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IS NUDGING REALLY EXTRA-LEGAL?

Péter CSERNE

INTRODUCTION

Some of the scholarly literature on nudges seems to assume, without giving it much further thought, that nudges represent a non-legal or extra-legal form of regulation.¹ Others routinely assume nudges to be legal, *i.e.* capable of being authorized and implemented in accordance with the law. Perhaps the term 'law' is used in different senses in these two contexts. But the issue may run deeper. The question about the (extra-)legal character of nudges is not simply whether certain regulatory interventions can be implemented legally in country X or Y. Rather, it is whether nudges represent a genuinely distinct mode of governance, with a corresponding distinct normativity.

In this paper I take a closer look at what makes a mode or technique of governance legal and query whether nudges can meet these criteria. This I shall do with reference to some of the abstract, and sometimes perhaps obscure, conceptual debates on the nature of law and the tasks of jurisprudence. Within the confines of this paper, I do not provide a fully-fledged theory of the nature of law. But in order to spell out the possible, and plausible, answers to the question in the title, I discuss some representative jurisprudential ideas and debates as to what kind of governance mechanism law is, drawing attention to the tension between instrumental and non-instrumental views of law and spelling out some conceptual consequences regarding nudges.

The paper proceeds as follows. In section I, I briefly discuss the term nudge and what is sometimes called “the nudge agenda”. Some of the debates about nudges draw on legal arguments or set out legal implications. Sometimes they do so by relying on rather unsophisticated views on what law is and how it operates.

One can come to the view that nudges are extra-legal in at least two ways. The view that nudges are not legal may follow from the intuitive idea that law is (necessarily or typically) linked to coercion. In short, nudges are too “soft” to be considered law. One can come to the same conclusion through a different route as well. If we focus not on law’s typical coerciveness but on one of its arguably necessary features: its reason-giving, action-guiding character, then at least some nudges can be seen as too “strong” or “crude” to be called law. I discuss these two lines of argument in sections II-1 and II-2, respectively. In section III I suggest two ways of understanding nudges as legal. Section III-1 provides some conceptual as well as historical arguments for encompassing nudges into the legal domain as conceptually subordinate but practically important instances of regulation. In section III-2, inspired by Lon Fuller’s project of *economics* I suggest considering nudges in a broader normative framework, along with other regulatory techniques; a broader project of good governance that is not distinct from law but encompasses various forms of legality. At the end it turns out that nudges are not obviously and not always legal nor are they necessarily or typically extra-legal. This conclusion does not seem very original, nor does not qualify as a useful policy advice. But my aim is neither originality nor practicality. This paper is perhaps best seen as “philosophical reflection” in the Oakeshottian sense, *i.e.* as “the adventure of one who seeks to understand in other terms what he already understands.”²

I - NUDGES AS GOVERNANCE TECHNIQUE

Let me start with some conceptual clarification as to what nudges are, as well as some demarcations as to how they are distinct from but related to behavioural economics and libertarian paternalism. Some may find these points obvious. They are indeed not too controversial in the sense that the important disagreements lie elsewhere. These remarks simply serve as a conceptual starting point for the discussion to follow.

In a recent paper, Hansen discussed extensively the various definitions and characterisations of nudge suggested in the literature, pointing out some of their shortcomings.³ At the end he came to suggest the following explication: “A nudge is a function of any attempt at influencing people’s judgment, choice or behaviour in a predictable way, that is (1) made possible because of cognitive boundaries, biases, routines, and habits in individual and social decision-making posing barriers for people to perform rationally in their own self-declared interests, and which (2) works by making use of those boundaries, biases, routines, and habits as integral parts of such attempts.”⁴

He adds some important conceptual implications of this definition. Thus, a nudge works independently of forbidding or adding any rationally relevant choice options, *i.e.* “command and control” type mandatory rules. It is also distinct from “changing incentives, whether regarded in terms of time, trouble, social sanctions, economic and so forth,” *i.e.* incentives that would also predictably change the behaviour for fully rational agents. Importantly, according to Hansen, nudges are also distinct from the provision of factual information and rational argumentation which would rely on the deliberative rationality of reasonable agents.⁵

This last point already indicates one reason why nudge and libertarian paternalism should be seen as distinct. Of course, the two are related: insofar as nudges are used in order to promote the interests of the nudgees, they are instances of libertarian paternalism. But information provision can be, and has been, suggested as a regulatory technique in the service of libertarian paternalism while not being a nudge. A libertarian paternalist may provide factual information and rational argument—this would not count as nudging. Vice versa, nudges are often motivated by or argued for on the basis of libertarian paternalism but this is not at all necessary. Hansen argues that for the sake of conceptual clarity, it is sensible not to define nudge by the motives of the nudgers or the potential reasons for nudging.

Another obvious distinction is sometimes forgotten. Nudges are often discussed, rightly, within comprehensive regulatory programs which implement findings of behavioural economics or cognitive psychology into public policy. But what makes an intervention a

nudge is not the empirical research that may underlie its introduction, nor the normative goals that may justify it. Under different normative premises behavioural economics may lead to policy implications very different from nudging. Furthermore, behavioural economics as an academic field is much broader than what policymakers or law professors have picked up from it. Many empirical researchers are cautious, and rightly so, not to draw far-reaching policy conclusions from their findings.⁶

Thus, to simplify it somewhat: on the one hand there is empirical behavioural research, conducted by scientists, economists, psychologist, legal scholars, or any combinations of these, providing empirical knowledge. On the other hand, there are various policy goals, better or worse, justified or unjustified, proposed by politicians, policymakers, citizens, ethicists etc. One among these goals is libertarian paternalism which is perhaps best understood as a normative benchmark or regulatory idea on what goals the government or we collectively should follow and through which means.

Nudges are in a third category, of regulatory tools or techniques. What distinguishes them is how they change the normative and factual environment of the nudgee. What makes nudges workable, i.e. the reason they make a difference is that nudgees are not fully rational and fully informed agents. Hansen put forward his explication as a “technical” definition, focusing on the way nudges operate, rather than on the ultimate purpose(s) they are supposed to serve. If we take this instrumental aspect of nudges seriously, we have to say that as a conceptual matter, it is possible to talk about nudges which are used in a scientifically uninformed way and/or implemented in the service of any, perhaps sinister, goal. As it has often been pointed out, private parties routinely use nudges in order to manipulate others (family members, customers, etc.) in certain directions. In doing this, they may be completely unreflective; they may also rely on behavioural assumptions, derived from sources as diverse as common sense, folk psychology or marketing research.

Typically, however, and in Sunstein and Thaler’s famous book,⁷ nudges are in between two reputable categories: they rely on empirical findings of behavioural economics, and are meant to promote or achieve policy goals which are regarded as being capable of generating

consensus or at least wide ranging support across the political spectrum. Based on a set of examples, they suggest implementing nudge as a regulatory technique. Over the last decade, this suggestion has been picked up by some governments and criticised by various academics. Looking at this “nudge agenda”⁸, one is probably justified in guessing that it was Sunstein the lawyer who was more concerned with the practical and normative implications. This impression is supported by both his subsequent books, *Why Nudge?*⁹ and *Simpler*¹⁰, and Thaler’s retrospective on the research field he co-founded and co-shaped, behavioural economics.¹¹

Reading through their various relevant publications, Sunstein and Thaler are, perhaps deliberately, never very precise about the normative goals of nudge: promoting autonomy, promoting rationality, respecting choice. Sometimes they claim that nudges are merely helping people to achieve their own goals. On other occasions they refer, among others, to human flourishing as an objective measure of well-being or to goals that they claim to be supported by a vast majority. In short, they are not clear at all what is the option towards which they want nudges to guide behaviour, how easy opt out should be, when is a mandatory rule justified etc. In some sense, this is not surprising. Both nudge and libertarian paternalism can be seen as sequels of Sunstein’s earlier idea for law and policy using measures or techniques that have a broad political appeal, at least in the US, without requiring grounded agreement.¹² Sunstein, to be sure, has never been tired of responding to queries and criticisms¹³ but the responses remain wanting in some respects. One such issue is the legality of nudges.

II - THE EXTRA-LEGALITY OF NUDGES

The legality of nudges can be problematized at two levels: conceptual and normative. I suggest that only after dealing with the conceptual questions and in light of the answers to those can we sensibly come to ask questions about instituting nudges legally, i.e. whether and how particular nudges can be authorised and implemented in a particular legal order. To be sure, the latter type of practical question has been often raised in the legal literature in recent years, not only with regard to US federal and state law, but e.g. with respect to EU law,¹⁴ in the framework of administrative law,¹⁵ or in light of certain principles of constitutional law.¹⁶ These commentators

do not merely raise technical or doctrinal legal questions. Theirs are, as it were, the lawyerly versions of the normative questions related to broader ethical, political and practical discourses about nudging by governments. Some of these normative questions are addressed by other contributions in this issue. Yet these are not the only relevant questions. In fact, such normative questions already presuppose at least an implicit understanding of what legality is. In this section I suggest that nudges may seem to fall short of being legal not normatively but conceptually and this in at least two ways: by being merely “counsel” or by being a kind of direct coercion not respecting agency. This is the question to which I turn presently.

II-1 - Law as obligation vs. nudge as advice

In this sub-section I discuss the argument that nudges are too “soft” or “weak” to be considered proper law. Nudges leave scope for choice from a menu or to opt-out of a default position. If law is enforced, at the limit by brute force, then nudges which are (necessarily or typically) non-coercive cannot really be legal.

Going back to Bentham and Austin whose jurisprudential views are mainly associated with classical legal positivism and the view of law as command, it seems easy to jump to the conclusion that the avowed non-coercive nature of nudges disqualifies them from the domain of law-as-command.¹⁷ This idea is simple or perhaps even simplistic but it contains a grain of truth. One can, in fact, go further back in the history of ideas, *i.e.* before Bentham, to find arguments in support of this view. Not being an intellectual historian, in the following I rely on the views of experts and on what seems to be accepted view among them.

In chapter 14 of *De Cive* and chapter 25 of *Leviathan* Hobbes distinguishes law (command) and counsel.¹⁸ Law is command and distinguished from another mode of governance, advice or counsel. Command is “the mark of law-giving, and accordingly the province of the sovereign.”¹⁹ Hobbes says that the command is to the benefit of the commander but this may be seen as a misleading expression of what he means: it is to the benefit of those whom the sovereign is, roughly speaking, representing. “The mark of counsel is that while also in the imperative mood, it aims at the good of the person to whom counsel is given.”²⁰ In contrast to commands, one can choose to ignore advice if one so wishes.

At first one could see this distinction as relevant for or at least analogous to our present discussion of the legality of nudges. The reference to the benefit of the advisee and the liberty to follow the counsel or not recall libertarian paternalism, and insofar as they cover the same subject, also nudges.

There are some further similarities which draw attention to the mechanisms by which counsel or at least a special kind of counsel operates. According to Hobbes, in case of exhortations the counsellor does not provide reasons, rather he uses some non-rational ways of persuasion.²¹ In Hobbes's view exhortations are used when counsel is given to a multitude, exactly because a single person would ask for explanations and reasons, which is much more difficult to provide in front of a crowd. He adds that in contrast to counsel by rational argument which typically serves the interest of the counselled, exhortations serve the benefit of the counsellors, only accidentally those who are advised. He also discusses what makes a good or bad counsellor. In particular, it is experience and empirical knowledge which qualifies someone to be good counsellor.

In light of this, nudges can be seen as extra-legal as far as they operate in a different mode than authoritative precepts: they are closer to expert advice on what it is prudent to do than to law which claims to have authority to tell what one ought to do. In this view, nudges can be seen as merely counsel, too weak to be considered proper law.

This may not fully convince though. To counter this argument one can either argue that nudges are indeed not so innocent in terms of coerciveness or one can question whether the distinctness of legality lies in coerciveness. The first route is viable insofar as we follow the above definition of nudges. That definition allows for nudges which are coercive in some sense, e.g. seriously manipulative. The distinction would then depend on how we think about these different kinds of coercion.

From the context of his discussion, it seems that Hobbes considers counsel mainly as an intra-governmental matter. One could think of the conceptual features of counsel and especially exhortation as relevant in the relations of modern government to citizens. But it is less clear whether Hobbes was even conceiving of a government operating in the advisory mode. What he says about counsel in *De*

Cive and *Leviathan* leaves some uncertainty as to which of the several differences between command and counsel is the crucial one. If the distinction is ultimately between those in power and those who are not, then it is not clear whether someone who can command is also in the position to give counsel. In other words, a Hobbesian could say, nudging by the government is legal simply because it issues from the sovereign.

The second route is also available. Modern legal positivism, while relying on Hobbes, as well as Bentham and Austin in some respect, seems to have repudiated the view that law is conceptually linked to coercion, especially as a kind of command. Granted, law is typically coercive, but what is distinctive about law is related to the sort of reasons for action it provides. Even before Hobbes, we can find the distinction in other authors of early modern philosophy. In fact, the distinction between command (or more generally obligation) and counsel (or more generally prudence) is known in early modern natural law theories more broadly.²² Theorists such as Grotius or Suarez both use this distinction, although in different ways, in arguing that there can be reasons for agents to act other than their own good. Thus, for instance, legitimate laws may demand people doing things against their interest. Their theories are not our topic here but remind us of the long tradition of thinking about law not merely in terms of coercion but in terms of (moral) reasons. Still, the legality of nudges does not fit easily into such a framework either: the *modus operandi* of counsel as a prudential reason is different from moral reasons.

II-2 - Law as normative guidance vs. nudges as manipulation of choice architecture

These other accounts of law draw attention not to law's typical coerciveness but to one of its other, arguably necessary features: its reason-giving, action-guiding character. The view of law as normative guidance also seems to suggest that at least some nudges are not legal. In fact, in this view nudges or at least some types of nudges can be seen as non-legal because they are too "strong" or "crude" to be called law. Previously I have argued along these lines when discussing whether nudging is compatible with what law assumes about human agency.²³

A useful starting point for understanding this view is to consider law as being based on implicit or explicit assumptions about its subjects, (human) agents. Some of these assumptions are operational,

linked to particular legal doctrines, but some are more fundamental, linked to law's general conceptual (or aspirational) features. To uncover these assumptions sometimes requires theoretical reflection. Relatedly, their content is more controversial. Consider, for instance, a general statement like this: "Laws are for humans, not for angels or devils." This statement seems to refer to some very general features of human nature or the human condition (arguably, features like limited rationality, limited benevolence, relative scarcity) as conditions under which it makes sense for a group of agents (not) to have law. Herbert Hart's discussion of the minimal content of natural law is a well-known rendition of this idea.²⁴

Following Hart, Fuller and other legal theorists in both the positivist and the idealist camps, and looking at legal doctrines of criminal and tort liability as paradigmatic instances, there seem to be good reasons to see law as being conceptually (or aspirationally) linked to the idea of *normative guidance*.²⁵ Law as normative guidance is a specific mode of governance—it sets rules for responsible agents, but does not make it practically impossible for these agents to disobey. Law as normative guidance is based on certain assumptions about its subjects, including their capacity to reason and responsiveness to reasons, of which law is one.²⁶ As Fuller put it:

To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view of man that is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.²⁷

How is this relevant for the legality of nudges? Law's behavioural assumptions set constraints on encompassing empirically informed techniques of manipulating choice architecture which disregard these assumptions—as long as the assumptions are in place. Some regulatory techniques, old and new, behaviourally informed or not, seem to disregard agency assumed by law as normative guidance. I do not claim that nudges *tout court* do this; some nudges are innocent in this regard. Yet when the regulation/governance/management of people operates through physical or technological restriction of their action space or manipulates their behaviour in such a way that they are forced or tricked into choosing or doing what the regulator wanted, without having a (reasonable) opportunity to disobey, we are dealing with an instance of governance or social engineering which runs counter the ideal of law as normative guidance.

These interventions physically (or in the online world, virtually) constrain the action space of agents. Road-bumps are the simplest example. Sometimes this governance technique is referred to as techno-regulation²⁸ but the boundary between this and nudges is porous. In effect, both represent kinds of choice architecture. Perhaps (techno-)regulation not respecting fully-fledged agency is not wrong *per se*. In some contexts, it may be an acceptable, or even commendable, way of managing the behaviour of people. But it can be seen as problematic in light of substantive moral or political principles, often enshrined in law.

What we are concerned with here is, however, not these normative questions but a conceptual one. Can a nudge be called law without providing normative guidance? If law is a specific mode of governance, then certain regulatory techniques are more congruent with law than others. Let's assume that some of the practically interesting nudges are instances of techno-regulation or intransparent manipulation or are in some other sense in tension with the idea of law as normative guidance. In order to operate within the domain of law as normative guidance, nudges should take certain fundamental assumptions about human agency into account. But what sort of should is this exactly? How much "cure, manipulation, conditioning and propaganda"²⁹ are allowed within law?

A categorical answer would insist that those instances of governance which do not fit into the terms of law as normative guidance can be useful, effective and even morally unobjectionable in some contexts, but they are not legal. This seems to be the view implied by Lon Fuller in *The Morality of Law*, at the end of his famous parable about the eight ways of failing to make laws:

The first act of [...] Rex II, was to announce that he was taking the powers of government away from the lawyers and placing them in the hands of psychiatrists and experts in public relations. This way, he explained, people could be more happy without rules.³⁰

This answer is straightforward about the extra-legal character of some nudges but, as I will argue in the following section, it is not entirely satisfactory.

III - THE LEGALITY OF NUDGES

The categorical answer provided above is problematic for various reasons. The first one can be formulated as a matter of concept-formation. The second one can be formulated as a matter of exegesis of Fuller's theory. Ultimately, however, both bring us to what could be called the normative reasons for conceptual choices.

III-1 - Juridical law and focal analysis

The quote from Fuller can be interpreted such that an instance of governance which falls short of the ideal of law as normative guidance is simply not law. This view not only raises the stakes unnecessarily high, it also depends on certain logical and semantic assumptions about concept-formation which can be problematized themselves. Furthermore, this view is in conflict with the modern doctrinal understanding of positive law. One of the alternative, low-stake answers is this: the focal or central meaning of law is normative guidance. The idea of normative guidance is law's aspiration but empirically we can observe other modes of governance that are more or less legal—they are in the penumbra of the meaning of the term law. While law as normative guidance is the central case of law (it has normatively grounded conceptual primacy), it is not necessary that law indeed operates this way in every instance, or indeed in the statistical majority of cases.³¹

This argument can be complemented by some historical and social observations. Research on European legal history suggests that the tension, or at least the distinction, between law, on the one hand, and governance or legally unconstrained policymaking, on the other, has characterized Western law for several centuries.³² Law has long been associated with courts and judges and their activity, within an intellectual and practical domain that the late-medieval legal scholar Bracton called *jurisdictio*.³³ It is a domain where lawyers as a professional group have developed a body of doctrinal knowledge and expertise, in the name of which to attenuate and moderate factual and normative claims and decide on their legal relevance or impact on the outcome of juridical processes. This juridical mode seems to be the primary mode of operation of law in a conceptual sense. Responsibility in tort law and criminal law are paradigm examples of this idea. Juridical law is backward-looking, holding reasonable

individuals accountable to behavioural standards and if they don't meet those, calls them to respond, *i.e.* finds them responsible.

In contrast, governance, or what Bracton called *gubernaculum*, is a domain where goals are set by political rulers (democratically elected or not) and imposed on human practice more or less directly, characteristically without lawyerly intervention. This is the domain of regulation and policy, that mode of governance which for much of the pre-modern and early modern period of European history was taken out of courts' jurisdiction and left to the wisdom (discretion) of the sovereign: taxation, warfare and foreign affairs.³⁴

Arguably, modern law operates to a large extent in this governance mode, *i.e.* through regulation that does not easily fit into the juridical model. This is perhaps not surprising, given that modern regulatory law is more concerned with aggregate social outcomes than individual behaviour.³⁵ A topical example is migration policy, the goal of which is named in a recent EU policy document as “the efficient management of migration flows”³⁶—a purpose clearly at odds with the idea of law as normative guidance.

Even though modern law is dominated, statistically, by this regulatory mode, the normatively grounded conceptual priority of law as normative guidance can still be noticed, at least implicitly, in legal terminology.³⁷ While this conveys a heuristic primacy to juridical law, nowadays lawyers hardly ever seriously question whether so-called ‘technical’ or regulatory rules are law *in the doctrinal sense*. Legal doctrine seems compatible with, and flexible enough to incorporate, policies that follow a regulatory, or managerial rather than a juridical logic. In other words, techno-regulation seems to raise little doctrinal concern. And if there are legal concerns, legal principles and doctrinal techniques such as human rights, the rule of law or proportionality are available for the task of control.³⁸ In fact, modern law is all-encompassing both in the sense that for any state action some legal authorization is needed (this is the core idea of the rule of law rather than of men, or the principle of legality) and in the sense that any private action is potentially subject to legal rules. Within this broad, all-encompassing set are included both law in a narrower juridical sense and law that is only loosely or formally associated with the core concept.

From a practical viewpoint it may seem futile or quixotic to question whether formally authorised nudges are legal. But in my view legal practice and doctrinal understanding alone cannot settle the matter. It is the task of theory to provide, in Hart's words, a "rational and critical foundation for law".³⁹ To be sure, when explicating the concept of law, legal theory as a hermeneutical exercise cannot stray too far from its common sense and doctrinal understandings. And there is also disagreement on what those rational and critical foundations should be. Some theorists are reluctant to link the concept of law to substantive moral ideas, thus calling "Brave New World-like" regulations non-law, less legal or a perversion of law. While they agree that law should ideally operate as normative guidance, not as a "goad" or manipulation, they hold this to be a moral desideratum not a conceptual matter. More precisely, above a certain minimal threshold of what is required by human agency, they are ready to talk about law even in case of a "Brave New World-like" rule, if it fulfils certain criteria of pedigree. They may add that the rule is a practically defective or even morally flawed one. Still, they refer to the theoretical and practical benefits from keeping conceptual and evaluative matters apart.⁴⁰ For these theorists, the legality of nudges is a non-issue. More precisely, instead of a conceptual issue, it becomes either a doctrinal or interpretative question (to the extent positive law constrains nudges) or a nakedly moral or political matter (to the extent normatively problematic nudges are not constrained legally).

Perhaps the question whether law's capability to provide normative guidance is a conceptual or a moral matter is the wrong question. Perhaps it is better to say that, above a minimal threshold, the nature of law is such that this capability is an inherent feature of law, not realised to the same degree in each instance. The focal case of law would be the one fully conforming to the ideal, while those more or less in conflict with it, would be peripheral exemplars. Such a focal analysis can make sense of legal practice, and the regulatory instruments that figure in it, in both explanatory and normative sense. Focal analysis can illuminate why non-transparent or manipulative nudges are peripheral instances of law. So the legality of nudges is not a dichotomous, black and white issue, but a quality that comes in degrees, gradually.

III-2 - Legal nudges within economics?

At the end of section 2, I suggested that in *The Morality of Law* Fuller links law conceptually to the ideal of normative guidance. In a forthcoming chapter, the Dutch legal philosopher Wibren van der Burg argues that Fuller can be understood as identifying law broader than legislation, linking only the latter to the idea of normative guidance.⁴¹ Van der Burg suggests that nudges, although perhaps in a different mode than governance by rules, can also be legal. He argues that Fuller's broader unfinished other project called economics, as presented in his posthumously published collection of essays *The Principles of Social Order*⁴² is fully compatible with, indeed perhaps encompasses nudging. The goal of economics is to "uncover the organising principles, features of design and participatory commitments which constitute different models of social ordering, and which make them appropriate for use in a given context."⁴³

Law, as discussed in *The Morality of Law* refers only to legislation. In reconstructing Fuller's views, Ken Winston, the editor of *The Principles of Social Order*, distinguished and characterized five main legal processes: contract, mediation, legislation, adjudication and managerial direction.⁴⁴ Each process has a different leading ideal, and a different internal morality. Whereas in *The Morality of Law*, law is explicitly distinguished from managerial direction, in this broader framework arguably these are merely different types of law. "The implication is that there is not merely one internal morality of law but that there is a multiplicity of internal moralities: in other words, a multiplicity of legalities."⁴⁵

Nudges and techno-regulation can either fall under the category of managerial direction or be seen as an entirely new legal process. Fuller's project is open-ended, in the sense that new regulatory techniques brought about by advances in empirical research and technology can be classified within this broader scheme of processes of social ordering.⁴⁶

Of course one can raise the question whether the project of economics is about law only or also other non-legal types of social ordering.⁴⁷ Van der Burg suggests moving away from terminological and conceptual issues to more pragmatic ones, although it is not clear whether he has the primary practice of social ordering or the secondary practice of theory-building in mind: "It is a more

productive research strategy to uncover the internal morality of those new types or subtypes of law, than merely to observe that there is a tension between those types and the internal morality of legislation because they do not provide normative guidance. [...]A fruitful interdisciplinary research strategy might be to uncover these internal moralities and *epistemes*, confront them with empirical insights and thus come to an enriched typology. Such a typology might help lawmakers and policymakers decide which legal processes are best suited to deal with certain types of problems.”⁴⁸

This suggests looking at the legality of nudges in a way different from the previous ones. If nudges are seen as embedded in this broader Fullerian normative framework of economics or good social ordering, along with other regulatory techniques, the question of their legality becomes a non-issue again. More precisely, one can still distinguish better and worse nudges according to criteria of the internal morality of nudging itself. Furthermore, this framework is not incompatible with the empirical observations that most instances of regulation are mixed types; they encompass elements of a number of processes identified by Fuller. Nudges by governments are usually enshrined in legislation or administrative regulation. This suggests that nudges are not obviously and not always legal nor are they necessarily or typically extra-legal. But under this view legality is at most one of the relevant criteria for propriety.

CONCLUSION

Of course the answer to the question, ‘when are nudges legal’ depends on our understanding of what nudges are and what law is. This paper suggested a few conceptual considerations on the kind of governance mechanism law is. There is, however, much more at stake than drawing conceptual boundaries.

We have seen that an important reason for thinking about nudges as extra-legal instruments can be our conception of law being linked to a certain ideal (law as normative guidance). One can ask for a point where too much use of techno-regulation or manipulative practices would turn a legal system into a regulatory regime that is “less than legal”. Regulatory techniques that do not take human agency into account would be seen as non-legal in a substantive sense or as perversion of the law, even if formally valid or authorised. In other words, there seems to be a point where formally valid law becomes

something fundamentally different from a mechanism of governance of and for reasonable individuals.

How much substantive normative conclusion can be inferred from the “law as normative guidance” ideal? This question is pertinent because moral and political controversies are sometimes framed as if they were logical or conceptual problems of behaviourally informed regulation or the nature of law. Ultimately, however, normativity needs to be addressed as a substantive political and moral matter.

In fact, some legal philosophers hold the view that it is a matter of substantive political goals or values how to define law. Whether the concept of law only includes formal elements, so-called social sources and no necessary substantive criteria or, conversely, law is defined in terms of the purposes it is meant to serve—this debate itself is fought in part in normative terms, *i.e.* as a debate about what kind of authority can be legitimate in a normatively plural society; or which understanding of law would allow officials and/or citizens a better critical perspective when faced with evil or seriously flawed, *i.e.* morally deficient “laws”. In short, in so-called conceptual debates one can hardly avoid seeing disagreements about political ideals and the means to achieve those ideals.

NOTES

- [1] This assumption of extra-legality of nudges (and techno-regulation and mandatory disclosure) is made explicit at the start of an insightful paper. Ryan Calo, “Code, Nudge, or Notice?”, *Iowa Law Review*, 99 (2014) 775. In the first footnote the author makes it clear that by defining law through its typical *modus operandi*, as it “directs behavior in certain ways; it threatens sanctions *ex post* if those orders are not obeyed” he “mean[s] only that within many civil, criminal, and administrative contexts the imposition of a rule serves as a natural starting point”. He makes it explicit that he does not “endorse the so-called command theory of law or suggest that law operates exclusively by identifying transgressions and setting and enforcing penalties.” The author has no time to think about the difference between directing behavior and threatening with sanctions. This paper can be seen as an attempt to think about this difference, or more generally, about what various conceptualizations of law imply as to

whether and how nudges, as well as other seemingly non-legal regulatory mechanisms, can be seen as within, rather than beyond the law.

- [2] Michael Oakeshott, *On Human Conduct*, Oxford, Clarendon Press 1975, vii.
- [3] Pelle Guldberg Hansen, “The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove?”, *European Journal of Risk and Regulation*, 7 (2016) 1-20.
- [4] Hansen, *op. cit.*, 20.
- [5] *Ibid.*
- [6] See e.g. Stefan T. Trautmann, “Empirical Knowledge in Legislation and Regulation: A Decision Making Perspective”, *Theory and Practice of Legislation*, 1 (2013) 533.
- [7] Richard H. Thaler, Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, New Haven, Yale University Press, 2008, which is an extended version of two earlier papers by the authors: Richard H. Thaler, Cass R. Sunstein, “Libertarian Paternalism”, *American Economic Review*, 93 (2003) 175, and Cass R. Sunstein, Richard H. Thaler, “Libertarian Paternalism is Not an Oxymoron”, *University of Chicago Law Review*, 70 (2003) 1159.
- [8] On the terminology see Erik Angner, “Behavioral Welfare Economics, Libertarian Paternalism, and the Nudge Agenda” (May 5, 2015), *GMU Working Paper in Economics*, No. 15-29; *GMU School of Public Policy Research Paper*, No. 15-14. Available at SSRN: <http://ssrn.com/abstract=2580523>
- [9] Cass R. Sunstein, *Why Nudge? The Politics of Libertarian Paternalism*, New Haven, Yale University Press, 2014.
- [10] Cass R. Sunstein, *Simpler: The Future of Government*, New York, Simon & Schuster, 2013.
- [11] Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics*, New York, W.W. Norton, 2015.
- [12] Cass R. Sunstein, “Incompletely Theorized Agreements”, *Harvard Law Review*, 108 (1995) 1733.
- [13] For a very informative and concise overview see the panel discussion on his book *Why Nudge?* on 17 April 2014 at Harvard Law School, at <https://www.youtube.com/watch?v=xCooeMHkTic>
- [14] Alberto Alemanno, Anne-Lise Sibony (eds.), *Nudge and the Law: A European Perspective*, Oxford, Hart 2015.
- [15] Alberto Alemanno, Alessandro Spina, “Nudging Legally: On the Checks and Balances of Behavioural Regulation”, *International Journal of Constitutional Law*, 12 (2014) 429.
- [16] Anne van Aaken, “Constitutional Limits to Paternalistic Nudging: A Proportionality Assessment” (May 14, 2015). Forthcoming in: Alexandra Kemmerer, Christoph Möllers, Maximilian Steinbeis, Gerhard Wagner (eds.), *Choice Architecture in Democracies, Exploring the Legitimacy of Nudging*, Oxford/Baden-Baden, Hart and Nomos, 2016; U. of St. Gallen, *Law & Economics Working Paper*, no. 2015-03. Available at SSRN: <http://ssrn.com/abstract=2606189>

- [17] On the role of coercion in law, with references to Bentham, Austin and the subsequent jurisprudential discussion, see Frederick Schauer, *The Force of Law*, Cambridge, Mass, Harvard University Press, 2015.
- [18] “We must fetch the distinction between Counsell, and Law, from the difference between Counsell, and Command. Now COUNSELL is a precept in which the reason of my obeying it, is taken from the thing it self which is advised; but COMMAND is a precept in which the cause of my obedience depends on the will of the Commander. For it is not properly said, Thus I will, and thus I Command, except the will stand for a Reason. Now when obedience is yielded to the Lawes, not for the thing it self, but by reason of the advisers will, the Law is not a Counsell, but a Command, and is defined thus, LAW is the command of that Person (whether Man, or Court) whose precept containes in it the reason of obedience [...]. Law and Counsell therefore differ many ways; Law belongs to him who hath power over them whom he adviseth, Counsell to them who have no power. To follow what is prescribed by Law, is duty, what by Counsell, is free-will. Counsell is directed to his end that receives it; Law, to his that gives it. Counsell is given to none but the willing; Law even to the unwilling.” Thomas Hobbes, *De Cive. Philosophicall Rudiments Concerning Government and Society. Or, A Dissertation Concerning Man in his severall habitudes and respects, as the Member of a Society, first Secular, and than Sacred* [1651] ch. 14.1, see online: <http://www.unilibrary.com/ebooks/Hobbes.%20Thomas%20-%20De%20Cive.pdf>, Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civil* [1651] ch. 25, see online: <http://www.gutenberg.org/files/3207/3207-h/3207-h.htm> For a brief modern summary see the entry “Command and counsel (imperatum et consilium)” in *A Hobbes Dictionary*, ed. A. P. Martinich, Oxford, Blackwell, 1996, Glew Newey, *The Routledge Guidebook to Hobbes' Leviathan*, London, Routledge, 2014, 94, 196.
- [19] Newey, *op. cit.*, 196.
- [20] Newey, *op. cit.*, 196.
- [21] “EXHORTATION, and DEHORTATION, is Counsell, accompanied with signes in him that giveth it, of vehement desire to have it followed; or to say it more briefly, Counsell Vehemently Pressed. For he that Exhorteth, doth not deduce the consequences of what he adviseth to be done, and tye himselfe therein to the rigour of true reasoning; but encourages him he Counselleth, to Action: As he that Dehorteth, deterreth him from it. And therefore they have in their speeches, a regard to the common Passions, and opinions of men, in deducing their reasons; and make use of Similitudes, Metaphors, Examples, and other tooles of Oratory, to perswade their Hearers of the Utility, Honour, or Justice of following their advise.” Hobbes, *Leviathan*, ch. 25. On Hobbes’s roots in the humanistic–rhetorical tradition, see Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, Cambridge, Cambridge University Press, 1997.
- [22] Stephen Darwall, *Honor, History, and Relationship: Essays in Second-Personal Ethics II*, Oxford, Oxford University Press 2013. Darwall analyses how the distinction between law and counsel figures in Grotius’s discussion

of natural law as a source of moral obligation. He argues that “what is novel in Grotius is the idea that morality (natural law) creates “obligations” whose binding force cannot be reduced to reasons or “counsels” of any kind. [...] By tying the idea of morality to that of legitimate demand, and distinguishing its normative force from that of reasons that can but recommend or “counsel” conduct, however strongly, but not yet require it, Grotius bequeathed to the modern period the problem of what is nowadays called the “authority of morality,” namely, how to understand and account for morality’s distinctive normative force.” (*ibid.*, 158) “For Grotius, therefore, there is no notion of moral right and wrong that is independent of moral obligation. Considerations of common good, taken by themselves, are simply insufficient to show that anything is morally right or wrong in the sense with which Grotius is distinctively concerned. The most they can provide is counsel, not authoritative demand.” (*ibid.*, 171). On the disagreements between Grotius and Suarez, see *ibid.*, 171 n. 27, 176-178.

- [23] See Péter Cserne, “Making Sense of Nudge-Scepticism: Three Challenges to EU Law’s Learning from Behavioural Sciences” in *Nudge and the Law* (n 14) 279-299. I have greatly benefitted from Fabrizio Esposito’s insightful critical comments on this chapter. See his book reviews of *Nudge and the Law* in *Humana.Mente Journal of Philosophical Studies*, 28 (2015) 267-269 and *European Journal of Risk and Regulation*, 6 (2015) 338-339.
- [24] Cf. H. L. A. Hart, *The Concept of Law* 3rd edn, Oxford University Press, Oxford, 2012, 193-200 and its interpretation by Leslie Green, “Introduction”, in H. L. A. Hart, *The Concept of Law* 3rd edn, Oxford University Press, Oxford, 2012, xxxiii–xxxvi; Leslie Green, “The Morality in Law”, in Luís Duarte d’Almeida, James Edwards and Andrea Dolcetti (eds), *Reading H. L. A. Hart’s The Concept of Law*, Oxford, Hart, 2013, 177.
- [25] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, Oxford University Press, 1968, 182-183; H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd edn, Oxford, Clarendon Press, 1985, lxxx–lxxxi. See also Péter Cserne, “Between ‘Metaphysics of the Stone Age’ and the ‘Brave New World’, H. L. A. Hart on the Law’s Assumptions about Human Nature”, in Miodrag Jovanović and Bojan Spaić (eds), *Jurisprudence and Political Philosophy in the 21st Century: Reassessing Legacies*, Frankfurt, Peter Lang, 2012, 71. On law as normative guidance, see Mátyás Bódog, “The Issue of Normativity and the Methodological Implications of Interpretivism I: The Idea of Normative Guidance”, *Acta Juridica Hungarica*, 54 (2013) 119.
- [26] It arguably assumes compatibility between physical and psychological determinism and free will as well.
- [27] Lon L. Fuller, *The Morality of Law*, New Haven, Yale University Press, 1964, 162. Fuller adds that “the whole body of the law is permeated by two recurring standards of decision: fault and intent” (*ibid.*, 167).
- [28] For a definition of techno-regulation and an informative discussion, see Katja De Vries and Niels van Dijk, “A Bump in the Road: Ruling out

- Law from Technology”, in Mireille Hildebrandt and Jeanne Gaakeer (eds), *Human Law and Computer Law: Comparative Perspectives*, Springer, Berlin 2013, 89; and Ronald E. Leenes, “Framing Techno-Regulation: An Exploration of State and Non-State Regulation by Technology”, *Legisprudence*, 5 (2011) 143-169.
- [29] H. L. A. Hart and A. M. Honoré, (n 25), lxxix.
- [30] Fuller, (n 27), 38.
- [31] On the focal approach to concept formation (sometimes called context principle) see Timothy A. O. Endicott, “How to Speak the Truth”, *American Journal of Jurisprudence*, 46 (2002) 229-248; Veronica Rodríguez-Blanco, “Is Finnis Wrong? Understanding Normative Jurisprudence” *Legal Theory* 13 (2007) 257-283; John Finnis, “Grounds of Law and Legal Theory: A Response”, *Legal Theory*, 13 (2007) 315, 316-321.
- [32] Bas Schotel, “Legislation, Empirical Research and Juridical Law”, *Theory and Practice of Legislation*, 1 (2013), 501. Michael Oakeshott’s distinction of civil association and corporate enterprise (non-instrumental law and instrumental governance) relate to similar concerns, both historically and philosophically. See Oakeshott, *On Human Conduct* (n 2) and Oakeshott, “The Rule of Law” in *On History and Other Essays*, Oxford, Basil Blackwell, 1983, 119-164.
- [33] For Bracton’s distinction, see Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca, NY, Cornell University Press, 1947.
- [34] According to Oakeshott these three issues or domains cannot be governed in a non-instrumental way, *i.e.* according to what he called the rule of law. So empirically, any state has to operate in a managerial way at least in these respects.
- [35] Within legal theory, Donald Kelley and Tim Murphy drew attention to the historical transition from the individualized way of judicial governance through court cases to regulation based on statistics and aggregate social variables. Murphy also argued, more controversially, that the old ‘juridical’ mode of operation of law is maintained nowadays in a somewhat quixotic way, as a sort of consolation for the lost importance of individuality in other social domains. Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1990; W. T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity*, Oxford, Oxford University Press, 1997, 195-197.
- [36] As has been made explicit recently with respect to the “Asylum, Migration and Integration Fund”, see e.g. http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/index_en.htm
- [37] For instance, international lawyers sometimes distinguish ‘legal’ and ‘technical’ measures of, for example, anti-terrorism. The former refers to how international criminal law defines certain types of acts or conducts and attaches legal consequences to them (the responsibility of individuals as well as jurisdiction and empowerment for prosecution and law-enforcement agencies). This is contrasted with so-called technical rules

which typically operate in the preventive mode, by setting security standards, technological and virtual barriers and other measures that are supposed to do most of the job of keeping people on the right track as well as keeping cases away from court. These technical rules are sometimes doctrinally less sophisticated or more distanced from the raw assessment of individual actions. Thanks to Vassilis Tzevelekos and Carmino Massarella for clarifying this distinction.

[38] See the references in n 14-15 above.

[39] See Cserne, (n 25), 74-78.

[40] This is, roughly, Hart's argument against Finnis's analysis of the concept of law (H. L. A. Hart, "Introduction", in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, 11-12). Praising Finnis for 'foster[ing] awareness of the way in which unspoken assumptions, common sense, and moral aims influence the law', Hart claims that 'these valuable lessons can be taught in other ways.' (*ibid.*, 11) While he does not explain what those 'other ways' are, he stresses the conceptual clarity we can gain and the confusions and obfuscation that we can avoid if we maintain the separation between conceptual analysis and moral evaluation. Hart claims that the focal meaning of the concept of law cannot or even if it could, should not be identified in light of moral values served by the law. They 'cannot', if we think that we cannot attribute any meaningful general goal or purpose to the law. They should not, if we care about the epistemic value of 'clear thought', and we want to adopt a 'balanced perspective' and avoid 'distortion' (*ibid.*, 12). These arguments do not seem conclusive. In fact, this issue has been the subject to extensive methodological discussion in jurisprudence, see e.g. John Gardner, "Hart on Legality, Justice, and Morality", *Jurisprudence*, 1 (2010), 253-65. See also Leslie Green, "Law as a Means" in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century*, Oxford, Hart, 2010, 169.

[41] Wibren van der Burg, "The Need for Audacious Fully Armed Scholars. Some Concluding Reflections" in Sanne Taekema, Wouter de Been and Bart van Klink (ed), *Facts and Norms in Law: Interdisciplinary Reflections on Legal Method*, Cheltenham, Elgar, 2016, forthcoming). Whether this interpretation of Fuller's views is entirely convincing is worth a separate discussion. In this section I merely summarise van den Burg's argument as far as it is relevant for the legality of nudges.

[42] Lon L. Fuller, *The Principles of Social Order. Selected Essays of Lon L. Fuller*, revised edn, ed. Kenneth I. Winston, Oxford, Hart, 2001. See Karol Soltan, "A Social Science that Does not Exist" in Willem J. Witteveen and Wibren van der Burg (ed), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, Amsterdam, Amsterdam University Press, 1999, 387.

[43] Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller*, Oxford, Hart, 2013, 37.

[44] Kenneth I. Winston: "Introduction", in Fuller, *Principles of Social Order* (n 42).

- [45] Wibren van der Burg, “The Work of Lon Fuller: A Promising Direction for Jurisprudence in the 21st Century”, *Erasmus Working Paper Series on Jurisprudence and Socio-legal Studies*, no. 13-02, May 13, 2013, Available at SSRN: <http://ssrn.com/abstract=2264020>
- [46] Van der Burg (n 41). Calo’s paper (n 1) can be seen as such an exercise.
- [47] This is somewhat similar to the issue raised by Roger Brownsword about the place of law and other, mainly techno-regulative interventions within a “regulatory environment.” See Roger Brownsword, “Comparatively speaking: ‘Law in its regulatory environment’” in Maurice Adams and Dirk Heirbaut (ed), *The Method and Culture of Comparative Law. Essays in Honour of Mark van Hoecke*, Oxford, Hart, 2014, 189-205.
- [48] Van der Burg(n41).