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Cognitive Law and Economics

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Definition

The tendency to consider the Behavioral Law and Economics and Cognitive Law and Economics as different sides of the same coin has been widespread inside the discipline. That was the consequence of a miscomprehension of what behavioral economics and cognitive economics are. These two research areas arise from a shared critique to standard neoclassical economics assumption of agents' perfect rationality and a common idea that economic agents, in the real world, are heterogeneous and more cognitive complex than what the theory assumed, but soon they diverge pursuing different goals and partially applying different research tools. Particularly BL&E is more concerned with what agents do, while CL&E is more about how agents think.

Hence we need a proper discussion of what Cognitive Law and Economics is as well as we need a proper definition of Behavioral Law and Economics.

Introduction

Do we really need an autonomous definition for Cognitive Law and Economics or it is the same of Behavioral Law and Economics? The tendency to consider the two approaches as different sides of the same coin has been widespread inside the discipline. That was the consequence of a miscomprehension of what behavioral economics and cognitive economics are. These two research areas arise from a shared critique to standard neoclassical economics assumption of agents' perfect rationality and a common idea that economic agents, in the real world, are heterogeneous and more cognitive complex than what the theory assumed, but soon they diverge pursuing different goals and partially applying different research tools. Hence we need a proper discussion of what Cognitive Law and Economics is as well as we need a proper definition of Behavioral Law and Economics.

Other entries in this encyclopedia show how and when law meets economics (see Law and Economics or Behavioral Law and Economics or Nudge or Financial Education). When law scholars started applying the insights offered by neoclassical economics to their inquiry, the aim of this new approach to law was to develop both a positive and a normative theory of law on which to build efficient legal norms. Law and economics (L&E) uses economic models and econometric tools to develop its research in two ways:

A. Marciano, G.B. Ramello (eds.), *Encyclopedia of Law and Economics*,
DOI 10.1007/978-1-4614-7883-6_630-1

1. Pursuing efficiency: efficiency is considered from two different points of view; on the one hand, it means that common law (judge-made law) is efficient, and on the other, from a normative point of view, it also means that law must be efficient.
2. Its emphasis on incentives and people's responses to those incentives.

L&E has been widely criticized (Ellickson 1989) in that applying economic tools is not sufficient to investigate the logic underlying the law and that the reductionist approach of economics cannot enable L&E to develop a proper positive theory of law and it excludes any consideration about justice.

L&E has been strongly influenced by the changes and debates that have characterized the development of economics since the middle of the last century (Rachlinski 2000). In recent years, the results obtained by the behavioral economics have given new emphasis to the first criticisms brought against law and economics. Behavioral economics shows that human behavior deviates from the perfect rationality assumption, and these deviations are not completely random, so it is possible to model and predict human behavior when it is affected by biases. During the 1990s, Jolls et al. (1998) investigate the opportunities offered by behavioral economics to develop a new approach to law based on a more exhaustive theory of human behavior whereby better understanding of the foundations of individual behavior should strengthen both the descriptive power of models and their normative power. Their pioneering work gives rise to Behavioral Law and Economics (BL&E). During these same years, inside economics is developing another important research approach called cognitive economics (CI) (Bourgine and Nadal 2004). Cognitive economics shares with the behavioral approach the idea that human behavior is complex and that economic theory must ground its theories on a better understanding of cognitive decision-making processes. Cognitive economics retrieve the tradition of what Sent (2004) define "Old Behavioral Economics" that is the approach by Herbert Simon, instead that Kahneman's.

Nevertheless, the two approaches follow (almost partially) different paths of inquiry. Cognitive economics puts itself in opposition to neoclassical economics investigating economic problems as complex phenomena. Its inquiry focuses on the analysis of the micro-foundations of human behavior and applies an interdisciplinary approach. Cognitive economics strongly criticizes the assumptions of standard economics and focus on the complexity of decision-making processes of heterogeneous agents. It questions the predictions of standard economics models and the rigidity of the formal tools applied. It is aimed at understanding decision-making processes, but it differs from behavioral economics, whose methodology is based on the analysis of the effectively exhibited behaviors. Cognitive economics' central idea is that each phenomenon can be investigated with different tools and from different points of view. For example, cognitive economics investigates interdependent decisions using game theory not as a formal tool to predict specific outcomes but as a framework of analysis that allows investigating the complexity of agents' decision-making processes (Schelling 1960); the outcomes of the game do not simply depend on strategies, but they are strongly linked to social context, path dependence dynamics, and focal pints. Cognitive economics focus on norms and institutions (Rizzello and Turvani 2000, 2002), but while law and economics has been much influenced by behavioral economics, the cognitive analysis of institutions has not been considered until recently.

Ambrosino (2016) shows two main explanations for this lack of interest in the cognitive theory of institutions:

1. The different concept of norms underlying the two research fields.
2. The cognitive theory of institutions is still far from developing a normative theory, and it focuses its inquiry on the positive level.

Nevertheless in the last few years, part of the literature points out the relevance of the analysis of the role of institutional forces and social norms in constraining and coordinating heterogeneous

individuals, and cognitive economics and law and economics start to be connected and a new path of inquiry is arising.

The next sections are organized as follow: section "Why Behavioral Law and Economics is not Cognitive Law and Economics" explains why Cognitive Law and Economics (CL&E) is not the same as BL&E, particularly, "Toward a Cognitive Approach to Law and Economics" describes the main feature of CL&E, and "Main Critiques to Behavioral Law and Economics" focuses on the main critiques that such approach moves to behavioral law and economics. Section "Toward a Cognitive Law and Economics Inquiry" provides an example of how CL&E contributes to the inquiry into law.

Why Behavioral Law and Economics is not Cognitive Law and Economics

Toward a Cognitive Approach to Law and Economics

The cognitive theory of institutions is grounded on the idea that it is not possible to investigate the rise and evolution of institutions without investigating individual decision-making processes (North 2005). The institutional and the individual levels of analysis are interconnected, so that an institutional change may be the starting point for modification of agents' behavior, and new cognitive classifications or new routines of behavior can engender a slow process of institutional change (Hayek 1982; Hodgson 2004; Ambrosino 2014). Cognitive theory of institutions assumes that agents are heterogeneous. Heterogeneity means that agents can exhibit different behaviors even if they belong to the same social and cultural context. That heterogeneity doesn't prevent coordination because agents are different, but they are made up of the same ingredients (Hayek 1982). Hence, they are able to understand each other, to build correct expectations about each other's behavior, and to share common social norms.

Recently such research filed shows points of contact with that part of the legal theory that firmly critiques BL&E. Such connection opens the door to a proper cognitive approach to L&E.

Particularly, Gregory Mitchell's main works seems to represent the main contribution to developing inquiry into the "individual-institution" framework already described by the cognitive theory of institutions (Hodgson 2004; Ambrosino 2014). Mitchell's critique of BL&E "provides reasons why legal theory should refrain from broad statements about the manner in which all legal actors process information, make judgments and reach decisions and why others should be skeptical of such broad claims by the legal decision theorists" (2002b, p. 33); "legal decision theorists should recognize the need for greater caution and precision in drawing of descriptive and prescriptive conclusions from empirical research on judgment and decision making" (2002b p. 32). Mitchell's contribution is based on a strong belief in the utility of psychological and other empirical research for legal analysis.

It emerges a new approach to law that shares with cognitive institutional economics the idea that agents are heterogeneous and that simply introducing the existence of "standard" biases in modeling human behavior does not enable the development of efficient predictive models; the perfect rationality assumption is not an appropriate instrument with which to investigate agents' behavior, and a proper theory of human behavior is needed. This approach suggests that the existence of cognitive biases in legal contexts must be investigated in the field and with respect to specific contexts through "social facts studies" (Mitchell et al. 2011): a social facts study applies different research methods to explain case-specific descriptive or causal claims, and it is focused on the context-specific features of the case at hand. The analysis of how agents should behave cannot be separated from the investigation of the specific social context and cultural and social relations. A multidisciplinary approach is necessary to develop better inquiry into the complexity of decision-making processes in legal contexts. Legal theory, hence, moves toward a new approach, in which the cognitive determinants of agents' behavior are investigated; it highlights the importance of (i) agents' cognitive predispositions, (ii) learning processes and the influence of past experience, and (iii) the role of context.

Moreover a cognitive inquiry into the diffusion of normative behavior and institutional change can furnish key into the opportunities offered by the development of prescriptive rules in shaping individual behavior. It emerges a new metacognitive approach to legal theory in which norms are concrete instruments with which to induce agents to develop different ways of processing information.

CL&E, following a social facts analysis, shows how to build appropriate decision tools based on objective casual claims. Scientific research results can be applied to normative purposes. They should constitute a sort of "social authority": an organizing principle for courts' of legislator' use of social science to create or modify a rule of law (Monahan et al. 2009). In the perspective of CL&E, social research and legal theory partially lose the need to furnish normative models. Producing case-specific evidence through reliable social science principles and methods, they become the research instruments that give judges and courts, and more generally the legislator, the information and the tools with which to evaluate and create new rules of law.

Main Critiques to Behavioral Law and Economics

Part of the literature inside legal theory criticizes BL&E both under a theoretical and a methodological point of view and points out relevant elements of contact with cognitive economics that has opened the door to a new path of inquiry.

BL&E arise to pursue two main aims: first, explain why people do not act as they should in context of interest for legal theory (the benchmark being that agents should behave as the perfect rationality assumption expects), and second, bring people to act as they should proposing "a form of paternalism, libertarian in spirit, that should be acceptable to those who are firmly committed to freedom of choice on grounds of either autonomy or welfare" (Sunstein and Thaler 2003, p. 1160).

To pursue such aims, BL&E applies the tools and the insights furnished by behavioral economics. It is not surprising that BL&E today is exposed to quite the same critiques as behavioral economics (Ambrosino 2016).

The first critique to BL&E is strictly related to one of the cornerstone ideas inside B&E. It is a common opinion in B&E that it is possible to incorporate the complexity of the cognitive determinants of human behavior into the standard formal models of the neoclassical approach. The idea is that the assumption of perfect rationality can be replaced with a new concept of rationality – in which the existence of deviations from the perfect rationality assumption is explained by introducing new variables corresponding to particular biases assumed as commonly shared among agents – that better explains the complexity of real decision-making processes. Behavioral economics returns to being a research approach completely compatible with mainstream economics (Davis 2013). This tendency to build formal models has also taken place in the behavioral approach to L&E (Korobkin and Ulen 2000). The replacement of the perfect rationality assumption guarantees that BL&E models, compatible with the mainstream, produce strong normative outcomes. The first criticism to BL&E concerns the way in which scholars introduce into their inquiries insights drawn from the cognitive and psychosocial research of the past 30 years (Mitchell 2002a, 2002b, 200[illegible]. BL&E grounds its research on the AU3 evidence of the existence of cognitive biases in human behavior and argues that such biases are widespread in the population and are responsible for predictable and systematic errors (Korobkin and Ulen 2000). Nevertheless BL&E scholars fail in their attempt to criticize the perfect rationality assumption because they do not develop a new concept of rationality including the complexity of human decision-making processes. BL&E substitutes the neoclassical assumption of perfect rationality with an assumption of "equal incompetence" (Mitchell 2002a). This assumption is based on empirical research that shows homogeneous behavioral tendencies among agents. BL&E uses these behavioral tendencies to compile a list of common deviations from rationality that characterizes the entire population, and it develops normative models prescribing how agents have to behave and how decision-makers should intervene to shape agents' behavior and avoid their errors. B&LE overlooks the substantial

empirical evidence that people are not equally irrational and that human behavior is strongly influenced by situational variables: "The only way the lessons of behavioral decision research on bounded rationality can be manageably incorporated into behavioral models for use in the law is if these lessons apply widely and uniformly. If the rationality of behavior depends on particular characteristics of the legal actor or on even just a few characteristics of the situation at hand, then the development of behavioral models that are both realistic and predictive becomes enormously complex" (Mitchell 2002a p. 83). CL&E argues that BL&E do not understand that heuristic processing is only one mode of thought and that agents often do not act as expected, and it suggests the need for a legal theory focused on finding solutions to specific problems rather than on developing a general model of legal behavior. Heuristics can lead to favorable solutions in many cases they can also give rise to errors. BL&E relies on the results obtained by behavioral research developed in other branches of economic theory and generalizes their significance. One of the main contributions is the pioneering work of Kahneman and Tvresky (1974). These authors argue that their "studies on inductive reasoning have focused on systematic errors because they are diagnostic of the heuristics that generally govern judgment and inference" (1974, p. 313). But this does not mean that the so-called K-T man can be reduced simply to the use of rules of thumb and heuristics in judgment. It seems an excessively simple explanation of human decision-making. "The likelihood that a particular decision or judgment will deviate from the ideal behavior derived from norms of rationality depends on a range of personal and situational factor. Even inside the relatively controlled environment of the laboratory, we see considerable variation in cognitive performance among individuals depending on their cognitive abilities, educational background, and affective state" (Mitchell 2002a, p. 109). CL&E suggests legal theory should not seek a general model of judgment and decision-making, but it should develop a contextualist approach that seeks to identify the conditions under which irrational behavior occurs. BL&E has important normative, methodological, and empirical limitations that prevent it from achieving descriptive and predictive accuracy. The libertarian paternalism suggesting that planners can improve social welfare by setting default rules that create benefits for those who commit errors but cause little or no harm to those who are fully rational (Sunstein and Thaler 2003) assumes the pervasiveness of irrational tendencies but ignores less invasive forms of intervention that may help agents overcome their errors without altering the substantive rights of the parties (Mitchell 2005). BL&E describing behavior as rational or irrational requires a normative standard against which the behavior may be judged (Mitchell 2003b). The behavioral approach assumes that rationality requires logical consistency and coherence in the formation and ordering of beliefs and preferences (Kahneman 1994; Simon 1997). Rationality as coherence operates as a closed system. Individual defines goals and beliefs and behavior must be logically consistent and coherent with respect to those goals and beliefs. In the case of legal judgment, when evidence of an irrational judgment is found, many different explanations are possible, some of which make the irrationality of the decision questionable (Mitchell 2003b). A behavior in a particular context may be at the same time rational and irrational depending on the goals, the interpretation of the situation, and the tools used by any agent involved in the decision-making process.

The second main criticism concerns the methods employed to test for cognitive biases and errors (Mitchell 2002b, 2003b). BL&E research underestimates situational and individual variations in behavior and employs relatively weak tests of the hard-core assumptions of agents' cognitive feature. The point is that the core of the research in heuristics and biases is based on statistical significance tests on experimentally generated and aggregate data. This body of research formulates in general terms the conditions under which events of various sorts occur and provides an interesting set of findings in general terms but with unspecified practical implications. Judgments are summarized by averaging across all the experimental subjects. That means that in BL&E analysis, if individual differences among judges emerge, these differences are treated as "errors," and an "average judge" is considered the most

meaningful summary of judges. This approach has the advantage of ensuring generalizability. Therefore, rather than examining individual variation in judgment and choice, behavioral decision theorists typically assume that "to a first approximation, the thought processes of most uninstitutionalized adults are quite similar, and any variation in subjects' responses is attributed to measurement error or random variance" (Mitchell 2002b, p. 46). The rigor of experimental research is purchased at the price of generalizability of results, and this trade-off operates most directly in those fields that use laboratory experiments to study how humans navigate complex social environments like BL&E. Such critique is strongly related to the debate emerged in psychology about the danger of relying on "statistical significance" as a measure of behavioral tendencies. Scientists (and journals) publish studies and analyses that "work" and place those that do not in the file drawer (Rosenthal 1979). One answer to this problem of publication bias is that we can trust a result if it is supported by many different studies. But this argument breaks down if scientists exploit ambiguity in order to obtain statistically significant results (Simmons et al. 2011).

Toward a Cognitive Law and Economics Inquiry

Hence Cognitive Law and Economics is aimed at developing a legal theory in which the peculiarity of decision-making in legal contexts can be really explained. The critique of the equal incompetence assumption suggests the need for a new analysis in which heterogeneous agents are considered (Mitchell 2002a, 2002b, 2003a, 2003b).

Evidence on cognitive biases must be investigated in legal contexts so as to build an original and consistent map of evidence. CL&E aspires to develop a contextualist approach. A contextualized approach acknowledges that features of the person, the situation, and the task have an impact on the nature and quality of judgment.

Experiments are only one of the tools that should be applied to examine variations in individual behavior. The need for an interdisciplinary approach arises from the recognition that multiple forces combine to produce particular behaviors. The cognitive theory of institutions has yet developed interesting inquiries into coordination processes (Schelling 1960) and into the relevance of learning in the process through which people conform to social or formal rules.

More recently, an example of the kind of inquiry CL&E can develop is given by Mitchell (2009) idea of a metacognitive approach to regulation. Such approach is based on his discussion about the role of second-level thought in shaping human behavior. BL&E describes judgment as the product of a non-deliberative thought process based on cognitive heuristics and rules of thumb. Psychological models of actors developed inside BL&E show that biases in judgment and errors often arise at the level of first-order thoughts; thoughts occur at the direct level of cognition and are not intentional and not deliberative. These models assume that agents are incapable of going beyond these first-order thoughts and that this is the cause of irrational and discriminatory behavior. This emphasizes the role of automatic and intuitive thoughts while neglecting the role played by controlled and deliberative thoughts. It leaves no room for self-correction, arguing that individuals lack self-awareness of their biases, and it ignores the substantial evidence that agents learn through experience. Second thoughts may be the products of conscious effort, but they may also be automatic corrections working at the unconscious level. The propensity to engage in self-correction varies among persons and situations, but all cognitively normal people are able to engage in some amount of "metacognition" about their own thoughts (Loires 1998). People may differ in their propensity for such reflection depending on their education, upbringing, values, or genetic endowment, but everyone possesses some level of ability in rethinking their own thoughts.

Regulation should take it into consideration. If second thoughts apply, law will not simply change the prices of different behaviors for the purposes of a rational analysis of the costs and benefits of different courses of action. Rather, law will focus on altering the ways in which agent processes

information. Under this point of view, law is a system of second thoughts that functions both consciously and unconsciously. Hence, law can contribute to influencing thoughts and behaviors in legal contexts. Mitchell provides concrete applications of his theory of law. The author (Monahan et al. 2009; Mitchell 2010; Mitchell et al. 2011) enters the debate on the proper scope of expert witness testimony that purports to summarize general social science evidence to provide context for the fact-finder to decide case-specific questions. Mitchell's analysis focuses on the Dukes v. Wal-Mart case on gender discrimination toward female employees. Dukes' plaintiffs submitted expert statistical evidence showing that female employees were faring worse in the aggregate than male employees, and a report by a social science expert identified a common source of this discrimination across all Wal-Mart facilities (Mitchell 2010, p. 136). The social science expert based his report on the "social framework analysis" method (Fiske and Borgida 1999). This method consists in using social science research as a framework for analyzing the facts of a particular case. The reliability of such analysis is based on the reliability of the research on which the general conclusions applied to the case at hand are based. In Dukes v. Wal-Mart, the expert summarized research on gender bias, organizational culture, and anti-discrimination measures and applied it to interpret the facts in the discovery material supporting the claims of the Dukes plaintiffs. Mitchell argues that testimony based on that social framework analysis should be restrained from making any linkage between general social science research findings and specific case questions. In the specific case of Dukes v. Wal-Mart, he based his critique on two main points: (1) in social framework analysis, experts use their personal judgment rather than scientific method to link social science to specific cases; in some sense, social framework analysis make the same mistake that BL&E does in extending the experimental economics results to its research purposes without dealing with context-specific research. (2) The expert corroborated his report with statistical evidence. But the statistical evidence was itself subject to dispute with regard to the proper unit of analysis. The plaintiffs argued for an aggregate-data approach. This choice did not allow consideration of context-specific differences due to store-by-store variation in male-female outcomes and to local control over personnel matters. This use of statistical evidence is an example of how statistical results can vary depending on the many decisions that researchers have to make while collecting and analyzing data (which outliers to exclude, which measures to analyze, and so on). Mitchell argues that there are social science techniques and methods that allow development of opinions about the parties or behaviors involved in a particular case; such evidence has been referred to as "social facts" (Mitchell et al. 2011). Social facts are special types of adjudicative facts produced by applying social science techniques to case-specific data in order to help prove some issue in the case. A wide variety of social science methods can be used to produce social facts. The design of a social fact study depends on what a party hopes to learn. Mitchell divides the search for social facts according to three main goals:

1. Obtaining descriptive information: getting the facts right is important, but doing so can be difficult when the relevant facts are in the possession of a large number of nonparties.
2. Obtaining explanatory information: gain a better understanding of the issue in a case. Many research methods can be applied, such as interview, survey, observational study, and experimental simulation.
3. Testing specific hypotheses: the ideal way to test causal hypotheses is through the use of experiments in which participants' behaviors are recorded to assess how changes in the experimental conditions affect the behavior in question (Mitchell et al. 2011).

Social facts constructed by a proper scientific method possess scientific reliability and fit the facts of a particular case. Such reliability depends on the reliability of the scientific method applied. Mitchell shows that when addressing such a complex task as deciding a legal dispute, it is necessary to rely on rigorous interdisciplinary research tools that help prove some issue in the case.

CLE remains a very recent research project; its finding can be still considered a preliminary

attempt to develop a proper interdisciplinary inquiry to law and economics. Moreover this approach is still mainly focused on a positive ground. As shown in this section, CL&E is a very relevant and promising research field.

Cross-References

- Behavioral law and economics
- Law and Economics
- Nudge

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