

Morality and the Law: Some Implications for Economics

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This article is motivated by two ideas. First, it is not now in dispute that institutions matter. Second, it is well established that “The issue that stands behind every controversy in contemporary legal theory is the problem of how law is to be understood in relation to moral values.”

I seek first to show that the three prominent theories of law incorporate elements of outcomes- and right-based moral theories. For this and other reasons, I argue that the three theories are logically incoherent, hybrid moral theories. I argue, moreover, that law and morality are inexorably intertwined, and that an explicit accounting of “ordinary conscience” forces a new understanding of judges’ and economic agents’ decision environments. This, in turn, animates a conservative theory of law, and implies a rejection of utilitarian social welfare theory, and its antecedent, received neoclassical economic theory.

Introduction

This article is motivated by two ideas. First, it is not now in dispute that institutions matter.¹ This is true, moreover, whether interest centers on informal or formal institutions. Significantly, while the former subsumes ethical and other behavioral norms, the latter subsumes constitutional, statutory, and common law. Second, it is well-established that “The issue, which stands behind every controversy in contemporary legal theory, is the problem of how law is to be understood in relation to moral values.”²

Granting all of this, my purpose is to show that each of the three prominent, competing theories of law incorporate elements of consequentialist or

outcomes-based and rights-based moral theories. For this and other reasons, I argue that each of the three competing theories is a logically incoherent, hybrid, moral theory. That said, I argue that law and morality are inexorably intertwined and that a proper understanding of the relationship between law and morality has implications for law and for economics. Reduced to its essentials, an explicit accounting of what the philosopher Roger Scruton has called “ordinary conscience” forces a new understanding of judges’ and economic agents’ decision environments. Inter alia, this implies a rejection both of utilitarian, social-welfare theory, and of its antecedent, the received, neoclassical, economic theory.

The Three Theories: An Overview

Given their prominence, interest centers on three, competing, legal theories. I consider first what Ronald Dworkin has called “the ruling theory of law.”³ Broadly speaking, legal positivism—the conceptual part of the theory—may be regarded as the analogue for the logical positivism that informs the economist’s “scientific,” intendedly value-free, social-welfare theory.⁴ Derivative of Jeremy Bentham’s theory of law, the ruling theory is characterized by a “separation thesis.”⁵ On this account, the conceptual part of the theory insists that concepts such as “legality,” “legal validity” and “legal system” and the explicit rules of “black-letter law” must exclude consideration of moral content, moral validity, or moral appraisal.⁶ For its part, the normative part of the ruling theory supposes that “legal institutions compose a system whose overall goal is the promotion of the highest average welfare among [the] individuals” who make up a community.⁷

As might be expected, given its Benthamite origins and its empirical, antimetaphysical orientation, the ruling theory rejects the idea of natural rights. Moreover, its conceptual part denies that legal rights can preexist legislation, while the normative, economic-utilitarian part rejects the idea that political rights can preexist legal rights.⁸

The Chicago approach deploys social welfare theory’s first and second fundamental welfare theorems, the economist’s theory of the State, in constructing a positive and normative approach to law and economics. The former contemplates determining whether prevailing common-law doctrines comport with the strictures of first-best Paretian optimality or economic efficiency.⁹ The latter focuses on the determination of efficient legal rules to guide legislative and judicial decision-making. Insofar as a legal change produces winners and losers, the theory invokes the compensation principle, or Kaldor-

Hicks efficiency. In either case, the desideratum is societal “wealth maximization.”¹⁰ On this account, “rights should be assigned in a way that maximizes the wealth of society.”¹¹ Finally, whereas there is a view that “there are questions of fairness as between the parties [in litigation] that are not answerable in economic terms,”¹² the Chicago approach suggests that if a legal standard “appears to impose avoidable costs on society,” the burden is on its authors to justify the standard.¹³

Ronald Dworkin’s “liberal theory of law” rejects the separation thesis and embraces the view—antithetical to the ruling theory—that individuals have natural rights. On his account, lawyers and judges appeal not only to black-letter rules but also to legal principles “like, for example, the principle that no man may profit from his own wrong.”¹⁴ Granting this, Dworkin insists that judges have a duty to be guided both by the requirement of “best fit” with all relevant legal precedent and by the criterion of “best light”—a duty, that is, to find the interpretation of legal precedents that provide the best political reading of the received, common law.¹⁵ It is in this sense that his mythical, omniscient, judge Hercules¹⁶ is said to be constrained, *inter alia*, by moral objectivism; by, in other words, the presumption that “there can be only one, morally sound interpretation of precedent.”¹⁷

Granting all of this, no distinction can be made between legal and moral standards: “Political rights are creatures of both history and morality: What an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions.”¹⁸ Justice, in turn, rests on the Kantian/Rawlsian assumption “of a natural right of all men and women to equality of concern and respect.”¹⁹ This idea is the basis of Dworkin’s natural rights interpretation; of the idea of rights as nonabsolute “trumps” against external preferences. In particular, “government must not constrain liberty on the ground that one citizen’s concept of the good life ... is nobler or superior to another’s.”²⁰

The Ruling Theory of Law

As has been emphasized, the conceptual part of the ruling theory, legal positivism, insists upon a separation between law and morality. *Inter alia*, this suggests that, in their jurisprudential role, judges can and do conduct, intendedly, value-free analysis.

While much can be said about this, the essential point is that appeal to black-letter rules of law cannot proceed in a vacuum. Judges, like all agents, are not, and cannot be, autonomous, transcendental selves unencumbered by

contingent circumstance. Agency requires a motive to act and this, in turn, requires immersion in contingent, empirical conditions.²¹ For their part, empirical conditions contemplate all manner of path-dependent phenomena, including both formal and informal institutions. While the former does, in fact, include the black-letter rules of law, the latter contemplates the determinants of what the philosopher Roger Scruton has called “ordinary conscience.”²²

To see this, consider first that the American legal and constitutional tradition is predicated on the idea of impartial treatment; that similar cases ought to be treated equally.²³ While little attention has been paid to it, this impartiality or generality imperative is derivative of the Kantian idea of the moral equivalence of persons.²⁴ As is well-known, the categorical imperative or moral law demands that persons be treated as ends rather than as means. Granting this, the veil of ignorance-constrained person, freed of knowledge of his own contingent circumstance, is impelled by “pure practical reason” to promote just, in the sense of impartial, institutions.²⁵ Among these institutions is the idealized rule of law.²⁶ In effect, “the concept of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system.”²⁷

On this account, the external morality of the law is informed by the Kantian moral law.²⁸ If nothing else were said, it is clear that legal positivism’s insistence that law and morality can be separated is logically incoherent.²⁹ It is a brute fact that the idea of equality before and under the law is, itself, informed by Kantian ethics.

More can, however, be said. As Scruton has emphasized, Kantian impartiality reflects the pure, practical reason of a transcendental, first-person self; a self that fully discounts its own “empirical conditions.” Yet, “a transcendental self, outside nature and outside the ‘empirical conditions’ of the human agent has no capacity to act here and now.”³⁰ Granting this, “either I am a transcendental self, obedient to reason, in which case I cannot act, or else I am able to act, in which case my motives are part of my circumstances and history.”³¹

On this logic, the first-person perspective must be supplemented by what Scruton has called “the third-person point of view”; a perspective “in which people are seen to be immersed in the contingencies of social life, acting from passions that respond to the changing circumstances of existence.”³² Among these “circumstances of existence” is, of course, the vector of socially determined ethical and other behavioral norms.

It follows that the vision of the good—of what a judge “ought” to do—is a socially cultivated empirical ought “that leads people to see the world in terms of value and so, to develop the transcendental perspective” contemplated by the moral law.³³ In effect, the transcendental, first-person ought cannot, as Kant acknowledged, be sustained. It can, however, be cultivated, but this, in turn, requires that the other dimensions of moral argument and appraisal—the ethic of virtue, sympathy, and piety, or respect for formal and informal institutions—be incorporated in the judge’s decision process.

Taken together, the four sources of moral argument and appraisal—the moral law, the ethic of virtue, sympathy, and piety—constitute what has been called “ordinary conscience.”³⁴

Whereas judge-determined or common law is, as I have suggested, an extended application of the moral law,³⁵ the practice of ordinary conscience deploys all four dimensions of moral argument and appraisal.

It seems clear, first, that when it speaks, the moral law is given lexical priority.³⁶ As Scruton has suggested, certain principles of Kantian “practical reasoning are accepted by all reasonable people”:

1. Considerations that justify or impugn one person will, in identical circumstances, justify or impugn another (the principle of moral equality).
2. Rights are to be respected.
3. Obligations are to be fulfilled.
4. Agreements are to be honored.
5. Disputes are to be settled by rational argument, not by force.
6. Persons who do not respect the rights of others, forfeit rights of their own.³⁷

If this adumbration of the principles of practical Kantian reasoning may be disputed, what cannot be in dispute is that judges do confront what Ronald Dworkin has characterized as “hard cases”; cases in which rights and duties conflict. In such circumstances, judges must deploy one or more of the other dimensions of moral argument and appraisal. So, for example,

When the claims of right and duty have been satisfied, insofar as is possible, the claims of virtue must be addressed. Even if the moral law neither forbids nor permits an action, there is still the question whether a virtuous person would perform it....

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Finally, when all requirements of right and virtue have been met, we can respond to the call of sympathy.... Even so, the authority of this reasoning is not absolute: for sympathy may compete with piety. We rationalize our pieties by measuring them against our sympathies, and we discipline our sympathies by testing them against the intuitions which stem from piety.³⁸

While the lexical ranking outlined above may be regarded as merely heuristic, this much is clear: The agency of judges requires a third-person perspective—a point of view both informed and constrained by path-dependent preference and value structures and contingent circumstance.³⁹ This, in turn, implies that judges' utility functions include as arguments dimensions of moral argument and appraisal. While this view contrasts with the Chicago approach [considered below]—which imagines that judges' utility is a function of income, leisure, and judicial voting⁴⁰—it seems broadly to comport with Ronald Dworkin's implicit view of judges' desiderata. In his view, "it will not do for the liberal simply to instruct legislators ... to disregard the external preferences of their constituents."⁴¹ What is required, Dworkin insists, is a "scheme of civil rights" that will, antecedently, prohibit judicial and other consideration of political, altruistic, and moralistic preferences. While I do not agree that external preferences should be "trumped" by a "scheme of civil rights," the essential point is that Dworkin implicitly acknowledges that judges' utility functions include as arguments "moralistic preferences."

If this view of judges' utility functions is correct, then Dworkin is correct. Because, in practice, judges invoke rules and moral standards or "principles"; law and morality are inseparably intertwined. Granting this, the separation thesis is logically incoherent. Even if it were supposed that the idealized rule of law is not informed by Kantian ethics, the common law—itself a path-dependent phenomenon—will, inevitably, be shaped by judges' moralistic preferences. It follows, equally, that the conceptual part of the ruling theory of law, legal positivism, is fundamentally misleading. Equally important, the inseparability of law and morality suggests that the "sphere of law" may legitimately contemplate "all that matters to social continuity, all that can be taken as standing in need of State protection."⁴² On this logic, external preferences "count," and laws may legitimately restrict "what some would call the 'freedom' of the citizen."⁴³

If the conceptual part of the ruling theory of law is incoherent, the same may be said of its normative part. Given the presumption that "legal institutions compose a system whose overall goal is the promotion of the highest average welfare among ... individuals,"⁴⁴ the latter implicitly endorses a form

of rule utilitarianism. Whether in preference or welfare form, rule utilitarianism “limits the application of the standard of utility to rules or social institutions and requires compliance with rules that are certified as having the requisite utilitarian justification.”⁴⁵ In effect, the obligation to obey legal (and other) rules is derived from “criteria drawn from consequentialist arguments about the likely outcomes of specific acts of disobedience or a general rejection of the authority of the law.”⁴⁶ The problem is that “evaluation of conduct from a utilitarian standpoint is dominated by direct utilitarian arguments and therefore ignores the moral force of justified legal rights.”⁴⁷ Stated differently, “there is no deep compatibility between the doctrine of utility and the concept of a right.”⁴⁸

It follows that the normative part of the ruling theory cannot, logically, generate an obligation to obey the law.

The Chicago Approach to Law and Economics

Because it is grounded in utilitarian social-welfare theory, the Chicago approach to law and economics is subject to the same debility. In their effort to deploy the first and second fundamental welfare theorems, proponents of the Chicago approach take no explicit account of the irreconcilability of goal- and rights-based moral theories. Because it is utilitarian, social-welfare theory is consequentialist or goal-based. Yet, given that unattenuated property and exchange rights are instrumentally important to the achievement of first-best Paretian optimal or efficient outcomes, the theory incorporates elements of rights-based moral theories. Granting this, both social-welfare theorists and proponents of the Chicago approach to law and economics face a conundrum: Either they must argue that the legal rights that they regard as instrumentally important are morally exigent in themselves (and reject the efficiency standard), or they must embrace the efficiency standard and deny the moral force of rights.⁴⁹

If the “rights problem” calls into question the efficacy of the Chicago approach, so, too, does the indeterminacy of the efficiency standard. Elsewhere I have shown that logical, empirical, and ontological problems attend the specification of both the efficiency frontier and the social-welfare function.⁵⁰ It follows that judicial decisions, changes in statutory law, and economic policies that are informed by the first and second fundamental welfare theorems must be regarded as ad hoc. Granting this, the logic of both positive and normative law and economics is undermined.

The Liberal Theory of Law

As has been emphasized, Ronald Dworkin's liberal theory of law rejects the separation thesis. With this I agree, but the theory also embraces a view—antithetical to the ruling theory but problematic in its own right—that individuals have natural rights. While it is safe to say that the idea of natural rights is an unsettled, philosophical question,⁵¹ my interest centers on Dworkin's natural-rights interpretation.

Recall first that, on Dworkin's account, "political rights are creatures of both history and morality: What an individual is entitled to have, in a civil society, depends upon both practice and the justice of its political institutions."⁵² Dworkin's idea of justice, in turn, is predicated on the Kantian assumption "of a natural right of all men and women to equality of concern and respect."⁵³ As has been emphasized, it is this idea that animates Dworkin's natural-rights interpretation. On his account, rights are nonabsolute "trumps" against political, altruistic, and moralistic "external preferences." Granting this, government and, presumptively, the judiciary, "must not constrain liberty on the ground that one citizen's concept of the good life ... is nobler or superior to another's."⁵⁴

Central to Dworkin's project is a peculiar, liberal interpretation of the Kantian moral law. I emphasize, first, that "high-minded" liberalism is grounded in Kantian/Rawlsian ethics—an ethics that, as we have seen, emphasizes the role of the transcendental or first-person self. On this view, the autonomous self, possessed of free will and reason—and freed of contingent circumstance by a "veil of ignorance"—is motivated by the categorical imperative or moral law. In effect, the moral equivalence of "person" demands that persons treat each other as ends rather than as means. The institutional imperatives to which this interpretation give rise are well known. First, because rights are given lexical priority, the greatest possible equal political participation must be promoted. Second, government must treat persons impartially or "equally."⁵⁵

Because these institutional imperatives are formal rather than substantive, they specify neither which rights (duties) are to be respected, nor what, precisely, "equal treatment" means. That said, on the liberal's account, the lexical priority of rights contemplates natural rights as trumps against external preferences; against, in other words, peoples' preferences with respect to others' consumption or behavior patterns. It is in this important sense that liberals proffer a contingent defense of majoritarian democracy: Given the prospect of the tyranny of a majority possessed of external preferences, the minority must

be protected against others' equal—but, therefore, contestable—moral tastes and values. For its part, equal treatment by government is interpreted to mean something more than impartiality. On the liberal's account, Kantian "autonomy"—"the property of the will to be a law to itself"⁵⁶—demands that government treat citizens equally but that it be "neutral on what might be called the question of the good life."⁵⁷

Thus, if the lexical priority of rights demands that citizens be protected against others' moral (and other) tastes or values, equality of treatment demands that government be neutral with respect to questions of "the right," of what the autonomous self ought or ought not do. It is characteristic of the liberal's constitutive political position, therefore, that government must respect the moral pluralism to which autonomy gives rise while, at the same time, institutionalizing rights designed to protect citizens against the intervention of others' external preferences.

The problem with this enterprise may properly be characterized as a Kantian-liberal lacuna. Reduced to its essentials, exclusive focus on the autonomously generated moral law precludes an explicit accounting of other, exogenously determined, and path-dependent sources of moral reasoning. As has been emphasized, while questions of right, duty, and responsibility are the province of the moral law, the ethic of virtue, sympathy, and piety are also instruments of moral argument and appraisal. These, however, are not autonomously generated. They are nurtured, intertemporally, by the interaction of the formal and informal institutions, customs, traditions, and local attachments that characterize a society. Together, the four sources of moral reasoning—the Kantian moral law, the ethic of virtue, sympathy, and piety—constitute what was earlier characterized as ordinary conscience. Both endogenously and exogenously determined, it is this ordinary conscience that, in part, animates or constrains action. Yet, given its commitment to the moral sovereignty of the autonomous, self-determining individual, "high-minded" liberalism denies the legitimacy of moral imperatives borne of contingent, societal impulses. Indeed, as we have seen, it is these exogenously generated behavioral norms that motivate the "rights as trumps" interpretation.⁵⁸

If, then, the liberal theory's rejection of the separation thesis appears to be unassailable, there are two fundamental problems. First, while the idealized rule of law is, in fact, an extension of the Kantian moral law, the liberal theory's interpretation of "the property of the will to be a law to itself" goes too far. Its insistence that government must be "neutral on what might be called the question of the good life" has, as a corollary, a tolerance-imperative.⁵⁹ The imperative, in short, is to be nonjudgmental; to give "moral and political

space”⁶⁰ to the autonomous, self-determining self.⁶¹ That the tolerance-imperative implies moral pluralism is, perhaps, self-evident. That this represents what Scruton has characterized as a “devious form of the Kantian moral law”⁶² may be regarded as hyperbole. However this may be, moral pluralism is a questionable desideratum.

The second fundamental problem with the liberal theory of law has already been suggested: Because the transcendental, first-person self has no motive to act, the liberal theory of law is subject to what Scruton has called the paradox of liberalism.⁶³ Reduced to its essentials, agency requires immersion in circumstance and history. Yet, this leads, inexorably, to an explicit accounting of the determinants of ordinary conscience. Granting this, if judicial decisions implicate the Kantian Moral Law, they must also reflect the interaction and potential tradeoffs among the ethic of virtue, sympathy, and piety. This, in turn, suggests that socially determined ethical and other behavioral norms have basic relevance.⁶⁴ It follows that rights cannot properly be construed to be nonabsolute trumps against moralistic preferences.

Finally, there is this: Even if it were granted that rights may properly be construed as trumps against external preferences, Dworkin’s view that “moral-legal principles [may be weighed] against considerations of good social policy” cannot be sustained.⁶⁵ Insofar as “good social policy” is motivated by utilitarian considerations, “the problem of establishing the threshold at which preexisting rights can be outweighed by arguments from public policy is a much larger one than that faced by Dworkin.”⁶⁶ In effect, utilitarian arguments can always trump the rights that Dworkin seeks to protect. Given its utilitarian “connection,” it follows that the liberal theory of law cannot, logically, regard the law as a “distributor of constitutional rights.”⁶⁷

Toward a Conservative Theory of Law

The point of departure must, it would seem, be the conservative’s constitutive, political position. Central to the enterprise is the idea that, unlike the liberal concept, the vision of the good is not a subjectively determined “ought.” Rather, it is the “concrete, immediate ‘ought’ of family” and other social bonds, and it is precisely this socially cultivated, empirical ought “that leads people to see the world in terms of value, and so to develop the transcendental perspective that the liberal requires.”⁶⁸ In effect, the transcendental, first-person perspective cannot, as I have emphasized, and as Kant acknowledged, be sustained. It can, however, be cultivated, but this, in turn, requires that the other dimensions of moral argument and appraisal—the ethic of virtue, sym-

pathy, and piety or respect for formal and informal institutions—not be the subject of relentless, institutional skepticism and the associated “reforming spirit.”⁶⁹

Moreover, on the conservative view, rights are not properly regarded as trumps against external preferences. Insofar as these interpersonal effects subsume political, altruistic, and moralistic preferences or values—each of which is shaped, in part, by social attachments—“any area of social life that is vital either to the strength of the social bond or to the social image of its participants, will be one into which the law may legitimately intrude.”⁷⁰ Furthermore, this “collusion between social values and legal norms”⁷¹ is antithetical to the moral pluralism to which the liberal’s first-person perspective gives rise. Equally important, it is consonant with Kant’s view that all political issues—including the character and content of legal rights—are moral issues.⁷²

If the conservative rejects the rights as trumps interpretation, he also contests the liberal’s concept of equality. Given that morality is not the exclusive province of the autonomous, first-person self, perceptions of the good life can neither be purely subjectively determined nor immune from societal scrutiny. Granting this, the imperative of government policy is not tolerance. Rather, it is that government must treat persons impartially—subject to the constraints imposed by a constitution informed neither by natural rights nor by moral pluralism. Rather, the constitution should, in the Kantian-Rawlsian sense, maximize equal political participation. It is in this way that perceptions of the good life—of how individuals ought to live—may find political expression. For their part, perceptions of the good life, or moralistic external preferences are, on this account, informed not by the liberal’s transcendental first-person self but by the four sources of moral argument: by the Kantian moral law, by virtue, by sympathy, and by piety.

If the conservative seeks, by constitutional and other means, to give voice to external preferences, he is concerned with the rent-seeking that characterizes representative, majoritarian democracy.⁷³ While the nature of, and catalysts to, rent-seeking are beyond the scope of this article, the essential point is that special-interest rent-seeking is intendedly discriminatory. Given that post-constitutional conflictual politics is congenial to such opportunistic behavior—a concern of America’s founders—a case can be made for appropriate, constitutional constraints.

Finally, whereas the liberal regards utilitarian, social-welfare theory—the economist’s theory of the State—as instrumental to the achievement of social ends, the theory finds no place in the conservative’s constitutive or derivative political positions. On the one hand, while the theory’s fundamental

constructs—the efficiency frontier and the social-welfare function—are indeterminate, the first and second fundamental welfare theorems are, nevertheless, deployed to justify both governmental market interventions and income redistribution schemes.⁷⁴ In effect, the theory has facilitated the discriminatory rent-seeking that the conservative abhors. On the other hand, the theory can accommodate neither the moral force of rights nor any plausible theory of justice.⁷⁵ Finally, because it is consequentialist, its focus—in liberal hands—is the promotion of social justice—an ephemeral concept for which no settled definition exists.

With this as background, it is clear that, if there is a liberal theory of law, there is also a conservative theory of law. This section concentrates on an adumbration of the key elements of the conservative view.

This much is shared with the liberal theory of law: Law and morality are inseparably intertwined. As agents subject to the contingencies of desire, circumstance, and historically driven path-dependencies, judges and legislators, the authors of statutory law, are informed, in varying degrees, by ordinary conscience. As has been emphasized, ordinary conscience consists in the imperatives of the moral law, the ethic of virtue, sympathy, and piety. It follows that the law embodies “the fundamental values of the society over which it rules.”⁷⁶ Respect for prevailing social values is both a *sine qua non* for the authority of the law and justificatory of law’s intrusion into “any area of social life that is vital either to the strength of the social bond, or to the social image of its participants.”⁷⁷ It is in this sense that, whereas the liberal theory of law seeks to extend “the sphere of choice into those realms where traditionally people have sought not permission but constraint,”⁷⁸ the conservative view of law does not seek, antecedently, to secure natural rights as trumps against external preferences.

While the conservative view does not embrace the liberal’s natural rights interpretation, it does acknowledge that “there are natural rights, to the extent that there are natural obligations—to the extent, that is, that a concept of ‘just [impartial] dealing’ arises naturally between people.”⁷⁹ Just dealing is not, however, congruent with the liberal’s notion of equal treatment.

Whereas the latter is an imperative deduced—on the liberal’s account—from the ruminations of the transcendental, first-person self, “just [impartial] dealing” is animated by the imperatives of the Kantian moral law, by the ethic of virtue, by sympathy, and by piety.

Granting all of this, “just [impartial] dealing” demands that statutory, common, and constitutional law respect the precepts of the external and internal morality of law. Following Rawls, the former contemplates “the regular and

impartial administration of public rules.”⁸⁰ For its part, the internal morality of law subsumes Fuller’s eight “precepts of justice associated with the rule of law”:

1. The law should be general in the sense that it lays down general standards of conduct.
2. Laws should be promulgated or made known to those to whom they apply.
3. Laws should be prospective.
4. Laws should be clear.
5. Laws should not be contradictory.
6. Laws should not demand the impossible.
7. Laws should not be changed frequently.
8. Laws should require a congruence between official action and the relevant statutes.⁸¹

Finally, given the rent-seeking and majoritarian cycling that characterize day-to-day conflictual politics, the precepts of the external and internal morality of law should, on the conservative’s account, be embedded in the constitution. As Scruton has suggested, “The constitution ... and the institutions that sustain it, will always lie at the heart of conservative thinking.”⁸² Central among the institutions that are instrumental to a “successful constitution”⁸³ is an independent judiciary. The role of the judiciary, in turn, is to appeal not only to black-letter rules but to “respect the social arrangement that is expressed in law.”⁸⁴ While this may be broadly interpreted to be congruent with Dworkin’s appeal to principle—and therefore to be consistent with his liberal theory enterprise—the conservative views the judiciary as a conservative force: “Politicians given to the pursuit of ‘social justice’ are apt to ... seek statutes that are immune from judicial qualification. And they must come in fast succession, forbidding time ... to take stock of change.... Inevitably, in the fever of fomented change, the judiciary must act as a conservative force.”⁸⁵

If these ideas are central to the conservative theory of law, the essential, recurring theme is that the liberal theory of law is built upon a truncated view of the autonomous self. On the liberal’s account, the transcendental, first-person self should be free to develop his own, subjective, moral code. His freedom to do so is ensured by a system of natural rights against others’ perceptions of the good life. In sharp contrast, the conservative maintains that agency—without which there can be no morality—requires a motive to act. This, in turn, requires appeal to a third-person perspective. It is this idea upon

which, both the conservative theory of law and the conservative economics adumbrated in the next section, is built.

Toward a Conservative Economics

I take as my point of departure the elements of rough correspondence between *homo economicus* and the liberal's concept of the first-person self. Both regard the agent as autonomous and atomistic. Moreover, meddlesome, nose, and external preferences represent a particular problem for both interpretations.

While *homo economicus* is regarded as a narrowly self-interested, utility maximizer, it is recognized that, if they are affective, interpersonal effects in utility functions are problematic. In particular, if minimal privacy rights are respected, meddlesome or nose preferences militate against the specification of a social-welfare function.⁸⁶ This, in turn, calls into question the normative use of the second, fundamental welfare theorem.

If meddlesome or nose preferences are irreconcilable with the economist's theory of the State, they are inimical to the self-realization of the liberal's autonomous self. As has been repeatedly emphasized, natural rights are regarded as trumps against external—political, altruistic, or moralistic—preferences.

Semantics aside, the meddlesome, nose, or metapreferences that trouble the economic theorist subsume the same phenomena contemplated by the liberal's external preferences interpretation. It follows that external preferences are a shared problem. Interestingly, however, the problem arises for the economist when minimal privacy rights *are* respected. For the liberal, the solution contemplates respect for natural rights against such preferences.

The external preferences problem is a metaphor for a larger values problem. While it is both institutionless and intentionally value-free, the economist's theory of the State is, in fact, a hybrid moral theory. Because it is utilitarian, it is consequentialist or outcomes-based. Yet, because property and exchange rights are instrumentally important to the achievement of first-best Paretian optimal outcomes, it incorporates elements of a rights-based, moral theory. Difficulties arise because the theory cannot accommodate the moral force of rights. Moreover, the theory cannot accommodate any plausible theory of justice.⁸⁷ Granting all of this, the economist's theory of the State is a confused and untenable moral theory.

For its part, the liberal's self-legislating, autonomous self, ensconced behind a natural rights structure, is free to erect his own subjective moral code. If, as Scruton suggests, the moral pluralism and institutional skepticism to

which this concept gives rise represents a “devious form of the Kantian moral law,” it is worth repeating that the liberal’s autonomous, first-person self has no motive to act. For this, he must invoke his empirical self; a self both animated and constrained by contingent circumstance. Among the defining characteristics of such an environment are the formal and informal institutions that characterize society. Central among these are the sources of moral argument and appraisal, which, unlike the moral law, are not endogenous to the individual. Yet, neither *homo economicus* nor the liberal’s transcendental, first-person self is informed, animated, or constrained by these elements of “ordinary conscience.”

The implications for economics would seem to be clear: The economist’s theory of the State, and the *homo economicus* interpretation on which it is based, must be rejected. For its part, the broad outlines of an alternative, explicitly normative economics are equally clear. Given that consequentialist or outcomes-based, social-welfare theory is encumbered by theoretical, empirical, and ontological problems, the focus should be procedural or institutional, with political rather than economic efficiency being the ultimate desideratum.⁸⁸ That said, methodological considerations suggest that agent motivation must be more intensively and comprehensively explored. Given that economists should seek to explain rather than, in the manner of logical positivism, predict observable behavior, the generative assumptions deployed must be realistic; they cannot be known to be false *a priori*, they must be independently testable, and they must be empirically confirmed.⁸⁹ Given this understanding, the assumptions that characterize both *homo economicus* and the liberal’s transcendental, first-person self are patently unrealistic and are, therefore, inadmissible.

Granting the logic of what has been said, explicit account must be taken of objective features of observable reality. Central among these are bounded rationality, information asymmetries, and opportunism.⁹⁰ Of particular interest here, however, are utility domains and the practice of ordinary conscience.⁹¹

Interest must center, then, on an explication of this more comprehensive and realistic understanding of the agent’s decision-environment, and on the implications both for economic theory and for public-policy appraisal. Emphasis must be placed on the complexity of the choice process and on the possibility that some of the anomalies discussed in the experimental economics literature may be attributed to neoclassical theory’s failure properly to account for these complexities. Notable among these are the endogeneity of preference and value structures and the role and importance of culture tradition, and socially determined behavioral norms.⁹² It is in this respect that

the approach is broadly reconcilable with what has come to be called the New Institutional Economics.⁹³ It is also clear, finally, that as an instrument of public-policy appraisal, the economics envisioned here is conservative rather than liberal.

Notes

1. D. C. North, "Economic Performance Through Time," *American Economic Review* 84 (1994): 359–60. See also V. Nee, "Norms and Networks in Economic and Organizational Performances," *American Economic Association Papers and Proceedings* 88 (1998): 85–86 and E. G. Furubotn and R. Richter, *Institutions and Economic Theory* (Ann Arbor: University of Michigan Press, 1997).
2. M. Tebbit, *Philosophy of Law* (London and New York: Routledge, 2000), 3.
3. R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), vii. On one account, Dworkin "is widely considered the most important American legal philosopher of recent times." See D. A. Farber and S. Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago and London: University of Chicago Press, 2002), 122.
4. T. P. Roth, *Ethics, Economics, and Freedom: The Failure of Consequentialist Social Welfare Theory* (Aldershot: Ashgate, 1999), 2. For another critical view of logical positivism see R. G. Lipsey, "Successes and Failures in the Transformation of Economics," *Journal of Economic Methodology* 8 (2001).
5. Dworkin puts the matter succinctly: "positivism ... insists that law and morals are made wholly distinct by semantic rules everyone accepts for using 'law.'" *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986), 98.
6. Tebbit, *Philosophy of Law*, 36.
7. Dworkin, *Taking Rights Seriously*, ix.
8. *Ibid.*, xi.
9. N. Mercuro and S. G. Medema, *Economics and the Law* (Princeton: Princeton University Press, 1997), 61.
10. *Ibid.*, 19.
11. *Ibid.*, 69.
12. R. Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973): 152.
13. Mercuro and Medema, *Economics and the Law*, 73.
14. Dworkin, *Taking Rights Seriously*, 46.

15. Tebbit, *Philosophy of Law*, 59.
16. Dworkin, *Taking Rights Seriously*, 105–30.
17. Tebbit, *Philosophy of Law*, 59.
18. Dworkin, *Taking Rights Seriously*, 87.
19. *Ibid.*, 182.
20. *Ibid.*, 273.
21. R. Scruton, *The Meaning of Conservatism* (South Bend: St. Augustine's Press, 2002), 189.
22. R. Scruton, *An Intelligent Person's Guide to Philosophy* (New York: Penguin Books, 1996), 126.
23. C. L. Ten, "Constitutionalism and the Rule of Law," in *A Companion to Contemporary Political Philosophy*, ed. R. E. Goodin and P. Pettit (Cambridge, Mass.: Blackwell, 1995), 397. See also J. M. Buchanan and R. D. Congleton, *Politics by Principle, Not Interest: Towards Nondiscriminatory Democracy* (Cambridge: Cambridge University Press, 1998), xi.
24. T. P. Roth, *The Ethics and the Economics of Minimalist Government* (Cheltenham, U.K.: Edward Elgar, 2002), chap. 1.
25. J. Rawls (1989), "Themes in Kant's Moral Philosophy," in *John Rawls: Collected Papers*, ed. S. Freeman (Cambridge: Harvard University Press, 1999), 509.
26. Buchanan and Congleton, *Politics by Principle, Not Interest*, xi.
27. J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971), 235. See also Ten, "Constitutionalism and the Rule of Law," 401.
28. Ten, "Constitutionalism and the Rule of Law," 397.
29. If Kantian ethics constitutes the external morality of law, the internal morality of law "provides a basis for establishing a necessary connection between law and substantive morality." *Ibid.*, 397. I shall have more to say about this below.
30. Scruton, *The Meaning of Conservatism*, 189.
31. *Ibid.*, 189.
32. *Ibid.*, 190.
33. *Ibid.*, 192.
34. Scruton, *An Intelligent Person's Guide to Philosophy*, 126.
35. *Ibid.*, 121.
36. *Ibid.*, 125.

37. Ibid., 120.
38. Ibid., 125–26.
39. For more on path-dependent preference and value structures, see T. P. Roth, *The Present State of Consumer Theory: The Implications for Social Welfare Theory* (Lanham, Md.: University Press of America, 1998), 144, 152.
40. Mercurio and Medema, *Economics and the Law*, 65.
41. R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 197.
42. Scruton, *The Meaning of Conservatism*, 68.
43. Ibid., 70.
44. Dworkin, *Taking Rights Seriously*, ix.
45. D. Lyons, “Utility and Rights,” in *Theories of Rights*, ed. J. Waldron (New York: Oxford University Press, 1995), 128.
46. Tebbit, *Philosophy of Law*, 79.
47. Lyons, “Utility and Rights,” 113.
48. Tebbit, *Philosophy of Law*, 109.
49. For more on this, see Roth, *Ethics, Economics and Freedom*, 43. See also Roth, *The Ethics and the Economics of Minimalist Government*, 67–68.
50. T. P. Roth, “Contractarian Analysis, Ethics, and Emerging Economies,” *Journal of Markets and Morality* 4 (2001): 56–58. See also Roth, *Ethics, Economics, and Freedom* and *The Ethics and the Economics of Minimalist Government*.
51. See, for example, B. Almond, “Rights,” in *A Companion to Ethics*, ed. P. Singer (Cambridge, Mass.: Blackwell, 1993). See also ed. J. Waldron, *Theories of Rights*.
52. Dworkin, *Taking Rights Seriously*, 87.
53. Ibid., 182.
54. Ibid., 273.
55. Rawls, *A Theory of Justice*, 221–28.
56. I. Kant, *Fundamental Principles of the Metaphysics of Morals*, trans. T. K. Abbott (1785; reprint, Amherst, N.Y.: Prometheus Books, 1988), 78.
57. R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 191–92.
58. On this account, “Citizens [are seen to] have moral and political rights that should be enforced by the courts.” Ten, “Constitutionalism and Rule of Law,” 401. Yet, despite his insistence that no account should be taken of external preferences,

Dworkin asserts that, in “hard cases” in which black-letter rules of law do not apply, “Judges should enforce only political convictions that they believe, in good faith, can figure in a coherent general interpretation of the legal and political culture of the community.” *A Matter of Principle*, 2. It is tautological, however, that the political culture contemplates moral and political external preferences. If nothing else were said, this calls into question the external preferences—rights as trumps interpretation.

59. It might, of course, be argued that the notion that government ought to be neutral on the question of the good life is itself a theory of the good. Dworkin rejects this idea. See, especially, *A Matter of Principle*, 203.
60. Scruton, *The Meaning of Conservatism*, 182.
61. The potential conflict between (apparently) intrinsically valuable tolerance, on the one hand, and intolerance of external preferences animated by perceptions of the good life, on the other, should be apparent.
62. Scruton, *The Meaning of Conservatism*, 73.
63. *Ibid.*, 189, 193.
64. The essential point is that the liberal theory of law is nonaccommodative of the dimensions of moral argument and appraisal that recognize “the unquestionable rightness of local, transitory and historically conditioned social bonds.” Scruton, *The Meaning of Conservatism*, 192. It is worth emphasizing that the liberal’s institutional skepticism—the propensity always to ask, “Why should I do that?”—is corrosive of the “natural piety” borne of these attachments (193). Granting this, the relentless questioning of society’s formal and informal institutions—itsself a corollary of the moral pluralism associated with self-generated morality—erodes the conditions that nurture the true, Kantian first-person perspective. It is precisely because these exogenously generated “traditional virtues” endorse, supplement, and nurture the moral law that they should be cultivated. Instead, the institutional skepticism of the morally sovereign autonomous first-person self “corrode[s] the conditions that nurture it.” (193).
65. Tebbit, *Philosophy of Law*, 109.
66. *Ibid.*, 110–11.
67. Scruton, *The Meaning of Conservatism*, 73.
68. *Ibid.*, 192.
69. *Ibid.*, 71, 175.
70. *Ibid.*, 73.
71. *Ibid.*, 132.

72. W. Kersting, "Politics, Freedom, and Order: Kant's Political Philosophy," in *The Cambridge Companion to Kant*, ed. P. Guyer (Cambridge: Cambridge University Press, 1992), 343.
73. Roth, *The Ethics and the Economics of Minimalist Government*, 76–78.
74. *Ibid.*, 59–70, 35–37.
75. *Ibid.*, 23–24.
76. Scruton, *The Meaning of Conservatism*, 7.
77. *Ibid.*, 73.
78. *Ibid.*, 74.
79. *Ibid.*, 78.
80. Rawls, *A Theory of Justice*, 235.
81. Ten, "Constitutionalism and the Rule of Law," 394–96.
82. Scruton, *The Meaning of Conservatism*, 24.
83. *Ibid.*, 85.
84. *Ibid.*, 58.
85. *Ibid.*
86. Roth, *Ethics, Economics, and Freedom*, 40–41. See also Roth, *The Ethics and the Economics of Minimalist Government*, 68–69.
87. Roth, *The Ethics and the Economics of Minimalist Government*, 17–24.
88. Buchanan and Congleton define political efficiency as the "efficacy of differing institutions in reducing or eliminating the incentive for [conflictual politics'] participants to invest resources in rent seeking aimed to secure discriminatory advantage through majoritarian exploitation." *Politics by Principle, Not Interest*, 40.
89. Roth, *The Present State of Consumer Theory*, 14–20.
90. Roth, *Ethics, Economics, and Freedom*, 8–15.
91. For a discussion of the nature and role of utility domains, see Roth, *The Ethics and the Economics of Minimalist Government*, 62, 65–67.
92. See, for example, F. Ackerman, "Still Dead After All These Years," *Journal of Economic Methodology* 9 (2002).
93. See, for example, E. G. Furubotn and S. Pejovich, *Institutions and Economic Theory: The Contribution of the New Institutional Economics* (Ann Arbor: University of Michigan Press, 1997).