Comment on the Presidential Address

Pittsburgh, City of Bridges: Developing a Rational Approach to Interdisciplinary Discourse on Law

Kenneth G. Dau-Schmidt

> Once a flat sea floor, millions of years of erosion have carved the surface of Allegheny County into a maze of ridges and valleys. Pittsburgh sits where the Monongahela River . . ., and the Allegheny River . . ., join to form the Ohio . . ..
>
> With topography such as this, it is not surprising that there are so many bridges. One count reports over 2000 bridges of 8 feet span or greater . . ..
>
> Bridge engineers hold their conventions here. The Gateway Clipper Fleet offers guided riverboat tours featuring the bridges. It's virtually impossible to travel any notable distance without crossing a bridge.
> (Bruce Cridlebaugh, *Bridges and Tunnels of Pittsburgh, PA,* http://pittsburgh.about.com/gi/dynamic/offsite.htm? site=http%3A%2F%2Fwww.pghbridges.com)

Lauren Edelman's Presidential Address is daring, thought-provoking, and exciting. Edelman lays a sound foundation for understanding the economic analysis of law within the context of law and society (L&S) scholarship by outlining plausible arguments and examples for the embedded nature of rationality in law, culture, and politics and the endogeneity of law, society, and economic behavior. In so doing, Edelman not only offers insight for economists into the limitations of the neoclassical economic model, but also challenges law and society scholars of other disciplines to take account of what can be learned from the work of law and economics (L&E) scholars. Edelman's address represents multidisciplinary discourse at its best, challenging both sides to reflect on the basic assumptions of their disciplinary methods and divine what can be learned from the other's perspective. Let me offer a few reflections on Edelman's ideas, standing on my own side of the

I would like to thank Ajay Mehrotra for useful comments on this article. Address correspondence to Kenneth G. Dau-Schmidt, Indiana University–Bloomington, School of Law, 211 S. Indiana Ave., Bloomington, IN 47405; e-mail: kdauschm@indiana.edu.

Law & Society Review, Volume 38, Number 2 (2004)

https://doi.org/10.1111/j.0023-9216.2004.03802004.x Published online by Cambridge University Press

river amid the foundation for the bridge from economics to sociology that I have tried to build for a multidisciplinary discourse on law.

Why Now, Why This Particular Bridge?

In an unflattering comment on the rise of economic analysis in legal scholarship during the 1970s, Arthur Leff asked, "[w]hy . . . now . . . why this particular tunnel?" (1974:452). The same questions, of course, can be asked of Edelman's bridge-building project. I personally think that Edelman's timing for beginning construction of a bridge between L&S scholarship and L&E scholarship is impeccable.

Interdisciplinary exchanges can be enormously valuable, but they need the right overlap of examined questions and methodology between the disciplines to occur and be profitable (Dau-Schmidt 1997). Although pure transplants of methodology from one discipline to another have occurred and been useful,[1] it is much more likely that scholars will see the implications of work from other disciplines if they are examining the same or similar social problems as scholars in the other discipline. Accordingly, some overlap in examined questions and methodology is desirable in order to promote interdisciplinary discourse. However, if there is too much overlap in examined questions and methodology, then the multiple disciplinary perspectives become redundant and no new insights can be gained from the exchange. An academic monoculture would be a very poor environment in which to examine social problems and is probably not even possible given the different ways in which people's brains approach problems. The goal, after all, is to build bridges among different disciplinary perspectives, not to force everyone to live on the same side of the river.

Although economics spent the better part of the twentieth century evolving in relative isolation from the other disciplines, in the 1960s a significant coalescence began among the disciplines with respect to examined questions and methodology, notably including the L&S movement and the L&E movement. Ironically, in economics, the first steps toward coalescence were undertaken by Ronald Coase, Gary Becker, and Richard Posner, scholars so wedded to the neoclassical economic model that they believed it should be applied to problems far afield of the traditional market analyses done by economists. By examining questions such as entitlements (Coase 1960), discrimination and crime (Becker

[1] For example, the movement toward redefining economics as a "positive science" using deductive modeling and mathematics is a pure methodological transplant from the physical sciences to economics (Dau-Schmidt 1997:405).

1976), and all aspects of the law (Posner 1973), these scholars opened the way for later generations of economists to examine these, and other questions traditionally analyzed by other disciplines, from a less rigid and less imperialistic economic perspective (Donohue 1989; McAdams 1995; Dau-Schmidt 1990). The work of these later economists shows further coalescence with other disciplines as they relax the traditional assumptions of the neoclassical economic model by borrowing empirical results and methodology from other disciplines such as sociology and behavioral psychology (Korobkin & Ulen 2000; McAdams 1997). Similarly, some sociologists and political scientists have begun to consider the implications of rational choice theory borrowed from economics (Dau-Schmidt 1997).

Given the current intersection in examined questions and methodology between L&S scholars and L&E scholars, Edelman is right that the time is ripe for a productive exchange. Enlightened scholars in the L&E movement realize this too. At the Law and Economics Section of the 2001 annual meeting of the Association of American Law Schools, Ian Ayres gave a presentation in which he argued that the future of L&E scholarship lies in work that seeks to relax some of the traditional assumptions of the neoclassical economic model and incorporate insights from other disciplines. At the 2000 annual meeting of the American Law and Economics Association, Robert Ellickson, whose own work has long mixed economic, sociological, and psychological concepts, not only officiated as president of the Association, but also delivered a presidential address remarkably similar to Edelman's in its call for greater discourse among the disciplines in the study of law (Ellickson 2001).

Anyone who is familiar with both the L&S and L&E literatures can see points of intersection and potential for useful exchanges. For example, three years after Marc Galanter published his classic in the L&S literature detailing how the law evolves to favor "repeat players" or the "haves" (Galanter 1974), Paul Rubin published the "seminal" work in the L&E literature modeling the same "evolutionary" process (Rubin 1977), yet to my knowledge there has never been any organized discussion between L&S scholars and "evolutionary" economists. Surely it's time we started talking to each other rather than past each other.

The Socially Embedded Nature of Rationality

So what can economists learn from Edelman's talk? Can economic rational actors be imbued with culture and human frailty (Ellickson 2001), or is it inevitable that they remain victims of a

https://doi.org/10.1111/j.0023-9216.2004.03802004.x Published online by Cambridge University Press

mysterious autism, savants with respect to their own individual desires and imbeciles with respect to social relationships and rules? I believe that Edelman's ideas are consistent with, and can be usefully integrated into, some of the more recent work on the economic analysis of law.

Drawing on economic sociology, Edelman describes the socially embedded nature of rationality implied in most L&S scholarship. According to this approach, what people view as desirable or even rational is determined within the context of social interaction, politics, and the law. This conception of rationality differs markedly from the traditional economic conception in which individual preferences are exogenously determined and said to be "rational" if they are: well-defined, reflexive, and transitive (Dau-Schmidt 1997). L&S scholars study rationality as a socially determined phenomenon, while L&E scholars have traditionally assumed rationality of mathematical perfection based on exogenous preferences. Edelman notes my efforts (Dau-Schmidt 1990), along with those of Robert Cooter and Cass Sunstein, to incorporate the idea of socially determined preferences into the economic analysis, but argues further that rationality is *itself* a social phenomenon (see Edelman 2004).

As previously mentioned, some L&E scholars are also dissatisfied with the simple neoclassical economic model of rational thought and are currently developing a richer model using empirical results on human decisionmaking from behavioral psychology. Russell Korobkin and Thomas Ulen (2000) have argued that people's decisionmaking commonly exhibits "bounded rationality," in that they can only process a finite amount of information and thus must rely on "rules of thumb" to make decisions; "bounded willpower," in that they sometimes do things that are not in their long-term self-interest; and "bounded self-interest," in that they care about other people and whether the treatment they receive is reciprocally "fair." Under "prospect theory," Amos Tversky and Dan Kahneman (1982) have also established that people evaluate the relative desirability of outcomes based on the change those outcomes represent from an initial "reference point," weighting potential losses more heavily than potential gains. Policy makers (or salespeople) can use this inconsistency in people's decisionmaking process to influence decisions by suggesting reference points and "framing" an opportunity as a gain or a loss. Christine Jolls, Cass Sunstein, and Richard Thaler (1998) have argued that L&E scholars must take account of these phenomena in order to produce an economic model with greater explanatory value, or "economics with a higher R-squared."

This new work in "behavioral law and economics" would seem to lend itself to many of Edelman's observations about the socially

https://doi.org/10.1111/j.0023-9216.2004.03802004.x Published online by Cambridge University Press

embedded nature of rationality. Although "rules of thumb" for decisionmaking probably have to have some objective utility in order to survive, such empirical shortcuts are undoubtedly learned and socially constructed. Similarly, although some non-self-interested acts identified by behavioral economists have no social value (for example, smoking or drug use), others can only be understood in the larger social context as purely altruistic or expressive acts (for example, dying for a cause or voting). Certainly, it would be impossible to understand people's characterizations of treatment as "fair" or "unfair," and their responses to such treatment, without understanding the existing social relationships and expectations. Finally, people establish their reference points for future decisions through their social interactions. Whether a person views an opportunity as a gain or a loss is undoubtedly influenced by how other people view that opportunity. Thus, the inconsistencies in people's decisionmaking process identified by behavioral L&E scholars commonly owe their form or origin to the social nature of human beings.

Is this the same perspective of embedded rationality outlined by Edelman? No, but how boring would that be? It is, however, an economic perspective on rationality that is usefully informed by work in behavioral psychology and the work of other L&S scholars.

The Endogeneity of Law, Society, and Economic Behavior and the Importance of Power

However, Edelman's vision of L&S scholarship goes beyond the socially embedded nature of rationality. Edelman argues that the task of L&S scholarship is not simply to specify social forces that affect preferences and define or constrain choices, but also to demonstrate the linkages at a societal level between legality, morality, and rationality. Edelman argues that law and society are endogenous phenomena in that the meaning of law is constructed within the social realm that it seeks to regulate. Moreover, Edelman argues that, given the socially embedded nature of rationality, economic behavior is also endogenously determined with legal and social behavior. As a result, the ideas of rationality and efficiency reflect and perpetuate existing power relationships, and laws designed to make exchanges more efficient may do little more than legitimate existing class, race, and gender biases. Edelman argues that, to the extent markets are understood to be embedded with cultural, political, and legal frameworks, concepts such as efficiency and rationality become far more complex and politicized, and lose force as normative justifications for public policy.

https://doi.org/10.1111/j.0023-9216.2004.03802004.x Published online by Cambridge University Press

Economists have always shied away from models with multiple endogenous systems, especially if they resort to explanations based on the concept of "power" (Becker 1976:5). As Edelman suggests, multiple endogeneities are very complex phenomena to work with. It is very difficult to say what is causing what, or to produce meaningful testable hypotheses, if all important factors in a model simultaneously change both influencing and being influenced by each other. Traditional neoclassical economists also have never been comfortable with the concept of "power," claiming that the concept is meaningless beyond describing people with low marginal productivity or a firm that enjoys barriers to entry in its pricing. This description of such an important phenomenon in human experience seems quite tepid in comparison with the descriptions of the source and exercise of power in other disciplines.

Despite the reluctance of some economists to address the issue of power, I would argue that L&S and L&E scholars actually have a lot of common beliefs on the subject. Both L&S and L&E scholars believe that the law tends to evolve in favor of wealthy people; it's just that L&E scholars of the Chicago school are happy about "wealth maximization," while L&S scholars are not. Although Posner (1980) has argued that wealth maximization is an adequate normative basis for the law, other economists acknowledge the implicit endorsement of the current distribution of wealth and preferences in the wealth maximization criterion (Dau-Schmidt 1990). Similarly, both L&S and L&E scholars believe that the law tends to evolve to favor repeat players such as manufacturers, banks, insurance companies, and employers, over one-time players such as consumers and employees (Galanter 1974; Rubin 1977). Moreover, by borrowing the notion of group status production from sociology, Richard McAdams (1995) has explained the phenomenon of racial discrimination within the context of the economic model. Economists also have an excellent understanding of many of the most important instances of market power: monopoly, monopolistic competition, oligopoly, and monopsony. Scholars in other disciplines can learn about how market power is established and exercised from economists.

However, even setting aside the important dispute over the desirability of wealth maximization, real differences in the understanding of power exist between L&S and L&E scholars. Although markets are marvelous instruments for the decentralized distribution of goods, many economists place too much faith in the competence of markets and reputation to address inequalities in bargaining power. The power an employer holds over a forty-seven-year-old employee with kids in high school lies in the information and transaction costs assumed away in the neoclassical economic model. Furthermore, Edelman is undoubtedly right that some of

https://doi.org/10.1111/j.0023-9216.2004.03802004.x Published online by Cambridge University Press

the most insidious aspects of exploitation and discrimination reside in the endogenous nature of law, society, and economic behavior. Advantages of wealth, race, and gender become magnified as they work their way through the symbiotic relationships of law, society, and economy. Economists could no doubt learn more about the subtleties of power by reading in other disciplines.

With respect to the endogeneity of law, society, and economic behavior, I think that Edelman is undoubtedly right. All human activity, including legal and economic behavior, takes place in the context of social roles and interaction and accordingly influences those social roles and interactions. Economists should account for the interrelationships among law, society, and economic behavior where these interrelationships are important to understanding the examined phenomenon. However, this daunting reality poses a challenge not only to economists, but to all scholars. Multiple endogeneities are not just tough for economists to model and analyze, they're tough for scholars of any discipline. Although social scientists should always remain mindful of the limitations of their analysis and the greater complexity of reality, sometimes important insights can be gained from partial analyses that examine only one or two of the interrelationships between law, society, and economic behavior. Indeed, any analysis is by necessity an abstraction or simplification of reality, since no model can ever capture all the richness and detail of the real world. Even if a completely "realistic" model could be devised, it would probably be too complex to further our understanding of the phenomenon. Being creatures of bounded rationality, we owe whatever understanding we have of a phenomenon to our ability to simplify the experience in our own minds and generalize to future occurrences.

The Value of Mindful Social Scientific Analysis

The true test of the value of a model, whether it be economic or from some other discipline, is whether it abstracts the essential features of a problem in a way that contributes to our understanding of the phenomenon (Dau-Schmidt 1991). In making abstractions from reality that allow insight into a problem, all social scientists need to be mindful of the limitations of their analysis and to adapt that analysis when the essential features of the problem exceed the capacity of their model. Talking to scholars in other disciplines, or reading their work, is one of the best ways to learn about the limitations of your own analysis and to find ways to address the problem.

To refer back to Edelman's analogy, the examination of social, legal, and economic problems is like traveling in Pittsburgh; it's virtually impossible to get any notable distance without crossing a bridge. I look forward to working with her to build bridges for a multidisciplinary exchange on legal problems.

References

Becker, Gary (1976) *The Economic Approach to Human Behavior.* Chicago: Univ. of Chicago Press.

Coase, Ronald (1960) "The Problem of Social Cost," 3 *J. of Legal Studies* 1–44.

Dau-Schmidt, Kenneth (1990) "An Economic Analysis of the Criminal Law as a Preference Shaping Policy," *Duke Law J.* 1–38.

——— (1991) "Relaxing Traditional Economic Assumptions and Values: Towards a New Multi-Disciplinary Discourse on Law," 42 *Syracuse Law Rev.* 181–95.

——— (1997) "Economics and Sociology: the Prospects for an Interdisciplinary Discourse on Law," *Wisconsin Law. Rev.* 389–419.

Donohue, John (1989) "Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells," 99 *Yale Law J.* 549–609.

Ellickson, Robert (2001) "The Market for Social Norms," 3 *American Law and Economics Rev.* 1–49.

Galanter, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95–160.

Jolls, Christine, Cass Sunstein, & Richard Thaler (1998) "A Behavioral Approach to Law and Economics," 50 *Stanford Law Rev.* 1471–550.

Korobkin, Russell, & Thomas Ulen (2000) "Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics," 88 *California Law Rev.* 1051–144.

Leff, Arthur (1974) "Economic Analysis of Law: Some Realism About Nominalism," 60 *Virginia Law Rev.* 451–82.

McAdams, Richard (1995) "Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination," 108 *Harvard Law Rev.* 1005–89.

——— (1997) "The Origins, Development and Regulation of Norms," 96 *Michigan Law Rev.* 338–433.

Posner, Richard (1973) *Economic Analysis of the Law.* Boston: Little, Brown and Co.

——— (1980) "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication," 8 *Hofstra Law Rev.* 487–507.

Rubin, Paul (1977) "Why Is the Common Law Efficient?," 6 *J. of Legal Studies* 51–63.

Tversky, Amos, & Daniel Kahneman (1982) "Judgement Under Uncertainty," in D. Kahneman, P. Slovic, & A. Taversky, eds., *Judgment Under Uncertainty: Heuristics and Biases*. Cambridge: Cambridge University Press.

https://doi.org/10.1111/j.0023-9216.2004.03802004.x Published online by Cambridge University Press