

ON THE APPLICATION OF CARE ETHICS TO THE ECONOMIC ANALYSIS OF LAW

EMLE FINAL THESIS

Abstract. The economic Analysis of law, also known as Law & Economics discipline holds important insights on the way we understand the law and markets. With that, the discipline relies on a consequentialist ground and liberal individualism assumption. This means that the discipline is limited in its ability to describe how inter-dependence and personal relationships effect human motives and behavior. Care Ethics (also part of the feminist ethical theories) is a relatively new moral theory that criticize traditional ethical theories on that exact point. CE advocates for including and accepting our feelings and relationships in making decisions. The paper presents why we should advocate for the incorporation of the two ideas into a more unified approach that would enrich both disciplines.

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AUTORSHIP DECLARATION

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I acknowledge the supervision and guidance I have received from Professor Pierre Garelo This thesis is not used as part of any other examination and has not yet been published.



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CHAPTER 1: INTRODUCTION

Care Ethics (CE) is a relatively new ethical approach starting from the 1980' in psychology and moved towards the philosophical world. In its core, CE argues that our interdependence and social relationships we are a part of affect, and should affect, our behavior and decision making.¹ The claim that the individual is dependent and has personal responsibility towards others may feel intuitive to some. Despite that, most traditional ethical approaches claim that when coming to make a moral decision, a person should see himself as independent from those relations (Held, 2006, p. 14).

On the other hand, the L&E literature in its modern wave developed in the middle of the 20th century (Gelter & Grechenig, 2014). The theory normative claim is that we should analyze the economic impact and use the economic methodology when analyzing the legal system. The L&E mainly developed over the traditional ethical approach of utilitarianism; therefore, the idea of the individualist decision maker is inherent to the discipline.²

But as chapter 5 will describe, claims since classical writings in the 18th and modern days behavioral L&E argue that the individualistic assumption does not accurately reflect the person. therefore, the paper asks to explain how we can incorporate the CE theory into L&E. Of course, the article do not ask to neglect the entirety of the vast and insightful literature of the L&E theory. It argues to make tweaks in the analysis of the individual in the L&E theory to get a more realistic perception of the person to be researched.

¹ See chapter 4

² See chapter 3

There are works that combined law or economics to CE. For example, Herring's book "Caring and the Law" (Herring, 2013). The book systematically analyzes different legal issues with the view of a complex and interdependent individual. On the economic side, the book "Applying Care Ethics to Business" offers the importance of treating businesses and markets as build out of people and the richness CE may offer when treated in the business world (Hamington & Sander-Staudt, 2011).

Both offered important insights to the connection between CE and their field. There are also some topics that include a little from all three ideas. See for example, Herring's ideas on contract law (Herring, 2013, p. chapter 8). Yet, I did not find a work that tries to dig deeply to the ethical of the L&E morality, and its influence on the discipline methodology.

On the other hand, attempts to create limitations on the sometimes-unintuitive morality of the economic analysis of law had been offered as well, but not for CE. Zamir and Medina offered in their 2010 book "law economics and morality" (Zamir & Medina, law, economics, and morality, 2010) how to incorporate deontological restraints on the economic analysis of law.

This paper tries to dive as deep as possible into the L&E theory and the assumptions behind CE. With those insights it will try to offer the way to incorporate CE into the economic analysis of the law.³

The paper will be divided into 3 major parts. The first part includes the general knowledge required for the analysis that will appear later. It starts with a brief review of the traditional normative ethical approaches (chapter 2). Chapter 3 will provide a

³ For simplicity and the scope of the article I will not dive into meta-ethical questions. The analysis assumes the need for non-relativist morality that won't be discussed. I will also won't discuss, for the reasons between difference in positivist and instrumental approaches.

deeper analysis of the morality of L&E, asking why and if a moral discussion is at all necessary to L&E. If, as I would claim, one cannot avoid the moral debate, I will describe what we can do to enrich the economic analysis of the law.

The second part will provide the solution. Chapter 4 will describe the underlying assumptions of CE and how it differs from the traditional theories. Chapter 5 will analyze the deeper reasons to support the incorporation of CE into the L&E discipline. The third and last part will answer how it is possible to incorporate CE into L&E. Chapter 6 therefore will describe the CE functions to include in the analysis, alongside other non-mathematical solutions. chapter 7 will demonstrate the incorporation of CE in a real-life scenario of mask wearing obligations.

CHAPTER 2: ON THE WESTREN APPROACHES TO NORMATIVE ETHICS

Normative Ethics defined by McCloskey as “[...] *directed at discovering the kinds of things, actions, and the like, which are good, right, obligatory, i.e., which judgments and principles are to be adopted and why [...]*” (McCloskey, 1969, p. 1). In other words, normative ethics could be seen as an attempt to create a procedure to guide a moral decision (McCloskey, 1969, p. 32). Those “prescriptions” are evaluated with different criteria’s, such as: explanatory power, simplicity, coherence, empirical content (Pollock L. , 1988, p. 230) and even intuition (Dancy, 1991). On a wider scale, the underline values those theories hold represent more than the way individuals should treat each other. Those questions are important to the way the law is built and the way our society is organized (Sandel, 2009, p. 9).

Traditionally, there are three major approaches in normative ethics: virtue ethics that emphasize the moral agent character and motives, Deontological approaches that

concerns with the moral nature of the actions themselves. Lastly, consequentialist approaches that considers only the result of an action. (Hursthouse & Pettigrove, 2018).

This chapter will discuss the main ideas of each to establish the necessary background required for an ethical debate on L&E in later chapters. A second purpose of the chapter is to distinguish care ethics as a modern development of normative ethics and see the problems it tries to solve (this concept will be developed further in chapters 5 and 6).

Three traditional (Western) Normative-Ethics approaches

Consequentialism

The first group of normative ethics we will look at focus mainly on the outcomes of an action as the guiding tool to decide if an action is moral (Sinnott-Armstrong, 2021). This is the main ethical ground for both neo-classical economics and L&E (Trachtman, 2004, pp. 68,70), therefore the approach is highly important to the question of the paper.

While all Consequentialist theories focus on the results of an action, disagreements emerged regarding how and what should be considered as the good result. For example, the main approaches in Consequentialism are the Hedonistic views, also known as utilitarianism (Sinnott-Armstrong, 2021). The Hedonistic theories originated with Jeremy Bentham (Schneewind, 1991, p. 151) and described by Sandel as: *“The highest principle of morality is to maximize happiness, the overall balance of pleasure over pain. According to Bentham, the right thing to do is whatever will maximize utility.”* (Sandel, 2009, p. 23). In other words, values such

as freedom are neglected from the definition of good if they don't increase pleasure (Sinnott-Armstrong, 2021).⁴

Mill famously criticized Bentham's work by creating a division between types of pleasure. While Bentham argued that all pleasures are dependent on the utility they create to the person, Mill divide utilities to lower and higher quality (Abdul Latif Mondal , 2016, p. 13). For example, Mill's approach suggests that the utility from reading a book is in higher quality, compared with the utility of taking drugs.

A later development in utilitarianism was rule-utilitarianism. The approach Introduced by Harrod (1936), and highly advocated by the Noble laureate economist Harsanyi (Harsanyi, 1977, p. 32). This approach asks what will be the rules/conducts that will benefit society the most, as opposed to the former theories known as Act-utilitarianism (Fleurbaey, Salles, & Weymark, 2008, p. 152) . For example, if under act-utilitarianism one will ask if they allowed to lie in order to prevent a harm, under rule-utilitarianism the relevant question will be "will society be better off if people won't lie?"

The major critiques of the consequentialist approaches are their over-demand on one side and a lack of demand on the other (Zamir & Medina, law, economics, and morality, 2010). consequentialism demands people to always take the action that maximizes the good, without consideration of other factors as their family. On the

⁴ In this chapter I referred to the classical ethical approach of utilitarianism. One may claim that the economic utility developed to be more complexed than that. This claim supports the first part of the paper argument that the hedonistic and classic utilities are not enough to describe human behavior. The second part will describe why I believe that CE is a good step forward.

other hand, it can justify terrible actions, even murder, if it increases the good (Alexander & Moore, 2021).

Deontology

Deontological theories are focused on the actions per-se, rather than their results (Barrow, 2007, p. 46). The name comes from the word duty– what we ought to do. This means that some actions are strictly forbidden, even if people would be better off by doing so. While there are differences between deontic theories (Alexander & Moore, 2021), some could be harsh as the infamous claim by Kant is that it is forbidden to lie, even to prevent murder. This claim may seem problematic to supporters of his theory (Varden, 2010).

Many deontological theories have developed over time, yet, without a doubt the most influential one is Kant’s moral theory (Alexander & Moore, 2021). The theory is based on the Categorical Imperative principle. The test, according to Kant, is rational and objective one must follow regardless of his desires (Johnson & Cureton, 2022). In practice Kant divided actions into “perfect duties” – actions one is strictly forbidden to do at any case, and “imperfect duties” that loosely binds one to act according to someone’s judgement (David E. Ohreen, 2012, pp. 368-369). Additionally, he provided a general scheme to ask if the action is moral (Johnson & Cureton, 2022).

Virtue Ethics

The last ethical approach is also the oldest, initially developed in ancient Greece by Plato and Aristotle (Hursthouse & Pettigrove, 2018). As old as the theory is, modern variations of it continue to develop (Annas, 2018) and among its advocates one can find Hume and Nietzsche (Swanton, *The Virtue Ethics of Hume and Nietzsche*, 2015). The

uniqueness of this theory is its emphasis on the person character and his motives for an action instead of suggesting a prescription of behavior (Annas, 2018).

Virtue ethics relies on two major terms: the Virtue (arete) and Practical Wisdom (phronesis). First, “*A virtue is a state or disposition of a person*” (Annas, 2018). The virtue is a quality that is deeply rooted within the person. the person possesses the virtue is excellent. he acts, feels, and understand, after taking into account a wide arrange of considerations what to do (Annas, 2018). His actions are the moral thing to do (Hursthouse & Pettigrove, 2018). The second term is the practical wisdom (Sandel, 2009, p. 104). the two major aspects of it are the understanding of what is moral and the understanding of what are the best means to achieve a goal, aiming to find the *middle ground. It is based on life experience and could get better over time* (Annas, 2018). The theory had been criticized for not providing a clear way of action (Annas, 2018).

A note on care Ethics and Virtue Ethics

care ethics and virtue ethics have similarities. Both support a more in-depth view of the context and the wide array of consideration before taking an action (Held, 2006). Those similarities led some scholars to suggest that care ethics is no more than a form of virtue ethics and not a separate moral theory (Thomas, 2011; Halwani, 2003; Herring, 2013, p. 76). Others, such as Held, will emphasize the differences, including the evolution of care ethics as a feminist theory (Held, 2006). To the matter of the question of the paper, this debate is less relevant, therefore won't be addressed. While the attempts in the literature to incorporate virtue ethics in L&E will serve some ideas presented in the paper (Chapter 6), care ethics concepts still stand on their own regardless.

Conclusion

The chapter briefly discussed the major ethical theories. we saw that the division between the theories is on what should be the thing we look at: the result of an action (Consequentialism), the action itself (Deontology) or the agent personality (Virtue Ethics). Of course, the ethical debate is far more complex and richer than the brief reviews the chapter offered. The discussion dealt with the main ideas that are necessary for the ideas that I will develop in the next chapters, starting with Chapter 3 on the ethics of law and economics.

CHAPTER 3: ON THE ETHICS OF ECONOMIC ANALYSIS OF LAW

At the Most basic level, the economic analysis of law (also known as Law and Economics or L&E), is the application of economic practices and thinking into the legal system while treating legal institutes as endogen to the economic models (Mackaay, 1999, p. 65). The modern wave of the discipline began in the 1950' with the work of Coase and Director, but the idea itself can be found in early writings since the 19th century (Gelter & Grechenig, 2014, p. 1). due to the scope of the paper, a review of the history of the field cannot be discussed widely, yet there is vast literature on the subject.⁵

Instead, the chapter will immediately dive into the ethical questions of the field. The chapter is built on layers with different sub-chapters. Each sub-chapter answers a deeper question on the morality of the field. The first one (Step 1), meant to show that L&E relies on some kind of moral ground. In other words, the sub-chapter will argue that

⁵For further reading on the history of law and economics, see: (Bouckaert, Boudewijn and De Geest, Gerrit, 2000) and (Gelter and Grechenigand, 2004)

there is a moral ground to L&E. Therefore, as I will claim, the moral debate in the field is too essential to be avoided. The second step gets into the question of what this ground is between the three normative approaches described in chapter 2. Using the “efficient breach” example I will demonstrate the consequentialist nature of L&E. The next layer (step 3) gets even deeper and dives into different opinions of scholars regarding the question of what the desirable results are.

The last part is different. It broadens the consequentialist nature of L&E to other normative ethics approaches. The part will present some works with a similar goal to the paper itself: incorporating non-consequentialist ethics into L&E.

Step 1: Is law and economics moral? Positive Vs Normative

A main distinction in the L&E discipline is between the positive Chicago school and the normative approach also known as the Yale School (Parisi, 2004, pp. 259-260). According to the positive theory, the focus should mainly be on the outcomes of rules without asking the question of what is desirable (Paccas, 2015, p. 57). this view is linked to the positivist view of economics famously argued by Friedman in the most influential paper in methodology of economics (Hausman, 2021) “Essays in Positive Economics”. The book suggests that positive economics should be as objective as the natural sciences, and “*independent from any ethical position*” (Friedman, Essays in positive economics, 1953, p. 4).⁶

Meanwhile, and probably independent from the work of Coase (Gelter & Grechenig, 2014, p. 3) the Normative approach to L&E developed, also known as the Yale School

⁶ Note that some scholars such as Hovenkamp argued that positivism in Law and in Economics are different, (Hovenkamp, 1990, p. 842). Yet, the positive L&E is built on ideas from both and the criticism on the approaches are similar (Hovenkamp, 1990, p. 823).

(Pacces, 2015, p. 62). This approach asks the question of what the desirable rules and policies are in an economic efficiency perspective (Pacces, 2015, p. 62). The Yale school approach was criticized in two major aspects: first, could we know how to maximize social welfare? Second, there may be other interests that are important when creating legal rules beyond economic efficiency (Pacces, 2015, p. 58).

As an ethical debate, the paper will heavily focus on the normative aspects of the field and its criticism. Yet, it is important to note that when dealing with a specific question, the line between normative and positive L&E can be blurred (Pacces, 2015, p. 58). An example for the blur can be presented by an article written by (Ater, Givaty, & Rigby, 2013). The article showed how a change in the responsibility for house arrests in Israel from the police to the prison authority reduced the number of crimes, while reducing arrests quality.⁷ Those results are positive in nature. But any suggestion about the desirability of the reform is normative.

An additional criticism on the positivist approaches in economics (and L&E by extension) goes even further. It tackles the approach foundations. According to it, the positivist economics is based on microeconomic-neoclassical tools which are, in fact, built on utilitarianism (Hovenkamp, 1990, p. 815). Specifically, it relies on Bentham's work (Sigot, 2002). Therefore, the economic positivist approach relies on ethical grounds too.

Step 2: On the Consequentialist nature of L&E - an efficient breach example

“Normative (or welfare) economics—which is the focus of our study—is a consequentialist theory, as it evaluates the desirability of acts, rules, policies,

⁷ Measured by the probability of an arrest to lead to charges

projects, etc., solely according to their outcomes” (Zamir & Medina, law, economics, and morality, 2010, p. 12)

As we saw, both positive and normative L&E are looking at the outcome of the law, and not the law or the action per-se as deontological approaches. they do not look on the person character as virtue ethics suggests neither. The importance is on the end result of the law or the legal system, while the morality of the actions themselves are less relevant. This makes the discipline consequentialist in nature (Zamir & Medina, 2008, p. 330).

A classic example in the L&E literature for this nature is the analysis of “efficient breach of contract”. An efficient breach of contract happens when a party is better off to pay damages to another party they are in contract with, rather than committing to their obligation (Macniel, 1982). Efficient breach could be described as:

Alice committed to sell to Bob a book at 50\$. For simplicity, I will assume that bob had no additional costs, and he values the book at 50\$. Then, Charlie tells Alice he will buy the book at 150\$. Under specific performance Alice will be mandated to sell the book to Bob. Yet, a L&E approach enables Alice to pay compensation to Bob and sell the book to Charlie, enlarging her profits from 50\$ to 100\$ (150\$ - 50\$ compensation to Bob).⁸

The classic L&E would claim that if the breach is really efficient (note that the types of efficiencies will be discussed later), meaning enlarging the welfare of all of the parties, the breach is legitimate and even desirable (Scalise, 2007, p. 723). The approach does not relate to the value of commitment, or prohibition to break a promise (Macniel, 1982). Furthermore – even when the L&E theory criticize the former analysis, they

⁸ The example is purposely simplistic. The literature on efficient breach variations is vast. Yet, the main concept is still presented in the example above.

impute it to other assumptions such as cooperation and transaction costs of breaching contract (Macneil, 1982) or the loss of efficiency in not keeping a promise (Jimenez, 2008), and not to the wrongness of breaking of a commitment!

Step 3: Efficiency and more -What are the desirable consequences?

“The moral heart of normative law and economics is efficiency, especially dynamic efficiency that takes incentives effects into consideration” (Hardin, 1992, p. 331)

The consequentialist nature of the discipline is not enough to fully understand the desirability of a law under normative L&E approach. It is only one step. As I described in chapter 2, the consequentialist approaches differ in their definition of what is the desirable outcome. The L&E discipline did not avoid this discussion as well. Therefore, the second step in the analysis of L&E ethics is to determine what are the desirable results the legal system should achieve. Clearly, the choice of what to maximize, meaning the type of efficiency, will have major impact on the relevant policy or research (Margolis, 1987, p. 471).

To understand what to maximize, we should first describe an important term in the morality of L&E: Efficiency (Hardin, 1992, p. 331). Many definitions of the term could be found over the years (Staveren, 2009, p. 107), as the one suggested by Posner:

“[...] exploiting economic resources in such a way that value -- human satisfaction as measured by aggregate willingness to pay for goods and services -- is maximized” (Posner, Economic Analysis of Law, 1977, p. 10).

This definition, that received many criticisms (Margolis, 1987),⁹ correlates with Posner’s goal of L&E research: *Wealth maximization*. According to it, the legal rules

⁹ For example, what exactly is the meaning of willingness to pay (Margolis, 1987)

that should be adopted are those which creates the highest aggregate wealth (Hardin, 1992, p. 344). This claim may sound like Utilitarianism, yet Posner claims the wealth maximization does not contain controversial claims against utilitarianism (Kronman, 1980, p. 73; Posner, 1990). Even further, Posner claims against natural rights or distributive considerations due to, among other things, their ambiguity (Posner, 1990, p. 9)

Posner's wealth maximization is only one type of efficiency (Kronman, 1980, p. 59). Many others could be found such as dynamic and static efficiencies as well. clearly, as the name suggests, there are debates which efficiency is the preferred one. Many times, the economic analysis focus on static efficiency. This means that they look at the allocation of what already exists (Hardin, 1992, p. 336) in search for an equilibrium (Blaug, 2001, p. 37). The dynamic efficiency is more concerned with the incentives to invest and innovate, yet it lacks a clear definition (Bergh, 2017, p. chapter 3).

Another distinction of efficiencies is between *Pareto efficiency and Kaldor Hicks (KH) efficiency*. One reason for their importance is that they are used in Cost-Benefit Analysis (CBA) which is a tool in policy making (Adlert & Posner, 1999, p. 170). The basic idea of CBA is that if the net benefits of A are better than the one provided by any other alternative, one should do A (Layard & Glaister, 1994, p. 1).

Pareto efficiency is a situation in which we cannot improve one's situation without harming another party (Brock & Logan, 2020). This may be called allocative efficiency as well (Cooter & Ulen, 2016, p. 14) . The problem that may rise is that a small harm on a wealthy individual welfare, that will tremendously benefit all others in society, is not pareto efficient.

Opposed to that, a Kaldor-Hicks efficiency allocation is reached when the people who benefit from some change (the “winners”) can compensate the ones who were harmed and stay with a surplus even after compensation (Adler, 2007). This criterion is also criticized, since on an entire market look it suggests no more than wealth maximization, and on specific cases it may be vulnerable to Scitovsky Paradox where a transaction and its opposite could both be KH efficient (Hardin, 1992, p. 346).

...

The wide use of the term efficiency in the discipline is not lack of criticism. According to Kirzner, the term efficiency in itself does not have any significant meaning (Kirzner, *Welfare Economics: A Modern Austrian Perspective*, 1988). Another criticism on the use of the term written by Krecké. She argues that the term is so vague and over-used it may be seen as “nihilism” in the discipline (Krecké, 2001, p. 1).. With that she also argues that we should not neglect the term entirely to the risk of ending with the rejection of any foundation to the law (Krecké, 2001, p. 15).

Step 3: Deontological restraints and Virtue ethics in the economic analysis of law

Although the heart of the discipline is in fact consequentialism, there were attempts to incorporate different normative ethical approaches within the economic analysis of law; the present paper being an instance of such an attempt.

The first example for those attempts is Zamir and Medina’s book “Law, Economics, and Morality” (Zamir & Medina, 2010). The book (and their 2008 paper as well) presents the two major moral difficulties with Consequentialism: first, it enables actions that seem immoral for the greater good, and on the other hand it demands too much from an individual to sacrifice for the greater good (Zamir & Medina, 2008, p. 331).

Therefore, they suggested 4 variations of threshold functions to cope with those critiques (Zamir & Medina, 2010, pp. Part 1, Chapter 4).

A second example is Zerbe work with the KHM (Kaldor-Hicks-Moral) efficiency concept (Zerbe, 2005) . According to him, to measure the social welfare, we need to address values that are missing from the classic cost-benefit analysis that uses KH efficiency. Those sentiments are values such as integrity (Zerbe, 2005, p. 307) and even caring for others (Zerbe, 2001). Those sentimental values that Zerbe presents as “essential in decision making” (Abakare, 2020, p. 104) could be seen in line with the virtue ethics perception.

The last example is White’s attempt to consider dignity and rights to the L&E literature by offering solutions such as adding those values to the evaluation of efficiency (White, 2008, p. 1). According to him, avoiding those considerations harms efficiency as an appropriate goal (White, 2008, p. 18). This stand faces directly against Posner approach of wealth maximization and his opposition towards natural rights (Posner, 1990, p. 9).

Conclusion

As the sub-chapters titles suggests, this chapter should be seen as different steps in the analysis of the L&E morality. Starting from the question if L&E is moral, the chapter progressed and showed how the moral debates in the field could influence policy and research. since each efficiency type could lead to a different analysis, the type of efficiency we choose is important. The chapter ended with a wider look on the field ethics with more holistic views on it. Since the literature is vast, many ideas could not have been addressed during the writing. For example, the question if we should include

only objective measurements in the utility with its practical benefits, as many scholars do, or a more subjective approach.¹⁰

With that, the chapter, in my opinion, met its goal to convey to the reader some sense of the importance and the complexity of the role(s) of ethics in the field. Since the ethics in L&E is essential and a core aspect of the field, it is necessary to create the ethical foundation that hopefully will result in better analysis.

CHAPTER 4: ON THE LIBERAL INDIVIDUALISM PROBLEM(?) AND CARE ETHICS

Chapter 2 demonstrated the difficulties that consequentialism faces, by acknowledging both its over-demand and lack of demand. As shown in chapter 3, since the economic analysis of law is a consequentialist approach, it faces the same criticism. Yet, acknowledging the difficulties gives a reason to search for an answer, but does not provide the answer. Therefore chapters 4 and 5 will deal with the solution. This chapter (4) will present the solution itself. First chapter 4 will explain what care ethics (CE) is and how it is different from the traditional normative ethics approaches. Then, chapter 5 will introduce the specific reasons why CE might offer a solution to the problem.

As it might be counter-intuitive at first, I will start the chapter with the difference between Care Ethics and the traditional approaches (consequentialism and deontology). The reason for this structure is that the difference in the inquiry subject of the traditional approaches and CE will help to explain CE. The second part will

¹⁰ See: Zamir and Medina paper (Zamir & Medina, 2008) Pages 383-388 for further discussion on measurement issues in L&E

present CE as a normative ethics approach. With the characteristics of care ethics and L&E I will finish the chapter with a review of some attempts to incorporate CE into the law and into markets.

Note that there are many definitions and interpretations for the concept of CE (Edwards, 2009; Collins, 2015). To create a coherent picture, during the writing I will follow the description and assumptions of Held in her book: “Care Ethics: Personal, Political and Global” (Held, 2006). The book is considered to be very influential in the field and was written by a notable writer.¹¹

On The Liberal Individualism assumption and its difficulties

According to Held, both Consequentialist and Deontological approaches see the individual as self-sufficient and independent. The person is required to be a rational and/or self-interested individual. They neglect the personal inter-dependance or feelings and it also ignores social or cultural pressure and context. (Held, 2006, p. 13). Moreover, as Kant’s Universal law suggests, the moral action supposed to be as general and universal as possible (Johnson & Cureton, 2022). This methodology is sometimes called “Liberal Individualism” (Clegg, 2000, p. 2).

Held presents three major problems that arise from this methodology: first, the mutually indifference problem. This is when the moral agents are separated into individuals who are free from interpersonal interaction and indifferent towards each other (Held, 2006, p. 20). In practice, some argue that this may led to alienation in society (Wu, 2019, p.

¹¹ Note that a similar review of the field could be found in Chapter 3 of Jonathan Herring’s book, “Caring and the law” (Herring, 2013). Due to the overlap I chose to focus on Held’s book, but a lot of the characteristics could be found in both.

179). Note that even if the alienation claim is rejected, one cannot argue that real life many moral dilemmas happens with people we have some kind of relationship with.

Second, the traditional theories do not leave room for feelings in the moral discussion. The traditional approach advocates that it is irrelevant how the agent feels regarding the action (Held, 2006). They ignore completely the emotions of the agents, and its effect, or how it should affect, the moral decision (Pulcini, 2016). The last problem the liberal individual in traditional ethics raises is the view of people are inherently equal to the moral agent, neglecting its personal relations with them such as friendship or family relations (Held, 2006)

This enables the traditional approaches to provide a simple prescription of behavior. Many aspects of the specific details in a given scenario, such as personal relationships, are not considered. The problem is that taking all the relevant factors into account will make the simple prescription or “algorithm” unusable (Collins, 2015, p. 17).

That’s why the liberal individualism concept, as an assumption to ethical views, raises two questions: first, a psychologic one, do individuals act as the self-interest independent individual? And a second ethical one, **should** people act this way? Care Ethics (CE) challenge this assumption and claims that the answer to both is negative.

On the Ethics of Care

Unlike the traditional approach that claim the moral ground is based on a duty or the results of the action, CE claims the ground should be empathy (Collins, 2015, p. 1). The development of the approach started with Gilligan’s work (originally a psychologist)

during the 1980' in her influential book: "in a Different Voice" (Norlock, 2019; Gilligan, 1982).¹²

According to Gilligan's findings, when coming to make an ethical decision women tend to put emphasis on the personal relationships and commitments more than men who tended to support universal prescription (Norlock, 2019). She addressed this difference to the traditional role of woman in society and their dependency on man during history (Held, 2006, p. 16). This is why CE is viewed as a part of feminist ethics approach, though many, as this article tries to suggest, and Gilligan herself supported, CE goes way beyond gender issues (Tronto, 1987, p. 664). During the development of the psychology discipline, on the philosophy side Nodding wrote the book "caring" in 1984 (Wu, 2019).

While some criticized Gilligan's results in psychology (Sander-Staudt, taken at 07/2022), the moral question whether people should act this way is still open. In its core, CE assumes that dependency relationships create liabilities (Collins, 2015, p. 7).

Held considers five aspects of CE: First, CE acknowledges the importance of satisfying the needs of others that we are obligated to. For example, the commitment of a parent to its children (Held, 2006, p. 10). Secondly, CE emphasizes the importance of feelings and emotions. While Consequentialism and deontology claim that the feelings are irrelevant to the moral decision, CE claims the opposite (Wu, 2019, p. 181; Held, 2006). Third, CE also rejects the abstract rules supported by traditional approaches. As Collins described, it rejects the ideas of "if X, then Y". the individual is complex and part of the experience (Collins, 2015, p. 4).

¹² As with the history of L&E, I referred to the modern variation. Collins claimed that earlier versions of the concept could be found (Collins, 2015, p. 9). Moreover, Baier suggests that Hume was a CE advocate himself (Baier, 1995). This argument will be further explained in chapter 5.

Another important aspect is the new division between private and public, which is common in feminist theory. While the traditional theories saw the household as something beyond the regular political sphere, and therefore the government should not intervene (Held, 2006, p. 14). feminist theories showed how this view harms women and children due to the power inequality in societies. This led the ethical thinking to ignore the personal relations in home (Held, 2006, p. 13; Tronto, *An Ethic of Care*, 1998, p. 17).

All those attributes lead to the final and perhaps the underneath assumption of CE thinking: CE simply sees a different person as the inquiry subject of the philosophical debate (Herring, 2013, p. 48). It is no longer the liberal individualist and rational person, which is relatively simple individual, rather a more complexed and dependent person. in essence, this is the rejection of the liberal individualism (Held, 2006, p. 15).

Although CE criticizes traditional ethical thinking, it does not necessarily mean that it tries to replace all of it. Many supporters of the theory simply claim that it emphasizes problems that were neglected in previous thinking and try to face the difficult task of incorporating CE into concepts like justice (Held, 2006, p. 9). This is a very important insight to the paper topic since it doesn't deny or completely rejects consequentialism and by extension L&E. The paper does not suggest disregarding and throw away important insights gathered using L&E analysis. The view that CE is an attempt to tune current debates enables us to continue to rely on a significant part of the L&E literature, with some adjustments.

Even though the paper advocates for the use of CE, the theory has been criticized quite a lot as well.¹³ some critiques were already mentioned here, specifically the criticism

¹³ To a full review of the criticisms on CE, see Sande-Staudt full article name "Care Ethics" at the internet encyclopedia of Philosophy. <https://iep.utm.edu/care-ethics> (Sander-Staudt, taken at 07/2022).

on Gilligan's empirical result and the claim that CE is not a stand-alone ethic perspective but rather a subset of virtue ethics. In addition to those, some scholars criticize CE as being a type of "slave-morality" claim (Sander-Staudt, taken at 07/2022). According to it, CE glorifies women oppression of women (Herring, 2013, p. 79). Those critiques rely on Nietzsche claim that oppressed groups will justify subservient traits as good. A second criticism is on the ambiguity of CE, as it does not provide a clear way of action (Sander-Staudt, taken at 07/2022). Yet, as to the complexity of the inquiry subject mentioned previously, the ambiguity is necessary (Clegg, 2000, p. 1).¹⁴

On the Use of Care Ethics in Practice

Some scholars argue that the individualist assumption is good for certain aspects in life, such as politics and law. They argue that CE should remain an ethical approach within the family or friends. Opposed to this approach there are scholars, such as Held, who see the approach as relevant to all sectors of life (Nelson, *Care Ethics and Markets: A View from Feminist Economics*, 2011, p. 44). Clearly, since L&E argues for the ways, we can and should change the legal system, the latter approach is necessary to incorporate CE into L&E.

Moreover, I would argue that the separation is impossible. the traditional neo-classical thinking suggests that firms and individuals are profit maximizers (Koplin, 1963, p. 131). Moreover, Friedman famously claimed that maximize profit is the moral duty of firms (Friedman, 1970). This assumption sees the firm as one organism that works

Alternatively, see Collins book "the core of care ethics", Chapter 2 (Collins, 2015) or Herring "caring and the law" (Herring, 2013, pp. 68-74)

towards a certain goal. But this claim is problematic in the CE literature (Nelson, 2010, p. 10). Nelson claimed that both individuals and by extension firms, since they are built from people, are more complex than the simple maximization. to run a business properly one should acknowledge those complexities. Caring between individuals in the firm, the caring towards costumers and more that are essential to a well-run business (Nelson, 2010, p. 6).

That is not the end of the story. Incorporating CE to the professional world could also be beneficial/efficient. An example for that is viewed in the lawyer-client relationship. According to Zwier and Hamric, lawyers that will interact with their clients in a caring way will provide a better solution at lower cost (Zwier & Hamric, 1996). They suggested that care enables lawyers to understand the deeper needs of their clients and by that offer the best solution (Zwier & Hamric, 1996, p. 400). Moreover, they even offered a type of “algorithm” that guides lawyers how to interact with their clients (Zwier & Hamric, 1996, p. 403).

In L&E terms, the article suggests that applying CE to the lawyer-client relations will increase the total welfare, as it increases the utility clients will get from the interaction. At the same time applying CE to the relations will reduce the litigation costs, which are part of the transaction costs of the process. Both are key factors the L&E literature emphasis.¹⁵

¹⁵ Chapter 3 of the paper showed the value of increasing welfare as a consequentialist approach. Regarding transaction costs, see the classic and seminal work of Ronald Coase “*the Problem of Social Cost*” (Coase, 1960), or Williamson’s article “*Transaction Cost Economics Meets Posnerian Law and Economics*” (Williamson, 1993)

Conclusion

The first goal of the chapter was to explain what is the problem CE attempts to solve. It challenges the assumption that the individual is not a part of the experience that he needs to decide about. The purpose was to show that the interdependence and relations one faces, as CE claims, are essential to decision making. The second part showed that this claim is not insignificant or irrelevant in practice. The first example on the firm's goals tried to tackle basic economic models that analyze firms. The second example goes further showing that CE is not only a theoretical concept for scholars, but also have practical implications on the welfare of people.

CHAPTER 5: ON THE REASONS TO SUPPORT CARE ETHICS IN THE ECONOMIC ANALYSIS OF LAW

After presenting the required background to the question in chapters 2 and 3, chapter 4 introduced the solution I am offering. It provided a general and theoretical view on what traditional ethical approaches neglected, and even examples to the benefits of applying CE. This chapter will widen the detail further on the reasons to support CE as a method that will increase the quality of L&E analysis.

The paper is part of a vast literature that criticizes the assumptions of the neo-classical economists' assumptions and their applicability to reality. In doing so I will claim that along the way the insights that CE offers were treated to some extent by different authors but neglected as the discipline evolved.

Therefore, the chapter is structured in a timeline. Starting with the 18th century philosophers Hume and Smith and their ethical views. I will then discuss how the Austrian School of economics that developed in the 19th and 20th century might also

explain the need of CE in the economic analysis of the law. But the attraction of CE to discipline is not an ancient concept, rather is relevant to modern research as well. As I will show, CE may relate to concepts we see in behavioral L&E of the 21st century. The last part will discuss some additional reasons that are not a part of the timeline, yet important to demonstrate the necessity of applying CE to L&E.

18th Century: Scottish Enlightenment Ethics and the Marginal Revolution

Both David Hume and Adam Smith are considered to be great thinkers. Both were part of the Scottish enlightenment (Broadie & Smith, p. 1). Both were close friends, and Hume's work influenced a lot Smith's work (Rasmussen, 2017). Both had complexed ideas on people and society.¹⁶ Both had an ethical theory that could be interpreted as CE (Terjesen, 2011, p. 59; Baier, 1995, p. 57). Most important, both thinkers' rich and complex theories on the individual got lost along the development of economics (Boettke, Leeson, & Smith, 2008).

This loss is often affiliated to the marginal revolution in economics (Boettke, Leeson, & Smith, p. 15) which marked the transition from classical to neo-classical economics (Mosselmans, 2020), With its influential writers such as Jevons, Menger, Edgeworth, and others (Bodkin, 1972). As opposed to the former political economy, neo-classical economics highly relied on mathematics and statistical analysis that gave economics a more "scientific" look (Boettke, Leeson, & Smith, 2008).

The mathematization did not come without a price though: to investigate human behavior (or market structure) in the form of mathematical analysis, some simplifications were necessary (Boettke, Leeson, & Smith, 2008, p. 16; Bergh, 2017,

¹⁶ For further reading on each author philosophy, see in the "The Stanford Encyclopedia of Philosophy": Fleischacker, Samuel, *"Adam Smith's Moral and Political Philosophy"*, and Morris, William Edward and Charlotte R. Brown, *"David Hume"*

p. 21). An example for this simplification can be seen in Jevons' 1871 book "Theory of Political Economy" (Jevons, 1871). The book is often considered as one of the initial works on the mathematization of economics (Schabas, 1989, pp. 62,60). To measure utility of an individual Jevons relied on Bentham's utilitarianism (Jevons, 1871, p. Chapter 2). While the original Bentham's theory described 8 dimensions that affect a person's utility, to make the mathematical analysis possible, Jevons had to let go 6 of them (Sigot, 2002, p. 265).

This man, developed by Jevons, is one variation of the "Economic-man" also known as Homo-economicus. This man was highly adopted by the neo-classical economists (Wheeler, 2020). The economic-man is completely rational, universal, and individualistic (Ruiz-Villaverde, 2019, p. 64). Assumptions that, as we saw, do not correlate with CE and, as I will show, not with Hume and Smith complex (richer) analysis.

In his ethical work Hume rejected the abstract rational thinking of morality (Pollock R. , 17/07/2022, p. Chapter 1). He claimed that the motives for morality are feelings, sentiments and passions, and not rational evaluation (Cohon, 2021). Hume even mentioned the need to care for others. This led Barrier to argue that Hume's ethics is in its essence a type of CE (Baier, 1995, pp. 52,63). Other scholars claimed that Hume's emphasis on the motives to action and virtues which he divided to artificial ones (such as the law) and natural ones, such as kindness, (Pollock R. , 17/07/2022). Those attributes led scholars to see his ethics to be a variation of virtue ethics (Swanton, 2007).

Either way, the argument for Hume is relatively simple: if Hume's ethics is CE, then incorporating CE into L&E will include his insights in the discipline. If not, it still

considers the need to care for others as a virtue and the importance of feelings. The argument for Smith is more complicated (Terjesen, 2011, p. 59).

Even though some may argue that Smith ethics is also a type of CE, this claim is more complicated than the direct link to Hume's ethics (Terjesen, 2011, p. 57). In his book "The Theory of Moral Sentiments" (Smith A. , 1759), Smith presented the idea of sympathy.¹⁷ He described sympathy as a possible judgment of a person when he imagines himself in the position of another. Smith argues that the attempt to understand other's feelings is an important drive to our behavior (Fleischacker, 2020). The emphasis on feelings is not the only similarity of Smith with CE. Smith acknowledge that our social context of our social interactions when one comes to make a moral decision, rejecting the individualistic assumption (Terjesen, 2011, pp. 60-61). Despite those similarities, Smith's ethics is not completely aligned with the CE theory. Smith argued that the moral action was the one that the "impartial spectator" will do. This suggests that there is some type of reasoning to what the moral judgment should be, as opposed to the modern CE theory (Terjesen, 2011, p. 63).

No doubt that the scholars influenced on the economic thought and the way we perceive economics to this day. In fact, Binmore called them the grandfather (Hume) and father of modern economics (Smith) (Binmore, 2011). As the founding fathers of modern economics, I would argue that we should treat their analysis on human behavior as well.

One may claim that the authors writings on ethics and human behavior are one, while their important work was in other topics. I find this argument problematic.

¹⁷ The idea of sympathy also appears in Hume's moral theory, but its more significant in Smith's. For further reading on the concept of sympathy and the difference between the scholars, see: Morrow's "*The Significance of the Doctrine of Sympathy in Hume and Adam Smith*" (Morrow, 1923)

one cannot separate the writers ethical and (political) economy works. Since the motivation to act are emotions, passions and desires, the economic behavior of an individual depends on what motivates his actions, and that, by extension, leads to their economic analysis (Kayatekin, 2014, p. 620).

This view also relates to what is known today as the “Adam Smith Problem”: how can one author, Smith, wrote two very different and contradicting explanations to human behavior (Wilson & Dixon, 2015). in the wealth-of-nations Smith talked about the self-love and interest of the individual. In the Theory of Moral Sentiment, he talked about sentiments and dependence of people as motives to action. One solution to the problem is that one cannot separate the political economy and the economic approach (Montes, 2003, p. 64). The broader look on the person cannot avoid the complex relations of people (Wilson & Dixon, 2015).

...

To conclude, both Hume and Smith ideas had and still have significant influence on the way we perceive modern economics. Yet, to achieve “scientific sense” to the economic field many of their insights were neglected. Specifically, the way they perceived human behavior which is crucial to the structure of markets. Incorporating CE to L&E might revive some of those insights. In fact, this argument exemplifies the purpose of this paper. To understand how markets operates, we cannot ignore the context in which people’s decisions are made.

19th-20th Century: The Austrian approach to the economic problem and the spontaneous nature of the law

The classic economic problem as taught today is the “scarcity problem”. According to it, there is a given state of affairs – a fixed supply of resources (see for example (Cooter

& Ulen, 2016, pp. 11-12). The economic problem is how to divide the scarce resources and its implication (Bergh, 2017, p. 48). Opposed to that stands the Austrian school of economics which presented a different problem.

The Austrian school's economic problem was presented in Hayek's seminal work "*the use of knowledge in society*" (Hayek, 1945). It is usually referred to as "the knowledge problem". The question it tries to solve is: how can we increase and do a better use of the knowledge in society? (Kirzner, 1984, p. 407). One insight could be highly relevant to the question of the paper: the nature of knowledge. Hayek claimed that the knowledge is tacit, dispersed and constantly changing.

I would like to take those qualities to the ethical world: how is it possible to neglect complete categories of information, while at the same time reach the optimal decision? Of course, many times when coming to decide one cannot and should not treat all the available information. Yet traditional ethical approaches demand a-priori neglect of complete categories of information! For example, deontological reasoning demands us to ignore the result of the action we must do.¹⁸

Another concept of the Austrian School of economics is the idea of the entrepreneur. The entrepreneur had different interpretations in the writings of Austrian economists (Klein & Bylund, 2013, p. 8). To the matter of the paper, I will use the concept of the entrepreneur as someone who uses the information in the market and create a change (Klein & Bylund, 2013, p. 9).

¹⁸ The "murderer at the door" infamous claim by Kant demonstrates this idea. Basically, it suggested that even if a lie could prevent a murder, one shouldn't lie. Further explanation on the problem could be found in (Cholbi, 2009) . one interpretation I suggest is that Kant a-priori decided to neglect the knowledge category of outcomes, leading him to problematic claim.

To show how the two ideas are related to the purpose of the paper, I will use the example of the Heinz dilemma:¹⁹

A woman was on her deathbed. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging ten times what the drug cost him to produce. He paid \$200 for the radium and charged \$2,000 for a small dose of the drug. The sick woman's husband, Heinz, went to everyone he knew to borrow the money, but he could only get together about \$1,000 which is half of what it cost. He told the druggist that his wife was dying and asked him to sell it cheaper or let him pay later. But the druggist said: "No, I discovered the drug and I'm going to make money from it." So, Heinz got desperate and broke into the man's laboratory to steal the drug for his wife. Should Heinz have broken into the laboratory to steal the drug for his wife? Why or why not? (Kohlberg, 1981)

Let's see Heinz as the Entrepreneur. let's also assume that the break-in to the store will create damages (e.g., broken window) on the pharmacist at 500\$. With the price of the medication at 2,000\$, making the entire damage of breaking to 2,500\$. Therefore, according to consequentialist theories, it will be socially efficient to break into the pharmacy if the life of Heinz's wife worth more than 2,500\$. We all might assume that Heinz's wife life is worth more than that amount.²⁰ Therefore, according to the traditional L&E analysis, he should break into the store.

But that is not the end of the analysis. Since the L&E ethical basis demands impartiality (and perfect information), everyone in town must break into the pharmacy! Moreover,

¹⁹ Gilligan's work on CE started as a criticism on Kohlberg moral development work (Herring, 2013, p. 47).

²⁰ While there are different methods in the literature to assess human life value, they are all way above 2,500\$. Regardless, I find the assumption that a person's life worth more than 2,500\$ as intuitive and widely accepted.

assuming that Heinz's wife is not the only person with the need to an expensive life-saving drug, the pharmacy might not be able to operate functionally at all, as the legal system will release all those who broke into the pharmacy.

This is a scenario where the pharmacy market will be paralyzed, leading to a loss of welfare to all (assuming the pharmacy increases the social welfare).²¹ In order to solve the problem, a more general rule (some kind of rule-utilitarianism) might be suggested that protects the property rights of the pharmacist. Protecting the property rights of the pharmacist will mandate to prevent and deter people from breaking into the pharmacy, enable the pharmacy to operate and increase the social welfare.

But, if one break-in, only the one of Heinz, won't paralyze the pharmacy. Then, if Heinz will break into the pharmacy the result will be more efficient! This suggest that there is an optimal level of break-ins to the pharmacy that will maximize the social welfare.

How can we tell what is this optimal level in which the pharmacy will continue to operate, but there will be some break-ins? More importantly, how can we adjust the legal system that the optimal level will be reached?

To do so we need to understand what might prevent people from breaking into the store. An assistance to that idea could be by using one of the most famous works in the legal analysis of law: Becker's deterrence equation (Becker, 1974). According to it, to get optimal deterrence, we need to create a legislation in which the probability of getting caught (P) X the sanction (S) outweighs the benefits of committing the crime:

$$\textit{Benefits} < \textit{Probability} * \textit{Sanction}$$

²¹ The idea that Wrongful doings in the market may lead to its abolishment might resemble at first sight to Akerlof's seminal work markets for lemons (Akerlof, 1970). But the two are different. In my analysis there is only one provider, and the reason he stops participating in the market is the lack of profitability due to repeated break-ins, and not information asymmetry.

But then again, what motivated Heinz to act this way? If we assume that P and S are identical to all people, why Heinz broke into the store (assuming that he did) while others do not?

The fact that the person who needed the drug was **his wife**. Using the Austrian school of economics terminology, Heinz, the entrepreneur held the tacit knowledge of his financial state and his wife health. Heinz also held the knowledge of the commitment he has towards her. No other person can hold or use this information. Heinz took this information and created a difference in the market. Moreover, His action also provided information to the market:²² the probability of getting caught x the sanctions (P x S) are in lower value to him than the risk of losing his wife!

Both Scottish scholars Hume and Smith, and the Austrian economists, show how important it is to consider one's motivation to act. In the Heinz dilemma, the motivation to act was his responsibility and care towards his wife. And Heinz's action, led to change in the market! If interdependence changes motives, then actions. And actions change markets (the actions of the entrepreneur): interdependence changes markets!

If the legal system according to the L&E school should use economic thought to create a more efficient system. And according to Hume, Smith, and the Austrian school, to understand markets we need to account for people's motives to act. And, if CE demonstrates reasons people actually act upon, it must be treated!

Of course, the story is hypothetical. In practice the price of 2,000 is supposed to reflect the R&D done to develop the cure,²³ the manufacturing costs and so on. This is further

22 This is an important idea in the writing of Hayek on the knowledge problem. One of the ways to overcome the knowledge problem is the market's price mechanism (Hayek, 1945, p. Chapter 4)

²³ Note that over 60% of new products in the market are failed (Gal & Shpigel, 2021, p. see footnote at page 4). The price of 2,000 supposed to reflect the risk taken by manufacture.

complications to the model that may explain some of the pharmacist behavior. due to the scope of the paper, I chose not to relate. The purpose of the example is to demonstrate the problem Heinz faces.

20th-21st Century: Behavioral L&E

Another criticism on the neo-classic analysis is relatively new but offers one of the largest developments in the L&E field (Cass R. Sunstein, 1998, p. 1471). This approach offers how to create changes in the classic homo-economicus to create a more realistic person that the field could analyze. The changes the approach offers are based on psychological research on human behavior (Tor, 2015, p. 17). Many works in the topics suggested different changes that are necessary for the Homo-economicus. For example, Hill suggested to consider the process of categorization in decision making. This due to the importance of categorization in decision making (Hill, 2003, p. 563).

To our context I would review two works, by several Nobel laureates (Thaler, Sunstein and Smith), that highly supports the idea of inter-dependence to the economic analysis of the law. The first one offered by Thaler, Sunstein and Jolls (Cass R. Sunstein, 1998). They offer a long review of the limitation the economic man has. One of the limitations is the bounded self-interest of an individual. According to their claim, people care. They care even about strangers, yet they care more about people they know well. (Cass R. Sunstein, 1998, p. 1494). Another work is Smith (Vernon Smith). the main idea of the article is the empirical suggestion that the ethical and personal perceptions of Adam Smith were actually correct (Smith V. , 2013). As the first sub-chapter suggested, Smith views are linked to the ideas of CE.

The ability to use the behavioral L&E helps us to understand what really motivate people and define their actions. Understanding that, as much as possible, will allow us

to create models that better represent persons utility and welfare. CE, to that concept, may suggest the theoretical grounds to the adaptations behavioral L&E suggests.

Additional reasons

The former reasons were highly academic, philosophical, and complicated. But not all reasons to support the application of CE into L&E thinking are such. At this sub-chapter I will briefly mention and explain a few more simplistic arguments to support the paper's idea.

Intuition

As mentioned in chapter 2, one of the main goals to assess an ethical theory is our intuition about it: does it feel right? Do the process or implications of the prescription feel morally just? While this argument can go both ways, since individuals would suggest CE is not intuitive at all, I would argue the opposite. It feels intuitive to me that Heinz should take care for his wife, because she is his wife. It feels right to understand that people are a part of the experience they are facing and should act accordingly. It feels to me, intuitively, that eliminating a-priori full categories of information is problematic.

This argument is a more general one to the application of CE to many aspects of life and not specifically to L&E. I also find this fine. As both the law and the economic world are connected to the everyday experience, an ethical claim relevant to all (or most) aspects of life is relevant to L&E as well.

Courts already acknowledge Care Ethics

While the name “Care Ethics” appears only in the 1980s, some argue that its origins are far older (Collins, 2015, p. 9). Regardless of the terminology we use, we can see that courts already acknowledge the necessity of CE in decisions and laws.

An example for that is the ability of a married couple not to testify against each other in criminal cases that appears in many countries.²⁴ Basically, this law means that the courts acknowledge the complexities of family relations and the difficulties in testifying against each other. I would claim that this is an example to the acknowledgment of the law that married couples inter-dependance towards each other. If the L&E discipline aspires to represent and analyze the law, acknowledging complexities of the law is an essential part of it.

Conclusion

The chapter dived into complex ideas of why we should support CE as a mean to improve the L&E analysis. It showed that the basic ideas of inter-dependency and contextual decisions appear in the literature in some variation since the 18th century but neglected for the scientific and simplistic approach of the marginalists. Moreover, I demonstrated that the interdependency feels right, and essential enough that courts acknowledge it even without the CE title.

CHAPTER 6: ON THE METHODS WE CAN INCORPORATE CARE ETHICS TO THE ECONOMIC ANALYSIS OF LAW

²⁴ For example, in Israel a married couple or known in public (a civil alternative to marriage) are allowed not to testify against each other in court. See “Kol-Zchut” site: https://www.kolzchut.org.il/he/%D7%99%D7%93%D7%95%D7%A2%D7%99%D7%9D_%D7%91%D7%A6%D7%99%D7%91%D7%95%D7%A8 in Germany couples are excused from testifying due to a constitutional protection on the family. See: <https://criminal-law-germany.lawyer/does-my-spouse-have-to-tell-the-truth-as-a-witness-in-court/>

After answering the question of why we should incorporate CE to the economic analysis of law (Chapters 4 and 5), we need to answer how this suggestion might come in practice. This task is complicated. The simple answer might be that CE is simply too demanding to be incorporated due to reasons such as the difficulty in quantifying feelings. therefore, it should be neglected. Obviously, due to the importance of CE in the human experience, as I showed, and the important insights on policy the L&E discipline described, this is not an answer I would accept. Therefore, preferring one over the other is missing the target and might create a loss to important insights that the two ideas, together, might suggest.

Therefore the chapter will analyze the ways we can incorporate the two ideas together. The first part will ask whether we can measure CE at all. Afterwards I will discuss the solutions themselves, with their advantages and disadvantages. Starting with a solution that aspires to separate the fields, continue with the mathematical solutions and finishing with a type of “rule-of-reason” solution. In the conclusion of the chapter, I will discuss what are the more suitable solutions from the options suggested.

Note that none of the solutions argues for the complete neglect of the L&E methods. CE, as I claimed several times, the purpose of the paper is to point a neglected point in an important academic field. The challenge is surely to combine the two, not to prefer one over the other.

Another important note for the chapter is the previously mentioned distinction between normative and positive L&E. all solutions fit both, but for different reasons. Under positive L&E the methods to incorporate CE are meant to find a better understanding of the human behavior for a certain goal (policy, research and so on). The CE is simply part of what determines people’s utility. In this case, the assessment of CE is. On the

normative side, the incorporation of CE is done in the purpose of saying that interdependence should be a part of the human ethical thinking. That people should relate to their surroundings when making moral decisions.

Could CE be measured?

Well, no. But many will argue that it is impossible to measure utility as well. Economists are having trouble to accurately measure the utility of individuals, and debates on the topic run for years (Strotz, 1953, p. 384). They developed some proxies to assess utility, such as money (Zamir & Medina, 2010) or ways to assess preferences. For example, economists used many times in the “revealed preference” methodology that views what consumers prefer, and the economist later aggregates the data to create preferences (Houthakker, 1950). But, as Sen showed, this practice is problematic. The revealed preference methodology does not differentiate people’s actions and the motives that let them to do so (Sen, 1973). For example, one can buy Rosé wine, even though his actual preference is beer. But, due to social pressure the individual chose the Rosé wine. In those cases, the methodology cannot reflect the actual preference of the individual.

A development towards the proper assessment might be through behavioral L&E, as it empirically assesses people preference and already acknowledged the bounded self-interested individual (See chapter 6). Either way, measurement of people’s preference is difficult. With that, I do not see the difference between assessment of utility and preference than CE. One may argue that therefore objective measures such as money are the only ones that relevant. This view is very narrow and limiting, as people welfare derived from many sources. A wider perception of welfare is also supported by many L&E scholars such as Posner (Hardin, 1992).

Separation to different fields

The idea of separate L&E and CE in different aspects of life had already been discussed here briefly. Basically, it's an approach that some scholars support and argues that the individual home, family, and private life should be treated with care (Herring, 2013, p. 3). opposed to that, the legal system and political/business world should be handled with the traditional ethical approaches (Held, 2006, p. 14).

The advantages of such approach to the question of the paper are clear. It enables to avoid the difficulty of measuring CE. It also enables simplicity and clear distinctions in legal discussions. To some extent, we can also see the separation in practice. One example we can see is family law. There are scholars who claim that family law lacks the order and reasoning of other domains of the law. Even referred to it as "chaos" (Dewar, 1998). The reason for that is due to the emotions, feelings and desires family law deals with. Therefore, the solutions in family law is to opt for a more case-by-case approach (Dewar, 1998, p. 468).

With that, I find this idea to miss the richness of a joint thinking might suggest. As we saw, applying care to the professional world is beneficial.²⁵ Moreover, both the political world and the private home built on people. The object of inquiry is the same, so why the research method of their behavior is different? The last criticism on the solution is its direct opposition to Held's idea of how the perception of different spheres harmed woman and other groups in society.²⁶

²⁵ For example, see the chapter 4 on the lawyer-client relationship

²⁶ See chapter 4, on the characteristics of CE. Also (Held, 2006, p. 24)

Mathematical solutions

The mathematical solutions, taken as it is, require us to do the assessment of the way we value CE. It means that the simple interpretation of them demands to quantify feelings. As suggested, proxies for that might be possible. But this is not the only way to interpret the mathematical solutions. they might be referred to as more of a way of thinking about the joint solution of the two fields, rather than actually quantify feelings. The methodological thinking without assessment creates difficulties for practices such as CBA, and the option if to create some type of assessment to CE depends on the available data and case.

First change: Function Composition

$$U = f(x(ce))$$

This solution suggests we need to incorporate CE values into our first evaluation of the measured parameters. For example, let's assume that x represents total income, as a proxy for utility. Adding the CE variable suggests that the x proxy is determined not by mere money, rather than other means as well. for example, instead of using 3,000EUR as total income, we would calculate the number of hours worked and their implication on family life. I find this solution problematic. It ruins the purpose of the proxies we used. The proxies for utility scholars use are meant for simplicity. They are also external and by that allows inter-personal comparison. Suggesting that we should replace the proxy by a complex function undermines the initial purpose of using it.

In practice this raises a problem as well. let's say that a judge needs to rule in a case of efficient breach, to a contract done between siblings. Applying this solution suggests that the judge cannot directly address the monetary damage that the breach caused. This is not to say that other considerations beyond monetary are not important. In fact

emphasizing those other considerations is one of the goals of the paper. But the monetary valuation should be analyzed as it is. Disregard the monetary value as independent will make it hard to appeal on the judge ruling as there is no objective measure at all.

Second change: internal solution

$$U = f(x + CE(ce)).$$

This solution suggests that the proxy x is partially independent from the CE restriction. On the one hand the proxy remains intact. On the other hand, when calculating f , the function that uses the proxy to suggest utility measurement, we still considered x and CE together. although philosophically this solution acknowledges the proxy independence, the problems raised in the former solution apply here as well.

Third change: Added functions

$$U = f(x) + CE(ce)$$

This is already a more practical solution. It suggests that we use the proxy separately, as L&E analysis already been done, and add the value of the personal relations and the interdependence.

Of course, such assessment to CE, and even evaluation of the sort is extremely difficult, but this solution offers an interesting idea: it suggests we can value if the personal relations and interdependence mechanisms are more important than the traditional assessment of utility in any given scenario.

For example, let's say we value the ability to not testify against a spouse at 10. If, in a given case, with high influence on society, the advantages of the testimony will be higher to society, we might demand a spouse to testify. Of course, when applying such method, we need to consider the wider effects of allowing a person to testify against its spouse to society and the trust in other households.

Fourth change: External solution/threshold function (Add Herring)

$$U = f(x) \text{ s. t } CE$$

This solution might suggest an interesting point of view as well. As any B.A. student in economics knows, optimize the choice of a person under restriction is very common in the economic research. For example, the amount of hours work subjected to the number of hours per day (and the necessary personal time such as sleep). Therefore, we might offer a new restriction as well: the Care Ethics restriction. This means that the level of utility we can gain from an action is restricted by the personal relations and interdependence we have.

Intuitively this may seem like the best-fitted solution. A person is free to maximize his utility, but restricted, among other things, his relationships. His interdependence limits the amount or extent of actions he may do. On the other hand, the solution holds the underneath assumption that the interdependence and relationships are necessarily do not improve the individual's welfare. This means that a person's partner or children are necessarily harming (or not impact) his welfare.

This solution might be fitted to some scenarios where the interdependence is necessarily harming, yet on a wider general solution it is problematic. For example, if someone needs to fill a conflict-of-interest document. If he will have to many restrictions, the job may not be offered to him. Of course, the personal relations limit his options and may

even harm his utility in this specific context. But if we look on their entire life, could we genuinely say that the personal relations harm the individual?

“Rule-of-reason” solution

This is the vaguest, yet most practical solution of all. In essence it means that when coming to decide we just need to take into account the complexity of personal relationships. We need to consider the social effects not only on objective measures such as money, rather use a more complex (sophisticated) individual.

The solution enables to assess how much the CE should be incorporated to a specific analysis. For example, even though I claimed that CE is relevant to all sectors of life, I would argue that our interdependence is significantly higher in the context of family law than contract law.

Therefore, CE solutions should be solved case by case as much as possible. While also avoiding the measurement difficulty, the solution struggles to be used in regulation that needs to assess those influences on a wide group of people a-priori.

Conclusion

Two solutions are probably the most suitable for the application of CE into L&E. each solution might be preferred in different times. in policy making, market research and so on, a mathematical solution might be preferred since it allows to create an assessment a-priori and comparable to other means. As we saw, the best fitted mathematical solution, in my view, is the added functions solution: $U = f(x) + CE(ce)$; when coming to a more individualistic and personal decisions, such as judicial rulings, the rule of reason might be the best. The reason is that it is the most representative for the

idea of CE – there is no simple algorithm that defines what is just. The specific context and individuals that in the case could change the desired outcome.

CHAPTER 7: ON MASK WEARING AND CARE

During the Covid-19 Pandemic governments around the world impose on their citizens different obligations and restrictions such as the mandate to wear masks. Masks had been proven to be effective in preventing infections, mainly preventing the mask wearer to infect others (Parsons, 2021).

Mainstream economists see the influence as an externality (Parsons, 2021; Salanié & Treich, 2020). This means that the individual decision to wear a mask will influence a third party, that are not directly involve in his decisions (Kenton, 2022). for example, people waiting in line to the ATM near him. Therefore, they suggested policy solutions that are similar to the way governments deal with other externalities such as liability and regulations (Parsons, 2021, p. chapter 5).. Those measures will change the utility of an individual to wear a mask that may not wear it otherwise. In economic terms, applying legal means to internalize the externality.

This view suffers a critical downside: legal obligations are limited in their capacity: enforcing wide mask-wearing obligation will be costly. But, without the enforcement, as Becker claimed,²⁷ the chances of a person to wear a mask if the probability of getting caught is small, will be small as well.

A CE analysis might give a different solution. Seeing the person as an interdependent individual may suggest that his utility function will be influenced from others' harm. Moreover, if the individual is in contact with more vulnerable people, such as elderly

²⁷ See chapter 4

parents, wearing a mask is no longer an externality – it is an obligation the young and healthy individual must do, due to his relationships that he is responsible for.

Assuming that a healthy individual with low risk of severe harm from covid do not care about others, then a severe legal enforcement is necessary to enforce the obligation. But, if he does care the, the government should only convince the individual that wearing a mask is the way to keep safe the people he is responsible for.

Its no longer an enforcement problem, rather a knowledge problem. Educating people for the importance of wearing a mask to their close individuals will create higher compliance.

Note that the argument does not neglect all other means. As it is impossible to enforce 100% mask wearing, it is also impossible to convince its importance to 100% of people. But the solution do suggest that instead of putting resources and efforts in enforcement, education might provide a complementary cheaper solution.

CHAPTER 8: CONCLUSION

The paper attempted to provide a methodological solution to the problem of liberal individualism that the L&E discipline rely on. Starting with a description of the main ideas in western ethics and the morality of L&E. I described why I found the assumption that people detached from the contextual nature of the decision making may create a distorted view on the way we think on decision making.

To that, one may argue that the purpose of a model is to simplify reality, therefore a less complex person may be necessary. To discuss this criticism, we need to consider what the assumption beneath it: the first is that the models may be inaccurate. Secondly,

the inaccuracies are legitimate as they are allowing to the analysis to be made.²⁸ One cannot create a model that includes the entirety of the human behavior in the model.

As Lewis argued, a scientific model quality is measured in 3 dimensions: simplicity, accuracy and strength (Lewis, 1994).²⁹ Using these criteria we need to determine whether the incorporation of CE to the L&E is meeting those demands.

The theory suggests that we face a tradeoff: the model should balance complexity and the ability to be practical. Therefore, if adding complexity to the model increases its explanatory capabilities, without harming the usability of the model, it is desired. I would argue that CE is exactly this type of complexity. The importance of our interdependence may be beneficial. It may help the increase the efficiency in lawyer-client relationship (chapter 4), while at the same time give methodological mechanism to better analyze firms and complexed human behavior. On the other side of the tradeoff, I would acknowledge that quantifying feelings and care is a complexed task. But this task is a problem economist facing for years in any other measurement (Chapter 6).

²⁸ See Marshall quote: “For many important aspects, especially those unravel over time, economic model can’t be full. The model is not dynamic, it is frozen in time, at the time it was created, even if it tried to consider the knowledge and the dynamic aspect that unravels through time, it is limited. Even the most elaborate model can’t account for that in a proper way.” (Marshall, 1920, p. Appendix)

²⁹ The simplicity argument argues that it is not complexed too much so people would not be able to make practical use. the accuracy means to assess the probability the theory could successfully predict the future. Strength means the extent the theory is relevant.

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