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Review Symposium

Introduction

Economic Rationality vs. Ethical Reasonableness: The Relevance of Law and Economics for Legal Ethics

W. BRADLEY WENDEL*

It is difficult to overstate the influence of the law and economics movement on academic legal thought in the United States during the second half of the Twentieth Century. In the 1970s and 1980s, it seemed that American legal academics were jumping on the economic bandwagon with boundless enthusiasm. Law schools were hiring faculty with graduate training in economics, many professors attended a summer "boot camp" run by a prominent advocate of the use of economic methodology in law, and, most significantly, many fields of law such as anti-trust and torts became so completely colonised by law and economics that it was difficult for a scholar to be taken seriously in those fields without either adopting economic methods or mounting a sustained critique of them. Other significant movements, such as critical legal studies, feminist legal theory and critical race theory, achieved prominence during this time in the American academy, but law and economics seems to have been the most successful, in terms of its influence on judicial decision-making and legal education.² Because other common-law jurisdictions seem not to have experienced quite the same fascination (or obsession) with the subject, my aim in providing this brief introduction to the review symposium on Randal Graham's book is to suggest some reasons for the remarkable success of law and economics, and to sketch a brief critique of economic methods from the standpoint of general ethical theory.

^{*} Associate Professor of Law, Cornell University. Thanks go to Randal Graham for a stimulating and ongoing conversation about the foundations of ethics.

¹ For support for these impressionistic observations, see Douglas G. Baird, "The Future of Law and Economics: Looking Forward" (1997) 64 *University of Chicago Law Review* 1129; Robert C. Ellickson, "Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics" (1985) 65 *Chicago-Kent Law Review* 23 and the classic (and hilarious) review essay, Arthur Allen Leff, "Economic Analysis of Law: Some Realism About Nominalism" (1974) 60 *Virginia Law Review* 451.

² William M. Landes and Richard A. Posner, "The Influence of Economics on Law: A Quantitative Study" (1993) 36 Journal of Law & Economics 385.

The law and economics movement applies the methodology of economic analysis to describe the workings of the legal system and to offer a framework for normative assessment of legal rules and legal institutions. More specifically, law and economics scholars use the tools of neoclassical micro-economic theory to offer explanations, predictions and assessments. This project is a mixed positive and normative undertaking: by making predictions about human behaviour on the basis of a model of rational action (the positive aspect), economic theory provides a standpoint for criticising legal doctrines (the normative aspect). For example, it may turn out that certain legal rules create perverse incentives, causing people to behave in a wasteful and inefficient manner. On the other hand, market mechanisms may exist by which the conflicting ends of various actors can be reconciled. A classic example illustrating the efficiency effects of legal rules is the appropriate remedy for nuisance, as in a case where a factory generates pollution that interferes with its neighbours' use of their land.³ Suppose the factory can increase its profits from zero to \$10,000 by increasing the amount of pollution it produces by one unit. This additional unit of pollution will cause \$1,000 worth of damage to neighbouring landowners. If the law of nuisance permits an adjoining landowner to obtain an injunction against the factory's additional pollution, and if the homeowner has a baseline entitlement to absolutely clean air (that is, zero units of pollution), the neighbour will be able to block the factory from realising \$10,000 in profits in order to prevent \$1,000 of damage. From the standpoint of aggregate social welfare (considering the factory and the neighbours as a whole), this is less than optimal—inefficient in economic terms. Economic analysis therefore suggests that the proper remedy for nuisance should be an action for damages, but not an injunction, which permits landowners to behave strategically and prevent a mutually beneficial bargain from being reached with the factory. Alternatively, the homeowner's baseline entitlement may be set at "reasonably" clean air (one unit of pollution), which similarly prevents strategic behaviour.

In its most stripped-down form, microeconomic analysis seeks to spin out the consequences of the assumption that people are rational actors who try to satisfy their preferences to the extent possible within the constraint of scarce resources.⁵ This rational-actor model is familiar in the history of ethics from Hume's account of the relationship between desires and reasons: "[r]eason is, and ought to be only the slave of the passions, and can never pretend to any other office than to serve and obey them".⁶ Rationality means taking actions that will

³ Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089. A simplified version of this analysis is given in A. Mitchell Polinsky, *An Introduction to Law and Economics* (2nd edn, Boston, Mass., Little, Brown and Co, 1989) at 15–25. I will use the numbers from Polinsky's presentation of this example.

⁴ Efficiency is a term of art in economics, and there are several competing definitions of efficiency. The two most commonly used in the version of welfare economics that is applied to law are Pareto and Kaldor-Hicks: Richard A. Posner, *Economic Analysis of Law* (5th edn, New York, Aspen Law & Business, 1998) at 14. A situation is Pareto efficient if it is impossible to make someone better off without making anyone else worse off. In the nuisance example, if the factory owner pays the neighbouring landowners at least \$1,000 to compensate for their damage, the outcome is Pareto efficient because the landowners are no worse off than in the *status quo ante* and the factory owner is better off. A situation is Kaldor-Hicks efficient if it is possible to compensate the person made worse off, even though no compensation need actually be paid. Moving from zero pollution to one unit is a Kaldor-Hicks superior situation with respect to no pollution, because the factory's profits increase by \$10,000 while the welfare of the landowners is decreased by only \$1,000.

⁵ See, eg, Gary S. Becker, *The Economic Approach to Human Behavior* (Chicago, Ill., University of Chicago Press, 1976), at 14; Louis Kaplow and Steven Shavell, "Fairness Versus Welfare" (2001) 114 *Harvard Law Review* 966 at 968.

⁶ David Hume, *Treatise of Human Nature* (Gale Group, Eighteenth-Century Collections Online, 1739–40), ii, pt iii at 248.

tend to make it more likely that your preferences will be satisfied; as for the origins of those preferences, we must regard them as exogenous to a theory of action. They simply *are*, and are not subject to rational criticism. Indeed, rationality is defined as maximising the index embodied in an individual's utility function, which in turn represents preferences that are *arational*, not subject to rational criticism or evaluation. People may turn out to be mistaken about their self-interest, or to be unable to maximise their own wellbeing because of cognitive errors, but in principle the operative conception of rationality underlying economic analysis is instrumental, in the sense that it prescribes fit between means and ends.

This kind of instrumental rationality can prescribe conduct once certain goals are taken as given, but can never issue in demands that do not "bottom out" on the desires of the agent. Consider this imperative: "[i]f you want to be a better piano player, you should play scales for at least a half hour every day". Here, the role of reason is to suggest a way to accomplish an end, but the end itself must always be bracketed within the "if" clause. The imperative operates only on people who want to be better piano players. For those people who want to be better basketball players or poker players, it has no force at all. Its binding force is contingent on the agent having a particular desire, in this case to become a better piano player. That desire, however, is entirely subjective and, according to rational choice theory, the source of value is nothing more than the satisfaction of these subjective preferences. 9 Notice that this is a very thin account of the explanatory significance of values. It is held to be sufficient as an explanation of why someone did X that the person had a preference for X. This methodological simplification has the consequence of pre-empting inquiry into what feature of X gave rise to the person's preference. 10 For surely it isn't a full account of a person's decision to take a holiday in Italy that she has a preference for Italian holidays; the complete explanation would make reference to her love of the food, culture, art, scenery, lifestyle, and so on. If an explanation of a person's choice is pushed to deeper levels, one may be able to fit features of X and its desirability within a larger story about the value of certain human goods, like the role played by the appreciation of art in a well-lived life in the case of the Italian holiday. For this reason, those with a humanistic inclination are often frustrated by the one-dimensional nature of the economic conception of value, which flattens the domain of human goods out into an arid, abstract category of "preferences".

The redefinition of value as the satisfaction of exogenously given preferences is one of the central methodological assumptions of law and economics and, not coincidentally, one of the

⁷ See, eg, Henry S. Richardson, *Practical Reasoning About Final Ends* (Cambridge University Press, 1997) at 92. Richardson is criticising this view, but his book carefully and sympathetically reconstructs the conception of rationality used in welfare economics and decision theory.

⁸ See, eg, Christine Jolls, Cass R. Sunstein and Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 Stanford Law Review 1571.

⁹ David Gauthier, *Morals By Agreement* (Oxford, Clarendon Press, 1986) at 47. The equivalence of value with what people desire is a matter of definitional fiat in the Posnerian version of law and economics. Leff, *supra* n. 2 at 456–8. It is therefore open to critics to ask why the satisfaction of preferences is valuable. See, eg, Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass., Harvard University Press, 1985) at 238–66. Whether the satisfaction of a preference is valuable may depend on whether the preference is for something that itself has independent value. Or, as Mill argued in opposition to Bentham, "[i]t is quite compatible with the principle of utility to recognize the fact that some kinds of pleasure are more desirable and more valuable than others": J.S. Mill, in Oskar Piest (ed), *Utilitarianism* (New York, Macmillan, 1957) at 12. It is conceivable that a legal system might opt to satisfy preferences for equal treatment, rather than preferences for racial discrimination, on the grounds that the object of the former preferences is valuable and the object of the latter pernicious.

¹⁰ T.M. Scanlon, What We Ome To Each Other (Cambridge, Mass., Belknap Press, 1998) at 116.

principal reasons for its influence. The appeal of law and economics for legal scholarship is that it provides a foundation or framework for normative analysis that rests on a thin conception of rationality and objectivity. The foundational rational-actor assumptions are intended to be uncontroversial, as compared with other normative theories that make substantive claims about the value of human ends. Some law and economics scholars are quite explicit about their ambition to squeeze moral theorising out of the law altogether, even in the field of legal ethics. "Because moral theory . . . threatens to undermine both the effectiveness of the ethical rules and the institutional integrity of the bar, the Model Rules [of Professional Conduct] should not be viewed as an expression of moral theory."11 In their provocative moments, law and economics theorists like to disparage moral philosophy as woolly-headed, too abstract, sanctimonious, impractical and, above all, incapable of producing objective judgements of right and wrong. 12 Similarly, in the introduction to the book under review, Randal Graham identifies the domain of morality with the commands of "some unseen ethical force", 13 ironically echoing Moore's definition of good as a non-natural property apparent to some mysterious faculty of moral intuition.¹⁴ Although this critique does not apply to philosophers not sharing Moore's metaethical commitments, there is nonetheless an important general challenge for legal ethics. The challenge is to give an objective foundation for rules governing the legal profession that do not rely on parochial moral values that are not shared by lawyers, clients and affected third parties.

The question of objectivity in law is taken to be important, because we want there to be standards for the validity of a legal norm beyond what an actor (a lawyer, judge or citizen) happens to think about the matter. For a judgment in any domain to be objective, it must be the case that it is still true, even if a person rejects it. In the clearest case, it remains the case that 2 + 2 = 4, even if I adamantly reject that proposition. There are standards for assessing the truth of arithmetic propositions that do not depend on contingent facts about human psychology, such as preferences or ideologies. These standards are independent of their acceptance by a particular person or within a given community. In other words, they are somehow compulsory. If I disagreed with them, I would not merely be expressing an idiosyncratic preference, such as liking butter pecan ice cream better than chocolate. Rather, I would be wrong, in a way that justifies the criticism of others. If I asked why I was wrong, the critic would be able to give an explanation in terms of something other than her own preferences, which happen to be different from mine. The explanation would refer to observations of the world of objects, claims about the causal relationship between objects in the world and our perception of them, rules governing the inferences that can be drawn from available evidence, and so on. It can be tricky to flesh out exactly what gives validity to these standards, but the claim of objectivity in any event is that it is possible to be wrong about something, in virtue of standards that do not depend on what people think about them.

¹¹ Sean J. Griffith, "Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics" (2002) 63 *University of Pittsburgh Law Review* 347, at 348.

¹² See, eg, Richard A. Posner, "The Problematics of Moral and Legal Theory" (1998) 111 Harvard Law Review 1637.

¹³ Randal N.M. Graham, Legal Ethics: Theories, Cases, and Professional Regulation (Toronto, Emond Montgomery, 2004) at 4.

¹⁴ G.E. Moore, *Principia Ethica* (Cambridge University Press, 1903).

Ethics characteristically presents itself as making these kinds of demands. Principles of ethics come across as "having their own independent force, as binding and inescapable", 15 unlike mere sentiments or desires. A substantial debate within academic moral philosophy is over "whether there is some method of ethical reasoning whose acceptance can be justified to thoughtful people with force comparable to the force with which acceptance of inductive logic can be justified". ¹⁶ This is clearest in the Kantian tradition, in which ethical principles are defended as necessary or categorical, not contingent. The central concern of Kant's moral philosophy is to ground ethical norms in our nature as rational beings. For Kant, being rational means seeing oneself as acting in a law-governed way, which means seeing the demands of reasons as binding us independently of our desires or preferences. 17 When we realise that other beings act similarly under laws of reason, we perceive that they have moral worth for the same reason we do, and therefore should be treated with respect, as ends in themselves. 18 For Kant and neo-Kantian ethical theorists, the acknowledgment of the value of the humanity of another is the source of moral obligation.¹⁹ Someone who denies the value of other persons and treats them merely as means to her own ends acts just as irrationally as someone who denies that two and two are four.

Rationality and objectivity are therefore related in ethics in the following way: It is irrational to fail to appreciate and act on objectively true values, such as the inherent dignity of other persons. Of course, there are many reasons for action that may be reasons only for persons who have certain beliefs or desires, which cannot be criticised as objectively good or bad. If I said, "Butter pecan ice cream simply is better than chocolate—don't you see?" it would appear that either I was joking or a bit crazy. We think that the choice of butter pecan or chocolate ice cream is merely a matter of taste or preference, and for that reason we do not criticise others for making the wrong choice. There is nothing to be right or wrong about; when someone disagrees with my choice of butter pecan over chocolate, the only ascription that makes sense is that we disagree, not that I am misguided. If the czar of some country, able to rule absolutely according to his whim, forced all his subjects to eat only butter pecan ice cream, we would say he acted tyrannically because he used his power to impose his subjective preferences on others. The situation would not be so dire, however, if the czar promulgated a law forbidding his subjects to kill each other merely for sport. In that case, the czar would be acting on the basis of a value that has a claim to being objectively true, not the subjective preference of the ruler. Although this example is plainly exaggerated, it shows what is at stake when laws claim to be justified as vindicating moral values, as opposed to being enabling laws (such as the Statute of Wills) or laws that serve pure coordination functions (like many traffic regulations). Laws enacted to further objectively valid moral values can be justified to affected citizens in terms of values that they share, or at least ought to share, given their objectivity.

One way of securing this objectivity is to thin out the conception of value that people must share, to the point where no one (or hardly anyone—you really can't do anything about the

¹⁵ Simon Blackburn, Ruling Passions (Oxford, Clarendon Press, 1998) at 280.

¹⁶ Richard B. Brandt, "Ethical Relativism," in Paul Edwards (ed), *Encyclopedia of Philosophy* (New York, Macmillan, 1967) iii, at 75, 76.

¹⁷ Immanuel Kant, *Grounding for the Metaphysics of Morals* in James W. Ellington trans. (Indianapolis, Ind., Hackett Publishing, 1981) at 412–14.

¹⁸ *Ibid* at 427–9.

¹⁹ Christine Korsgaard, *The Sources of Normativity* (Cambridge University Press, 1996) at 143.

wackos) would disagree. It bears emphasis that the critical conceptual underpinning of economic theory is radically to subjectivise value, so that every person gets to be the judge of what he or she takes to be worthwhile. Then economic analysis instructs legal institutions to maximise efficiency, in the sense that it is not possible to satisfy someone's preferences to a greater extent without denying another person the satisfaction of her preferences.²⁰ If this occurs, the economist says, there is a perfect overlap between law and ethics, since ethics is merely an instrument that people use to increase their own well-being. Randal Graham follows David Gauthier in asserting that anything we call "ethics" can ultimately be explained and justified in terms of maximising the satisfaction of individual preferences. In Morals By Agreement, Gauthier defends a sophisticated model which depends on a distinction between "straightforward maximisers" (SMs), those who are disposed to maximise their utility thinking strategically only from their own point of view (that is, assuming that others will also straightforwardly maximise) and "constrained maximisers" (CMs), persons who are disposed to maximise their utility in light of the utilities of others with whom they interact.²¹ In other words, CMs base their actions on a joint strategy—on the possibility of achieving a cooperative surplus—and can therefore obtain the benefits of cooperation that are unavailable to SMs.²² In order to realise the benefits of cooperation, CMs must credibly commit to be bound by norms against defection from the cooperative arrangement. What we recognise as ethics is the result of the attempt by people to constrain their short-term self-interest sufficiently to enable them to realise long-run cooperative gains. Graham has a similar view, although naturally slimmed down to fit within a book aimed at law students: A world without ethics would be wasteful, because individuals would be forced to spend resources monitoring one another and defending against predation.²³ Thus, people invent ethical norms against lying, cheating and stealing, and enforce them through social sanctions such as shame and ostracism. Everything we understand under the heading of "ethics" is actually just a way to do better at maximising the satisfaction of our preferences.

Although this vision sounds bleak, as a theory it does have the virtue of avoiding undue metaphysical and epistemological complications. Attempts to ground the objectivity of ethics in something transcendent are susceptible to John Mackie's famous "argument from queerness": "[i]f there were objective values, then they would be entities or qualities or relations of a very strange sort, utterly different from everything else in the universe". Objective values in the form of "moral facts" would not only have somehow to be part of the furniture of the universe in the same way as rocks and quarks, but must also be capable of grounding evaluation and providing motivational force. It is one thing to observe that a rock exists, quite another to conclude that one should not pick it up and hit someone else over the head with it. Verifying the first sort of proposition involves understanding the processes of causal interaction between the world and observers; verifying the second involves . . . what? The connection between the natural properties of a rock and its ethical properties (or the ethical properties of using the rock to commit acts of violence) is obscure. It is just this kind of

²⁰ This is the Pareto version of efficiency.

²¹ Gauthier, *supra*, n. 9 at 166–7.

²² *Ibid*, at 170.

²³ Graham, *supra* n. 13 at 14–16.

²⁴ J.L. Mackie, Ethics: Inventing Right and Wrong (Harmondsworth, Penguin, 1977) at 38.

obscurity that is the target of Graham's characterisation of the foundations of ethics as a "mystical notion".²⁵

But there is no reason to believe that objectivity in ethics depends on postulating inherently prescriptive moral facts, supernatural forces or mystical properties. In his eagerness to set aside ethics as fuzzy thought, in contrast with the rigour of economic analysis, Graham ignores or downplays the work of ethical theorists who offer ways to think about objective judgement in ethics without the inflationary metaphysics. Horeover, he creates a false dichotomy by implying that values are either a matter of preference or reflect muddled, mystical thinking. It may be possible to insist on a distinction between preferences that are merely subjective and those which are compulsory:

"I dislike spinach but think it a matter of taste; that means in part that although I dislike spinach, I am willing to eat it if I like it. The norms I accept endorse eating it if I like it and not otherwise. I oppose cruelty unconditionally: I want myself not to be cruel even if, hypothetically, I should want to be; the norms I accept forbid being cruel even if one wants to be. Commitment to anything one thinks is a fundamental requirement of rationality is likewise unconditional."²⁷

The glib response from an economist might be that spinach and cruelty are indeed on a par, and it is merely a coincidence that most people prefer not to be cruel, while opinions differ as to spinach. A sophisticated ethical theorist would not be content with this response, because practices of evaluating and judging do not exist in a vacuum; we endorse norms because they make sense in the context of doing something, which in turn has a point or purpose. In certain social contexts, we admit of variations in taste or preference, because it makes sense to grant people latitude to develop their own idiosyncratic interests free from the pressure to conform to social expectations. ²⁸ In other contexts, we do not permit people with idiosyncratic preferences, such as the Marquis de Sade, whose taste runs to gratuitous cruelty. The structure of ethical discourse shows that not all values reduce to mere preferences. It would be silly to have a heated discussion about whether butter pecan ice cream or spinach is "really" the sort of thing that others ought to prefer, but it is not silly at all to imagine a conversation in which the participants try to convince each other of the wrongfulness of, say, euthanasia or abortion. This distinction between preferences (which underlie economic conceptions of rationality), on the one hand, and norms that apply regardless of preference (which underlie ethical conceptions of reasonableness), on the other, forms the basis for two related criticisms of the application of economic rationality to problems of ethics.

First, "preference" cannot be a primitive, unanalysable concept in an adequate explanation of human behaviour. To put the point in terms of a previous example, someone's preference for taking a holiday in Italy can be further explained in terms of the qualities of an Italian holiday that make it desirable. In the context of taking holidays, certain features of a place—scenic beauty, a relaxed pace of life, historical significance, etc.—make it desirable as a holiday destination. In this way, the value of something inheres not in someone having a preference for it, but in the properties of that thing that cause people to form preferences for

²⁵ Graham, *supra* n. 13 at 18.

²⁶ See, eg, Hilary Putnam, The Collapse of the Fact-Value Dichotomy and Other Essays (Cambridge, Mass., Harvard University Press, 2002); Geoffrey Sayre-McCord (ed), Essays on Moral Realism (Ithaca, NY, Cornell University Press, 1988).

²⁷ Alan Gibbard, Wise Choices, Apt Feelings (Cambridge, Mass., Harvard University Press, 1990) at 167.

²⁸ Elizabeth Anderson, Value in Ethics and Economics (Cambridge, Mass., Harvard University Press, 1993) at 92.

it.²⁹ Similarly, if one has a preference for cruelty, it is open to ask what features of cruelty make it appealing as a way of life, which is to say valuable. Concentrating on these features enables us to critique the preferences of a person who desires to be cruel, from the standpoint of something objective, namely what makes a human life worth living. Certain things are conducive to the end of a well-lived human life, and other things make a life less desirable; health is preferable to illness, bodily security is better than fear, the opportunity to engage in social interaction is more desirable than isolation, and so on.³⁰ When we argue about ethics, we argue as though we are talking about something that matters—health, bodily integrity, and so on. That is the difference between arguing about a value and arguing about a preference. No one would think that anything of importance is at stake in a debate over vanilla v. butter pecan ice cream, but we recognise something quite significant in ethical discourse.

Naturally one might quibble with how values should be ranked, balanced or harmonised. In the trivial example, people might reasonably disagree whether Italy or New Zealand was a better vacation destination, given a traveler's interests in both scenic beauty and artistic treasures. In the more serious example of a desirable human life, perhaps one person values self-imposed isolation in pursuit of artistic excellence, while a more gregarious person would find that form of life miserable. In fact, one of the principal attractions of political liberalism is that it gives people space in which to make these tradeoffs for themselves.³¹ Even given a plurality of conceptions of a valuable life, however, there are numerous ways of treating people that cannot be justified on the basis of any plausible conception of a good life. The rejoinder that "cruelty is valuable to me because I enjoy cruelty" fails to locate anything of ethical value in cruelty, because one of the logical preconditions of something's being a reason within ethics is that it be the kind of reason that can be offered to another person.³² This is probably the methodological commitment on which economic analysis and ethics part ways. Economic analysis is concerned only with the perspective of a single deliberating agent, weighing costs and benefits, without regard to whether her reasons can be reasonably accepted by others.

It is therefore highly significant that the second objection to replacing ethical reasoning with economic analysis is that austere rational-actor assumptions cannot play a robust role in ethics because they are incapable of directing action. It may be the case that concentrating on preferences as the fundamental explanatory concept of human behaviour may enable theorists to construct hypotheses and make predictions.³³ If we knew that people, in the aggregate, had a stronger preference for taking holidays in Italy than in, say, Texas, we would be able to predict that all things being equal more people would travel to Italy than to Texas, that more people might start going to Texas as the euro increased in value relative to the dollar, and so on. (Real economic theorists naturally make more adventurous predictions with respect to more complicated social practices.) This focus on prediction from a third-personal perspective may make economics useful as a social science, but it obscures one of the central

²⁹ This is Scanlon's well known "buck passing" account of value. Scanlon, *supra*, n. 10 at 96.

³⁰ Compare the list of basic human functional capabilities given by Martha Nussbaum in *Sex and Social Justice*, (Oxford University Press 1999) at 41–2.

³¹ Joseph Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986).

³² Blackburn, supra, n. 15 at 229.

³³ Posner, *supra*, n. 4 at 18–19.

functions of ethics, which is to guide deliberation from a first-person point of view.³⁴ The imperative to maximise the satisfaction of one's preferences is simply tautological, because that is what people will do regardless of whether they subscribe to economic theory. Rational-choice theory:

"does not issue recommendations or norms, or give advice in the name of "reason". The framework itself issues no empirical predictions, nor any normative recommendations. Why not? No empirical predictions, because nothing an agent does is inconsistent with it. . . . [N]o recommendations, because a recommendation is something you can succeed in following, or in disobeying. But under the present suggestions, nothing you do would count as acting not to maximize expected utility."35

Putting it somewhat differently, economic reasoning cannot guide action because the assumption that all ends are commensurable as contributions to the agent's utility is inconsistent with the phenomenology of decision-making; agents experience options as involving qualitatively distinct goods which cannot be equated and measured against one another using an abstract quantity like wellbeing or hedonic pleasure.³⁶

If a lawyer is genuinely perplexed about how to resolve an apparent ethical dilemma, it is not helpful to say "maximize the satisfaction of your preferences", because the lawyer's question is "what preferences ought I to have?". As Graham concedes, a lawyer with a preference for altruism will realise more expected utility by behaving altruistically.³⁷ But genuine perplexity implies that the lawyer is not already predisposed to behave in a certain way or, if she is, she is sufficiently reflectively self-conscious to be able to subject her dispositions to critical scrutiny. Economic analysis runs out, however, right at the moment where it is most needed, as a guide to the critical scrutiny that is a part of serious ethical deliberation. Thus, when legal ethics theorists appeal to economic analysis as part of the foundational justification of their discipline, they must be prepared to explain the choice-worthiness of ends adopted by hypothetical rational actors.

The reviewers whose work is featured in this symposium make these points, and they are well known in the philosophical critique of law and economics. It is worth observing, by way of conclusion, the plain fact that economic methods persist as a major challenge to ethics despite these difficulties, and to speculate on the reason for this persistence. My hunch is that one's attraction to law and economics is inversely related to the confidence one has that judgements of reasonableness within ethics are capable of objectivity. Much has been made of the attack by Cardinal Ratzinger, now Pope Benedict XVI, on the "dictatorship of relativism". It may be such as welfare and efficiency. It may surprise adherents of law and economics that Cardinal Ratzinger went on to denounce elevating "one's own desires" into the position as the highest source of value. So it seems that economic analysis does not escape the critique of value relativism. Whether modern secular ethical

³⁴ Blackburn, supra, n. 15 at 206.

³⁵ Ibid, at 167.

³⁶ Martha C. Nussbaum, "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics" (1997) 64 *University of Chicago Law Review* 1197 at 1199–203.

³⁷ Graham, *supra* n. 13 at 52.

³⁸ See, eg, E.J. Dionne, "Cardinal Ratzinger's Challenge" Washington Post 19 April 2005, at A19.

theory does any better is a matter of serious dispute within moral philosophy. In any event, there is a lively and ongoing debate on how best to secure objective foundations for moral judgements.³⁹ Thus, in the spirit of the proverbial "big tent", producers and consumers of legal ethics theory should welcome law and economics as a participant in our shared enterprise of seeking better understanding of how people and professionals ought to behave.

³⁹ See, eg, Brian Leiter (ed), Objectivity in Law and Morals (Cambridge University Press, 2001).