

This is an electronic version of an article published in the *Law and Society Review* complete citation information for the final version of the paper, as published in the print edition of the *Law and Society Review*, is available on the Blackwell Synergy online delivery service, accessible via the journal's website at [www.blackwellpublishing.com/journals/lasr](http://www.blackwellpublishing.com/journals/lasr) or <http://www.blackwell-synergy.com>.

## **Building the Bridge from Both Sides of the River: Law and Society and Rational Choice**

---

Lee Epstein

Jack Knight

**W**e begin by acknowledging the debt that we—indeed, all members of the Law & Society Association—owe to Lauren Edelman. Her effort to build bridges between law and society and law and economics is, at bottom, an effort to inject greater diversity into our research programs. As supporters of diversity on a number of grounds—not the least of which is that the greater the diversity of ideas contributed to the institutional process, the better the outcomes (Epstein, Knight, & Martin 2003)—we cannot help but applaud her attempt.

We also cannot help but take up her invitation to help build that bridge. Accepting that challenge requires us, at least as a first step, to clarify what the two approaches can and cannot do, which questions are better suited to one approach or the other, and how the approaches can best complement each other. These clarifications are necessary, we believe, because while Edelman does a nice job at capturing the standard understanding of law and economics, she perpetuates some common misunderstandings about more general rational choice approaches (especially strategic analysis<sup>1</sup>) to the study of law. It is only by offering correctives to Edelman's

---

Lee Epstein is the Edward Mallinckrodt Distinguished University Professor of Political Science and professor of law at Washington University in St. Louis, Department of Political Science, Washington University, Campus Box 1063, 1 Brookings Drive, St. Louis, MO 63130; e-mail: Epstein@arts.wustl.edu. Jack Knight is the Sidney W. Souers Professor of Government in Arts and Sciences at Washington University in St. Louis.

<sup>1</sup> Strategic accounts belong to a class of non-parametric rational choice models, as they assume that goal-directed actors operate in a strategic or interdependent decisionmaking context. Virtually all rational choice models invoked by judicial specialists in our discipline are nonparametric. That is because "politics" is in large part about strategic interactions—those in which the outcome is the product of the interdependent choices of at least two actors, regardless of whether those actors are motivated by self-interest, the public good, impartial principles, or some combination of these or other motivations. To the extent that many sociolegal phenomena contain a political dimension, strategic analysis provides an appropriate approach. For a more detailed discussion, see Epstein and Knight (2000).

characterization that we can advance the bridge-building enterprise. That is because, as we hope to demonstrate, rational choice can contribute far more to the undertaking than Edelman suggests.

We develop this demonstration in three steps. We begin our article by delineating Edelman's primary claims about the weaknesses of the law and economics account vis-à-vis the law and society approach. As we explain in the second part, though, many of Edelman's concerns about law and economics evaporate when we move away from standard law and economics and toward rational choice (and, again, especially strategic analysis). Finally, in the third part we turn to the question of what rational choice can bring to Edelman's project and identify topics worthy of future inter-approach research endeavors.

### **Edelman's Claim about the Distinctiveness of the Law and Society Approach**

Among the many possible sources of dialogue between law and society and economic approaches, Edelman identifies one: "how an understanding of the social and political underpinnings of economic rationality might inform sociolegal scholarship, L&E scholarship, and social justice generally" (Edelman 2004:183). By design,<sup>2</sup> of course this turns out to be less a dialogue than a one-way conversation—a conversation in which law and society demonstrates to law and economics that it is in error to tie rational action and rationality so closely to efficiency; that it ought instead to take its cues from law and society and draw attention to "*to the social, political and legal construction of rational economic behavior and to the economic construction of law*" (Edelman 2004:184, emphasis in original). The take-away from the conversation is clear: We should, as Edelman puts it, "*replace L&E's rational actor with a social actor whose thinking incorporates institutionalized notions of rationality*" (Edelman 2004:188, emphasis in original).

Why we ought to do so is a question Edelman addresses in no uncertain terms. To her, too many advantages of law and society's "more socially grounded account of how [law, markets, and rationality] are interrelated" exist to ignore (2004:186). First, in contrast to law and economics, law and society "promises a richer understanding of the interplay between law and the economy, and an account that is more likely to recognize and perhaps to ameliorate social injustices that follow from efficiency-based reasoning" (2004:186). Second, unlike law and economics, the

---

<sup>2</sup> Edelman acknowledges that her perspective is sociological and invites commentary from rational choice-oriented political scientists. We bring this orientation to our response.

law and society approach does not assume that all action is akin to market behavior; rather, it suggests that we can best understand individual action in the social context in which it occurs. Rationality, in other words, may differ across social contexts, and law and society is better at tackling these differences. Third, while law and economics assumes that preferences are fixed and stable, law and society takes a more realistic approach: that the preferences themselves are responsive to “institutions, norms, and historical context” (2004:187). Finally, law and society, in juxtaposition to law and economics, does not ignore the role of power; power, in fact, plays a central role in the account.

Having laid out the drawbacks of law and economics and the benefits of her approach, Edelman turns to characterizing the task for law and society scholars. It does “not simply [involve specifying] the social forces that affect preferences or the social forces that constrain choice,” she tells us, since “L&E scholars could easily incorporate [these] into their models.” Rather, the task entails demonstrating “the links at the societal level between legality, morality, and rationality” (Edelman 2004:188).

### **Broader Take on Rational Choice Approaches to the Law**

As even this brief summary of Edelman’s basic claims reveals, she is hardly enamored with law and economics. More to the point, she devotes a large fraction of her essay to showing that law and society is better equipped to undertake the task as she sets it out.

Frankly, when it comes to standard law and economics we cannot say we disagree with her; that approach is too cramped to do much, if any, of the heavy lifting. When it comes to more general rational choice approaches to the study of the law, however, at least three of her most prominent criticisms are overstated or in error.

First, rational choice is not wedded to any particular assumptions about social context. To be sure, scholars have used it to study action in markets, but they also have employed it in many other contexts: in political, social, and judicial contexts, to name just three (see, e.g., Ensminger 1992; Eskridge & Ferejohn 1992; Miller 1992; Ostrom 1990). Also, to be sure, some who have employed rational choice to study nonmarket behavior have inappropriately modeled the nonmarket institution as if it were a market (e.g., the law and economics tendency to treat a national judicial system as a market). But this is a weakness of specific research projects, and not of the approach per se. Properly specified, rational choice can capture the particular characteristics and effects of nonmarket contexts.<sup>3</sup>

---

<sup>3</sup> For a detailed discussion of the ways in which rational choice models can account for the differences in social context, see Knight (1995).

Second, rational choice is not wedded to a focus on efficiency (see, e.g., Miller 2000). So while it may be legitimate to criticize standard law and economics approaches on this ground, the same cannot be said of rational choice approaches per se. Actually, rational choice can move far beyond efficiency and place its primary focus on other types of legal and institutional consequences, including the basic distributive effects of social interactions—effects that have been a primary focus of the standard law and society approach.

Finally, rational choice does not prevent analyses of power and power relationships (Knight 1992). We should not take the fact that many law and economics scholars have ignored power to mean that power cannot be employed in rational choice. In fact, we can quite easily incorporate power into strategic analysis of important law and society questions, such as those centering on the evolution and construction of law and legal institutions and on the nature of judicial interpretation and decisionmaking.

### **Complementary, Not Conflicting, Approaches**

In offering these correctives to Edelman's characterization of economic approaches, we do not mean to undermine the idea that law and society and law and economics are complementary, nicely lending themselves to the bridge-building that Edelman desires we undertake. What we do want to suggest is that if we move away from the standard law and economics approach and toward rational choice (and strategic analysis in particular), then rational choice has a much more important role to play than Edelman suggests.

To see this, return to the task that Edelman sets out: "to demonstrate the links at the societal level between legality, morality, and rationality" (Edelman 2004:188). In thinking how we ought best accomplish it, recall that Edelman suggests that her approach will do a better job of providing "a richer understanding of the interplay between law and the economy," as well as one that "is more likely to recognize and perhaps to ameliorate social injustices that follow from efficiency-based reasoning" (Edelman 2004:186). We, on the other hand, believe that the development of a richer understanding of the relationship between law and economy, as well as of an adequate assessment of existing social injustices, *requires* us to employ the explanatory tools of strategic analysis. We offer two arguments in support of this claim.

First, at the heart of Edelman's argument is the belief that the linkages among legality, morality, and rationality are fundamentally political (broadly defined) in nature. We agree. But we would insist that these political processes involve complex social interactions

that are characterized by various forms of strategic behavior (a point, we might add, well exemplified in Edelman's discussion of civil rights laws). To understand adequately the ways in which social interactions and the power asymmetries that characterize them enter into these processes, rational choice approaches are not merely valuable; they are critical. They are, to provide just a few illustrations, central to any explanation of how laws and norms are produced, how rational action is defined, how instrumental action interacts with norms, and how power asymmetries influence social conceptions of morality and rationality.

Second, strategic analysis allows us to specify the ways in which the social factors emphasized in the law and society literature enter into the relevant causal processes. This type of analysis provides a framework for identifying the specific causal mechanisms that generate social outcomes, such as how social context affects both individual choice and the resulting social outcomes. Moreover, because strategic approaches require us to specify and detail the underlying mechanisms of social interactions, rational choice accounts that incorporate power can do so *ex ante*. As such, they avoid a common problem of social explanations (including many law and society accounts) that use power as an explanatory variable—namely, positing power *ex post* after we already know the identity of the winner and losers. Finally, a clear and thorough understanding of how specific social outcomes are produced is especially relevant to efforts addressing the social injustices that characterize many of these outcomes.

## Discussion

As the above discussion suggests, we take issue with Edelman's understanding of the relative importance and contribution of rational choice approaches: To us, strategic analysis—because of its analytical clarity—can help produce more compelling and persuasive social explanations. At the same time, though, we take quite seriously, and indeed share, her basic concern: Rational choice alone cannot adequately analyze the linkages among legality, morality, and rationality. To explore these linkages—that is, to answer fundamental questions about how actors form preferences, how social factors affect strategic behavior, how those same factors influence competing conceptions of morality, and the like—we must supplement rational choice with other accounts. Edelman's is a particularly compelling one. We have little doubt that it will work to further our understanding of these central questions; it also should lead rational choice scholars to rethink some of their own specifications.

## References

- Edelman, Lauren (2004) "Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality," 38 *Law & Society Rev.* 181–98.
- Ensminger, Jean (1992) *Making a Market: The Institutional Transformation of an African Society*. Cambridge: Cambridge Univ. Press.
- Epstein, Lee, & Jack Knight (2000) "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead," 53 *Political Research Q.* 625–61.
- Epstein, Lee, Jack Knight, & Andrew Martin (2003) "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court," 91 *California Law Rev.* 903–66.
- Eskridge, William N., Jr., & John Ferejohn (1992) "Making the Deal Stick," 8 *J. of Law, Economics and Organization* 165–89.
- Knight, Jack (1992) *Institutions and Social Conflict*. Cambridge: Cambridge Univ. Press.
- (1995) "Models, Interpretations and Theories: Constructing Explanations of Institutional Emergence and Change," in J. Knight, & I. Sened, eds., *Explaining Social Institutions*. Ann Arbor, MI: Univ. of Michigan Press.
- Miller, Gary (1992) *Managerial Dilemmas: The Political Economy of Hierarchy*. Cambridge: Cambridge Univ. Press.
- (2000) "Rational Choice and Dysfunctional Institutions," 113 *Governance* 535–48.
- Ostrom, Elinor (1990) *Governing the Commons*. Cambridge: Cambridge Univ. Press.