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Rational, Reasonable and Nudged Man

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Abstract: This paper is part of a broader enquiry into three main models (or concepts) of individual, which appear in philosophical and legal discourse: the Reasonable Person, the Biased Nudged Human, the *Homo Œconomicus* (or the Economic Rational Man). The overall research aims to clarify the differences and similarities between such models as used by the relevant classical literature. The general purpose of the research is mainly to understand whether these models overlap or resemble each other and, if so, to what extent. The paper focuses on the theses that: (i) the different literatures concerned with these models of individual should be confronted more critically and, in particular, a closer dialogue between studies concerning reasonableness and nudging should be fruitful; (ii) a significant distance exists between the legal uses of these models and their use in theoretical and philosophical speculation. This is particularly true with regard to the Reasonable Person and the *Homo Œconomicus* concepts. Although legal scholars refer to them, such references are often nothing more than embellishments. In many instances, they import concepts and conceptions from other fields of investigation or literature by making a spurious and superficial analogy.

Keywords: Rationality; Reasonableness; Nudging, Individuals; Law

Index: 1. Introduction – 2. The Reasonable Person and the Man on the Clapham Omnibus – 3. Econs and Humans: Biases and Nudges – 4. *Homo Œconomicus*: a Cluster of Models – References

1. Introduction

This paper is part of a broader enquiry into three main models of the individual, which belong to philosophy and appear in legal discourse. I refer to the Reasonable Person, the Biased Nudged Human, the *Homo Œconomicus* (or the Economic Rational Man),

The overall research aims to explain and clarify the differences and similarities that exist between such models in the relevant classical literature. The general purpose of the research is therefore to understand whether these models of the

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individual overlap or resemble each other and, if so, to what extent. These models of the individual spring from a remarkable history of ideas that I will outline below just briefly along with some selected references¹. Considering the extensive literature about each one of these models, a selection of references is unavoidable, but it will suffice to see the large varieties of assumptions and premises that lay beyond them. Some key references of my investigation will be, *inter alia*, the theories and ideas of John R. Lucas (1963), W.M. Sibley (1953), John Rawls (1958; 1997), Richard H. Thaler and Cass R. Sunstein (2008), as well as Charles Reinold Noyes (1948) and Herbert A. Simon (1957; 1978).

Many philosophers, economists and legal scholars think that a particular model of the Economic Rational Man is at the very centre of the concept of reasonableness or “nudges” (see *e.g.* Sen 1977). This attitude is considered a core element of the Western rationalistic tradition (see *e.g.* Searle 1992). The Economic Rational Man has been the common term of comparison of the Reasonable Person in the last centuries (see *e.g.* Hill 1969), and continues to be so². In turn, the Biased Nudged Human is a model traditionally and deliberately juxtaposed with the archetypal *Homo Oeconomicus* (Thaler 2000). However, in contemporary thinking, the relationships between the Economic Rational Man and the other two models (the Reasonable Person and the Biased Nudged Human) are contested and ambiguous. It is worth noting that while a considerable number of studies deal with the rational and the reasonable, or are concerned with rational and biased humans, studies dedicated to the examination of the concepts of nudging and reasonableness are rare. In this respect, another general purpose of this research is to contribute towards bridging the previously mentioned gap. The present paper proposes that a closer dialogue between the literature on reasonableness and nudging would be of value to legal theory and practice.

To clarify the general framework of this paper it is useful to summarize the six hypotheses, which are tested and defended in my research on the models of individuals.

1. The concept of the Economic Rational Man, which has been extensively discussed and criticized in the literature on the Reasonable Person and the Biased Nudged Human, is a false target of criticisms created *ad hoc*. A large part of economic theory – perhaps the majority of it – proposes models of the individual that are not simply versions of the stereotypical *Homo Oeconomicus*, as its critics often maintain (see *e.g.* Doucouliagos 1994; Lecouteux, 2013). Rather, economic theory and philosophy of economy are familiar with a great variety of models of the individual, each one of which is based on and characterized by a certain form of bounded or limited rationality. Therefore, among scholars, there is a great debate

1 For a preliminary introduction and further information, see Bowles, Gintis 1993: 83-102; O’Boyle 2010: 195-204; Harstad, Selten 2013: 496-511.

2 In addition, the Reasonable Person model has and is often (especially in legal theory) seen in opposition to some form of positivistic legal reasoning or some form of “rationality” which is assumed to pervade the legal domain: however, to develop this part of the investigation about rationality is out of the scope of this paper.

as to which one of those differing conceptions of limited rationality and models of bounded rational man will prevail as a better way of describing and understanding human behaviours.

2. Nudging is not a new concept, but a more forward-looking legacy of a long-standing tradition in economic thinking for which the economy is a branch of our society and economics is a social science that has to be realistic and “positive” (Caplin, Schotter 2008; Cserne 2017). It also represents one of the more successful developments of those schools of economic analysis (of law) that have given relevance to the institutional and social dimensions of human behaviour (see *e.g.* Heukelom 2014; Williamson 1985). In spite of some disparate interpretations (Galletti, Vida 2018), it does not seem to have specific historical links with the philosophy of Bentham and utilitarianism.

3. Both the Reasonable Person and the Biased Nudged Human models are based on an ideal conception of bounded rationality, which is strictly related to (ordinary) common sense. In this respect, (ordinary) common sense is an essential component of both the Reasonable Person and the Biased Nudged Human. Often, depending on differing opinions about common sense, such as nudges, references to the Reasonable Person may cover cultural stereotypes and is a cause of scepticism and criticism towards the theoretical use of such concepts (Moran 2010; Cominelli 2018: 47; 168-171).

4. Each one of the three models considered here emphasizes a certain facet of practical rationality. Roughly speaking, just as the practical sphere consists of ethics, politics and the economy, so rationality has ethical, political and economic specifications, which the Reasonable Person, the Biased Nudged Human, and the (Bounded) Rational Economic Man respectively incorporate. That is to say, the Reasonable Person pertains to the sphere of morality, the Biased Nudged Human to the sphere of politics, and, finally, the (Bounded) Rational Economic Man to the sphere of economics.

5. As the long-established doctrine regarding the “Man on the Clapham Omnibus” shows, human beings are, according to the legal perspective, far from being perfectly rational agents (Gardner 2015). The criterion of the Reasonable Person is a multifarious legal standard that is widely applied by authorities to judge and guide people, including officials, generally assuming that our behaviour and decisions are essentially context-dependent and contingent on factual and evaluative factors (Gardner 2001; Garrett 2017). On the other hand, nudging may be roughly sketched as the architecture of intentional choice, typically addressed to biased human beings and used by policymakers who aim to guide people to better, easier, smarter choices (Sunstein, Reisch 2019). In light of the above, the relevance of reasonableness in nudges, and vice versa, merits careful reflection.

6. As I said, it appears that a closer dialogue between the respective literatures regarding the models of the individual considered here and, in particular, those concerning reasonableness and nudging, are of value from a theoretical point of view. On the other hand, a significant distance exists between legal discourses that use these models and the related theoretical and philosophical speculation. This is particularly true with regard to the Reasonable Person and the *Homo Economicus*.

These two models of the individual do not have a significant impact in the legal domain. Although legal scholars refer to them, such references mostly serve to enhance the discourse and are often nothing more than embellishments. In many instances, they import concepts and conceptions from other fields of investigation or literature by making a spurious and superficial analogy.

In the following paragraphs, I will focus only on the last hypothesis. These paragraphs will provide a comparison between philosophical thinking on the aforementioned models of the individual in light of the legal approach to them. I will divide the presentation into three parts. Each one will be mainly descriptive and explicative and it will concern, respectively, the Reasonable Person, the prevailing thinking on nudging and the state-of-the-art on *Homo Economicus*. This order of illustration follows the ranking of importance of these models in legal discourse. I will start with the Reasonable Person as the model most largely used by jurists and deemed to have a wide impact on the law and the legal systems all around the world. Then, I will continue with the phenomenon of nudges considering the focus on it in the contemporary legal debate and that its quickly increasing impact thanks to many reforms and legislative projects. Finally, I will discuss the *Homo Economicus* which, notwithstanding its importance in social sciences and history, it rarely appears in legal discourse. As would be expected, each topic has an extensive and complex literature. I will provide only a few references to some theories, authors, and a few legal examples taken from the American, English and Italian case laws, which in my opinion are paradigmatic of the approach of most jurists.

2. The Reasonable Person and the Man on the Clapham Omnibus

The essence of the literature on the Reasonable Person is the complex relation of this notion relationship with the concept of rationality (see *e.g.* James, 1869; Sibley, 1953; Lucas, 1963). The basic idea prevailing in contemporary philosophical thinking is that the reasonable is not the same as the rational that there is no logical or necessary connections between the two. Of course, many actions and choices can be rational and reasonable at the same time. Nevertheless, according to the majority, this is only a potential correspondence. Actually, given that the idea of the Reasonable Person is contingent on the meta-ethical conceptions and ethics underpinning it, different ways of conceiving the model co-exist (see *e.g.* Zorzetto, 2008; 2015; Cuono 2012-13).

The Reasonable Person is usually compared to and differentiated from the Economic Rational Man who is a purportedly perfect maximiser who acts only in his own interest and who measures all his actions from a purely economic standpoint by balancing benefits and costs (a famous disputed application of this model is the Learned Hand Test; Ripstein 2009).

Some scholars draw a historical link of the concept of Reasonable Person with the concept of right reason, *i.e. recta ratio* (see *e.g.* La Torre 2012; Hill 1969). Sometimes the Reasonable Person is an anthropomorphic image of jus-

tice; for others it is a symbol of prudence and sympathy opposed to hubris and passion (see *e.g.* Perelman 1979; Aarnio 1987). It can also be an ideal model of conduct socially acceptable and inspired by moderation (see *e.g.* Moran 2003). A common basis of these ideas is the intuition, reflected in ordinary language, that being reasonable implies discernment and equilibrium. In this view, the Reasonable Person approaches every circumstance by taking into consideration other people and tries to obtain fair terms of cooperation (Rawls 1997). This tenet is significant since it evokes an association between reasonableness and *aequitas* or equity (*i.e.* justice as fairness). Along this line, reasonableness is often presented as both an intellectual and a practical virtue of all humans capable of a sensible and sensitive reasoning (Sibley 1953; Lucas 1963). The Reasonable Person is therefore conscious that moral convictions and beliefs might be wrong, and desires should not be satisfied at all costs. In addition, they are aware that the collateral effects of everyone's behaviour on others shall be taken into account and that actions shall not be based only on economic calculation, but also with regard to a gradation of priority in the order of values and interests.

To understand if an act is reasonable or unreasonable, it shall be considered where it is connected: “((1) to events, and risks of which an actor is conscious, that a jurisdiction regards as tolerable, *i.e.*, not ‘wrongful,’ regardless of whether they are motivated by blameworthy mental states or emotions; and (2) mental states of inadvertence or emotions such as anger that are consistent with a jurisdiction’s values and, hence, are not ‘blameworthy,’ regardless of whether they produce wrongful events. This distinction between sets 1 and 2 is significant because, while the “reasonable person” by which events in set 1 are assessed is a disembodied and impersonal ideal that consists of nothing but the uncompromising values of the jurisdiction, the reasonable person by which mental states and emotions in set 2 are measured must necessarily incorporate some of an actor’s individual traits or risk blaming the blameless.” (Westen 2008: 159-160). This *distinguo* is instructive as it presents two facets of the concept of the Reasonable Person. On the one hand, it is an impersonal or fictitious ideal grounded on a general claim for equality; on the other, it is a way to leave space for the physical, psychological and emotional traits of each individual (see *e.g.* Green 1968).

Although the aforementioned applies to the predominant thinking of philosophers on this subject, among legal thinkers the Reasonable Person is a legal standard generally accepted and widely used both in common law and in civil law cultures.

The common opinion is that the notion of Reasonable Person belongs to British common law (see *e.g.* Piggott, 1888-1889; Fleming 1951; Saltman 1991; Austin, 1992; Joachim 1992). In the common law tradition, the Reasonable Person is a basic standard in tort cases and those regarding fair dealing and negligence in contracts (see *e.g.* Schwartz 1989; Mullender 2005). It is a guideline in evaluating defendants’ conduct in criminal cases (see *e.g.* Hoernle 2008), such as cases of insult, harassment and defamation. It is also applied where deviance, delinquency, and mental suffering or illness are disputed (see *e.g.* Harlow 2007).

Judges and juries tend to evaluate actions and discourses in the light of an “ordinary reasonable” person that, frequently, is equated to the English legal concept of the “Man on the Clapham Omnibus” (Gardner 2015), or the Welsh and Australian “Man on the Bondi Tram” (see the 1985 *Papatonais vs Australian Telecommunications Commission* case). The origin of the Man on the Clapham Omnibus and its content are highly uncertain and controversial; there are records of its uses in the eighteenth century (McCaughran 2011). For many scholars it is a ubiquitous and almost mythic figure.

I will give a rough sketch of this model recalling some leading cases.

A prominent record goes back to the 1903 *McQuire vs Western Mornings News Co Ltd* case of the King’s Bench Court of Appeal Division.

On June 24, 1901 the plaintiff – who was an actor and a theatrical manager – appeared in a play written and composed by himself; the following words appeared in an article published on the day after in the newspaper owned by the defendants:

A three act musical absurdity entitled ‘The Major,’ written and composed by Mr. T. C. McQuire, was presented last evening before a full house by the author’s company. It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play, ‘The Major’ is composed of nothing but nonsense of a not very humorous character, whilst the music is far from attractive. This comedy would be very much improved had it a substantial plot, and were a good deal of the sorry stuff taken out of it which lowers both the players and the play. No doubt the actors and actresses are well suited to the piece, which gives excellent scope for music-hall artistes to display their talent. Among Mr. McQuire’s company there is not one good actor or actress, and, with the exception of Mr. Ernest Braime, not one of them can be said to have a voice for singing. The introduction of common, not to say vulgar, songs does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness.

In this case, the Court stated that:

This raises a very important question as to what are the limits of ‘fair comment’ on a literary work, and as to what are the respective provinces of the judge and jury with respect thereto. One thing, however, is perfectly clear, and that is that the jury have no right to substitute their own opinion of the literary merits of the work for that of the critic, or to try the ‘fairness’ of the criticism by any such standard. ‘Fair,’ therefore, in this collocation certainly does not mean that which the ordinary reasonable man, ‘the man on the Clapham omnibus,’ as Lord Bowen phrased it, the jurymen common or special, would think a correct appreciation of the work; and it is of the highest importance to the community that the critic should be saved from any such possibility. In principle, therefore, there would be nothing to leave to the jury unless there was some element in the criticism which might support an inference of unfairness in some other sense. [...] in the case of a literary work at all events, it is something that passes out of the domain of criticism itself. Criticism cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact.

As this case shows, reasonableness is a criterion to evaluate fairness and, at least in some cases, the right standard according to law does not simply fall into line with the ordinary Man on the Clapham Omnibus, given that the court demands a higher and more polished standard which takes into account the circumstances.

Prudence is a key feature of the Reasonable Person according to case law. For instance, in the 1837 *Vaughan vs Menlove* case (Dorfman 2012), the concept of the Reasonable Person was applied by referring to the “caution that a prudent man would have observed”. In the 1993 *Hall vs Brooklands Auto-Racing Club* case concerning a case in which a motor car seriously injured a crowd of people during a race, the request for compensatory damages was dismissed by using the standard of the Reasonable Person, given that – in the opinion of Lord Justice Greer – no barrier would provide protection from this potential, albeit highly improbable, occurrence.

Some decisions issued by the US courts are also useful to understand the content of this model.

In the 1964 *New York Times vs Sullivan* case, it was stated that “we are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to judicial shifting of loss” (Kalven 1967),

In the 1988 *Thompson vs US* case, the District of Columbia Court of Appeals discussed the instructions that can and, in some cases, must be provided to the jury.

[W]e are constrained to assume – the Court observed – that when they contain realistic rather than theoretical distinctions, and when they are clearly and understandably delivered, they will reduce, if not dissipate, the danger of unfairness and prejudice. In weighing probative value against prejudicial effect, courts should inquire as to whether the risk of prejudice has been or can be meaningfully reduced by the trial judge’s instructions. [...] [The first question is] whether the distinction propounded in the limiting instruction can make any sense to a jury of lay people. Not all instructions are equal in this regard. A direction to the jury that a prior conviction shall be considered only in connection with the defendant’s credibility, and not in relation to his guilt or innocence of the charged offense, is at least readily understood, if not easily followed. An instruction that a defendant’s prior drug sale may be considered in connection with his intent to sell drugs on the occasion for which he is on trial, but not as showing his guilt of the current offense in any other way, appears to require a degree of refinement which, if theoretically achievable, is probably well beyond the ken of the average juror. [...] [A second question deals with] whether the limiting instruction has been phrased in terms which a jury is likely to understand.

That said, a judge of the Court comments that:

One might well wonder what the man on the Clapham bus (Britain’s proverbial reasonable person) or his American counterpart thinks of the proceedings when he is told to consider a defendant’s five prior convictions for possession of heroin only in connec-

tion with the defendant's truthfulness or lack thereof, but not at all in connection with the defendant's guilt or innocence of the current charge of possession or heroin. That instruction is replete with the kind of language, (e.g., 'the jury may draw therefrom an inference,') which, to put it charitably, ordinary people do not use in the Safeway or on the bus, and which may bring bafflement if not slumber to the jury box. This is the sort of jargon that may account for the popularity of Dick the Butcher's famous suggestion that 'the first thing we do, let's kill all the lawyers.' SHAKESPEARE, HENRY VI, PART II, Act IV, Scene 2.

These cases show that the Reasonable Person is a broad model of individual, in possession of ordinary common sense and ordinary intuitions about fairness and justice. Whether the Anglo-American Clapham Omnibus represents a certain moral ideal that belongs to common sense, rather than a composite of society at large, is in fact unclear.

Instructive in this respect is the debate that arose out of Devlin's Clapham Omnibus argument, as outlined in his famed proposal for the enforcement of morals (Devlin [1959] 1965; Cane 2006).

As Feinberg observes (1990: 133-148), Devlin's emphasis on the reasonableness of the "man in the jury box" leads to a strict objective moralism. Feinberg criticizes the overlap between morality and law in Devlin's thinking. Aside from that, Feinberg supports the idea that "the juror in an ordinary legal case must be a reasonable person, but her reasonableness need be no greater than that of the ordinary minimally qualified bloke. One would think that a higher standard than that would be needed if we are to infer the true morality from unanimous jury verdicts". Ronald Dworkin (1965-1966) and Herbert Hart (1963) also criticised Devlin's Clapham Omnibus argument: in brief, the core of the censure is that such an argument neglects the fundamental distinction between positive (anthropological) and critical (discriminatory) morality (G. Dworkin 1999).

Although this debate is still modern, judicial uses of reasonableness continue to be so broad and undetermined that it is almost impossible to grasp this distinction between positive (anthropological) and critical (discriminatory) morality in legal reasoning. Equally, it is relatively difficult to figure out, on the basis of judgements, some stable and precise relationships with one or the other conception of the Reasonable Person as offered by philosophers.

3. Econs and Humans: Biases and Nudges

The second model of individual under analysis is the Biased Nudged Human as conceived by Sunstein and Thaler (2008). This model has received considerable attention in legal literature. In fact, thanks to the increasing success of the concept of nudging in public and private policies all around the world (Whitehead, *et al.* 2014), jurists – and legal scholars in particular – are becoming familiar with this notion (Alemanno, Sibony 2015; Mathis, Tor 2016). Legislators, institutions and organizations such as the United Nations and the World Bank put many nudges

into practice and try to take advantage of them. Thus, in a very short time, in part thanks to the propagation power of the internet, nudging has become a focus of interest, with a significant turnover; however, so far nudges have remained outside of the courts.

While political and moral philosophers discuss the acceptability of nudging and the values it might promote or, conversely, restrict, a large number of studies in behavioural economics assess its efficacy and develop its uses (Ferraro, Zorzetto 2019). Nonetheless, nudging is also a victim of its own success and the target of numerous criticisms. On one side, a vast multifarious literature uncritically portrays nudging as a smart tool for making people's lives simpler, safer or easier; on the other, a profusion of critics stigmatize it as a surreptitious vehicle for manipulating people's behaviour in the name of hypocritical paternalism (Wilkinson 2013; Tor 2016; McCrudden, King 2016).

I will focus only on one topic of the current debate, namely the received view, which traces an opposition between Econs and Humans. This opposition belongs to the originators of nudging: Richard Thaler and Cass R. Sunstein. Among many contributions, I will refer hereinafter to the books "Nudge. Improving Decisions About Health, Wealth, and Happiness" (herein after briefly quoted as 'T&S 2009') and "Misbehaving. The making of behavioral economics" (Thaler 2015).

Thaler and Sunstein conceive of "two imaginary and real species" of individuals: the Econs and the Humans (T&S 2009: 7).

It is important to note that, although the authors consider Econs and *Homo Oeconomicus* as equivalent (T&S 2009: 6-7), Econs have specific features that are significantly different from those usually ascribed to the Economic Rational Man as typically portrayed in economic literature.

Thaler and Sunstein qualify as Econs those people who "make unbiased forecasts", while it is "not required to make perfect forecasts (that would require omniscience). That is, the forecasts can be wrong, but they can't be systematically wrong in a predictable direction. Unlike Econs, Humans predictably err" (T&S 2009: 7).

Econs and Humans, hence, act differently and have different attitudes in terms of predictability. Consequently, their decision-making processes lead to contingent errors or systematic fallacies.

Another distinctive feature relies on the well-known distinction made by psychologists and neuroscientists between the Automatic System, which governs fast, intuitive reactions and the Reflective System of thinking, which is a deliberate and self-conscious system of thought. "Econs never make an important decision without checking with their Reflective Systems (if they have time), But Humans sometimes go with the answer the lizard inside is giving without pausing to think." (T&S 2009: 22).

Moreover, "Econs respond primarily to incentives" and ignore nudges, while "Humans respond to incentives too, but they are also influenced by nudges" (T&S 2009: 8). Humans are frequently nudged by other Humans. On the contrary, Econs are "pretty unsocial creatures. They communicate with others if they can gain something from the encounter, they care about their reputations, and they will learn from others if actual information can be obtained, but Econs are not followers of fashion." (T&S 2009: 53).

The following example of the authors is useful to better understand how Econs and Humans diverge (T&S 2009: 120):

How would Econs decide how much of their portfolio to invest in stocks? An Econ would make a trade-off between risk and return that would be based on his preferences about retirement income. That is, he would decide whether the possibility of being, say, 25 percent richer is worth the risk of being 15 percent poorer. Needless to say, even if it occurred to Humans to think about the problem this way, they would not know how to make the necessary calculations. The decisions they do make will differ from those of Econs in two ways. First, they will be unduly influenced by short-term fluctuations, and second, their decisions are likely to be based on rules of thumb.

Thus, Biased Humans should be gently pushed with the aim of reducing ordinary deficiencies and the negative effects of rationality failures or in order to counteract such failures, while the theoretical Econs do not need such interventions.

Many other scholars follow this line of reasoning (e.g. Mongin, Cozic 2018). Similarly, for Hausman and Welch (2010), people who are the object of nudges possess flaws in individual decision-making and nudges work by utilising these flaws. Equally, in Oliver's view, Biased Humans – although affected by deficiencies – allow themselves to be influenced by a redesign of their choice context (Oliver 2013).

The findings of behavioural economics (including neuroscience) on both the automatic and the reflexive responses of people are fundamental in this approach in trying to avoid overt methods of persuasion, to preserve freedom of choice and to avoid reducing the available options.

As the Committee for the Prize in Economic Sciences in Memory of Alfred Nobel noted in its illustration of the contribution provided by Thaler, “[a]n important part of nudging is to collect evidence on which policies actually work as intended, before they are implemented on a larger scale. Ideally, the policies should be tested and evaluated in randomized field experiments” (Thaler 2015: 335).

In this respect, for instance, Thaler mentioned several real-life circumstances in his research where the perceived unfairness of business decisions had striking consequences, thus highlighting the impact that the endowment effect has on the perceptions of fairness (Thaler 2015: 131).

The above analysis shows that the Biased Nudged Human model is close to the Reasonable Person, especially in its judicial version of the ordinary man or the Man on the Clapham Omnibus. The former can be considered a more sophisticated and accurate model; the main difference is the scientific knowledge on which the former is based, while the judicial uses of the ordinary reasonable person are generally not supported by any scientific or empirical evidence about human behaviours. On the other hand, the models of the individual as applied in nudges and in the judicial uses of the ordinary reasonable person are very distant from the philosophical versions of the Reasonable Person. The latter are pervaded and saturated by ethical convictions and assumptions about practical rationality and detached from empirical research.

The catalogue of ten important nudges outlined by Sunstein (2014) is helpful to understand how much the Biased Human model of the individual may enhance the judicial versions of the Reasonable (ordinary) Person.

Nudges comprehend (Sunstein 2014): (1) default rules; (2) simplification; (3) uses of social norms; (4) increases in ease and convenience; (5) disclosure; (6) warnings, graphic or otherwise; (7) pre-commitment strategies (by which people commit to a certain course of action); (8) reminders; (9) eliciting implementation intentions; (10) informing people of the nature and consequences of their own past choices.

Although this catalogue is very broad and heterogeneous, it is unquestionable that its items influence our ordinary judgment about what is reasonable or unreasonable in each circumstance.

In addition, the analysis of the nudges as applied in many fields, such as food, health, transport, energy, and so forth, show that the belief that their aim is to achieve economic rationality or to maximize preference satisfaction is fallacious. Whether nudging is or is not a way to promote economic rationality (whatever that means) or other kinds of value-oriented rationality depends on the circumstances. Biased Nudged Humans often hold values – and corresponding preferences – which are unrelated to their own economic efficiency: sometimes they act according to purely moral concerns, while acknowledging that it would be better for them to act differently (that is, in a more selfish way). This feature of Biased Nudged Humans is obviously not a mark of irrationality, but rather a response to non-egoistic preferences. Moreover, this feature is part of our ordinary judgment about what is (un)reasonable and emerges from the judicial uses of reasonableness.

As for now, however, sociological data will be pointed out. In Italy nudges have not come before the courts and the situation seems similar in Europe. At least in Italy no case law concerning nudging exists, notwithstanding the presence of the concept in the public debate and the plans put in action by policy makers (legislators and administrative bodies). In fact, no cases related to nudges appear in the database, and the legal doctrine does not study any concrete case. One of the main reasons for this is likely to be the general novelty of the phenomenon, while the non-binding nature of nudging does not prevent by it-self the possible existence of disputes and conflicts regarding their implementation. In the future, one of the main issues could be whether the application of nudges might have responsibility for the Nudger vis-à-vis the Biased Nudge Humans.

4. *Homo Economicus*: a Cluster of Models

In this last paragraph, I will give a rough sketch of some widespread ideas in economic theory about the Economic Rational Man in order to compare them with the cursory references made by the courts.

Provided that human behaviour have a large rational component, still it is debatable and strongly disputed that such rationality is the one personified by the *Homo*

Œconomicus. Nowadays, not only behavioural scientists, but also the champions of the evolutionary approach applied to economy tends to use different models (Hodgson 2013).

The followers of the *Homo Œconomicus* model assume a specialized sense of rationality: the rationality of the utility maximiser as he is “guided only by the desire to obtain the greatest utility with the minimum effort” (Pareto 1960: 386). This ideal has been variably shaped by Neoclassical microeconomics (Persky 1995; McCormick 1997). But, in any case, the term ‘rational’ has in this context a much more specific meaning than its dictionary meaning: “agreeable to reason; not absurd, preposterous, extravagant, foolish, fanciful, or the like; intelligent, sensible” (Simon 1978: 2).

Individuals who respond to the *Homo Œconomicus* model assumed by the classical economic theory are fully rational, given that they have a consistent and stable set of preferences, sequentially ordered (Wheeler 2019; Hausman 1981 and 2018, ch. 5.1; Blaug 1980, 229-234). Even their expectations are rational in the same sense as they are predictable and measurable (Muth 1961). The *Homo Œconomicus* always thinks and acts to maximize the satisfaction of those preferences, *i.e.* utility (Marschak 1950). As Gary Becker tells us (1974), “he would read in bed at night only if the value of reading exceeded the value (to him) of the loss in sleep suffered by his wife.”

The *Homo Œconomicus* has full information, unlimited cognitive abilities to process that information and no time constraints to reach decisions accordingly. More in detail, traditional economic theory postulates that the Economic Rational Man has: (i) “knowledge of the relevant aspects of his environment which, if not absolutely complete, is at least impressively clear and voluminous”; (ii) “a well-organized and stable system of preferences”; and (iii) “a skill in computation that enables him to calculate, for the alternative courses of action that are available to him, which of these will permit him to reach the highest attainable point on his preference scale” (Simon 1955: 99).

The rigorous economic argument, involving the idea of maximizing the outcomes of human behaviour and decisions, assumes no uncertainty and no changes in time and space (Sen 1985: 111).

Such a view of the *Homo Œconomicus* is the target par excellence both of the literature on the Reasonable Person and on the Biased Nudged Human. This notwithstanding, such a model of *Homo Œconomicus* is a misleading stereotype and an artificial target. Of course, it cannot be denied that lots of theories and models of rational choices exist and have a great role in the development of economics, but such a model of *Homo Œconomicus* is useless for the purposes of legal theory and practice. So much so that the models of the individual based on some forms of bounded or limited rationality are not a novelty generated by behavioural economics. There is in fact a very long and rich tradition that has prepared the ground for the current studies on behavioural economics. Indeed, a notable genealogy of precursors exists with respect to the modern investigations developed by economists, (neuro)psychologists, biologists, sociologists, etc., which are dedicated to provid-

ing a more realistic description of the *homo sapiens* (Kahneman, Tversky 1984; Samuelson, Zeckhauser 1988; Kahneman, Knetsch, Thaler 1991; Elster 1998).

My main reference is to the economic thinking about the “economic man” as a human characterised by constraints of space and time, limited physical and mental capabilities, and so forth. Among the many studies that have addressed these points, those by Herbert Simon should be recalled first; Simon observed that assumptions of rationality are essential components of virtually all the sociological, psychological, political, and anthropological theories. “[A]lmost all human behavior has a large rational component, but only in terms of the broader everyday sense of rationality, not the economists’ more specialized sense of maximization.” (Simon 1978: 2).

Before the dissemination in the nineteenth century of the studies on bounded rationality, a longstanding tradition highlighted the importance of taking into account people’s real behaviour in economic models. We can go back to the philosophical, political and ethical background in which the idea of the economic man flourishes from the late sixteenth century, then during the Enlightenment, until approximately the nineteenth century (Grampp 1948; Griswold 1999: 76-146). Not surprisingly, modern criticism against neoclassical orthodoxy resembles such older criticism directed against the old classic economy of Adam Smith and the Smithianismus (Godkin 1891).

Anthropological studies also offer a small but very important consideration. In the history of human beings, the passage from the “natural man” who produces to satisfy immediate wants and the “economic man”, who produces or traffics in consumable goods for future gain, represents a radical change of mind and life, situated at the beginning of human progress (in the modern meaning of the term) (Jenks 1902). This change of mind forces us to introduce the element of time in our models of the individual.

Among many other theories, we can recall the pure ideal of rationality framed by Leon Walras (Koppl 1995) and the alternative view proposed by Wilhelm Roscher and its call for historical awareness (Roscher 1878: 102-116). An additional exemplification of the different conceptions of the “economic man” co-existing in economics is the debate raised around the book “Economic Man in Relation to His Environment”, written by C. Reinold Noyes (Noyes 1948-1950, 1951; Keirstead, 1951).

Noyes argued that it is imprecise to speak of man as “rational” in his economic decisions. Some behaviour is “automatic,” some “impulsive”, some “deliberate” or “effortful”. These – Noyes said – are specific terms, while the trouble with the word rational is that it is not specific. Keirstead remarked, however, that economics is not concerned with impulsive, appetitive or passionate behaviours. Economic analysis begins only when these wants rise to consciousness and choices between them have to be made. In turn, Wolfe (1950) and Poffenberger (1950) who participate in the debate, believe that non-emotional, voluntary, and effortful sources of behaviour are redundant.

These positions show that a recurrent methodological battle is fought between the followers of the neo-classical micro-economic theory, on one side, and those

who argue for a closer dialogue and interplay with the social sciences, on the other (Friedman 1953: 3-43).

Noyes took a middle position, conceiving of a spectrum of behaviour ranging from the most irrational and impulsive to the most rational and voluntary (deliberate). As he observed, if choices were not rational (i.e., deliberately and consistently made), then indifference curves would not be convex to the origin, and need have no regular shape at all; by following Hicks's argument (1939), no single market price could emerge. However, empirically, as experiments conducted by Weldon show (1950), somebody may prefer A to B, B to C, and C to A.

In this cultural context, Herbert A. Simon proposed replacing the "global rationality of economic man with a kind of rational behaviour that is compatible with the access to information and the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist" (Simon 1955: 99). As he wrote, "[t]he player, instead of seeking for a 'best' move, needs only to look for a 'good' move" (Simon 1955: 108).

Thus, while the precedent classical models of rationality were fundamentally static, the aim of Simon, as of many other scholars, is to construe a more feasible and dynamic model, which considers the passing of time, possible changes in aspirations, different evaluations regarding pay-offs, unanticipated consequences and non-isolated processes of decision-making – in short, contingent on the given institutional background (as developments of such a program see e.g., the experiments done by Gigerenzer, Goldstein 1966 and Selten 1991)³.

In this framework, the study of rationality, in circumstances where attention is scarce, problems are immensely complex, and crucial information is absent, call for a less unpretentious individual who reaches plain and "reasonable" conclusions. In the light of Ockham's Razor "[p]arsimony recommends that we prefer the postulate that men are reasonable to the postulate that they are supremely rational" (Simon 1978: 8), Bounded rationality is indeed closer to the reasonable rather than to the rational (Simon 1955, 1978: 14).

Jurists, apart from those acquainted with the Economic Analysis of Law (Smith, Parisi 2005; Kirchgässner 2008; Mathis, Steffen 2013), are not familiar with all of the above. While the notion of *Homo Economicus*, as previously mentioned, is a typical term of reference for all those who discuss the role of rationality in the law, it is rare in case law and references to it by legal scholars tend to be cursory in nature.

By way of exemplification, it is useful to recall two Italian cases where judges use the notion of *Homo Economicus* in discussing whether a lawsuit with very low economic value (a few Euros) is admissible under Italian law.

In the first case, the creditor – after having received the payment of a sum of 17,854.94 Euros – began an enforcement proceeding claiming the existence of a residual debt of 12 Euros for the interest matured between the notification of

3 All jurists know very well that each case is different from any other and is contingent to circumstances. Therefore, this need to specify whether a model is considering time and how it does is definitely critical respect to any possible use of models in law.

the order of payment and the effective payment. Notwithstanding this being an enforcement case, the legal reasoning of the Court seems applicable to all kinds of civil proceedings, as shown by the following excerpt (Court Cass. Civ. Sec. 3, judgment March, 3, 2015, no. 4228):

When the subject matter of a litigation is a credit that is exclusively economic in nature and not even indirectly connected to non-economic legally protected interests, the interest to start an enforcement procedure, as well as the interest that must support any claim as to the merit of a declaratory relief, cannot receive legal protection if the economic amount of the claim is objectively low and hence of such an amount as to make a legal process unjustifiable. For that reason, even the suspicion of a possible violation of article 24 of the Italian Constitution ... is unfounded, because – by protecting the right of action – [that constitutional provision] does certainly not exclude that the law might request, in pure economic lawsuits, that the economic value of the claim should overcome a minimum threshold of relevance, primarily from an economic point of view ... As jurisdiction is notoriously a limited national resource, surely the law – explicitly or implicitly – may limit the application before a court in cases of economic claims, also taking into consideration that, given the limited resources available, the number of lawsuits has an impact on the reasonable length of proceedings, which is protected by art. 111 of the Italian Constitution and art. 6 of ECHR.

This legal precedent has been disregarded by another section of the Court of Cassation as it was considered limited solely to enforcement proceedings, and not applicable to declaratory reliefs concerning claims on the merits. The subsequent case dealt with a standard contract entered into by a company managing a public service with a user of the same service.

The Judges observed the following (Court Cass. Civ. Sec. VI-3, judgment January 27, 2017, no. 2168):

[R]egardless of the observation that the value of the dispute ... could not be considered solely from the user's point of view, but should also be seen from the [public service company's] point of view, [and from this latter point of view, the claim] would be not of the lowest value (always based on the evaluation criterion of the homo economicus), [However, the precedent quoted earlier is overruled for the following reason:] the issue of the present dispute is clearly traceable to what the legislator has called class action [...] The possibility to start a class action suit has been stated by the legislator without any limitation related to the value of the claim of the single consumer or user, thus it is admissible that the economic value of the identical rights would be of the lowest value if considered singularly. As the class action is not mandatory and the consumer or user is free to individually start a claim, it is manifest that the limitation related to the economic value of the claim cannot be applied, also in cases of exercising individual litigation.

By referring to the well-known *Homo Economicus*, judges try to put their position in the best light. However, the reference is extremely cursory: judges do not provide any analysis of the concept and they do not clarify which one of the versions of *Homo Economicus* they have in mind. As previously mentioned, in

the economic literature the *Homo Economicus* is not univocal. Even assuming that, in the literature on the economic analysis of law, the *Homo Economicus* is the epitome of the infallible rational utility maximiser (Zouboulakis 2014: 1), the quotation seems more an allusion, than a quotation adding substantial content to the reasoning.

In other words, the concept of *Homo Economicus* – whatever it may be – remains entirely in the subtext and the real legal reasoning is a hodgepodge of theoretical and normative assumptions that goes beyond any given conception of economic rationality.

Nevertheless, this does not mean that judges disregard economic concerns and evaluations.

Comparing the decisions, the different evaluations concerning the existence of a minimum threshold of relevance in cases of pure economic claims are absolutely clear. It is interesting to note that both decisions focus on economic considerations and, in particular, are based on macroeconomic rationales. Notwithstanding their *prima facie* inconsistency, they can be justified from two different economic considerations. On the one hand, the first decision justifies the existence of a minimum economic threshold of relevance on the basis of the limited resources available for the judicial system; in brief, constitutional and international principles allow for the exclusion of the smallest claims in order to efficiently use the resources available for more relevant claims. On the other hand, the second decision justifies the existence of small claims in cases of litigation that have the same nature as a class action for formal equality reasons: as no threshold exists in class action cases, a threshold for individual claims cannot exist either. In addition, the whole line of reasoning suggests that individual small claims may produce a general benefit for the majority of consumers and users. In this respect, for a better understanding of this judgment, it is important to note that in Italy class actions are rarely brought by consumers and users, while the latter generally pursue individual litigations. The rulings issued in each single case, however, easily become *de facto* legal precedents that are binding in other cases. Therefore, if collectively considered, small claims can have a relevant economic impact from the point of view of companies and entrepreneurs.

To conclude, legal references to *Homo Economicus* are part of a generically teleological approach to law, which is not linked to a precise economic school of thought. Economic considerations are broad and sometimes akin to common-sense ideas about what is convenient, efficient and so forth. Courts briefly touch on both micro- and/or macroeconomic issues, but they do not apply any specific economic theory. The outcomes of legal cases are contingent on substantial considerations somehow related to values such as solidarity, redistributive and equitable goals. As Neil MacCormick points out in his analysis of legal reasoning (MacCormick 1994: 103), decisions must make sense from a general point of view, and this is one of the strongest reasons why judges are concerned with social needs that go beyond the individual. Besides, all the models of the individual, which are embedded or applied in legal discourses, have a double dimension: both explicative and normative. As a model each version of the Reasonable

Person, the Biased Nudged Human, the *Homo Economicus* (or the Economic Rational Man) serves to provide a possible abstract and simplified explanation of some phenomena, based on certain metaphysical, philosophical, anthropological assumptions and premises. On the other hand, such models have a multilevel normative dimension that authors and followers may display less or more transparently, but which is in any case unavoidable. A normative dimension of such models exists at a methodological level, but a more rich normative dimension exists particularly in the legal domain where they serve as tools of pursue normative goals and make prescriptive reasoning and discourses.

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