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## BEHAVIOURAL ECONOMICS AND CONTRACT LAW

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**Abstract.** Individuals make economic decisions on a daily basis that do not look rational and that sometimes turn out to be mistakes. This behaviour has a cost for each individual and for society as a whole. Behavioural law and economics identifies which mental shortcuts used by individuals in decision making are behind those mistakes. Once cognitive biases affecting people are determined, behavioural law and economics propose to use the information gathered to design a set of rules that reduces individual and collective losses. This set of rules would steer people to rational choices that set them better-off and produce social welfare, but this would be done without banning or blocking choices; each individual would be free to choose an action which goes against the socially good for behavioural economists. Therefore, behavioural law and economics might be a new approach to be taken when dealing with contract law situations where intervention is considered necessary. This paper tries to explain the main features of behavioural law and economics while questioning the validity of its assumption that people are not rational. In addition, this paper addresses the problem of intervention in some grounds of contract law and takes a stand on whether it is desirable a strong intervention, a lighter one based on behavioural law and economics, or a neoclassical approach in favour of free market and freedom of contract with restrictions on them being an exception.

**Keywords:** behavioural law and economics, rationality, cognitive biases, contract law

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### I. INTRODUCTION. WHAT IS BEHAVIOURAL LAW AND ECONOMICS?

Behavioural Law and Economics (hereinafter, BLE) can be defined as a social science that analyses cognitive processes and frameworks, information-processing mental shortcuts and other factors that influence individuals' decision making in their economic life, in order to design regulation so people are steered towards rational behaviour while respecting freedom of choice of each individual<sup>1</sup>. The starting point is an economic scenario and people's behaviour in it. Every day, people must make economic decisions and choose what they think is the best for their needs, desires and goals, and in order to do so, a decision making process is required.

BLE analyses what elements are actually influencing people towards one specific choice among several ones. Neoclassical Economics assumes people's behaviour is rational, and if it is found one decision made without following this presumption, the rational-choice economist will search a

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1 See R. BUBB and R. H. PILDES, 'How Behavioral Economics Trims Its Sails and Why' [2014, forthcoming] 127 HLR - NYU Law and Economics Research Paper No. 13-29, at 2.

theoretical explanation for it and will check if there is after all a point of rationality in it<sup>2</sup>. In BLE, individual rationality is abandoned. Behavioural economists try to identify irrational human behaviour and cognitive biases causing it<sup>3</sup>.

BLE takes approaches from many different sciences, and the most important one is psychology. That is because BLE's ultimate goal is to set a paternalist intervention in law and the two main aspects behavioural economists argue to explain the necessity of paternalism are psychological phenomena: bounded rationality and self-control problems<sup>4</sup>. At the same time, studies may get into the scope of sociology when cultural, historical or racial factors are taken into consideration. Non-social sciences also influence BLE studies, such as neuroscience or biology<sup>5</sup>.

Behavioural economists think it is necessary to preserve freedom of choice. Hence, their intention is not banning choices, but guiding people to actions that set the individual better-off and that foster social welfare. Thus, BLE aims at 'libertarian paternalism', also referred to as 'soft paternalism' or 'weak paternalism', which has been defined as 'an approach that preserves freedom of choice but that authorizes both private and public institutions to steer people in directions that will promote their welfare'<sup>6</sup>. However, the idea of a 'libertarian paternalism' itself is open to discussion, since other scholars think it is a contradictory concept<sup>7</sup>.

Financial services, marketing, community managing, social work or business administration are just a few of many grounds where understanding people decision making processes can be useful for economic purposes. It might be useful for businesses and consumers as well, since being aware of their cognitive processes may help them to choose better. In law, this can be useful for legislators in order to set rules that steer people to social desirable behaviour.

## II. COGNITIVE BIASES AND BEHAVIOUR

Nobody can deny that people do not always make the right choice, nor that people are emotional and make decisions based on feelings<sup>8</sup>. The key idea is that when people must make decisions in complex situations, they do so by using 'simple mental shortcuts' in their cognitive processes

- 2 See J. D. WRIGHT, D. H. GINSBURG, 'Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty' [2012] 106 Nw. U. L. Rev. 1040.
- 3 See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 111 ('the literature on cognitive biases is filled with accounts of the pitfalls of ordinary reasoning: anchoring, availability, representativeness, hindsight, optimism, hyperbolic discounting, and the like'). See also C.R. SUNSTEIN, R. H. THALER, 'Libertarian Paternalism Is Not An Oxymoron' [2003] 70 U. Chi. L. Rev. 1163.
- 4 See E.L. GLAESER, 'Paternalism and Psychology' [2006] 73 U. Chi. L. Rev. 133-156. See also D. KAHNEMAN, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' [2003] 93 AER 1449-1475.
- 5 On neuroscience and BLE, see C. F. CAMERER, 'Wanting, Liking, and Learning: Neuroscience and Paternalism' [2006] 73 U. Chi. L. Rev. 87-110; B. KNUTSON *et al.*, 'Neural predictors of purchases' [2007] 53 Neuron 147-156. For a biological approach, see T. BURNHAM, 'Toward a neo-Darwinian synthesis of neoclassical and behavioral economics' [2013] 90 J. Econ. Behav. Organ. 113-127; Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 29-37.
- 6 See C.R. SUNSTEIN, R. H. THALER, 'Libertarian Paternalism Is Not An Oxymoron' [2003] 70 U. Chi. L. Rev. 1160, 1170; R. H. THALER, C. R. SUNSTEIN, 'Libertarian Paternalism' [2003] 93 AER 179.
- 7 See G. MITCHELL, 'Libertarian Paternalism Is an Oxymoron' [2005] 99 Nw. U. L. Rev. 1245-1277.
- 8 See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 111.

which are referred to as ‘heuristics’<sup>9</sup>. This way, individuals deal on a daily basis with many complex situations without making much effort or spending too much time. But at the same time it is out of the question that heuristics lead people to make mistakes<sup>10</sup>. The point is which concrete factors people are affected by, if those factors play a substantial role or just a small one, and if they imply that people are irrational by nature. There are lots of elements that influence people’s behaviour, but now we will refer to just a few of them. In first place, for example, five problems have been identified as factors that may contribute to excessive borrowing: cumulative cost neglect, procrastination and inertia, unrealistic optimism, self-control problems and miswanting<sup>11</sup>.

Sometimes, individuals come to different conclusions in spite of having received the same information, depending on the way the information is presented; this is a ‘contextualization error’ known as ‘framing effect’<sup>12</sup>. Another heuristic people suffer is anchoring and adjustment<sup>13</sup>. Anchoring is observed when the information people start with affects their perception of the situation as a whole, while adjustment comes from the fact that, when provided a numerical data as anchor, people rely too much on it and are unable of adjusting their response up or down from it<sup>14</sup>.

The ‘overchoice effect’ must be mentioned as well. Logic says the more options we can choose among, the more well-being we will have. However, this turns out to be wrong as it gets to a point when too many options are available, people do not take into account all of them, and risks of choice deferral and post-decision regret increase<sup>15</sup>.

Another shortcut is availability. Addressing the frequency or probability of an event, availability makes the person estimate it by relying on the ideas or examples that come quickly to mind<sup>16</sup>. Availability is sometimes confused with representativeness. When individuals have to determine the probability of an event, they do so using representativeness if they compare the characteristics of the event to the main characteristics of the process the event results from<sup>17</sup>.

One of the most important biases is called the ‘sunk cost effect’, which has been described

9 See J. J. RACHLINSKI, ‘Selling heuristics’ [2012] 64 Ala. L. Rev. 390.

10 *Ibidem*, 391.

11 See C. R. SUNSTEIN, ‘Boundedly Rational Borrowing’ [2006] 73 U. Chi. L. Rev. 251-253.

12 See J. D. WRIGHT, D. H. GINSBURG, ‘Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty’ [2012] 106 Nw. U. L. Rev. 1041-1042 (‘an individual faced with an identical set of choices in different contexts makes different choices, thereby implying an underlying inconsistency in his preferences’). See also J. J. RACHLINSKI, ‘Cognitive Errors, Individual Differences, and Paternalism’ [2006] 73 U. Chi. L. Rev. 210-216; M. J. SANDEL, ‘Justice: What’s the Right Thing to Do?’ (New York: Farrar, Straus and Giroux 2009) 21-24.

13 See A. TVERSKY, D. KAHNEMAN, ‘Judgment under Uncertainty: Heuristics and Biases’ [1974] 185 Science, New Series 1128-1130.

14 See J. P. SIMMONS, R. A. LEBOEUF, L. D. NELSON, ‘The Effect of Accuracy Motivation on Anchoring and Adjustment: Do People Adjust From Provided Anchors?’ [2010] 99 JPSP 917-918.

15 See B. SCHWARTZ, A. WARD, ‘Doing Better but Feeling Worse: The Paradox of Choice’, in P. A. LINLEY, S. JOSEPH (eds.) ‘Positive Psychology in Practice’ (Hoboken: John Wiley & Sons, Inc. 2004) 86-104.

16 See A. TVERSKY, D. KAHNEMAN, ‘Availability: A Heuristic for Judging Frequency and Probability’ [1973] 5 Cognitive Psychol. 208. See also C. JOLLS, C. R. SUNSTEIN, R. H. THALER, ‘A Behavioral Approach to Law and Economics’ [1998] 50 Stan. L. Rev. 1477 (‘[R]ules of thumb such as the availability heuristic - in which the frequency of some event is estimated by judging how easy it is to recall other instances of this type’).

17 See A. TVERSKY, D. KAHNEMAN, ‘Availability: A Heuristic for Judging Frequency and Probability’ [1973] 5 Cognitive Psychol. 208; A. TVERSKY, D. KAHNEMAN, ‘Judgment under Uncertainty: Heuristics and Biases’ [1974] 185 Science, New Series 1124-1127.

as a ‘tendency to continue an endeavour once an investment in money, effort, or time has been made’<sup>18</sup>. Another heuristic to refer to is a process known as ‘mental accounting’. Since people have limited funds to satisfy their needs and desires, they assign an amount of money to obtain something and account the transactions they get into to evaluate their outcomes. One of the features of mental accounting is dividing the total budget into several categories or accounts which are not exchangeable, so each category serves some specific purposes and the funds in each one are not going to be used for purposes different than those initially established. This is a violation of the principle of fungibility of the money<sup>19</sup>.

Related to mental accounting and the sunk cost effect is decoupling, a cognitive bias by which the more you separate the act of payment from the act of consumption the lower the cost you will perceive. When people assign funds to purposes, they link the utility they get and the cost of it; if they fail to get the utility in one given domain, the cost becomes a loss and the individual feels badly. By decoupling, the mentioned link gets weakened, reducing the perception of the potential loss<sup>20</sup>.

### III. ARE HUMAN BEINGS *TRULY* IRRATIONAL?

Behavioural economists admit that all biases do not affect all the people, all the time, and to the same extent, but most of them point out that within a given group, individuals biases are more or less the same so conclusions for that group can be reached<sup>21</sup>. But since each individual has different experiences, education, training, skills, emotions, values and preferences, BLE sceptical scholars state BLE cannot be a better predictor because it assumes people’s cognitive processes and vulnerabilities are the same.

In very complex situations, it is impossible to execute all the operations required to calculate the consequences, benefits, costs and externalities of each decision<sup>22</sup>. People have limited computational skills, so they display ‘bounded rationality’, people do some things although they know they are acting against their long-term interests (‘bounded willpower’), and some human actions do not seem to reflect the utility function, but a ‘bounded self-interest’<sup>23</sup>. These three aspects may indicate human beings are actually irrational. But at the same time, many of the cognitive biases could be actually rational tools; if people are emotional, it would be rational to act according to their emotions, because feeling good with one’s choices is also getting utility<sup>24</sup>.

In the same way, in order to be able to make lots of decisions without making great efforts and spending too much time evaluating the situation, using anchors and relying on availability and

18 See H. R. ARKES, C. BLUMER, ‘The Psychology of Sunk Cost’ [1985] 35 *Organ. Behav. Hum. Dec. Processes* 124.

19 See R. H. THALER, ‘Mental Accounting Matters’ [1999] 12 *J. Behav. Decis. Making* 183-206.

20 See D. SOMAN, J. T. GOURVILLE, ‘Transaction Decoupling: How Price Bundling Affects the Decision to Consume’ [2001] 38 *J. Mark. Res.* 30-44.

21 See J. J. RACHLINSKI, ‘Cognitive Errors, Individual Differences, and Paternalism’ [2006] 73 *U. Chi. L. Rev.* 208-210.

22 See H. A. SIMON, ‘A Behavioral Model of Rational Choice’ [1955] 69 *Q. J. Econ.* 103-104.

23 See C. JOLLS, C. R. SUNSTEIN, R. H. THALER, ‘A Behavioral Approach to Law and Economics’ [1998] 50 *Stan. L. Rev.* 1476-1479. See also R. A. POSNER, ‘Rational Choice, Behavioral Economics, and the Law’ [1998] 50 *Stan. L. Rev.* 1553-1558.

24 See R. A. POSNER, ‘Rational Choice, Behavioral Economics, and the Law’ [1998] 50 *Stan. L. Rev.* 1554. See also Y. FOKA-KAVALIERAKI, A. N. HATZIS, ‘Rational After All: Toward an Improved Theory of Rationality in Economics’ [2011] 12 *Revue de Philosophie Économique* 25 (‘The maximization of utility function is erroneously identified with the maximization of monetary profit’).

representatives while assuming potential mistakes could be rational. Behavioural economists have accepted this, but they have stated that then individuals would divert from the standard rational choice model<sup>25</sup>. This model implies that individual preferences are complete, transitive and continuous<sup>26</sup>. Therefore, it is necessary to define 'rationality' to check out if the stickiness on what behavioural economists refer to as the standard model is justified, or if behaviour does not become irrational in spite of the diversion from it. In my opinion, a simple but quite accurate definition of rationality was given by POSNER: 'choosing the best means to the chooser's ends'<sup>27</sup>.

Hence, attention must be paid to concepts as 'optimization', 'satisfaction' and 'maximization'<sup>28</sup>. It has been said that people do not actually try to 'optimize' their utility, as the standard rational choice model suggest, but just try to get an acceptable level of utility (satisfice), or the best option among a limited amount of possibilities (maximize). Maximization and optimization are sometimes very close of being the same thing, since trying to optimize an action could increase the decision costs too much without getting an equal benefit in return. A rational individual seeks efficiency, and that implies to take into consideration marginal utility<sup>29</sup>.

Some scholars have pointed out that behavioural economics is useful to predict mistakes even in situations where it may be rational to use shortcuts, because tools taken by individuals to manage complex problems are themselves predictable<sup>30</sup>. In general, scholars who are sceptical of behavioural economics do not deny that in certain situations behavioural economics *might* be a better predictor of human behaviour than neoclassical economics<sup>31</sup>. But in some important economic grounds, such as standard form contracts -including credit card contracts- or supermarket shelf space allocation, BLE as a better predictor has been called into question<sup>32</sup>.

- 25 See C. JOLLS, C. R. SUNSTEIN, R. H. THALER, 'A Behavioral Approach to Law and Economics' [1998] 50 Stan. L. Rev. 1477 and 1478 ('[S]omeone using such a rule of thumb may be behaving rationally in the sense of economizing on thinking time, but such a person will nonetheless make forecasts that are different from those that emerge from the standard rational-choice model').
- 26 See Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 11 ('Complete are the preferences, for example A and B, that the individual may either (i) prefer A to B, or (ii) prefer B to A, or (iii) is indifferent between them. Transitive are the preferences, say A, B and C, where, if the individual prefers A to B and B to C, then she prefers A to C. [...] Continuous preferences mean that for any bundle of two goods there is at least another bundle of the same goods in different proportions offering the same utility for the individual'). See also R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 Stan. L. Rev. 1551 and 1552.
- 27 See R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 Stan. L. Rev. 1551. See also Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 8-13.
- 28 See B. SCHWARTZ, A. WARD, 'Doing Better but Feeling Worse: The Paradox of Choice', in P. A. LINLEY, S. JOSEPH (eds.) 'Positive Psychology in Practice' (Hoboken: John Wiley & Sons, Inc. 2004) 91-93.
- 29 See Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 12.
- 30 See C. JOLLS, C. R. SUNSTEIN, R. H. THALER, 'A Behavioral Approach to Law and Economics' [1998] 50 Stan. L. Rev. 1477.
- 31 See J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 471-472.
- 32 *Ibidem*, 509-510. See also Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 20; R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 Stan. L. Rev. 1559.



#### IV. LEGAL INTERVENTION AND CONTRACT LAW

As it has been already said, BLE's ultimate goal is to set a legal framework that, without erasing individuals' freedom to choose whatever they want, steers them towards behaviour considered good for social welfare and for individuals themselves. Steering people towards a specific behaviour while respecting free choice is anything but new in law; every default rule that can be opted out does that. Out of the scope of contract law, the burden of excluding the application of default rules is easy to observe in certain matters, as it has been noticed about organ donations; a public policy setting a change in a default choice from an opt-in to an opt-out seems to increase donation rates<sup>33</sup>.

In contract law, parties to a contract are sometimes steered to maintain default rules, and not only because of the traditional argument that drafting a contract clause implies some costs that they may not want to assume, which can be true, but maybe most importantly because the mere proposal to derogate or modify a default rule could make the other party suspicious and trust is important in agreements<sup>34</sup>. The strength of non-mandatory default rules is not so great in contracts with standard terms because the cost of drafting a document to be applied to all contracts of the same type is small and clients do not want to spend much bargaining terms which are often applicable to uncommon situations<sup>35</sup>. The utility of getting the offered good or service is great, while the risks are small because if contract terms were truly harmful for consumers that information would spread easily through the market and that would be bad for the business; that is the ultimate reason why standard contract terms do not *seem* to reflect efficient terms and BLE predicts their quality will decrease the more competition there is<sup>36</sup>.

When lawmakers pass mandatory rules in private law matters, they are seeking to impose a regulation that sets fair results. In certain grounds such as consumer law or labour law, freedom of contract is highly restricted in order to make all the contracts be fair<sup>37</sup>. Sometimes, protective rules in contract law deal with factors leading to unacceptable unbalanced situations that the law tries to correct, but more often their effect is to avoid some concrete results and provide a remedy to set some specific contract terms aside. BLE pretends results as well, but the approach taken is to fight the process leading to undesirable outcomes, not the outcomes themselves. Under a BLE legal framework, once the intervention is set, the imbalance that might result from the agreement would be in principle valid, binding and legally enforceable. Thus, libertarian paternalism is closer to freedom of

33 See D. LI, Z. HAWLEY, K. SCHNIER, 'Increasing Organ Donation via Changes in the Default Choice or Allocation Rule' [2013] 32 J. Health Econ. 1117-1129.

34 See O. BEN-SHAHAR, J. A. E. POTTOW, 'On the Stickiness of Default Rules' [2006] 33 Fla. St. U. L. Rev. 652-653.

35 See R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1227-1234.

36 See L. A. BEBCHUK / R. A. POSNER, 'One-sided contracts in competitive consumer markets' [2006] 104 Mich. L. Rev. 829-831; R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1243-1244; J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 496.

37 In the European Union, restrictions on party autonomy in contract law are quickly identified with consumer protection, but it should be regarded more as protection of the weaker party in an asymmetric contract, whether the weaker party is a consumer or not. See V. ROPPO, 'From Consumer Contracts to Asymmetric Contracts: a Tend in European Contract Law?' [2009] 5 ERCL 304-349.

choice than imposing mandatory rules that no one can opt out from, because although BLE aims to make people decide the *right thing*, ultimately individuals have the option to act *irrationally*.

If people make mistakes because of heuristics, a genuine free market seems to be the best scenario for all kinds of hustlers. Behavioural economists have been able to change decisions by manipulating some conditions, so other people would be able to do it in the marketplace, taking advantage of the weakest ones<sup>38</sup>. But BLE says individuals would make bad choices even without anybody else trying to fool them. With this in mind, desirability of intervention seems out of the question; law should protect individuals from others and also from themselves<sup>39</sup>.

Libertarian paternalism might be a new general approach to address legal reforms about matters individuals are free to choose about, but most importantly it might be a more efficient tool than mandatory rules to constrain freedom of contract in those grounds where it is considered that one of the parties to the contract must be provided special protection because of an asymmetry.

In my opinion, libertarian paternalism is better option than a mandatory legal framework because it allows individuals to adapt themselves to the specific marketplace they operate in, making easier maximization of utility. However, BLE also presents some problems. Now, individuals go to the marketplace and think they are acting freely, but BLE tells us that individuals' will is steered by human cognitive biases. With a BLE legal framework, people would go to the marketplace thinking they are free but they would be being steered as well, towards what legislators have considered to be better for social welfare and for individuals themselves. Why should people trust in legislators that, as human beings, are biased, use shortcuts, and therefore can be deceived by their assistants and counsellors or lobbies?

Another problem of BLE is that it would bring moral hazard. Now, people are aware of the fact that marketing experts, businesses and other private individuals may try to make profits out of their mistakes. In this context, individuals can be wary and ask market operators to compete to earn their trust. But if individuals give legislators enough power to steer them, nobody would think about deception, arising moral hazard<sup>40</sup>. And if legislators can steer people towards a given economic behaviour, those interested in taking advantage of biases will find ways to do it as well, and moral hazard would make deceiving people easier. Then, new intervention would be needed and we would get on a slippery slope; one day, libertarian paternalism would not be libertarian anymore<sup>41</sup>. BLE scholars defend free market and think freedom of contract should be a key princi-

38 This is what some scholars have argued about standard contract terms, which are considered sometimes a weapon of businesses to take advantage of consumers. On the contrary, and in my opinion more accurately, other scholars have pointed out that each consumer is different and that a business cannot distinguish which biases a client is affected by, so a good business strategy may be 'to ignore these biases altogether'. See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 121.

39 See J. J. RACHLINSKI, 'The Uncertain Psychological Case for Paternalism' [2003] 97 Nw. U. L. Rev. 1165-1166.

40 See R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1248 ('But buyer bounded rationality can result in the market providing sellers with a profit incentive to draft inefficiently low-quality form terms. Legislatures have no such incentive, and they can thus focus their full attention on drafting efficient terms'). See also J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 473.

41 See J. D. WRIGHT, D. H. GINSBURG, 'Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty' [2012] 106 Nw. U. L. Rev. 1075-1080.

ple to be respected, but given the power to steer wills to legislators, who knows when, where and how to draw the line?

And there is another point. Some BLE scholars argue sellers adapt their strategies to consumer misperceptions<sup>42</sup>. If they do, they do so without knowing exactly which heuristics their customers use and the extent of their effects; sellers face many different interests and preferences. So, if behaviour becomes more uniform thanks to BLE's intervention, people who want to take advantage of consumer misperceptions would have to find just one way to deceive them all.

## V. CONCLUSION

In my opinion, the starting point should be the assumption of rationality and the general rule to respect freedom of choice without interventions, bans or any other attempts to steer people to specific behaviour. Of course in some grounds intervention is required and some actions must be forbidden and punished, but to establish intervention as a general rule does not seem desirable to me<sup>43</sup>. I think human beings must take responsibility for their actions, and that implies the person making a right choice is the only one entitled to the profits out of it and the person making a bad choice must be the one who assumes the cost of his mistake. Self-interest is a powerful tool to reduce, at least, irrational behaviour. Individuals learn from their mistakes and seek to avoid them in the future because they suffer the cost of their errors<sup>44</sup>. Even in grounds as excessive borrowing and credit-card contracts, which have been considered situations where irrational behaviour is the rule, it can be said markets work well<sup>45</sup>.

Every person is different and therefore flexibility is highly valued. Marketplaces differ, and within one specific type of contract many differences can be found because there are lots of different business strategies<sup>46</sup>. Facing a coercive system such as that of mandatory rules, flexibility is erased in order to get *what someone considers* fair. BLE is coercive as well, since paternalism has been defined as 'the interference of a state or an individual with another person, *against his will*, and justified by a claim that the person interfered with will be better off or protected from harm' (emphasis added)<sup>47</sup>. Legislators must see intervention as something accidental and extraordinary, and maybe now it is a good time to recall HERBERT SPENCER's famous quote: 'a man's liberties are

42 See O. BAR-GILL, 'The Behavioral Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 765-780.

43 See R. A. EPSTEIN, 'The Neoclassical Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 804-805 ('There are, however, two-sets of well recognized circumstances in which the neoclassical theory accepts the proposition that some government intervention *may* make sense: private monopoly and imperfect information').

44 See R. A. EPSTEIN, 'The Neoclassical Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 811. The counter-argument is to question the efficacy of learning; on the one hand, its positive effects may come just after some costly mistakes and at the same time the different uses of a product, on the other, if products are functionally non-standardised the information and learning that one consumer gets is less useful for other consumers. See O. BAR-GILL, 'The Behavioral Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 754-758.

45 See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 127, 131. See also J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 485-488.

46 See R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1249.

47 See C. F. CAMERER, 'Wanting, Liking, and Learning: Neuroscience and Paternalism' [2006] 73 U. Chi. L. Rev. 101-102.

none the less aggressed upon because those who coerce him do so in the belief that he will be benefited'<sup>48</sup>.

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<sup>48</sup> See H. SPENCER, 'Principles of Ethics', Vol. II (New York: D. Appleton and Company 1896) 224 at [http://www.hubertlerch.com/pdf/principles\\_of\\_ethics2\\_spencer.pdf](http://www.hubertlerch.com/pdf/principles_of_ethics2_spencer.pdf).

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