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ON PHILOSOPHY AND ECONOMICS

By Cass R. Sunstein*

I. INTRODUCTION

A few years ago, I attended an interdisciplinary conference on the subject of incommensurability. The economists and the philosophers seemed quite hostile to one another, and to be disagreeing very sharply; but it was unclear what they were disagreeing *about*. The high-point, or low-point, came when the distinguished game theorist Kenneth Binmore asked the distinguished legal philosopher Joseph Raz, with utter exasperation, what Raz meant by the term “the will.” Was Raz—Binmore wanted to know—referring to a physical entity? If not, what in the world (literally) did Raz *mean*? Raz responded, quietly, that he was building on ordinary usage. Binmore made it clear that he did not consider this an answer. It should not be surprising that no economist is represented in the volume that grew out of the conference.¹

Many philosophers are critical of economics, on the theory that “efficiency” is not an appropriate social ideal and that the economic conception of human motivation is extremely crude. And much of Martha Nussbaum’s recent work has consisted of a philosophical critique of economics, or, more precisely, that form of economics that has been especially influential in the economic analysis of law (hereinafter EAL).² Nussbaum thinks, as do many philosophers, that economists work with hopelessly crude foundations, rooted in assumptions that philosophers have long shown to be misguided. I believe that Nussbaum has made a number of convincing arguments, but

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1. See *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (Ruth Chang ed., 1998).

2. See Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV 1197 (1997) [hereinafter *Flawed Foundations*]; see also MARTHA NUSSBAUM, *POETIC JUSTICE* (1996); Martha Nussbaum, “Only Grey Matter?” *Richard Posner’s Cost-Benefit Analysis of Sex*, 59 U. CHI. L. REV. 1689 (1992).

that that these arguments are not nearly as damaging as she thinks to conventional EAL, most charitably read. Part of the problem, it seems to me, is that she reads EAL as if it were, or aspired to be, a branch of political philosophy, where in fact EAL is mostly an effort to predict the consequences of law and to understand the forces that bring law about. EAL is concerned with *testable hypotheses*, a topic of little concern to philosophers. One way to put the point is that while philosophers often complicate ordinary understandings, by introducing further distinctions and refinements, economists often simplify ordinary understandings in the interest of parsimony. Nussbaum makes a number of good criticisms of EAL insofar as it is normative or insofar as it attempts to set forth an accurate descriptive account of practical reason; but only a small amount of EAL is normative in the sense that she is complaining about, and economists need not be read to claim to have a good descriptive account of practical reason.

There is a broader lesson, involving the relationship between philosophy and economics, and about the possibility of productive collaboration between philosophers and economists. To the extent that they are speaking about law, economists are especially good at exploring the consequences, many of them apparently unintended, of legal rules. Within the social sciences, they are especially good at developing testable hypotheses and then testing them. Economists are also helpful in giving accounts of how law comes into being and in showing the best way to achieve specified ends. At the more normative level, they are most helpful in showing that if some X is the goal, some instrument Y will or will not achieve it. It follows that philosophical critiques of the “foundations” of EAL—including Nussbaum’s—do not, by and large, undermine the most common and important uses of economics in law. Economists and philosophers are generally engaged in different tasks. With respect to productive collaborations, philosophers can, among other things, clarify concepts that economists leave murky; posit ingredients in individual utility functions that economic analysts of law might otherwise overlook; raise questions about how to conceive “rationality”; and show difficulties in full-fledged normative work in EAL. I suggest that an especially promising domain for productive collaborations is behavioral law and economics.

II. ECONOMICS, EXTENDED UTILITY FUNCTIONS, BEHAVIORAL ECONOMICS

A. Normative, Positive, Prescriptive

Let us begin with some distinctions. Economic analysts usually distinguish between positive and normative work. Positive work is concerned with explaining why law is as it is and with predicting the consequences of law. Why do we have maximum hour laws? What will happen when the minimum wage is increased? What will be the effects of a law forbidding discrimination on the basis of sex? If the Federal Aviation Administration requires children to have their own seats on airplanes, how many lives will be saved as a result? What will minimum prices accomplish? Positive work might say, for example, that a law nominally designed to protect against air pollution was actually an effort to help eastern coal; or that maximum hour legislation owes its existence to the lobbying efforts of labor unions; or that the consequence of an environmental statute, or of maximum hour legislation, will be to help certain industries at the expense of others; or that mandatory seats for children will actually cost lives, by leading people to drive rather than fly, even though driving is more dangerous. I believe that most EAL is positive rather than normative.

Normative work is concerned not with “is” but with “should,” or more particularly with what the law should do. This variety of work in turn should be divided into two quite different subcategories: full-fledged normative work and work that might be called “prescriptive.” Sometimes economic analysts assume that some specified goal is desired—less pollution, higher employment of women, fewer workplace injuries, increased income for the working poor, or (more controversially) greater aggregate social wealth (or “efficiency”). Some normative work does not evaluate the specified goal, but simply says *how to get there*; it is purely instrumental. If the goal is less pollution, a gas tax may be better than technological requirements imposed on new cars. This important kind of work is what I am describing as prescriptive.

Much more ambitiously, some (actually only a little) normative work in EAL argues on behalf of a contested social maximand, such as utility maximization or wealth maximization, or urges that the law should take a certain course *because* it will promote that contested maximand. Thus it might be said that the law should do *X because X* is

efficient in the sense that it will maximize wealth. To take a vivid example, consider a recent and somewhat hilarious article in the *Journal of Legal Studies*, defending a ban on flag-burning on the ground that people may well be willing to pay a good deal to prevent flag-burning; the upshot of the article is that a ban on flag-burning may be justified because such a ban might be efficient.³

The idea that “wealth maximization” is the appropriate goal of a social order is not very plausible, and its leading defender, Judge Posner, no longer defends it. To be sure, some work in EAL, and even more casual talk within EAL, urges, or even takes it for granted, that “efficiency,” or “wealth maximization,” is what the legal system should pursue. But this work is best taken more modestly as prescriptive—as suggesting that to the extent that efficiency is sought, some strategy X or Y will or will not achieve it. There is no good defense of the idea that efficiency is the only thing that should concern a good social order, and most people in EAL are aware of this fact. Very little of economic analysis of law amounts to full-fledged normative work. EAL is dominated by positive and prescriptive analysis.

B. Parsimony, Testable Hypotheses, and Puzzles About Preferences

Prescriptive and positive work in EAL often attempts to propose hypotheses and then to test them. The minimum wage will increase unemployment; the implied warranty of habitability will result in increased rents or a diminished housing stock for poor people; a right to be protected against arbitrary discharge will make employers more reluctant to hire people in the first instance. To have a testable hypothesis, the analyst must make parsimonious assumptions. With a “full” or “rich” account, we might be able to capture the nature of practical reason; but it is unlikely that we will be able to generate and then to test hypotheses. I will simply assert, without defending the point, that with respect to positive and prescriptive work, EAL has produced extremely important advances, and it is the best (indeed the only) game in town. At the same time, the predictions are often quite crude, involving the direction of effects rather than their magnitudes,

3. See Eric Rasmusen, *The Economics of Desecration: Flag Burning and Related Activities*, 27 J. LEGAL STUD. 245 (1998).

and the bare notion of “rationality” is often too thin and formal to produce robust predictions.⁴

Whether positive or normative, economics tend to work from a simple foundation, involving the idea of “preferences.” People—it is assumed—“have” preferences, and they seek to satisfy them. This idea plays a central role in EAL. The best defense of the assumption involves the goal of parsimony. But there is ambiguity in the very notion of a “preference.” Sometimes the term preference refers to “choices”; sometimes it refers to the motivations that lie behind and help explain choices. Thus, it might be said, John prefers chocolate to vanilla, because (and to the extent that) John chose a chocolate cone over a vanilla cone; or it might be said that the *reason* for this choice is that John likes chocolate best.⁵

All this raises an obvious question: What *are* people’s preferences? To get either prescriptive or positive work (or for that matter normative work) off the ground, this question has to be answered. Some economic analysts of law seem to say or to assume that people are rational, self-interested profit maximizers—or simply to say or assume that people want more money rather than less. For many purposes, an assumption of this sort is sufficient to produce progress; consider the question whether compulsory seats for children on airplanes will increase safety, or whether doubling the minimum wage will increase unemployment. But three issues arise at this stage, and in at least some contexts, these issues appear important. First, the term “rational” has to be specified, and it might be understood in many different ways.⁶ Sometimes people do not seem rational in the sense assumed. They rely on heuristics, or rules of thumb, that lead to errors; they show biases and confusions of multiple sorts.⁷ Second, sometimes people seem concerned with things other than self-interest, narrowly construed; they are sometimes willing to sacrifice material self-interest for the sake of other goals, including reputation, status, and fairness.⁸ Third, sometimes people show bounded willpower; they can be myopic or impulsive, and they may even take steps to counteract these tendencies.

4. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1485-89 (1998).

5. The distinction is discussed in CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* ch. 2 (1997).

6. See Jolls et al., *supra* note 4.

7. See *id.*

8. See Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281, 1282 (1993).

These various issues—relating to questions of rationality, willpower, and utility function—have received considerable and growing attention within economics and EAL. For example, Gary Becker—a founder of and an inspiration for EAL—has worked with the idea of an “extended utility function” that includes people’s concern for things other than self-interest, narrowly defined.⁹ Becker and his followers are well-aware that people are not solely concerned with material goods.

In addition, those interested in behavioral law and economics have argued that bounded rationality and bounded self-interest raise serious problems for some aspects of conventional law and economics.¹⁰ Thus it can be shown that people often care about being perceived as fair, and they will sacrifice their material self-interest, in some circumstances, to achieve this goal. Work on prospect theory and on heuristics and biases has raised questions about conventional assumptions about rationality.¹¹ It is generally agreed that the future task is to go back and forth between hypothesis and data, to see what understanding is falsified or confirmed by evidence. At this stage it should be clear that philosophical questions about what people really care about are receiving considerable attention; the problem is understood as an empirical one to be resolved by exploring actual behavior. Behavioral economists, like conventional economists, are interested in producing testable hypotheses. Sometimes the simple assumptions of conventional EAL may be enough for positive and prescriptive work; sometimes behavioral work provides a necessary corrective. A great deal of additional thinking and research would be helpful in sorting out the resulting questions.

III. NUSSBAUM’S PHILOSOPHICAL CRITIQUE

With this as background, let us examine some philosophical issues. Nussbaum offers a number of challenges to what she sees as economic analysis of law. The challenges can be organized into three categories, involving human motivation; incommensurability and plural utility; and deliberation about ends and agency. Obviously these criticisms raise important issues about how to achieve an adequate descriptive account of practical reason, and they are also significant from the normative point of view. But the question is how much they touch the positive and

9. See GARY S. BECKER, ACCOUNTING FOR TASTES ch. 1 (1996).

10. See Jolls et al., *supra* note 4, at 1485-89.

11. See *id.*

prescriptive tasks of economic analysis of law, and—since most economic analysis is both positive and prescriptive—to what extent they work as convincing criticisms of most of economic analysis of law in its current form. How do these points work as objections to conventional economic analysis? How might they be made into a basis for better prescriptive and positive work? To what extent can they help in the creation of testable hypotheses?

A. *Human Motivation*

Nussbaum complains of the “reduced number of explanatory entities behind human action. Indeed, the capacious category of ‘preference’ seems to cover all of the psychological underpinnings of action, both cognitive and conative.”¹² By contrast, philosophers “have agreed that the explanation of human action requires quite a few distinct concepts,” including “belief, desire, perception, appetite, and emotion—at the very least.”¹³ Similarly, Nussbaum objects that homo economicus “is a self-interested maximizer of his own satisfactions”; that under EAL, altruism is “reduced to a type of egoism, in which people get reputational or psychic goods for themselves”; and that it is necessary at a minimum to recognize “sympathy and commitment as independent sources of motivation.”

It should be granted that in order to have a good descriptive account of people’s self-understandings, the various ingredients of motivation must be disentangled from one another. But the degree of refinement depends on the author’s particular task; a novelist (Henry James is an obvious example) may be concerned to offer an especially fine-grained account, while a philosopher may reject the coarsest accounts while offering a manageable number of distinctions. An economically oriented analyst of the law has a different task, and should not be taken as a philosopher manqué.

The question is what account of motivation is helpful for the particular tasks that economists set for themselves. Perhaps a parsimonious account will do and be especially useful by virtue of its simplicity. For example, how much must be posited about motivation in order to know the effects of a law increasing the minimum wage, or imposing a warranty of habitability, or allowing workers to cartelize, or increasing cigarette taxes? If economists offer a simple account of

12. *Flawed Foundations*, *supra* note 2, at 1208.

13. *Id.* at 1209.

motivation—that people want, in these contexts, to increase their profits—why and how will they go wrong? It is not clear how a richer understanding of motivation will lead to better predictions and prescriptions, at least in areas of this kind. At least the philosopher-critic might want to go through such areas to see what account of motivation will lead to better predictions.

Nussbaum can be understood to be making several different points here; they should be addressed independently.

1. She might be saying that economists do not *understand* the complex subdivisions of people's motivations. This may or may not be true; the economist may say, plausibly enough, that she is working with a simple account to see where it leads (in terms of predictions or prescriptions). Whether the simple account does well depends on what the evidence shows. A complex account—involving “belief, desire, perception, appetite, and emotion—at the very least”—is not likely to do better and may well do worse, simply by virtue of its complexity. (Are the distinctions among desire, appetite, and emotion, for example, important for the positive and prescriptive work of economic analysts of law? Exactly where do they go wrong when they ignore those distinctions? Do these distinctions matter for purposes of understanding the effects of a regulation requiring parents to purchase seats for their children on airplanes?)

2. Nussbaum might be arguing that people are not egoists, that is, they care about the well-being of others. This is sometimes true, and as noted it is a chief inquiry of behavioral economics and in the recent work of Gary Becker. Perhaps some economic analysis goes wrong because it disregards the existence of altruism;¹⁴ but this does not seem to be a challenge to economic analysis of law as such. It is instead a point about the actual contents of people's utility functions. The point may be important; perhaps people will not behave in the predicted ways precisely because they care about others. But then the natural question arises: Where, concretely, does Nussbaum think that economic analysts have gone wrong because of their failure to understand altruism or other motivational forces? To answer this question, undoubtedly it will be necessary to be highly particular and concrete, and undoubtedly to distinguish among different areas. In family law, there is probably more altruism than in commercial transactions. A casual survey of articles in

14. See Jolls et al., *supra* note 4, at 1485-89.

the *Journal of Legal Studies* and the *Journal of Law and Economics* suggests that very few, if any, of the articles are vulnerable to this kind of critique.

3. Nussbaum might be saying more specifically (with Amartya Sen¹⁵) that sympathy (a regard for the well-being of others) and commitment (a belief in certain principles) can motivate human action. Sympathy and commitment are qualitatively different from “tastes” or “desires.” For some purposes this is both true and important. But for purposes of predicting behavior, when is it necessary to emphasize this point? Is this important to understand the effects of a change in the Clean Air Act or an increase in the minimum wage or of a rent control law? This is an empirical question, and perhaps the answer is not straightforward. The question, for those pressing this challenge, is whether it can be turned into testable hypotheses that perform better than conventional economic hypotheses. This is in a sense exactly what behavioral economics, and those interested in behavioral law and economics, are trying to do.

Nussbaum is right to argue that people sometimes behave in accordance with nonmaterial incentives. Perhaps they do not breach contracts, even though it is efficient to do so, because of their commitment to certain principles, or because of reputational incentives. If this is a philosophical point, it is also a way of starting to frame a hypothesis, which might actually be tested. Someone interested in EAL would ask: To what extent is this true? And if it is true, how is economic analysis impaired?

Suppose, for example, that we think of an extended utility function, including not only material self-interest but also a taste for fairness. As noted, much of behavioral economics has been concerned with this issue. How, if at all, does the extension of the utility function adversely affect EAL? Nussbaum gives few examples. I conclude that Nussbaum’s discussion of human motivation makes some valuable points; that those points work against some cruder hypotheses in EAL; but that they do not amount to a general or fundamental criticism of EAL, because Nussbaum’s concerns have been taken up both by Becker and his followers and by those interested in behavioral economics. A lurking question is whether a fine-grained philosophical account of motivation is by itself too fine-grained to be a basis for predictive social science. The question for the future is whether philosophical challenges

15. See Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 317-44 (1977).

of this kind can be used in that way. What can philosophers add to the economic picture of motivation, in such a way as to produce hypotheses that might be tested and shown to be correct?

B. Commensurability and Plural Utility

Nussbaum believes that a “commitment to the commensurability of all an agent’s ends runs very deep” in EAL. She links this commitment with the project shared by Plato and Sidgwick, a project that is, in her view, “radically revisionary,” rather than merely reportorial of how people are.¹⁶ It follows that what EAL does is to envision a “a world remade, not the world we live in.” Thus EAL adopts “a perspective of lofty detachment” that “has flattened and simplified things that are usually messy and real.”¹⁷ In support of her challenge to EAL, she claims that this criticism “is by now a common point in mainstream economics,” and invokes Amartya Sen’s work on “plural utility,” which sees utility “primarily as a vector (with several distinct components), and only secondarily as some homogenous magnitude.”¹⁸

Here too we need to make some distinctions. There need be no quarrel with Nussbaum’s claim that an adequate view of people’s self-understandings, or of practical reason, will raise doubts about the view that all human goods are commensurable.¹⁹ And I agree with Nussbaum’s argument that a world of genuine commensurability would represent a revision (for the worse) of our actual experience, a revision that would make much of that experience unrecognizable.²⁰ But it is not clear that EAL is really committed to denying this point; recall that it is working with parsimonious assumptions in order to make predictions. Thus the question is this: In what sense and to what extent is an emphasis on incommensurability and plural utility a criticism of EAL,

16. *Flawed Foundations*, *supra* note 2, at 1199.

17. *Id.*; see also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993). I believe that Anderson’s influential and very illuminating book also misconceives the project of much economic thinking, which is to generate predictions. Her account of rationality offers many insights into practical reason, but it is not at all clear that it could generate any predictions at all.

18. See Amartya Sen, *Plural Utility*, 81 *PROC. ARISTOTELIAN SOC’Y* 193, 193-215 (1981)

19. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); see also Matthew Adler, *Law and Incommensurability: Introduction*, 146 *U. PA. L. REV.* 1169 (1998) (introducing Symposium on Law and Incommensurability); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779 (1994).

20. See RAZ, *supra* note 19 (discussing constitutive incommensurability).

especially insofar as it is engaged in positive and prescriptive tasks? This is less clear. Nussbaum contends that an assumption of commensurability is “too simple to lead to illuminating and pertinent prediction.” This is plausible in some settings; perhaps a claim of the commensurability of all outlets for sexual gratification will make predictive mistakes.²¹ (It is not clear that these mistakes are a result of a commitment to commensurability or instead a misspecification of what is included within most agents’ utility functions.) But when? And when is the daily work of EAL undermined by its assumption of commensurability?

Let us assume, for example, that observers are trying to predict the effects of the English Rule (requiring losers to pay attorney’s fees and costs) on plaintiffs who have a low probability of prevailing, or that we are interested in knowing the consequences of final-offer arbitration, or that we want to know what will happen to marriage rates when contraception is readily available, or that we are trying to figure out why central banks are independent, or that the government seeks to understand the consequences of a mandatory paid-leave program. (These examples are chosen from a random sampling of recent papers in EAL.) In these contexts, does an emphasis on incommensurability and plural utility undermine in any way EAL? Does such an emphasis help to produce testable hypotheses that compete with those of EAL?

I do not mean to suggest that this question has no answer—only that philosophers, including Nussbaum, have not provided one. Her discussion of incommensurability and plural utility operate at a high level of abstraction and seem to engage mostly descriptive questions about practical reason, and also normative issues. But here is a possible place where Nussbaum might look for support. In some contexts, people seem to think certain reasons for action are entirely inadmissible; they are blocked, not outweighed.²² People may think, for example, that they will not gossip about a friend’s misfortune simply because it is fun to do so, or that they will steal a book from a friend’s office simply because they know that they would love that book (while the friend doesn’t much enjoy owning it). Their refusal to make all goods and options commensurable is accompanied by, or helps generate, a series of *excluded reasons for action*.²³

21. Cf. RICHARD A. POSNER, *SEX AND REASON* (1992).

22. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 34-48 (1975) (discussing exclusionary reasons).

23. See *id.*

I am not sure that whether and to what extent this phenomenon makes trouble for the conventional uses of EAL, but it is possible that it does so in some important settings. At the very least, it raises some difficulties with the (normative) claim that cost-benefit analysis should be the foundation for policy. Some things for which people are willing to pay ought not to count as reasons for action; consider a desire not to see flag-burning,²⁴ or racial intermarriage. In addition, the metric of dollars elides important qualitative differences among social goods, and people ought to see those good for themselves.²⁵ These points do raise questions about cost-benefit analysis as a normative foundation for policy. But as I have emphasized, most uses of EAL do not involve that normative foundation; they involve instead positive and prescriptive issues. It remains to be seen how economic analysis of these issues is adversely affected by ignoring problems of incommensurability and the possibility of “plural utility.”

C. Ends: Of Deliberation and Agency

Nussbaum believes that economists and rational choice theorists share a “dogma” to the effect “that we can deliberate rationally only about the instrumental means to ends, and not about the content of ends themselves.” She says that the dogma “relies on the idea that our ends are hard-wired by exogenously given tastes.” She believes that philosophers like David Wiggins and Henry Richardson have shown that people “do deliberate in life, in [a] holistic manner that seeks broad coherence and fit among our ends considered as a group.”²⁶ In her view, EAL “cannot afford to proceed as though all these arguments do not exist.” In a similar vein she thinks that people are not merely concerned with end-states but also with their own agency, which they “value and pursue.” The key problem here is that EAL focuses “on well-being to the exclusion of agency,” something that Nussbaum thinks produces predictive, explanatory, and normative problems.

From these points, I am not sure exactly what Nussbaum thinks that economic analysts of law are doing wrong. She appears to think that those analysts think that all tastes are “hard-wired.” But few economic analysts make this (utterly implausible) claim. Some tastes are of course hard-wired; there is much room to debate how many, and

24. See Rasmusen, *supra* note 3, at 245.

25. See Sunstein, *supra* note 5, ch. 4.

26. *Flawed Foundations*, *supra* note 2, at 1208.

which, have biological roots. But for purposes of most EAL, the answer to that debate does not seem to matter much (except to the extent that it is being assumed that tastes, because hard-wired, cannot be changed; of course government can affect choices even with respect to hard-wired tastes, by raising the price of some choices and decreasing the price of others).

A second possibility is that Nussbaum is urging that tastes are not “fixed.” This complaint seems right, in the sense that sometimes neither choices nor motivations are unmalleable; and the complaint is a reasonable criticism of some conventional EAL. Consider, for example, the fact that the initial allocation of an entitlement may affect both choices and tastes, and the possibility that laws forbidding employers from firing workers without cause, or requiring recycling, may affect both preferences and decisions. Thus prescriptive and positive work may go wrong if it disregards the preference-shifting effects of law. The efficiency consequences of legal rules—even the consequences themselves—may be hard to assess, or may have to be assessed differently, if legal rules will actually change tastes and values. It is possible that laws against discrimination will have preference-shaping effects;²⁷ so too with laws forbidding sexual harassment; so too with laws regulating the content of television. Behavioral work has even questioned the idea of stable, context-independent preferences.²⁸

But here we have an empirical question, not a philosophical question: Under what circumstances, and why, do tastes change? This question might well be turned into testable hypotheses. Both ordinary and behavioral economists have been grappling with aspects of that issue and in particular with the preference-changing effects of entitlement allocations.²⁹ In any case, what is important to know is when preferences are not fixed, and why, and what changes them, and how this is relevant to the predictive tasks of EAL. In some contexts, the phenomenon of shifting tastes may not matter at all to EAL. The fact that preferences are malleable does not seem to matter much to analysis of farm subsidies or milk price supports, for example.

A third possibility—and the one most consistent with the flavor of Nussbaum’s text—is that Nussbaum is objecting most of all to the fact

27. See Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 386 (1993).

28. See Paul Slovic, *The Construction of Preference*, 50 AM. PSYCHOLOGIST 364 (1995).

29. See RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991).

that EAL ignores the human capacity to choose ends, rather than simply to pursue them. It is true that people are sometimes self-conscious about their ends; but we need to know exactly what kind of criticism this is. To be sure, some economists appear to write as if ends are simply “there” and are not products of deliberation and choice. Here too a descriptive account of practical reason will fail if it does not see how this process occurs.

It is important to make some distinctions here. Consider Nussbaum’s claim that “this is how we really do deliberate in life, in this holistic manner that seeks broad coherence and fit among out ends considered as a group.” This appears to be an empirical claim; is it true? What evidence is there on its behalf? Undoubtedly some people, some of the time, do deliberate in this way; but the picture seems to ignore both the (qualitatively diverse) costs of deliberation and simple self-interest, which can make people unwilling to be holistic. Often people do not attempt to seek “holism.” For present purposes the more important question is this: How, exactly, is the economic analysis of law undermined by the fact that people deliberate about ends? The basic method of EAL is to use a utility function of some kind; it does not much matter whether the ends emerge from deliberation, from biology, from government propaganda, or from Mars. Most of the positive work of EAL seems unaffected by this fact; so too with prescriptive work. What remains to be seen is whether some positive and prescriptive work would look different if it took on board the fact that people deliberate about ends.

Nussbaum is surely right to say that agency is an important and separable part of well-being. People care not merely about end-states but also about their ability to choose. But it is not clear how and to what extent this is a criticism of EAL. The first point is that the incorporation of agency as a part of well-being creates no special problems for the vast bulk of work on EAL. The second point is that, to the extent that economic analysts refer solely to end-states, and place no special premium on choice as such, there is certainly a problem at the normative level. But there is no reason not to include agency as part of the set of things that people care about, as certainly they do. (How much do they? This is an interesting empirical issue.) The typical economic approach would be to value agency, like everything else, in terms of private willingness to pay. Now this idea does raise serious normative problems. Not all goods should be valued from the standpoint of private willingness to pay. But that is a very different question.

A question for the future is how EAL might incorporate people's agency, and their protectiveness of their own agency, into positive or prescriptive analysis. An interesting aspect of cost-benefit analysis, especially in the context of environmental amenities, attempts to do this. People value not simply beaches and parks as experiences, but also the option to visit beaches and parks. Hence "option value" is a distinct component of value, studied by those interested in contingent valuation studies. Those studies raise many problems, but here at least is an area in which economists have been studying how much people value options. Perhaps this incipient work could be used by EAL to obtain valuation of agency as well as end-states.

IV. CONCLUSION

The most serious problems with EAL are normative, above all in the suggestion that all preferences deserve support, regardless of their origins or of the reasons brought forward on their behalf. Some reasons for action are properly blocked, even if they are based on private willingness to pay. Sometimes the genesis of wants can help "impeach" them.³⁰ There are positive and prescriptive problems with EAL as well, with its conception of rationality and its understanding of what people seek to maximize; some of these are receiving attention with behavioral economics and with the idea of an extended utility function. Sometimes the idea of "preferences" is far too crude for normative or even positive work, as where it is not disaggregated into intrinsic value and reputational value. Further disaggregations may sometimes prove useful.

Nussbaum's criticisms of EAL therefore contain some important points, especially (not only) in terms of capturing people's reflective self-understandings and from the normative point of view. But the criticisms seem to me overstated, above all because they operate at a high level of abstraction, do not engage the day-to-day work in EAL, and fail to show that the criticisms are well-taken from the standpoint of positive analysis and predictions, where parsimony is crucial. To return to my basic themes: What testable hypotheses are suggested by the philosophical critique? How does a more fine-grained understanding of human motivation falsify concrete work in economic analysis? Why is it a problem, for predictions about the effects of law, if values are

30. See JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985).

incommensurable, or if people deliberate about ends, or if people do, and should, care about their agency? Nussbaum tends to read economic analysts of law as if they were badly educated philosophers, and to see EAL as if it were making a set of philosophical claims and arguments. But this is not its point.

For the future, I believe that a suitably advanced version of behavioral economics may well meet most of Nussbaum's complaints on both the positive and the prescriptive sides. Whether those complaints are correct, on those sides, depends on going back and forth between hypotheses and evidence; philosophical abstractions will not by themselves provide much help. With respect to prescriptive work, EAL makes important advances by showing that certain means of achieving agreed-upon ends will not accomplish that goal. Insofar as EAL attempt to posit a single goal (economic efficiency) for a well-functioning society, it is not worth taking seriously, for reasons that Nussbaum (and others) have shown; but very little work in EAL depends on accepting that goal, or even urges that it should be accepted.

There are some lessons here for both economists and philosophers, and for the appropriate division of labor, as well as for constructive engagements, among them. Economists tend to be simplifiers; philosophers tend to be complicators. EAL should be taken to be arguing about the effects of legal rules; if simple assumptions lead to false assessments, then by all means let us see if better assumptions would do better. Philosophers are in a good position to produce a clearer understanding of the concepts at work, and of the normative goals that the legal system does, or might, attempt to pursue. What I have attempted to do here is to suggest that many of the apparent disagreements between economists and philosophers are not disagreements at all, but misunderstandings about one another's tasks and goals. To the extent that there are disagreements, they might be made the basis for a research program in which alternative hypotheses might be generated and tested. Productive collaborations between EAL and philosophers—long overdue—might involve the generation of those alternative hypotheses and an exploration of how they might be tested. I have not described such a research program here, but I hope to have indicated a few places where those interested in such a program might start.