The Normativity of Law in Law and Economics

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1. Introduction

This paper is about some theoretical and methodological problems of law and economics (economic analysis of law, EAL). More specifically, I will use game theoretical insights to answer the question, relevant both for law and economics and legal philosophy, how should a social scientific analysis of law account for the normativity of law (the non-instrumental reasons for rule-following) while retaining the observer’s explanatory or descriptive perspective. The goal is to offer a constructive critique of both traditional law and economics scholarship and mainstream analytical legal philosophy (the “Jurisprudence of Orthodoxy”, see Leith and Ingham, 1977) in this respect. The paper will concentrate on the second, explanatory branch. In this sense, EAL seeks to explain, first, how law influences human behaviour by changing incentives (law as explanandum) and, second, to analyse legal (and possibly non-legal) rules as the outcome of individual actions (law as explanans).

This explanatory/approach has to confront a clear and central problem, often raised as a (self) critique of standard EAL: its inability or inadequacy to deal with the internal perspective on law. In fact, even if this approach has several more or less sophisticated versions, what seems to be common to all is that the nature of law (rule-following) is instrumental. Thus the case of rule-guided behaviour, i.e. the case of action, is either included in these theories in an ad hoc manner or is missing altogether.

On the other side, contemporary analytical legal philosophy, which is at least an English-speaking world, generally considers legal rules instrumental and practical philosophy, usually treats legal rules as specific non-instrumental reasons for action. In this view, even if empirically there are different motives why people obey legal rules (including conformity, fear of sanctions, etc.), the nature of law is defined by these specific reasons, while the further motives are treated as if they were reasons in a genuine sense for compliance with the law.

Now, in order to be taken seriously as an explanatory legal theory, EAL has to account for this feature, e.g. that law offers reasons for rule-following, and this answer (or at least how it is taken) is some fundamental questions about the normativity of law. These questions are both conceptual/analytical (‘What is the..."
conceptual difference between regularity of behaviour and rule-following? What does it mean to follow a rule? And explanatory (Why people obey the law or they do not?). At the same time, in order to be taken seriously as sound social science, EAL has to stick to the methodological principles of rational choice theory as explanatory social science. In the following, I shall enquire whether EAL can fulfil this double challenge.

One consequence of these methodological principles should be emphasised right at the beginning. The normative or justificatory question, central to mainstream analytical legal philosophy conceived as a part of normative practical philosophy, Is there a (moral) duty to obey the law? should remain outside the scope of this paper (and in general, explanatory/descriptive EAL). But the moral or prudential standpoint of the participants who face this question in some form should, of course, be recorded and included in the analysis as an object of explanation. To repeat, I shall be speaking about EAL throughout only in the second sense as an explanatory enterprise. As a different enterprise, it might be possible to work out a full-fledged normative legal philosophy as an a version of EAL (based roughly on welfarist consequentialist principles), which would have answered that justificatory question. But this prospect does not concern me here.

In the last decades serious efforts have been made within rational choice theory (especially game theory) to deal with norms both as expplananda and as expplanantia. In these analyses, norms are often denoted more explicitly as social norms and considered explicitly as anśúnon-legal, e.g. as connected to legal norms. It will be clear, these models are still highly relevant for my purposes. In part, but not only because the mechanisms exposed in these rational choice models are general enough to be applicable to legal rules too. My question is now, whether the incorporation of these results of rational choice theory into EAL makes it possible to approach the above-mentioned basic problems of legal theory in a new way.

In a broader perspective, it might be possible that also the gap between explanatory social science and normative practical philosophy can be bridged via evolutionary game theory, especially evolutionary game theory (especially evolutionary game theory). Section 2 presents how rule-following is modelled in standard EAL scholarship. Section 3 is about the jurisprudential meaning, importance and explanations of the normativity of law. Instead of the detailed analysis of jurisprudential and legal philosophical issues related to the normativity of law, I will restrict myself to sketching the most characteristic standpoints. Section 4 gives a survey on rational choice models of norms and normativity and discusses some of the features of the legal system in view of the previous insights. This section is intended to be systematic (maybe not exhaustive). Section 5 concludes.

2. What is wrong with EAL and how to “save” it?

Despite the complaints that much of law and economics scholarship is strikingly un-self-critical (Hanson and Hart, 1996: 328), it would be very easy to enumerate hundreds of articles by law and economics scholars offering thoroughgoing and fundamentally critical views on law and economics scholarship. The structure of the paper is the following. Section 2 presents how rule-following is modelled in standard EAL scholarship. Section 3 is about the jurisprudential meaning, importance and explanations of the normativity of law. Instead of the detailed analysis of jurisprudential and legal philosophical issues related to the normativity of law, I will restrict myself to sketching the most characteristic standpoints. Section 4 gives an overview of rational choice models of norms and normativity and discusses some aspects of the legal system. Section 5 concludes.

1 For an excellent overview of the recent philosophical standpoints on the duty to obey the law see Green, 2004. On the relation of Law and Economics to legal scholarship in general, see Symposium, 2004.
of the objections. In the following I shall try to avoid naiveté and moralising and be constructive in drawing attention to possible solutions to the problems detected.

2.1 EAL as rational-choice sociology of law

As mentioned in the Introduction, economic analysis of law can be conceived either as a (consequentialist) normative/evaluative legal philosophy (EAL1), or as an explanatory/descriptive theory of law (rational choice theory applied to law; EAL2) or a set of propositions for legal reform (legal policy, Rechtspolitik, EAL3). What I mean by EAL1 as legal philosophy is a partly conceptual and partly normative analysis of the main guiding principle of law. EAL3 as legal policy is a set of proposals for reforming legal rules in order to fulfill certain hypothetical or tacitly accepted normative criteria of which efficiency is the most important.

For several reasons, it seems the most fruitful to concentrate in the following on the second, explanatory branch of EAL. Speaking about rational choice theory and more generally the methodology of the social sciences in EAL2, we refer to the approach elaborated most convincingly by Jon Elster. Especially, Elster shares in common with such sociologists as Raymond Boudon, James S. Coleman, Hartmut Esser, Siegwart Lindenberg, Karl-Dieter Opp and others. Their most important common premises are methodological individualism, non-teleological view of society, and the heuristic primacy of rationality. Following Coleman, the theory is based on three explanatory links: macro-micro, micro-micro, and macro-micro (the “bathtub” form) as it seeks to explain social phenomena on the level by using individualistic mechanisms.

2.2 Traditional EAL on rule-following

Standard economic models usually follow O. W. Holmes (1897) in adopting a bad man’s view on law. That is, they treat legal rules not as obligations but as incentives or prices. This view is clearly reflected in the EAL arguments for “the efficient breach of contract” (see Cserne, 2003) and is present in other legal areas as well. In this view, people (should) obey the law as long as they are deterred by sanctions:

"Managers should not have an ethical duty to obey economic regulatory law just because law exists. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much they want firms to sacrifice in order to obey the law."

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to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers should only obey rules when it is profitable to do so.\(^5\)

Even if the normative version of this view is less popular now, standard EAL considers sanctions as prices. It imputes to citizens only prudential reasons for compliance with the law, and takes an external perspective on law. This bad man's view is in general not a descriptively correct model of human behavior in face of law and its predictions are often contradicted by empirical findings. But, as we shall see, there are numerous contexts where it is realistic from a behavioral perspective.\(^6\)

Adhering to the normative version of EAL could be called legal centralism (Posner, 2000: ch. 1, Ellickson, 1998: 541). This view of law is ruled by legal rules and standards. Non-legal mechanisms of cooperation are often neglected. Enacted laws are supposed to modify the behavior of agents as changes in market prices do, while law is enforced in an anonymous way. “By exaggerating the reach of law, [EAL scholars have] underrated two other major sources of order: internally enforced norms (socialisation) and externally enforced norms. In addition, they paid too much attention to the human pursuit of status.” (Ellickson, 1998: 539)

Here, again, adherence to the standard model of EAL is interesting, as it allows for a clear distinction between legal and non-legal norms. Judges are expected to enforce the legal rules, and their view on the desirability of the rule is irrelevant. Judges thus enforce the legal rules as they are announced, regardless of the judge’s own view of the legal rule (Kornhauser, 2001: sec. 1.). True, there are models on what judges want to do (Posner, 1990). Still, when EAL scholars want to analyze the behavior of judges, they usually have in mind the official’s view of law and the judge’s own preference profile. The two perspectives don’t seem fully compatible. He attempts to solve this by positing a different enterprise than EAL. And according to this theory, judges’ behavior is complex and cannot be reduced to only one perspective (see Cserne, 2004).

\(^5\) Cited from Easterbrook & Fischel in Cooter, 1992: 523 n. 2.

\(^6\) In one sense, Richard Posner writes from the participant perspective, i.e. as an American federal judge (in Posner, 1990). In another sense, he wants to analyze the behavior of judges from outside, i.e. as an economist who wants to account for this behavior and its impact on the legal system. He attempts to solve this by positing a different enterprise than EAL. And according to this theory, judges’ behavior is complex and cannot be reduced to only one perspective. (See Cserne, 2004).
2.3 Ad hoc and quasi-instrumental explanations of normativity of law

Ad hoc and quasi-instrumental explanations of normativity of law involve taking a specific approach to understanding the reasons why individuals follow legal rules, often by appealing to factors outside the formal legal system. The standard EAL models treat legal rules (rule-following) instrumentally. In more complicated models, this basic view is either sustained in a subtle way, as e.g. by Eric Posner who explains co-operative behaviour in a repeated-game framework as a signalling mechanism (roughly, people comply with rules in order to sustain their reputation for trustworthiness, Posner, 2000), or alternatively, the model is modified to include the case of rule-guided behaviour in an ad hoc manner, e.g. through a redefinition of preferences, or attaching utility to norm-conformity itself (Rabin, 1993, for a critique see Ambrus-Lakatos, 2002), or by simply assuming a certain proportion of agents to follow norms in a committed way, interacting with uncommitted others (e.g. Cooter, 1997, 1998, 2000b). These models are very different in details (actually, this is one problematic aspect of making ad hoc assumptions) but similar in spirit. The sympathetic interpretation of these solutions is that they explain law-abiding behaviour as enforced by non-legal mechanisms (social norms) which in turn are sustained by those who care about their future benefits and thus their reputation (have a relatively low discount rate). All this is in accord with standard assumptions of rational choice theory.

The less sympathetic interpretation (especially of type (1) models) is that it is more important to appear good than to be good, i.e. morality is a mirage or at least a discourse that is reducible to something more fundamental and essentially non-moral. But why should this be a problem?

One reason is that, as some argue, there is a categorical difference between moral and non-moral preferences or moral and prudential reasons for action. An important aspect of this distinction is that moral norms are often given priority in decision-making over outcome-oriented preferences. The distinction between norm-following and outcome-oriented action has been highlighted by John Elster when discussing John Dunn’s argument about the relation between virtue and self-interest (Elster, 1981: 8):

“the prospect of gains might be a sufficient motive for someone setting out to become virtuous (though it might also prove an obstacle to that goal), but it cannot be a motive for being virtuous (though it can be a motive for appearing to be virtuous).”

Some EAL scholars see this difference, take it seriously, but cannot explain it. For example, even 20 years after his seminal article which made clear the basic difference between “Prices and Sanctions,” and after several further illuminating articles on non-instrumental norm-following, Robert Cooter includes the possibility of non-instrumental law-abiding in his textbook on the economic analysis of criminal law (Cooter and Ulen, 2004: 466) without being able to explain it analytically more thoroughly. The options he presents are: “The economic models of crime thus no longer make sense; we have been discussing assumptions that are inconsistent with the evidence.”

These models are often criticized for being too simple, too one-dimensional, too self-critical. In fact, many people obey the rules for intrinsic reasons, not just because they are expected to. But why should this be a problem?

For references to eight different attempts to “enrich classical law and economics” see Ellickson, 1998: 546–550.
2.4 The Meaning of Money

Recent progress in EAL is related to the similarities and differences of prices and sanctions in another way too. More precisely, here the implied idea is questioned that both a fine (for violation of the law, an illegal behaviour) and a tax (on the same action, now considered as legal behaviour) have the same effect on the frequency of a given action. At first glance, the legalistic and jurisprudential distinction of punishment and taxation seems to be straightforward (Hart, 1994: 39) but it is far from evident that this has a real impact on the behaviour of the citizens. For example, the payment due for parking in a forbidden zone (or time) may be considered as either a fine or a price. We can imagine that below or above a certain amount, the "name" of a legal category makes only a semantic difference and does not matter for the behaviour of the citizens looking for a parking lot. Or, even if there is a statistical difference in the micro-level, it may be unobservable, at least in a partial equilibrium model. The payment for parking in a given territory, from the perspective of the norm-subject, both payments count as a price increase. From the calculative point of view, the same model predicts that the deterrent effect of a fine is measured by the expected value of the payment, whereas it is neutral. Formally, this is a special case of the framing effect in terms of behavioural economics (from the orthodox rational choice perspective, this is generally considered as an "anomaly"), and deviation from the standard homo oeconomicus model. Substantially, it is an example of the general sociological insight that money may have different meanings according to the social context in which it is paid (Zelizer 1994, 1998).

Recent empirical research confirms that the simple fact of declaring a behaviour illegal has some deterrent effect. Labelling matters, especially in criminal law (Kahan 1998). From the orthodox rational choice perspective, this is generally considered as an "anomaly", and deviation from the standard homo oeconomicus model. Substantially, it is an example of the general sociological insight that money may have different meanings according to the social context in which it is paid (Zelizer 1994, 1998).

If these results about the importance of labelling and social meaning are robust, it may turn out that what counts as "economic" cannot be defined in a completely formal way (following L. Robbins). It may turn out that human behaviour can be modelled in every social context (e.g. on the market and in the family) essentially in the same (maximising, self-interested) way. It may turn out that what at first sight looks naturally economic (e.g. from the orthodox market-oriented perspective) is essentially non-economic (maximising, self-interested) too. Namely, that the economic dimension of the social context, for example, the economic dimension of family, is essentially non-economic (and even in economic terms, the family is essentially non-economic). The traditional EAL logic of "the imperialism of economics" (see Becker 1976, Radvitzky o-Bernholz 1987, Ramb o-Tietzel 1991, Cserne 2000) may have to be reconsidered.

In economic terms, the social meaning of money is "economic" when it is "economic" in a formal sense. But it may turn out that what at first sight looks naturally economic (e.g. from the orthodox market-oriented perspective) is essentially non-economic (maximising, self-interested) too. Namely, that the economic dimension of the social context, for example, the economic dimension of family, is essentially non-economic (and even in economic terms, the family is essentially non-economic). The traditional EAL logic of "the imperialism of economics" (see Becker 1976, Radvitzky o-Bernholz 1987, Ramb o-Tietzel 1991, Cserne 2000) may have to be reconsidered.

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To sum up, in standard EAL models, citizens comply with legal rules for prudential (instrumental, consequentialist) reasons. At the same time, it is often implicitly assumed that legal officials act conscientiously in their roles, out of respect for law or following other non-self-regarding principles. In the next section, we shall see how this view can be judged against jurisprudential theories on the normativity of law.

3. The normativity of law in legal philosophy and jurisprudence

At least in the English-speaking world, legal philosophy has been considered a branch of practical philosophy, along with ethics and political philosophy. What these branches have in common is the interest in conceptual and normative questions about right conduct, obligations, and duties of the individual, isolation of different communities, and what is simple, and the question: ‘What should be done?’ ‘What is good to be done?’ (Wallace 2003). The normativity of law counts as a basic problem within this paradigm of legal philosophy. Despite the inner controversies, a great number of legal theorists have shared a common terminology and work on similar problems.

3.1 Basic concepts and the compatibility of jurisprudence and rational choice theory

Without going into details, it seems necessary to overview briefly the basic concepts of this practical philosophical paradigm. As will be clear, some of these terms have already been used above. Consequently, until now, it may have seemed evident that jurisprudence and rational choice theory (including EAL2) are not incompatible. However, some of the assumptions about the theories can mutually benefit from each other. Therefore, whatever the possible objections against this project, the first of the concerns with the different possible interpretations of legal theories (see section 3.1.3), the second with the different interpretations of (practical) reason (see section 3.1.4).

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10 It is interesting to note that the differences in legal and philosophical background, research focus, and argumentative style between English-speaking and Continental legal theories are still considerable. This can be observed, for example, in the work of German sociologist Michael Baumann (2000). In this paper, he tries to show that the empirical (behavioural) reduction of normativity in a Kelsenian (or Austinian) view of legal theory is not compatible. However, what is important is that the project of concentrating on the expression of the want of a person in power is among others completely unaware of Herbert Hart’s fundamental critique of an imperative theory of law (Hart, 1994: ch. 3–4) and the embeddedness of legal theory in practical philosophy. These views would put Baumann’s whole enterprise into another light, and not only say it superficially. Thus, this example only illustrates dramatically that there is a cultural clash between the legal and the sociological paradigms of law.

3.1.1. Norm, rule, and law

‘Statistical’ and ‘sociological’ definitions of norm which concentrate on the regularity of behaviour within a given group of individuals (e.g. Hechter and Opp, 2001) lack the element of normativity (obligatoriness, ought-element) from the definition of norms. Analytical legal theory clearly adopts the philosophical sense, which treats norms as prescriptions. For the present purposes, we treat both rules and laws as norms.

3.1.2. Internal and external aspects of rules

According to a now classical distinction of Herbert Hart, one of the defining features of rules (in contrast to habits or mere regularities of behaviour) is that they can be viewed both from an internal and external aspect (Hart, 1994: 55–56). The internal aspect implies that rules are used as standards to evaluate and criticise the behaviour of all persons who apply them. As for the external perspective, it is concerned with rules “merely as an observer who does not himself accept them.” Alternatively, it can refer to “the position of an observer who does not refer in this way to the internal point of view of the group,” “is content merely to record the regularities of observable behaviour” (Hart, 1994: 89).

Further analyses have shown that this categorisation is not complete. There are several other possible perspectives on normative phenomena (rules, law). One of them, further acknowledged by Hart as important, is called the detached legal point of view (Joseph Raz) or the hermeneutic view (Neil MacCormick) and refers to the perspective of somebody who uses the normative language (rights, duties, obligations, etc.) without being (morally) committed to the normative phenomenon. This view can be represented by the characteristic semantic form: “According to the law, A has to do X.”

3.1.3. Observer and participant perspective

This distinction, although strongly related to the former one, is between an internal and external view. Observers usually construct “non-legal,” “scientific” theories about law while participants, following Aristotle, construct “lawyer’s theories” in law, from within law as a human practice (form of life).

One of the objections against the use of rational choice theory in jurisprudence is related to this duality of perspectives. As indicated in the Introduction, I assume in this paper that it is possible to build up a descriptive and general legal theory.

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Hartian sense (Hart, 1994: 240–241). Of course this assumption does not rule out that the best possible version of his sort of theory may largely diverge from either Hart’s or any other current theory’s details. And indeed, the objection against rational choice theory’s specificity is quite generally against descriptive (sociological) approaches to the possibility of an observer perspective.

What is not evident (or questionable) for critics (e.g., theorists like Ronald Dworkin, see Dworkin 1987) is that it is possible to build a legal theory without adopting the participant perspective, to follow a methodology which is not interpretive in the Dworkinian sense. But even at first glance (and I shall not go into details here) this objection is not well founded, for the following reason. The view on the exclusive legitimacy of the participant perspective is not only a question of the possibility of historical and comparative research (how do you find an adequate participant perspective for these?) but also at the bottom line it would imply that social science qua science is not able to analyze normative phenomena. And this seems absurd on the basis of the theory.

To answer the possibility of an observer perspective to the objection means, however, that the only or even the theoretically more fruitful perspective is not evident. We don’t have to decide this question here. Our own methodological standpoint does not question the legitimacy of others, if they are coherent. E.g., this is the case with John Finnis who acknowledges that the sociological, descriptive accounts are valuable even for a theory of natural law, if only with subordinated importance (Finnis, 2002: 12–13).

To note, the duality of perspectives does not coincide with, actually cuts through, the traditional dichotomy between positivist (conventionalist) and naturalist legal theories (Postema 1987). It is possible that these theories have to compete within both perspectives. What cannot be accepted, however, is the objection that the non-evaluative point of view is logically or practically inadequate, unsound, or illegitimate theoretically.

3.1.4. Instrumental vs. non-instrumental (prudential vs. moral) reasons for rule-following

Clearly, motivations for obeying the law may be very different and the relative importance of the types of motivation is an empirical question. Still, as noted in section 2.3, some theorists consider the distinction between instrumental and non-instrumental reasons categorical, even if both are modelled within rational choice theory. A related problem concerns again the compatibility of jurisprudence and rational choice theory. Ultimately related to the objection, at least about the different meanings of the terms, reason and rationality, an analytical philosophy of practical reasoning involved here can be summarised like this.

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For example, Jon Elster models non-moral reasons as a second filter of possible actions or as lexicographic preferences, see section 4.2.2.
As they argue, rational choice theory speaks both about rationality and choice only in a technical sense, concentrating on situations where both true reasons and genuine choices are absent (Finnis 1992: 40–1, 45–6, 50–1). Acting on genuine reasons is the full and true sense, acting on unfounded emotions and false desires, thus potentially against them. EAL and rational choice theory, on the other side, seems to agree with Hume that "reason is, and ought only to be the slave of the passions" (see George 1999: 287–289, esp. 288–289).

This is not the place to evaluate the philosophical merits of the problem involved but to lay the main remarks. One should turn to the distinction, first used by another 18th century moral philosopher, Francis Hutcheson, between exciting (motivating) and justifying (reasons) (see MacCormick 1987: 111–112). Furthermore, the rich concept of reason that these critics adopt, even if philosophically fruitful, is in my view less fruitful in empirical social science, which EAL based on rational choice theory, finally purports to be. Here, the operationalisation of concepts needed to which are much more problematic than those of the non-instrumental concept of rationality. As we will see in section 4.2, these two arguments are related to each other as well as to the problem of normativity of law.

3.2 The normativity of law

Normativity is the specificity of rules that cannot be understood from the bad man's point of view. Where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reactions and for applying the sanctions. (Hart, 1994: 84)

Current analytical legal philosophy treats legal rules as specific non-instrumental reasons for action (see, e.g., Finnis 1992, Raz 1990, Schauer 1991). This view, even if empirically and historically accurate, is different from which empiricism is based on rational choice theory and which is finally more or less a matter of the nature of law, including its normativity. This is defined by the concept of reason, which is possible in further motives for conformity. For reasons to have the force of law, they have to be found in the normative aspect of the law. True, opinions on the exact nature of the normativity of law differ within legal philosophy. What follows, I shall only give a brief overview of the most influential views.

A complete philosophical account of the normativity of law comprises both the explanatory and the normative-justificatory task. The explanatory task is the attempt to explain how legal norms can give rise to reasons for action, and how they become involved in the reasoning of the judge. The justificatory task concerns the justification of the law and its effect on the actions of individuals. In other words, it is the attempt to explain the moral legitimacy of law. As noted in the Introduction, I shall concentrate on the first of these two questions, i.e., the different theories about the nature of law that purport to explain the normativity of law.

Early representatives of the legal positivist tradition, such as Bentham and Austin, assumed that the normativity of law resides in its coercive aspect, whereas positive law forces its practical demands on its subjects by means of threats and violence. Concerning the
relative importance of sanctions for the ability of law to fulfill its social functions, Kelsen maintained that the monopolisation of violence in society, and the law's ability to impose its demands by violent means, is the most important of law's functions in society. Legal positivists in the 20th century, like Hart and Raz, claim that coercion is neither essential nor pivotal to the fulfillment of law's functions in society.

As noted above, Hart emphasised the reason-giving function of rules. Hart's fundamental objection to the predictive model is actually a result of his vision about the main functions of law in society, holding, contra Austin and Kelsen, that law's justification functions are not exclusively related to the law's ability to impose sanctions. Hart asks why people should regard the rules of law as reasons or justifications for actions, or why they should regard the rules of law as reasons or justifications for actions.

One of the most influential approaches to the normativity of law is Joseph Raz's theory of authority, which relies in several respects on Hart's theory (Raz 1990). The basic insight of Raz's argument is that the law is an authoritative social institution. The law is not only de facto authority but also de jure legitimate authority.

What kinds of things can claim legitimate authority? Authorities are there to make a practical difference, and they can make such a difference only if the authority's directive can be recognised as such without recourse to the reasons it is there to decide upon. Secondly, the authority's claims must be capable of forming an opinion on how their subjects ought to behave, distinct from the subjects' own reasoning about their reasons for action. An authority is legitimate only if the subjects of the authority believe that the authoritative resolution is better than any other resolution they could figure out on their own.

4. Rational choice theory on (social) norms

In the last decades serious efforts have been made within rational choice theory (especially game theory) to deal with norms (both as explananda and as explanantia). Rational choice models of norms are manifold: some analyse the effect of norms on behavior, others the interaction between law and norms. Still others try to explain the emergence of norms, especially social norms, whether they are derived from moral or other evaluative considerations about which the legal system is concerned. Therefore a norm is only valid if it does not derive from moral or other evaluative considerations about which the legal system is concerned.
4.1 Rationality, morality, internalisation

As I stressed before, motivations for obeying the law may be very different and the relative importance of different motives is an empirical question. But it has been widely accepted in social sciences that the diversity of motives should not disallow constructing ideal types or models. Furthermore, Frederick Schauer argues (1991) by contrasting prudential and moral considerations for rule-following that the first type of reasons is more important for institutional design. Among these, he distinguishes three different sorts of prudential reasons: avoidance of sanctions, seek for rewards; simplification of decision; epistemic reason: belief that the rule-giver has superior information on what the agent should do. To be sure, for explanatory purposes we have to take also the moral reasons into account.

There are several ways to enrich the simple rational choice models in order to account for morality, internalised norms etc. In this literature, norms are often denoted as social and considered as explicitly non-legal ones. Sometimes, however, the mechanisms exposed in these rational choice models are general enough to be applicable to legal rules too. Here are some characteristic attempts.

4.1.1 Leaving internalisation exogenous

As already mentioned in section 2.3, one of the pioneers of this sort of modelling has been Robert Cooter (see, e.g., Cooter 1997, 1998, 2000b). His basic idea is to take the different (moral and amoral) attitudes as given and analyse the dynamics of their relative success in different environments. Some scholars argue that internalisation would mean unfalsifiability in explanation because any type of behavior can be explained as the result of following a putatively internalised but unobservable norm prescribing the observed behavior (Opp, Hechter and Wippler 1990: 1-2). They therefore stick to explanations based on the interest of individuals, i.e., rationality. Question is, whether this means necessarily instrumentality and self-interest too. There are different ways open.

4.1.2 Value rationality and lexicographic preferences

It is often argued that the assumptions of rational choice theory concerning the individual’s system of preferences cannot be sustained. The formal structure of the problem is roughly the following (see Csontos, 1999: 213-24). According to an important but often ignored assumption, it can be explained that the agent follows a lexicographic order of preferences. The Archimedean property means that if one bundle is preferred to another, then it is possible to increase the amount of one good so much that the agent prefers the second bundle to the first. Such measure can be directly preferred toward a bundle with a smaller amount of a good.
calculation is really "one-dimensional" (Csontos, 1999: 213), where "everything has its price" (Elster, 1984: 126).

There are, however, preference relations in which it is not so. One of the cases where an individual's preferences violate the Archimedean axiom is the so-called lexicographic ordering. In case of a lexicographic ordering the preference for a bundle with a smaller amount of $x$ cannot be achieved merely through increasing the amount of $y$. That is, "there is no currency (money, power, influence) that could compensate for the decrease in the amount or the value of the other good" (Csontos, 1999: 213 n. 5). Lexicographic preferences are an analytical device used in models of value rationality (Wertrationalität). When the Archimedean axiom is not satisfied, we are dealing with goods or activities that do not lend themselves to the economic approach but are governed by real-world constraints (Elster, 1984: 127).

This type of preferences raises both formal and substantial issues. Formally they are not representable in the usual way. But "this does not show that lexicographically governed behavior cannot be made amenable to rational choice analysis, only that this analysis is not possible without a utility function." (Elster, 1984: 125 n.1)

Substantially, from a rational choice perspective, lexicographically prior values can be interpreted as constraints on decision-making rather than criteria for decision-making. Thus, value rationality can be seen as a constraint on decision-making rather than a criterion for decision-making.

4.1.3 Game-theoretical models, with or without rationality

The basic idea of the game-theoretical models relevant to us is this. Retaining the assumption of rationality but changing the situation (constraints) in which individuals interact. Here, instead of an impersonal market implicit in usual EAL models of law enforcement (Becker 1976, for a succinct version of the traditional EAL view see Polinsky and Shavell, 2000) strategic interaction (game-theoretical situation) is used (Holler 1993, Frey and Holler 1999). Regarding the problem of law enforcement in the practical, legal policy sense (EAL3), this approach also provides policy recommendations, which are either more promising than the traditional ones or at least prove to be more convincing in many respects.

This game-theoretical approach can be modified further by the adoption of evolutionary models. Here the multiplicity of approaches is not the only issue. Evolutionary game theory is sometimes welcomed for explicitly rejecting the assumptions about individual hyper-rationality and focusing on learning, imitation, and other replicator mechanisms (Skyrms 1996, Young 1998, cf. Platteau, 2000). Here, however, the question is whether evolutionary models can provide a basis for doing without rationality (Bunzl, 2002).

In this perspective, indirect evolutionary approaches may be interesting (see, e.g. Güth and Napel, 2003: 1-3).
evolutionary approach is the following. In contrast to other evolutionary models, here the rationality of the players is assumed, what is evolving is the constraints within which they are placed.

Harsanyi claimed that all that is explained in terms of social norms could be explained through a concept of the theory of games. Ullmann-Margalit disagrees (1977: 14). Even if adopting game theory in the analysis of norms, she claims that the framework of the theory of games is a formal discipline. Hence, inadequate, the assumption of the generation of norms (Ullmann-Margalit 1977: 6), especially because the multiplicity of equilibria problem, where the common cultural background etc. help to find focal points. Thus, connotations of formal games and the contextual details matter. In order to transcend the debate between Harsanyi and Ullmann-Margalit, the evolutionary approach may be helpful. For example, Binmore (1994, 1998) explicitly deals with multiple equilibria situations where the context of the game theory choice of focal points dies outside of the scope of the former. Thus, the latter.

4.1.4 Endogenous development of (conditional) morality

A further family of game-theoretical models shares the idea of retaining the assumption of instrumental rationality but on a rather sophisticated level. In contrast to (1) changes in external constraints (section 4.1.3), (2) reputation effects or (3) the introduction of non-opportunistic behavior is explained by the models by self-management, “egonomics,” i.e. through an endogenous process of preference modification by rational individuals (see, e.g. Frankel 1987, 1988, Schelling 1978). For example, Raub and Voss present a mechanism where moral preferences (more precisely, those representing an Assurance Game) emerge as the outcome of rational individual choices. Applying standard game theory, they derive decision processes effective over preferences rather from an endogenous development of (conditional) morality by self-interested individuals (Raub and Voss, 1990: 86).

4.2 Progress through distinctions

To profit from these diverse models, especially the problems of the normativity of law, we need to make certain distinctions. We are dealing with this problem in a direct way

(1) norms in general and especially the interaction of legal and non-legal “social” norms in operation

(2) in economic situations of these two types

(3) in research on social interaction and cooperative strategies of cooperation.

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I shall explain these distinctions in sections 4.2.1–4.2.3, respectively. Finally, in section 4.3 I shall distinguish different types of situations that law regulates. Arguably, these different "functions of law" can be linked to (modelled as) different types of games while each function has potentially a corresponding type of norm, which, in turn, generates different motives and reasons for rule-following.

4.2.1. Legal vs. Social Norms

In section 2.3 we have already mentioned the relatively recent but intense interest of EAL scholars for the problem of norms, i.e. social (non-legal) norms, and their interaction with law. Although these recent developments promise important insights into understanding social norms, legal norms, and the functioning of civil legal systems, the results are, at first glance not directly relevant for understanding the normativity of law.

If behaviour is in conformity with law because of compliance with a non-legal norm, the normative force of law does not work in this case, even if legal obligations are fulfilled and rights are respected. There are, however, several reasons not to neglect these results.

These contributions are important even for jurisprudence inasmuch as they focus on the interaction of several different normative systems. The central subject matter of legal theory is to define the specificity of law, but the functioning of a legal system cannot be understood without due attention to the interaction of different norms. It is true that in order for a legal system to be effective, legal duties have to coincide with the requirements of social norms, or informal contexts. Thus, even if this does not question the importance of conceptual analysis and discussion on the sound understanding of legal centralism (Ellickson 1991, 1998, Posner, 2000: ch. 1), the results of the conceptual analysis on the sound understanding of the concept of law have repercussions on legal theory in this narrow sense.

There is another, more formal reason for being attentive to rational choice models of norms. If we want to explain why people obey the law, we have to use analytical methods similar to the models of norm-following in non-legal contexts. This does not rule out the importance of legal specificity, its institutionalised and systemic nature. What sort of differences these make will be discussed in the next subsection.

In sum, knowledge about social norms is crucially important for EAL and legal scholarship in general, both theoretically and practically. But we have not yet discussed directly and specifically the questions about the normativity of law.

4.2.2. Officials and Citizens. The Institutional and Systemic Character of Law

When cursorily discussing the difference between legal and social norms, Elster makes an interesting statement: "Legal norms are enforced by specialists who do so out of self-interest: they will lose their job if they don't. By contrast, social norms are enforced by members of the general community and not always out of self-interest." (Elster 1998a: 100) This criterion of distinction as highly controversial (especially with regard to the motives of the enforcers, see below) does not answer directly and specifically the questions about the normativity of law.
Legal systems, at least in their modern form. Namely, to the institutional character of law, that there is a specialised staff of people who enforce law. Legal theorists tend to agree (see Hart 1994, Lagerspetz 1995, Postema 1982, Raz 1990) that there is a systematic difference between officials of a legal system and members of society subject to law (including officials acting in their non-official capacities) with respect to their attitude toward law. This difference is not only empirical but has analytical consequences. Jurisprudence quite generally holds Hart's view (with slight differences) that there is a conceptual minimum of a legal system. This minimum is necessary for the existence of a legal system, especially for judges to take an ontological perspective on law. Thus, a logically possible and speakable existence of a legal system (though not necessarily flourishing) is even if only the rules are observed and the citizens take an external perspective.

In this respect, orthodox EAL as presented in section 2.2 is compatible with mainstream positivist legal theory, especially that of Hart who sees the internal perspective of officials and the conformity of citizens as a conceptual minimum of a working legal system (Kornhauser 2001).

This compatibility becomes less straightforward if we look at a more elaborate view on the existence conditions of a legal system (Lagerspetz 1995: 167-174). More specifically, the existence of a legal system is necessary for these two groups of persons (officials and citizens). For both groups of people, we can distinguish four possible basic attitudes, conformity, obedience, acceptance, and moral acceptance. Thus, the legal system may work in this way if the lack of moral acceptance is not common. This situation may leave room for the difference between exciting and justifying reasons for judges, mentioned above (MacCormick 1987: 111-121).
knowledge. However (3) or (2)'s view, only an extremelimiting case. Lagerspetz's argumentson plausible Idhat (4) or (3)'s argument on appropriate description of the efficiency of modern legal system (Lagerspetz 1995: 71), especially with regard to (3)'s view on the majority of citizens in the majority of the cases and the interpretation of (4)'s view. Probably only a justifying reason sense. We shall come back to the question of the citizens' attitudes towards law in section 4.3.

4.2.3 Distinguishing emergence and compliance

Social norms and institutions raise at least two very general questions for social scientists: (1) how and why norms come into being, (2) why people comply with norms. Indhis paper we are mainly interested in the second question and we can thus rely on the results of research on the direction.

These problems are not independent, however. Namely the second question is clearly related to such further problems as 'how and when norms persist and change' and the first question about the emergence. The link may be more direct to explain norms and institutions as part of a spontaneous order, i.e. as unintended consequences of individual actions (see Barry 1992).

For the present purposes, it is interesting to see that the answer to (2) depends on how we explain (1). One such kind of obvious illegitimacy question is: 'Are the rules followed?'. The answer to (2) depends, at least in part, on how we explain norms and institutions as part of a spontaneous order, i.e. as unintended consequences of individual actions (see Barry 1992).

The answer to (2) is arguably correlated to the answer to (1) also because there are different types of situations that lead to different types of norms. These norms, in turn, offer different reasons to follow them. These interrelated differences in situations, norms, and reasons are clearly relevant for the problem of normativity, as well. We shall elaborate on this important topic in the next section.

4.3 Which game do we play?

Edna Ullmann-Margalit, in her famous book The Emergence of Norms (1977), gives an account of three types of strategic interaction situations where norms emerge. She assumes that every strategic situation can be classified into one of three core or paradigmatic cases: (1) Prisoners' Dilemma situations, (2) coordination problems, (3) inequality/partiality situations. Even if this trichotomy is disputable, we follow her in viewing these situations useful in classifying norms. With due caution, we can state that these distinctions are relevant for the problem of normativity, as well. We shall elaborate on this important topic in the next section.

14 Hart famously notes (1994: 14) about the situation: 'The society which this is was so might be deplorably yeeple liketheeheepmayand theeslaughterhouse. But there are little reasons for thinking that it could not exist for denying the title of a legal system.'

15 Some philosophers argue that rational choice theory cannot really explain the origin of rules. Rules of a game are always exogeneous to the explanation because they are considered to be given. (Kliemt, 1990: 73, 78%79). This might be true in a strictly logical sense, but as I see it, it does rule out the possibility of constructing medium-level theories with some exogeneous variables.
basic idea is that different functions (a) correspond to different game theoretic models, (b) provide different reasons for compliance, and (c) may explain normativity in different ways.

4.3.1 Interrelated differences in situations, norms and reasons

There are several important functions which the law serves in our society (solving recurrent and multiple coordination problems, setting standards for desirable behavior, proclaiming symbolic expressions of communal values, resolving disputes about facts”, Marmor 2001). Probably without being one essential among them. For example in private law, especially contractual problems usually correspond to two-person games, often repeated ones. Public law is usually concerned with large-scale (n-person) collective action problems, which can be modelled as 2-person games (Holler 1993, Frey and Holler 1999, Andreozzi 2002). Interestingly, some situations are supposed to be operation and maintain prisoners’ dilemma, e.g., if for cartels and certain types of corruption. Thus the uncritical identification of co-operative strategy in PD situations with moral behaviour is false. There are cases where the law is supposed to impede co-operation and maintain prisoners’ dilemma, e.g., for cartels and certain types of corruption. Thus the uncritical identification of co-operative strategy in PD situations with moral behaviour is false. However, the enforcement of such rules can be modelled as 2-person games (Holler 1993, Frey and Holler 1999, Andreozzi 2002). Interestingly, some situations law is supposed to impede co-operation and maintain prisoners’ dilemma, e.g., for cartels and certain types of corruption.

To sum up, the different situations that law regulates can be modelled by different games and each has a corresponding type of norm and a different typical reason or motivation for following the law. More importantly, if there are essential single or essential reasons for following the law, there is no single explanation for its normativity. Therefore, we have to distinguish between different types of cases. One useful typology (based on Ullmann-Margalit 1977 and Coleman 1990) is presented by Esser (2000: 56, 129-131).

<table>
<thead>
<tr>
<th>Type of the norm</th>
<th>Conventional</th>
<th>Essential</th>
<th>Repressive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structure of the problem</td>
<td>Co-ordination</td>
<td>Dilemma</td>
<td>Conflict</td>
</tr>
<tr>
<td>Relation of addressee and beneficiary</td>
<td>Conjunct</td>
<td>Conjoint or disjunct</td>
<td>Disjunct</td>
</tr>
<tr>
<td>Mechanism</td>
<td>Symbols</td>
<td>Morality</td>
<td>Dominance</td>
</tr>
<tr>
<td>Basis (Grundlage)</td>
<td>Interest, habits, practice</td>
<td>Shadow of the future, dependence</td>
<td>State, law, legitimacy</td>
</tr>
<tr>
<td>Guarantee</td>
<td>Convergence of interests</td>
<td>Sanction (internal, informal)</td>
<td>Sanction (external, formal)</td>
</tr>
<tr>
<td>Social process</td>
<td>Understanding, communication</td>
<td>Socialisation, internalisation</td>
<td>Social control</td>
</tr>
</tbody>
</table>

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16 For a brilliant indirect evolutionary model of law enforcement in a private law situation where courts also sustain trustworthiness, see Güth and Ochsenfels 2000. Applying an indirect evolutionary approach with endogenous preference formation, they show that a legal system can induce players to reward trust even if material incentives dictate to exploit trust. The model assesses how a court influences the characterisation of different types of cases. One useful typology (based on Ullmann-Margalit 1977 and Coleman 1990) is presented by Esser 2000: 56, 129-131.

18 http://www.bepress.com/gwp/default/vol2004/iss1/art35
These three types of norms require an increasingly external guarantee and sanctions. The separate and genuine problem of legitimacy arises only for repressive norms, whereas the other types of norms are legitimised by the interests of the agents who depend on their validity. To be noted, this structural typology does not account for the emergence of norms on a strict sense. This poses a separate, second-order problem.

What this table says about law seems to be, at first sight, in conflict with the discussions above. But this contradiction can be solved, in part, if we keep in mind that the specificity of law is captured here by its ability to resolve conflict situations through repressive rules, which no other norm can match. Law is ”the strongest weapon” among the three, but it may and often does regulate the two other types of problems as well, which do not have differential structures (Esser 2000: 56). Nonetheless, cases where one unilateral substitutability and potential conflict between law and other solution mechanisms (habit, morality) that have to be noted about law's ability to resolve conflict situations could minimally require. This should be noted throughout the table only points to the problem of legitimacy, but not to solving this.

Applying his understanding of the question of normativity of repressive law, Butot makes clear the conflict between law and the two other types of situations where what law requires does not coincide with habits or morality, i.e. non-legal norms.

4.3.2 Law as convention, law as co-ordination

There are several legal theories that seek to understand legal normativity from law’s conventional nature. In their attempt, they increasingly rely on rational choice theory, in spite of the doubts about compatibility mentioned above. Thus, the works of philosophers David Lewis (1969) and Edna Ullmann-Margalit (1977) who in their turn relied on the results of Thomas Schelling (1960), legal theorists have begun to restate the decades since the basic game theoretical concepts and models. They seem to be the most concerned with co-ordination games and the nature of legal normativity, which is not coincident with habits or morality, i.e. non-legal norms.

Still, there are three different senses in which this “law as co-ordination” paradigm has been used. In order to understand the legal normativity of law, it must be noted that the concept of co-ordination is defined in the following way:

1. Law (like paper money) is essentially conventional by its nature. The existence of law depends on mutual beliefs and expectations of people, which is essentially meaningful for sense outside the mind of other people. Without this mutual belief, the existence of law is conceivable (Lagerspetz 1995: ch. 1, Ruiter 1993).

2. Law offers the solution to co-ordination problems by pointing to one equilibrium in a game. One of the most important functions of law is to determine (c.f. the term determinatio in Aquinas) one of several equally possible and just (not unjust) arrangements (social law) (Finnis 1989). This may also offer a justification of law’s authority (Gans 1983).

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17 For an overview see Special Issue 1998, Postema 1998.
Law is conceived as a complex system of strategic interactions that are essentially of co-ordinating nature (Postema 1982). More precisely, according to Postema there are three levels of co-ordination: among citizens, but also between officials and citizens, and further between officials. The second level is especially important, because Postema attempts to ground judges’ obligations to obey the law on conventional nature of the rule of recognition.

The question whether law solves co-ordination problems in a game theoretical sense is partly conceptual, but partly an empirical question. For instance, it is highly controversial whether the co-ordinative function of law is compatible with its coerciveness, let alone could it justify or legitimise the use of coercion (Ullmann-Margalit 1983). Law is generally viewed as co-ordinating authority, and as a question able whether it can justify co-ordination norms. The question is: if law is essentially founded on social conventions, how can this conventional practice give rise to reasons for action and obligations? I shall argue that conventional rules cannot, by themselves, give rise to obligations.

As we have seen in point 2, according to some theorists, conventional rules emerge as solutions to recurrent co-ordination problems. If the rules of recognition are of such a co-ordination kind, it is relatively easy to explain how they may give rise to obligations. Co-ordination conventions would be obligatory if the norm subjects have an obligation to solve the co-ordination problem that initially gave rise to the relevant convention. This, however, may be true for co-ordination among officials, but definitely not for co-ordination among citizens. In this context, it is questionable whether law as a co-ordinating authority, or in other words, as a structured game, can be considered as defined by social conventions. Such constitutive conventions are not explicable as solutions to some pre-existing recurrent co-ordination problem, because the conventional rules constitute the game itself as a kind of social activity. The constitutive convention solves the co-ordination problem of the emerging social practice. Such values, however, are only relevant for those who care to see them. And the existence of a social practice, in itself, does not provide anyone with an obligation to participate in it.

The rules of recognition only define what the practice is, and they cannot settle for the judge, or anyone else for that matter, whether it should be played by the judge. The rules of recognition cannot settle for the judge, or anyone else for that matter, what the judge should do. They only define the judge’s obligations by the rules of the game. The rules of recognition cannot settle for the judge, or anyone else for that matter, whether the judge should play by the rules of the law. The obligation to play by the rules of the law is defined by the rules of the game. The judge’s obligations are defined by the rules of the game.

Following Hart, the rule of recognition is defined as social conventions which determine certain facts or events. It is the way of the judge's creation, modification, and annulment of legal standards. These facts, such as acts of legislation or judicial decisions, are the sources of law conventionally identified as such in each and every modern legal system (Hart 1994: ch. 6.1).

Here again, following Marmor 2001. For the affirmative answer see Postema 1998, Special Issue 1998.
4.3.3 Coercion and conditional cooperation

On the other side, if the rationale of a great variety of legal arrangements can be best explained by the function of law in solving problems of opportunism and inefficiency (Prisoner's Dilemma situations), then the law's main role is indeed one of providing coercive measures. Still, even if law's functions are more closely related to its coercive aspect (Hart, Postema, and Postema 2003) have assumed (see section 5.3 above), we should refrain from endorsing Austin's position that providing sanctions is law's only function.

As we have seen above, law fulfills very different functions in a modern society while Esser's characterization of law by its potentially repressive nature has still some plausibility. Still, often it is argued that the law's functions are more closely related to its coercive aspect than Hart and Postema seem to have assumed (see section 3.3 above), we should refrain from endorsing Austin's or Kelsen's position that providing sanctions is law's only function.

Often, a law is considered to be repressive, and it should be better solved if another, less dismal nature than repression, even if it is often argued that the law's function is to solve problems of social order (which Parsons called the Hobbesian Problem) can be modelled as a Prisoner's Dilemma (Ullmann-Margalit 1977: 35). Now, PD norms turn these games into Assurance Games (Ullmann-Margalit 1977: 35) which represent a conditionally cooperative attitude. If we scrutinize Hobbes' writings, it turns out that, in contrast to the usual interpretations, Hobbes also argued that the basic problem of social order is captured by something like the Assurence Games (see, e.g., 95, ch. 7). Thus, even if there is no single "essential" function of the law, one of its most important functions is to sustain conditional cooperation.

5. Sociology vs. Philosophy: Conclusions

Starting from the existing endeavours in EAL, we have summarized the impact of rational choice methods on legal theory in explaining the nature of law, and discussed the possible changes as a result from learning lessons from game theoretical results and from the practical philosophy of law. There are still several questions left open.

Game theory and rational choice methods are useful tools both for sociology and for the philosophy of law. In my view, the rational-actor theory is prior to its competitors (norm-oriented and structuralist approaches), even if it is not necessarily more successful in each particular case (Elster 1984: viii-ix). The main challenge for future research is to develop a comprehensive theory of adjudication.

We can approve that Sen is right in saying that in a strictly logical sense, when analysing the nature of law in a social scientific manner, there should not be an a priori bias toward (1) prudence against morality, (2) self-interest against altruism, and (3) rationality against structural constraints. His view that evolutionary and reflective mechanisms are complementary is especially important (see, e.g., 98: xii-xiii). But I share with Max Weber, Jon Elster, John Harsanyi, and others the view that a theory of law as a part of social theory of adjudication is necessary.
reasons for this are rather pragmatic: prudence, self-interest and rationality are simply convenient to be privileged as initial assumptions about human behaviour.  

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