heater or not.[43]

Nudging thus helps people make better decisions while preserving freedom of choice. This is promising for the protection of weaker parties when making financial decisions as it can help effectively protect them while simultaneously preserving freedom of contract. Some consumer legislation in the EU already shows a nudging approach to the protection of weaker parties through the use of simpler information and default positions,[44] but the full potential of nudging is still untapped. One probable reason is that the full potential of nudging for the protection of weaker parties in contract law in general, but also specifically within the context of financial decisions, is not currently known. In order to discover this, two 'knowledge gaps' should be filled.

First, there is the empirical question about what works. For example, experiments have shown that using minimum loan amounts as anchors instead of maximum loan amounts steers people into choosing lower amounts, but that the use of standard financial products did not seem to improve people their ability to compare different products.[45] More knowledge about which theoretically effective nudges work and which do not, is therefore needed to discover which protection nudging exactly can offer. Moreover, there are other empirical questions about the potential for nudging that need further investigation, including the long term effects of nudging and whether transparency about a nudge influences its effectiveness .

Second, there are also ethical questions about nudging and its place within contract law. Some argue that nudges manipulate and therefore undermine autonomy instead of promoting it.[46] The concept of nudging covers too much to address this issue in general, but it is true that there may be ethical reasons not to nudge people and instead use a less effective protection mechanisms or prohibitions.[47] In order to discover the full potential of nudging, it is important to map its ethical boundaries within contract law. For example, a standard consumer sale of

40. R.H. Thaler & B. Shlomo, *Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving,* 112 J. OF POL. ECON. 164 (2004).

41. C. DE JAGER, *supra* note m28.

42. G. Bohner & L.E. Schlüter, *A Room with a Viewpoint Revisited: Descriptive Norms and Hotel Guests' Towel Reuse Behavior*, 9 PLOS ONE 1 (2014).

43. J. Hattie & H. Timperley, *The Power of Feedback*, 77 REV. OF EDUC. RES. 81 (2007).

44. *Regulation 2014/1286/EU*; *Directive 2011/83/EU*, art. 22.

45. AUTORITEIT FINANCIËLE MARKTEN, STANDAARDPRODUCTEN EN FINANCIEEL BESLISGEDRAG VAN CONSUMENTEN. EEN GEDRAGSWETENSCHAPPELIJKE ANALYSE (2015).

46. *See generally* T.M. Wilkinson, *Nudging and Manipulation*, 61 POL. STUD. 341 (2013).

47. *See* NUFFIELD COUNCIL ON BIOETHICS, PUBLIC HEALTH: ETHICAL ISSUES 41-42 (2007).

food might not justify a nudging approach. Mapping the ethical boundaries can be done by uncovering the normative foundations of contract law: what does it mean to act autonomously? When is protection of a weaker party justified? What is the exact goal of protection? And how much weight should be given to an individual's will? If one combines the answers to these questions—which may vary among jurisdictions—with the insights from the discussion about nudging within philosophy, then it becomes clear which nudges ethically fit within contract law and can help people make better financial decisions.

CONCLUSION

In this article we looked for a way to both incorporate insights from behavioral science about how people make financial decision in contract law and maintain a balance between autonomy and protection. We argued that the evolution of private law should be perceived as a process of waves that started with egoism, then became paternalism, turned into fraternalism, and now returns to paternalism again. To avoid the autonomy paradox to which contract law is heading and simultaneously make the protection of weaker parties more effective, we suggested the use of nudging. Like GPS, nudging helps people make better decisions while allowing them to choose differently. For example, using minimum loan amounts as anchors instead of maximum loan amounts steers people into choosing lower amounts but also allows them to choose differently. However, in order to discover the full potential of nudging for the protection of weaker parties in contract law, more empirical research is needed about its effectiveness, and its ethical limits within contract law must be determined.