

Adjudging The Heuristics Debate

Author : Robin West

Date : February 1, 2013

Mark Kelman, [The Heuristics Debate](#) (Oxford 2011).

In his accessible and thoroughly enjoyable book *The Heuristic Debate*, Mark Kelman demonstrates for the benefit, primarily, of legal scholars and policy makers, that there is not just one, but there are two challenges, or alternatives, to the economists' rational choice model of decision making that has so influenced law and policy over the last few decades, both of which come to us from the discipline of cognitive psychology, with one of which — objections coming from the "heuristics and biases" school — lawyers are largely familiar, but the second of which — those coming from the group Kelman labels the "fast and frugal school" — we are not. But we should be. The second challenge, Kelman suggests, cuts quite a bit deeper than the first, and yields insights of relevance to both law and policy which are at right angles with those offered by rational choice theorists and the heuristics and biases school both. Mark first presents these two schools — heuristics and biases (hereinafter HB) and fast and frugal (hereinafter FF) — as participants in an intra-cognitive psychology debate, as that is how both schools originated, rather than as responses to the economists' rational choice model of decision making, much less the latter's deployment in law and policy. Nevertheless, and as Mark eventually argues, it's also useful to understand both schools in their quite differing relations to the rational choice model of decision making with which they are both in conflict. (Mark calls the latter "rat choice" for purposes of brevity, but I won't, I'll call it RC instead.)

I'll quickly summarize what I understand as the book's most basic claims, then make a perhaps unwarranted inference, although I hope not, that will sharpen and recast the differences between them but also sharpen the differences of the fast and frugal school with both the heuristics and biases school *and* the rational choice school. My basic claim is that it is those differences, between FF on the one hand, and both RC and HB, that have the potential to reframe fundamentally the place of rational choice in our conception of law, and our understanding of alternatives to it. By contrast to those differences, and that challenge, the familiar challenges posed to RC by HB look much more like friendly amendments — provocative, thoughtful, and fun amendments, but amendments all the same. In my concluding remarks I will aim to cast somewhat differently what I take to be the most imaginative and interesting but also the weakest part of Mark's book, to wit the discussion of Holmes and Langdell as exemplars of HB and the FF schools respectively and then finish up with some quick remarks about the role of these models of cognition in legal scholarship and legal policy debates quite generally.

For my purposes, best to start with rational choice, RC for short. RC is the economics-derived theory of decision making that has so permeated legal thought, some legal decision making, as well as some public policy and decision-making. According to RC we — humans — each rationally maximize the relative utilities of a decision, and then make the choice that increases our own net gain. RC consists of two major claims, or three if we expand the net to include its normative aspects. The first claim concerns our cognitive abilities: individuals making decisions are capable of more or less accurately assessing the probability, at least within the limits of the information they have rationally decided to compile relevant to that decision, of the various eventualities to which the prongs of a decision fork might lead, including the probability of their own future state of satisfaction or well-being with the chosen route. So if I want to buy a couch on credit with a particular interest rate for the loan, I know, better than anyone else, the probability that I will default, and the probability that I will enjoy the couch,

and how much I will enjoy the couch, and how much I will suffer in the event of default. Same goes, if I am deciding, rather than to buy a couch or not, to vote on a constitutional amendment defining marriage, or on a traffic ordinance raising the speed limit, or on a term of probation, or on whether or not a letter mailed but not received constitutes acceptance of a contract. All of these decisions call on my abilities to calculate future probabilities and assess their utility. The second prong of the rational choice model, though, is motivational: once having calculated the net gains and losses of a decision, each of us then chooses in such a way as to maximize our own net utility, or if we represent others, the net utility of the group, by which is generally meant, by contemporary economists although notably not by Bentham or Mill themselves, the greatest satisfaction of felt desires. The third claim is the moral one: we should arrange our social life such as to satisfy as many of these felt desires as possible. Because people are best situated to decide for themselves the utility of possible decisions, and are motivated by and large to do so as well, we do this primarily through allowing the free flow of products through free markets, the free flow of information so that consumers can first rationally choose how much information they want and then make the most informed choices that it is rational for them to make, and through representative political systems that align the felt desires of legislators with those of constituents. Then we – meaning legislators, regulators, and judges – should get out of the way. The main normative principle that emerges from rational choice, in other words, is a strong anti-paternalism principle, particularly with respect to the utility of felt outcomes. Just about everything in normative law and economics of the 1970s and 1980s flows from this: antipaternalism in contract, Coasean analysis in tort and regulatory law, the skeptical rethinking of the logic of the antidiscrimination principle in constitutional law and so forth. All of it gets back to some form of consumer or individual sovereignty over one's own pleasures and displeasures, all of which is in turn justified by the "I know what I like and furthermore I know how to get it" principle of what it means to be a grownup.

As most legal theorists are now aware, the group of psychologists that Kelman refers to as the heuristics and biases school have gone after the first of these three prongs – the cognitive one — with gusto; showing in now hundreds, perhaps thousands of experiments, that we're not very good at calculating these probabilities, and regardless of how much information we've amassed. The problem is that we're not good at inferential reasoning, be it Aristotelian formal logic or Bayesian probabilities. We think Sheila is more likely to be a feminist bank teller than a bank teller simply because she was a lefty in college, we think that Attila the Hun was born in whatever year most closely resembles the first three numbers of our social security number, we think that Cleveland is bigger than Columbus because we've heard more about the former than the latter (or, in my case, because it has an American league baseball team), we think that we won't default on a disastrous consumer loan because our neighbors and relatives with the same loan agreement haven't defaulted, and just as our parents to our everlasting discontent persisted in their delusional belief that because most heroin users also smoked marijuana that therefore marijuana is a gateway drug to heroin so too we apparently think that a straight man testing positive for HIV is overwhelmingly likely to have it because after all just about everyone who has HIV tests positive, and we think that whether it's true that only the cards with odd numbers have black icons on the back can be settled by simply investigating the odd numbered cards and one or two of the evens rather than also checking out whether any of the cards with black icons have even numbers on the flip side, and so on. So if we make these logistical and inferential errors, and quite routinely, then we're hardly going to be reliable actors in the coordinated effort to maximize social welfare by moving resources to their most highly valued users. The consequence, then, of assuming cognitive irrationality, for law and policy, is greater paternalism in markets, more use of experts in administration, less reliance on jurors, and perhaps the preferability of a republican rather than purely representative form of democracy that aims directly at human welfare or flourishing, rather than at simply satisfying as many of the people's felt desires as possible. Consumers acting in their own interest, administrators trying to act in the interest of all, voters deciding between policies, legislators acting on the perceived policy preferences of constituents, and jurors ascertaining facts, none are reliable assessors of probabilities and therefore of the future state of the world that hinges on decision,

and are therefore not good utility-maximizers. The resulting dilemma is what has generated a now familiar, if not yet traditional, debate in legal circles: the economist's rational choice based anti-paternalism, in its various loci, is pitted against the psychologist's purportedly more informed view that tends to favor some limited paternalism — not so as to question or readjudicate the desirability of anyone's desired end state, but rather a soft or limited paternalism that might nudge us toward the decision we would reach, assuming the givenness of desires, but were we not beset by biases.

Fast and Frugal psychologists as Mark presents them agree that we use heuristics: We do indeed make decisions quickly, and on the basis of less than all the information we could have at our disposal to maximize the utility of competing outcomes between which we must decide. That's the area of agreement with the bias school. But what we don't do, according to FF, is look at all those factors, compensating, weighing, and balancing them, each against the others — we don't do this either rationally or irrationally. We don't take "all things into account." We don't calculate the relative utility of possible streams of consequences. We don't assess, project and then weigh probabilities for what might happen if we do x, y or z, and then calculate, computer style, which yields highest utility, taking "all things into account," and then take which ever path maximizes net gains. So it's hardly fair to fault us for doing irrationally, that which we're not trying to do at all – and furthermore, that which we shouldn't try to do at all. Rather, what we do is leap to conclusions. We decide things, when we decide things, on the basis of one or two but at any rate a very few factors, or prompts, or cues used sequentially: we do what we've done in the past, or out of habit, or what our neighbors do, or what we've been taught to do, or what a legitimate authority tells us to do, or what we think we ought to do on the basis of deeply held values. We use these heuristics – community norm, habit, etc. – so that we *can* make decisions quickly: the heuristic blocks out, or obliterates, all those factors we don't take into account. And finally, our use of those heuristics either today or at some prior time contributed to our own survival or that of our descendants. It helps our own odds of survival to obey those in authority, be they biological mothers or fathers on whom we rely for basic needs or political authorities on whom we come to rely for protection against aggressors, or gods in whom we come to believe. It's not a bad strategy toward the same end likewise, to do as our neighbors do, or to ostracize others and outsiders, and so on. So, we rely on these cues – follow the community norm, follow habit — *not* so as to maximize utility, either rationally or irrationally, but in order to maximize our inclusive fitness. The decisions we make, then, even employing heuristics that are patently irrational, and look all the more so when viewed in laboratories that strip the environments of the ecological factors that would make them intelligible, are not as counterproductive as they seem, and their use far more often than not leads to acceptable outcomes.

That's my summary. Now, Mark draws a number of contrasts between these two schools, and spells out implications from each for consumer protection, criminal punishment, discrimination law, and for formalism and realist theories of judicial decision making. There are two further and quite consequential inferences we can draw, though, from Mark's account, that I'd like to highlight. The first is just this: the contrast between the fast and frugal school on the one hand, and both rational choice *and* the heuristic biases schools on the other, as Mark presents them, is so great as to dwarf the contrast between the HB and RC schools which has absorbed the attention of legal theorists for two decades now. In other words, against the backdrop of the fast and frugal school, the heuristics and biases tradition emerges from mark's account as a friendly amendment to rational choice, with the fast and frugal school being by far the deeper critique. Put differently, we might have viewed the HB school as being such a deep critique of rational choice simply for lack of a third comparator, sort of like how I thought my two sons were just night and day different, until I had my third child, a girl. So, the result of Mark's presentation of the three schools in this one book is that the debate is reconfigured, with the HB school – who might be relabeled as the irrational choice theorists — and the rational choice theorists on one side of the divide, with at least the fast and frugal theorists – and maybe others — on the other. This is an important finding, because the reconfiguration it suggests opens up a new question: what do

the rational choice and the HB people share, in spite of all their differences, that the frugal school has put into doubt? And should the rest of us doubt it as well?

The answer is obvious once it's stated that way and particularly if you will accept just for these purposes my relabeling: the rational choice school and their irrational choice critics converge on the centrality of "choice," and what it means to make one, and even what it means to make one rationally. They differ on our abilities to carry it out. But what unites them is much greater, and it is that common ground that is thrown into relief by a theory of decision making that contrasts with both, and that is what Mark's book above all else shows. What unites them is twofold: they both, unlike the FFers, agree with what I identified as the second claim of the rational choice theory above, to wit, that individuals are motivated to maximize utility (whether their own or that of others). Second, they agree that what people do, when facing a decision, is *choose*, and in a calculated manner, that which does so. What unites them is their shared commitment to the joint proposition that we are and should be utility maximizers, first, and that the way we maximize utility is through choice. What divides them is simply how good we are at it. Because the gulf between the belief in rationality on the one hand and irrationality on the other seems so large, we have been relatively blind to the gigantic ground they share at the bottom of the gulf. The ground on which they both stand, although miles apart, is choice and utility.

The fast and frugal school puts both utility and choice in doubt, with respect to vast areas of decision making, including, most assuredly, legal and moral decision making, but also including decision making in parenting or childing, in military service, and in education. It puts utility in doubt, quite explicitly: we aim, at least sometimes, toward inclusive fitness, not utility, when making decisions. Mark notes this and repeatedly. But second, and here comes my perhaps unwarranted inference, it seems to me that if Mark's description is correct, the FF school also puts choice in doubt, although he never quite says so. When we are faced with a decision, at least some of the time, according to the FF theorists, we don't "choose" at all, whether rationally or not. Choice is the wrong verb. We don't calculate, we don't take all things into account, we don't balance one sort of consideration over another, and we don't choose among them seeking to maximize payoffs. Rather, what we do, according to FF, when making decisions at least much of the time, is *follow*. We follow habit. We follow the speed of the traffic. We follow a community norm. Sometimes, if there's a relevant authoritative pronouncement, we follow that norm. More than "follow," I would say, we *obey*, or we submit, or we comply, or we conform, or we go along to get along. Or, if there's a relevant moral principle, we obey that. These are all different from choosing. Now again Mark doesn't characterize it this way, so I assume the FF school doesn't either, but it follows pretty directly on the heels of two things they do emphasize. The first is simply the scarcity of cues – if one must do something, and one only has one cue, then that cue becomes an imperative: do this. If that cue proves inadequate one moves on to the next, which then itself becomes imperative. But second, it follows from the nature of these cues the FF'ers identify, at least those that guide decisions about what to do rather than cues about what is true or false: community norms, habit, moral principle, authoritative directives. These cues are all, in some sense, imperatives.

One way, then, it seems to me, to characterize the difference between FF and both RC and HB, is that the cues that FF identifies for action guiding decisions are not only far fewer in number, and aimed at inclusive fit rather than utility, and used one at a time, but that they are very different in content and even in grammar from the "heuristics" of the HB school or the factors and probabilities of the RC approach. The "heuristics" identified by the FF school are, simply, imperatives of some sort: of a commander, of a policeman, of the state, of a moral principle, of a community, of a habit, of a father. If, in the face of one of these "cues," we weigh it against other considerations, if we balance a moral principle or a parent's directive or a military commander's order against other considerations, we have done something that is not so much irrational, as non-compliant. Think of a promise: a promise is a reason-displacing imperative one makes to the promisee and ultimately to oneself. If we've made a promise we must keep it, when faced with the decision to do so, even if we regret having made it, full

stop, so to speak. We don't consider pros and cons. We must do as we promised. That's typically how we speak of it. Sorry, I *can't* meet with you, because I promised... There's an imperative dimension to that promise that pushes aside other considerations, or it's not what it appears to be. The promise becomes a command that displaces choice. The same is true of a duty. If we have a duty, we act in accordance with it, full stop. That is what it means to be under the sway of a duty. If we're duty bound, we're duty *bound*, the duty displaces choice. The command of Justice is just that, it's an imperative, whatever else it is, it is that with which the lawgiver *must* comply. When we act in accord with law, with morality, with parental authority, with community norm or from habit, we act in accordance, we don't choose.

In these cases, in these circumstances, which is obviously not all of the time, these decisions don't feel like choices. When we keep the promise we regret having made, we feel that we do so because we must, that we don't have any choice, as we might even say, we don't keep it because we have calculated the dis-utility of relative social disharmony if we dispense with the institution in this case or generally and decided that it's not worth it to contribute to that disharmony. We act in accord with the categorical imperative because it's an imperative, we must. We act in accord with law, or with our parent's or the sergeant's directive because we must; these things displace choice, they don't guide or frame it. Likewise the lawgiver or judge *must* act in accord with the command of Justice. The decision, then, is not what to choose to do, with relative utilities attached to each, it's whether or not to obey. We feel compelled to act, and there might be a question whether we have the courage or imagination to buck that compulsion, but more often there's not. We're indeed making a decision, but there is an imperative pushing it. The value of the FF school, I believe, whatever one thinks of the evolutionary story on which it rests, is that it puts that contrast – between decision as choice, and decision as compliance, or habit, or community, or the imperative of principle – front and center.

If we attend to THIS contrast – between the sense of choice that the rational and irrational choice theorists focus on and the sense of compulsion which the frugalists highlight, the contrast between choosing and following, between descriptions of states of affairs with probabilities attached and descriptions of states of affairs that are laden with imperatives, as cues of action – then I would suggest that the accounts of decision-making that occur within some relationships – between parent and child, or sergeant and private, or even doctor and patient or teacher and student or in some contexts sovereign and subject and perhaps as well between moral principle and moral agent and certainly between habit and habitué – become more recognizable. These are relations of authority, in which one party issues a directive the point of which is that it must be obeyed, not construed as a factor with sanctions the utility of which must be assessed and weighed and so forth. Within these contexts, the FF account of decision-making seems far more compelling because it seems so much recognizable. Some decision-making contexts, it seems, give rise to the imperativist quality of FF thinking, some are structured around it. All structures of human authority, it seems to me, are such contexts, including legal authority. Moral principles though have the same quality – they too have an imperativism that displaces calculation. As we mature we may find in our adult lives that it is *only* moral principle, and then only some of the time, and law, and that again only some of the time, rather than any other human authority, that invites FF thought. You must, you shall, you will.

And finally, if we attend to this contrast – the contrast that is between factors that trigger individual choice in the rational choice or the HB way, and factors, or imperatives, that trigger compliance, obedience, submission, and so on – some recurrent debates in both law and morality also come into sharper relief. Deontological moral theorists basically pose moral questions as raising issues of right and wrong that require imperative resolutions; what's being sought is the thing that must be done. The deontic moral rule famously displaces consequentialist analysis, it's not weighed against it. More to my point though the categorical imperative is an *imperative*, moral rules are *rules*, not standards. Rights theories in international and to some degree in constitutional law as well do likewise; what's sought is

what *must* be done, not what all things considered should be done taking everything into account. If I have a constitutional right to something, then the state simply must respect it, it's not one factor to weigh against others. Likewise, if FF thinking is deep seated, and if a promise is an example of a cue which displaces in the imperative way Mark attributes to them, then it's obviously no wonder that the Holmes-ian account of a contractual promise – that it is a prediction that either an event will occur in the future or that damages will be paid – sounds like nonsense to so many people including many of our students; it is a deep grammatical mistake, both linguistic and moral at the same time, to characterize a promise in such a way, including a legal one. Similarly, if a duty is a cue that precludes calculation, it is again no wonder that the realist understanding of it as something which predicts an act in accordance with it or liability for damage seems just ludicrous. If a tort is a “wrong” it's absurd to define it as a set of background norms that kick in where transactions are so high as to preclude bargaining but which mimic what those bargains would have been, assuming rational actors. More broadly still Mark might be right that Langdellian understandings of legal rules and principles construe both as the sort of thing which sets calculation aside, in which case he is right to regard Langdell as an interesting example of a fast and frugal-influenced thinker. But if he's right in that, it's because for Langdell, but not Holmes, law appeared as a context within which FF thinking felt fully appropriate. I suspect it did appear as such, and it did so precisely because of its authoritative, imperative dimension. You must, you shall, you will. Holmes just didn't experience the commands of law as commands, nor did his bad man, that's what makes him so bad.

Let me close with two quick normative suggestions. If we take the possibility of even occasional FF thinking seriously, we might want to quit so compulsively characterizing all decisions as decisions of choice. They're not. Second, we might consider the possibility that by so doing — by framing all decision making, monochromatically, from decisions regarding purchases of toothpaste to votes on constitutional amendments to judicial reasoning as decisions calling upon us to choose — we are doing our students, and even the world, a disservice. Sometimes, even in law, a little bit of modularized, FF thinking, particularly with regard to legalistic moral principles, might be called for. Don't torture. Don't target citizens for assassination. Don't execute the innocent. Don't ruin the earth. Perhaps, were law schools to take seriously the idea that there exist some legalistic moral and imperative principles of justice – commitments to fairness, to process, to the protection of the vulnerable, to human dignity, or whatever those legalistic moral principles might be – that are worthy, we might wish to instill a modularized respect for them. A modularized respect for them, in turn, might, sometimes, such as the times we now inhabit, serve us better than the consequentialist balancing, the weighing of all factors, the calculating, the assessing, and the choosing, that we so relentlessly practice and seek to instill, and that we so relentlessly and insistently call reason.

Cite as: Robin West, *Adjudging The Heuristics Debate*, JOTWELL (February 1, 2013) (reviewing Mark Kelman, *The Heuristics Debate* (Oxford 2011)), <https://juris.jotwell.com/adjudging-the-heuristics-debate/>.