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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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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

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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

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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

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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.

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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

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[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.

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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).

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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.

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