

Review Essay

Law, Economics, and the Skeleton of Value Fallacy

BEHAVIORAL LAW AND ECONOMICS

Edited by Cass R. Sunstein[†]

Cambridge: Cambridge University Press, 2000. Pp.vii,
431. \$69.95 cloth.

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INTRODUCTION

Generations of art students and English majors fulfilling distribution requirements have endured introductory economics courses, sitting in the back of the room doubting, sometimes out loud, the value of predictions and analyses that are premised on the ludicrously truncated conception of humanity known as *homo economicus*. Generations of economics instructors patiently have tried to explain the principle of parsimony, and the sound trade-off between the simplifications of *homo economicus* and the production of elegant, powerful explanations of complex social phenomena.

It turns out that those artsy types have a point after all. Experiments show that, even in stripped-down settings, in which the true path to preference satisfaction is perfectly obvious, real people do not behave at all in the way that economists have supposed they do.¹ In one experiment, a group of subjects is given an everyday item (such as a mug or a set of pens) to which a value has been assigned by the researcher. They are then instructed to trade with another group that has been given cash, knowledge of the assigned values, and no item. The subjects who start with the items tend to hang on to them well beyond the point at which they would be made better off by trading. In another set of experiments, people faced with

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1. The experiments described in this paragraph are discussed more fully, *infra* Part II.

an offer that will clearly make them better off if they accept, and provide them nothing if they refuse, refuse offers that are profitable but not fair. The experimental subjects' failure to pursue their self-interest has not caused economics departments to pack it in. Nevertheless, it poses serious challenges. The first experiment mentioned above, for example, suggests an "endowment effect," which contradicts the Coase Theorem: the notion that, in the absence of transaction costs, goods will find their most efficient distribution regardless of their initial assignment.²

Cass Sunstein has collected a set of essays by economists and legal scholars exploring these challenges, in a volume entitled *Behavioral Law and Economics*. This review will argue that the objections of the art student and the English major still have not been met. This prospect will not cause the authors in this collection any embarrassment because none of them sets out to meet these objections. Their objective is to refine the tools of economic analysis, not to defend economics against a fundamental but seemingly sophomoric challenge. Nevertheless, in the course of refining the economic conception of practical rationality,³ the authors of this volume instead uncover reasons to abandon it. Ultimately, these considerations undermine the economic analysis of law, and indicate the need for a fundamental re-orientation of legal theory. The issues raised in *Behavioral Law and Economics* call for a greater appreciation of the nature of value and judgment, and they suggest that scholars should focus on the law's production of states of character rather than states of affairs.⁴

The support that behavioral economics inadvertently lends to objections to economic rationality is more than an ironic curiosity. In the volume's lead essay, *A Behavioral Approach to Law and Economics*, Cass Sunstein, Christine Jolls, and Richard Thaler propose to examine the ways in which real people differ from *homo economicus*, and to explore the implications of these differences for law and economics (pp. 14-15). They describe three "bounds" on human behavior: bounded rationality, bounded willpower, and bounded self-interest (pp. 14-16). "Bounded rationality" refers to the limit on our ability to remember and to compute accurately; "bounded willpower" refers to our chronic inability to serve our own long term interests even when we recognize them; and "bounded self-interest" refers to the fact that people "care, or act as if they care, about others, even strangers, in some circumstances" (p. 16). The authors promise, on their own behalf and implicitly on behalf of the authors of the essays that follow, an inquiry that will "draw into question the central ideas of utility

2. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

3. The term "practical reasoning" refers generally to the valuations, rational responses to value, and motivations that contribute to action.

4. See discussion *infra* Part III.

maximization, stable preferences, rational expectations, and optimal processing of information" (p. 14).

This project is both too timid and too bold. The timidity is evident in the parenthesis that follows the above-quoted description of bounded self-interest: "(Thus, we are not questioning here the idea of utility maximization, but rather the common assumptions about what that entails)" (p. 16). Having been promised an inquiry that will draw utility maximization into question, the reader is left to wonder where, if not in connection with the assumption of self-interestedness, the critique of utility maximization will occur. The answer is nowhere and everywhere. Throughout this volume, the contributors again and again bump up against reasons to discard this and other premises of economic thought. And again and again the authors either fail to realize the scope of their own discoveries or simply are at a loss over what to say about them. If this blind spot or hesitation is due to their reluctance to undermine the foundations of law and economics as a discipline, then they have been too bold.

Sunstein, Jolls, and Thaler's statement that self-interest is limited because people care, or act as if they care, about others, is a good illustration of this ambivalence. People do care about one another, and they act accordingly. The authors' apostrophe "or act as if they care" (p. 16), however, suggests that this caring behavior can be reduced to self-interested behavior (presumably through an analysis of reputation effects⁵), thus saving legal economists the trouble of understanding the implications of caring behavior on its own terms. But caring behavior cannot be reduced to self-interested behavior, and neither can other, commonly observed non-optimizing behavior such as honoring family and friends, living out a personal narrative, expressing an emotion, or nurturing a virtuous character.⁶

5. E.g., Ian Ayres & Stewart Schwab, *The Employment Contract*, 8 KAN. J.L. & PUB. POL'Y 71, 78 (1999) ("For example, until recently, IBM carefully nurtured a reputation for caring for its workers, including a policy of no layoffs.").

6. A number of philosophers recently have examined, broadly speaking, the rationality of non-optimizing behavior of this kind. E.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999); Christine M. Korsgaard, *Skepticism About Practical Reason*, in *CREATING THE KINGDOM OF ENDS* 311 (1996); MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE* (1990); JUSTIN OAKLEY, *MORALITY AND THE EMOTIONS* (1992); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); MICHAEL SLOTE, *BEYOND OPTIMIZING: A STUDY OF RATIONAL CHOICE* (1989); MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* 338-42 (1990); Christine Swanton, *Satisficing and Virtue*, 90 J. PHIL. 33, 40 (1993). In legal scholarship, this discussion has proceeded under the heading of expressive rationality. E.g., Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1261-63 (1998); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419-25 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597-601 (1996) [hereinafter *Alternative Sanctions*]; Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 *passim* (1992); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-16 (1993); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90

A serious inquiry into the ways in which people actually do value, choose, and act is bound to uncover not only the existence of this non-optimizing behavior, but also its resistance to economic reduction. But what is a self-respecting legal economist to do when she reaches this point? Join the motley opposition?

The opposition to law and economics is well described as motley, because it is a far less discrete, cohesive school of thought than the law and economics movement, and also because the arguments against law and economics as an enterprise are not easily summarized, and have rarely been persuasively articulated. As Jeanne Schroeder has pointed out: "The critical left tends to take legal economics' claim to rationality at face value and, therefore, frequently engages in the self-defeating strategy of attempting to form rational arguments against rationality."⁷ As a starting point in this Review Essay, I will summarize one line of controversy that bears directly on the issues of "realism" that the essays in *Behavioral Law and Economics* address. Part I uses a hypothetical dialogue between a believer and nonbeliever in the law and economics approach to frame the criticism suggested in the preceding paragraph; namely, that economics purports to, but cannot, reduce all practical reasoning to the terms of self-interested behavior. Nor does the part of practical reasoning that economics does recognize constitute a representative or essential core of sound practical reasoning. I refer to this defect as the skeleton of value fallacy, for reasons that will appear below.

Part II of this Review Essay examines several instances of the skeleton of value fallacy in *Behavioral Law and Economics*. This Part focuses on the endowment effect and its implications for the Coase Theorem. Two of the younger contributors to the volume grasp the implications of the endowment effect more fully than their elders do, but the result of this insight is to leave the arguments of both scholars at a curious dead end. I argue that the next step they must take is a difficult one because it is incompatible with the core economic assumptions of utility maximization and transitive preferences.⁸ In other words, the pursuit of behavioral

COLUM. L. REV. 2121, 2143-66 (1990); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 938-39 (1991).

7. Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 150 (2000).

8. Transitivity of preferences means that if B is preferable to A, and C is preferable to B, then C is preferable to A. Transitivity of preferences is a component of the economic conception of rationality, which has been summarized this way:

For the economist, . . . rationality means choosing in accordance with a preference ordering that is complete and transitive, subject to perfect and costlessly acquired information; where there is uncertainty about future outcomes, rationality means maximizing expected utility, that is, the utility of an outcome multiplied by the probability of its occurrence.

MARK BLAUG, *THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN* 229 (2d. ed. 1992).

economics leads to the discovery of good reasons not to do economics at all.

Part III considers the implications of the skeleton of value fallacy, and of the contributors' failure to recognize it. This discussion focuses on the concepts of fairness and fault as they are portrayed by behavioral economists. I argue that economics distorts both concepts in ways that a behavioral approach cannot cure unless its proponents are willing to abandon consequentialism altogether.⁹ Consequences matter to the law, of course, but the essays in *Behavioral Law and Economics* give us reasons to shift focus away from states of affairs as such and toward matters of judgment and character.

I

ECONOMIST AND ANTI-ECONOMIST

The common ground between the economist and one who believes that economic analysis is distorted, distorting, and false (call him the anti-economist) is narrow or nonexistent. As a result, it seems easiest to lay out their differences in dialogue form. Therefore, as an introduction to the questions of value and rationality that concern us here, consider several rounds in the debate between the economist and the anti-economist.

The Anti-Economist: Since I was an undergraduate, I have been struck by the inadequacy of economists' conception of value, and by your narrow and implausible premises about how and why people are motivated to act. You seem to be caught in the seventeenth century, sharing Hobbes's conviction that all normative claims are nothing more than elaborations of pleasure and pain.¹⁰ Your conception of rational response to value seems only slightly less antique in its insistence, reminiscent of Hume's, that reason's role in action is only to gauge the intensity of competing desires, seek the means to their satisfaction, discount for probabilities of success, and pull the trigger.¹¹

This conception of value and rational response to value is actually widespread as a kind of folk-psychology¹² of action. But the fact is that few

9. The term "consequentialism" refers to a tradition in philosophical ethics that includes utilitarianism and neo-classical economics, among others. Consequentialism describes right action in terms of the promotion (maximization, optimization) of states of affairs such as utility, wealth, or social welfare. Philip Pettit, *The Consequentialist Perspective*, in MARCIA W. BARON ET AL., *THREE METHODS OF ETHICS: A DEBATE* 92, 129-33 (1997).

10. THOMAS HOBBS, *LEVIATHAN* 39-40 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) ("But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth Good: And the object of his Hate, and Aversion, *Evill* . . .").

11. DAVID HUME, *A TREATISE OF HUMAN NATURE* 415 (L. A. Selby-Bigge & P. H. Niddich eds., Oxford Univ. Press 2d ed. 1978) (1739-1740) ("Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.").

12. The term "folk-psychology" refers to a widely and uncritically held set of beliefs about human psychology. It echoes the term "folkways" as coined by the sociologist William Graham

serious students of value and motivation take the seventeenth- and eighteenth-century interpretations seriously. Even philosophers who accurately can be called neo-Humeans recognize that there is more to value and rational action than desire and its satisfaction.¹³ I have never been able to decide whether economists actually adhere to these outmoded theories,¹⁴ or whether they rely on the superficial plausibility of this folk-psychology opportunistically, to bolster the public credibility of economics as a discipline.

The Economist: Your mistake is to assume that economists have or need a psychological theory of value. On the contrary, economics doesn't make any claims about how people value things, or why they do what they do. Economics is based only on the observation that people do, in fact, choose one thing over another. Economic theory is agnostic about how or why this occurs.¹⁵ To call the notion of observed preferences a theory of value is much too grand a title for a simple, straightforward step in economic analysis.

Your alternative, if I have read the anti-economic literature correctly, is an elaborate theory of value that glorifies irrationality. The claim is made that valuations are incommensurable; in other words, that value cannot be reduced to a single measure such as utility or wealth or preference-satisfaction.¹⁶ To me, this claim implies that important choices are made arbitrarily and that significant actions are taken for no good reason,

Sumner. WILLIAM GRAHAM SUMNER, *FOLKWAYS* 3-4 (2d ed. 1913) (coining the term "folkways" to describe the widely and uncritically held beliefs that constitute the mores of a society).

13. E.g., GERALD F. GAUS, *VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY* 80-203 (1990) (setting forth a neo-Humean theory of value); MICHAEL SMITH, *THE MORAL PROBLEM* 92-129 (1995) (setting forth a neo-Humean theory of motivation); Bernard Williams, *Internal and External Reasons*, in *MORAL LUCK: PHILOSOPHICAL PAPERS, 1973-1980*, at 101, 102-04 (1981) (describing deliberations over and adjustments to one's "motivational set" as part of a neo-Humean conception of motivation); Philip Pettit & Michael Smith, *Practical Unreason*, 102 *MIND* 53 (1993) (describing practical reasoning as the consonance of deliberative reasons and desire).

14. For example, Gary Becker advances the Hobbesian and Humean views of value and motivation when he writes:

The economic approach to human behavior is not new, even outside the market sector. Adam Smith often (but not always!) used this approach to understand political behavior. Jeremy Bentham was explicit about his belief that the pleasure-pain calculus is applicable to all human behavior: "Nature has placed mankind under the governance of two sovereign masters, *pain and pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. . . . They govern us in all we do, in all we say, in all we think."

GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 8 (1976) (quoting JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 1 (J. H. Burns & H. L. A. Hart eds. Athlone Press 1970) (1780)).

15. Martin Hollis & Robert Sugden, *Rationality in Action*, 102 *MIND* 1, 2-7 (1993) (describing economic theory's disavowal of psychological premises in the theory of revealed preferences); cf. PAUL A. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* 90-92 (enlarged ed. 1983) (discussing the economic concept of a preference).

16. See ANDERSON, *supra* note 6, at 23-26, 55-56 (describing the incommensurability of value); RAZ, *supra* note 6, at 328-35 (distinguishing and describing the relationship between rough equality of value and incommensurability of value).

because we do make hard choices between competing ends.¹⁷ People usually pursue the satisfaction of their preferences in a consistent fashion, and they must necessarily treat disparate and dissimilar values as commensurate when they do so.¹⁸ So these claims about incommensurability seem to be empirically false. To be sure, people are irrational at times. They make decisions based on whim, prejudice, habit, and so on. In these instances people do not exhibit consistent preference orderings. But it seems misguided to treat these decisions as anything other than aberrational and self-defeating. Whatever our preferences might be, we can coordinate and satisfy them to the greatest extent possible and, presumably, this is what we wish to do. Insisting on supposed incommensurabilities only confuses and thwarts this enterprise.

The Anti-Economist. Your argument confuses incommensurability with incomparability. To say that values are context-dependent, plural, and incommensurable is only to deny that they can be ranked along a single metric. It is not to deny that competing values can be rationally compared or that rational choices between them are possible.¹⁹

Incidentally, this is the point at which your antique and impoverished theory of value comes to the fore. Your insistence that choice between competing ends “necessarily” entails commensurability of value, and your frank admission that you cannot conceive of any other basis for a rational choice, reflect your conviction that valuations, or “preferences” as you call them, are rationally comparable only on the score of intensity. This is simply indistinguishable from the Hobbesian conception of value.²⁰ It ignores the fact that, while value is premised in emotion, emotion is not merely a feeling.²¹ Emotion has a cognitive dimension, and it can be assessed along parameters other than intensity.²²

17. See Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1062 (1989) (advancing the argument that values must be commensurable because, otherwise, rational decision making would be impossible).

18. See Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 694-98 (arguing that apparent incommensurabilities can be resolved into interdependent utilities).

19. See Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PA. L. REV. 1569, 1588-91 (1998).

20. See HOBBS, *supra* note 10.

21. GAUS, *supra* note 13, at 49-56; ROBERT M. GORDON, *THE STRUCTURE OF EMOTIONS: INVESTIGATIONS IN COGNITIVE PSYCHOLOGY* 21-44 (1987); Nico H. Frijda, *Emotions Require Cognitions, Even if Simple Ones*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 197 (Paul Edman & Richard J. Davidson eds., 1994); Robert C. Roberts, *What an Emotion Is: A Sketch*, 97 PHIL. REV. 183, 185-90 (1988).

22. RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 173-90 (1987); ANDREW ORTONY ET AL., *THE COGNITIVE STRUCTURE OF EMOTIONS* 15-17 (1988). For example, a person who expresses distress for the hurricane that is dissipating into an ordinary storm, while demonstrating indifference to the hurricane's human victims, meaningfully can be said to be mistaken in her emotions. GAUS, *supra* note 13, at 136. She could benefit from treatment in which she is challenged to defend these responses

Similarly, because values are premised in emotion, they can be assessed along any number of parameters other than intensity of feeling.²³ To take a classic example, if a father were to accept a large sum of money not to see or speak to his children for several months, his action would seem odd and inappropriate to most people and could be expected to carry some social stigma.²⁴ He might truthfully say that his desire for the cash was more intense than his desire for the time with his children, but this would hardly end the debate. In contrast, suppose a father were offered the same amount of money to do a challenging job that promised to be personally rewarding and of some value to society. He could accept the offer with little fear of social condemnation, even if the job required him to be out of communication with his family for several months.

The difference in these two transactions reflects the difference between commensurability and comparability. The first father behaves as if time with his children and a cash payment could be brought under a single metric: the relative intensity of his desires. Of course there is nothing wrong with cash transactions as such, but we simply don't believe that the cash transaction is appropriate in this situation, resulting in the social condemnation of the father's action. In the second example, in which considerations such as the pursuit of a profession and social good come into play, the father can defend his choice rationally. For example, he can reason that his children will benefit in the long run from his doing challenging and fulfilling work, not only materially, but from the example it provides of a serious person making sacrifices in a worthwhile pursuit. The notion of incommensurability is simply a way of cautioning against oversimplifying practical reasoning by collapsing decisions of the second kind into decisions of the first kind. There are real differences between these two fathers and the transactions in which they engage, differences that are due to the context-dependence, pluralism, and incommensurability of value. These differences explain the social condemnation of one choice and the social acceptance of the other.

The Economist: It is tempting to insist that the two transactions do collapse into one another. It seems to me that the condemnation of the first father's decision to "sell" time with the kids is a bit of pretense and posturing, while the second father's decision to take a job for the same amount of money involves a good bit of rationalization. The bottom line is that time at home with the kids does have a value that is commensurable with

rationally. *Id.* at 31-34 (noting that psychotherapy assumes that emotions are cognitive); Pildes, *supra* note 6, at 1546 (same).

23. See GAUS, *supra* note 13, at 106-26; ORTONY ET AL., *supra* note 22, at 34-47; Andrew Ortony, *Value and Emotion*, in MEMORIES, THOUGHTS, AND EMOTIONS: ESSAYS IN HONOR OF GEORGE MANDLER 337 (William Kessen et al. eds., 1991); cf. DE SOUSA, *supra* note 22, at 218-20 (describing mistakes in desire as arising from mistakes about the aspect or character of the emotion).

24. RAZ, *supra* note 6, at 345-53.

cash, even if part of that value comes in the form of enhanced reputation. It's just a question of how much is on offer. But as I say, to make this argument is only a temptation. It is one that I will resist because it would commit me to psychological premises that I just don't need.

Even if I concede your main point, that values are comparable even if not commensurable, and that choices between incommensurable values can be made on a rational basis, economics can and does remain agnostic on the psychology of valuation. Whether they are rational or irrational, these choices are made and can be observed. Even if the father in your second example is sincere and truthful, he nevertheless exhibits his preferences in this transaction. I can satisfy your concern about oversimplification with a suitably elaborate description of these preferences. He has a preference, for example, for exposing his children to role models of people engaged in serious and rewarding work. This preference might not have a cash value, a point I don't concede, but it is an observable value that is traded against time at home in the second transaction. There is no reason to conclude that economic analysis is incapable of accurately describing and assessing his choices.

The Anti-Economist: Your first argument has a couple of flaws, and perhaps you recognize one of them, since you decline to endorse it. But the other flaw in your first argument is one you apparently don't see, because it affects your second argument as well.

The first flaw is, once again, the inadequacy of your conception of practical reasoning. You are tempted to argue that pretense and rationalization lie behind society's different reactions to the two fathers' transactions because you adhere to Hume's simple desire-belief model, in which desires remain untouched by reason.²⁵ According to this model, moral beliefs in particular have no motivating force, and do seem to be little more than pretensions that are likely at any moment to be overwhelmed by ordinary desires. Furthermore, these desires can be conditioned at a non-cognitive level. On this view, people are both opportunistic and manipulable, words never really match deeds, and cynicism is in order. Thankfully, there is ample reason to think that this primitive account of practical reasoning is simply mistaken, even if it survives as folk-psychology.²⁶

The second flaw has to do with your insistence that everything has a cash value because some transaction at some price can always be imagined. Your error is to conflate price and value. We agree, I assume, that price and value are distinct and don't always match up. The question is when and why the disparity arises. Take an example. In the novel *Sophie's Choice*,

25. See HUME, *supra* note 11.

26. See GAUS, *supra* note 13, at 84-112; Korsgaard, *supra* note 6, *passim*; SMITH, *supra* note 13, at 16-59.

the main character arrives on the receiving dock at Auschwitz and is forced by a sadistic SS officer to choose which of her children will live, on pain of having both of them killed.²⁷ In other words, she is forced to purchase her son's life at the price of her daughter's life. This price, of course, has nothing to do with the value of her children. The question is why not. You would say that the problem is unequal bargaining power: with the Nazi death machinery to back him up, the SS man can dictate this price. The failure of price to match value reflects a market failure, but you would insist that in a perfect market, price will always match value.

In fact, however, the conceptual distinction between price and value can never be fully overcome no matter what the circumstances. Precisely because value is context-dependent and incommensurable, there is necessarily some unrealized value or some uncompensated-for loss of value in all actual choices. In other words, value has a tragic dimension. For example, say that Mary is born with extraordinary talent for both the piano and swimming. She can pursue both vocations up to a certain point. But if she wishes to achieve true excellence in either one, she must at some point devote herself fully to one vocation to the exclusion of the other. The necessary hours at the swimming pool are the same hours as those she would need to spend practicing her music. She cannot solve this dilemma about the course of her life by finding an optimal mix of piano playing and swimming that will give her the maximum attainable satisfaction. She is not motivated either to swim or to play by a prospect of generic satisfaction; she is motivated in each enterprise by what it distinctively allows her to express and to be. These expressions and identities are not interchangeable, and there is no optimal mix of the two, because the value of excellence as a musician and the value of excellence as an athlete are incommensurable values.

This is not an extraordinary situation; it is quotidian. If Styron's Sophie were allowed to live in peace, she would nevertheless face choices of this kind with her children. An hour spent drawing with her daughter is not an hour spent flying a kite with her son, and the choice between these actions is not a matter of optimizing the total amount of parental satisfaction. Sophie's children are incommensurable in value; time spent with one child is incommensurable with time spent with the other. As a result, some value is lost in the course of choosing and acting. To call this loss the tragic dimension of value is not to say that choice is always a cause for grief. It is only to point out that the loss of value entailed by choice is a necessary feature of the human condition.

Your faith that price will equal value in a perfect market reflects a failure to appreciate the tragic dimension of value. If, within an ordinarily complex practical context, I accept a price for something of value, time

27. See WILLIAM STYRON, *SOPHIE'S CHOICE* 483-84 (1979).

with my children for example, this does not imply that the cash payment fully reflects this time's value. Nor does it imply that any discrepancy must be due to some market failure; nor that this time is commensurable with the value of all other things, such as the rewards of a profession. On the contrary, there is unrealized and uncompensated-for value in these transactions, just as there is in any practical choice. It is a necessary feature of the human condition that I cannot have all that I want. Price and value are distinct because value has a tragic dimension and price does not, and this is not a gap that a perfect market or anything else can bridge.

The recognition that value has a tragic dimension also undermines your insistence that the economist's treatment of revealed preferences is untouched by questions about the nature of value, and can fully describe the second father's choice. It is a persistent and odd feature of economic thinking that its practitioners insist they have no theoretical commitments, simply because they refuse to articulate them. Revealed preferences are evidence of valuations, and inferences from revealed preferences are claims about the values that lie behind actions. But the tragic dimension of value is invisible to revealed preference analysis because lost and unrealized value is never revealed in choices made. *Homo economicus* is oblivious to the tragic dimension of value. But real people are all too aware of it, and it lies behind many non-optimizing features of their behavior.

The Economist: Of course economic analysis does not reflect human rationality in all its detail. But *homo economicus* is not just a simplification of human reality, it is a parsimonious version of that reality. It is comprised only of those carefully selected assumptions about value, choice, and action that are not too complex to be useful in economic modeling, but that are sufficiently complex and accurate to allow that modeling to generate insight into and accurate predictions about human behavior. Naturally some features, such as the tragic dimension of value (if this exists) are not represented. Some detail is missing in the pictures thus produced, but the pictures are accurate in their essentials because the assumptions about value and choice cover the essentials of practical rationality. In fact, *homo economicus* is a flexible concept. It is conceived of differently by various economists engaged in various analyses, but in each instance the objective is an optimal complexity. The addition of the tragic dimension of value to *homo economicus*, even if it could be done and even if there were agreement on what that concept means, would overburden economic analysis with a complexity that would not be justifiable in terms of increased accuracy of prediction or greater insight into behavior.

The Anti-Economist: The argument that you have just made is one that I call the skeleton of value thesis. You admit to using an incomplete version of practical rationality, but you contend that it captures the essence of practical rationality. The flesh and blood of human valuation and choice

are missing, but you claim to have captured at least the superstructure at the center of it all. The details can be draped over this superstructure later, if necessary, but you suppose that the account of choice and action is accurate at its core.

This is a piece of essentialism that, like all essentialism, needs a strong supporting argument. But in this case the argument is lacking. You have selected features of human practical rationality for inclusion in your model on the basis of their utility in facilitating economic analysis. It is simply a non sequitur to say that these very features represent the essence of practical rationality, and that therefore the results of economic analysis are descriptively accurate. The error is compounded when these results are asserted to be so well-founded that they provide a uniquely reliable basis for public policy prescriptions. Because the skeleton of value thesis rests on this non sequitur, it is better described as the skeleton of value fallacy.

How do you know that your parsimonious account has captured practical rationality in its essentials? On what ground have you concluded that optimizing behavior is sufficient for an accurate account of human motivation and action, and that non-optimizing behavior is not necessary? Some argument on this score is needed.²⁸ Given your discipline's normative pretensions, how do you justify leaving out of account such basic behavior as honoring family and friends, living out a personal narrative, expressing an emotion, or nurturing a virtuous character? Can you persuade us that you have not picked an incomplete set of practical rationality's features, so that your prescriptions are distorted, or that you have not chosen the wrong features, so that your normative claims are simply mistaken?

The Economist: Of course I can. Again, you don't seem to appreciate economics as a scientific enterprise. The accuracy of these assumptions isn't something that can be, or needs to be, defended in the abstract. On the contrary, it is defended by concrete results. Like any scientific hypothesis, the construct of a rational economic actor is falsifiable: *homo economicus* is shown to be false if it fails accurately to predict human behavior. The accuracy of the construct, conversely, is demonstrated by its resistance to falsification, that is to say, by its success in predicting behavior. The proof you are asking for is to be found in the track record of the entire discipline.

The Anti-Economist: The problem with that argument is that the economic conception of rationality isn't a hypothesis at all, but an axiom. Instead of testing *homo economicus* in deliberate attempts to disprove it, most economists spend their time generating elaborations of their

28. But cf. BECKER, *supra* note 14, at 153 ("[E]veryone more or less agrees that rational behavior simply implies consistent maximization of a well-ordered function, such as a utility or profit function.").

arguments in order to preserve their premises against contrary evidence.²⁹ To take a notorious example from public choice theory, no self-interested, consistent maximizer of preferences would vote. Given that he is extraordinarily unlikely to cast the deciding vote, voting cannot possibly benefit him as much as virtually any alternative activity.³⁰ Nevertheless, people continue to vote in election after election. Far from revising their view that people are always utility maximizers, and considering explanations for voting that don't make this assumption, economists of the public choice school have spent the last several decades defending the axiom of utility maximization against this falsifying evidence. They do this, not by subjecting revised hypotheses to testing, but by abstract argumentation that owes much to outmoded folk-psychology and little to science.³¹

To give credit where credit is due, some economists have taken the construct of economic rationality as a hypothesis rather than a given. They have conducted experiments to determine whether, even in the simplest, pared-down, purely monetary settings for choice, the assumptions that comprise *homo economicus* accurately portray behavior. They have found that those assumptions are not accurate. Contrary to Coase, for example, initial assignments of property rights do affect their ultimate disposition, even in the absence of transaction costs. The only complaint I have about this work is that its full implications have not been articulated. These scholars see themselves as engaged in a quest for the optimally complex version of *homo economicus*, just as you describe it. But while they see themselves as adding sinew to the skeleton of value, they are in fact effectively dismantling it, and rightly so.

II

OVER-EXPERIMENTATION AND UNDER-ANALYSIS

Several of the contributors to *Behavioral Law and Economics*, particularly those who have examined the endowment effect and its implications for the Coase Theorem, seem to be nascent anti-economists. They would deny this calumny, of course, but a more thorough and far-reaching consideration of the implications of their iconoclastic experiments might give them reasons to consider such a career change.

Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler's essay, *Experimental Tests of the Endowment Effect and the Coase Theorem*, examines the endowment effect (pp. 211-31). Suppose that each member of

29. DONALD P. GREEN & IAN SHAPIRO, *THE PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 33-46 (1994).

30. *Id.* at 49-50 (citing ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); NORMAN FROELICH & JOE A. OPPENHEIMER, *MODERN POLITICAL ECONOMY* (1978); GORDON TULLOCK, *TOWARD A MATHEMATICS OF POLITICS* (1967)).

31. GREEN & SHAPIRO, *supra* note 29, at 47-71.

one group of subjects in an experiment is given a token that has no value other than a redemption value assigned to it in the experiment, according to a given scale. If these subjects are then instructed to trade with members of another group, each of whom has cash and information about the redemption value of a token, but no token, then about half of the tokens in the experiment will change hands. The median price for both buyers and sellers will be the median price on the assigned value scale. This "induced value" experiment tends to confirm the Coase Theorem, which states that the initial assignment of a property right has no effect on the ultimate distribution of that right (pp. 211, 213).

Suppose, however, that the tokens in this experiment are replaced with an item of minor value such as a coffee mug or a set of pens. The other conditions of the experiment remain unchanged. Each item has a redemption value assigned to it in the experiment according to a given scale, and subjects endowed with an item are instructed to trade with members of another group, each of whom has cash and information about the redemption value of an item, but no item. In this experiment, far fewer than half the items change hands. The median price demanded by sellers is significantly higher than the median price offered by buyers (pp. 216-20).

The latter experiment tends to disprove the Coase Theorem, along with the standard explanations legal economists offer for real-world deviations from the theorem such as transaction costs or income effects (p. 219). Initial assignments do matter: a phenomenon Richard Thaler dubbed the "endowment effect." The endowment effect is not due to transaction costs, because there are no more or different transaction costs in the coffee mug trials than in the induced value trials. Neither poor bargaining nor habits of strategic bargaining (whereby sellers might overstate their price and buyers undervalue goods) account for the endowment effect, because these distorting tendencies do not show up in the induced value trials and (more importantly) because the effect persists in repeated item trials with the same subjects, in which they have the incentive and opportunity to shed these tendencies.

Kahneman, Knetsch, and Thaler reported these experiments, along with further refinements that also confirm the endowment effect, in a 1990 paper reproduced in *Behavioral Law and Economics* (p. 211). The importance of their paper is difficult to overestimate, and its influence is evident throughout the volume. The authors were frank about contradicting the Coase Theorem, and did not hesitate to declare that "endowment effects and loss aversion [are] fundamental characteristics of preferences" (p. 229). Nevertheless, their explanation for the endowment effect is hesitant and confused. They write:

Some markets may share [the features] of induced value markets, especially when the conditions of pure arbitrage are approached.

However, the computation of net gain and loss is not possible in other situations, for example, when risky prospects are traded for cash, or in markets where people sell goods that they also value for their use. In these conditions, the cancellation of the loss of the object against the dollars received is not possible because the good and money are not strictly commensurate. The valuation ambiguity produced by this lack of commensurability is necessary, although not sufficient, for both loss aversion and a buying-selling discrepancy (p. 226).

This passage seems, at first, to attribute the endowment effect to the kind of incommensurability that the anti-economist sees in value-rich practical contexts. If this were the case, then this analysis of the endowment effect would be a remarkable departure from standard economic thought. But Kahneman, Knetsch, and Thaler are not revolutionaries; they are members of a loyal opposition within the economic fraternity.

To say that goods and cash are not “strictly” commensurate suggests that they are commensurate in some yet-to-be-determined way. To refer to the endowment effect as a “valuation ambiguity” falls short of an appreciation of value’s complexity if there is a suggestion that less complexity or a greater capacity to resolve it would eliminate the ambiguity. And the authors do suggest this. They attribute their faux incommensurability to their experimental subjects’ inability to compute gains and losses. Thus they attribute the endowment effect to bounded rationality, rather than to the intrinsic features of value itself. The authors’ failure to appreciate the cognitive complexity of valuation is corroborated by their reference, in a passage just preceding the one quoted above, to “the differences in preference or taste demonstrated by more than seven hundred participants in the experiments reported in this paper . . .” (p. 226). The identification of value with “taste” is a classic error of the economist who conceives of value in Hobbesian, non-cognitivist terms, as a feeling, in response to an object, that varies only in intensity from one object to another.³²

Russell Korobkin’s essay, *Behavioral Economics, Contract Formation, and Contract Law* (pp. 116-43), is strongly influenced by Kahneman, Knetsch, and Thaler, and comes much closer than they do to articulating the full implications of the endowment effect. Korobkin brings a more sophisticated conception of value to bear on the problem, but he is, if anything, even more ambivalent about these implications than his predecessors. In spite of his apparent grasp of valuation’s cognitive

32. See, e.g., Epstein, *supra* note 18, at 688-89 (“Initially, it is important to note that the incommensurability theme resonates tightly with one strand of utilitarian thought which insists that all values should be regarded as subjective and personal to the individual who holds them.”).

dimensions, Korobkin also hesitates to depart from the orthodoxy of utility maximization.

Korobkin conducted a series of experiments with law students that isolated the endowment effect in the context of contract negotiations (pp. 117-29). He describes an experiment in which the law student participants were told that they represented a shipping company that was engaged in negotiations with a company that sold gift items, that the parties had agreed on a twenty dollars per package shipping price, and that their client sought a contract term that would limit its liability to reasonably foreseeable damages. In one trial, subjects were told that an industry form-contract contained such a provision. The subjects were asked to state a per-unit price at which the client would be willing to surrender the clause and accept a full-liability damages provision. In another trial, subjects were told that the industry form-contract contained a full-liability provision, and the subjects were asked to state a price at which the client would purchase a limited-liability provision. As in the experiments by Kahneman, Knetsch, and Thaler concerning property rights, the seller's price greatly exceeded the buyer's price, indicating a tendency to hold on to endowments or to maintain a perceived status quo in a contracting situation. Refinements of this and the other experiments eliminated transaction costs, private information, and network benefits as explanations for the results (pp. 126-29).

Korobkin advances an explanation for the endowment effect that recognizes the emotional basis of valuation, and that also recognizes the cognitive dimensions of emotion and value. He attributes the endowment effect to the avoidance of regret, and describes regret as a complex, rationally articulated psychological phenomenon (pp. 129-33). According to Korobkin, regret arises from counterfactual thinking. In the process of constructing counterfactual scenarios, we find some aspects of reality more mutable than others. Stable background features such as earth's gravity, one's own identity, and social norms are relatively immutable, whereas abnormal events are highly mutable. Specifically, actions not taken are relatively immutable, whereas actions one has taken are relatively mutable. The mutability of actions taken means that counterfactuals are more readily constructed concerning one's actions as compared to one's inaction. The result is a greater likelihood that one will experience regret over an action taken than over an action not taken. Anticipation and avoidance of regret favors maintaining the status quo, resulting in the endowment effect.

However, at the critical juncture of this inquiry, Korobkin's analysis is unpersuasive. He asks why the prospect of regret over an unfortunate decision should loom larger than the prospect of rejoicing over a fortunate one. In other words, why isn't the regret-based endowment effect canceled out by the equally likely possibility that one's actions will succeed instead of fail? Korobkin notes that the salience of regret is consistent with the

phenomenon of loss aversion, in which the apparent disutility of a downward departure from a reference point is greater than the apparent utility of an upward departure of the same magnitude from the same reference point (p. 133).³³ These phenomena are consistent; indeed, Kahneman, Knetsch, and Thaler treat loss aversion and the endowment effect as variants of a single phenomenon (p. 226). But Korobkin offers no explanation for either loss aversion or the salience of regret.

The difficulty is that Korobkin ignores what he knows about the cognitive dimensions of regret. To frame the problem, as Korobkin does, as a question of "feelings of regret" versus "feelings of rejoicing" (p. 133), is to treat regret and rejoicing in simplistic Hobbesian terms, as a pain and a pleasure that mirror one another. It is to suppose that the relationship between the two emotions can only be a matter of one's outweighing or counteracting the other by its greater relative intensity. Instead, Korobkin ought to generalize the points he makes about regret, and recognize that all emotions are similarly rational and articulable. Emotions are not merely feelings that vary in intensity, but complex phenomena that can be reasoned about and rationally compared in many dimensions. If there is an explanation for the salience of regret in matters of choice, and a more complete explanation for the endowment effect, then it lies in the intricacies of regret as compared to resignation, grievous loss, and defiant submission on the one hand, and satisfaction, vindication, rejoicing, and shameless gloating on the other.

If Korobkin were to engage in a qualitative analysis of the values at issue, instead of the quantitative analysis he pursued up to this point, then he would no longer be engaged in doing economics. This point might be taken to be a *reductio ad absurdum* of my own argument, but to take it as such, and to dismiss this criticism of economics so lightly, would be a mistake. Korobkin has indeed arrived at a point at which it is impossible to continue to do economics. He recognizes that value has a cognitive dimension. His thesis is that the cognitive dimension of valuation, in particular the logic of regret, makes valuation context-dependent. The difficulty is that if value is context-dependent, then values are incommensurable.

The connection between the context-dependence of valuation and the incommensurability of some values is the notion of value's intransitivity. Because values arise from diverse and discrete practical contexts, they often are intransitive.³⁴ For example, Mary finds that winning the Van Cliburn competition is not better than becoming the national champion in the 200-meter backstroke. Becoming the Olympic champion in the

33. Korobkin cites Amos Tversky & Daniel Kahnemann, *Loss Aversion in Riskless Choice: A Reference Dependent Model*, 106 Q. J. ECON. 1039 (1991).

34. To say that values are intransitive means that if I find that A is not better than B, but C is preferable to B, it does not follow that C is preferable to A.

200-meter backstroke would be preferable to becoming the national champion, but this does not necessarily imply that becoming the Olympic champion in the 200-meter backstroke is preferable to winning the Van Cliburn competition. These alternatives are intransitive because they arise from radically different practical choice settings: art and sports.³⁵ Economists attribute the apparent incommensurability of some values to their being very close or roughly equal in value, and therefore difficult to choose between. In fact, it is their intransitivity that accounts for their incommensurability.³⁶ In this example, the swimming alternatives are roughly equal in value, but the piano alternative is incommensurable with both swimming alternatives. Whereas roughly equal values can be analyzed in economic terms, genuine incommensurability of value renders economic analysis impossible because the theory of utility maximization depends entirely on the notion that preferences are transitive.³⁷

This, then, is the situation. Korobkin, like Kahneman, Knetsch, and Thaler, has pursued the evidence where it leads. But his inquiry into the endowment effect has reached a point at which the simplifying assumptions of economics concerning the psychology of choice and action are an impediment to further understanding. To resist the next step in the analysis out of a perceived need to maintain the premises of economics, and the integrity of the discipline, can only deflect and distort the analysis. To adhere to the assumptions of utility maximization and the transitivity of preferences when the evidence indicates that these assumptions cannot be maintained violates the principles of scientific inquiry. To pursue behavioral economics is to discover good reasons not to do economics at all.

We can only speculate upon the extent to which economists and legal economists who have examined the endowment effect recognize these implications. At times, they seem strikingly obvious. For example, Korobkin writes that the assumption of exogeneity of preferences (that is, that there is no endowment effect) "is embedded deeply in the behavioral model of rational choice theory, which underlies the economic analysis of law" (pp. 117-18). If preferences are not exogenous, but are instead endogenous to the practical choice situations that present them, then this implies that rational choice theory itself is at least questionable. Yet Korobkin does not question this model, even though his own experimental evidence showing

35. ANDERSON, *supra* note 6, at 55-56.

36. RAZ, *supra* note 6, at 328-35.

37. Cf. LEONARD J. SAVAGE, *THE FOUNDATIONS OF STATISTICS* 69 (2d ed. 1972) ("A function U that thus arithmetizes the relation of preference among acts will be called a utility. It will be shown that the multiplicity of utilities is not complicated, every utility being simply related to every other."); James P. Spica, *The Rationality of Normative Expectations*, 24 J. CONTEMP. L. 259, 277 n.74 (1998) ("Ramsey's third axiom (concerning the transitivity of preference relations) is characteristically innocuous: 'If option A is equivalent [i.e., indifferent] to option B and B to C then A to C.'") (citing F. P. Ramsey, *Truth and Probability*, in *PHILOSOPHICAL PAPERS* 52, 75 (D. H. Mellor ed., 1990)).

the weakness of the exogeneity of preferences thesis has given him every reason to do so.

Ward Farnsworth's essay, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral* (pp. 302-21), demonstrates that he is another member of the younger generation of legal economists who sees the implications of the Coase Theorem's demise, but does not see them clearly. Calabresi and Melamed (as well as Coase) advance the theory that judgments that misallocate resources leave unrealized value on the bargaining table. Their analysis suggests that this value should be taken up and redistributed by post-judgment bargaining (p. 302).³⁸ If, due to high transaction costs or other market failures, this bargaining cannot be expected to take place, then it is incumbent on courts to recognize the economically rational outcome and to effect it in the judgment. Farnsworth's essay relies on a small, unscientific sampling of actual nuisance cases to argue that post-judgment bargaining is unlikely ever to take place. In the cases he examined, the parties' lawyers invariably described such bargaining as foreclosed, not only by the level of animosity existing between the parties, but also by the way the parties valued the rights at issue in their litigation (p. 304). Several of the parties expressed a continuing belief in the right to use their land as they pleased. Most stated that they were uninterested in money, and some acted on this sentiment by turning down an offer by the other side to purchase their property outright.

Farnsworth attributes the parties' acrimony to the absence of a depersonalizing market for the highly particular rights at issue, and to the resulting absence of pacifying market norms (pp. 311-12). Significantly, however, Farnsworth recognizes that this explanation does not reach the other impediments to post-judgment bargaining. He characterizes these other impediments as a distaste for bargaining, and he recognizes that this attitude is an aspect of the context-dependence of value. Farnsworth explains that:

The "price" that the holder would state in such a situation is not a price for the rights per se, but rather reflects the cost of selling rights to a particular neighbor against the background of a particular history or context of beliefs and norms that makes cash bargaining uncomfortable. The parties were not thinking of their rights as bargaining chips and did not want to think that way about them. Their preferences and sense of value could have been flattened onto an accountant's spreadsheet, Mercator fashion, but would have been distorted by the process in a way that obliterated any bargaining range (p. 314).

38. Farnsworth cites Coase, *supra* note 2, at 13; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115 (1972).

Farnsworth also recognizes that value is founded in emotion, noting: "To say there are no substitutes for a good is to make a statement about the way people feel about the good, not about the good itself" (p. 316). Given these features of value, Farnsworth recognizes that it is tautological to say that the parties would have bargained if different rights had been at issue, or if robust markets for these rights had existed, or if the parties felt differently about their rights. Each of these propositions amounts to no more than an empty supposition that the parties would have behaved differently with regard to the values at issue if different values had been at issue (p. 316).

Farnsworth is to be credited for his sensitivity to the context-dependence of value, but his insights leave him without any explanation for the parties' behavior. Previous generations of economists and legal economists hardly were unaware of the fact that actual bargaining after judgment is unlikely. Even though they attributed these failures to bargain to market failures, such as high transaction costs, presumably they were no less aware than Farnsworth that people can be stubborn and vindictive. But they did not draw the conclusions from this that Farnsworth draws, because traditional economic analysis contains a subtext that explains away the context-dependence of value as Farnsworth presents it, and that threatens to swallow Farnsworth's analysis whole.

The economist, like his utilitarian forebears, is at heart an essentialist. The point of ignoring high transaction costs, incomplete information, and other features of less-than-ideal markets is to reach what he perceives to be underlying market mechanisms. The essentials of markets must be grasped before society can intelligently identify and eliminate market failures, reduce inefficiency, and maximize social welfare. Individual decision making is also subject to this essentialist enterprise. People's assessments of value are, at bottom, emotional reactions. Like other emotional reactions, judgments about value can be confused and confusing, and may cause people to fail to recognize and pursue their own long-term welfare. As with markets, it is important to get down to essentials. Problems in individual decision making can be analyzed by looking at the essentials of emotion and value, which for the economist consist of pleasure versus pain: to fail to maximize one's pleasure over the long term is simply irrational. This simple, seemingly irrefutable core of practical reasoning provides, to the economist's way of thinking, an uncontroversial and uniquely reliable basis for public policy.

Nothing in the economist's enterprise, so conceived, is inconsistent with the context-dependence of value. Granted that value arises from particulars, we can nevertheless abstract from particulars. We can intellectually extract not only pleasure and pain from the welter of emotions, but also the essence of rational behavior from the welter of

context-sensitive valuations and emotionally grounded motivations. According to the traditional economist, the essence of rational behavior is to optimize pleasure. To fail to put sufficient thought into this task, to fail to distinguish the essential from the inessential in one's present circumstances, is just another aspect of economic irrationality. Farnsworth's litigants certainly were embedded in their particular practical choice settings. But to the extent that they failed to rise above them (to generalize, to be objective, to take the long view) they were irrational. This kind of practical reasoning has no role to play in sound public policy analysis.

Farnsworth concedes too much to the traditional economic argument when he allows that the nuisance case parties' heeding their context-dependent evaluations was irrational. He writes:

It may not be possible to state one price that the owner of an entitlement places on it; its value may depend on who is asking and why, and on what sort of statement the parties would be making about the right, and about themselves, by entering into a cash transaction for it. These are instances of human complexity. Whether they are instances of irrationality in either a lay or economic sense is another and more difficult question (p. 314).

The answer to this more difficult question is that the parties were not behaving irrationally, except in an economic sense, and that this demonstrates a fatal shortcoming in the economic sense of rationality.

Farnsworth need not concede even the possibility that the parties' behavior is irrational. The foregoing economic argument against Farnsworth's position rests on the skeleton of value thesis: the notion that the assumption of utility maximization captures the essentials of sound practical reasoning and creates a uniquely reliable set of economic implications, even if the value thesis fails to capture all of human practical reasoning. When Farnsworth recognizes that the valuations of his nuisance litigants are legitimate because they are context-dependent, he recognizes, in effect, that the skeleton of value thesis is a fallacy. Many valuations do not call for maximization as a rational response; they call instead for expression, or fidelity, or nurturing.³⁹ These non-optimizing responses are neither irrational nor reducible to "real" value; nor are they aesthetic responses to "real" value. The supposition that non-optimizing behavior is any of these things, and that it safely can be ignored in both descriptive and prescriptive analyses of human behavior is to misunderstand the nature of value and practical reasoning.

Whether because of a reluctance to discard the axioms of economic thought or for other reasons, Farnsworth, like Korobkin, fails to appreciate the full implications of context dependence and to break free from the skeleton of value fallacy. As a result, he overlooks the critical feature of his

39. See authorities cited *supra* note 6.

nuisance cases, the tragic dimension of value. When the values at issue in a practical choice setting are incommensurable, as they are bound to be in cases involving land, then a choice between competing values necessarily leaves value unrealized or uncompensated for. This is the tragic dimension of value, and economics will always fall short of explaining it. The judgments in these cases are imperfect resolutions of the conflicts at their core, but no subsequent negotiations can produce a better result. The choices implicit in the judgments inevitably leave value unrealized, precisely because the values behind the conflicts are context dependent. The premises of economic thought ignore the features of value that give rise to its tragic dimension. The pretense that all value nevertheless is reduced and incorporated into economic analysis precludes any acknowledgment of this deficiency.

III FAIRNESS AND FAULT

What difference does it make to law or legal theory if economics rests on the skeleton of value fallacy? It renders economics incapable of giving a persuasive account of core legal concepts, such as fairness and fault. It causes us to overlook the impossibility of eliminating ex post determinations of value and, as a consequence, to fail to appreciate fully the role of adjudication in law. And it leads to an overemphasis on states of affairs, and a blindness to the law's efforts to shape character and to assess the quality of individuals' practical reasoning. Both fairness and fault have far more to do with the ongoing construction of personal and social identities than they do with the production and distribution of social welfare. Ultimately, these considerations lead to the conclusion that we ought to abandon the consequentialist model in legal theory,⁴⁰ and make use of the quite different tradition in philosophical ethics known as virtue ethics.⁴¹

In the lead essay in *Behavioral Law and Economics*, Jolls, Thaler, and Sunstein consider the ultimatum game and the importance of fairness to

40. By "the consequentialist model in legal theory" I mean the pervasive assumption that all law is a system of incentive structures designed to induce self-interested individuals to produce certain policy outcomes through the use of instrumental reasoning. See *infra* notes 60 and 61 and accompanying text.

41. One should not be put off from the notion of virtue ethics legal theory by the colloquial meaning of the word "virtue." It does not denote a rigid morality. In philosophical ethics, the word "virtue" refers to self-governance at the level of motivation by means of the conscious cultivation of one's values, attitudes, and propensities. The principal characteristic of a person of virtue is sound practical judgment: the capacity to do the right thing in any given context because one perceives, values, and pursues the good as it presents itself in particular circumstances. This quality of judgment is the focus of virtue ethics, and it stands in direct contrast to a doctrine of moral duties. See Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1449-56 (1995) [hereinafter *Inculcation*]. Virtue ethics legal theory consists mostly of a rigorous examination of the ways in which the law relies on individuals' internalizing the law.

practical reasoning (pp. 21-26). A simple version of the ultimatum game involves two players and a sum of money. The players are told that if they can agree on how to divide the money, they can keep it. However, negotiations are limited to one round: one proposal by one player and one acceptance or rejection by the other. If the Responder rejects the Proposer's offer, neither player gets anything. According to rational choice theorists, the Proposer will offer the smallest unit of currency into which the sum can be divided, and the Responder will accept it. It is better from the Responder's point of view to receive a penny than to receive nothing, and it is obviously preferable from the Proposer's point of view to take as much of the pot as he possibly can.

The problem for rational choice theory is that real players almost never play the game this way. Instead, Proposers usually offer a fair portion of their windfall, at least 20% and usually about 40% to 50%, and Responders reject offers lower than this. Reputation effects don't account for these results, because the game is a one-time event, often played anonymously. Repeated trials that might allow for learning do not lead to different results.

Jolls, Thaler, and Sunstein attribute these results to bounded self-interest and, specifically, the pursuit of fairness. They define a fair result as one that does not depart substantially from a "reference transaction": some benchmark position of the parties (p. 26). In the simple version of the ultimatum game, the reference transaction is the parties' entry into the game with equal rights to the game's windfall. Jolls, Thaler, and Sunstein contend that players in the ultimatum game hew to the reference transaction because they value fairness. Elaborating their notion of bounded self-interest, the authors describe this commitment to fairness as a set of preferences that includes a preference for the well-being of some others and a preference for "what kind of person [one] wish[es] to be" (p. 25).

This analysis is unsatisfactory because its principal points are contradictory. First, the authors refer to "substantial" departures from the reference transaction as unfair (p. 26), but of course the issue is more complex than this. A better way to put the point would be to ask whether there has been an "unreasonable" departure from the reference transaction. If players were told that they would play two rounds of the ultimatum game, switching roles after the first round, then it would be perfectly fair for the Proposer to offer the Responder a penny. This would be a substantial departure from the reference position, but the prospect of a second round would make it eminently reasonable and fair. In this game, the reasonable and fair division also would be an equal division, but this is not always the case. In the original version of the ultimatum game, an offer of anything over twenty percent appears to the players to be reasonable and fair. This is not an equal division; it is a proportionate division. If fairness is a

reasonably proportionate departure from a reference transaction, then the question is how this proportionality is determined. As Jolls, Thaler, and Sunstein seem to recognize, it has to be determined by reference to the practical context in which the issue arises (p. 26). There is no context-independent answer to a question such as, "What is a reasonable proportion?"

However, the authors undercut their own insight when they describe fairness in terms that fit the skeleton of value thesis. They describe the concern for fairness as the product of a preference for others' welfare and a preference for a character one can live with, and not as the product of concern for others' welfare or concern for one's character. The point of framing these concerns as preferences is to make them amenable to economic analysis. A preference for others' welfare is a utility function like any utility function: a preference for a defensible character can be plotted on an indifference curve, and so on (p. 24). This move echoes the authors' description of bounded self-interest as "an important fact about the utility function of most people: They care, or act as if they care, about others . . .," discussed in Part 1 (p. 16). These passages imply that selfless behavior ultimately can be reduced to self-interested behavior. Furthermore, they imply a reduction of incommensurable, context-dependent value to commensurable, context-independent value where "desires compete with others in a world of scarce resources" (p. 25). The authors do not deny that people genuinely do behave in selfless ways, but they suggest that this behavior can be translated into the terms of economic analysis without a loss of significance.

In short, one of the authors' two points about fairness recognizes irreducible, context-dependent, and incommensurable value, while the other point implies that all value can be reduced to the maximization of context-independent utility. Both of these things cannot be true. If our concern for the welfare of others can be reduced to preferences, then the question of reasonable proportionality involved in fairness can be resolved by the standard techniques of economic analysis. If the context-dependence of value places the reasonable proportionality of fairness beyond the reach of economic analysis, then our concerns for the welfare of others and for a defensible character are not reducible to preferences. Put another way, if one recognizes the deficiencies in the economic account of practical reasoning, then what is the point of packaging the newly recognized, more complex human values as "preferences" and inserting them back into an unmodified analytical framework of utility maximization?

Elsewhere, these authors strongly endorse the notion of context-dependent value, and argue that economics must come to terms with it, at the cost of a loss of parsimony (pp. 20-21). It seems then, that they do not want to say that a concern for fairness reflects preferences for others'

welfare and one's own character; preferences that are to be optimized in commensuration with one's other preferences. Instead, they want to say that fairness reflects genuine concerns for others' welfare and for our own character, concerns that we can and do pursue on their own terms and for their own sake. A new kind of economics will not help us to understand this latter enterprise; it is not amenable to economic analysis at all. Because these concerns are context-dependent, they require us to compare and choose between incommensurable values, and to cope with the tragic dimension of value that attends incommensurability. Economics has nothing to do with such an enterprise because it does not acknowledge the possibility of such an enterprise.

An example will illustrate this point. Questions of fairness arise in the criminal law in connection with the proportionality of punishment. When we ask whether a mentally retarded offender ought to suffer the death penalty, for instance, we ask whether the infliction of the most severe punishment possible would be fair in light of the offender's limited capacities.⁴² In Jolls, Thaler, and Sunstein's terms, the reference transaction is the execution of an offender with normal mental capacities, and the question is whether the execution of a person with substantially less mental capacity is a reasonable or unreasonable departure from this benchmark. In order to answer this question, legislators and jurors must ask whether condemning such a person to death is consistent with their sense of themselves and of their society as a civilization.⁴³ This much of the analysis is apparent to the authors.

The next steps, however, elude them. Regardless of which answer legislators or jurors give to the question of proportionate punishment for the mentally retarded, something will be lost. They face a tragic choice.⁴⁴ If they do not authorize the execution of the killer, then they will accord less honor and sympathy to the victim than her surviving family expects. If they do authorize the execution of a mentally retarded person, then they will fail to separate us from our forebears who killed what they hated, feared, and could not understand. There is no optimal solution, because this tragic dimension is intrinsic to value itself. Furthermore, compounding this tragic dimension, the answer to this question is constitutive: it will reflect the character of the individual juror or legislator, and of the society that she represents, but it also will determine that character.⁴⁵ As Aristotle

42. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195 (2000). The fairness or eligibility-for-punishment aspect of the offender's culpability is distinguishable from the fault or mens rea aspect of the offender's culpability. *Id.* at 1228-30. The proportionality of a death sentence depends on the relationship between these two aspects of culpability. *Id.* at 1254-57.

43. See *id.* at 1282.

44. E.g., David Stout, *Court to Hear Appeal From Texas Death Row Inmate*, N.Y. TIMES (November 27, 2000), available at <http://www.nytimes.com/2000/11/27/national/27CND-SCOT.html>.

45. Huigens, *supra* note 42, at 1254-57.

recognized, character is a function of practical choice.⁴⁶ We can be no better and no worse than our chosen path so far enables us to be. As a result, far more rides on this choice than the fate of the mentally retarded murderer. We define ourselves, individually and in the aggregate as a society, by how we frame and make this tragic choice.⁴⁷

These issues are all well beyond the limited resources of economics, behavioral or otherwise. To frame the question of fairness in the execution of the mentally retarded as a preference for a character that one can live with, and the execution or sparing of the offender as the optimal satisfaction of this preference, improperly flattens out the competing values and our ultimate choices, Mercator-fashion. To package incommensurate values for economic analysis in this way leaves out the tragic dimension of value and overlooks the role of individual judgment in coping with the context-dependence, intransitivity, and incommensurability of value that give rise to it. Because she focuses exclusively on the production of optimal states of affairs, the legal economist ignores the ways in which the law copes with the tragic dimension of value by its attention to matters of individual practical judgment.

These defects are especially apparent in connection with fault. Jeffrey Rachlinski's essay, *A Positive Psychological Theory of Judging in Hindsight* (pp. 95-115), examines the phenomenon of hindsight bias. Viewed retrospectively, most events seem inevitable and predictable, when in fact they were neither. This "20/20 hindsight" causes people judging ex post to overestimate the ex ante probability that the past event would occur. The implications of this phenomenon for negligence liability seem obvious: juries sometimes will find fault because they think a defendant "should have known" something was likely to occur, when in fact the defendant could not have known without the benefit of hindsight.

The hindsight bias implicit in negligence liability can be economically inefficient in two different ways. A certain degree of hindsight bias might

46. ARISTOTLE, NICOMACHEAN ETHICS II.1.1103a-1103b, II.4.1105a-1105b, II.6.1107b, X.9.1179b-1180a (Martin Ostwald trans., Bobbs-Merrill 1962) (describing the acquisition of virtue as a fixed disposition toward the good); see also M. F. Burnyeat, *Aristotle on Learning to be Good*, in ESSAYS ON ARISTOTLE'S ETHICS 69, 74 (Amélie Oksenberg Rorty ed., 1980) (describing the process of habituation to virtue); L. A. Kosman, *Being Properly Affected: Virtues and Feelings in Aristotle's Ethics*, in ESSAYS ON ARISTOTLE'S ETHICS, *supra*, at 103, 108-09 (describing virtue as action from proper motives, construed as emotional states); John McDowell, *Deliberation and Moral Development in Aristotle's Ethics*, in ARISTOTLE, KANT, AND THE STOICS: RETHINKING HAPPINESS AND DUTY 19, 21-23 (Stephen Engstrom & Jennifer Whiting eds., 1996) (describing practical reasoning and doing well in the context of habituation to virtue).

47. Remarkably, much of this complexity is captured in the phrase the Supreme Court has used to frame this issue for Eighth Amendment purposes. The question is whether the punishment can be reconciled with our "evolving standards of decency." See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (framing the evolving standards of decency test); see also *Penry v. Lynaugh*, 492 U.S. 302 (1989) (applying the evolving standards of decency test to the constitutionality of the execution of a mentally retarded offender).

lead to an inefficient excess of precaution. If the bias is sufficiently pronounced, then its effects will resemble strict liability, which generally does not result in inefficient levels of precaution, but which can overdeter by raising costs to prohibitive levels (pp. 100-03). Rachlinski concludes: "A system that produced unbiased judgments would, therefore, avoid one of two adverse economic consequences of the hindsight bias" (p. 102). True to its origins in the skeleton of value fallacy, this analysis distorts or omits two critically important aspects of negligence.

First, Rachlinski overemphasizes the importance of probability as a feature of negligence. Negligence is a species of fault, and fault is an aspect of wrongdoing.⁴⁸ No one would say I was negligent if I were to misjudge the probability of my hitting a golf ball into the rough. I would be negligent, however, if I were to misjudge the probability of my hitting a golf ball through the window of a nearby house. Furthermore, fault is inferred from the particular circumstances and manner in which harm is inflicted or wrongdoing is done. To misjudge the probability of harm or wrongdoing is only one way in which a person can be negligent. I might negligently hit a golf ball through the window of a nearby house because I misjudged the probability of my strike going awry, but I would be equally negligent if I failed to notice the house at all.

Rachlinski's focus on probabilities might seem to be a defensible simplification of negligence, but it suffers from the skeleton of value fallacy. Probabilities have to do with the likelihood of future events, and the analysis of probabilities and their estimation fits comfortably into economics' consequentialist framework. Consequentialism, as the name implies, is inveterately forward looking. But it hardly follows from this convenient circumstance that the inaccurate estimation of probabilities constitutes any necessary or sufficient feature of negligence. The assessment of fault by judges and juries is primarily a retrospective affair that involves an analysis of every aspect of the defendant's practical judgment, including not only the quality of his instrumental reasoning but also the propriety of his chosen ends.⁴⁹ The analysis of negligence is almost certain to be distorted by a focus on those aspects of judgment, such as the

48. Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 971-80 (2000).

49. Huigens, *Inculcation*, *supra* note 41, at 1475-76; Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 455-57 (1998). This point probably accounts for the notorious inability of the law and economics movement to develop any viable conception of fault that is not parasitic on traditional categories. See Huigens, *supra* note 48, at 958-84 (describing this failure in the deterrence theory of punishment); see also Jules L. Coleman, *Crime, Kickers, and Transaction Structures*, in CRIMINAL JUSTICE 313, 323-26 (J. Roland Pennock & John W. Chapman eds., 1985) (arguing that the concept of fault simply is absent from economics); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 320 n.11 (1984) (noting that the economic analysis of crime suggests "no inherent reason why crimes themselves should be defined with respect to any mental element").

estimation of probabilities, that are limited to instrumental reasoning and that have a predominantly prospective orientation.

This distortion can be subtle. For example, Rachlinski argues that fear of hindsight bias in negligence litigation might explain isolated bans on negligence liability, such as the business judgment rule. In some areas, the effects of hindsight bias might be particularly damaging. Rachlinski writes: "We might want doctors, lawyers, or accountants to guarantee their work with a system of de facto strict liability, or take an occasional excess of precautions, but corporate managers operating under such a regime will be apt to betray the real interests of their shareholders" (p. 111). This seems to be a plausible account of the origins of the doctrine. It would be a mistake, however, to accept it as a reason to expand the application of the business judgment rule. Negligence liability might still be appropriate for a corporate manager whose wrongdoing has nothing to do with the assessment of probabilities and whose trial and liability would be unaffected by hindsight bias. Managers, like golfers, can simply fail to see as well as fail to judge properly. They also can fail to adopt defensible objectives.⁵⁰

Second, Rachlinski's references to the results of an unbiased justice system treat adjudication as merely incident to the administration of static, value-promoting rules. This ignores the constitutive role of adjudication in justice. To the extent that Rachlinski appreciates the context-dependence of value, this ought to make the constitutive role of adjudication obvious to him and to other behavioral economists. Consider, for example, the juror who must decide whether to execute the mentally retarded offender. The question is one of fairness, and to say, as Jolls, Thaler, and Sunstein seem to do, that such decisions are context-dependent is to say that each decision is unique, and underdetermined by the applicable rules of decision. The final determination of fairness takes place only in the judgment of the decision maker who has the requisite legal authority, in the typical capital case, the jury. It is in this sense that adjudication is constitutive of justice.

The constitutive role of adjudication is a prominent feature of negligence. Negligence is unique as a species of fault because the content and parameters of the standard of due care are determined at the same time and in the same manner as the question of whether that standard has been

50. E.g., *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 967-68, 971-72 (Del. Ch. 1996) (indicating that directors' failure to pay due attention might not be protected by the business judgment rule); see also William T. Allen, *20th Century Evolution and Growth of Delaware Corporation Law*, 17 DEL. LAW. 16 (1999) ("In ultimately adopting an intermediate standard—reasonableness in light of some goal—in *Paramount Communications Inc. v. QVC Network, Inc.*, [637 A.2d 34 (Del. 1994)], the Delaware Supreme Court willingly inserted courts more readily into the business of substantive review of decisions."); Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213, 1225 n.53 (2000) (citing *Caremark* and noting increased vigilance over business judgment in state courts).

violated, after the fact and by the legally authorized decision maker at trial. In this sense, adjudication is constitutive of negligence.

Because adjudication is constitutive of negligence, Rachlinski's ideal of an unbiased justice system is questionable. It is not entirely clear that hindsight is not itself a constitutive feature of negligence. Adjudication is constitutive of fault because fault is context-dependent: we infer from the specific manner and circumstances in which wrongdoing occurred that the rationale behind the legal rule that has been violated is fully implicated. Otherwise, the imposition of the legal consequences of the rule's violation might not be justified.⁵¹ In cases of negligence, however, there is no rule; there is only the unspecified standard of due care. Hindsight might well have a positive value in the determination of negligence, because the task of abstracting society's interests and expectations from a highly fluid series of practical decisions and consequences threatens to be an overwhelming one. Hindsight bias might have a compensating effect, exaggerating subtle social values and interests that otherwise might be overlooked and left unprotected.⁵²

These two points against Rachlinski can be generalized to indicate a promising new direction for legal theory, given the deficiencies of both traditional law and economics and its behavioral economics progeny. Once one recognizes that the context-dependence of value entails intransitivity, incommensurability, and a tragic dimension in value, then the importance of sound practical judgment in coping with this complexity becomes increasingly apparent. Legal theory might be framed around the governance of practical reasoning generally, including not only matters of choice and action, but of value and motive as well. The analysis of fault, in particular, is best framed in this way.

In criminal law theory, economists and legal economists sympathetic to the themes of *Behavioral Law and Economics* have pursued such an approach. They have described the law's role in "preference-shaping" and the implications of this phenomenon for criminal fault and the governance of conduct generally.⁵³ However, the same contradiction that has been examined in this review comes to the fore: If one recognizes the deficiencies in the economic account of practical reasoning, then there is no point in packaging the newly recognized, more complex human values as

51. Huigens, *supra* note 48, at 1028-31.

52. For example, to disallow the defense of mistake of fact regarding consent in rape cases results in negligence liability. This liability can be defended on the ground that it bolsters a woman's right to refuse sex, and counteracts patriarchal tendencies that undermine that right. See Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention and Reasonable Mistakes*, 11 LAW & PHIL. 95, 125 (1992).

53. E.g., Keuneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 24-37; Kahan, *Alternative Sanctions*, *supra* note 6, at 597; Dan M. Kahan, *Ignorance of Law Is an Excuse—But only for the Virtuous*, 96 MICH. L. REV. 127, 141 (1997).

"preferences" and inserting them back into an unmodified analytical framework of utility maximization.⁵⁴

To give recent insights concerning context-dependence in valuation their due, one must break with consequentialism all together, and appeal instead to the tradition in philosophical ethics that has always centered on the governance of individuals at the level of valuation and motivation. This tradition is virtue ethics:⁵⁵ the philosophy of Aristotle rather than Bentham or Kant.⁵⁶ The notion of virtue ethics legal theory instantly raises specters of puritanical brainwashing or an insidious legislative agenda dominated by prudes and prohibitionists. But it is none of these things. Virtue ethics legal theory is simply a matter of taking advantage of an ancient tradition in philosophical ethics, in the same way that legal theory has taken advantage of the insights of consequentialism at least since the time of Holmes.

In the matter of fault, for example, a virtue ethics theory of punishment interprets fault as an inference, drawn from the particular manner and circumstances of the defendant's wrongdoing, to the effect that his practical reasoning is deficient or flawed.⁵⁷ This inference justifies the punishment of the accused, not only because of its relationship to the prohibition at issue, but more generally because the justifying purpose of criminal law is the inculcation of sound practical judgment, a quality which is also known as virtue. The determination of fault brings the justification for the criminal prohibition to bear upon the individual case of punishment in a justifying way. This is why criminal fault is not merely a side constraint on punishment, but also an affirmative, justifying reason to punish.

Second, a recognition of the importance of judgment in coping with the tragic dimension of value should lead to a greater appreciation for adjudication. Because value is context-dependent, many choices are unique and underdetermined by any conceivable rules of decision. This makes the judgments of legal decision makers constitutive of justice in individual cases. The implications of this change of perspective are subtle but potentially important. For example, jurors in capital cases may currently be instructed that sympathy must play no role in their decision on the execution of the offender.⁵⁸ The Supreme Court's decision authorizing these instructions assumes, as consequentialist legal theory tends to do, that the jury is

54. See *supra* pp. 561-62 Huigens, *supra* note 48, at 1004-07 (advancing a similar argument against Lawrence Lessig's version of this economic argument).

55. See generally Roger Crisp & Michael Slote, *Introduction*, in *VIRTUE ETHICS*, 1, 3-4 (Roger Crisp & Michael Slote eds., 1997) (describing virtue ethics as third major tradition in philosophical ethics that has been revived as an alternative to consequentialism and Kantian deontological morality).

56. Huigens, *supra* note 48, at 1019-21; Huigens, *Inculcation*, *supra* note 41, *passim* (summarizing Aristotelian ethics and applying them to the theory of punishment).

57. Huigens, *supra* note 48, at 985-88; Huigens, *Inculcation*, *supra* note 41, at 1462-67.

58. *Saffle v. Parks*, 494 U.S. 484 (1990).

merely an administrative body that is most reasonable and fair when it applies legal rules in a rote and dispassionate manner. The opinion does not exhibit even a rudimentary understanding of human valuation and judgment, nor any inkling of the constitutive role of the jury in a just decision.

Virtue ethics legal theory, had it been sufficiently developed to be of use to the Justices, might have made a difference in this case.⁵⁹ The criminal law is concerned not only with the virtue of offenders and potential offenders, as it is in the matter of fault, but also with the virtue of the punishing majority. When, in our collective legal capacity, we consider whether or not to punish an individual, we are concerned, not only with the offender's practical judgment and his set of standing motivations, but also with our own judgments, motivations, and characters, both individually and as a society. We will not punish in some cases even if it might be effective to do so, if to punish in this way would make us a brutal society instead of an enlightened one. These questions are acute in a capital case, and the jury asks and answers them for us all. To ask the jury to decide them dispassionately is to misunderstand the nature of adjudication.

CONCLUSION

The dream of a complete reduction of practical reasoning to the maximization of utility is a legacy of the reformist spirit of Jeremy Bentham.⁶⁰ To cut away the tradition, to burn off the superstition, to overcome the inertia that caused so much injustice and poverty in his day were admirable goals that were well served by an exclusive attention to consequences. But we now occupy a position two hundred years after Bentham, and one hundred years after Holmes brought this way of thinking to bear on the law.⁶¹ Their enterprise has run up against its natural limits. There are non-consequential values and responses to value that are neither intuitions nor traditions, neither superstitions nor a priori phantoms. We cannot do without such things as caring for others, nurturing a virtuous character, and honoring family and friends. We would risk doing positive harm to society if we were to eliminate all recognition of these things from law, and all understanding of them from legal theory.

The contributors to *Behavioral Law and Economics* each understand this situation to one degree or another. I suspect that they hope to refine

59. Some of the justices in *Saffle*, e.g., 479 U.S. at 550 (Brennan, J., dissenting), and in an earlier case on a similar issue, *California v. Brown*, 479 U.S. 538 (1987), displayed a considerably more sophisticated grasp of the relationship between law and emotion.

60. E.g., JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 20-21 (Prometheus Books 1988) (1782) (arguing that principles other than utility lead to overcriminalization and excessive severity in punishment).

61. See, e.g., O. W. HOLMES, JR., *THE COMMON LAW* 39-51 (The Legal Classics Library 1982) (1881) (stating a consequentialist theory of punishment and contrasting it to retributivism).

homo economicus, and are willing to sacrifice parsimony to do so, not only to make the economic analysis of the law more “realistic” but also make a place in that tradition for humane values beyond the humane values of the marketplace. The difficulty is that they still cling to the tools of consequentialism. Bentham’s consequentialist agenda and axioms have already succeeded to the extent that they can, and fidelity to his spirit now requires an entirely new approach that gives nonconsequential value its due, recognizes it where it persists in the law, and incorporates it into legal theory on its own terms. The conservative strategy of packaging nonconsequential values as preferences for nonconsequential values, and then proceeding with conventional economic analysis, is the strategy that prevails in *Behavioral Law and Economics*. It is a strategy that is bound to fail.