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Introduction

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Why is a law review symposium filled with psychologists and marketing experts (as well as distinguished products liability and tort scholars)? And what is the title of the symposium supposed to mean? In this introduction, I shall try to briefly answer those questions and try to explain what is at stake.

The story that leads us to the present moment begins during World War II with the Austrian school of economics and its most prominent member, Friedrich von Hayek. This was a time when totalitarian governments–in Germany, Italy, Spain, Russia and Japan–appeared frighteningly successful. Many wondered whether this was the inevitable face of the future. Would totalitarian systems ultimately prevail over democratic, free-market systems, if not immediately on the battlefield then later through scientifically planned economics?

Hayek and the Austrian school of economics pursued an enterprise of trying to show why centrally planned economies–what he called collectivist systems–were inferior to free market economies. Hayek conceded that in an ideal world there would be great advantages to a planned economy, but he argued that, as a practical matter, it was impossible for central planners to do all the supply and demand calculations necessary to direct a large, modern economy.[1] Should the state produce more shoes or more tires, more socks or

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1. *See* F. A. Hayek, The Road To Serfdom 55 (1994).

more coats, more nails or more lunch boxes, more canned peaches or more canned tomatoes, and so on? There are simply too much data to analyze and too many calculations to make.

What made Hayek so successful was his ability to tie this practical, seemingly objective argument to normative arguments about freedom and liberty. "[I]t would be impossible for any mind to comprehend the infinite variety of different needs of different people which compete for the available resources and to attach a definite weight to each,"[2] he wrote. "This," he argued, "is the fundamental fact on which the whole philosophy of individualism is based."[3] Hayek continued:

> [T]he limits of our powers of imagination make it impossible to include in our scale of values more than a sector of the needs of the whole society, and that, since, strictly speaking, scales of value can exist only in individual minds, nothing but partial scales of values exist–scales which are inevitably different and often inconsistent with each other. From this the individualist concludes that the individuals should be allowed, within defined limits, to follow their own values and preferences rather than somebody else's; that within these spheres the individual's system of ends should be supreme and not subject to any dictation by others.[4]

In the United States, Hayek caught the attention of Aaron Director, an economist associated with the University of Chicago.[5] In 1944, at Director's urging, the University of Chicago Press published Hayek's now-classic work, *The Road to Serfdom,* which had previously been rejected by three other publishers.[6] A couple of years later, Hayek helped the University of Chicago obtain substantial funding for a center dedicated to promoting private enterprise.[7] It is historically significant that the donor stipulated that the center be affiliated–not with the economics department, as one might have expected–but with the law school.[8] Hayek joined the

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2. *Id.* at 65-66.

3. *Id.* at 66.

4. *Id.*

5. *See generally* Neil Duxbury, Patterns of American Jurisprudence 339-48 (1995) (discussing Aaron Director's involvement with Hayek's career).

6. *See id.* at 342.

7. *See id.*

8. *See id.*

Chicago faculty, Director headed the center,[9] and the field that we today think of as law-and-economics was born.

Hayek never argued that people were rational actors. On the contrary, he conceded that the masses could be manipulated by propaganda, advertising and other forces.[10] "But this does not mean," he wrote, "that anyone is competent, or ought to have power, to select those to whom this freedom is to be reserved. It certainly does not justify the presumption of any group of people to claim the right to determine what people ought to think or believe."[11] Hayek did not argue that individuals were competent to make choices for themselves; rather, he based his argument on the inability, and the immorality, of central planners making choices for them.

Ironically, Hayek's argument was consistent with the concept of bounded rationality, that is, that decision-making is constrained because people can only possess and process limited amounts of information. Herbert Simon illustrated the idea of bounded rationality by comparing economic actors to chess players.[12] In choosing what move to make, a chess player must consider what response his opponent will make, what options he will then have, what possible moves his opponent can make to each of those options, and so on, until the end of the game. If chess players could consider all of these possibilities they would play perfectly. But the possible scenarios approach the infinite, and neither the human mind nor any computer yet devised can analyze this vast amount of information.

However, it is now the central premise of the Chicago neoclassical economics (on which law-and-economics is based) that both business firms and individuals are rational actors. That is, not only do businesses act rationally to maximize profits, but consumers act rationally to maximize their own interests. Milton Friedman, who became the most influential member of the Chicago school, argues that the free market works so well because people are rational, or at least, people act as if they are rational.[13] In contrast to Simon's chess player, Friedman offers a billiard player

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9. *See id.*

10. *See* Hayek, *supra* note 1, at 180.

11. *Id.*

12. *See* Duxbury, *supra* note 5, at 370.

13. *See id.* at 371.

analogy.[14] Friedman argues that while an expert billiard player may not consciously know all the laws of physics, geometry, and mathematics that explain how the force she applies to the cue ball causes the other balls to react and travel in desired directions, she nevertheless plays as if she does.[15] In much the same way, argues Friedman, business firms seeking to maximize profits behave as if they possess and have processed all the information necessary for them to succeed.[16]

Rational choice theory, as it is called, has extended its influence well beyond the confines of economics. It has become an important school of thought–aspiring to become the dominant school of thought–in both political science[17] and in law,[18] where it is known as law-and-economics. Richard A. Posner, the best known proponent of law-and-economics, argues that individuals act in their own self-interest so regularly and so predictably that when an individual claims he is wrestling with a difficult decision and has not yet decided what course to pursue, others who know this individual well and understand his needs and desires can better predict what he will do than can the individual himself.[19]

Although all of law-and-economics rests on the single pillar of rational choice theory, the argument that people are rational actors is often presented as nothing more than an assumption. The prime example is Richard A. Posner's *Economic Analysis of Law*,[20] which is undoubtedly the single most important text in the field of law-and-economics. Posner devotes no more than a few sentences

14. *See id.*

15. *See id.*

16. *See id.*

17. *See, e.g.*, Jonathan Cohn, *Irrational Exuberance*, New Republic, Oct. 25, 1999, at 25 (describing the ascendancy of rational choice theory within prominent political science departments and journals); James Ryerson, *Games People Play: Rational Choice with a Human Face*, Lingua Franca, Dec./Jan. 2000, at 61 (describing rational choice theory generally and its influence within both political science and law).

18. *See, e.g.*, Anthony Kronman, The Lost Lawyer 166 (1993) (stating that law-and-economics is "the single most important change in American legal education in the last twenty-five years"); Mark Tushnet, *Idols of the Right*, Dissent, Fall 1993 ("For a moment it seemed possible that [law-and-economics] would become the leading dialect, dominating the conversation of law; now it seems likely to be only a specialized discourse, to be used or abandoned as seems helpful.")

19. *See* Richard A. Posner, The Problems of Jurisprudence 187 (1990).

20. *See* Richard A. Posner, Economic Analysis of Law (4th ed. 1992).

of his 722-page work to this fundamental proposition. On the first page of the first chapter, Posner writes:

> As conceived in this book, economics is the science of rational choice in a world–our world–in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications *of assuming* that man is a rational maximizer of his ends in life, his satisfactions–what we shall call his "self-interest."[21]

How, one wonders, can so grand an edifice rest on a mere assumption?

The title of our symposium comes from an article by Amartya K. Sen, entitled *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*.[22] In this article, Sen argues that rational actor theory is flawed because people are more complex than the theory allows. Rational actor theory requires reducing a person's needs, desires, motives, impulses and moral judgments to some kind of standard measure. Rational actor theorists see people as self-seeking egoists because "[i]t is possible to define a person's interests in such a way that no matter what he does he can be seen to be furthering his own interests in every isolated act of choice."[23] That is, when an individual chooses x rather than y, rational actor theorists conclude the individual preferred x to y, and then assign a greater numerical value to the utility of x than the utility of y. Sen notes such a theory will appear to validate itself every time, except when the individual makes inconsistent choices.[24]

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21. *Id.* at 3 (footnote omitted) (emphasis added). Elsewhere, Posner has stated this assumption in even stronger terms:

> The basic assumption of economics that guides the version of economic analysis of law that I shall be presenting is that people are rational maximizers of their satisfactions–*all* people (with the exception of small children and the profoundly retarded) in *all* of their activities (except when under the influence of psychosis or similarly deranged through drug or alcohol abuse) that involve choice.

Posner, *supra* note 19, at 353.

22. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 Phil. & Pub. Aff. 317 (1977).

23. *Id.* at 322 (footnote omitted).

24. *See id.* at 322-23. And, although Sen does not mention it, the rational actor theorist can conclude that values have changed over time, i.e., the individual derived more utils of pleasure from vanilla yesterday but more utils of pleasure from chocolate today. We would simply say the individual wanted vanilla yester-

Rational choice theory, Sen argues, is too simple, too reductionist, because it assumes that all of a person's interests, welfare, ideas, and desires can be given one preference ordering.[25] It can all be measured with the same yardstick. He continues:

> Can one preference ordering do all these things? A person thus described may be "rational" in the limited sense of revealing no inconsistencies in his choice behavior, but if he has no use for these distinctions between quite different concepts, he must be a bit of a fool. The *purely* economic man is indeed close to being a social moron.[26]

Despite the criticisms, rational choice theorists continue to argue that people act rationally in all sorts of things–love, marriage, adoptions, pornography, taking drugs, playing the lottery–indeed, perhaps all pursuits.[27] Some ridicule these views.[28] Both sides in the debate are now increasingly turning to cognitive psychology. Psychologists talk about bounded rationality, that is, limits to rational thought and behavior. They talk about cognitive biases, which can be thought of as quirks or disruptions in rationality.[29] They claim, as I understand them, that some cognitive biases are predictable. The idea that people act irrationally in predictable ways presents conflicting challenges and opportunities to both sides in the debate. Proponents of rational choice theory see it as a means of closing loopholes in their grand theory. They believe that if we can understand when people will depart from their usual behavior of acting rationally, and know how they will act even when

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day and chocolate today, but the legal economist believes he has achieved a deeper understanding of behavior.

25. *See id.*

26. *Id.* at 335-36.

27. *See* Gary S. Becker, The Economic Approach to Human Behavior (1976) (applying rational choice theory to a wide spectrum of activities including love, altruism and drug taking); Edward J. McCaffery, *Why People Play Lotteries and Why it Matters*, 1994 Wis. L. Rev. 71 (applying rational choice theory to the lottery); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323 (1978) (applying rational choice theory to adoptions).

28. *See, e.g.*, Alan S. Blinder, *The Economics of Brushing Teeth*, 82 J. Pol. Econ. 887 (1974).

29. A superb overview of the psychological literature can be found in Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630 (1999); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420 (1999).

they are acting irrationally, we can refine the predictive power of rational choice theory. Critics, on the other hand, argue that if people act irrationally in predicable ways, they can be manipulated by propaganda and advertising.

Some of this is about technique. In the products liability field, we want to know whether we can help consumers make rational purchasing decisions and use potentially dangerous products safely by furnishing them with information. To know that, we must understand how much information consumers can absorb and how they process information. But much more than technique is at stake. At bottom, this is a deep political argument. The debate today is, of course, no longer between collectivism or capitalism; it is about how much regulation is desirable in a free market economy. Those who believe that people are rational actors tend to believe that less regulation is necessary. Consumers can best take care of themselves. Those who believe that people may often be irrational–and susceptible to manipulation by propagandists and advertisers–favor more regulation.

We decided that it would be useful not only to have legal scholars argue about the implications of cognitive psychology for products liability, but to hear directly from the psychologists themselves. We are fortunate to have some of the nation's most prominent cognitive psychologists and marketing experts participate. They have much to teach us.