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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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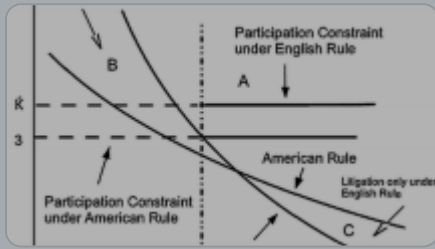
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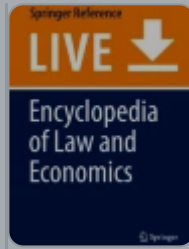
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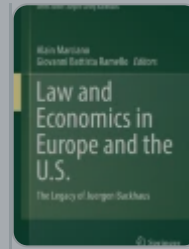
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4. Roughly speaking, law and economics favours economic policies that connect the rule of law with ideas of economic efficiency whereas law and society furthers social policies that emphasize principles of social justice.
5. My personal impression 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

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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.

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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.

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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

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“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

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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.

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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).

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