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The Problems with Heuristics for Law

Russell Korobkin

UCLA School of Law, University of California,
Los Angeles, CA 90095-1476, U.S.A.

ABSTRACT

A large body of evidence, now familiar to the legal community, demonstrates that individual judgment and choice is often driven by heuristic-based reasoning as opposed to the pure optimization approach presumed by rational choice theory. This evidence presents several challenges for consequentialist legal scholars who wish to make normative public policy recommendations. First, the fact that actors subject to the legal system often rely on heuristics suggests that their behavior will not always maximize their subjective expected utility, undermining the traditional assumptions of law and economics scholarship that private contracts are necessarily Pareto efficient and that legal "taxes" and "subsidies" can cause actors to behave in a way that maximizes social efficiency. Second, the fact that the decision makers who create law also rely on heuristics suggests that law will not necessarily maximize either the collective good or the utility of favored groups, and that law that attempts to create incentives for certain behaviors might not be properly calibrated to its goal.

This chapter describes these two problems that heuristics cause for law and recommends four approaches that lawmakers should consider to mitigate the problems: developing context-specific legal rules when possible; creating "heuristic-savvy" legal institutions; manipulating heuristics; and implementing a context-sensitive "cautious paternalism."

INTRODUCTION

Most consequentialist legal theory, exemplified by but not limited to scholarship self-consciously in the law and economics tradition, rests on a positive prediction and a normative commitment. The positive prediction is that legal rules provide a nontrivial behavioral incentive for those subject to them. The normative commitment is that providing behavioral incentives is law's most important (although not necessarily its only) function.

From a consequentialist perspective, a legal rule might have one of three substantive goals: (a) to facilitate private ordering such that actors may maximize