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I
THE PROBLEM OF THE PUBLIC DOMAIN

The introduction of behavioral decision theory into the domain of public law is methodologically problematic. To date, behavioral decision theory has been defined by its ability to fashion a richer set of understandings of human cognition. Its focus has been on the heuristics employed by individuals to reason under conditions of uncertainty. Its prime insight has been the paradoxical nature of human decisionmaking and the attendant difficulties that this presents for models of social interaction that assume a parsimonious set of motivations and behaviors. Its methodological foe has been the narrowly constructed *Homo economicus*, a creature that lives in an entirely rational world of unmediated and uncomplicated motivations and consequent conduct.

Thus far, however, this newly evolving *Homo behavioralis* has lived in a fairly atomized world in which social interactions are designed primarily to determine the cognitive processes that affect individual decisionmaking. As revealed in his preferred habitat, the experimental lab setting, *Homo behavioralis* exhibits a variety of predictable and endearing traits that set him apart from the crudely drawn *Homo economicus*. This richer behavioral individual predictably overvalues what he has as opposed to what he could have, overestimates his view of himself and his surroundings and assumes that estimation to be shared by others, is unable to forecast his preferences or desires into the future in a consistent and organized fashion, views the present as inevitably the product of ambignous events in the past, takes a Panglossian view of the status quo as presumptively the best of all possible worlds, and so on. In short, he is an appealing if somewhat foolish individual who we may readily see reflected in ourselves and others.

The focus of this behavioral approach has been on gaining a richer sense of the internal mechanisms employed by individuals in negotiating the complex decisional pathways that life throws at us. To date, however, the literature has had relatively little to say about the

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role of institutional mechanisms that may buffer or even neutralize defective heuristics that can dominate individual decisionmaking. Some studies have sought to approximate the learning presumably associated with repeat play by contrasting professional judgments with those shown by one-time players in the laboratory setting, with only preliminary and inconclusive results.[1] But the experimental literature is almost devoid of studies seeking to establish how behavioral insights would translate into complex institutional settings.[2] While it is possible that institutional actors would simply mirror the heuristic biases of individuals, there are strong reasons to believe that they might not. As Professors Rachlinski and Farina point out, despite the frailty of human judgment and the difficulty of accurately assessing low-probability, long-term risk, bridges rarely fall[3]—a tribute to the ability of professional and governmental standard-setters to build in excessive capacity. Similarly, the introduction into law of behavioral insights has reinforced a number of legal doctrines by showing how they conform to an intuitive sense of human decisionmaking.[4]

The absence of a richer empirical understanding of decisionmaking in institutional settings should dictate a fair degree of caution in applying behavioral insights in the domain of public law. Public law differs markedly from private law, in which behavioral insights may be harnessed to develop institutional responses that assist the ordering of private decisionmaking. Public law, by contrast, exists only in the in-

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1 *See, e.g.*, Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 980 (1994); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

2 There are a few exceptions that have started to explore institutional behavior. *See, e.g.*, Chip Heath & Nancy Staudenmayer, *Coordination Neglect: How Lay Theories of Organizing Complicate Coordination in Organizations*, 22 RES. ORGANIZATIONAL BEHAV. 153 (2000); Roberto A. Weber & Colin F. Camerer, Cultural Conflict and Merger Failure: An Experimental Approach (2000) (unpublished manuscript, on file with author). More typical, however, is the attempt to see how group settings affect individual behaviors. *See, e.g.*, Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1991) (reporting experimental jury data on the group polarization effect).

3 Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 560 (2002).

4 There are three examples that I consider most noteworthy: (1) the risk of hindsight bias is mediated by rules such as the business judgment rule that temper the inability to accurately assess risk once a negative event has occurred, *see* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); (2) the bias toward majoritarian default rules, i.e., contractual rules that attempt to anticipate what parties would likely bargain for, corresponds to the "stickiness" of default rules and the difficulty that individuals have in breaking from these, *see* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); and (3) the increasing legal bias in favor of protecting the employment of long-term employees despite the at-will rule of employment may arguably correspond to the likely endowment effect on employees of their job-holding, *see* Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783 (1996).

stitutional setting. The role of law is not so much to assist in the process of efficient private ordering but to define the domain of governmental conduct through a complex maze of institutional practices. Accordingly, it does not necessarily follow that behavioral economic insights may be extended from their modest introduction into the private law realm where the prototypical interaction is between private actors, for whom cognitive biases are unmediated. It has been difficult enough to derive clear answers to problems of institutional design in private law.[5] Applied to the domain of public law, any legal reform must have a compelling account (and evidence) of how a superior institutional design will emerge, and such clear institutional mandates have been conspicuously few in the legal application of behavioral insights.

The limited experience with direct institutional translation of behavioral decision theory should be treated as a deep concern in public law (and the subset of administrative law), for this is an area of law that does not exist except through complex institutional structures. At the very least, it is a difficult methodological proposition to both extend a field that is largely established experimentally at the level of individual decisionmaking to a conspicuously different realm of public life and to simultaneously claim great traction at the institutional level. Even more problematic is the claim, at the heart of this Symposium of "getting beyond cynicism," that the insights derived from behavioral decision theory may already be sufficient to supplant public choice theory as a descriptive account of the public realm.

II

ADMINISTERING THE STATE

The key problem of administrative law is the trade-off between expertise and democratic accountability.[6] Agencies typically may claim greater expertise in the subject matter they oversee, but admit of less authority in setting policy or answering through the political process for the consequences of their policy decisions. The great battle lines of administrative law, reflected through leading cases such as *Chevron*[7] and *Vermont Yankee*,[8] may be seen as turning on the deference that should be afforded to expertise as opposed to the risk of moving critical decisionmaking further from the domain of formal governmental structures. For those who see the agencies primarily as an

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5 This is a theme I have already addressed in Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729 (1998).

6 For a fuller account of this tension, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6–7 (1995).

7 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

8 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

arena subject to capture by interest groups, public choice theory provides an elegant analytic method and the claim of nondelegation provides its accompanying constitutional prod.[9] For agency enthusiasts, by contrast, the administrative state must rely on expert judgment to fill the inevitable lacunae in statutes[10] and should be given a broad deferential swath by judicial overseers.

Behavioral decision theory intersects these debates in two primary ways, as set forth in Articles by Professor Seidenfeld[11] and by Professors Rachlinski and Farina.[12] First, it offers a theory of governmental error that draws from the cognitive failures of policymaking officials (as opposed to the venality of their having been overtaken by rent-seeking private agents). Second, and more richly, behavioral decision theory offers an account of the types of errors that lay generalists (such as legislators) are likely to make, and contrasts those to the greater reliability of experts, while also giving an account of the distinct vulnerability of experts and the role of lay institutions in checking those sources of likely error.

The first of these insights does not tap a rich vein for setting policy, particularly when standing alone. The argument that "poor [governmental] decisions are often the result of fallibility rather than culpability," as concisely framed by Rachlinski and Farina,[13] does not refute the public choice claim that errors borne of capture exist in the administrative state. That there may be other sources of error does not eliminate the public choice claim, in the same way that claiming that broken gas mains cause great harm after earthquakes does not dispel the fact that earthquakes themselves are perilous. Moreover, the argument that there may be cognitive failures at work in the administrative state does not diminish the sense that administrative processes fail not randomly but predictably in favor of powerful inter-

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9 One that has yet to see its fruition in Supreme Court doctrine, it should be noted. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (refusing to adopt the nondelegation doctrine). *Compare* Brief for the Petitioners at I, *American Trucking* (Nos. 99-1257, 99-1426) (setting forth the question presented as "Whether Section 109 of the Clean Air Act, . . . as interpreted by the Environmental Protection Agency . . . effects an unconstitutional delegation of legislative power"), *available at* 2000 WL 1010083, *with American Trucking*, 531 U.S. at 462 (stating the question presented as "Whether § 109(b)(1) of the Clean Air Act . . . delegates legislative power to the Administrator of the Environmental Protection Agency").

10 This argument has a long pedigree but can certainly be thought of as a core component of the Hart & Sacks "legal process" approach. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *accord* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

11 Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

12 Rachlinski & Farina, *supra* note 3.

13 *Id.* at 554.

est groups. It is difficult to conjure up regulations requiring a powerful dairy lobby to color butter a shade of pink so as not to confuse users of oleomargarine,[14] or permitting everyone to prescribe eyeglasses except the well-organized optometrists.[15] Perhaps the examples of random error are there, but they do not leap to mind quite so readily as to make one want to discard all claims derived from public choice theory.

The more interesting claim, and the one that commands the core of the two Articles, is the issue of the comparative strength of expert versus lay decisionmakers in defining policy objectives and carrying them out successfully. The experimental literature that both Articles rely upon indicates that experts are less likely to make certain sorts of predictable errors, such as overestimating the likely recurrence of vivid events, and more likely to gain some adaptive ability to overcome erroneous judgments as a result of repeat encounters with specific factual scenarios. As Professor Seidenfeld points out, this is consistent with the literature on group decisionmaking, which "indicates that groups tend to outperform individuals in making many decisions, including solving problems that require analysis and evaluation."[16] Both Articles properly acknowledge the limits of the ability of experts to overcome heuristic deficiencies, but nonetheless retain confidence that, on balance, experts are more likely to have a better understanding of matters within their purview than lay generalists. At the same time, experts are subject to three distinct biases of their own. First, they are likely to overestimate their actual knowledge. In the experimental setting, they demonstrate levels of confidence in their judgments that exceed the actual advantages conferred by their expertise, the propensity to be "often wrong, but never in doubt." Second, they are likely to adopt a world view that turns largely on the area of their expertise and are unable to weigh its relative merits against other matters outside the zone of their expertise. As Isaiah Berlin once put it, "to a cobbler, there's nothing like leather."[17] Third, and relatedly, they are subject to routinized ways of approaching problems and to an unreflective "group think" style of inbred behavior.

The strength of this line of inquiry is that it begins at the core of what behavioral decision theory does best: explaining the types of reasoning that individuals are likely to undertake in particular settings.

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14 *Cf.* Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 84 n.3 (1989) (describing the butter industry's attempts to prescribe the color of margarine).

15 *Cf.* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (upholding the constitutionality of a statute allowing only optometrists and ophthalmologists to prescribe eyeglasses).

16 Seidenfeld, *supra* note 11, at 530.

17 ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 24 (1953).

Starting from this vantage point, both Articles ask what sorts of institutional mechanisms might be devised that would best harness the greater decisional accuracy of administrative experts, while not succumbing to either their excessive confidence or their field-driven myopia. Although the two Articles start from different premises, it is interesting to note that they converge on a prescriptive recommendation: outside review of agency decisionmaking focusing largely on the processes used to arrive at agency policy determinations. For Seidenfeld, this emerges from a narrower inquiry into judicial review of agency rulemaking under the arbitrary-and-capricious standard of review. For Rachlinski and Farina, the prescriptive recommendation follows from recasting administrative law as starting from the assumption that agencies are trying to make good decisions and that when they err they do so as a result of defective processes rather than subverted ends. In either case, the main prescriptive recommendation looks much like a defense of a rather generous arena for agency activity accompanied by a hard-look standard of judicial oversight. In other words, the outcome is fairly recognizable as more or less the state of administrative law as it stands.

III
BEHAVIORAL INSIGHTS AND POSITIVE LAW

Indeed, it is useful to compare the administrative world developed through the behavioral decision theory with the Supreme Court's most recent pronouncement on non-*Chevron* deference to agencies—that is, the role of judicial oversight of agency action that is not an interpretation of the underlying statutory standard, but its implementation. In *United States v. Mead Corp.*,[18] the Court confronted Mead's challenge to a tariff-classification ruling by the United States Customs Service, arguing that imported day planners should not be considered "[d]iaries, notebooks and address books, bound," a category subject to a 4.0% tariff, but should fall under the "other" category, not subject to tariff.[19] The Harmonized Tariff Schedule of the United States provides that the Customs Service shall fix final classifications of merchandise subject to the rules laid down by the Secretary of the Treasury, which in turn devolved to administrative "ruling letters" issued by any of the forty-six port-of-entry Customs offices.[20] The question before the Court was whether such diffuse, low-level administrative decisionmaking was entitled to *Chevron* deference.[21]

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18 121 S. Ct. 2164 (2001).

19 *Id.* at 2170.

20 *Id.* at 2168.

21 *Id.* at 2171.

In harmony with the insights from behavioral theory, the Court created a presumption of deference to administrative expertise in those circumstances evincing the greatest procedural regularity and the maximum ability for outside input:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.[22]

Absent such procedural regularity, the agency can claim only the less deferential *Skidmore* standard of review, in which the court reflects both upon the experience and information available to the agency and the procedures used to reach the ruling:

> *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . .
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> . . . Such a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.[23]

The Court's focus on process regularity is strikingly consistent with the conclusions of the two Articles on the mechanisms most likely to overcome the particular biases built into expert groups, while preserving the gains that may be achieved through such administrative expertise. As summarized by Seidenfeld:

> The most complete review of the literature on the psychology of accountability suggests that for accountability to improve the quality of decisionmaking it must satisfy the following four prerequisites: (1) the decisionmaker must be aware that he will have to explain his decision prior to making any irrevocable commitments to that decision; (2) he must perceive the audience to which he explains the decision as legitimate; (3) he must not know the identity of the audience that will hear his explanation; and (4) he must believe that the basis for the audience's evaluation of the decision will be process- rather than outcome-based.[24]

Translated into administrative law doctrine, Rachlinski and Farina use the cognitive insight to defend hard-look review:

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22 *Id.* at 2172–73 (citation omitted).

23 *Id.* at 2175–76 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).

24 Seidenfeld, *supra* note 11, at 512–13.

> Hard-look review forces an agency to articulate the factors it considers relevant to its decision, engage in some perceptible assessment of alternative courses of action, and respond to meaningful comments by outsiders. Cognitive psychological research indicates that one of the best mechanisms for reducing overconfident judgments is forcing oneself to consider alternatives and carefully review arguments against one's position.[25]

In normal legislative action, the advantages gained by accountability to other governmental entities not sharing the same biases and expertise are built into the normal functions of checks and balances. Thus, the judiciary, in reviewing ordinary legislation, does not represent the sole branch capable of assuring that reasoned deliberation has been brought to bear on a problem. According to Rachlinski and Farina, such process-based judicial review is all the more necessary in the administrative setting because "[a]gency decisional protocols typically do not replicate the broad multi-perspectivity provided by bicameralism and presentment."[26] But, consistent with Seidenfeld (and with Justice Souter's majority opinion in *Mead*), the review advocated by Rachlinski and Farina is not an invitation to substituting substantive judgments: "Significantly, however, all of the intensity of hard-look review is directed toward identifying flaws in the agency's decisional process."[27]

That these two Articles end up pointing in the direction in which the law has generally evolved should not be either surprising or dispiriting. The strongest claim that can be made on behalf of expertise is that it is, in effect, experience tested. Through repeat confrontations with a problem, errors that may trigger heuristic deficiencies in lay actors may be overcome, or at least compensated for. It is no stretch to think of the law, particularly the incremental case-centered process of common-law reasoning, as just that sort of experience-based expertise that should be expected to approach (through hesitating and uneven steps) sensible mechanisms to overcome some of the frailties of individual human actors.[28] The de-biasing technique advocated in both Articles looks like the welcome cousin of the familiar legal-process refrain of procedural regularity and structural accountability.

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25 Rachlinski & Farina, *supra* note 3, at 588. A slight modifier from research in which I participated indicates that forcing a party not simply to consider but to actively formulate arguments against herself is the most effective "de-biasing" technique. *See* Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997).

26 Rachlinski & Farina, *supra* note 3, at 589.

27 *Id.*

28 This claim relates to a broader debate in political theory. Professor Hayek makes a similar efficiency argument on behalf of the common law. *See* Paul G. Mahoney, *The Common Law and Economic Growth: Hayek May Be Right*, 30 J. LEGAL STUD. 503 (2001) (summarizing the Hayekian insights).

IV
THE VIRTUE OF SMALL STEPS

Although the two Articles converge on a set of prescriptive conclusions based on behavioral studies, they depart significantly in the critical realm of how far they wish to push their conclusions and how much weight they ascribe to their methodological contributions. Professor Seidenfeld frames his Article only as a modest defense of judicial oversight of rulemaking under the arbitrary-and-capricious standard of review. It draws from the cognitive literature a defense of judicial review as improving the quality of rulemaking decisions. Critically, however, it recognizes that there are a number of other variables that play into the overall impact of agency rulemaking that may compromise the gains from judicial oversight, including the costs of delay and the additional costs of interual procedures. Its claimed contribution is the introduction of complex psychological influences on agency decisionmaking, even while recognizing that such an additional line of inquiry cannot conclusively resolve "whether, overall, arbitrary and capricious review is good or bad."[29]

By contrast, the Rachlinski and Farina Article is more venturesome in its conclusions and, to my mind, weaker as a result. Nowhere is this more evident than in a sketchy section on how behavioral decision theory compels greater judicial openness to the use of legislative intent in statutory consideration.[30] Here the authors take a weak insight—"To the extent that legislative materials are written by committees and others with expertise, they can help convey an expert's view of the underlying policy concerns"[31]—and attempt to infuse this with sufficient authority to quell a high-level debate over the extent to which legislative history may be used in statutory interpretation. This step too far fails for three separate reasons.

First, this somewhat storybookish version of legislative committees sitting to deliver the benefits of their collective wisdom does not engage the deep debates over the nature of statutory interpretation. In the work of leading scholars such as Professor John Manning[32] and Dean William Eskridge,[33] to name just the authors of the most significant recent contributions to this field, the debates about the role of judges in statutory interpretation takes on major issues of historical legitimacy, separation of powers, and democratic accountability. To

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29 Seidenfeld, *supra* note 11, at 491.

30 Rachlinski & Farina, *supra* note 3, at 594–96.

31 *Id.* at 594.

32 *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

33 *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001).

be rather blunt, the limited insight that legislative committees may bring some expertise to addressing particular problems unreflected in the statutory text is unlikely to cause even a ripple in these debates.

Second, even without addressing the public choice concerns, the process of committee report preparation is rife with the risk of expert overconfidence and a detachment from the values and priorities of the general public—the very concerns that Rachlinski and Farina introduce in their discussion of the need for judicial oversight of administrative agencies. Indeed, in their contrast of agency decisionmaking with the normal processes of legislative enactment, Rachlinski and Farina find the former inferior because "[a]gency decisional protocols typically do not replicate the broad multi-perspectivity provided by bicameralism and presentment."[34] It is difficult to credit committee reports, often written after the fact of the legislation, as well as legislative history in general, as having the same quality of bicameralism and presentment as attaches to statutes proper.

Finally, there is the public choice problem. The fact that committees may bring expertise to bear does not defeat the proposition that they may also be particularly subject to capture, as the authors acknowledge by citing the risk that legislative history might be "surreptitiously doctored by interests that could not succeed openly in the lawmaking process."[35] Nor does it defeat the claim that the lack of oversight and accountability in the final form of enacted legislation compounds the risk of democratic illegitimacy in the use of legislative history as a substitute for textual authority. This is obviously a complicated story and one that is not to be resolved here. To a large extent, this may require empirical proof as to the frequency with which private-regarding concerns crowd out public needs in the contested terrain for legislative attention. But it is worth cautioning the proponents of a new methodology against claiming more for their approach than they can support. That there are important psychological dimensions to decisionmaking does not negate the claim that there are also important political, institutional, and economic dimensions as well. Proving that there are well-motivated reasons for error unfortunately does not mean that there are not also malevolent reasons operating as well.

CONCLUSION

Ultimately, the contribution to be gleaned from the first introduction of behavioral decision theory to the administrative law realm will turn on two questions. The first is whether the descriptive ac-

34 Rachlinski & Farina, *supra* note 3, at 589.

35 *Id.* at 595.

count has more explanatory power than prior accounts. Here the answer is entirely unclear. Whether reviewing the range of agency conduct through a psychologically-based prism captures a truer picture of administrative practices than a public choice–based account remains to be seen. At best, the Articles thus far indicate that there are alternative interpretive structures to be applied from behavioral decision theory. The extent of their explanatory power remains to be seen. Second, there is the question whether the psychologically based insights, assuming that they are empirically established, would yield interesting prescriptive conclusions. Here the answer seems both more promising and comforting. The main thrust of both the Seidenfeld and Rachlinski and Farina Articles is to buttress the need for procedural order and institutional accountability. Here the behavioral decision theorists are playing to the lawyers' strength.