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# False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics

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economics to behavioural law and economics will be analysed from a third, namely sociological perspective: the economic sociology of law. In this framework, it is possible to compare and confront the “old” *homo oeconomicus rationalis* and the “new” *homo oeconomicus behaviouralis* with a third model—*homo oeconomicus culturalis*—which demonstrates the limits of the previous models, not least with regard to explaining the recent financial crisis. While governance by nudges might look, at first sight, as a tempting idea, I will question the normative side of this project and emphasize its possible effects on our legal culture and, thereby, our human condition.

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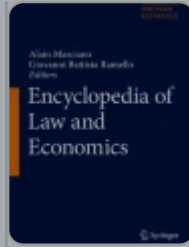
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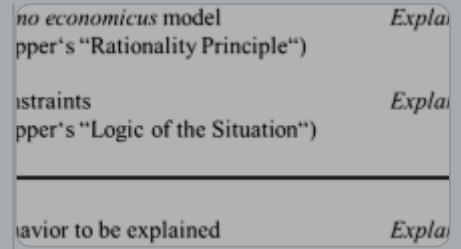
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favoured by the historical school of economics (Desautels-Stein [2010](#), p. 37).

3. The concept of “information asymmetry” stems, of course, itself from modern standard economics. Its usage in the present context demonstrates the accessibility and versatility of economic concepts even outside the economic discipline.
4. Roughly speaking, law and economics favours economic policies that connect the rule of law with ideas of economic efficiency whereas law and society furthers social policies that emphasize principles of social justice.
5. My personal impression is that the different perspectives of economics and sociology are not equally represented in the public media that offer popular

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9. Curiously, there is now a second book called *Nudge* on the market, which clearly follows an evangelical mission: “Awakening each other to the god who’s already there” (Sweet [2010](#), subtitle).
10. This argument surfaces already in Thaler ([2000](#)). Accordingly, behavioural economists seek to replace “traditional models” of “rational, unemotional agents” with “behavioural models” of “quasi-rational emotional humans.” In short, “homo economicus” has to evolve into “homo sapiens” (ibid., p. 140). In his review of *Nudge*, Etzioni ([2009](#)) adopts, somewhat uncritically, the same terminology.
11. Camerer ([1999](#), p. 10575) labels this as a positivist (as opposed to a realist) approach: “[B]ecause theories with patently false assumptions can make

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14. And in reality, *homo sapiens* is often short-sighted—and could thus also be dubbed *homo myopicus* (Baird et al. [2006](#)).
15. I borrow this term from Amitai Etzioni who used it, however, only in a footnote (Etzioni [2010](#), p. 392, fn. 3).
16. The distinction between a rational consumer, a naive one, and a sophisticated one is used and illustrated by Teck et al. ([2006](#), pp. 316–318).
17. As suggested by Camerer and Loewenstein ([2004](#), p. 24).
18. Homer Simpson also appears—albeit less frequently—in academic articles.

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23. Drawing on the classical notion of idiots, which, admittedly, appears somewhat “discomforting” today, Camerer et al. ([2003](#), p. 1218) argue: “In a sense, behavioural economics extends the paternalistically protected category of ‘idiots’ to include most people, at predictable times. The challenge is figuring out what sorts of ‘idiotic’ behaviours are likely to arise routinely and how to prevent them, while imposing minimal restrictions on those who behave rationally.”
24. Jolls and Sunstein ([2006](#), p. 201) describe “debiasing through law” as strategies that “directly [operate] on the boundedly rational behaviour” and “help people either to reduce or to eliminate it.” They thus preserve and do not eliminate individual choice (as more rigid regulations presumably would).

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however, also have unintended normative effects (what can be called the “reflexivity” and “performativity” of social science in society). On the intertwinement of positive analysis, prescriptive analysis, and normative analysis in behavioural law and economics, see Sunstein ([1997](#)) and Jolls et al. ([1998](#)).

29. One may wonder why the *homo economicus behaviouralis* is suddenly of much appeal. It seems that the “market society,” which overwhelms the individuals both with the possibility and the necessity of taking “free” and “rational” choices in all matters of life (including, for example, retirement savings), has thus found its inner limits.

30. Instead, they argued that “bounded rationality” furthers “a scepticism about

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assumption of bounded rationality.

36. In behavioural economics, the “classic assumption that economic agents are systematically driven by the pursuit of material self-interest” (Zarri [2010](#), p. 562) is often considered too restrictive since it cannot explain the sense of fairness that economic actors exhibit in certain situations.
37. This is, at least, the direction the inquiry takes in behavioural economics and which leads, almost by necessity, to neuro-economics.
38. Camerer et al. ([2005](#)) give the following account: “Neural evidence suggests [...] that the same dopaminergic reward circuitry of the brain in the midbrain (mesolimbic system) is activated for a wide variety of different reinforcers,

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internally, by affecting what goes on in court, and externally, by affecting what happens in ordinary transactions—market and nonmarket” (ibid.).

42. And towards law and neuro-economics (Chorvat et al. [2005](#))?
43. In the present reinterpretation and enhancement of Rischkowsky and Döring’s ([2008](#)) categories, I include not only “new” but also “old” institutionalism. While the former has occasionally been dubbed “rational-choice institutionalism,” the latter opens the field for more macro-analytical and sociological approaches.
44. This antagonism can be summarized as follows: “In stark contrast to the formal legal notion of the ‘sovereign-consumer,’ the citizen-consumer entails

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([2007](#), [2008](#)). The “nudgeable” consumer appears then just as the latest form of the “governable” self (Frerichs [2010b](#)).

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