

**EXCERPT FROM:**

**CONTRACTARIAN LEGAL THEORY**

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## *I. Legal Contractarianism: The Third Theory*

This is a work at the intersection of three areas of study: philosophical rational choice theory, legal theory, and Hobbes studies. With regard to the last, it is important to stress that it is not intended as an exegetical work on Hobbes. Among other obstacles to any such project, Hobbes wrote too little about the law to allow us to discern from his writings a fully articulated legal theory. Instead, the aim of this book is to articulate a contractarian approach to law in the Hobbesian tradition, extrapolating from the little Hobbes has to say about law and attempting to fill in the gaps with more general Hobbesian contractarian political commitments and basic principles of rational choice theory. The book thus aims to bring a certain approach to rationality and political life, one that is generally encompassed within the Hobbesian framework, into the fold of legal theory.

The motivation for a work with this somewhat unorthodox shape lies at least in part in the typography of the major schools of thought in existing legal theory. For many years the core positions in jurisprudential writings have divided between those who defend a moral, or deontological, approach to legal questions and those who defend a utilitarian, or economic, approach. The interest of a Hobbesian legal theory is that it holds out the promise of an alternative to these two historic rivals, and thus offers an end to a longstanding stalemate in the jurisprudential literature. Furthermore, it is my suggestion that the contractarian alternative I shall propose is of particular interest because it allows legal theory to avoid the major weaknesses of each of the traditional approaches, meanwhile capturing the benefits of each. This Introduction will attempt to explain the nature of both these weaknesses and benefits. It will provide an overview that will identify the place of a contractarian approach in the overall

landscape of jurisprudential theories. It will be the task of the rest of the book to sketch the proposed contractarian alternative, in as much detail as possible, articulating it in particular in the context of specific legal doctrines. In this way, I hope to make good on the central claim of this work, namely that a contractarian approach in the rationalistic tradition does present a viable alternative to legal reasoning based on moral intuition, on the one hand, and legal reasoning based on the concept of maximization on the other.

### 1. Deontological Legal Theory

The Deontological approach to legal theory is not in fact a single, unified approach. It is a number of different approaches, united by a common commitment to the relevance of moral reasoning to legal topics and a general rejection of utilitarian reasoning as a basis for justifying the structure of legal norms. In addition, deontological legal theorists are united by the fact that they share a common methodology: they tend to proceed by a method that Rawls called “reflective equilibrium,” in which intuitions drawn from particular cases in the fields under consideration provide the raw data for the construction of ethical or jurisprudential theory. With this rather generic definition of deontological legal theory in hand, we can treat the category as encompassing not only rights-based thinkers about law and legal topics, such as Ronald Dworkin and Judith Jarvis Thomson, but also the “legal moralists,” such as Michael Moore or even John Finnis.<sup>1</sup> There is also Lon Fuller, who vigorously defended the moral dimension of legal rules in

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<sup>1</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990); Michael S. Moore, 'Law as a Functional Kind', in *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

a famous debate with H.L.A. Hart.<sup>2</sup> Despite Hart's position in that discussion, Fuller's position eventually made an appearance in Chapter 9 of Hart's *Concept of Law*, in Hart's discussion of the "minimum content of natural law."<sup>3</sup>

Some legal theorists have combined moral theory with utilitarian intuitions, within what we can nevertheless think of as a deontological framework.<sup>4</sup> The hallmark of deontological legal theory for such theorists is the treatment of moral intuitions as raw data, on the basis of which legal theory is to be constructed. In addition to these more obvious examples of the application of moral reasoning to legal questions, there are views that are still properly characterized as "deontological" that bear a more attenuated relation to moral philosophy, such as the view of expressivists or emotivists, who see law as a vehicle for expressing moral sentiment or emotion<sup>5</sup>. The category also encompasses the views of those who defend deontological reasoning in the law from a broadly speaking positivistic perspective, such as corrective justice theorists,<sup>6</sup> in

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<sup>2</sup> For the Hart-Fuller Debate, see H.L.A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71(4) (1958); see also Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', *Harvard Law Review*, 71(4) (1958).

<sup>3</sup> H. L. A. Hart, *The Concept of Law* (2nd edn.; Oxford: Clarendon Press, 1994), ch. 9. I am not suggesting that Hart should be considered a deontological legal thinker, but only that I omit from this category, however, strict positivists like John Austin, given that his view is better understood as a precursor to law and economics, as it is based on the creation of incentives to shape the behavior of rational individuals. It is complicated where to put the legal philosophy of Immanuel Kant on this metric, since on one view of Kant's legal philosophy his account is as coercion-oriented as Austin's. This is a matter I discuss below. See *infra* ch. **Error! Reference source not found.**

<sup>4</sup> See Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (Chicago: University of Chicago Press, 1996).

<sup>5</sup> For a thorough overview of expressive theories of law, see Matthew D. Adler, 'Expressive Theories of Law: A Skeptical Overview', *University of Pennsylvania Law Review*, 148(5) (2000) and Elizabeth S. Anderson and Richard H. Pildes, 'Expressive Theories of Law: A General Restatement', *University of Pennsylvania Law Review*, 148(5) (2000).

<sup>6</sup> See, e.g., Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001).

addition to autonomy theorists in fields like contract law, where such views are gaining ground.<sup>7</sup>

This application of moral philosophy to substantive legal problems has mostly taken the existing shape of legal doctrines for granted: it has generally been more descriptive than prescriptive, and has sought to explain the central tenets of doctrinal analysis as an extension of a moral framework, rather than treating ethical theory as providing a program for revision or a basis for answering difficult doctrinal questions. In addition, deontological legal theorists have been largely unable to meet the demands of systematization that doctrinal influence requires.<sup>8</sup> Because philosophical ethics is for the most part highly intuition-driven, the legal doctrine based on that theory is also intuitionistic. This restricts the degree to which deontological theory can equip substantive legal scholars with a program for improved doctrinal analysis—still less a recipe for systematic rethinking of the central doctrines of the common law. For the foregoing reasons, although the allure of the deontological approach to legal questions has been great, its influence has been limited.

## 2. Consequentialist Legal Theory

At the opposite extreme, utilitarian legal theory, which mostly takes the form of economic analysis of law, has been steadily gaining ground in American legal scholarship as the dominant mode of legal analysis. Generic cost-benefit analysis had always occupied a place in American legal scholarship as well as in adjudication. In 1947, for example, Judge Learned Hand introduced the famous “Hand Formula” to American law in a case called *United States v.*

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<sup>7</sup> For an overview of competing theories of contract law, see Jody S. Kraus, 'Philosophy of Contract Law', in Jules L. Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).

<sup>8</sup> One recent exception to this would be Arthur Ripstein’s treatise on Kantian legal and political theory. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009).

*Carroll Towing*.<sup>9</sup> The Hand Formula is a test for determining whether the defendant has behaved negligently in a suit for civil damages, according to which the court is instructed to consider the following factors: the gravity of the resulting harm under consideration, discounted by the (ex ante) likelihood of the harm's occurring, and that discounted harm to be weighed against the burden to the tortfeasor of taking adequate precautions against the occurrence of harm. If the burden of taking precautions was less costly than the discounted gravity of the evil caused by the failure to take precautions, then the injurer should be deemed negligent for failing to take those precautions. This was an early foray into economic methodology as applied to law.<sup>10</sup>

But the great increase in popularity of economic analysis as applied to law is perhaps more correctly traced to the publication of Richard Posner's *Economic Analysis of Law* in 1972. Unlike the Hand Formula, the modern Law and Economics movement, as exemplified by Posner's work, does not restrict its ambitions to demonstrating the utility of economic reasoning in a narrowly defined area of legal inquiry. Instead, the ambition of modern law and economics is to apply specific economic analysis to all areas of legal analysis, as well as to meta-level analysis that sets the terms for legal debate. And that ambition has in large part been fulfilled: In the wake of this publication, numerous areas of legal scholarship have been converted to explorations of economic concepts and models and an attempt to show that the central doctrinal puzzles in the law can be sensibly solved by the application of economic analysis. In this way, the systematicity of economic methodology has replaced intuition as the dominant mode of analysis in legal scholarship.

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<sup>9</sup> 159 F.2d 169 (2d Cir. 1947).

<sup>10</sup> The Hand Formula has been formalized as follows: an act is in breach of the duty of care if  $B < PL$ , where B is the cost (burden) of taking precautions, and P is the probability of loss (L). L is the gravity of loss. The product of  $P \times L$  must be a greater amount than B to create a duty of due care for the defendant.

Hand-in-hand with this transformation in American legal scholarship has been the slow but steady transformation of judicial decision-making as well: Judges now attend to arguments from efficiency to a much greater degree than they formerly did.<sup>11</sup> And cost-benefit analysis is often taken for granted as a sensible way to analyze competing considerations and values in just about any area of the law. In view of the impact of economic theory on the legal profession as a whole, then, it seems fair to say non-economic theory has been largely relegated to the sidelines as far as its ability to make a practical impact on the practice of law in the United States.

Several key features of economic reasoning as applied to law are worth noting—two main ones in particular: Law and economics is both reductionistic and revisionist. It is a reductionist philosophy in its descriptive ambitions, in that it seeks to reduce the explanation for the development of legal doctrine to a single factor, namely the law’s implicit attempt to create incentives for efficient behavior. As Richard Posner has explained, legal economists see the common law as following the logic of efficiency, or, what is treated as synonymous, social welfare maximization, even if judges, juries, and other legal actors do not consciously focus on maximizing social welfare as the goal of adjudication or legal reform. As he writes:

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<sup>11</sup> Richard Posner and William Landes have used “citation analysis” of cases to conclude that economic analysis is growing in influence compared to doctrinal analysis. Richard A. Posner and William M. Landes, 'The Influence of Economics on Law: A Quantitative Study', *Journal of Law and Economics*, 36(1) (1993). Examples can be pulled from the case law. See, e.g., *Graceway Pharmeceauticals, LLC v. Perrigo Co.*, 697 F. Supp.2d 600, 609 (D.N.J. 2010) (“Plaintiffs were the low cost actor, and, for that reason, they should have acted.”); *Halek v. United States*, 178 F.3d 481 (7th Cir., 1999) (“Negligence is a function of the likelihood of an accident as well as of its gravity if it occurs and of the ease of preventing it.”) (Posner, C.J.); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir., 1974) (supporting conclusion with “cheapest cost avoider” discussion). Economic analysis is very prominent in antitrust cases. See, e.g. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 20 (1979): “[O]ur inquiry must focus on whether the effect . . . of the practice [is] to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market . . . .”

“[E]conomics is the deep structure of the common law, and the doctrines of that law the structure. The doctrines, understood in economic terms, form a coherent system for inducing people to behave efficiently, not only in explicit markets but across the whole range of social interactions.”<sup>12</sup> Efficiency here is understood not as the idealized concept of Pareto efficiency, but rather in the more modest terms of Kaldor-Hicks efficiency.<sup>13</sup> The thought behind this descriptive claim is that the common law tends towards efficiency, regardless of its conscious aims, because when judges and legislators focus on social welfare they will incidentally be promoting aggregate social wealth, at least in the Kaldor-Hicks sense. While the reductivism of this descriptive thesis is widely shared among legal economists, it is not universally shared.<sup>14</sup>

The reductivism of law and economics is its descriptive stance towards the law. On the prescriptive side, law and economics is revisionist. This is because it seeks to reform existing legal institutions in conformity with its normative commitments—largely those of utilitarianism. Just as traditional utilitarian moral theory begins with the premise that there is only one item of

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<sup>12</sup> Richard A. Posner, *Economic Analysis of Law* (7th edn.; New York, NY: Aspen Publishers, 2007), 249.

<sup>13</sup> *Ibid.*, p. 13. Kaldor-Hicks efficiency is a substantially weaker condition than Paretoism. A distribution of social goods is Pareto efficient if and only if it is not possible to alter that distribution to make someone better off without making another person worse off. A distribution is Kaldor-Hicks efficient if and only if it would be possible for the “winners” under that distribution to compensate the “losers.” This is a concept of maximization, since a distribution that maximizes social welfare is Kaldor Hicks efficient, but it may or may not be Pareto efficient. For an excellent analysis of the different concepts of efficiency employed in the economic analysis of law, see Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization', in *Markets, Morals, and the Law* (Cambridge, Mass.: Cambridge University Press, 1988), 95-132.

<sup>14</sup> Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Cambridge: Harvard University Press, 2002), for example, restrict their attention to the normative ambitions of law and economics. Part of their reason for this is that they reject Posner’s claim that the logic of doctrinal development has been largely that of welfare maximization. As they say, their thesis is “entirely normative” (*ibid.*, 4) and that they “do not assert that the law fully reflects the prescriptions of welfare economics,” and further rue the fact that “the law is influenced by notions of fairness . . .” (*ibid.*, 92).

value in the world, variously described as utility, happiness, pleasure, satisfaction, and a host of other possibilities, economic analysis begins with the idea that social welfare is of self-evident and unique value, and that the exclusive goal of any legal system ought therefore be to seek to maximize it. Unlike the descriptive commitments of much writing on law and economics, this normative commitment is universally held among legal economists: the claim that legal systems (and legal actors) ought to seek to maximize social welfare is as fundamental to legal economists as the claim that the criterion of right action depends on its effect on social utility is to utilitarians.

What is the explanation for the enthusiastic reception of economic reasoning in American jurisprudence? The answer is already partially suggested by the drawbacks of deontological legal theory discussed above. First, unlike deontological approaches, economic methodology is often able to offer unambiguous recommendations on legal questions—recommendations that can be implemented and ultimately empirically evaluated according to the goals of economic theory. Non-economic schools of thought have to date been unable to offer this kind of practical guidance. Economic approaches to substantive legal problems thus hold out the hope of removing legal reasoning and legal policy-making from the domain of moral intuition and placing it under the heading of *science*, where one might suppose one could have greater confidence in its dictates.<sup>15</sup>

Second, economic analysis relies on fairly sparse assumptions. The central theoretical commitment of law and economics is a rather non-controversial postulate about human nature, namely that human beings are rational maximizers who reason instrumentally toward the

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<sup>15</sup> This was the ambition of John Austin, who was a determined defender of a “science of jurisprudence.” John Austin, *The Province of Jurisprudence Determined*, W. Rumble (ed.), Cambridge: Cambridge University Press (first published, 1832) (1995), 112.

attainment of their ends. This is the standard portrayal of rational agency in the economic tradition, and one accepted by many different schools of thought in political and legal analysis.<sup>16</sup> When this assertion of psychological egoism is combined with the prescriptive thesis that the purpose of legal rules is to maximize social utility, a suggestion about the structure of legal rules emerges quite naturally: *ideal legal rules alter payoffs to provide individuals with incentives to engage in actions that maximize social utility.* Left to their own devices, rational maximizers would not favor social utility-maximization as the principle to follow. They would instead favor individual utility maximization, and social maximization would be securely supported only where the results of individual maximization happened to coincide with social utility maximization. Since much of the time individual and social interests will diverge, the emphasis on social utility will seem irrational to the individual maximizer, and the insistence on individual maximization will appear unduly self-serving from the standpoint of concerns about social welfare.

While economists generally, and legal economists in particular, adopt the central normative thesis of utilitarianism, it is crucial to notice that utilitarians do not share the economist's central descriptive thesis about human nature. On the contrary. At least the early utilitarians were clear about the fact that philosophical egoism, as it is sometimes called, does not provide a terribly good foundation for utilitarian moral theory. In his *Methods of Ethics*, for

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<sup>16</sup> Posner, *Economic Analysis of Law*, 3 (“The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life . . .”). Contemporary examples of this portrayal in contractarian political philosophy include David P. Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986) and James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975). The economic account of rational agency also can be found in standard accounts of game theory. See, e.g., K. G. Binmore, *Game Theory: A Very Short Introduction* (New York: Oxford University Press, 2007); Douglas G. Baird, Robert H. Gertner and Randal C. Picker, *Game Theory and the Law* (Cambridge, Mass.: Harvard University Press, 1994), 11.

example, Henry Sidgwick wrote as follows:

The difference . . . between the propositions (1) that each ought to seek his own happiness, and (2) that each ought to seek the happiness of all, is so obvious and glaring, that instead of dwelling upon it we seem rather called upon to explain how the two ever came to be confounded, or in any way included under one notion . . . [C]learly, from the fact that every one actually does seek his own happiness we cannot conclude, as an immediate and obvious inference, that he ought to seek the happiness of other people.<sup>17</sup>

Bentham likewise was painfully aware that the normative ideals of utilitarian theory could place considerable psychological strain on ordinary human beings, and that the impulse to maximize social welfare might have to be inculcated through a laborious process of education.<sup>18</sup> In order for the ideal of utilitarian moral theory to be met, then, human beings would most likely have to be *altruistic* in nature – the opposite of the narrowly conceived rational maximizers economic theory assumes.

An important conclusion can be drawn from the foregoing discussion: The theory of individual rationality to which economists are committed is neither entailed by nor entails the theory of value that economists inherited from the early utilitarians. There is, in fact, no intrinsic relation between personal utility maximization and social utility maximization. Let us consider this suggestion in greater detail.

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<sup>17</sup> Henry Sidgwick, *The Methods of Ethics* (7th edn.; London: Macmillan and Co., 1907), 411-412. Sidgwick is interpreting Mill's argument for the principle of utility. For an interpretation of Mill's argument that does not embed the problematic inference but still remains problematic, see Elijah Millgram, 'Mill's Proof of the Principle of Utility', *Ethics*, 110(2) (2000), 282-310.

<sup>18</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon press, 1879), 63 ("Under a well-constituted . . . government, men's moral sensibility is stronger, and their moral biases more conformable to the dictates of utility . . .").

First consider the claim that the maximizing theory of individual rationality is not entailed by the utilitarian theory of value economists endorse. The claim that utility is the highest, and indeed only, item of real value does not suggest anything about the psychological makeup of the bearers of utility. Strictly speaking the utilitarian normative thesis does not require that subjects of a utilitarian regime even possess the *capacity* to reason in a maximizing way about their own utility. We could, for example, ask what the best life for cows would be and seek to maximize *their* utility by providing them with grassy fields and plenty of water. But we need not think cows capable of reasoning on their own behalf about what would maximize their own utility, still less of engaging in anything resembling instrumental reasoning. The only requirement that social utility theory imposes on the creatures to whom it applies is that they be capable of experiencing pleasure and pain, since without this we could not meaningfully speak of their having any utility or well-being to maximize. This is of course well recognized in the history of utilitarianism, and is both the source of creative uses of utilitarian moral theory as well as the basis for objections to it. For example, utilitarianism has been used to defend more humane treatment of animals,<sup>19</sup> as well as reviled because it appears to suggest that we should give up our egocentric pursuits and take up animal husbandry, as we would increase total utility by doing so.<sup>20</sup>

Now consider the claim that a maximizing individual psychology does not entail a commitment to the normative theory of *social* utility maximization. This point has traditionally been less obvious to legal economists as the previous one, but the logic is just as clear once one

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<sup>19</sup> See Peter Singer, *Animal Liberation: a New Ethics for Our Treatment of Animals* (New York: Random House, 1975).

<sup>20</sup> John Mackie describes utilitarianism generally as an “ethics of fantasy” because it is overly demanding on persons even with respect to other persons. J. L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin, 1977), 129.

reflects on the point. If agents are individually rational, it is highly unlikely they would be social welfare maximizers, given that the state of affairs that maximizes an individual's personal utility will almost invariably be different from the state of affairs that would maximize society's welfare. This suggests that not only does rational actor psychology not entail the utilitarian theory of value; but the two are actually in some tension with one another. The tension stems from the fact that when we maximize *social* utility, we usually end up sacrificing the welfare of some members of society for the sake of achieving greater gains in social welfare overall. That is, maximizing social utility will result in some people faring worse than they otherwise would, even though other people fare better. This is of course another rather central reason why the normative theory of utilitarianism has been so controversial since its inception: In the process of maximizing social utility, we must often override considerations of individual welfare, including considerations moral philosophers think of as protected by the notion of a *right*. As has often been noted, traditional utilitarianism is indifferent to distributions of utility that do not affect total value.<sup>21</sup>

What this suggests is that a theory like law and economics that subscribes to psychological egoism at the same time that it assumes utilitarian normative theory has some explaining to do. It must explain why the normative theory it inherits from the utilitarian tradition is not fundamentally at odds with its assumption about individual human psychology. Now legal economists do have at least the rough outlines of an answer that reconciles the two, though they rarely, if ever, state the point explicitly. But if one were to press them hard they might say something like the following: The gap between the goal of social welfare

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<sup>21</sup> See, e.g., Anthony T. Kronman, 'Wealth Maximization as a Normative Principle', *Journal of Legal Studies*, 9(2) (1980), 232.

maximization and individual instrumental rationality is admittedly real and is regrettable. This gap, however, can be easily closed by the judicious use of legal rules. When legal rules are correctly drafted or otherwise handed down, they ensure that *when individual actors maximize their own utility, they will be maximizing social utility as well*. Legal rules are able to accomplish this convergence of personal and social utility by restricting individual maximizing within socially useful bounds. Thus if wheat farming is more socially beneficial than gambling, the law can be used to increase incentives to wheat farm and decrease incentives to gamble. Assuming that legal subjects are rational agents, they will respond to such incentives as expected and the socially desirable balance between wheat farming and gambling can be achieved. Nevertheless, this thesis about the function of law leaves many questions unanswered, and as it turns out that it cannot supply an answer to our question about value without fuller elaboration.

A first question is the following: What is the justification for imposing a legal system guided by the utilitarian theory of value on individuals who do not themselves perceive their own good as maximized in such a system? Does the legal economist suppose, for example, that individual agents would *select* welfare maximization as the overriding goal of the legal system? Given what we have just said, it seems unlikely that individuals *would* select this as the goal of the legal system. The question then urgently arises whether the legal economist has a way of justifying the imposition of a legal regime on rational individuals living under that regime that overrides the probable lack of consent. More in keeping with the economist's assumption of individual rationality is the suggestion that the best, most justified, most preferred legal regime for such agents would be the regime that *they themselves would select*, despite the fact that such a regime might have a lower level of total social utility than the one the economist might pick.

Legal economists do have at least the beginning of a response to this point. First, they

maintain in effect that since there is no higher good than utility (or what they interchangeably call “welfare”), a regime with lower total welfare could *not* be intrinsically better than a regime with higher total welfare. It is thus a kind of definitional stop. As Louis Kaplow and Steven Shavell have recently put the point:

Our central claim is that the welfare-based normative approach should be exclusively employed in evaluating legal rules. That is, legal rules should be selected entirely with respect to their effects on the well-being of individuals in society. This position implies that notions of fairness like corrective justice should receive no independent weight in the assessment of legal rules.<sup>22</sup>

Their argument for ignoring considerations of fairness is very simple: “Our argument for basing the evaluation of legal rules entirely on welfare economics, giving no weight to notions of fairness, derives from the fundamental characteristic of fairness-based assessment. . . . As a consequence, satisfying notions of fairness can make individuals worse off, that is, reduce social welfare.”<sup>23</sup>

Their claim is that a regime with greater total utility is *always* to be preferred over a regime with less total utility, since it is always possible to make some better off and none worse off in the regime with the higher total utility, simply by having the winners compensate the losers. The system with the highest total utility is what economists call Kaldor-Hicks efficient, and in such a regime everyone is at least *potentially* better off, at least as compared with a regime that is Pareto optimal (in which at least some are better off and no one is worse off). For this

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<sup>22</sup> Kaplow and Shavell, *Fairness Versus Welfare*, 3-4.

<sup>23</sup> *Ibid.*, 52. See also Claire Finkelstein, 'Legal Theory and the Rational Actor', in Alfred R. Mele and Piers Rawling (eds.), *The Oxford Handbook of Rationality* (New York: Oxford University Press, 2004), 399-416.

reason, legal economists side with maximization over distribution, and will always prefer the regime with more, rather than less, total utility.

From the standpoint of individual rationality, however, these arguments beg the question. First, no single individual values welfare *per se*. Each individual values only his or her welfare. And an increase in the welfare of any particular individual is precisely what maximizing social welfare does *not* guarantee. Second, there is a significant gap between *could compensate* and *would compensate* in the appeal to Kaldor-Hicks efficiency. Legal systems that produce high total utility and grossly unequal distributions for their subjects will not readily garner the assent of the winners to redistribute to the losers without having mechanisms of redistribution already firmly in place as part and parcel of the agreement. Since such mechanisms of redistribution are potentially costly, and therefore potentially detract from the total social utility, it is clear that rational agents are willing to absorb some costs in utility for the sake of protecting their individual positions relative to others, despite an overall reduction in a possible scheme of social utility.

### 3. Varieties of Contractarianism

This question brings us to the contractarian project that is the subject of this book. If rational agents would not, on balance, select the utility maximizing regime as their preferred legal system, what sort of legal system *would* they regard as most respectful of individual preferences? It is my contention that beginning with the same theory of individual rationality assumed by legal economists, the more compelling, more natural form of legal justification would be contractarian rather than utilitarian. That is, contractarianism is the political theory implied by the assumption that human beings are rational maximizers—not utilitarianism. Moreover, this thesis itself has a consensual, or contractarian, justification, namely that

contractarianism is the *normative* theory that rational maximizers would endorse to guide the adoption of legal rules. Contractarianism nevertheless remains almost wholly unexplored in legal theory, despite the popularity of rational actor theory in the law, and despite the prominence of contractarianism in political philosophy as well.<sup>24</sup>

Contractarian theories regard the major rules and institutions of civil society as legitimate insofar as they can be thought of as in some way based on, or justified by, an agreement among the individuals who must submit to their authority. There are roughly speaking two strains in the contractarian tradition: what we might call “normative contractarianism,” on the one hand, and “rational choice contractarianism,” on the other. Normative contractarianism descends from Immanuel Kant, but it covers a variety of views, the most influential of which in recent years has been that of the late John Rawls. According to Rawls, we can best discern intuitions about justice in a liberal society by asking what principles of justice would be selected by individuals entering into a foundational political agreement with one another, prior to the existence of any actual social institutions. Rawls assumes that in this original position of choice, contractors would select basic principles behind a so-called “veil of ignorance,” meaning that they choose without any knowledge of the particular circumstances in which they will find themselves in society or what their personal characteristics will be.<sup>25</sup>

Rational choice contractarianism, by contrast, descends from Hobbes. It asks what form of social organization rational agents seeking to maximize their own welfare would choose to

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<sup>24</sup> The most discussed modern contractarian theory is, of course, John Rawls’s “justice as fairness.” John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).

<sup>25</sup> *Ibid.*, pp. 11-22 (describing original position); *ibid.*, pp.136-42 (describing the veil of ignorance).

improve their positions relative to their presocial baselines.<sup>26</sup> To the extent the contractarian tradition has been brought into legal theory, it has been almost entirely of the former, normative variety.<sup>27</sup> Legal theorists have tentatively explored the application of Rawlsian-style contractarianism to international law, punishment theory, contract law, and even to bankruptcy. The more straightforward project for the present work would therefore have been the application of normative contractarianism to problems in legal theory. But it is quite deliberately my purpose to eschew this branch of contractarianism in favor of its rationalistic cousin, for the following crucial reason.

What makes contractarianism a significant and potentially superior alternative to utilitarian and deontological legal theories is that, at least in principle, contractarian theories seek their justificatory force in the consent of legal subjects. What this implies is that the legal institutions that appear to be coercively organized are in fact the product of choice on the part of the governed. The more voluntary a legal organization, the easier it becomes to justify the imposition of the rules of that institution on presently unwilling subjects. Normative contractarian accounts, however, do not preserve the voluntariness of legal or other political arrangements. The notion of a *contract* plays a very different role in such accounts. Normative contractarian accounts seek to show legal or political institutions as *fair*, rather than as consensual.

Rawls says: “Our social situation is just if it is such that by [a] sequence of

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<sup>26</sup> In its view of human nature, rational choice contractarianism shares the basic presuppositions of law and economics, i.e., that human beings are rational maximizers whose preferences obey certain conditions or axioms of rationality. For a comparison of legal contractarianism and law and economics, see Finkelstein, 'Legal Theory and the Rational Actor', in 404-11.

<sup>27</sup> See, e.g., Symposium, 'Rawls and the Law', *Fordham Law Review* 72 (2004) (discussing impact of Rawls's scholarship on legal world).

hypothetical agreements we would have contracted into the general system of rules which defines it.”<sup>28</sup> He continues:

No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects. Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous *and the obligations they recognize self-imposed.*<sup>29</sup>

But the sense in which obligations are “self-imposed” in Rawls's scheme is highly attenuated, since the original position involves neither actual agents nor actual agreement, and so a fortiori the individuals restrained by a system of justice have not in any sense agreed to be so restrained.<sup>30</sup> Rawls conceives of the members of the original position as the “representatives” of flesh and blood human beings, explaining why their “consent” could be binding for real legal subjects. As is often pointed out by critics of Rawls’s original position, however, it is not clear why hypothetical creatures lacking in all human characteristics should be thought of as representing actual persons.<sup>31</sup> Rawls responds that actual

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<sup>28</sup> Rawls, *A Theory of Justice*, 13.

<sup>29</sup> *Ibid.* (emphasis added).

<sup>30</sup> See Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy', *Buffalo Criminal Law Review*, 7(2) (2004), 314-29. (presenting Rawlsian account of punishment based on hypothetical consent).

<sup>31</sup> Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

representation of flesh and blood individuals is not what his theory seeks to articulate; it presents a political, not metaphysical conception of the person.<sup>32</sup> Each actual person should recognize the rules under which he is constrained as legitimate, not because he has literally given his proxy to a set of representatives, but because they correspond to his intuitions about the fairness of basic institutions, elicited through the thought experiment of the original position. But recognizing certain rules as *fair* does not, by itself, mean a person would consent to be governed by them. Fairness might ultimately justify *imposing* those rules on him, regardless of whether he accepts them. But that is a different story, and it is not, at any rate, a contractarian story.<sup>33</sup>

This purpose of this book is to explore the prospects for a truly contractarian approach to law in the rational choice tradition. Some explanation is needed though, as to why we would want to undertake this project through the lens of Hobbes's legal and political philosophy, rather than proceeding to consider rational choice contractarian solutions to contemporary legal problems directly. There are at least four reasons for engaging in this investigation via Hobbes. First, while Hobbes has been exalted, reviled, and dissected for many years as a political philosopher, his views on law have received surprisingly little attention. Hobbes was himself extremely learned in the law, and was a frequent contributor to contemporary debates about the proper function of judges, the nature of legal reasoning, the legitimate scope of punishment, the appropriateness of contemporary legislation, and so on. Nevertheless, his views on law have rarely been examined in any detail. In particular, what is generally thought to be Hobbes's last work, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, has

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<sup>32</sup> See John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs* 14 (Summer 1985): 223-251; see also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 27.

<sup>33</sup> These points against the Rawlsian position have all been made before in one form or another. But it is helpful to see their effect when they are combined with our fourth assumption about punishment.

received virtually no critical attention from commentators of any sort, philosophical or legal.<sup>34</sup>

The richness of Hobbes's legal ideas alone provides ample incentive for conducting our investigation of contractarian legal theory by way of Hobbes.

Second, it turns out that Hobbes's ideas on law provide a convenient way to explore certain perennial problems in his political philosophy. It has long been suggested by commentators, for example, that Hobbes's solution to the problem of exit from the state of nature is inadequate, and that Hobbes does not provide a compelling or even a clear answer to the question of how any agreement in the state of nature to establish a sovereign could be binding. At the heart of Hobbes's views on this question, however, is the notion of a *contract*, with all of the legal associations that any legal scholar in Hobbes's day would have had. As we shall see, when considered in light of the legal concept of a contract, this aspect of Hobbes's political theory becomes significantly more pellucid, and we may hope to diminish the objections to Hobbes's political philosophy by this route.

A third reason to explore legal contractarianism via Hobbes has to do with Hobbes's potential contribution to the study of general jurisprudence. Sanction-based accounts are now, thanks to Hart, all but discredited, and that has left social practice accounts as the only viable positivistic option. Yet the deficiencies of practice-based accounts have been amply articulated in recent years, and while sophisticated attempts have been made to remedy such deficiencies, it is not clear that practice-based accounts of law are ultimately viable. By the same token, most legal scholars remain unconvinced by natural law accounts, even in the more flexible and forgiving form articulated so compellingly by Ronald Dworkin.<sup>35</sup> While debates between Hart's

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<sup>34</sup> Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. Joseph Cropsey (Chicago: University of Chicago Press, 1971) (1681).

<sup>35</sup> Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986).

and Dworkin's followers rage on, it may prove instructive to return to a time when the battle lines between utilitarian and deontologists had not yet been so sharply drawn, and when rationalistic and moral arguments were more significantly intertwined than they later became. I shall suggest in the course of this work that Hobbesian theory of law offers us a middle way: it may allow us to combine positivistic notions like command and sanction with a more robust notion of legal obligation than positivists are usually able to supply. Hobbesian legal theory may thus point in the direction of an alternative jurisprudence to those expounded in central jurisprudential writings to date.