DEFINING "THE GOOD LAWYER":

An Economic Account of Legal Ethics

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Introduction

(a) Avoiding Good and Evil

"Good" and "evil" are troublesome notions. Generations of philosophers, theologians and even lawyers have proffered definitions of these terms, yet no single set of workable meanings has managed to gain acceptance. Despite the musings of many well-intentioned theorists, the notions of "good" and "evil" still elude clear definition. As Thomas Hobbes observed:

> divers men, differ not onely in their Judgment, on the senses of what is pleasant, and unpleasant to the tast, smell, hearing, touch, and sight; but also of what is conformable, or disagreeable to Reason, in the actions of common life. Nay, the same man, in divers times, differs from himselfe; and one time praiseth, that is, calleth Good, what another time he dispraiseth, and calleth Evil.[2]

In the absence of a settled definition of "good" or "evil", it seems unwise to rely on either of these notions when constructing a workable theory of ethics. More importantly, reliance on the ideas of "good" and "evil" may give rise to logical problems. One of the purposes of any ethical theory is to help discern the nature of "good" and "evil". If a goal of ethical theory is to provide a definition of "good" and "evil", it makes very little sense to rely on preconceived meanings of "good" and "evil" when defining an ethical theory. Indeed, an ethical theory that begins with settled ideas concerning the meaning of "good" and "evil" (or "moral" and "immoral", "ethical" and "unethical") amounts to little more than an exercise in perfectly circular reasoning. As a

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[2] Thomas Hobbes, *Leviathan* (New York: Norton & Company, 1997), 87.

result, when trying to make sense of ethical systems we are well-advised to suspend reliance on pre-existing notions of good and evil. This paper will accordingly avoid the trap of explaining legal ethics by reference to inexplicable notions.[3] Instead, this paper will eschew assumptions concerning the nature of good and evil and will instead attempt to explain all ethical systems (and legal ethics in particular) by reference to more basic, tangible things – namely scarcity, self-interest and the human need to survive. In short, this paper explains legal ethics by reference to theories of evolution and economics. Because economics and evolution are so thoroughly intertwined, throughout this paper the ideas of evolution and economics, together with their impact on the study of legal ethics, are brought together under the rubric of "an economic theory of legal ethics".

The use of economics as a tool for explaining legal ethics presents two immediate problems. First, people are resistant to the idea that ethical systems are based on notions of survival and the maximization of wealth. For mystical reasons, people *want* their theories of ethics to be grounded in metaphysics. According to Robinson and Garratt, for example:

> Human beings seem reluctant to accept that morality is something invented by themselves and so tend to legitimize moral rules by mythologizing their origins.[4]

People want to believe that ethics flow from a supernatural source, from spirituality or from something within themselves that is far greater than the instinct to survive. From this perspective, any theory that attempts to explain ethics by reference to mundane human needs is considered unpalatable and vulgar. This objection can be overcome quite easily. An economic theory of legal ethics does not exclude the possibility of a god, of spirituality or of some unseen ethical force that guides us toward the resolution of ethical quandaries. On the contrary, an economic theory simply tells us that whatever forces may be guiding us toward or away from ethical decisions, those decisions can be explained, predicted and evaluated in economic terms. Even if ethical decisions are grounded in something more mysterious than economic reasoning, they usually unfold in the way that economic analysis would predict. As John Dewey explains:

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[3] As David Hume observed in *An Enquiry Concerning the Principles of Morals* (Oxford: Oxford University Press, 1998), 77 "It is full time [that philosophers] they should attempt a … reformation in all moral disquisitions; and reject every system of ethics, however subtile or ingenious, which is not founded on fact and observation."
[4] Dave Robinson and Chris Garratt, *Ethics for Beginners* (Cambridge: Icon Books, 1996), 8.

> [E]conomics has been treated as on a lower level than either morals or politics. Yet the life which men, women and children actually lead, the opportunities open to them, the values they are capable of enjoying, their education, their share in all the things of art and science, are mainly determined by economic conditions. Hence we can hardly expect a moral system which ignores economic conditions to be other than remote and empty.[5]

Even if God is at the helm, the ethical course that He or She has charted seems to be leading us toward wealth maximization and the assurance of the survival of our species. These concepts fall squarely within the domain of economics. As a result, it makes sense to use the tools of economics to evaluate and predict the ethical choices people make.

The second objection to an economic account of legal ethics is more basic than the first. Simply put, the study of legal ethics is supposed to be exciting, and economic theory is not. When students embark upon a study of legal ethics, they hope to study impossible conundrums – Should a defense lawyer betray the confidence of her guilty client where doing so would save an infant's life? Should the lawyer help incorporate a company that will wipe out acres of rainforest or destroy a protected species? Should the criminal lawyer defend a racist charged with hate-crimes? Should a lawyer stall proceedings against a client in the hope that an elderly, adverse witness will die before the matter can go to trial? These questions seem more interesting than demand curves, mathematical formulae and other basic tools of economics. Happily, the tools of economics are incapable of siphoning the excitement out of the study of moral choices. On the contrary, they enhance the study of ethics by providing insights into the ways in which real people grapple with ethical questions. Rather than simply asking "what forms of conduct are prohibited under an ethical code?", or "what may a lawyer do when faced with particular moral questions?", an economic inquiry allows us to probe more deeply into legal ethics: What forms of conduct *ought to be* prohibited? When should the lawyer break the law or violate ethical codes on the grounds that doing so is in the lawyer's interest? Can a breach of ethical rules create a better legal system? Questions of this nature are *economic* queries. The study of economics is not the study of fiscal policy or accountancy: it is the study of human choices and a compelling

[5] John Dewey, *The Quest for Certainty* (London: George Allen & Union Ltd., 1929), 269.

method of predicting, analyzing and measuring those choices and their effect on the real world.[6] The ethical choices lawyers make are no exception. Like any choice a person faces, an ethical decision involves a series of cost/benefit calculations which ultimately determine the course of action that the decisionmaker will take. The tools of economics are designed to help us understand, evaluate and predict these kinds of choices.

The remainder of this paper focuses on a single question – How can economics help us analyze ethical choices? In answering this question, this paper begins with a general overview of the economic theory of legal ethics, looking at various legal and ethical issues through an economic lens. Following that overview, this paper moves on to establish the connection between ethical systems and economic drives. The goal of the concluding portions of this paper is to demonstrate that, despite our human desire to define ethics by reference to metaphysical notions of "good and evil" or "right and wrong", many core ethical concepts owe their origin to the economic ideas of self-interest, scarcity and wealth-maximization. On a fundamental level, we are ethical (or unethical) because we want to survive and prosper. Our ethics flow (at least in part) from economic drives. It therefore seems quite sensible to analyze ethical choices through the use of the tools of economic reasoning.

(b) A New Perspective

The best way to become accustomed to observing the world through an economic lens is through the use of concrete examples. The purpose of this section is to demonstrate a basic economic analysis of standard legal relations, and to use that analysis to build the groundwork for an economic theory of legal ethics. Consider the following situation:

Example 1

> Ted is in the business of making widgets. Poonam, whose widget-supply is low, wishes to purchase a dozen widgets from Ted for $2,000. Poonam is happy to pay $2,000 for the

[6] As Cooter and Ulen noted in the first edition of *Law and Economics* (Harper Collins, 1988), at page 11, "economic concepts such as maximization, equilibrium, and efficiency are fundamental categories for explaining society, especially the behavior of rational people responding to rules of law".[6] In short, "economics" can be defined as the study of rational responses to specified incentives.

> widgets, because she values them at $2,500. Ted is happy to accept $2,000 for the widgets, as they cost him only $1,500 to produce. As a result, Ted agrees to sell Poonam a dozen widgets in exchange for Poonam's payment of $2,000.
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> What has Ted *really* agreed to do?

A simple view of this scenario suggests that Ted has agreed to do exactly what he said he would do in the terms of his agreement: Ted has agreed to convey one dozen widgets to Poonam in exchange for Poonam's payment of $2,000. A lawyer or an economist might take a different view. A lawyer, for example, might note that the law of contract requires Ted *either* to deliver the widgets to Poonam *or* to pay whatever damages the law requires in the event of breach. Under a system of expectation damages,[7] those damages would be equal to whatever dollar figure would be sufficient to place Poonam in the economic position she would have occupied had Ted lived up to the terms of his agreement.[8] As a result, a lawyer might not contend that Ted has agreed to sell his widgets. On the contrary, from a lawyer's perspective Ted has agreed to *either* (a) deliver the widgets, *or* (b) pay Poonam whatever damages are required to put her into the economic position she would have enjoyed had Ted abided by to the explicit terms of the contract. The lawyer views the possibility of breach (and the ensuing legal consequences) as an unstated element of the agreement, and an option that Ted has from the moment the contract is accepted. When he fails to deliver widgets, Ted has not committed an ethical violation. On the contrary, he has simply opted to take the route of expectation damages rather than the route of widget-delivery. By viewing Ted's agreement through the lens of contract law, we change our views concerning the nature of Ted's contractual obligations.

An economic view of Example 1 takes the lawyer's analysis one step further. What if Ted found someone else (say, Alice) who would be willing to pay $3,000 for one dozen widgets?

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[7] Expectation damages have the objective of placing the victim of a contractual breach into the economic position that he or she would have occupied had the other (breaching) party lived up to the terms of the contract. As Cooter and Ulen note, "If expectation damages … achieve their purpose, the potential victim of breach is equally well off whether there is performance, on the one hand, or breach and payment of damages, on the other hand. We say that *perfect expectation damages* leave potential victims indifferent between performance and breach". (*Law and Economics*, 4th ed., (Boston: Pearson Addison Wesley, 2003), 239.)

[8] In this example, damages should equal $500 (the economic surplus that Poonam would enjoy as a result of the widget-contract). Since Poonam values the widgets at $2,500 and only pays $2,000, she hoped to improve her economic position by $500 through the agreement to purchase widgets. If Ted breaches this agreement, he must replace the $500 gain that Poonam would have received had he adhered to the terms of the contract. Since the contract would have given Poonam a $500 benefit, she is neutral as between (a) Ted's adherence to the agreement and (b) receiving a damage-payment of $500. Either way, she comes out $500 ahead.

Unfortunately, Ted has only one dozen widgets available for sale: he cannot convey the same 12 widgets to both Poonam and Alice, and he has already agreed to sell the widgets to Poonam. What should Ted do now? Ted can either (a) deliver the widgets to Poonam in accordance with the terms of the agreement, or (b) breach the agreement (paying whatever damages contract law requires) and convey the widgets to Alice in exchange for $3,000.

If Ted adheres to the terms of his agreement, he will deliver the widgets to Poonam and enjoy a profit of $500 (the difference between Poonam's payment of $2,000 and the $1,500 it costs Ted to produce the widgets). If Ted violates his agreement and sells the widgets to Alice, he will enjoy a profit of $1,000: $3,000 from Alice minus (a) the $1,500 cost of producing a dozen widgets and (b) a $500 damage-payment to Poonam. By breaching his promise to sell the widgets to Poonam and conveying them to Alice, Ted is $500 better off (earning $1,000 by breaching rather than $500 by adhering to Poonam's contract). From an economic perspective, Ted *should* violate the explicit terms of his contract. This is an example of what economists call an "efficient breach" of contract (a concept that will be important throughout this paper).[9] Although Ted is breaching the contract (by failing to deliver the widgets to Poonam), in so doing he is making the world (in economic terms) a better place. Poonam is no worse off than she would have been had Ted delivered the widgets (she is equally pleased to receive the widgets or to receive a damage payment of $500).[10] Ted is $500 better off by breaching the contract and selling the widgets to Alice. Assuming that Alice values the widgets at more than $3,000 (which she must, since she was wiling to give up $3,000 in exchange for the widgets in question), she is economically better off than she would have been had Ted gone along with the terms of his original agreement. It is efficient for Ted to breach this contract (and sell the widgets to Alice), because the overall gain inherent in the widget-sales-agreement has increased through Ted's decision to breach the contract. In economic terms, the surplus generated by Ted's relationship with Poonam (that is, the economic gain that would inure to the benefit of all of the relevant parties) is maximized where Ted breaks his agreement with Poonam, sells the widgets to Alice

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[9] In the first edition of *Law and Economics* (Harper Collins, 1998), Cooter and Ulen provided the following definition of "efficient breach" (at pages 290-291): "a breach of contract is more efficient than performance of the contract when the costs of performance exceed the benefits to all the parties … The costs of performance exceed the benefits when a contingency arises such that the resources necessary for performance are more valuable in an alternative use … Incentives for breach are efficient when the transfer of resources to the highest-valued use is accomplished at the lowest transaction costs and in such a way that no one is made worse off by the transfer and at least one person is made better off.

[10] See footnote 9, above.

and (through the payment of expectation damages) puts Poonam into the economic position she would have occupied had Ted adhered to the terms of his original bargain.

Presumably, Poonam and Ted entered their agreement with the principal goal of economic gain. Generally speaking, people enter contracts in order to obtain an economic advantage. Since the principal motivation for a contract is economic gain, the best decision for contracting parties to make is whatever decision gives rise to the optimal economic gain. As a result, a rational economist would support Ted's decision to breach the contract with Poonam - the decision to breach the contract maximizes the economic gains that are distributed among all of the relevant players.

The foregoing illustration provides a simplified example of the way in which economics helps us evaluate decisions. Without undertaking an economic analysis, people might support a general rule that breaching a contract is an undesirable act. The economist, by contrast, undertakes a cost/benefit analysis of the decision to breach a contract and analyzes the outcomes that may flow from the choices available to the parties. The economic analysis of the widget-sales-agreement allowed us to see that, in certain situations, breaching a contract might be "the right thing to do" in the sense that it leaves all relevant parties better off than they would have been had they adhered to the original terms of their agreement. By viewing Ted's contractual obligations through the lens of economics, we come to appreciate (a) the objective of the original agreement (that is, economic gain), and (b) how a breach of the agreement may achieve the goal of economic gain more successfully than adherence to the terms of the agreement.

Our analysis of Example 1 was an "economic analysis" not because it related to profit or to monetary sums: an economic analysis needn't relate to financial issues. On the contrary, an "economic analysis" simply refers to any analysis focusing on "the implications of rational choice".[11] Economics is not the study of money, fiscal policy or the economy. It is the study of rational choices and the impacts that those choices are likely to have on the real world. As a result, we can turn our economic lens toward any system of choices, whether or not the choices in question relate to monetary sums.

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[11] David Friedman, *Law's Order* (Princeton: Princeton University Press, 2000), 8.

(c) Ethical Choices

The form of economic analysis applied in the previous section can be extended into the realm of legal ethics. Consider the "Barristers Oath", an oath that lawyers must take upon their admission to the Bar of Ontario:

> You are called to the Degree of Barrister-at-law to protect and defend the rights and interest of such citizens as may employ you. You shall conduct all cases faithfully and to the best of your ability. You shall neglect no one's interest nor seek to destroy any one's property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any one, but in all things shall conduct yourself truly and with integrity. In fine, the Queen's interest and the interest of citizens you shall uphold and maintain according to the constitution and law of this Province. All this you do swear to observe and perform to the best of your knowledge and ability. So help you God.[12]

What does this oath mean? From a "plain meaning" perspective, one could argue that the Oath entails precisely what it says: the new lawyer swears to "observe and perform" the various promises that are found within the Oath. But what does the Oath mean from an economic perspective? Recall Example 1. As we saw in that example, Ted's promise to sell his widgets could be regarded as something *other than* a promise to sell widgets. Instead, it could be regarded as a promise to *either* (a) sell the widgets, *or* (b) pay whatever damages might be awarded as a result of his failure to sell his widgets. By the same token, the Barristers Oath can be regarded as a promise to *either* (a) dutifully observe the various promises found within the text of the Oath, or (b) submit to whatever penalty might flow from a decision to break the relevant promises. Consider the following example:

<u>Example 2</u>

> Norman is a lawyer in the province of Ontario. He has taken the Barristers Oath, and has sworn (based on the Oath's literal language) to "uphold the Queen's interest … according

[12] The "Barristers Oath" is found in by-law 11, section 6(6) of the By-Laws of the Law Society of Upper Canada.

> to … the law of [Ontario]". The Law Society of Upper Canada (the body charged with regulating lawyers in Ontario) has set the penalty for breach of the Barristers Oath at $5,000.[13]

From an economic perspective, Norman has agreed to *either* uphold the Queen's interest *or* to submit to whatever penalty might flow from his failure to do so. Assume that Norman opposes the monarchy. In pursuit of his anti-monarchist agenda, Norman is contemplating a non-violent (yet disruptive) act of civil disobedience (such as a "sit-in" at the legislative assembly). Assume that Norman's act of civil disobedience would (a) violate the language of the Oath, giving rise to a fine of $5,000, and (b) violate various provincial laws, giving rise to additional fines totaling $3,000.

Assuming that Norman is a rational person armed with forethought and full knowledge of the costs that flow from a breach of the Barristers Oath, Norman is now equipped with all of the tools he needs in order to choose his course of action. He can either (a) abide by the Barristers Oath and adhere to provincial laws, or (b) violate the Oath and the relevant laws, incurring fines totaling $8,000. Norman must now engage in a cost/benefit analysis. If Norman would gladly give up $8,000 (or more) in order to rail against the monarchy, he should violate the Oath (and related provincial laws) and engage in his contemplated act of disobedience. Norman will be giving up an asset worth $8,000 (namely, the cash required to pay the relevant fines) in exchange for another asset (namely, the right to engage in the contemplated act of disobedience) which Norman values more than $8,000. If Norman sets a personal value of $10,000 on this particular act of civil disobedience (in the sense that Norman would happily forego $10,000 of income in order to engage in the relevant act), he will be better off by breaking his oath and paying the relevant fines. In effect, he will have purchased $10,000 worth of civil disobedience for a price of $8,000. For Norman, that is a bargain.

What is the Law Society's perspective in this scenario? On the facts of this example, the Law Society levies a fine of $5,000 whenever someone breaches the terms of the Barristers Oath. From one perspective, this means that the Law Society has set a *price* of $5,000 for any action that violates the terms of the Oath. As Cooter and Ulen note:

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[13] This figure is hypothetical.

> the rules established by law establish implicit prices for different kinds of behavior, and the consequences of those rules can be analyzed as the response to those implicit prices.[14]

From this perspective, there is no question of "good" or "bad" in Norman's decision to breach the Oath. On the contrary, the Law Society has simply set a price for a specific type of behavior: it costs \$5,000 to do anything which conflicts with the promises found within the Oath. If Norman chooses to break the Oath, he has done nothing sinister or malicious. On the contrary, Norman has simply purchased an asset (the right to engage in certain behavior) at the price (\$5,000) that the Law Society set. Since the Law Society set the price at \$5,000 per violation, the Law Society should be relatively neutral as between (a) receiving the \$5,000 fine, and (b) having Norman refrain from his acts of disobedience. In effect, the Law Society is in the business of selling "ethical indulgences" at prices that it defines.[15] Through its regulation of lawyers' behavior, the Law Society has established the market price of violations of the Barristers Oath. If the Law Society shows a strong preference for receiving the \$5,000 fine, the Law Society has set the market price too high.[16] If the Law Society shows a strong preference for having Norman abide by the terms of the Oath rather than paying the fine, the Law Society has set the price too low. If this is the case, the Law Society should increase the relevant fine and ensure that only those who are willing to pay a much greater figure (say, \$50,000) will be willing to pay the fee to break the Oath.

At first blush, an economic view of promise-keeping may seem unsettlingly mercenary. For many people, the decision to break a promise seems more troubling than the purchase of an asset. Breaking a vow seems more ethically questionable than a decision to purchase a bicycle or buy groceries. One might think, for example, that Norman's decision to break an oath makes Norman a bad person. He is not merely breaching a contractual obligation and paying the requisite fee – instead, he is breaking an *ethical* obligation and demonstrating a lack of moral fiber. This objection can be overcome through a more thorough economic analysis.[17] Assuming

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[14] Cooter and Ulen, *Law and Economics* (Harper Collins, 1988), 11.

[15] Indeed, since the Law Society is the only institution in a position to "sell" breaches of the lawyers' ethical code, it could be argued (from an economic perspective) that the Law Society has a monopoly on unethical behavior. This perspective is developed in chapter 4 "Legal Ethics", footnote 1, above.

[16] Note that this is only one possible economic explanation of the law society's perspective. Alternative (and, in my view, more sensible) explanations are developed in chapter 4 of "Legal Ethics", footnote 1, above.

[17] On a rhetorical level, this objection can also be overcome by reference to precedent. Consider the example of Gandhi (upon whose life Norman's fact situation is loosely based). Gandhi was a lawyer, yet Gandhi engaged in various acts of civil disobedience in order to eliminate the monarchy's hold on India. This was an economic choice.

that the objection is correct and that there are moral implications to Norman's decision to break his promise, the costs of these moral implications can be added to our ethical calculations. If the "moral element" of oath-breaking leads (for example) to feelings of guilt or a reputation for dishonesty, these consequences can be analyzed as economic costs. While it is difficult to place a dollar value on a person's reputation, it is not impossible to do so (indeed, courts do this in cases involving defamation of character). An economist would demand that we take account of these values when deciding whether to take an ethically questionable course of action. When assessing Norman's decision to violate the Barristers Oath, for example, an economist would require Norman to take account of *all* costs (pecuniary and moral) that flow from his decision to break the Oath.[18] Any damage to Norman's reputation, any loss of future income due to possible ill-fame, or any other losses that flow from Norman's decision to break the Oath must be incorporated into the "price" associated with Norman's actions. Norman must determine the value of all of these costs and then add those costs to the fines that he will pay. This final sum (made up of fines plus "moral" costs) is the true economic cost of breaking an oath. Where the gains associated with breaking the Oath outweigh the total cost, the rational person will break the Oath and thereby maximize his or her well-being. While it may be difficult to regard this as a "moral" form of reasoning, it may be easier to see this in more glaring examples: if Norman's decision to break the Oath would save the life of Norman's child, for example, it would be apparent (to many people) that breaking the Oath was the right decision. The value of the child's life outweighs the costs that would be associated with a decision to keep a promise (including the relevant financial costs as well as any intangible costs that Norman would incur). Whenever we engage in moral reasoning of this nature (that is, justifying a questionable act by reference to a goal that it achieves), we are engaging in a cost/benefit analysis. This is a form of economic reasoning.

For Gandhi, the costs associated with civil disobedience (including potential disbarment, imprisonment, fines, etc.) were more than offset by the gains that he associated with an independent India. Gandhi made a rational, economic choice to violate local laws and professional guidelines. The asset to be gained (a free India) was worth more to Gandhi than the costs that he incurred.

[18] Norman's decision to break the oath will not only impose costs on Norman (in the form of guilt or a bad reputation). This decision will also impose external costs (by diminishing the reputation of lawyers generally, for example, or impairing the legal system). Presumably, these costs have been factored into the fines that Norman pays ($5,000 to the Law Society and $3,000 to the province). As a result, these "externalities" have already been factored into Norman's decision. If the external costs created by Norman's decision are not fully reflected in the fines, the fines should be increased. This topic is addressed in chapters 3 and 4 of "Legal Ethics", footnote 1, above.

The foregoing economic perspective can be summed up rather simply: an individual can do whatever he or she desires as long as that individual is willing to pay the price. In short, "you may continue to do harm to your neighbors so long as you pay a fee for it".[19] Do whatever you like, but pay the price. Actions are neither intrinsically good nor intrinsically bad; they give rise to various benefits and costs. The study of ethics is simply the study of the manner in which individuals calculate and respond to those costs and benefits. This is essentially an economic inquiry.

The examples of economic analysis set forth in this section are quite simplistic. Indeed, a more thoroughgoing economic analysis may lead us to question conclusions that we reached when analyzing ethical and contractual duties. Throughout the remainder of this paper, we will develop the tools required to undertake a thorough economic analysis which allows us to more carefully balance the costs and benefits of ethical (and unethical) actions. For now, it is sufficient to note that human actions lead to various costs and benefits, and that legal or ethical rules impose costs and provide incentives. The tools of economics allow us to weigh those costs, benefits and incentives and to determine what a rational person will do when faced with a choice between competing actions. This analysis applies to any form of rational choice, including an individual's decision to adhere to (or breach) a code of ethics. As a result, one can use an economic analysis to evaluate the consequences of ethical decisions.

<u>The Nature of Ethics</u>

(a) Introduction

The illustrations found in earlier sections of this paper demonstrated the use of economics in the evaluation of ethical choices. While those illustrations may be useful in demonstrating a typical economic analysis, they do fail to answer a critical question. While ethics *can* be analyzed from an economic perspective, does it make any sense to analyze ethics in this way? Why should we bother applying economic reasoning to legal/ethical issues? The answer to this question may be surprising to those who are unfamiliar with economic reasoning. Although an

[19] Per Jansen J. (dissenting) in *Boomer v. Atlantic Cement Co., Inc*. (1970) 309 N.Y.S.2d 312 (Court of Appeals of New York), at 321 (quoted in Cooter and Ulen, *Law and Economics*, 4th ed. (Boston: Pearson Addison Wesley, 2003), 171).

economic analysis of ethics might initially seem unpalatable, a careful review of ethical systems makes it clear that economics are not only relevant to the study of legal ethics, they are the source from which many important ethical values flow. Simply put, ethics are (at least in part) economic concepts, owing their origins to economic notions. This idea is explored in the following sections of this paper.

(b) What are Ethics?

Ethics are a product of human minds.[20] Like poetry, car insurance, fax machines and income tax, the central ideas that form an ethical system flow from the thoughts of human beings. Like any form of voluntary human behavior, ethics can be regarded as a form of stimulus response: in response to certain stimuli human neurons fire in ways that ultimately produce an ethical system. At its core, the subject of ethics is a form of behavioral science – the study of how human minds behave when they decide that certain actions are "right" or "wrong". As a form of human behavior, the practice of creating and responding to ethical codes should be analyzed like any behavioral system. We must ask *why* people engage in the relevant conduct and *what* people do when pursuing the behavior in question. What are the stimuli that lead to ethical systems, and what is the nature of the human minds' response?

The first step in analyzing ethics is to consider the root-causes of ethical systems. Why is it that humans create (and often adhere to) a series of guidelines which differentiate "right" and "wrong"? A complete answer to this question is beyond the scope of this paper. Indeed, there is no single cause of every phenomenon that is embraced by the term "ethics". While our ethical beliefs concerning lying and truth-telling might be rooted in reciprocity and self-interest, other ethical beliefs, such as the belief that torturing infants is immoral, might have deep, genetic roots with little or no relation to other ethical values.[21] The fact that these beliefs are often amalgamated under the label "Ethics" need not imply a common origin. Indeed, the word "ethics" (like any categorical label) is simply a frequently-useful tag that can be used to describe

[20] Some readers may find this notion distasteful in that it ignores the role of spirituality in ethical reasoning. This is not the case. Even if ethical notions are derived from a metaphysical source, the mechanism by which we consider and apply those 'spiritual ethics' is, of course, the human mind.

[21] This argument should not be taken as a suggestion that the ethic against torturing infants is *not* rooted in reciprocity and self interest, or that there is no genetic imperative against lying: it simply suggests that individual ethical beliefs may, in fact, be drawn from different sources.

a loosely related group of discrete phenomena.[22] Despite the varying nature of ethical values, however, a significant number of foundational ethical norms share one feature in common: they are grounded in economics. The relationship between economics and ethical systems is explored in the following section of this paper.

(c) The Roots of Ethical Systems

One way to observe the economic foundations of ethical values is to imagine a universe in which ethics do not exist. What would happen in a world where lies were just as acceptable as truth, where people had no sense of "fairness" or "unfairness" and where no mode of activity could give rise to moral censure? In such a world, many forms of interaction would be costly. Consider the following situation:

<u>Example 3</u>

> Alex and Mina live in a world without ethics. Alex wishes to acquire $10,000 worth of Mina's widgets. Alex values the widgets at $10,000, and hopes to pay as little as possible. Mina incurred a cost of $5,000 making the widgets, and she hopes to sell them for the highest possible price.

Since there is no ethical system in this hypothetical universe, Alex's first approach to acquiring Mina's widgets should be theft.[23] It will almost certainly cost Alex less to steal the widgets than it would to purchase them on the open market, and (if Alex is rational) he would prefer to maximize his wealth by acquiring the widgets at the lowest possible cost. Alex has no moral compunctions concerning the theft of Mina's property, as moral compunctions do not exist in this hypothetical world. More importantly, no one who detects Alex's theft will hold it against him: theft is not *wrong* in an amoral universe; it is simply another way of doing business.

Knowing that there is nothing preventing Alex from attempting to steal her property, Mina will expend resources in an effort to prevent Alex (and everyone else) from taking her

[22] The "linguistic" problems inherent in a term such as "ethics", and the impact of those problems on the economic account of legal ethics, are discussed in chapter 5 of "Legal Ethics", footnote 1, above.

[23] For the purposes of this example, we are presuming that I will not simply give you my widgets unless you can offer me something valuable in exchange.

widgets. If she expends sufficient resources on protection (by installing an effective security system in her widget-factory, for example), then Alex will be forced to either (a) expend resources in an attempt to circumvent the security-system, or (b) offer to make a mutually profitable exchange.[24] If Alex opts for option (b) (because it is less costly than attempting to circumvent Mina's security system), a lack of ethics presents additional problems: Mina will almost certainly force Alex to pay her in advance, as Mina has no reason to believe that Alex will pay her once the widgets are in his clutches.[25] Since no rule of ethics compels Mina to adhere to her portion of the agreement, Alex is equally distrustful and will expend substantial resources ensuring that Mina complies with the terms of the agreement. Before Alex willingly parts with his money, he will want to ensure that (a) Mina actually has the widgets that she has agreed to sell, (b) the widgets are of the quality stipulated in the agreement, and (c) Mina will deliver the widgets once Alex's payment has been made. No one else (including the legal system, in the unlikely event that one exists in a non-ethical world) will give Alex these assurances or bear the cost of ensuring that Mina will comply with the contract: no one cares if Mina takes advantage of Alex, as everyone in this hypothetical world is neutral as between ethical and unethical forms of behavior.[26] The only way to safeguard one's own interests in this universe is to expend resources in pursuit of self-protection.

In this example, if Alex does not spend adequate resources monitoring Mina's conduct and preventing her from engaging in unscrupulous behavior, Mina is certain to take advantage of Alex's trusting nature. She will keep Alex's money and her widgets, and Alex will rue the day that he attempted to make a contract in a non-ethical world. If, by contrast, Alex does expend sufficient resources to ensure Mina's compliance with the agreement, Alex will pay his money, Mina will deliver the widgets, and the exchange will be completed. To bring this contract to fruition, Alex and Mina have each been forced to expend significant resources in order to safeguard their respective interests. Expenditures of this nature, which are known as "transaction costs" in economic circles,[27] are not unique to non-ethical worlds. Indeed, contracting parties in

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[24] A threat of reprisal (by the victim of unethical behavior) constitutes a cost of self-protection. In order to make good on such a threat, the victim of unethical behavior will have to expend resources when exacting revenge.

[25] For this reason, it is unlikely that credit will be a feature of our non-ethical universe.

[26] Indeed, residents of this hypothetical world would have no way of differentiating "ethical" from "unethical" behavior.

[27] Cooter and Ulen (in *Law and Economics*, 4th ed., (Boston: Pearson Addison Wesley, 2003) define "transaction costs" as follows (at page 91 – 92): "Transaction costs are the costs of exchange. An exchange has three steps. First, an exchange partner has to be located … Second, a bargain must be struck between the exchange partners. A bargain

the real world incur costs of this nature every day, performing credit checks, title searches and other costly actions that are designed to detect and minimize the impact of unscrupulous dealings. In our non-ethical world, however, these costs would be much greater. There is no disincentive to stealing, lying or cheating in a non-ethical universe. In other words, there are no costs or penalties for behaving unethically. No one will ever feel badly for having cheated, no one will face social pressure to be honest, and no one has a reason to be fair to arms-length parties. As a result, individuals in a non-ethical universe have to expend substantial resources in an effort to protect themselves from other individuals. These other individuals will then spend their resources attempting to circumvent the protection that others have purchased.[28] The resources that individuals spend on self-protection (and on circumventing each other's protective methods) will be wasted, unavailable for use in productive ventures. This waste is inefficient, as resources could be put to use in more productive ways.

Needless to say, the residents of our hypothetical, non-ethical universe would quickly see their resources dwindling. It seems likely that, in the absence of a pre-existing ethical system, individuals would be compelled to *invent* an ethical system in order to minimize the waste associated with self-protection. The manner in which an ethical system can reduce transaction costs is quite straightforward: Assume that the first ethic introduced in our community is an ethic against lying, cheating and theft. If an individual violates an agreement and cheats a contractual partner out of money, the members of the community will disapprove of the cheating-party's actions. The cheater will incur a reputational cost (by being branded a cheater), and it will become increasingly costly for the cheater to transact with other people. Our hypothetical cheater may have to give collateral, make all payments in advance or pay a premium for goods or services that the cheater purchases. In other cases, disapproving members of the community may refuse to deal with the cheater entirely.[29] Certain services may become unavailable to the cheater as a result of his or her bad reputation. The cheater may ultimately be forced to be self-sufficient, losing all of the advantages that are inherent in co-operative exchange. Provided that our

is reached by successful negotiation, which may include the drafting of an agreement. Third, after a bargain has been reached, it must be enforced. Enforcement involves monitoring performance of the parties and punishing violations of the agreement. We may call the three forms of transaction costs corresponding to these three steps of an exchange: (1) search costs, (2) bargaining costs, and (3) enforcement costs".

[28] It is important to note that this hypothetical universe is not a world in which people are basically "bad": it is a universe where there simply is no notion of "good" or "bad", so people tend to behave in whatever manner benefits them the most.

[29] As David Friedman notes, "Reputation may be the most important method for enforcing agreements in our society, although not the one of most interest to lawyers". Friedman, 145.

hypothetical cheater is armed with foresight, he or she is now far less likely to engage in unethical conduct. While a cheater might gain $2,000 (for example) by swindling a contractual partner today, he or she stands to lose far more than $2,000 in the future (in the form of social stigma and other losses that flow from moral censure). As Cooter and Ulen note in *Law and Economics*, a society armed with an ethical code

> …uses certain non-legal incentives to minimize the occurrence of breach of contract. Of these, one of the most powerful is the value of one's reputation. Because a reputation as a trustworthy contractual partner is sometimes valuable, a reputation as one who breaches contracts is detrimental and may restrain the impulse to engage in breach except in the most serious cases.[30]

Where society imposes a reputational cost upon those who cheat contractual partners, the cost of cheating contractual partners may outweigh the gains associated with cheating. If our hypothetical cheater continues down an unethical path, and in so doing consistently incurs costs that outweigh the gains that might be generated through unscrupulous activity, the cheater will quickly squander his or her resources. The presence of an ethical system (which carries with it the possibility of community censure) makes anti-social behavior far more costly than it otherwise would be. As a result, an individual's ability to profit from anti-social behavior is significantly diminished where ethical rules exist. To put it bluntly, the presence of an ethical system makes unethical conduct far more expensive.

To the extent that costs of behaving unethically outweigh the gains that an unethically-minded person might generate through unscrupulous dealings, individuals (if they are rational) will abstain from unethical conduct in order to preserve their resources. Through its ability to impose costs upon unethical actors, the specter of moral disapproval deters individuals from engaging in unethical behavior. The diminished likelihood of unethical dealings allows everyone to spend fewer resources on self-protection: when you live in a safe neighbourhood, you can afford to install a less extensive security system. Once an ethical system has been established, resources that would have otherwise been spent on self-protection may now be used in more efficient, productive ways.[31] The presence of an ethical system has effectively diminished the

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[30] *Law and Economics* (Harper Collins, 1988), 289.

[31] As we shall see, by adopting an ethical code we are still paying a fee for self-protection. This fee now comes in the form of our decision to refrain from potentially profitable unethical behavior. We give up one asset (the right to

overall cost of interacting with other people. By preserving community resources and promoting collective behavior, the ethical system makes prosperity far more likely. In other words, one of the principal effects ethical systems is to promote our species' survival. The ethical system preserves resources, allows trade and common-defense, and permits us to rely on one another to survive. The manner in which ethical systems achieve these goals is through the creation of incentives for co-operative behavior and disincentives for anti-social conduct. Any system that alters behavior through the creation of incentives and disincentives is (by definition) an economic system.

The foregoing discussion is not an account of the origin of an actual ethical system: no group of community elders gathered together to produce a schedule of costs which they could impose on unethical actors. On the contrary, the foregoing discussion merely serves to illustrate two points. First, it illustrates the ability of an ethical system to facilitate co-operative behavior (by reducing costs associated with excessive self-protection and deterring individuals from unethical conduct). Second, this illustration demonstrates the economic nature of ethical reasoning.

Once the notions of "ethical" and "unethical" (together with the possibility of moral censure) have been established, there are predictable costs associated with the decision to take an unethical course of action. When deciding what actions to take, a rational individual will take into account the outcomes and costs associated with potential decisions. The rational actor will take whichever course he or she believes will bring that actor the greatest gain (meaning the largest possible benefit at the lowest possible cost). When people opt for an ethical course of action, they do so because they believe that they will be better off for having adopted an ethical stance. By the same token, an individual who decides to pursue an *unethical* course of action will typically do so because he or she believes that the net gains generated by unethical conduct will be greater than the gains that would have accrued to the actor had he or she adopted an ethical stance. In other words, the decision to be ethical or unethical is rooted in self-interest. Whichever course of action (ethical or unethical) will yield the greatest gain for the relevant actor is the course of action that the actor will choose. The presence of an ethical system does not change the

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be unethical) rather than another (the costs associated with self-protection), presumably on the basis that the costs associated with self-protection are more costly than our right to engage in unethical behavior.

way in which people govern their affairs: they still perform a self-interested cost/benefit computation when deciding how to behave. The presence of an ethical system does not eliminate the specter of self-interest, it merely changes the costs that must be taken into account when people calculate the costs and benefits of unethical actions.[32] Whether or not an ethical system exists, individuals will inevitably tally the costs and benefits associated with potential courses of action: the presence of an ethical system merely changes the math.

From another perspective, all individuals within an ethical system are engaged in a process of exchange. Each individual (when deciding whether or not to adhere to a community's ethical code) engages in a cost/benefit analysis, deciding whether or not to give up one asset (that is, the right to engage in and profit from unethical behavior) in exchange for other assets (for example, a favourable reputation or an increased likelihood that others will act ethically in response). In either case, the decision is driven by the actor's predictions and perceptions concerning the costs and benefits flowing from particular activities. By definition, this is an economic decision. As a result, our decision to adhere to (or depart from) our community's ethical code is essentially an economic choice. This choice is best evaluated through economic analysis.

Throughout this paper we have seen that ethical systems can be "judged by the structure of incentives they establish and the consequences of people altering their behavior in response to those incentives".[33] On a fundamental level this is the nature of an economic analysis. An economist observes the rules that govern a system of behavior, considers the incentives and consequences created by those rules, and predicts that outcomes that will be generated as a result of people's response to the rules in question. Whether those rules relate to money, law or ethics, they are amenable to an economic analysis. Indeed, wherever humans create a system of penalties and incentives with a view to modifying human behavior, economics provides a useful means of evaluating the relevant system.

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[32] As this text is being written at a time when "Operation Iraqi Freedom" is dominating headlines, it is hard to avoid pointing out repeated claims (by representatives of the American government) that the Iraqi regime will not abuse American captives as it is not "in the Iraqis' self-interest" to torture captives. This statement is an endorsement of the cost/benefit analysis that is inherent in all ethical decisions, as well as the power of "community censure" to control a self-interested ethical calculation.

[33] Friedman, 11.

One objection to an economic account of ethical systems (as opposed to systems of law or fiscal policy) relates to the "mystical notions" that were described at the outset of this paper. People flinch at the idea of ethical systems that relate to profit motives or to economic needs. As John Dewey noted:

> To many persons, the idea that the ends professed by morals are impotent save as they are connected with the working machinery of economic life seems like deflowering the purity of moral values and obligations.[34]

In other words, people prefer to believe that ethics are rooted in philosophical notions beyond the explanatory power of economics. The most obvious of these philosophical notions is altruism: the desire to help others at the expense of one's own needs. Happily, economics is perfectly capable of dealing for altruism and other metaphysical notions. One way in which economics can account for altruism is discussed in the following section of this paper.

(d) Altruism

An economic approach to ethical reasoning strikes many people as a hollow and inaccurate view of ethics. Ethics, it is argued, are not linked to a profit motive: they are based in altruistic tendencies inherent in decent human beings. With respect, this objection is premised on an unduly narrow view of economics. Economists are perfectly happy to acknowledge that people are frequently motivated by altruistic motives. Many people (including a few economists I have met) would be happy to give up large portions of their income in order to end child-poverty, ease the suffering of the sick or improve the lives of those who are unable to help themselves. Many people would sacrifice their property, their security or their lives in order to achieve a laudable philanthropic goal. Many people (perish the thought) might even give to worthy causes without claiming deductions from their taxable income. These people are not anomalies who disprove the economic theory of ethics. An economic theory does not deny the possibility of altruistic motives. Indeed, economics is perfectly able to take account of intangible preferences (such as altruism) when conducting an analysis of ethical decisions. Consider the following example:

[34] John Dewey, 269.

Example 4

> Mary is a philanthropist. She has the opportunity to raise a great deal of money ($100,000) for the purpose of helping Canadian orphans. During the course of her money-raising venture, Mary has the opportunity to embezzle $20,000 from the Canadian Orphan Fund. There is no chance that Mary will ever be caught.

Critics of economic analyses may contend that economics would provide a distorted view of Mary's decision. According to an exceedingly narrow view of economics, Mary would (in this example) profit $20,000 by embezzling from the charity. If she refrains from taking the money, her profit will be $0. As a result, one could argue that (if ethics are truly based in self-interested, economic calculations) a rational person in Mary's position will inevitably choose to embezzle the money. A good economist knows that this is not an accurate picture of Mary's choice. Mary's sense of altruism (in the form of her commitment to the charity) is surely *worth* something to Mary. She may be happy to forego a great deal of her own income in order to ensure that the charity prospers: if someone were to approach Mary and offer a choice between $10 and an end to all child poverty, Mary is very likely to take the second option. Moreover, Mary may place a rather high value on her personal sense of right and wrong. Mary may, for example, be willing to forego $10,000 of disposable income in order to avoid feelings of guilt associated with stealing from a charity. She may be willing to give up a further $5,000 in order to ensure that all of the charity's funds go to appropriate beneficiaries. Finally, Mary may value her sense of self-respect and good character as much as she values $7,000 worth of tradable goods and services. Assuming that Mary would lose self-respect and experience feelings of guilt if she embezzled the charity's funds, Mary is economically better off by *not* embezzling.[35] The gross benefit Mary derives from embezzling the money is $20,000 (the amount of money embezzled). The cost of embezzling equals the sum of (a) the value that Mary places on her loss of self-respect ($7,000 in our example), (b) the value Mary places on a guilt-free conscience, (namely, $10,000), and (c) the value Mary derives from seeing the charity's funds directed toward needy children ($5,000). The sum of these costs is $22,000, which is $2,000 more than Mary would

[35] The idea that an altruist may be driven by self-interest to pursue altruistic actions is not a new one. As Immanuel Kant noted, where an individual's actions appear to inure to the benefit of others, "we cannot from this infer … that it was not really some secret impulse of self-love, under the false appearance of duty, that was the actual determining cause of the will". Immanuel Kant, Fundamental Principles of the Metaphysic of Morals, 296. The topic of self-interest is explored in "Legal Ethics", footnote 1, above.

gain by embezzling the funds. As a result, Mary would be irrational to embezzle the money, as a decision to embezzle results in a net loss of $2,000.[36]

In this overly simplified example, we observe that economics is capable of accounting for ethereal assets (such as self-respect, a guilt-free conscience and a sense of altruism) that are not readily convertible into cash. While it is theoretically possible to assign a dollar value to such assets (for example, by determining to the amount of income that an actor would forego in order to have the relevant asset), there is no substantive reason to perform this valuation. All that an economic analysis demands is an ordering of preferences: Mary *prefers* an untarnished reputation, a guilt-free conscience and a successful charity to 20,000 embezzled dollars in her own pocket. We can accordingly say that Mary's altruistic values are (from Mary's perspective) worth more to her than $20,000. As a result, Mary will give up the opportunity to embezzle $20,000 in order to preserve the intangible (but nonetheless valuable) assets represented by her altruistic values. If Mary refrained from embezzling $20,000 yet jumped at the chance to embezzle $100,000, we could safely assert that Mary's altruistic values were (from Mary's perspective) "worth" some amount between $20,000 and $100,000.

(e) Valuation of Choices

The use of dollars as a measurement of value when evaluating ethical decisions may seem crass. It might seem vulgar and counter-intuitive to put a price on honesty and integrity.

[36] The example of Mary's preference for altruism could fall victim to the following critique (put forward by David Friedman in another context): "An economic theory that is free to eliminate anomalies by explaining them away as due to someone's unexplained and peculiar tastes has very little in the way of testability or predictive power. Our objective is explanation, not description. It is possible that people do have those tastes, but if unexplained tastes are the sole reason for the institutions we wish to explain, we have failed to explain them. And our project is much more interesting if we can show that the institutions our tastes favor are in fact efficient, implying that our peculiar tastes are actually an efficient set of norms". (Friedman, 239). Happily, there is an explanation of the efficiency of the human preference for altruistic deeds. This explanation relates to Butler's notion that "Every particular affection, even the love of our neighbour, is as really our own affection, as self-love; and the pleasure arising from its gratification is, as much my own pleasure, as the pleasure self-love would have, from knowing I myself should be happy some time hence, would be my own pleasure" (Joseph Butler, Fifteen Sermons, 255). The Economics of Butler's account have been developed elsewhere, but are beyond the scope of the present work.

The use of dollar values in such cases does not imply that integrity can be purchased or commodified. On the contrary, the use of a dollar figure is simply a matter of convention: a dollar provides a convenient (and relatively constant) measure of value which is useful when explaining a person's preferences. I may inform you, for example, that I prefer a luxury car to a bowl of ice cream, but this provides you with very little information concerning the relative weight of my preferences. It would be more informative if I asserted that I was perfectly neutral between a luxury car and 10,000 bowls of ice cream: to me, the car is worth exactly 10,000 bowls of ice cream, and (from my perspective) 10,001 bowls of ice cream would be worth exactly one bowl-of-ice-cream more than a car. "Bowls of ice cream", unfortunately, is a cumbersome measure of value. As a result, we convert our valuation to some standard unit of measurement (such as dollars) in order to make our preference ordering more convenient. If we determine (for example) that I value a bowl of ice cream at $2, and then determine the dollar value that I would subjectively place on each of my other competing preferences (including intangibles such as altruism, revenge, love, and loyalty), we can then proceed to order my various preferences in a rather convenient way, comparing the dollar value I place on loyalty, for example, to the dollar value that I place on other goods, services or intangible assets.[37] Comparing dollars to dollars is intuitively easier than comparing bowls of ice cream to altruism, or embezzled dollars to loyalty. A standard benchmark of value simply facilitates our comparisons, and need not imply that loyalty, love and self-esteem are convertible into cash.

As we have seen, the fact that one cannot purchase loyalty, love, vengeance, self-respect or other intangibles on the market does not mean that economics is incapable of taking account of these intangible notions when measuring preferences or evaluating choices. The assignment of a dollar value to an asset does not rely on the notion that one could, in fact, purchase the relevant asset for the relevant dollar value. On the contrary, it merely means that our decisionmaker values the relevant asset just as much as he or she values a particular sum of money (or particular goods or services that the relevant sum of money could supply). In other words, the dollar amounts used throughout this paper merely provide a method of assigning relative weight to

[37] It seems unusual to place a dollar value on love and altruism. That being said, it is possible and convenient to do so. Many people can determine (with relative confidence) that they would gladly give up $1 of income in order to have the love of their parents. The fact that an individual can make this assertion makes it clear that comparisons between sums of money and intangible feelings are possible. As Immanuel Kant observed, "Whatever has a value can be replaced by something else which is *equivalent* … Whatever has reference to the general inclinations and wants of mankind has a *market value*" (*Fundamental Principles of the Metaphysic of Morals* (New York: The Liberal Arts Press, 1949), 51.)

competing preferences. We could just as easily use a different standard of measurement (such as "happiness units", "utiles" or "karma points") in order to analyze a decisionmaker's subjective valuation of competing preferences. For the sake of convention, consistency and simplicity, however, dollar values will generally be used throughout this paper.

The Goals and Functions of an Economic Theory of Ethics

(a) Introduction

Previous sections of this paper have provided an overview of an economic theory of legal ethics. The details of this theory are worked out in R.N.M. Graham "Legal Ethics" (Toronto: Emond Montgomery, forthcoming 2004). Before moving on to consider the details and implications of the economic theory of legal ethics, it is important to consider a critical question: why bother? What is the purpose of an economic theory of legal ethics? This question is briefly addressed in the remaining sections of this paper.

(b) What an Economic Theory Can Do

The primary goal of an economic theory is to provide an accurate method of describing human choices. In the realm of legal ethics, economics helps describe how people create, abide by and deviate from ethical codes of conduct, situating these behaviors within an over-arching system of human activity. In everything we do, humans respond to various stimuli by considering the outcomes of our actions and selecting the choice that we regard as the "best decision". On the most general level, these "best decisions" are designed to promote the survival of our species. By analyzing ethical systems through the lens of economics and evolution, we can see that ethical choices are not unique: they are governed by the same guiding principles that govern every choice that humans make. There is at least some value in a theory that can accurately describe the process of ethical decision-making and situate that process within an over-arching system of behavior.

A second goal of the economic theory of legal ethics is to provide a level of structure to our assessment of ethical choices. Rather than generating an *ad hoc* analysis of individual ethical dilemmas, an economic theory of ethics helps us consider whether or not there are any unifying threads that permeate our ethical systems. As we shall see, those unifying threads do exist and can be used in our analysis of the choices people make. Rather than relying on unexplained notions of "good" and "evil", an economic model ties decision-making to measurable incentives and costs that drive human decisions. By tying ethical decisions to these measurable, objective costs and benefits, an economic theory transfers ethical systems out of the mystical realm of the unexplained and into the arena of measurable and testable hypotheses. Through the lens of economics, ethical theories can be subjected to objective, rigorous standards rather than dogmatic conclusions concerning the nature of "right" and "wrong". As Dewey explains:

> With the transfer, these, and all tenets and creeds about good and goods, would be recognized to be hypotheses. Instead of being rigidly fixed, they would be treated as intellectual instruments to be tested and confirmed – and altered – through consequences effected by acting upon them. They would lose all pretence of finality – the ulterior source of dogmatism. It is both astonishing and depressing that so much of the energy of mankind has gone into fighting for (with weapons of the flesh as well as of the spirit) the truth of creeds, religious, moral and political, as distinct from what has gone into effort to try creeds by putting them to the test of acting upon them"[38]

In other words, an economic theory helps demystify the notions of "good" and "evil" and converts them to testable hypotheses. Rather than boldly asserting that "X is ethical" or "God endorses Y", an economic theory allows a fairly objective measurement of the ways in which our ethical choices impact on the world.

Once we come to understand an ethical system as a series of incentives that promote human survival, we can begin to study the structure of those incentives and the manner in which they promote or prohibit particular forms of conduct. As we shall see, economic theory helps us determine whether or not a particular set of incentives accomplishes the goal of modifying human behavior in sensible ways. Where a particular body of rules (such as an ethical system) successfully modifies behavior in a way that promotes survival, economic theory can point to the reasons for the success of the relevant system. Where a body of rules fails to provide useful incentives or generate sensible outcomes, economic theory can help expose and explain this failure while pointing the way toward more efficient systems of incentives. The manner in which

[38] John Dewey, 263-264.

an economic theory can help accomplish these goals is further developed in R.N.M. Graham "Legal Ethics" (Toronto: Emond Montgomery, forthcoming 2004), Part I.

(c) What An Economic Model Does Not Intend To Do

One of the first objections students raise when confronted by economic theory is that its model of human choices is misguided. Humans, it is argued, do not go about their lives computing the costs and benefits of potential actions. Instead, they simply do what "feels ethical" at the moment. This objection is not a new one. Indeed, Plato voiced this issue in *The Apology*:

> You are sadly mistaken, fellow, if you suppose that a man with even a grain of self-respect should reckon up the risks of living or dying, rather than simply consider, whenever he does something, whether his actions are just or unjust, the deeds of a good man or a bad one.[39]

The answer to this objection has been developed many times in diverse contexts. According to John Stuart Mill, for example, this objection is based on the notion that "there is no time, previous to action, for calculating and weighing the effects of any line of conduct on the general happiness".[40] Mill provides the following answer:

> This is exactly as if anyone were to say that it is impossible to guide our conduct by Christianity because there is not time, on every occasion on which anything has to be done, to read through the Old and New Testaments. The answer to the objection is that there has been ample time, namely, the whole past duration of the human species. During all that time mankind have been learning by experience the tendencies of actions; on which experience all the prudence as well as all the morality of life are dependent. People talk as if the commencement of this course of experience had hitherto been put off, and as if, at the moment when some man feels tempted to meddle with the property or life of another, has had to begin considering for the first time whether murder and theft are injurious to human happiness … Nobody argues that the art of navigation is not founded on astronomy because sailors cannot wait to calculate the Nautical Almanac. Being rational creatures, they go to sea with it ready calculated; and all rational creatures go out upon the sea of life with their minds made up on the common questions of right and wrong, as well as on many of the far more difficult questions of wise and foolish. And this, as long as foresight is a human quality, it is to be presumed they will continue to do.[41]

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[39] Plato, *Defence of Socrates Euthyohro Crito* (Oxford: Oxford University Press, 1997), 41.
[40] John Stuart Mill, *Utilitarianism* (Canada: Broadview Press Ltd., 2000), 32.
[41] Id., 32-34.

In his economic account of legal systems, David Friedman makes a similar observation:

> Rationality does not mean that a burglar compiles an elaborate spread-sheet of costs and benefits before deciding whether to rob your house. An armed robber does not work out a precise analysis of how shooting his victim will affect the odds of being caught, whether it will reduce the chances by 10 percent or by 20. But if it is clear that it will reduce the risk of being caught without increasing the punishment, he is quite likely to pull the trigger.[42]

Simply put, the truth of economics does not depend on the assumption that individuals go through life with calculators in their hands. On the contrary, economics simply assumes that people tend to make the choices they prefer. Their preferences are based on established notions concerning the costs and benefits of various actions, and rough assessments of the consequences that are likely to flow from choices that are available. All that economics presumes is that people know what they want and have a fairly good idea of how to get it. From these simple assumptions flows an array of powerful tools designed to describe and evaluate human decisions. Economics is the study of human choices, and a useful way of determining how a system of incentives can be used to direct the choices people make. An ethical system is a prime example of a system of incentives. Economics can accordingly help us study and understand the ethical choices people make.

[42] Friedman, 8.