

Economic Analysis *in* Law

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This Essay explores the relationship between normative law and economics and legal theory. We claim that legal theory must account for law's coerciveness, normativity, and institutional structure. Economic analyses that engage these features are an integral part of legal theory, rather than external observations about law from an economic perspective. These analyses, or economic analysis in law, play a crucial role in understanding the law and in developing legal policy arguments. After establishing economic analysis in law's terminology, this Essay maps out three contributions of economic analysis in law: prescriptive recommendations in areas amenable to preference satisfaction as a normative criterion, analyzing efficiency as one aspect of a broader normative inquiry, and exposing feasibility constraints. Finally, this Essay turns to an exploration of possibilities for extending economic analysis in law beyond its comfort zone. It suggests that economic analysis might expand into areas where values other than preference satisfaction are or ought to be dominant considerations.

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Introduction

Like other extra-legal disciplines, economics has long been an important source of valuable insights about law. Over the past half-century, the economic analysis of law has become one of the dominant modes of thinking about law and policy, and as such, one of the most important members in the family of discourses about law. In this Essay, we aim to spotlight those aspects of normative law and economics that cross the porous boundary from discourses about law and take their place as integral, internal parts of legal theory.

According to this characterization, legal theory focuses on the work of society's coercive normative institutions, taking each element in this triad seriously. Legal theory does not arise in an academic vacuum; it is open to methodological and thematic lessons from other disciplines. However, rather than straightforward application of other disciplinary tools to legal materials, legal theory engages in a distinctive mode of inquiry. It concentrates on the relationship between law's normativity and its coerciveness, and on the implications of law's institutional structures. A fundamental entailment of these relationships is the recognition that law's coercive power raises demanding justificatory constraints. One such constraint, and our focus in this Essay, is the demand of public reason, or the claim that legal prescriptions must appeal to normatively acceptable and openly accessible reasons.

To clarify this point, consider the following difference between a discourse about law and legal theory. A sociological account of law may satisfy itself by observing regularities in obeisance to a norm by a group of people,¹ even if compliance with the norm is based on what may be called non-normative reasons (terror, belief in magic, etc.). Legal theory, by contrast, cannot make do without at least some account of normativity; it must, in other words, consider the law as purporting to claim legitimate authority. In what follows, we assume that the reasons that ground law's claim to authority should ultimately express humanist commitments to self-determination and equality.²

Distinguishing legal theory from other discourses about law is not an exercise in ranking the desirability of academic disciplines. Scholarly analyses that do not engage directly with normativity expand the understand-

1. People may be the addressees of primary norms, for example, do not drive over sixty-five miles per hour, or addressees of secondary norms of the type addressed to people generally and often specially tailored for legal officials, such as judges. The most jurisprudentially familiar secondary norm is H.L.A. Hart's rule of recognition, which prescribes "the ways in which the primary rules may be conclusively ascertained." H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961).

2. This statement is posited for purposes of discussion, and its controversial nature does not concern us here. At the level of generality stated, and for at least ostensibly liberal polities that command our attention here, we believe it serves as an easily acceptable baseline. Delineating the particularities of such a baseline is a difficult endeavor, but avoiding some form of normative commitment is not possible for a legal theory.

ing of legal phenomena. But without some account of underlying justification, these discourses about law cannot offer grounds for normative conclusions; nor can they fully account for the workings or the products of legal institutions. The point of developing this terminology, thus, has little to do with policing its boundaries. It is instead oriented towards clarifying the possible role of academic work in normative argument.

Accordingly, economic analysis in law stands for those economic analyses of law that advance or rely on some engagement with law's normativity, or in other words, its reasons for binding the actors subject to law. Additionally, such an engagement must, at least in theory, open up its claims to reasoned argument, rather than offering a "black box" that purports to produce a result. In this sense, its arguments must align with the requirements of public reason. In this Essay we focus on normative law and economics, that is, on economic analyses that seek to prescribe what the law should be or how we should understand it.³

Viewing economic analysis within legal theory along these lines functions as a double invitation: it is at once a call to economically oriented scholars to engage directly with the core questions of justification that animate legal theory, and a call to non-economically oriented scholars to grapple with economic insight.⁴ These invitations inform the two goals of this Essay: first, to highlight aspects of normative law and economics that non-economically oriented legal scholars ought not ignore; second, to plot out one possible trajectory for developing economic analysis in legal theory, by expanding its tools to deal head on with values that are irreducible to aggregate preference satisfaction.

Part II addresses our first goal. It offers a tentative map of three genres of economic analysis in legal theory that pervade contemporary normative discourse. Part III turns to our second goal, which is more speculative. The aim here is to explore economic analysis's potential outside its comfort zone. We should clarify upfront that the comfort zone to which we refer merely describes the existing mainstream of normative law and economics.⁵ Indeed, part of the point of Part III is to destabilize this by-no-means necessary state of affairs.⁶ But before we turn to these tasks, Part I

3. We believe our discussion has potential implications for empirical scholarship as well, especially on the level of research design. See Hanoch Dagan, Roy Kreitner & Tamar Kricheli-Katz, *Legal Theory for Legal Empiricists*, 43 L. & SOC. INQUIRY 292 (2018).

4. Cf. EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 3 (2010) (developing a framework of incorporating "threshold deontology" into economic cost-benefit analysis).

5. See Eric A. Posner, *The Boundaries of Normative Law and Economics*, 38 YALE J. ON REG. 657 (2021). Thus, at least some views on distributive justice—those that can be captured by a social welfare function—may be deemed well within the economic "comfort zone," since welfare economics allows for many different social welfare functions. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 28-38 (2002).

6. We thus read Lewis Kornhauser's claim, in his rich Comment on this Essay, that "economic analysts already pursue these" inquiries or, at the very least, have laid the groundwork for

offers an account of the character of legal theory and the constraints of public reason.

I. Legal Theory and Public Reason

A. *Discourse About Law and Legal Theory*

Law, like economics, can be investigated from internal or external perspectives. Studied externally, law serves as the source of data that is the object of study by scholars who employ their own extra-legal theory or methodology. Studied from within, law comes with its own constitutive features, the characteristics that make it what it is. Admittedly, few accounts (if any) fully fit one polar perspective or the other. A professional historian who makes use of legal documents like court decisions, for example, needs to know something about the nature of law; some knowledge of law will be necessary to distinguish “legal” or “binding” documents from those with no validity or effect within the legal system. Many scholarly endeavors do not aspire to full autonomy but are attentive to lessons from neighboring disciplines. That said, these different perspectives—for our purposes, the perspective of a discourse about law on the one hand (or a discourse for which legal materials are sources of information about some wider phenomenon) and that of legal theory on the other—present distinct types of work, with different points of focus.

Legal theory, as we analyze it elsewhere in some detail,⁷ denotes the various accounts that, in studying either the law as a phenomenon or any specific legal field, explicitly or implicitly engage with law’s constitutive features. Legal theory follows jurisprudence in interrogating the law as a set of coercive normative institutions. Different legal theories offer differing accounts of the way law’s power and normativity align and how this discursive cohabitation manifests itself institutionally. To be sure, disciplines like sociology, philosophy, political science, and economics also offer important insights on these three fronts: coerciveness, normativity, and institutions. But legal theory nonetheless has a distinctive signature, which lies at its simultaneous focus not only on what the law is but also on the standards by which it should be judged.⁸ For legal theorists, these three features of law and their complicated interactions imply answers on both descriptive and normative fronts.

them, as largely supportive. See Lewis A. Kornhauser, *The Non-Consequentialist Uses of Economic Analysis: A Comment on Dagan and Kreitner*, *Economic Analysis in Law*, 38 *YALE J. ON REG. BULL.* 159, 160 (2021).

7. See, e.g., Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 *CORNELL L. REV.* 671 (2011).

8. See Julie Dickson, *Is Bad Law Still Law? Is Bad Law Really Law?*, in *LAW AS INSTITUTIONAL NORMATIVE ORDER* 161, 169-70, 174 (Maksymilian Del Mar & Zenon Bankowski eds., 2009).

When law is used as raw material for the application of a non-legal disciplinary methodology or theory, these characteristics do not, and indeed need not, burden the analysis. For example, highly technical analyses of some legal questions handled by common law judges may yield valuable insights even when any attempt to translate them into legal prescriptions would be ill-advised given the institutional capacity of the pertinent legal actors. Legal theory, by contrast, must pay attention to this concern.⁹ Law is always institutionally embedded, and the capacities of existing or potential institutions can never be deemed irrelevant. It is no wonder that some of the leading works detailing the economic analysis involved in, for example, contract law, focus on these institutional concerns and how they should constrain the use of substantive economic considerations in the design of contractual rules and doctrines.¹⁰

Our focus here, though, is not on legal theory's sensitivity to institutions, but rather on its attention to the idea that power and reason are both endemic to law. Law implicates power both because judgments prescribed by law recruit the state's force to back them, and because of the institutional and discursive features that tend to disguise or downplay the element of force.¹¹ This is why internal juristic discourse is likely to be not only justificatory, but apologetic. Recognizing this tendency, legal theory must establish at least a modicum of critical distance from practical jurists' proffered reasoning. At the same time, legal theory at its best resists reducing law merely to parochial interests or power politics. It recognizes that modes of legal reasoning—substantive and technical, abstract and contextual—often constrain the sense of choice available to legal decision-makers in directions that transcend their self and group interests. In the best case, legal reasoning must aspire to appeal beyond the parochial, and instances of argumentation exposed as a cover for interest are treated as cases of abuse.¹²

Again, other disciplines' inquiries of law often ignore law's normativity (or its element of force). This disposition is, at times, quite beneficial, as the case of the sociological account that exposes legal pathologies (such as compliance driven by terror) with which we started demonstrates. Similar insights drive economic analyses of the way legal actors may maximize

9. Thus, there may be an ideal theory of how to make a decision that requires a great deal of information and technical capacity, and developing that ideal may yield insight. However, if the matter is typically handled by common law decision procedures (and not by the idealized decision-maker), the fact that judges have neither the information nor the technical (institutional) capacity would be not simply relevant, but very weighty. In some cases, this may call for a legal reform of transferring jurisdiction to another institution, such as an administrative agency manned by experts.

10. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 598 (2003).

11. Here we refer notably to the institutional division of labor between "interpretation specialists" and the actual executors of their judgments, and to our tendency as lawyers and even as citizens, to "thingify" legal constructs and accord them an aura of naturalness and acceptability.

12. For a poignant example—an exception that proves the rule—see *Republic of Bolivia v. Philip Morris Cos.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

their self-interest while developing, interpreting, or applying the law.¹³ But it is legal theory that tells us that cases in which law is reduced to brute power or interest are indeed pathologies (as H.L.A. Hart's distinction between the power of the law and that of the gunman famously highlights).¹⁴ Law is often unjustified; like other social practices it can, and often does, fail in complying with its task of providing people justifiable reasons for action. But normative legal theory is nonetheless informative because it defines what counts as success and what counts as failure.

Indeed, the proposition that the requirement of justifiability is constitutive of law is not a relic of a romantic conception of the law. Quite the contrary: it is at least implicit in any approach that engages in, or seeks to comprehend, evaluation of the law or its critique. Thus, as Karl Llewellyn explained, while "distortion to wrong ends [and] abuse for profit or favor" are part of the life of the law, they are always deemed to be disruptions, which are "desperately bad," exactly because there is "in every 'legal' structure . . . [an implicit] recognition of duty to make good."¹⁵ This demand of justification is not just "an ethical demand upon the system (though it is [also] that)."¹⁶ Rather, it is "an element conceived to be always and strongly present in urge," one that cannot be "negated by the most cynical egocentric who ever ran" the legal system.¹⁷ Similarly, Joseph Raz wrote that law's claim to authority implies that law must present itself as making genuine moral demands and that it is thus "essential to the law that it recognizes that its use of power is answerable to moral standards."¹⁸

B. Economic Analysis of Law and in Law

Since part of what it means to justify law's authority is to understand law as a means to human ends, legal theory searches for sources of

13. See, e.g., Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

14. See HART, *supra* note 1, at 82-85 (distinguishing between the gunman's commands and law's prescriptions, which are reasons for action).

15. K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Jurisprudential Method*, 49 YALE L.J. 1355, 1385 (1940).

16. *Id.*

17. *Id.* Llewellyn's last proposition is echoed in leading accounts of the incentives that motivate judges as rational maximizers. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 18, 90, 106 (2006) (describing how judges are motivated by their political preferences, which are, at bottom, driven by ideals about the common good); RICHARD A. POSNER, *HOW JUDGES THINK* 11-12, 60-61, 371 (2008) (explaining how either because they are driven by a "desire for self-respect and for respect from other judges and legal professionals," or due to "the intrinsic satisfactions of judging," judges are mostly motivated by "a taste for being a *good* judge," which "requires conformity to the accepted norms of judging").

18. JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 1, 177-78, 180 (2009). In other words, our focus in this Essay on law's normativity should not be interpreted as marginalization of power. Quite the contrary: the requirement that law offers acceptable justification is urgent because law is in the business of monopolizing (legitimized) force in society, and this burden of justification by reference to the humanist commitment to self-determination and equality is exactly what preserves the possibility of criticizing existing law and recruiting law for morally required social change.

knowledge about the state of the world on which legal norms and institutions have an impact, and about the possible effects of the law on that world. This is one sense in which current legal theory differs from traditional jurisprudence: rather than aspiring to establish law as an autonomous discipline, it reaches out for lessons from interfacing disciplines of the social sciences and the humanities.¹⁹ Economics is a major source of such lessons.

Standard works in normative law and economics study the incentive effects of legal rules and doctrines and examine how they fare vis-à-vis the normative criterion of maximizing aggregate preference satisfaction.²⁰ The way law's prescriptions are translated into incentives is clearly relevant to legal theory, and understanding that translation requires considering the behavior of law's subjects (we the people) and its various carriers (judges, administrators, sheriffs and the like). Thus, the gap between economic analysis of law and economic analysis in law does not relate to the reliance on incentives. Rather, it focuses on the typical reference to maximizing aggregate preference satisfaction as the analysis's normative guideline.

Legal theories in which law should be indifferent to people's preference satisfaction mark an extreme version of this gap.²¹ But this position is an outlier. Most legal theories accept that in some contexts, preference satisfaction is a proper normative guideline for the law. The reasons offered for respecting preferences are varied, but they seem to converge around the humanist commitment to self-determination and equality, which implies that satisfying people's preferences is normatively significant because these preferences both reflect and serve people's life plans. In this more common position, the reason for the gap between economic analysis of law and economic analysis in law does not derive from the inadmissibility of preference satisfaction. Rather, it focuses on the unacceptability of assuming maximizing aggregate preference satisfaction as the sole or ultimate normative commitment of the law. The claim has two related parts: first, preference satisfaction is not always necessarily valuable, as its value inheres in, and is thus limited by the more fundamental value it reflects or serves; second, there are indeed more fundamental normative commitments to which the law should respond.

Some theorists are likely to push back even against this claim and argue that any other normative value—be it objective well-being, autonomy, democracy, or distributive justice (and the list can go further, of course)—

19. See Dagan & Kreitner, *supra* note 7, at 685-89.

20. See, e.g., ZAMIR & MEDINA, *supra* note 4, at 12; Lewis A. Kornhauser, *The Domain of Preference*, 151 U. PA. L. REV. 717 (2003); Roy Kreitner, *Anti-Preferences*, 22 THEORETICAL INQUIRIES L. (forthcoming 2021). While we do not believe that preference satisfaction is plausible as the exclusive goal of normative theory, we think it is clearly plausible as one normative goal among others.

21. One extreme example comes from Kantian legal theories. See, e.g., ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009). These theories also marginalize law's effects.

is important only because it reflects people's preferences or is otherwise conducive to the goal of maximizing their satisfaction.²²

However, economic analysis as a method does not require this normative position. In fact, there are obvious reasons to believe that most legal economists operate within a very different set of normative commitments. They do not think, for example, that the wrongness of slavery depends upon its (necessarily contingent) incentive effects, or that democracy or distributive justice are justified only to the extent that they reflect people's preferences. Experts in the methods of economics need not subscribe to the specific version of utilitarianism—maximizing aggregate preference satisfaction—that typifies many examples of these methods. Economic analysis of law may well generate insights on law even when it ignores values such as autonomy, democracy, or equality. But economic analysis need not be wedded to a particularly narrow normative vision.

There is, of course, a voluminous literature on the validity of utilitarian normative foundationalism, but our purpose is not to resolve this debate. We assume that, just as legal theorists who find no value in preference satisfaction are unlikely to accept our invitation to engage with economic insights, adherents of utilitarian normative foundationalism are likely to reject the idea of any divergence between legal theory and economic analysis of law. This does not mean that Kantians (who subscribe to the former view) or utilitarians are not doing legal theory. Rather, it admittedly implies that our notion of economic analysis in law is likely to be unacceptable—maybe even unintelligible—for these legal theorists and economic analysts.

Acknowledging this limit of the possible power of our thesis allows us to refine our (tentative) characterization of the object of this Essay. Economic analysis in law, as we understand it, is the body of existing and potential economic studies of law or of its constituent branches, manifestations, or doctrines, which accept that law's claim to legitimate authority ultimately expresses commitments to self-determination and equality. There is probably more than one way of grounding this premise and thus defining the scope and content of economic analysis in law, but for the purposes of this exploratory Essay, one position suffices.

Preferences, in this view, "are, in most cases, active attitudes which people hold for reasons,"²³ and these reasons refer back either to people's plans, projects, and goals, or to their normative convictions. Situating the satisfaction of people's preferences in their life stories explains both its

22. Another possible response may be that the focus on maximizing preference satisfaction is grounded in modesty regarding law's ability to promote any other normative value. We accept this cautionary attitude and indeed think that scholarship that elucidates law's feasibility constraints is invaluable to legal theory. *See infra* Part II.C. Of course, a cautionary attitude about feasibility need not translate into global skepticism. *Cf.* RONALD DWORKIN, *LAW'S EMPIRE* 76-86 (1986) (distinguishing between external and internal skepticism).

23. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 112 (1994).

normative significance and why it cannot be foundational or even free-standing. People's preferences must be taken seriously because of their role as features of personal self-determination; and it is the maxim of equality that explains why preferences with equal intensity should be equally counted irrespective of the identity of their holder. Appreciating the way in which some of our preferences are grounded in normative convictions further refutes the plausibility of treating all preferences as "opaque natural events."²⁴ Together, both directions suggest that at times it is inappropriate to be guided—or solely guided—by the criterion of maximizing aggregate preference satisfaction.

II. Mainstream Economic Analysis *in* Law

A. *Acceptable Monism*

We now turn to our first main task. In this Part we identify three existing forms of normative law and economics that are integral to legal theory as we have described it, because they clearly comply with law's justificatory burden. The first genre is straightforward. There are economic accounts that deal with legal arrangements, which are amenable to monist economic analysis, because their reliance on preference maximization as a goal tracks normatively sustainable arguments for these particular contexts.

Alan Schwartz and Robert Scott's work on business contracts between firms provides a classic example. Schwartz and Scott focus on firms—entities that are "organized in the corporate form and [have] five or more employees" or else in limited or professional partnerships—so as to set aside concerns of systematic cognitive error.²⁵ For purposes of developing their theory, they further assume there are no relevant externalities or rather that such externalities should be specifically targeted by, for example, environmental and antitrust laws. For this externality-free, bias-free, sophisticated commercial subset of the contractual universe, Schwartz and Scott identify the good of contracting as maximizing the parties' joint gains, or the contractual surplus.²⁶ Given this good, Schwartz and Scott claim that such commercial parties would prefer the state to provide a contract law that restricts itself to the pursuit of efficiency.²⁷

One can argue against the more specific propositions that Schwartz and Scott derive from this premise, dispute their view that contracts between firms are "the main subject of what is commonly called contract law,"²⁸ or take issue with the way they isolate the subset of contract law

24. *Id.*

25. *See* Schwartz & Scott, *supra* note 10, at 545-46.

26. *See id.*

27. *See id.* at 544.

28. *Id.*

that, in their view, should focus solely on the parties' preference satisfaction. But these substantive debates need not detain us here. The important point for our purposes is that, at least for these authors, the claim for efficiency monism in business contracts is founded on a commitment to "party sovereignty" that in this context is exhausted by maximizing their contractual surplus.²⁹

Before the interventions of Gary Becker,³⁰ economic analysis was mostly geared toward such contexts, which are at least facially amenable to an acceptable normative focus solely on preference satisfaction. While it makes no sense to imagine turning back the clock, it is worth noting that outside these limited domains, overly hasty translations of all types of rights, interests, and reasons into the metric of preferences is problematic. But even for legal questions for which aggregate preference satisfaction cannot hope to be the sole normative consideration, two types of economic interventions may be important.

B. Subcontracting

The first intervention is straightforward. Legal theory need not engage in an "all things considered" account of a legal phenomenon. However, when legal theory aspires to relevance for policy discussions, consideration of a range of perspectives and values becomes pressing. Economic analysis can serve as a "subcontractor" of a more comprehensive normative account, offering, for example, the economic implications of competing arrangements for a policy question that requires consideration of both welfarist and non-welfarist concerns.³¹

A canonical example of such a division of labor is Judge Guido Calabresi's *The Costs of Accidents*.³² Judge Calabresi sets out the policy question surrounding accidents writ large as one that involves two principal goals: "First, it must be just or fair; second, it must reduce the costs of accidents."³³ He then goes on to posit that while justice is more difficult to pin down than economic efficiency, the determination of justice is of a different order than the determination of efficiency: it can neither be subsumed to efficiency, nor ignored in any total evaluation of the system. His conclusion is clarifying: "An economically optimal system of reducing accident costs . . . might be totally or partially unacceptable because it strikes

29. See *id.* at 556. Other authors implicitly employ similar positions. See, e.g., VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 2 (2006); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 296-99 (2004).

30. See, e.g., GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).

31. Often, the economic implications are presented not in terms of preference satisfaction, but rather in other terms, such as cost reduction (as in the example that follows) or allocative efficiency. But these considerations are, in these views, desirable because they imply that more resources would be available for satisfying people's preferences.

32. GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

33. *Id.* at 24.

us as unfair, and no amount of discussion of the efficiency of the system would do much to save it. Justice must ultimately have its due.”³⁴

For Judge Calabresi, the question of how to combine the analysis of justice with the analysis of efficiency poses a vexing problem in and of itself.³⁵ While his recognition of different types or orders of normative goals is an important step, Judge Calabresi stops short of considering a direct engagement or combined evaluation of differing (and perhaps conflicting) normative orders. For him, amorphous normative intuitions potentially constrain the pursuit of efficiency, granting them a crucial but extremely circumscribed role in the analysis. This is disappointing for two reasons. First, it assumes that while efficiency analysis is rigorous, other normative considerations are little more than sentimental hand-waving about an author’s “sense of justice.”³⁶ Second, and more important here, is that Judge Calabresi’s framing turns the analysis sideways by assuming that efficiency does the primary normative work, while other considerations may occasionally appear to limit its applicability. From a more general perspective, however, it should be clear that efficiency analysis is one piece of a larger set of values that populate a more totalizing normative inquiry.

Legal theory will not always engage in full-fledged totalizing normative inquiry. Nonetheless, as legal theory approaches justificatory or reformist projects, the imperative to integrate and synthesize varied normative perspectives and disciplinary tools becomes weightier. The reason is that as legal analysis comes closer to policy determinations, it must account for its responsibility in affecting people’s lives (including, recall, by applying coercive means).³⁷ Ignoring the weight of significant normative arguments, whatever their disciplinary pedigree, weakens the justificatory force of the analysis. Structuring the mode of analysis so that some considerations appear only as side constraints on the margins is similarly problematic. A genuine synthesis of normative goals that have been developed, discussed, and refined by different, often non-communicating, discourses is a weighty challenge, but one that cannot be ignored.

*C. Exposing Feasibility Constraints*³⁸

A third economic contribution to legal theory applies even in settings where the normative name of the game should not be maximizing prefer-

34. *Id.* at 25-26.

35. Because “justice is a totally different order of goal from accident cost reduction,” it may be seen as a “constraint that can impose a veto” rather than as something to be strictly balanced against the goal of efficiency. *Id.* at 25. But elsewhere it appears that fairness is in some ways comparable with other goals. See Jules Coleman, *The Costs of The Costs of Accidents*, 64 MD. L. REV. 337, 344-46 (2005).

36. CALABRESI, *supra* note 32, at 24.

37. See Dagan, Kreitner & Kricheli-Katz, *supra* note 3, at 301-03.

38. We borrow the term “feasibility constraint” from Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 779 (2005), an article that can be used as another example

ence satisfaction. For any normative legal theory that aspires to policy relevance, the expected responses of addressees (whether private parties, regulators, or other officials) of specific legal norms will form a relevant factor for consideration.

Well-informed and sophisticated parties are especially likely to take law's prescriptions, even if presented as reasons for action, as incentives rather than norms. In other words, they may behave like Justice Oliver Wendell Holmes's image of the bad man, looking at norms as a list of prices for particular behaviors.³⁹ Legal norms do not translate into their intended actions transparently, as many of the norm's potential addressees and interested third parties may have vested interests in circumventing those intended effects. As anyone who has ever mused about the hairsplitting over the distinction between tax avoidance and tax evasion can attest, such action often undermines the norm's putative goals. Therefore, scholars interested in law's expected consequences, whatever their own normative persuasion may be, must consider its incentives with particular attention to unintended and perhaps counterproductive effects.

This type of analysis refines the understanding of feasibility constraints for various legal rules and standards. A familiar case in point relates to the difficulties of directing distributive outcomes through contracts. Richard Craswell shows that "defining a 'pro-consumer' distributional position" regarding warranties is difficult, since such rights affect different consumers in different ways.⁴⁰ Moreover, and more importantly, because the rich are typically "willing to pay more for protection against [many risks] simply because they have more money with which to pay," the intra-consumer distributional effects of many "pro-consumer rights" are likely to "favor the rich at the expense of the poor."⁴¹ This means that "the identity of the winners and losers may be correlated with wealth in a way that makes the resulting redistribution regressive."⁴² This complexity of distributional analysis applies quite broadly, which explains common economics-based arguments according to which distributive justice recommends using an earned income tax credit, rather than minimum wage, or arguments preferring direct measures, such as subsidies, to improve the income of poor tenants over rules like the implied warranty of habitability.⁴³

for the third genre of economic analysis in law. See also Kornhauser, *supra* note 6, for what one may call "second-order feasibility constraints"—the possible incompatibility between efficiency and other normative values—which economics helpfully illuminates.

39. See OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 171 (1921).

40. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 377 (1991).

41. *Id.*

42. *Id.* at 376-77.

43. See, e.g., Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 461 (2011).

Our point is not to suggest that these familiar economic arguments are correct with regard to specific policies.⁴⁴ These analyses have their weaknesses, but for the purposes of this Essay we need not enter the fray. At the very least, such analyses make clear that a commitment to distributive justice—or any other normative goal—requires theorists to carefully examine the final incidents of each potential measure.

The possibility that a specific measure is likely to be less effective than its intended aim does not imply that the pertinent normative goal is of necessity beyond the power of law writ large or even the specific branch of law in question. At times, it simply directs the architects of the law to devise mechanisms that can serve as countermeasures that change the incentives of the parties whose responses threaten to frustrate the measure's goal. These legal mechanisms may take various forms—such as additional civil or criminal sanctions or a set of proactive regulatory requirements—and they can either supplement or supplant the original contemplated measure.⁴⁵

III. Outside the Comfort Zone

The second goal of this Essay is to stake out potential contributions of economic analysis to legal theory beyond these three established genres. The previous Part accepted as a given that economic analysis in law would focus, as it has generally, on maximizing preference satisfaction. It drew attention to the way that focus may yet comply with the justificatory burden on legal theory. This Part relaxes the assumption that normative law and economics always adheres to preference maximization. It thus attempts to drive a wedge between economic methods and utilitarian normative foundationalism.

The goal here is to think about the ways that economic methods might expand beyond their traditional bailiwick and contribute to analyses that consider normative values aside from preference satisfaction. Our approach here is tentative and exploratory. We touch on distributive justice, democracy, and individual autonomy as normative goals whose value depends neither on preferences nor on their contribution to the size of the aggregate economic pie. But while we depart from the specific value that conventionally guides normative law and economics, we nonetheless hope to point to possibilities for using economic methods for further expanding the scope of economic analysis in law.

44. For critiques, see, for example, *infra* note 49 and accompanying text.

45. See, e.g., Bar-Gill & Ben-Shahar, *supra* note 38, at 720, 730-36, 779; Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice (Jan. 2, 2021) (unpublished manuscript), <https://papers.ssrn.com/abstract=3637034> [<https://perma.cc/7L6Y-5QDW>].

A. Distributive Justice

Starting our survey with distributive justice may seem odd given the economic canon in which, but for the tax and transfer system, law should ignore distributive concerns. An important argument for this position, powerfully developed by Louis Kaplow and Steven Shavell, focuses on the “double distortion” problem. While both tax rules and nontax rules distort the incentive to work when they redistribute income, redistribution through the latter adds another layer of inefficiency, namely, the adoption of less efficient legal rules.⁴⁶ Thus, even if nontax rules are equally effective in redistributing income, they achieve this result at a higher cost.⁴⁷ Therefore, redistribution via the tax and transfer system provides more resources to the poor.⁴⁸

Had the discussion ended there, this would have been yet another example—indeed, an extension of the one on which we have focused—of the feasibility constraint category of economic analysis in law. But the ensuing debate belies this conclusion. Critics have shown the limits of this argument by demonstrating that under certain circumstances nontax rules (say, tort law, on which much of this discussion focuses) are better vehicles for redistribution. The reasons vary, including, for example, the way uncertain events such as incurring tort liability are often processed, the political economy of taxation, and the particularly elastic choice of tax jurisdiction given today’s global tax competition.⁴⁹ The enriched argument refines the contexts and conditions under which it makes sense to use nontax doctrines as instruments of distributive justice.

This opening is particularly significant for tort law rules, which are not vulnerable to the additional, more specific difficulties of contractual contexts that we noted above. Happily, we already have important contributions that use economic tools to generate insights that may improve tort law’s distributive implications. For example, Judge Calabresi famously integrated distributional concerns in the consideration of different insurance schemes for auto accidents.⁵⁰ More recently, Ariel Porat combined distribution and efficiency considerations in an analysis of the standard of care

46. See Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667-68 (1994).

47. See *id.*

48. See *id.*

49. See respectively Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018); and Tsilly Dagan, *The Global Market for Tax and Legal Rules*, 21 FLA. TAX REV. 148 (2017). There are, to be sure, further complications that undermine the claim that distributive justice should be excluded from nontax law. See Oren Bar-Gill, *Willingness to Pay: A Welfareist Reassessment*, 38 YALE J. ON REG. 503 (2021); Lee Anne Fennell, *Remixing Resources*, 38 YALE J. ON REG. 589 (2021).

50. See Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833, 840-45 (1984).

in tort law.⁵¹ In some sense, distributive concerns in torts have become a commonplace that places them easily alongside, and sometimes within, traditional efficiency analysis.⁵²

Whatever one may think about these particular recommendations—the validity of their economic argument and how they fare vis-à-vis other normative considerations with which tort law should be concerned—their ambition is noteworthy.⁵³ Each of these contributions uses a strategy similar to the feasibility constraints genre but goes beyond highlighting law's limits and constraints. Recall that this genre identifies possible counterproductive consequences of putative legal rules given their incentive effects on parties who are likely to behave according to the preference satisfaction maximization model. But the significance of this service of economic analyses to legal theory implies that this type of effort can be, as these examples indeed illustrate, more ambitious; that it can be deployed not only “defensively,” but also constructively, namely, for identifying legal rules that are actively conducive for the promotion of goals other than maximizing preference satisfaction.

These tort law examples, which set the incentives that parties other than law's main beneficiaries face so that they are optimally attuned to distributive justice, demonstrate one category of cases in which this strategy seems promising. One way to think about this strategy is as a “visible hand.” It recruits the self-interest of private parties for the promotion of a normative goal, but crucially, of course, does not assume that this goal can be achieved if only their preferences are properly aggregated.

B. Democracy: Deliberation and Participation

Like distributive justice, democracy is an important subject of economic inquiry. In contexts ranging from constitution-making to the legis-

51. Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82 (2011); Ariel Porat, *The Future of Law and Economics and the Calabresian External Moral Costs*, 16 JERUSALEM REV. LEGAL STUD. 153 (2017).

52. Intriguingly, the impulse for integrating distributive concerns as part and parcel of an economic analysis has often been pursued by critical scholars. *See, e.g.*, TSACHI KEREN-PAZ, *TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE* (2007); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). The intriguing aspect is that critical insights often become the basis for reintegration in scholarship that aims at normative reconstruction rather than critique.

53. This ambition can be pushed farther, as it has been in YAIR LISTOKIN, *LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS* (2019), which argues that legal rules can be tailored with a view toward direct impact on aggregate demand. Listokin's analysis includes a wide range of examples whose impact on overall economic performance is large, dwarfing the magnitude of effects generally considered in typical efficiency analyses of individual legal rules. While the goal is increasing demand to improve overall economic performance, the entire analysis is driven by the importance of distributive concerns and the intermediate goal of moving money to lower-income groups who have a greater propensity to consume than wealthier groups. *See id.* at 175-97.

lative process to regulatory rulemaking, local governance, and the workplace, democracy is often promoted as a central value.⁵⁴ At times, democracy has been advanced as an intermediate good that ensures better outcomes, primarily based on some idea of the wisdom of the multitude.⁵⁵ The question of what makes an outcome better is relegated to some other normative discussion. We put aside these types of arguments and consider instead those that treat democracy as a good in itself, that is, as an independent value. Without venturing too deep into questions of what makes democracy a value, we allude to two aspects of democratic decision-making: participation and deliberation.

While both participation and high-quality deliberation may contribute to decision-making legitimacy, for our purposes it pays to hew to a more direct, even simplistic claim. We posit that participating in the decisions that govern important aspects of the shape of society is simply part of the good life. Similarly, but separately, high-quality deliberation over those decisions opens them to demands of justification, and a right to justification over those measures (particularly coercive measures) is a basic aspect of self-determination. The good of democracy, on this account, is independent of whether people have developed preferences for participation or deliberation: they may have no taste for them, they may prefer to spend their time on other pursuits, they may be happy to free ride on the efforts of concerned participants; the good of democracy survives.

Now, however, the difficult work begins: how should institutions be designed in order to incorporate the value of democracy? How much participation or deliberation is enough, or too much? How should the costs of alternative democratic mechanisms be conceived, in terms of the separate elements of democratic value? And how should other, competing values be weighed against democracy? The difficulty focuses precisely where economic methods might be enlisted to get a better grasp on how to address these questions. Designing institutions that incorporate participation or encourage quality deliberation is in large part a question of incentives, which is the economist's forte. But because the currency of democracy cannot be money without undermining democracy itself,⁵⁶ incentives must be conceptualized in a manner that fits the task.

54. See, e.g., DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003); DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN? (Shawn W. Rosenberg ed., 2007); DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE (John Parkinson & Jane Mansbridge eds., 2012); CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003).

55. This is an argument typically attributed to Aristotle, or in its modern form, to Condorcet. See generally Jeremy Waldron, *The Wisdom of the Multitude*, 23 POL. THEORY 563 (1995), for discussion.

56. Cf. Hanoch Dagan, *Political Money*, 8 ELECTION L.J. 349, 351-54, 356-57 (2009) (explaining why naked preferences cannot exhaust the language of politics and how the gap between preferences and their manifestation as measured by the willingness to pay exacerbates the difficulty).

To get a bit of concrete traction on some of these abstract questions, compare two pieces of scholarship dealing with the institutional innovation of legislation whose effectivity is projected into the future. For example, Daniel Herz-Roiphe and David Grewal theorize “sunrise amendments,” or changes to the Constitution that would take effect only after a substantial time delay.⁵⁷ They recognize that delayed implementation seems at first glance to sidestep democratic legitimacy because one generation is legislating for another, but then go on to analyze the conditions under which such legislation or constitutional amendment may actually be democracy-enhancing. Their conclusion is that lawmakers should seize opportunities to create democratic renewal through constitutional means, and their argument clings tightly to the currency of democracy: the costs and benefits of the mechanism are weighed only in terms of whether the mechanisms enhance or erode democracy itself.

By contrast, in an economically oriented article, Ariel Porat and Omri Yadlin propose using similar provisions to achieve consensus over contested issues, particularly redistributive policies.⁵⁸ The mechanism suggested is similar, but some differences stand out. First, the goal of the project is to improve the outcomes of the political process, and primarily to allow for the achievement of transfer payments that advance distributive justice.⁵⁹ Democracy as an independent good is mentioned only to note the difficulty that legislating for the future raises concerns. Second, and related, the framework is geared toward economic outcomes for the groups who will be affected by the legislation. The costs and benefits are almost seamlessly monetized. The noteworthy point, however, is that the incentive structure for various actors is given serious attention.

A worthy challenge for economic analysis, as we see it, is to combine the strengths of these two approaches. On the one hand, there are grounds to take the value of democracy seriously on its own terms, as an independent good. On the other hand, a deep inquiry into the possibilities of institutional design begs for an analysis of various actors’ incentives. The difficulty is to account for those incentives without translating costs and benefits into a type of currency that replaces inquiry into the democratic goals themselves.

Some economic analyses of legislative procedure take the first steps along this path, in particular by considering whether certain procedural rules increase the likelihood of deliberation. However, even such sophisticated economic analyses of legislation still consider deliberation primarily

57. Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015).

58. Ariel Porat & Omri Yadlin, *Promoting Consensus in Society Through Deferred-Implementation Agreements*, 56 U. TORONTO L.J. 151 (2006).

59. Cf. Dennis C. Mueller & Thomas Stratmann, *The Economic Effects of Democratic Participation*, 87 J. PUB. ECON. 2129, 2151 (2003) (demonstrating that increased citizen participation reduces income inequality).

as a means to achieve something else, for example “public spirited legislation”⁶⁰ or “aggregate rationality.”⁶¹ Lewis Kornhauser’s circumspect attitude toward deliberation is telling: “Economic conceptions of interest generally exclude the possibility of deliberation over ends Deliberation is unlikely to resolve substantial conflicts of interest. . . . Again, deliberation is unlikely to induce [] normative beliefs to converge to a common one.”⁶²

As long as deliberation is seen as a means to a different end (better legislative outcomes or a rational legislature), the complexities of causation and representation make it difficult to appreciate its potential. It is thus no accident that much economic analysis of legislation focuses intensely on the obstacles to rational decision-making in groups, by now classic obstacles like cycling or the inordinate power of organized interest groups or of agenda-setters.⁶³ That focus is understandable, even intuitive, because cycling, like similar obstacles to rational preference ordering, threatens to undermine majoritarianism, a basic aspect of democracy. If majorities cannot succeed in passing their preferred measures (precisely the threat of cycling effects), democracy’s most basic pretense is undone. Nonetheless, majoritarianism does not exhaust the value of democracy. The single-minded focus on problems of rationality, which in turn undermine majoritarianism, obscures other independent democratic values.

Deliberation, however, can be seen as its own end, as part of the meaning of representative politics. Even if Kornhauser is correct in assuming that deliberation will not resolve conflicts over normative beliefs among legislators, its value is not exhausted. When legislators speak to an assembly, they are doing more than trying to convince their colleagues. They are putting their support for particular proposals in terms of reasoned argument, appealing not only to fellow legislators, but just as importantly to the electorate. Representatives argue in universalizable terms for particular pieces of legislation. In so doing, they are appealing to all potential listeners to identify with a particular program, but also to judge them as representatives, to consider their potential as leaders, as problem solvers or compromisers, as articulators of values. In essence, they are enacting the aspirational element of politics, inviting listeners to consider their positions as well as their character. Legislative deliberation is, or at least can be, a site for public articulation of and contestation over normative values, just

60. Eric A. Posner & Jacob E. Gersen, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 570-73 (2007).

61. Lewis A. Kornhauser, *Aggregate Rationality in Adjudication and Legislation*, 7 POL. PHIL. & ECON. 5, 18-21 (2008).

62. *Id.* at 21.

63. For a detailed overview, see MAXWELL L. STEARNS, TODD J. ZYWICKI & THOMAS MICELI, LAW AND ECONOMICS: PRIVATE AND PUBLIC 545-58 (2018). For an application to the rules structuring the makeup of the legislature, see Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT’L REV. L. & ECON. 145, 147-49 (1992). For a non-technical explanation of the theoretical problem, see Kornhauser, *supra* note 61, at 10.

as legal scholars often view constitutional adjudication. Those acts of articulation and contestation give meaning to politics, and their value is distinct from the question of whether they yield better legislative outcomes.⁶⁴

A similar analysis of participation could be advanced, though it would likely focus on citizens rather than representatives. It is easy enough to see that participation entails difficulties that can be termed costs. It is difficult to turn those costs into comparable and thus calculable units. Thus far, economic analyses have primarily considered deliberation and participation instrumentally. But it seems difficult if at all possible to figure out the consequences of more or better deliberation and participation in terms of ensuring rational decision-making, majoritarianism, and the like. Appreciating the independent or free-standing value of deliberation and participation and focusing on some kind of cost-benefit analysis of the terms that incentivize them could then simplify the analysis.⁶⁵ Doing so would allow for an economic analysis of democracy on its own terms, bringing some of the most important economic methodology tools into a discussion of how to advance democratic values.⁶⁶ Once an internal accounting of democratic value is established, there will be further work in synthesizing different values. This task, always challenging, would be somewhat more achievable if the tools for internal comparisons were better developed.

C. Self-Authorship

The first two categories of economic analysis in law beyond its comfort zone discussed thus far disconnect economic methods from their typical utilitarian normative foundationalism by avoiding aggregation. These examples seem suggestive and promising for further applications of this strategy in other areas of the law. Alas, there are contexts in which they are inapplicable: settings that invite a normative legal analysis where preference maximization is not a plausible basis for normative prescription, and there is no way around aggregation.

We know of no example of an economic analysis that addresses this challenge, but we think it is important, and we hope to convince economic analysts to take it on. We therefore present in this Section one timely case study for the urgency of developing a strategy that can address this challenge and explain why, although we do not have a solution to it, we are nonetheless optimistic that a solution can be found.

64. *Cf.* RAINER FORST, *THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE* 188-228 (Jeffrey Flynn trans., Columbia Univ. Press 2011) (discussing the basic right to justification).

65. Public choice theory has taken steps in this direction, for example by noting that direct citizen voting (plebiscites) may actually undermine democratic values. *See* Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 *GEO. WASH. L. REV.* 311, 313-15 (2012).

66. We think the same kind of exercise could be performed in additional contexts, perhaps most directly in analyses of workplace democracy.

Our case study belongs to a wider category, and we thus begin with this broader framework. Recall that our analysis in this Essay is premised on the conviction that the normative significance of preference satisfaction relies on law's ultimate commitment to self-determination and equality.⁶⁷ This premise implies that preferences that defy people's right to self-determination or might threaten it should be rejected or overridden. This proposition seems clear insofar as it relates to preferences that pertain to other people's self-determination and equality (such as the racist's). But it is also valid with respect to some preferences that relate to one's own goals and plans. The typical hierarchical and nested character of people's goals and plans imply a distinction between, on the one hand, ground projects—projects that give meaning to one's life, that are important chapters of one's life story—and, on the other hand, sheer preferences.⁶⁸

Neither people's relationships with their loved ones nor their other constitutive features and choices, such as their vocation, are on par with their garden-variety preferences regarding mundane goods or daily services. This means that any attempt to study doctrines that affect these aspects of people's self-determination in terms of preferences is bound to fail, or at least risks obscuring their significance (recall that preferences are grounded in reasons) and thus distorting the legal analysis. Where these doctrines affect large groups of people, legal theory, committed as it must be to serve human ends as they unfold in real life, should study the possible effects of alternative legal regimes, and thus look for tools of aggregating autonomy (or self-determination, we use these terms interchangeably).

A detailed discussion of autonomy, or of the way law can and should proactively contribute to people's autonomy, is beyond the scope of this short Essay.⁶⁹ For our purposes it is enough to appreciate one fundamental challenge of a legal system that seeks to serve people's right to self-determine, to plan and act on their capacity “to have, to revise, and rationally to pursue a conception of the good.”⁷⁰ Such an autonomy-enhancing law must empower people's self-determination by conferring upon them the power to make commitments while also safeguarding the self-determination of their *future selves*, thus vindicating their right to *rewrite* their life stories. Since *any* act of self-authorship constrains the future self, the challenge is

67. For a similar position, see, for example, MATTHEW D. ADLER, *MEASURING SOCIAL WELFARE: AN INTRODUCTION* 48, 56, 71 n.21 (2019).

68. Cf. T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 122-23 (1998) (criticizing the utilitarian aggregation technique for ignoring the hierarchical character of people's plans, projects, and goals as well as their complicated interconnections); Bernard Williams, *Persons, Character and Morality*, in *MORAL LUCK* 1, 12 (1981) (characterizing “ground projects” as those “projects which are closely related to [an individual's] existence and which to a significant degree give a meaning to his life”).

69. For a discussion of the way law proactively contributes to people's autonomy, see Hanoch Dagan, *Autonomy and Pluralism in Private Law*, in *THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW* 177 (Andrew S. Gold et al. eds., 2020).

70. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 19 (2001).

to limit the range, and at times the types, of enforceable commitments people can undertake consistent with the state's obligation to respect both our present and future selves.⁷¹

Consider now our case study, which deals with one dramatic clash between the autonomy claims of the current self and the future self. Think about employee non-compete agreements, which have become endemic in recent years,⁷² and focus on those that are *not* interpersonally abusive. Many of these agreements come about where the current self plots a plan that is genuinely empowering; the employee who not only earns more, but also gains upgraded skills that may open up new professional horizons. Nonetheless, where the *quid pro quo* is a significant encumbrance of the future self, even these agreements may, as they should, be subject to critical scrutiny. A contract law that takes seriously people's right to self-determination cannot remain agnostic towards severe limitations of the ability of the employee's future self to rewrite the story of her life, and this proposition is not dependent upon the employee's imperfect foresight or any possible external effects of the parties' agreement.⁷³ These are genuinely hard cases, because safeguarding the future-self's right to rewrite her life story implies that law limits the empowering potential that contract could have generated for the current self.⁷⁴

The existing doctrine governing non-competes is complex and varies across jurisdictions,⁷⁵ and this is not the occasion for its analysis. The basic thrust of the law in many jurisdictions—examining the reasonableness of the constraint in terms of occupational, geographic, and temporal scope—seems reasonable, and we do not disparage the viability of developing it to a set of rule-of-law-friendly prescriptions based on informed qualitative judgments. And yet it is hard not to expect that a more rigorous way of aggregating these autonomy concerns would yield invaluable insights.

71. See Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 112, 114, 123-25 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

72. See THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 3 (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [<https://perma.cc/B79Z-XPRA>].

73. Indeed, as with other doctrines that need to address the competing autonomy requirements of the current self and the future self, at some point people's right to change course is semi-inalienable. Consider, for example, the strict unavailability of specific performance against employees even in jurisdictions in which this is the default contractual remedy, or the semi-inalienability of rights of exit from various cooperative ventures, such as co-ownership of land or marriage. See Hanoch Dagan & Michael Heller, *Specific Performance* 37-38, 49-54 (Columbia Law Sch. Law & Econ. Working Paper Grp., Paper No. 631, 2020), <https://ssrn.com/abstract=3647336> [<https://perma.cc/K92M-KGA8>].

74. See Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 386-87 (2019); see also, e.g., Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 969-71, 1029-30 (2020) (explaining how noncompetes encourage firms to invest in cultivating intellectual and human capital). *But see* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 242 (2013).

75. See Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 941 (2012).

Autonomy as such is not amenable to any exercise of aggregation, so doing so is likely to require a proxy, which unfortunately we do not have.⁷⁶ But there may yet be room for optimism. To see why, consider the crucial, but all too often unnoticed, methodological move that makes preference satisfaction seem an obvious candidate for economic analysis. The commensurability across people, essential to the conventional economic cost-benefit analysis, is in fact not a feature of preference satisfaction. Aggregating preferences across people is no less mystical than aggregating their autonomy. But preference satisfaction still becomes amenable to this exercise thanks to its canonical translation to willingness to pay, which serves as its proxy, and is commensurable across people. The imperfections of the use of this proxy—notably the reliance of willingness to pay on ability to pay—are familiar. And yet, the quality of willingness to pay as a proxy whose correlation to preference satisfaction is conceptually grounded implies that where preference satisfaction is indeed the name of the game, careful economic analyses can avoid these pitfalls.

This accomplishment suggests that the conventional presupposition that the tool of cost-benefit analysis is *necessarily* married to the goal of maximizing preference satisfaction is in fact unwarranted. Rather than a conceptual barrier, we face an operational challenge: to devise commensurability-friendly *proxies* for other goods such as autonomy.⁷⁷

Conclusion

Almost a decade ago, Alan Schwartz remarked that the gap between “law and economics scholars and professors who identify with particular fields but who are not interested in economics can induce despair.”⁷⁸ This Essay may be read as a response to Schwartz, and as a suggestion that the situation might not be quite so dire. We identified and attempted to refine the aspects of mainstream economic analysis of law that provide indispensable insights for legal theorists, including those who are not law and economics insiders. In particular, we focused on economic analyses of areas

76. The proxy would need, as Kornhauser suggests, to untangle the various dimensions of people’s self-determination in the context at hand (here, vocation). See Kornhauser, *supra* note 6. We acknowledge that our observations regarding the distinction between ground projects and mere preferences and—more generally—respecting the hierarchical and nested character of people’s goals and plans are only preliminary steps in this regard. But we think that they imply that, *contra* Kornhauser, what is missing is not only more philosophical work. See Tamar Kricheli Katz, *Response to Jennifer Arlen on The Essential Role of Empirical Analysis in Developing Law and Economics Theory*, 38 YALE J. ON REG. BULL. 154 (2021).

77. Some scholars attempt to forcibly incorporate these values into the economic analysis comfort zone by assuming that autonomy, equality, etc., are quantifiable or that their value is grounded in preference satisfaction. As noted earlier, we think that these maneuvers seriously jeopardize the plausibility of the analysis. If this ends up as the only alternative economic analysis can offer, legal theory seems well-advised to stick to the qualitative assessments it currently uses, along the lines of the abovementioned non-compete reasonableness inquiry.

78. Alan Schwartz, *Two Culture Problems in Law and Economics*, 2011 U. ILL. L. REV. 1531, 1537.

amenable to preference satisfaction as a normative criterion, and on the power of economic analysis to expose feasibility constraints of legal prescriptions that aim at other normative goals. At the same time, we suggested that economic methods might be apt for examining how values other than preference satisfaction, such as distributive justice, democracy, and autonomy, can be pursued through law. The goal has been to pull economically and non-economically oriented scholars in a common direction, in the hope that the interaction might produce new insights, fruitful for both camps.