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Utility, The Good and Civic Happiness: A Catholic Critique of Law and Economics

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Abstract

This paper contrasts the value maximization norm of welfare economics that is central to law and economics in its prescriptive mode to the Aristotelian/Aquinian principles of Catholic social thought. The reluctance (or inability) of welfare economics and law and economics to make judgments about about utilities (or preferences) differs profoundly from the Catholic tradition (rooted in Aristotle as well as religious faith) of contemplation of the nature of the good. This paper also critiques the interesting argument by Stephen Bainbridge that homo economicus bears a certain affinity to fallen man, and that law and economics thus provides appropriate rules for a fallen world. From a Catholic perspective, the social vision of neo-classical economics and its progeny (welfare economics and law and economics) rests on a concept of human autonomy and a utilitarian concept of pleasure inconsistent with the Aristotelian and Aquinean concept of virtue and the conception of civic happiness articulated by Antonio Genovesi and other Catholic economists.

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UTILITY, THE GOOD AND CIVIC HAPPINESS: A CATHOLIC CRITIQUE OF LAW AND ECONOMICS

Mark A. Sargent*

Introduction

One of the dominant modes of discourse in the legal academy today is that of the law and economics movement. Having long ago burst the bounds of market-oriented subject areas such as contracts, property, business associations and antitrust, law and economics has tackled everything from family law to criminal law to constitutional law.[1] The discipline has not only reconceptualized those spheres of experience as markets, it has invaded the traditional spheres of political theory and jurisprudence to redefine the proper role of law.

Its goal in all these spheres is not just descriptive or analytic. Law and economics has become prescriptive or normative, employing the concept of social welfare as a substitute for more traditional notions of fairness, morality or justice in defining what legal rules should be preferred. In its view, the goal of law and individual legal rules should be the maximization of social welfare as an aggregate of the preferences or utilities of individuals, whatever they may be.[2] A legal rule maximizes social welfare, to the extent it maximizes in the aggregate individual preferences or utilities, and hence the well-being of individuals.

This concept of social welfare is much broader than the wealth maximization norm originally associated with law and economics, which asserted prescriptively that "law should

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[1] On the growth of the law and economics beyond its original concerns, see Eric Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, in *Chicago Lectures on Law and Economics* (Eric Posner, ed.) 189-91 (1999).

[2] For discussion of this concept, see text accompanying notes [TBA] below.

seek to increase social wealth, as measured by the dollar equivalents of everything in society."[3] It rests instead on a more comprehensive notion of what an individual might value, and can include not just goods, services or power (wealth in the narrow sense) but also "environmental amenities, personally held notions of fulfillment, sympathetic feelings for others,"[4] and even a "taste for a notion of fairness."[5] Even this more comprehensive concept of utility, however, avoids any attempt to distinguish among preferences in terms of relative value or worth. Preferences are what they are, and an individual's well-being depends entirely on legal rules' ability to enable individuals to realize their preferences. One preference, or end, is as good as any other. There is certainly no hierarchy of ends.[6] Law and economics, thus, is value-neutral; it is emphatically not a meditation upon the Good.

Law and economics does assume, however, thateconomic actors are rational in the pursuit of their preferences.[7] According to rational choice theory, they will make choices that maximize their ability to achieve their ends.[8] Law and economics simply does not make judgments about the rationality of those ends. It also does not judge them against a set of values. In fact, it repudiates judgment about those ends, or about the effects of legal rules, in terms of

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[3] Stephen M. Bainbridge, *Law and Economics: An Apologia*, in Michael W. McConnel, Robert F. Cochran, Jr. & Angela C. Carmella, *Christian Perspectives on Legal Thought* 209 (2001) (hereinafter cited as Bainbridge, *Apologia*).

[4] Louis Kaplow & Stephen Shavell, *Fairness versus Welfare* 18-19 (2002). See id. at 35, n.41 for discussion of how the broader concept of utility maximization has challenged wealth maximization in law and economic analysis. See also notes ___ infra.

[5] Id. At 21

[6] For critical analysis of this aspect of law and economics, see Don Herzog, *Externalities and Other Parasites*, 67 U. Chi. L. Rev. 895, 900 (2000).

[7] Steven Shavell, *Economic Analysis of Law* 1 (2004) (economists "generally take the view that actors are forward-looking and 'rational'").

[8] This is a core assumption of neoclassical economics and law and economics. See Gary Becker, *The Economic Approach to Human Behavior* 14 (1976):

> [A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.

"fairness" or, presumably, any other value extrinsic to the individuals' preferences.[9] When being prescriptive, law and economics is prescriptive only its own terms - - maximization of social welfare conceived of as the aggregation of individual utility maximizations[10] - - and not through the application of moral norms developed philosophically or through religious belief.

If that is true, what possible relationship can there be between law and economics and a jurisprudence grounded in Catholicism? A Catholic jurisprudence may draw on different sources of inspiration such as Scripture, natural law, Thomas Aquinas, the *Magisterium* of the Church, Catholic social thought or any combination of those approaches, but all presume the knowability of the Good. While recognizing that no human social, political or legal arrangements in the fallen world can embody the Good, Catholic thought hardly shares the indifference to ends central to the utility maximization norm. A Catholic jurisprudence will ultimately be about ends. It will make judgments about the values implicit in those ends, and will critique and prescribe legal rules on the basis of those judgments. Nothing could be less like law and economics.

If that is true, should it be said that law and economics and a Catholic jurisprudence are in conflict, or at least engaged in fundamentally different enterprises? This paper will address that question first, in Part I, by elaborating upon the irrelevance of values in both the descriptive and prescriptive modes of law and economics. Part II will describe an argument by Stephen Bainbridge, a noted Catholic law and economics scholar, who believes that law and economics possesses a deep affinity, or at least consistency with the Catholic world view.[11] In Part III I will argue, in contrast to Bainbridge, that law and economics, at least in its prescriptive mode, while

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[9] See Kaplow and Shavell, supra note 3, for an extended argument against the use of concepts of fairness, or any other standard extrinsic to individuals' preferences, as a measure of well-being and social welfare. For further discussion of welfare economics, see text accompanying note [TBA] infra.

[10] See, id. at 26 regarding the process of aggregating "different individuals' well being into a single measure of social welfare."

[11] Bainbridge, *Apologia*, supra note 2.

useful, is ultimately inadequate from a Catholic jurisprudential perspective. I will conclude by urging greater attention to a richer, and Catholic-inspired conception of economics.

I. The Irrelevance of Values

The irrelevance of judgments about values to rational choice theory is one of its defining characteristics. In rational choice theory's world of utility-maximizing individuals engaged in market relations, values are merely data. They are simply economic actors' preferences or tastes, and of little importance for purposes of economic analysis. The key point is that in the ideal-typical world of the market, self-interest rules, however that self-interest is defined. Even altruism – an apparent contradiction to self-interest – is merely disguised selfishness. The human agent's welfare is measured solely by the extent to which those preferences are satisfied: "How well-off an individual is, is the same thing as how well-satisfied an individual's preferences are. Orthodox normative economics consequently identifies welfare and preference satisfaction."[12] The economist does not make judgments of value about those preferences;[13] the only judgment the economist can sustain is that of efficiency, which is "conceived as the appraisal of the adequacy of means in view of the maximum (possible) achievement of the

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[12] TBA

[13] See Kaplow & Shavell, supra note 3 at 421-22.

> The idea of an analyst substituting his or her own conception of what individuals should value for the actual views of the individuals themselves conflicts with individuals' basic autonomy and freedom.

Note that Kaplow & Shavell make this bold moral assertion without any elaboration whatsoever. Do they mean that individuals' preferences are never subject to moral critique? If not, what makes any moral position better or more important than any other, including the one they assert here? Why should this rather simple libertarianism operate as a, indeed *the*, governing moral principle? Kaplan & Shavell, to their credit, do acknowledge that their neutral position on preferences, and the whole approach of welfare economics, "involves value judgments." Id. at 25.

> First, value judgments underlie the assumption that social welfare depends on individuals' well-being, that this dependence is positive, and that factors unrelated to individuals' well-being are irrelevant. In other words, to adopt welfare economics is to adopt the moral position that one should be concerned, positively and exclusively with individuals' well-being.

Id. at 25-26. Paradoxically, therefore, the position that the morality or immorality of ends is irrelevant is defined as a moral position, though not defended as such in philosophical terms.

interests of the participants in the market game,"[14] or, in simple terms, acting "without wasting money."[15]

Economists thus seem to be making relatively modest claims. Rational choice theory is simply a tool useful for predicting how people will respond to choices; it is "emphatically not a moral norm,"[16] and is essentially descriptive in its function. Richard Posner's claim that *homo economicus* "is a person whose behavior is completely determined by incentives; his rationality is no different from that of a pigeon or a rat,"[17] thus does not pretend to be a moral or a normative statement. It purports to be only a description of the autonomous individual's practice of making rational choices that maximize her preferences.

This is not to suggest, however, that economics is non-normative. Indeed, it is normative economics that is most concerned with law. The body of legal theory known as law and economics has both descriptive (or positive) and normative (or prescriptive) dimensions in the questions it asks about legal rules.[18] As one leading law and economics theorist, Steven Shavell, puts it in a basic, mainstream law and economics textbook,

> One type of question is descriptive, concerning the effects of legal rules on behavior and outcomes. For example, will liability for causing car accidents result in fewer accidents? The other type of question is normative, concerning the social desirability of legal rules. Thus, we might ask whether liability for car accidents is socially desirable, given its effect on the incidence of accidents, the compensation of accident victims, and the costs of the legal system.[19]

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[14] TBA

[15] Bainbridge, *Apologia*, supra note 2, at 210, citing Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 Notre Dame L. Rev. 817, 817 (1989).

[16] Bainbridge, *Apologia*, supra note 2, at 217.

[17] Id., citing Richard A. Posner, *The Problem of Jurisprudence* 382 (1990).

[18] For analysis of the distinction between these two aspects of economics, see Mark Blaug, *The Methodology of Economics, or How Economics Explains* 112-34 (1980), emphasizing that the boundary between the two is not absolute. For a more recent overview of the methodological debates within law and economics about positive, normative (and now "functional") approaches, see Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics*, Eur. J. of L. & Econ. (forthcoming 200__).

[19] Shavell, supra note 6, at 1.

Whether something is "socially desirable" depends on whether it maximizes social welfare. The concept of social welfare used in law and economics derives from rational choice theory and its value-neutral position on individual preferences in applying the utility-maximization norm. In defining the law and economics' understanding of social welfare, Shavell explains that:

> First, the notion of the utility or well-being of a person is completely general and includes everything that a person cares about. Second, the concept of a measure of social welfare is built up from the utilities of individuals and is presumed not to depend on factors other than their utilities.[20]

The measure of social welfare thus is a function of the individual preferences of the rational, utility-maximizing individuals effected by a legal rule. Considerations of fairness (or any other deontological principle), which are frequently a basis for normative evaluation of legal rules, are irrelevant, because fairness and the efficient maximization of individual utilities are apples and oranges. Notions of fairness, Shavell argues,

> Typically…are not defined in terms of the well being of individuals and are, in fact, not dependent on the consequences of their use. For instance, the idea that punishment should reflect the gravity of the act is not premised on how proportionality of the punishment affects the well-being of any person or on whether it promotes deterrence or incapacitation….Because the goal of satisfying notions of fairness is different from advancing the utilities of individuals, pursuit of the goal can lead to the reduction of individuals' well-being.[21]

This is hardly a desirable outcome in Shavell's view.

> Indeed…in principle, the pursuit of any notion of the social good that is not based positively and exclusively on the well-being of individuals will, in some circumstances make everyone worse off: all individuals will want policy A to be chosen over policy B, yet the notion of the social good will require B to be chosen. This result implies that a person who wants to respect the unanimous choices of individuals must, on grounds of consistency, reject any notion of the

[20] Id. at 107.

[21] Id. at 110.

> social good that does not depend positively and exclusively on the utilities of individuals.[22]

From Shavell's perspective, the introduction of moral principles into decision-making is almost perverse, at least when the choices of the individuals involved in a transaction are thereby disregarded

Fairness, Shavell concedes, may have some limited, instrumental uses in economic analysis of law. For example, individuals may have a "taste" or preference for fairness, such as a desire to have the punishment fit the crime.[23] That taste enters into the economic analysis, however, as just another individual utility, and is not in any sense privileged. "Fairness" is not a separate normative consideration external to or superior to the efficiency analysis. As Shavell puts it, fairness would not "have normative weight independently of whether… individuals …happen to have a taste for satisfaction of the notions [of fairness]."[24] Shavell is grateful, however, that notions of fairness do exist in society: "Were people not to have moral notions instilled in them, it is apparent that society as we know it could not function. These notions are actually very useful from the point of view of welfare economics, so it is desirable that individuals believe in these notions of fairness and that social resources be employed to instill them."[25] Shavell's concession is thus quite limited, and he is not at all interested in the nature, origins or extent of those useful "moral notions," and they are not relevant to the determination of social welfare. He concludes that whatever usefulness such notions might have, that

[22] Id. These arguments are elaborated and defended at much greater length in Kaplow & Shavell, supra note 3.

[23] Shavell, supra note 2 at 110-11; Kaplow & Shavell, supra note 3, at 21.

[24] Id. at 111.

[25] Id.

usefulness "does not imply that an analyst, in thinking about legal policy, should give a notion of fairness independent weight of its own."[26]

This principle of strict adherence to the utility maximization norm, however, should not be regarded as methodological modesty, or as recognition of a limit on the usefulness or scope of economic analysis of law. To the contrary, it is an aggressive, almost imperialistic assumption that fairness or other deontological principles applied in traditional jurisprudence and philosophy are inferior to welfare economics and should be supplanted. In short, the norm is central to law and economics' conception of a better society.

Despite its analytical purity, the categorical assumption of the supremacy of the utility maximization norm has been qualified somewhat in the law and economics literature. In the course of a defense of the norm, Bainbridge acknowledges that

> [a]lmost from the beginning … important law & economic scholars asserted that the wealth maximization norm could be trumped by what Guido Calabresi called "Other Justice" norms. That position now prevails in the law and economics community. Even Judge Posner concedes (albeit with qualifications) that economic analysis sometimes can be trumped by non-economic norms.[27]

This concession, however, tends to be a grudging one. While recognizing in theory that "Other Justice" norms should sometimes prevail in the evaluation of legal rules, economists often emphasize what Bainbridge calls "the thorny problem of implementation."[28] For example, law and economics scholars frequently employ public choice theory to show that legislatively-created legal rules reflect the preferences of intensely-focused interest groups with high stakes in the outcome, rather than the interests of larger, more diffuse groups (such as consumers or public

[26] Id. See also Kaplow & Shavell, supra note 3, at 21-22 ("philosophers' or policy analysts' views of what notions of fairness should be endorsed by members of an enlightened society are irrelevant").

[27] Bainbridge, *Apologia*, supra note 2, at 212.

[28] Id. at 213.

shareholders) whose interests legislators theoretically should be protecting.[29] This kind of problem can lead a theorist such as Bainbridge to conclude that "although in theory I acknowledge the need to permit other normative values to trump wealth maximization, in practice I am deeply suspicious of claims that Other Justice norms should prevail."[30] Assertions of fairness, of "the public interest," social justice and equality thus are often perceived with in the law and economics tradition as masks for self-interest, as rhetorical dodges deflecting attention from the play of conflicting interests.

How does all this fit with a Catholic perspective on law? A useful basis of comparison may be between law and economics and Catholic social thought[31] with its broad implications for a huge variety of social questions within the province of law. Because of their concern with many of the same issues - - the nature of property, the purpose and proper functioning of economic life, the relationship of the state to the economy, the relationship of superior and subsidiary authorities, and much more - - it can be said that Catholic social thought and law and economics are playing in the same field. But do they have any relationship beyond that?

At first blush, there would not seem to be an important place for Catholic social thought, with its insistence on evaluating social arrangements in accordance with moral and spiritual principles, in the law and economics universe. In the Catholic universe the nature of ends or preferences is not irrelevant. Perhaps Catholic social thought can, at best, serve as a source of one of those elusive "Other Justice" considerations that, at least theoretically, trump the utility

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[29] On public choice theory generally, see J. Mark Ramseyer, *Public Choice* in *Chicago Lectures in Law and Economics* (Eric Posner, ed.) 101-11 (1999).

[30] Bainbridge, *Apologia*, supra note 4, at 213.

[31] The literature on Catholic social thought is enormous, and need not be cited here. An excellent overview is Charles E. Curran, *Catholic Social Teaching, 1891-Present* (2002). The application of Catholic social thought to jurisprudence and to specific problems in law, however, is a relatively recent development, and a literature is just now developing. For a sample of current efforts, see *Symposium on Catholic Social Thought and the Law*, 1 J. Catholic So. Thought 201-706 (2004).

maximization norm, especially in non-market contexts. It may reflect a taste, or preference within an individual's utility determination. It may serve merely as means for guiding the distribution of wealth after economics resolves the serious questions of wealth creation. Fundamentally, however, the complex of interlinked assumptions about human nature, the nature of the common good, and the proper measure of a just economy and just society that constitute Catholic social thought seem to be of marginal relevance to law and economics.

There is, however, a more sanguine view of their possible relationship.

II. A Catholic Defense of Law and Economics

There is a body of Catholic opinion that asserts a deep consistency between Catholic thinking about the economy and society and neoclassical economics in general and law and economics in particular. Most notable is the work of Michael Novak and Stephen Bainbridge.

I have considered Novak's claims elsewhere,[32] and will not elaborate on them here, but will emphasize his key points, which are actually quite simple. Novak asserts that conception of human dignity essential to Catholic thought requires a robust conception of human freedom. Human freedom, he argues, is found only in the democratic capitalist system that maintains the separate sovereignty of the economic, political and cultural/associative spheres. Only this full elaboration of the principle of sphere separation allows the market to operate freely and efficiently without the distortions created by the intervention of the state, which he often refers to as "Leviathan." Only the operation of the market, furthermore, will create the wealth needed to establish the material conditions essential to the flourishing of the human person thatCath olic teaching regards as the goal of a just society. Any state attempt to intervene in market relations, or in the exercise of economic liberty, for the purpose of wealth distribution or achieving "social

[32] Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. Catholic Soc. Thought 561, 574-81 (2004).

justice" (a term Novak derides) is not only an infringement on human freedom (and hence dignity), but an undermining of the goal of wealth maximization, the only legitimate goal (for Novak) of the economic sphere.[33] This line of reasoning is obviously congruent with neoclassical economics and law and economics.

What is notable for my purposes here is Novak's insistence that this economically-informed view of the world is "Catholic," and that Catholic or other Christian thinkers who criticize it are crypto-socialists who do not understand their own religion. According to Novak, those Catholic and other Christian thinkers who have criticized his version of economics from a communitarian perspective, or have contested neoclassical economics' view of human nature, or have insisted on the primacy of distributional or other social justice goals, have distorted Catholic and Christian values by injecting into them entirely foreign and secular socialistic ideologies. Economic liberty, wealth maximization and the subordination of distributional goals constitute for Novak not just good economics, but the true Christian message. Indeed, he regards the democratic capitalist system as a sign of God's grace in the world.[34]

Bainbridge, an influential law and economics scholar principally interested in the law of business associations and securities regulation, has done original and provocative work extending Novak's premises to law and economics *per se* (something Novak has done only glancingly). Bainbridge's work has extended from a general *apologia* for law and economics from a Catholic (and more broadly Christian) perspective to specific analyses showing how

[33] This summary is derived from Novak's central works on these topics, including Michael Novak, *The Spirit of Democratic Capitalism* (2002); *Toward a Theology of the Corporation* (1990); *On Corporate Governance, The Corporation as It Ought to Be* (1997); C*atholic Social Thought & Liberal Institutions, Freedom With Justice* (2d ed. 2000).

[34] See Sargent, supra note 32, at 574-81 for more detailed discussion of Novak's argument and relevant citations.

certain CST critiques of corporate governance and corporate law are both bad economics and erroneous applications of CST principles.

Bainbridge's *apologia* for law and economics rests partially on the standard defenses:

- Legal sanctions constitute a cost for engaging in certain activities, thus "changing a legal rule is no different from any other change in price."[35]

- A legal rule is thus "just as subject to economic analysis as is the price of a commodity."[36]

- "The bedrock principle of normative economics analysis is wealth maximization; that is, law should seek to increase social wealth, as measured by the dollar equivalent of everything in society."[37]

- Wealth maximization is crucial to implementation of the efficiency principle. Understanding wealth maximization in terms of efficiency "shifts the burden of proof to the opponents of the wealth maxim."[38]

- While it must be acknowledged that "law and economics is an instrumental mode of reasoning that must be constrained and guided by exogenous norms," such as "Other Justice" considerations, the implementation of such norms creates serious problems. Public choice theory shows, at least in the legislative area, decisions made in the name of distributive justice usually reflect only interest group pressures.[39]

As just suggested, all of this is standard apologetics for law and economics, and there is nothing particularly Catholic about it. To his credit, however, Bainbridge offers a deeper defense that does, in fact, attempt to draw on the Catholic worldview.

He does so by asking whether the wealth maximization norm and the rational choice theory that underpins it can be reconciled with Christianity: "How can Christians associate

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[35] Bainbridge's articles on Catholicism and corporate governance are: Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, 1 J. *Catholic Soc. Thought* 596 (2004); *The Bishops and the Corporate Stakeholder Debate*, 4 Vill. J. L. & Invest. Mgmt. 3 (2002). Also relevant is his *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Corporate Law*, 43 Vill. L. Rev. 741 (1998).

[36] Bainbridge, *Apologia*, supra note 3, at 208.

[37] Id.

[38] Id. Note that Bainbridge prefers the standard of wealth maximization rather than utility maximization, and uses it consistently in his *Apologia*.

[39] Id. at 209.

themselves with a normative principle explicitly intended to maximize wealth and whose measurement of wealth includes only those preferences having monetary value?"[40] (Note that Bainbridge uses throughout his apologia the narrower concept of "wealth" rather than utility maximization.)[41] Bainbridge recognizes correctly that it is the vision of human nature implicit in rational choice theory that is at the heart of the question: "'Economic Man' is an autonomous individual who makes rational choices that maximize his satisfaction. The question before us is whether the economic view of human nature is consistent with that of Christianity."[42]

Bainbridge's answer to that question is essentially twofold: a non-theological and a theological answer. The non-theological answer is again a standard law and economics argument. "Economic Man," he emphasizes, is "not intended to describe real people embedded in a real social order."[43] The concept simply provides a mechanism for describing how people choose between alternatives.[44] It presumes rationality in the decisions made by people to satisfy their preferences - - whatever those preferences may be.[45] As such, law and economics rests on

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[40] Id. at 214-216

[41] Id. at 209

[42] See note 38 supra. By rejecting the broader utility maximization principle, Bainbridge presumably adopts a more modest position on law and economics' explanatory or prescriptive power than Shavell, Kaplow and other who favor the utility maximization approach. That probably should not be assumed, however, that the distinction between "utility" and "wealth" leads to a meaningful difference in their sense of the scope of law and economics. As one critic has stated the problem:

> Economic accounts routinely wobble between these two interpretations of utility maximization. At some point in the story, one senses that the account is following the first interpretation, motored by misanthropic glee: the agents in question all seem single-mindedly devoted to pursuing their own profit or power or pleasure. One objects--surely there's more to it than that!--and the economist backtracks to the second interpretation, saying patiently, "no, by utility maximization I just mean the formal structure, any content will do." But then, within minutes--or paragraphs--we find ourselves right back to the first interpretation.

Herzog, supra note 6, at 898-99.

[43] Bainbridge, *Apologia*, supra note 2, at 216.

[44] Id. at 218.

[45] See id. at 18 for Bainbridge's explanation of how rational choice theory is not a moral norm, but rather a "benign" assumption that consumers have transitive preferences.

an "economic model of behavior [that] adequately explains the behavior of people engaged in exchange."[46] It thus does not matter, concludes Bainbridge that "Economic Man is an imperfect model of human behavior."[47]

Bainbridge's theological response is more original, and raises a question about his claim that Economic Man is just an imperfect but useful model of human behavior. He returns to the basic limitations of rational choice theory. The formation and nature of human preferences is beyond economics.

> Here's the ticket: price theory tells us how people will choose, but as R.H. Coase notes: It does not tell us why people choose as they do. Why a man will take a risk of being killed [by crossing a busy street] in order to obtain a sandwich is hidden from [economists] even though we know that if the risk is increased sufficiently, he will forgo seeking that pleasure. In other words, economics has no good account of the character or origins of human preferences.[48]

It is here, Bainbridge argues, the Christian faith "brings something to the table:"

> Christianity is not a utopian faith but rather is quite realistic about human beings. In particular, our central doctrine of the Fall of Man tells a coherent story about the nature and origins of human preferences in an unredeemed world. In my view, the assumptions about human behavior made by economists are largely congruent with the fallen state of man. If Economic Man is a fair description of Adam after the Fall, the rational-choice model used in economics is not a bad model for predicting the behavior of fallen men. At the same time, however, because Christianity's account of how man fell and the consequences of that Fall provide an answer to Coase's question about human preferences, our faith gives Christian practitioners of economic analysis a more fully realized account of human behavior.[49]

Furthermore, Bainbridge argues that if Economic Man and Fallen Man bear a rough equivalence, then law and economics provides not only an accurate basis for modeling human behavior, but a sound normative basis for ordering society. This might, however, seem counterintuitive from a

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[46] Id.

[47] Id.

[48] Id. at 222.

[49] Id.

Christian perspective, as Bainbridge acknowledges when he points out that "Christians are called to a higher standard of behavior than that of Fallen Man."[50]

It cannot be assumed, however, that most people, whether Christian or not, will overcome their fallen nature, and it should not be believed that society actually can be organized on the assumption that they will be able to do so. Bainbridge thus argues that

> [I]f the purpose of economic analysis is to predict how people will respond to changes in legal rules, however, can we assume Christian behavior by the masses of a secular and Godless society? No realistic social order can assume "heroic or even consistently virtuous behavior" by its citizens. A realistic social order therefore must be designed around principles that fall short of Christian ideals. In particular, the rules must not be defined in ways that effectively require every citizen to be a practicing Christian. Christian visions of justice therefore cannot determine the rules of economic order. Instead, legal rules and predictions about human behavior must assume the fallen state of Man, which is precisely what I have tried to suggest Economic Man permits us to do.[51]

For Bainbridge, therefore, law and economics, while not precisely "Christian" or "Catholic" itself, has an affinity with the Christian view of the fallen nature of man and hence with a Christian view of the constraints on human ability to create a just society. There is certainly no tension between the two for Bainbridge, as he concludes that "a Christian scholar may rely on both positive and normative economic analysis with confidence that it is both a powerful analytical tool and one that is consistent with his or her walk with God."[52]

Bainbridge's argument is impressive both in its originality and in its ambitious harmonization of law and economics and Catholic Christianity. He has formed the argument in a subtler and more convincing manner than Novak. But is he right?

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[50] Id.

[51] Id. at 222-23.

[52] Id. at 223.

III. The Limits of Law and Economics

Bainbridge's reconciliation of Christianity and Economic Man is ingenious in its linking of rational choice theory, utility maximization and our fallen state. Human selfishness, for the Christian, is one of the consequences of the Fall; rational utility maximization thus may be an accurate way to describe how the fallen will tend to act. There is perhaps an inconsistency between Bainbridge's initial insistence that Economic Man and rational choice theory simply constitute a useful predictive model, rather than a description of human nature and his subsequent conclusion that in the Christian view Economic Man is actually the way people really are, but be that as it may.

More troubling is the corollary of Bainbridge's equation of the two. Even if we assume that Economic Man acts something like Fallen Man, as a descriptive matter, does that mean that the prescriptive goal of economics (helping Economic/Fallen Man maximize his preferences, whatever they are, as efficiently as possible with the sum of those preferences being the sole measure of social welfare) is also "Christian"? To be sure, Fallen Man will act selfishly to pursue his own interests, and will do so rationally to the extent possible, and a type of well-being will be achieved through legal rules that efficiently maximize his utility, i.e., help him get what he wants. For law and economics, however, that is the end of the story. From a Catholic perspective it cannot be. The reasons it cannot be the end of the story suggest not only that Bainbridge's equation of Economic Man and Fallen Man takes us only so far, but also that there are serious tensions between the two world-views' understandings of the human person, the nature of civic happiness, and the purpose of economics.

Note, however, that my identification of this tension, and consequent skepticism about the ultimate value of law and economics, does not presume that "economics" is irrelevant. To

the contrary, this analysis presumes that concepts of neoclassical economics such as rational choice, efficiency, game theory, rent-seeking, the principal-agent problem and much more "ought to be in the toolkit of any self-respecting social or political theorist,"[53] whether Catholic or not. Indeed, there is nothing Catholic about wasting money, and our moral responsibility for faithful stewardship of God's earthly gifts requires understanding and application of efficiency principles. The question is how far those concepts can take us. Can they replace the Catholic moral tradition of meditation upon virtue and the Good as a guide to decisionmaking in law? Recognizing the relevance of economics, furthermore, also requires recognizing that the neoclassical economics from which law and economics derives is not the only kind of "economics." Much as law and economics scholars such as Bainbridge and Shavell draw on the theoretical framework of economists such as Coase, Becker, Stigler, Friedman and others, this analysis also will draw on the work of economists, but economists of a very different type. Notable among them are the Italian Catholic economists Antonio Genovesi,[54] Stefano Zamagni,[55] Luigino Bruni[56] and Benedetto Gui,[57] who have articulated a vision of economics as

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[53] Herzog, supra note 6, at 906.

[54] Genovesi was a principal figure of the 18th century Neapolitan enlightenment. For detailed discussion of his economic theory, particularly his concept of *pubblica felictà* ("public happiness"), see Luigino Bruni, *The "Technology of Happiness" and the Tradition of Economic Science*, 2 J. Hist. Econ. Thought 21 (2004) (hereinafter, *Technology of Happiness*).

[55] For representative works, see Stefano Zamagni, *Humanising the Economy: On the Relationship Between Catholic Social Thinking and Economic Discourse*, in J.S. Boswell, F.P. McHugh and J. Verstraeten (eds.), *Catholic Social Thought: Twilight or Renaissance?* (2000), at 149 (hereinafter *Humanising the Economy*); *On the Foundation and Meaning of the "Economy of Communion" Experience*, in Luigino Bruni (ed.) *The Economy of Communion, Toward a Multidimensional Economic Culture* (2002), at 130; *The Market, Happiness and the Economics of Reciprocity*, 43 Living City 16 (2004). See also his co-authored work, Luigino Bruni e Stefano Zamagni, *Economia civile: efficienza equità, felicità pubblica* (2004).

[56] For representative works see BRUNI & ZAMAGNI, supra note 56; Luigino Bruni, L'Economia, La felicità e gli altri: un' indagine su beni e benessere (2004); Bruni, Technology of Happiness, supra note 54; Luigino Bruni & Vittorio Pelligra (eds.), Economia come impegno civile, relazionalità ben-essere ed economia di commune (2002); Luigino Bruni (ed.), *The Economy of Communion, Toward a Multidimensional Economic Culture* (2002) (hereinafter *Economy of Communion*); Luigino Bruni & Amelia J. Uelmen, *Religious Values and Corporate Decisionmaking: The Economy of Communion Project* (forthcoming); Luigino Bruni, *Economy of Communion:*

oriented toward production of civic happiness that is deeply informed by Catholic social teaching. Much of the following discussion reflects their work.

A Catholic critique of law and economics should proceed on several distinct, albeit related levels. First, there is a foundational philosophical disagreement between rational choice theorists and Catholic thinkers. Rational choice theory's (and game theorists') view of human nature and the purpose of life is rooted in Hobbes. As Peter Berkowitz (a non-Catholic political philosopher) has pointed out accurately, "With Hobbes . . . the game theorist supposes that the world is matter in motion and nothing more; that there is no greatest goal or ultimate aim, no human perfection or salvation; that the primary and only salient motive for human conduct is rational self-interest."[58] Opposed to the quintessentially modern Hobbes (and his intellectual heirs among economists) is the distinctly religious Catholic conception of personhood: incarnational, capable of redemption, and oriented toward salvation. Humans are fallen, but redeemable. That person is capable of more than utility maximization, should not be regarded as interested only in utility maximization, and may be judged in a moral framework that values something greater than the autonomy needed to satisfy individual preferences.

Second, rational choice theory and welfare economics assume that the ends of action - - the purposes of choices - - are beyond the ability of economics to evaluate normatively. Law and economics, which is dependant for its analytical force on rational choice theory, "disclaims all

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Between Market and Solidarity, in J.S. Boswell, F.P. McHugh & J. Verstraeten (eds.), *Catholic Social Thought: Twilight or Renaissance?* 239 (2000).

[57] For representative works, see Benedetto Gui, *Productive Organizations with Ideal Aims and Personal Fulfillment: Interpersonal Relations and Horizons of Meaning*, in Bruni (ed.), *Economy of Communion* supra note 56, at 112: Luigino Bruni & Benedetto Gui, *Quattro parole su economia e communione*, in Bruni & Pelligra (eds.), *Economia come impegno civile*, supra note 56, at 191; Benedetto Gui, *Sharing That Builds Universal Brotherhood*, 43 Living City (June 2004), at 20.

[58] Peter Berkowitz, *The Futility of Utility*, New Republic (June 5, 2000) at 38. I am indebted to Michael Moreland for this reference.

concern with the ends of action,"[59] hence what I have described as the "irrelevance of values." In contrast, the Catholic tradition, grounded in Aristotle and developed through Aquinas, insists on the capacity of reason to deliberate about ends and not just means. Ends (or preferences) may be shaped by reason and directed toward the Good.[60] For Catholic thinkers that end, the ultimate good, is God,[61] but the secularist can substitute alternative conceptions of the Good. Law and economics' insistence on the irrelevance of ends is a sharp break with both the Catholic and secular Aristotelian tradition, making it ultimately inadequate from those perspectives as a guide for deciding and acting.

Third, the concept of human flourishing central to Catholic social thought is far richer and more complex than the utility maximization norm of law and economics. Here, the difference is once again rooted in Aristotle, particularly the Aristotelian notion of "happiness," or *eudaimonea*. This notion is quite different from the concept of "pleasure" derived from utilitarianism and understood in neo-classical economics and law and economics as the consequence of utility maximization. For Aristotle, that pleasure is a transitory, neutral state; it does not constitute subjective well-being, or happiness. Happiness is a byproduct of being virtuous, in particular of practicing the civic virtues.[62] The civic virtues are particularly important because the human person is inherently social (a key concept in Catholic social thought as well as Aristotle). In modern economic terms, the human person is other-oriented and derives satisfaction form amassing "social capital."

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[59] David Gauthier, *Morals by Agreement* (19__), 25-26.

[60] For an excellent exposition of this insight, see an unpublished paper by Michael P. Moreland, *Homo Economicus and Catholic Social Thought* (undated), at 8-10.

[61] Aquinas, *Summa Theologiae*, I-II.3.viii.

[62] For an explanation of how the concept of *eudaimonia*, articulated in Aristotle's *Nicomachean Ethics*, was elaborated by Genovesi as a guiding principle for economics, see Bruni's, *Technology of Happiness*, supra note 54 at 27-29. For discussion of how Aristotle linked happiness with the virtues to construct a concept of "human flourishing," see id. at nn. 13-15.

These Aristotelian notions were built into Catholic thought about ethics and politics by Aquinas,[63] and through him into Catholic social thought, with Catholic social thought's emphasis on the relational nature of happiness, the obligations of reciprocity, and the common good as a constraint on wealth and property rights. They were brought into Catholic thinking about economics by Antonio Genovesi, a cleric and principal figure of the Neapolitan enlightenment of the 18th century, who used these Aristotelian/Aquinian concepts to define the purpose of economics as bringing about *pubblica felicità*, or public happiness, in which the goal of market relations is not simply to maximize the wealth of each individual but to secure the happiness of others and of society in general. Genovesi recognizes that each individual will pursue his own interests (act "rationally" in modern terms), but if he only pursues his own interest, and ignores the civic virtues, neither the individual nor society will achieve true happiness, because happiness and virtue are bound inextricably. Luigino Bruni explains this paradox in Genovesi's thinking.

> In a letter we find a very clear sentence synthesizing Genovesi's theory of happiness as *eudaimonia* and its paradox, "every man acts looking for his happiness, otherwise he would be less of a man . . . The more one acts for interest, the more, if he is not mad, he must be virtuous. It is a universal law that it is impossible to make our happiness without making others' happiness" (Genovesi 1764, p. 449). Here it is affirmed that man acts according to his own "interest." Interest however means "happiness," and one can only reach happiness/interest indirectly, by being virtuous. Virtue here is civic virtue, that is, other-oriented, genuinely social. Finally, happiness is a "by product" of this virtuous/social behavior.[64]

Where economics went wrong, Bruni argues, is in the decision to equate "happiness" with "pleasure," jettisoning the Aristolelian/Aquinian connection between happiness and virtue, particularly the civic virtues, for the sake of the value-neutral (virtue-indifferent) concept of

[63] Id, at 27.

[64] Id, at 28.

utility maximization.[65] This move elevated purely instrumental tools such as rational choice theory, utility maximization, and the concept of efficiency into the sum total of economics, leaving no place for reasoned deliberation about ends or consideration of the real sources of human happiness – the virtues.

Fourth, economists inspired by Catholic social thought such as contest the core assumption "that values are just a datum,"[66] and that "'some of the most intrinsically human peculiarities of the economic agent such as his notions of justice, honor, loyalty and also his vaguest hopes and illusions [are] pre-economic data, or 'accidental deviations from the rational norm' which reciprocally compensate within the vast body of data.'"[67] Their presumption is that economic analysis needs to have some account of how virtues such as benevolence, sympathy, trust and solidarity are crucial to the operation of the market. The key aspect of all those virtues is that they are relational; they all involve the individual's relationship with the other. This strikes at the individualistic core of neoclassical economics and law and economics – the "sovereignty of individual preferences."[68] This sovereignty presumes an individualistic anthropology, which to economists grounded in Catholic social thought, such as Zamagni, "is inadequate because its vision of the concept of person denies precisely what is essential to a person: interaction with others and the relationship to others as a value per se."[69] It also presumes that humans are satisfied ("happy") merely so long as they have the freedom to choose. But that freedom is purely individualistic, and not sufficient to produce happiness in the

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[65] Id. at 36 (*"The reductionism of happiness/eudaimonia to utility/pleasure is the real break-point in this history of happiness in economics")* (emphasis in the original).

[66] Zamagni, *Humanising the Economy*, supra note 55, at 156.

[67] Id., citing G. Bocatini, *Possibilità e limiti dell' economia di mercato,* in *Economia e politica* (1999), at 101-02.

[68] Id. at 160.

[69] Id. at 161.

Aristotelian sense. To Zamagni (and Catholic social thought) true freedom is not merely the exercise of choice, but the incorporation of each person's "deep, vital need for the other. It is the relation 'with' the other which is crucial to freedom, not the relation 'to' others *per se* . . . Robinson Crusoe may maximize his own utility, by himself, but for him to be happy, there must be Friday."[70]

IV. Conclusion

Where does all this leave law and economics? Its descriptive powers remain largely intact, but its expansive and exclusionist prescriptive claims for how society and the economy should operate largely collapse, because its value-neutrality, indifference to ends and radical individualism provides no insight into what is required for the happiness in which humans can truly flourish. In short, law and economics provides useful descriptive and analytic tools, but from a Catholic perspective they are tools of inherently limited value. Law and economics does not provide an acceptable framework for determining what *ought* to be, because of the limits it imposes on its own capacity for moral judgment and conceptualizing human happiness. As a result of these self-imposed limitations, law and economics and Catholic thinking about law do not so much conflict as diverge onto separate paths.

Prescriptive law and economics begins and ends with social welfare as the maximization of individual preferences. There is no conception of the common good apart from the satisfaction of individual preferences; indeed it is believed that such satisfaction is the only way to achieve social welfare. This relentless orientation toward the self, however, is ultimately antithetical to Catholic thinking about economic life, which emphasizes reciprocity, other-orientation, the social nature of happiness and the promotion of civic virtues. The goal of a

[70] Id. at 163.

Catholic economics is not the creation of a *societas perfecta* or a communal utopia—Augustine taught us that perfection is for the City of God, not the City of Man—but the creation of an economy and society that is more virtuous rather than less, and that the world, while fallen, is capable of redemption.