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

| Original Paper | Published: 29 June 2011

Volume 34, pages 289–314, (2011) Cite this article



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Aims and scope →

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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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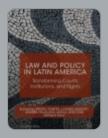
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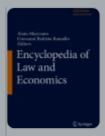
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standard economics. Its usage in the present context demonstrates the accessibility and versatility of economic concepts even outside the economic discipline.

- 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).

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- 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."

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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,

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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).

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- 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

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- 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.

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- 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).

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Cite this article

Frerichs, S. False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics. *J Consum Policy* **34**, 289–314 (2011). https://doi.org/10.1007/s10603-011-9164-7

Received Accepted Published

10 October 2010 07 June 2011 29 June 2011

Issue date

September 2011

DOI

https://doi.org/10.1007/s10603-011-9164-7

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