

## FOREWORD

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## I. WHAT'S THE POINT OF THE SYMPOSIUM?

In August, 2003, I had the honor of directing the *Special Workshop on Law and Economics and Legal Scholarship* of the 21st IVR World Congress in Lund, Sweden. The idea was to encourage a group of legal theorists to examine the transformations that law and economics has brought about in legal scholarship. I had the privilege of coordinating the deliberations of great scholars (and friends) during a whole week in the magnificent Scandinavian summer. The theme I had chosen was anything but new. Indeed, it is now more than twenty years since a notable group of economic lawyers discussed in a well-known *Hofstra Law Review* symposium a set of methodological and normative issues related to law and economics.<sup>1</sup> But much water had flowed under the bridge and there still was not an overall treatment of the theme among recent law journal symposia. This symposium seeks to fill in this gap by offering to law students and professors a selection of the papers submitted to the Lund workshop.

The contributions address a set of interconnected topics. In a sense, Lewis Kornhauser's paper addresses the most fundamental issue.<sup>2</sup> He seeks to investigate how law and economics bears on the jurisprudential agenda of understanding law and legal propositions. Surprisingly, the concept of law that emerges from this economics-informed philosophical inquiry is associated with Hart's descriptive sociological investigation, which concludes that law is a union of primary rules of obligation and secondary rules of recognition, change,

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1. See generally the articles cited in *Symposium on Corporate Governance*, 8 HOFSTRA L. REV. 1 (1980).

2. Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 CHI.-KENT L. REV. 355 (2004).

and adjudication.<sup>3</sup> Kornhauser claims that law is a kind of governance structure built on incentives.

Anthony Ogus<sup>4</sup> and Thomas Ulen<sup>5</sup> focus on the influence of law and economics on legal scholarship, with quite different results. While Ogus adopts the modest view that law and economics is a useful predictive and explanatory tool for legal scholars, Ulen takes the more ambitious route of rethinking legal scholarship. Ulen says that, because of its new economic orientation, legal scholarship has already acquired the two requisite features of a mature science: theorization and empirical testing. He also discusses the academic implications of legal scholarship's mutation.

Francesco Parisi and Jonathan Klick<sup>6</sup> consider the new "functional" approach to law and economics, which Kornhauser more classically calls "political economy." This approach looks for the incentive-based causes of legal rules, rather than their behavioral consequences. The normative version of functional law and economics favors preference revelation as a decision criterion over the more traditional utility maximization and wealth maximization. This new conception of law and economics fits very well with Ulen's view of legal science as a theoretical and empirical discipline. Indeed, Parisi and Klick illustrate the new approach with empirical research on the conditions leading participants to opt for cooperative outcomes.

The central importance of public choice in functional law and economics seems to support the redesign of law schools' curricula to encompass public choice. There might nonetheless be strong reasons to maintain traditional curricula. Guido Pincione<sup>7</sup> discards a diversity of objections to public choice teaching in law schools, thus taking sides with Ulen's academic recipe. One of Pincione's telling points is that public choice teaching may be compatible with and even conducive to a moral and public-spirited stance toward law and politics.

The Public Choice School is, essentially, the result of the economic dissection of questions and puzzles originated in the reflection

3. See generally H. L. A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

4. Anthony Ogus, *What Legal Scholars Can Learn from Law and Economics*, 79 CHI.-KENT L. REV. 383 (2004).

5. Thomas S. Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT L. REV. 403 (2004).

6. Francesco Parisi & Jonathan Klick, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking*, 79 CHI.-KENT L. REV. 431 (2004).

7. Guido Pincione, *Should Law Professors Teach Public Choice Theory?*, 79 CHI.-KENT L. REV. 451 (2004).

on fundamental legal institutions. Might the effect of law on economics be more profound? This is the question that animates Bruce Chapman's line of research.<sup>8</sup> He seeks to improve the theoretical structure of economics by borrowing themes and insights from law and jurisprudence. In his contribution, Chapman tries to solve the paradox of rational commitment by appealing to the idea of normative requirements, developed by the moral philosopher John Broome. On Chapman's account of individual practical rationality, normative requirements interact with reasons to yield rational decisions. Chapman goes on to suggest that this model of practical rationality is also instantiated in common law decision making, in which the rational decision may not be the decision backed by the best balance of reasons in a particular case.

In the last two contributions Giuseppe Dari Mattiacci<sup>9</sup> and I<sup>10</sup> explore the role of welfare and fairness in understanding and justifying legal rules. In different ways, we both disagree with Louis Kaplow and Steven Shavell in denying that welfare maximization is a self-sufficient principle. Dari Mattiacci agrees with Kaplow and Shavell in treating welfare and fairness as two mutually excluding principles. He argues that welfare maximization is a consistent but incomplete system of social choice, which means that some decisions must be reached by criteria other than welfare maximization, typically fairness. Finally, I rebut the implicit assumption that fairness and welfare play the same role in every legal system, regardless of its historical configuration. Specifically, I claim that law's commitment to fairness is stronger in civil law systems.

## II. LAW AND ECONOMICS AND LAW AND PHILOSOPHY: THE PATH TO RECONCILIATION

In the remainder of this Foreword I would like to address the relationship between law and economics and law and philosophy, as well as the effects of these interdisciplinary approaches on future legal scholarship. In law schools links between legal theorists and economic lawyers vary today from alliance for the intellectual cause to

8. Bruce Chapman, *Legal Analysis of Economics: Solving the Problem of Rational Commitment*, 79 CHI.-KENT L. REV. 471 (2004).

9. Giuseppe Dari Mattiacci, *Gödel, Kaplow, Shavell: Consistency and Completeness in Social Decision-Making*, 79 CHI.-KENT L. REV. 497 (2004).

10. Horacio Spector, *Fairness and Welfare from a Comparative Law Perspective*, 79 CHI.-KENT L. REV. 521 (2004).

distrust and open confrontation. For instance, in a friendly mood, Professor Ulen says in his contribution, “as law schools make a transition to a scholarship that is more congenial to that practiced in the other Ph.D.-granting units in the great research university, law and philosophy will find the transition to be easy and will help law schools make the transition.”<sup>11</sup> In fact, legal philosophy has for a long time been committed to a scholarly conception of legal education. Still the pending question is whether, with the growth of the theoretical-empirical kind of scientific enterprise Ulen advocates, there will be sufficient room for legal philosophy in research-oriented law schools.

The question has an obvious answer if we regard legal philosophy as a theoretical enterprise. Whatever the status of legal scholarship—be it descriptive-empirical or normative—it can always raise theoretical problems that professional philosophers are well equipped to discuss and marshal. Even in the most extreme case of a successful and complete reduction of legal scholarship into economic theory, there would still be theoretical puzzles flowing from the most abstract postulates and inferences of economics. So I take it for granted that legal philosophy, as a branch of philosophy, will always have a prominent theoretical place whatever legal scholarship’s future will be. However, I am more interested in legal philosophy as coming into conflict with law and economics in the normative realm. Economic lawyers do not content themselves with finding out the consequences of legal rules or detecting the causal conditions of their creation and change. Rather, they usually have normative pursuits. Normative law and economics typically defends welfare maximization, or wealth maximization, as a standard to endorse new rules or to appraise existing rules. In so doing it obviously competes with normative legal philosophy. This is the apparent rivalry I would like to discuss.

Normative legal philosophy is, by definition, a form of public ethics, because it concerns the moral justifiability of actions taken in the public domain, or of social and political institutions. Classical utilitarianism and Rawls’s theory of justice are two contemporary positions in public ethics, but we could easily multiply the examples. Public actions and social and political institutions affect the claims, interests, welfare, etc. of great numbers of persons. Among those institutions, law typically yields consequences impinging on the whole citizenry, and sometimes on mere inhabitants or citizens of foreign

11. Ulen, *supra* note 5, at 425.

states. Decisions like the passing of a law in Congress or the Supreme Court's overruling of a law have an evident public ethical dimension, because their upshots—whether intended or unintended—extend to the society at large. Against the background of these remarks, it is very easy to show that normative legal philosophy overlaps with moral and political philosophy. In fact, great legal philosophers like Aristotle, Thomas Aquinas, Kant, and Bentham were at the same time moral philosophers. But let me emphasize that normative legal philosophy and moral and political philosophy bear a necessary connection, not just a contingent, historical one. It is a truth in normative language that the justification of a decision affecting other people is ethical in nature. Therefore, the justification of law, which constitutes the principal object of normative legal philosophy, pertains to the realm of ethics.

Just as normative legal philosophy, normative law and economics engages also in the justification of legal measures, whether legislative, administrative, or judicial. In a trivial sense, normative law and economics is a particular theory among the gamut of normative theories of law. While positive law and economics can claim a commitment to the scientific method that legal philosophy does not have or pretend to have, normative law and economics must openly compete, on an equal footing, with other normative theories of law. Thus conceived, normative law and economics is just a technical derivation of utilitarianism. True, law and economics sometimes appeals to maximands other than happiness, like Pareto efficiency or wealth. This only reveals a value difference, that is, a divergence in the underlying theory of the good, but not a substantive disagreement as regards the structure of the moral theory defended. Both utilitarianism and normative law and economics embrace an aggregative teleological ethical theory, which competes with a diversity of nonconsequentialist positions, from the School of Natural Rights and perfectionist conservatism to liberal egalitarianism.

If normative law and economics is only one possible position in normative legal philosophy, then any suggestion that one should cede terrain in favor of the other seems out of place. However, economic lawyers might want normative law and philosophy to be the final position in normative legal theorizing, the “end of public ethics,” so to speak.<sup>12</sup> Interestingly, this tenet could not be grounded on any num-

12. I have borrowed Daniel Bell's metaphor; see DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (rev. ed. 1988).

ber of theoretical or empirical advances made in positive law and economics. Whatever its degree of explanatory or predictive success, positive law and economics cannot yield normative consequences. This is just a way of rephrasing Hume's famous motto that "is" does not imply "ought."<sup>13</sup> A similar idea was defended in twentieth-century metaethics by claiming that—without assuming the proper naturalist definition—it is fallacious to draw moral judgments from a set of premises only containing factual statements.<sup>14</sup> Normative law and economics, like any other consequentialist moral theory, is not "naturally" true. It is absurd to attack nonconsequentialism as implausible or irrational just by noting that its results are at odds with consequentialism. In the absence of further argumentation, it is question-begging to dismiss nonconsequentialism by taking a stand on consequentialism.<sup>15</sup> By the same token, it is question-begging to attack fairness-based theories of law by relying on the welfare maximization thesis of normative law and economics.<sup>16</sup>

Curiously, one often finds question-begging arguments in the criticism of nonconsequentialist moral positions. This might be due to the fact that an aggregative, maximizing conception of rightness, coupled with a monist theory of the good, has an attractive logical property: it systematically provides a single moral solution for every moral problem. The association of utility maximization to systematicity and coherence has led some theorists to assume that utilitarianism is the only scientific or rational method for reaching moral decisions. Thus, according to Mill, Bentham, and Sidgwick, it was this concern with unity and coherence that gave utilitarianism its impetus.<sup>17</sup> Similarly, in his contribution to this symposium Dari Mattiacci contends that coherence is the main motivation of normative law and economics. Now, as long as one assumes that utilitarianism or some other form of consequentialism—*i.e.*, normative law and economics—is the only rational procedure of moral decision making, the criticism of noncon-

13. DAVID HUME, A TREATISE OF HUMAN NATURE 469–70 (L. A. Selby-Bigge ed., 2d ed. 1978).

14. GEORGE EDWARD MOORE, PRINCIPIA ETHICA 38 (1922); *see also* ARTHUR N. PRIOR, LOGIC AND THE BASIS OF ETHICS ch.9 (1949); W. K. Frankena, *The Naturalistic Fallacy*, 44 MIND 464 (1935).

15. I have defended this view in my book, AUTONOMY AND RIGHTS: THE MORAL FOUNDATIONS OF LIBERALISM 175–76 (1992).

16. *See generally* Kimberly Kessler Ferzan, *Some Sound and Fury from Kaplow and Shavell*, 23 LAW & PHIL. 73 (2004).

17. *See* Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFF. 313, 324–25 (1994).

sequentialism can proceed in a noncircular way. As is obvious, the crucial step is requiring unity and coherence as an adequacy condition of moral theories, yet this step typically remains undefended.

Normative law and economics is just one position in normative legal philosophy, and a vulnerable one. To show its vulnerability, I will summarize four objections that have been raised, more or less clearly, in recent literature.

#### A. *The Argument from Autonomy*

John Rawls has famously criticized utilitarianism because it ignores problems of distribution between individuals. Provided utility or other relevant value is maximized, utilitarians do not care to whom it accrues. Moreover, argues Rawls, utilitarianism does not take seriously the distinction between persons because it extends to social choice the principles of individual choice by mandating the maximization of utility regardless of its location in different persons.<sup>18</sup> This objection has clear Kantian overtones. The claim is that, on account of its aggregative calculation method, utilitarianism offends the value of individual autonomy. As I have shown elsewhere, autonomy is a unique value because it excludes an aggregative practical response; by its very nature, autonomy must be *respected*, not maximized.<sup>19</sup> Thereby we should expect an autonomy-based theory of contract law to yield different substantive outcomes from one grounded on welfare maximization.

Normative law and economics could escape the above criticism by two different routes. First, it could restrict itself to a Paretian conception of welfare, dismissing aggregative views, like Kaldor-Hicks efficiency. While this defense strategy works well in preserving the value of autonomy, because each person's welfare (or wealth) is neither compared with nor traded off against other people's welfare (or wealth), it curbs the usefulness of law and economics as legal decision making is often confronted with options that bring about both gains and losses for different persons. Second, instead of applying the maximizing decision procedure on a case-by-case basis—as act-utilitarianism requires—one could choose an *ex ante*, institutional stance for the purpose of measuring utility or welfare. If the benchmark chosen is sufficiently detached from the positions of particular

18. See JOHN RAWLS, A THEORY OF JUSTICE 27 (1971).

19. See SPECTOR, *supra* note 15, at 162.

persons, one could resort again to a Paretian criterion of choice, thus avoiding a violation of individual autonomy. For instance, this is the stance adopted by constitutional economics.

### B. *The Argument from Equality*

Thomas Nagel, Will Kymlicka, and Charles Taylor have claimed that utilitarianism offers a distinctive conception of impartiality or moral equality.<sup>20</sup> On this view, the main point of utilitarianism is not to maximize utility but rather to realize a conception of persons as equals. Utilitarianism treats everyone impartially because each person's viewpoint matters equally. Specifically, it respects equality by employing a procedure of social calculus in which each person's interests count once. As Nagel says, under utilitarian social choice "persons are equal in the sense that each of them is given a 'vote' weighted in proportion to the magnitude of his interests."<sup>21</sup> Since normative law and economics is a form of utilitarianism, it can be read in the same fashion. Thus—the argument goes on—there is not really a conflict between welfare and fairness-based theories of law, for welfare theories too spell out an egalitarian conception of fairness. Trading on this egalitarian interpretation of (normative) law and economics, Ronald Dworkin has reached substantive conclusions in tort law that come surprisingly close to those defended by Richard Posner.<sup>22</sup> Egalitarians have also maintained that other normative theories competing with utilitarianism, like Rawls's theory of justice and equality of resources, articulate more truly or faithfully the ideal of moral equality.

### C. *The Argument from Pluralism*

Isaiah Berlin and Joseph Raz have rejected the monist theories of value adopted by utilitarians and other contemporary political theorists.<sup>23</sup> These authors defend perfectionism and value-pluralism, as well as the possibility of incommensurability among ultimate individual and social options. Since there is no overarching principle of

20. See generally WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* ch.3 (1989); THOMAS NAGEL, *MORTAL QUESTIONS* ch.8 (1979); CHARLES TAYLOR, 2 *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* ch.9 (1985).

21. NAGEL, *supra* note 20, at 112.

22. See RONALD DWORKIN, *LAW'S EMPIRE* ch.8 (1986).

23. See generally ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

choice, value pluralism is not associated to systematic unity and coherence. On the other side of the Atlantic, Anthony Kronman, probably motivated by Berlin's and Raz's moral theories, has argued that normative law and economics and its associated decision making method distort the way decisions are taken in legal settings. Typically, the judge or legislator is confronted with conflicting, and often incommensurable, values sanctioning different measures. Because of their incommensurability those values cannot be reduced to utility or welfare. According to Kronman, it is practical wisdom, and not an artificial calculus, that can help the judge or legislator to find a reasonable solution in that predicament.<sup>24</sup>

#### D. *The Argument from Initial Titles*

Both critics and defenders of law and economics acknowledge that the economic analysis of legal norms typically proceeds on the basis of an existing distribution of titles over physical resources.<sup>25</sup> This is crystal clear in the case of a wealth-maximization conception of law and economics. Willingness to pay, for instance, is a function of the existing distribution of resources.<sup>26</sup> If this standard is applied to establish the most valued uses, the normative properties of the initial allocation of titles will transmit down to our policy decisions. For instance, abrogating a barrier to the sale of slaves would be inefficient (besides unfair) vis-à-vis alternative institutional arrangements despite its being an efficient move as compared with the situation *ante*. When the standard to be applied is welfare maximization, do we do away with the problem? Not quite. First, cost-benefit analysis depends on stable background prices, which, in turn, are a function of the existing distribution of resources.<sup>27</sup> Second, economic analysis can dictate, for example, that private ownership is a more efficient prop-

24. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

25. See C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Robert Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 CHI.-KENT LAW REV. 523 (1987). For the assumption of self-ownership, see Horacio Spector, *Self-Ownership and Efficiency*, in JUSTICE, MORALITY AND SOCIETY: A TRIBUTE TO ALEKSANDER PECZENIK ON THE OCCASION OF HIS 60TH BIRTHDAY, 16 NOVEMBER 1997, at 359 (1997).

26. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (1972).

27. See Cooter, *supra* note 25, at 548.

erty regime than an open commons under conditions of scarcity.<sup>28</sup> Yet it cannot tell us what particular distribution of ownership is to be preferred according to a welfare standard, nor whether the existing distribution of property rights is the optimal one. Moreover, restructuring an existing allocation of titles reduces security and, therefore, may be deleterious for overall satisfaction.<sup>29</sup> Once a property regime is in place, changing it brings about large indirect costs, so the welfare assessment of legal decisions will frequently be biased by the existing distribution of titles.

I hope these arguments reasonably show that normative law and economics cannot be taken as the final position without further ado. Being an ethical outlook on society and policy, it belongs in the complex and unfinished human debate about the best form to ordain our living together.

28. See David Schmitz, *The Institution of Property*, in ENVIRONMENTAL ETHICS: WHAT REALLY MATTERS, WHAT REALLY WORKS 361 (David Schmitz & Elizabeth Willott eds., 2002).

29. See JEREMY BENTHAM, THE THEORY OF LEGISLATION 119–21 (Richard Hildreth trans., Oceana Publications 1975) (1840).