Take your 3D glasses off – How nudging provokes the way we imagine law

Christopher Unseld 2015-04-17T12:45:37

Nudging does polarize, but it also challenges the conventional way German legal scholars imagine the world of law. Even though it is good intuition to be afraid of a totalitarian government of economic rationality, it would be wrong to defend our current logic of judicial proportionality against the nudging approach. Instead, we should embrace democratically supervised economic expertise within our regulatory framework, without giving up on the possibility of radical love and revolution.

1. German 3D glasses

The idea of nudging challenges the way German lawyers see the world through the glasses of law. As I have argued before (see here), I understand law not only as a mean to an end, but as a genuine perspective on our daily lives. Every German law student probably can remember during her first weeks in law school catching herself thinking about the number of contracts she just entered buying a loaf of bread at the local bakery store (hint: at least three). Of course, this is not unique to the legal profession. Economists probably have similar experiences. As the Chicago School has taught us, there is no issue that is completely out of reach of economic analyses.

But there is something idiosyncratic about the way German lawyers construct their legal perspective. In German legal education, one learns to see the world through something I would like to describe as 3D glasses. Through these glasses a legal dispute consists not only of a two-dimensional conflict between two private parties with contradicting interests, but also a third dimension, a power outside their sphere watching: the public government. From time to time, this great power gets involved. But if the state decides to intervene it needs a reason justified by public interest. This typically is the case if one of the private parties externalizes a significant harm on one or more other private parties. But if one private individual is only harming itself, the government has insufficient reason to get involved. This would constitute an act of paternalism that nobody wants. This is – of course – a simplified description, but I think it suffices for the purpose of this argument.

2. US perspective

The liberal harm principle and the problem of paternalism are well known in the US. But for legal scholars educated in the United States, these concepts have little impact on legal analyses. They wear normal glasses. And to differentiate between public and private interests while arguing a legal problem really compares to wearing

3D glasses at the movies: You hear that those glasses provoke nothing more than headaches, especially for unaccustomed users. Critiques argue further that they do not add value to the experience (not to mention the narrative) but are simple baroque gimmicks to make the customer spend more money.

Applied to the public/private distinction this critique has a lot going for it. What categorical difference does it make if the government forces you to wear a seatbelt driving your car or if it decides to make you stop smoking? This is very easy to illustrate in a complex welfare state such as Germany: If you harm yourself you are arguably harming the society by – at least – causing taxpayer's money to be spent on you. No question about that. It is also clear that many people feel uncomfortable about this purely economic calculation. Academically, this was expressed forcefully by Giorgio Agamben and Michel Foucault. And Juli Zeh, a young German novelist and former lawyer, has translated this fear into a great novel and play.

But it would be wrong to assume this solely is a problem of welfare states. And it would be even worse to conclude we had to cut back the social welfare state as to limit the state's power to apply "biopolitics" on us. As Cass Sunstein has shown some time ago, there is really no categorical difference between the government enforcing "positive" rights and protecting "negative" rights. Even a strictly libertarian government would need courts and police forces to protect those "negative" rights guaranteed. At the end of the day, the difference between, for example, a "positive" right to fair housing and the "negative" protection of your plot of land seems to be a matter of political willingness to spend the money necessary. This is exactly the perspective needed to understand the rationale supporting the idea of "choice architecture": even to let somebody exercise a classical "negative" freedom qualifies as implicit decisions by the government.

Let me give you an example: If you have the right to smoke a cigarette in your apartment there is only one reason for it: The government has – so far – not decided to change that. It does not really matter if the government has ever thought about doing anything about it. But it is imaginable, for example, that the government would allow landlords to prohibit their tenants to smoke. This would help them protect their houses or other neighbors from the various fallout caused by smokers. If you are smoking in your own little hut in the woods, one might be afraid of you falling asleep and causing a wildfire. If you are allowed to smoke on the streets, you might be tempted to litter. And even if you are building yourself a secure smoking room, perfectly safe for your neighbors and the environment, you could not force the government to spend the resources necessary to check it out. And the already mentioned problem sticks nevertheless: If you get a heart attack from smoking there will be an ambulance taking you to the hospital or – if that is not the case – other people will hopefully stop their current business and take care of you. Even those private people taking time to help you could be doing something more useful and meaningful instead. Does it matter at all if the landlord, the fire department, the cleansing department, the street, the ambulance, the hospital or your insurance is public or private? I am pretty sure, that Cass Sunstein's answer would be a clear "no". He has already explained that in "State Action is Always Present."

3. The move from constitutional to regulatory law

As we can see from the just mentioned paper, Cass Sunstein is not in the majority of this argument in the realm of US constitutional law. The so-called "state action doctrine" he criticizes in that piece still differentiates strongly between acts of the government and private acts for the purpose of deciding if the 14th Amendment of the US Constitution is applicable to a case in question (often in conjunction with other fundamental rights like free speech).

This is a reason for why the US government – even if the Congress wanted to – has a hard time banning private behavior (especially if and when that behavior qualifies as free speech). So it seems a good reason to use nudging instead, therefore flying under the radar of US constitutional law by changing the "choice architecture" rather than banning dangerous or misleading private behavior. There is an additional upside to this: Translating political issues into economic problems helps justify the use of the federal Commerce Clause power, thereby circumventing the previously mentioned "state action doctrine." Constitutional problems get circumvented and we enter the realm of administrative or regulatory law.

Administrative law is a traditional part of the German legal education, much more so than in the US. Many American law schools only quite recently began to acknowledge the need to make their students familiar (on an obligatory basis) with the responsibilities that come with the modern regulatory state and the growing use of statutes. I would argue that Cass Sunstein serves as a perfect example to illustrate the rising importance of regulatory law in the US. Some decades ago, a Professor of Sunstein's extraordinary reputation, (also) in constitutional law, might have been disappointed when offered a job as the head of the "Office of Information and Regulatory Affairs." Admittedly, constitutional law still seems to be the more glamorous career option, but the fact that the job was Cass Sunstein's "dream job" is not just a curious anecdote about him (see his book Simpler). It also supports the more general point about the growing importance and acceptance of administrative law in the US legal community.

But we should not think that the US system will adapt to our ideas of administrative law. To understand some important differences between the US and German understanding of administrative law it helps to have a look, for example, at the obligatory course "Legislation & Regulation," as it is presently taught at the University of Michigan Law School. As the title suggests, the course is roughly divided into two parts (for a textbook see here). There is the issue of "legislation"; this portion focuses mainly on the question about "why" and "how" to regulate. Economic efficiency, politics of delegation and behavioral economics play a role here. Those are issues a German law student normally does not get exposed to at all. On the other hand the "LegReg" course deals with the canon of interpretation of statutes and with the "Chevron framework," the rules of judicial supervision of agencies. The "interpretation" part seems to be pretty similar to German doctrine. But one of the big differences is the typically strong emphasis on the "original intent" of the legislator.

German administrative lawyers in practice, on the other hand, are used to not only making sense of parliament's commands (i.e. interpreting laws) but also executing them within the margin of appreciation left to the administration and doing so efficiently ("Recht- und Zweckmäßigkeit"). In German law schools, however, the second part gets ignored for the most part. Instead, during the interpretation there is a lot of creativity demanded. Instead of concentrating on the "original intent," German law students learn to understand administrative law in conjunction with constitutional law, constructing it in the light of fundamental rights and – very importantly – measuring almost everything by the overarching principle of proportionality. Even delegating powers to independent agencies (in the US governed by the mentioned "Chevron framework") is limited by a kind of inherent proportionality analyses (the so-called "Wesentlichkeitstheorie"). Especially in comparison to the US, it is remarkable to see that German lawyers are checking almost all administrative actions by the standards of economic efficiency, dressed up as proportionality analyses, even though they are in no way prepared (or explicitly legitimated) to do so. US lawyers on the other hand are prepared to think about the economics of regulation but also learn how to generally limit interpretation to the will of the legislator and to respect the power of the government to install very autonomous agencies.

While many German legal scholars refuse the American understanding of administrative law as excessively unchecked, they are proud to claim that the more and more globalizing proportionality test was invented by Prussian administrative judges to direct the 'good police' ("gute Policey") to do what is necessary ("nöthigen Anstalten") in the public interest. In Prussian times there really existed a public interest distinguishable from private interests, since there was a Kingdom to defend against the reach of democratic rule. Nowadays, it seems to be more of an empowerment for the judicial branch to second-guess the administration and the legislator in the name of the public interest by employing a laymen's idea of economic efficiency.

So what follows from this little excursion into the field of comparative law? I would suggest the following: German lawyers who refuse nudging on the grounds that it violates the public-private divide might have to think harder. I can see no reason why we would mind our elected government question its influence on our behavior, be it caused by action or omission. The German solution to have an economically rationalized check on our government by empowering courts to apply the proportionality analyses does not seem a better solution since our judges simply lack the expertise. And if we fear a Foucauldian auto-mechanism that leads into pure economic rationality we better be more afraid of this hidden process infiltrating the law and changing the way young lawyers learn "how to think like a lawyer" in Germany. Somebody like Cass Sunstein, who is not only an expert on behavioral economics and constitutional and regulatory law, but who also got appointed by the US President to deal with these issues for a limited time and who openly explains the motives and rationalities in books and lectures seems to be much less frightening. That does not mean, however, I would not have my own worries about his approach.

4. Nudging and the possibility of love

As Chris McCrudden has pointed out, the nudging approach wears a scent of despair in times of a dysfunctional political system in Washington. This is partly true, but it is not sufficiently convincing since the first nudging book by Thaler and Sunstein was only published a couple of months before Barack Obama's election in times of high hopes. But it is also true that there is a technocratic turn attached to nudging that has a dampening flair on our horizon of possibility.

This became clear to me when Cass Sunstein ended his key note lecture on the "Ethics on Choice Architecture" in Berlin asking for the most precious commodity available to the human species. His rather counter-intuitive answer was: "not 'love' but 'peace of mind.'"

My instant reaction was: why would you think of love as a commodity? The answer is, that if you want to have peace of mind, it makes completely sense to avoid thinking about love. Love cannot be hedged by law or economics. We only need to go to the movies (with or without 3D glasses) to understand that love can help to constitute, redeem or destroy order, but it does not follow economic or legal rules (for a comprehensive account of this see here).

Nudging does not prevent you from enjoying love, pain and unhappiness. Unlike in the "Brave New World," nobody forces you to take pills to make you happy. You will only be asked to consider taking them or seeing a doctor. And if you try to ensure people actively choose their misery, chances are they will not. How much fun is it to rationally decide for irrationality? Not much I would suggest. That is like planning to spontaneously have sex.

At this point it might be helpful to get back to imagining law as a pair of glasses. We know it is possible to treat "love" as a commodity in economic or legal terms. But we should never forget that we are wearing glasses. There is always the possibility to take them off. Instead of fine-tuning our existing system with nudges there is always the possibility of real change, of revolution. At some point people might decide in favor of pain, sacrifice and love instead of peace of mind. The fact that Sunstein and Thaler presented their ideas on nudging during the rise of Barack Obama should have been a warning to everybody hoping for more than bureaucratic change and for those who fell in love with the idea of real change. Peace of mind is fine most of the time. But sometimes you want to believe and love.
