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

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Abstract

Economic bestsellers like *Freakonomics* and *Nudge* that mainly address outsiders of the economic discipline are also consumed by lawyers. The latter has already become an important reference in the field of consumer law and policy. In principle, this is nothing to complain about but part of law's encounter with science, namely the social sciences. Notably, the law and economics movement proved successful in importing economic perspectives into legal discourse. However, it would seem questionable if the law followed each trend on the academic book market. While there has been an increasing emphasis on economic perspectives at the expense of sociological perspectives within the field of law, economy, and society, a major shift can now also be observed in the field of law and economics. With the behavioural turn in law and economics, *homo oeconomicus* seems to be transformed into *Homer Economicus*, and consumer law prone to be Simpsonized. In this paper, the turn from neoclassical law and 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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Notes

1. Technically speaking, scholars are only consumers when they pay for the acquisition of knowledge. In the present context, I use the term, however, in a wider, more figurative sense. In a “consumer society,” academics as well as non-academics are also the target of the “marketing” of scientific knowledge, which thus takes a “commodified” form (such as popular science books). The scholars can then “buy” the propagated ideas or not. This principle holds true even if money is not an immediate part of the transaction.

2. In this respect, it is much different from the “legal analysis of economics” once 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

representations of scientific theories (including widely distributed books, magazines, and newspapers as well as broadcasting and internet services).

6. See also Farber 2001 whose review of "behavioural law and economics," edited by Cass R. Sunstein, is aptly titled "Toward a new legal realism." Sunstein uses the notion of legal realism himself, albeit in a slightly different context, namely with regard to judicial behaviour (see Miles and Sunstein 2008; Stephenson 2009).

7. A simple Google search yielded results for *Economist*, *Financial Post*, *Telegraph*, and *Wall Street Journal.* See, for example, Weisman (2010).

8. At least the "new international edition" that I am working with plays with a diabolical imagery: the cover is blood-red, with black and white lettering. A Sunday Times quote on the top announces "Hot stuff." And the word "nudge," which is the eye-catcher of the book, is used to illustrate itself: the "g" nudges the "u" with its descender which symbolizes, iconically, the tail of the devil.

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 surprisingly accurate predictions, economic theories that assume that

individual agents are highly rational and willful, judge probabilities accurately, and maximize their own wealth might prove useful, even though psychology shows that those assumptions are systematically false."

12. Interestingly, reservations about the rationality and autonomy of "human beings" also seem to imply a greater respect for the interests of "nonhuman animals" which may perceive pleasure and pain in similar ways as humans. Not surprisingly then, Sunstein also takes a stance in the animal rights debate and, notably, trades Descartes and Kant off against Bentham and Mill (Sunstein 2003, pp. 387–389). In the same vein, he confronts the "rationalist" positions of Posner and Epstein with more "behaviouralist" arguments based on animals' capacity to suffer (Leslie and Sunstein 2007, pp. 117–118). What is at stake here is the always contingent line between subject and object, ends and means, (legal) person and (legal) property—and, ultimately, how to define a "humane [!] treatment of animals" (ibid., pp. 132–133).

13. Including not only *homo oeconomicus* but also *homo juridicus* (Supiot 2007).

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. One of the sequences related in *Nudge* was previously used by Camerer et

al. (2003, p. 1254, fn. 144), with Matthew Rabin acting as a mediator. It is about lowering Homer's IQ by hammering a crayon into his nose: "The surgeon knows the operation is complete when Homer finally exclaims: 'Extended warranty! How can I lose?'" (Thaler and Sunstein 2009, p. 87, fn.*).

19. For readers not familiar with this character: it should be enough to have a quick look at pictures of him on the internet.

20. In a way, he was paternalistically "nudged" to take precautions.

21. These could also be precautions taken by someone else in order to protect him from his own biases.

22. This term is also used by Hall (2005) in an attempt to use *The Simpsons* for teaching purposes.

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).

25. This is at least suggested by introducing Thaler and Sunstein's (2009) recent terminology into the field of behavioural law and economics, thus building on earlier collaboration between Jolls et al. (1998) and Jolls and Sunstein (2006).

26. The notion of "animal spirits" goes back to John Maynard Keynes (Pech and Milan 2009). In today's behavioural economics, it is notably specified as the "affective—'animal'—system of the human brain" (Loewenstein and O'Donoghue 2004, p. 34) which predates and complements the "deliberative system" that modern humans take so much pride in. See also Lewis (2010) and Schwartz (2010).

27. Namely, the nature of man as a social animal. The social component is thus not excluded. However, it is mainly approached from our affective system.

28. On the one hand, models of economic man, or social action, more generally, may explicitly serve normative purposes (such as the rationalization of economic action through standard economics). On a deeper level, they may, 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 antipaternalism but not an affirmative defence of paternalism" (Jolls et al.

1998, p. 1541).

31. behavioural economics and new economic sociology even share important sponsors, such as the American Russell Sage Foundation. For behavioural economics, see Lambert (2006), pp. 54–55; for new economic sociology, see Convert and Heilbron (2007), pp. 49–50.

32. Which notably do not confine themselves to restricted notions of “herd behaviour.”

33. In other words, the more we focus on man’s universal nature, the less we understand about the variability of human culture.

34. Here understood not as social but as scientific “representations” of the financial crisis given by scholars and not by laypersons (Leiser et al. 2010).

35. The rationality assumption of standard economics is thus replaced with the 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, including attractive faces, funny cartoons, cultural objects like sports cars,

drugs, and money. This suggests that money provides *direct* reinforcement." (ibid., p. 35; original emphasis; references omitted) Of course, money is also a cultural object.

39. A counter-example is the study by Henrich et al. (2005) which confronts seemingly universal patterns of human behaviour, suggested by previous research, with cultural variation in a sample of 15 small-scale societies.

40. This "ranking" should not be taken for granted. In his review of *Nudge*, Schlag (2010) argues pointedly: "Someone's nudge is someone else's compulsory mechanism. And it may well turn out too that a 'nudge-in-action' will be more coercive than 'a command and control regulation-in-the-books'" (ibid., 917).

41. According to Sunstein (1997), "the legal system is pervasively in the business of constructing procedures, descriptions, and contexts for choice" (ibid., p. 1177). More precisely, "law can construct rather than elicit preferences both 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 a series of positive values, which cannot be legitimated by a simple internal legal dedication to the maintaining of contractual autonomy, but must

instead find their approbation in democratic discourse and the subjection of law to subsequent political direction" (Everson and Joerges 2007, p. 159).

45. In the same vein, one can distinguish between *bourgeois* and *citoyen*.

46. At the same time, they are also "participants in informal life and livelihoods that permeate both the private and the public sphere" (Reisch 2004, p. 3; emphasis omitted).

47. Which can then either be interpreted as a humanistic ideal, a cognitive illusion, or a social construction.

48. On the link between behavioural economics and new governance, see Amir and Lobel (2008). This deserves, however, a more thorough discussion, which also makes use of the governmentality concept initiated by Michel Foucault (2007, 2008). The "nudgeable" consumer appears then just as the latest form of the "governable" self (Frerichs 2010b).

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