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MUST WE CHOOSE BETWEEN RATIONALITY AND IRRATIONALITY?

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EMOTE CONTROL: THE SUBSTITUTION OF
SYMBOL FOR SUBSTANCE IN FOREIGN POLICY
AND INTERNATIONAL LAW

*Jules Lobel and
George Loewenstein*

1045

Historical perspectives, as well as recent work in psychology, converge on the conclusion that human behavior is the product of two or more qualitatively different neural processes that operate according to different principles and often clash with one another. We describe a specific “dual process” perspective that distinguishes between “deliberative” and “emote” control of behavior. We use this framework to shed light on a wide range of legal issues involving foreign policy, terrorism, and international law that are difficult to make sense of in terms of the traditional rational choice perspective. We argue that in these areas, the powerful influence of emotions not only on the general public, but on politicians and judicial decision makers, leads to a substitution of symbol for substance that can be seen at two different levels: (1) in the types of situations and stimuli that drive people to action (namely vivid symbols rather than rational arguments), and (2) in the types of actions that people take—specifically symbolic actions that are superficially satisfying as opposed to more substantive actions that are less immediately satisfying but actually more likely to produce desired long-term results.

RATIONAL CHOICE AND RAT CHOICE:
SOME THOUGHTS ON THE

RELATIONSHIP AMONG RATIONALITY,
MARKETS, AND HUMAN BEINGS

Edward L. Rubin

1091

For about 2,500 years, the term rationality has been used in the Western world to describe the application of human reason to a wide range of problems or issues. In the past thirty years, however, the term has been appropriated by microeconomists and microeconomically-oriented social scientists to mean something quite different—the application of instrumental rationality to the particular problem of material self-interest maximization. This Article will attempt to recapture the original meaning of the term rationality, and explain the place of the microeconomic model within it. Using Weber’s distinction between instrumental rationality and values rationality, it will argue that all theories of rationality incorporate instrumental rationality, but that most theories also insist that reason be applied to the choice of human goals, that is the purposes to which instrumental rationality are directed. Material self-interest maximization is only one particular human goal, and it is not one that, on either philosophical or empirical grounds, would be chosen by most people when they use reason to select the goals that guide their lives. Instead, it is the goal that would be instinctively chosen by the sort of person who would be described, in colloquial

discourse, as a “rat.” Having established this distinction, the article will elaborate it by discussing two examples: academic scholarship and elections for public office. It will argue that the rat choice goal of material self-interest maximization is not a choice that a rational person may make in either of these contexts.

PETS OR MEAT

Mary Anne Case

1129

I am interested in exploring questions of whether and when commingling commodification with affection is more problematic than naked commodification. My title comes from the scene in the Michael Moore film *Roger and Me* depicting the marketing of rabbits. The dynamic I am interested in is common, not only in human relations with other animals, from lab and farm animals to pets, but also in pink collar work. The secretary given flowers instead of a bonus, the housekeeper whose employers say of her, “she’s one of the family”—each of these cases is troubling, although it is not clear that more naked commodification of personal services would be preferable. What about instances when affection is explicitly what we’re buying? Laws against prostitution say money cannot (legally) buy some forms of love. But why don’t we think of nannies as mistresses and baby sitters as hookers?

FOR LOVE OR MONEY: SOME
EMOTIONAL FOUNDATIONS OF
RATIONALITY

Gerald L. Clore

1151

Having emotions represents what people value. Just as cognition concerns whether things are true and false; emotion is about whether they are good or bad. Thus, emotion may be a necessity for rationality, rather than its antithesis. Our emotion research shows that emotional feelings provide compelling information about the value of outcomes, actions, and objects. As a result, although it can also lead to excess, emotions provide a coherent basis for judgment and decision. In addition, I suggest that the current psychological theory is helpful in thinking about rationality because it assumes more than one mode of reasoning. Similarly, current emotion theory is helpful because it assumes more than one kind of good.

BOUNDED RATIONALITY OF *HOMO*
CLASSIFICUS: THE LAW AND
BIOECONOMICS OF SOCIAL NORMS AS
CLASSIFICATION

Janet T. Landa

1167

In the “New Chicago School” (“NCS”) law and economics literature that emerged in the 1990s, social norms play an important function in their dual role as constraints on behavior and as signaling devices. Missing in the NCS social norms literature, however, is any treatment of social norms as classification, a concept which is fundamental to a more complete theory of social norms. In this Article, I show that my early 1980s theory of social norms embedded in the ethnically homogeneous middleman groups (“EHMGs”) clearly falls within the NCS tradition. Since the 1980s, I have extended my law and economics analysis of social norms as classification. The concept of social norms-as-classification is further extended in a law and bioeconomics of EHMGs as “adaptive units” viewed from a multilevel evolutionary perspective. The expanded theory of social norms links together the disparate social science disciplines of economics, law, sociology, anthropology, political science, evolutionary psychology and beyond to evolutionary biology and bioeconomics. By providing evidence of EHMGs functioning as adaptive units, I provided a very rare and important example in support of “group selection theory” in the field of evolutionary biology. The expanded theory of social norms has implications for understanding minority middleman success in various parts of the world, racial discrimination, racial profiling, ethnic conflict, and international terrorism.

THE LEGAL FUNCTION OF RITUAL

Geoffrey P. Miller

1181

This Article offers a theory of ritual as social control. It argues that an important function of rituals is to align personal identities with social roles. The celebratory aspect of rituals reflects the sense of felicity that accompanies the successful alignment of identity and role. Violence in ritual reflects the fact that the alignment of identity and role is compulsory and often imposes significant costs on personal autonomy. Within the framework of this theory, rituals can be classed into three general types: rituals of reformation (e.g., marriage, initiation, and installation) help align identity and role; rituals of renewal (e.g., religious services, patriotic ceremonies, and sacrifice) act as “booster shots” to maintain the alignment; and rituals of reformation (e.g., purification, confession, and cure) act to restore the connection once it has broken down. This Article analyzes rituals within a broader framework of social control including laws and norms. It conjectures that societies will tend, in general, to make efficient investments in each of these approaches. Societies that expend the most resources on ritual are likely to be small, homogenous, and tight knit; insulated from technological change; or politically undeveloped.

NEUROECONOMICS AND RATIONALITY

Terrence Chorvat and

The assumption of rationality is both one of the most important and most controversial assumptions of modern economics. This Article discusses what current experimental economic as well as neuroscience research tells us about the relationship between rationality and the mechanisms of human decision making. The Article explores the meaning of rationality, with a discussion of the distinction between traditional constructivist rationality and more ecological concepts of rationality. The Article argues that ecological notions of rationality more accurately describe both human neural mechanisms as well as a wider variety of human behavior than do constructivist notions of rationality.

ROUNDTABLE DISCUSSION: MUST WE CHOOSE
BETWEEN RATIONALITY AND IRRATIONALITY?

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STUDENT NOTE

BY ITS FRUITS SHALL YE KNOW;
AXSON-FLYNN v. JOHNSON, ONE MORE
ROTTED FRUIT FROM *EMPLOYMENT*
DIVISION v. SMITH

Bradley C. Johnson

1285

The Supreme Court's decision in *Employment Division v. Smith* has been widely criticized for decimating the Free Exercise Clause and leaving free exercise rights vulnerable. Critics maintained that the Supreme Court's decision in *Smith* to shift protection of free exercise rights to primarily the political process would have devastating consequences for religious individuals. In *Axson-Flynn v. Johnson*, decided fifteen years after *Smith*, one of those consequences has become clear: a state university can constitutionally require an individual to swear as part of an acting program, even if swearing violates that individual's deeply held religious beliefs. This result of compelled swearing is striking considering that for most of America's history, swearing has actually been prohibited by law. This Note examines whether there is any principled argument for contending that there is still sufficient constitutional protection after *Smith* to avoid the result of allowing a state to require an individual to swear against his religious belief. The Note argues that there is not, and concludes that the only way to prevent the odd result of compelled swearing implicated in *Axson-Flynn* is to reinterpret or overrule *Smith*.