

THE TWIN TEMPTATIONS OF LAW AND ECONOMICS

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INTRODUCTION

Over two hundred years ago, Alexis de Tocqueville made an analogy between nations and people. De Tocqueville claimed that if we are to understand a given person or country, we should not study them as grown, mature entities but begin “higher up,” for the “entire man is, so to speak, to be seen in the cradle of the child.”¹ Legal movements also fit this description. For example, the Law and Economics movement (“L&E”)—like nations and people—has distinct origins with equally distinct contours. In Tocquevillian terms, the “vices and virtues” of L&E are to be understood and evaluated, not only in their present state, but also within the origin and history of L&E.²

Economics is an important field of study for any society. A discussion of law in society necessarily bears on economics, and vice versa. At its core, modern day economics informs us about what is an efficient allocation of scarce resources, and L&E prescribes how the law should respond in light of such phenomena.³ These efforts have given the legal community new lenses through which to see social interactions and new criteria by which to evaluate these interactions. Economics illuminates the study and practice of law, and any treatment of L&E would be incomplete were it only to showcase its worst possibilities, especially in view of L&E’s contributions to a better understanding of antitrust law,⁴ due process,⁵ tort liability,⁶ and “new-to-law”

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¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 26 (Phillips Bradley ed., Henry Reeve trans., Everyman’s Library 1994) (1840).

² *Id.* at 31.

³ RICHARD A. POSNER, *ECONOMICS OF JUSTICE* 88-115 (1981) [hereinafter *ECONOMICS OF JUSTICE*]; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (6th ed. 2003) [hereinafter *ECONOMIC ANALYSIS OF LAW*].

⁴ Douglas H. Ginsburg, *Originalism and Economic Analysis*, 33 *HARV. J.L. & PUB. POL’Y* 217, 218 (2010); see also ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

⁵ Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 *HARV. L. REV.* 1363 (1990).

topics, such as transaction costs, moral hazard, and externalities.⁷ At this stage of American jurisprudence, it is difficult to imagine an area of law unchanged by L&E.⁸

This Note illustrates that L&E was troubled in its origin, and that those troubles remain. Specifically, as the study of economics evolved, it departed from the study of political economy and the greater concerns for society and was transformed into an inquiry of efficiency alone.⁹ In so doing, greater legal relevancy was traded for empirical certainty.

This Note also addresses the fundamental problems of L&E as inextricably interwoven with its utilitarian heritage. It argues that L&E is part of a movement that tempts jurists to reach for science and empirical knowledge in an attempt to import certainty and perfection into legal rules. This is not good for the study and practice of law.

At present, the L&E movement dwarfs other jurisprudential movements and its influence extends beyond the legal academy into positive law. While L&E has provided new lenses through which to view some legal problems, other incarnations like the myth of *homo economicus*¹⁰ are being called into question, in part, because recent research has revealed a more complete picture of what animates human decisions.¹¹ Legal scholarship must recognize this.

Finally, as an alternative to these misuses of L&E, this Note advocates for Adam Smith's traditional notions of justice and virtue ethics, a more restrained application of L&E to primarily

⁶ Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973).

⁷ Carrie Menkel-Meadow, *Taking Law and _____ Seriously: Before, During, and After "The Law,"* 60 VAND. L. REV. 555, 568-70 (2007).

⁸ ROBIN FELDMAN, *THE ROLE OF SCIENCE IN LAW* (2009); Richard Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 54 U. CHI. L. REV. 1167 (1997).

⁹ EKELUND & HERBERT, *infra* note 14, at 314.

¹⁰ See Brian Netter, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 J. CRIM. L. & CRIMINOLOGY 186, 193 (2005) (citing MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (Harvard Univ. Press 2d ed. 1971) (Olsen is one of the more recent analysts to use the term)).

¹¹ *Homo economicus* is a device or model created to describe the operations of people through the economic lens. See generally MORAL MARKETS, *infra* note 156.

market transactions,¹² and a renewed focus on *law* and economics.¹³

I. PROBLEMS WITH UTILITARIANISM: PAST AND PRESENT

A. A Brief History of Economic Inquiry

In order to fully understand and discuss modern L&E, we must first briefly explore the history of economic inquiry. The evolution of economics from its philosophical origins to an empirical scientific discipline is important to the analysis of this Note.¹⁴

1. Greek Philosophy

The ancient Greek philosophers wrote about exchanges and value in terms of political economy rather than those of modern economics. Plato's writings on the benefits of private property and specialized labor created a paradigm for later writers.¹⁵

Aristotle's writing had an even greater impact by influencing medieval thinkers, who in turn had a profound influence on later economists, such as Adam Smith.¹⁶ The Aristotelian contribution most germane to this paper is the two-pronged concept of justice: corrective and distributive.¹⁷ However, modern economists find little value in Aristotle's work because his inquiry accounted for the whole of society's concerns instead of market mechanics alone. One finds the ever-present themes of the *telos*, or the end of a thing, and *eudaimonia*, or the good life, permeating Aristotle's writings. In addition to linking economic phenomena to the deeper questions of how individuals and society should operate, Aristotle also forced the debate over a theory of *value*. While Aristotle has

¹² Ronald Coase was in favor of keeping L&E within the scope of market transactions. John F. Pfaff, PIONEERS OF LAW AND ECONOMICS 148 (Lloyd R. Cohen & Joshua D. Wright eds., 2009) [hereinafter PIONEERS].

¹³ This is the perspective of Richard Epstein. *Id.* at 203-221. *See also* Epstein, *supra* note 8.

¹⁴ ROBERT B. EKELUND, JR. & ROBERT F. HERBERT, A HISTORY OF ECONOMIC THEORY AND METHOD 3, 6 (Bonnie E. Lieberman ed., 2d ed. 1983).

¹⁵ *Id.* at 2-7.

¹⁶ JOHN MÉDAILLE, THE VOCATION OF BUSINESS 42, 49 (2007).

¹⁷ In its simplest form, distributive justice concerns a person's "share" of the benefits of society and benefit-conferring regime in place, whereas corrective justice is that which rectifies private transactions. Much could be, and indeed has been, written on these two concepts. *See* ARISTOTLE, NICHOMACHEAN ETHICS (Martin Oswald trans., Prentice Hall 1999). *See also* MÉDAILLE, *supra* note 16, at 39.

been criticized for an ignorance of market functions,¹⁸ he influenced economic theorists through the nineteenth century.¹⁹

2. Adam Smith

Adam Smith ushered in the era of modern economic analysis by attempting to discover a “Newtonian” principle for economics—like the law of gravity for physics—that would reduce a complex field of study to a simple principle.²⁰ Much to Smith’s chagrin, the attempt yielded two principles.²¹ Smith’s labor theory of value and the “invisible hand” began to test the boundaries of Aristotle’s twin theories of justice. The labor theory of value, referred to as the “liberal reward of labor,” concerned the same sort of equity interests involved in distributive justice and expounded on the conflicts that Smith perceived between merchants and the labor (or land-owning) classes.²²

Conversely, Smith’s “invisible hand” theory relied on corrective justice—justice in the exchange—and resolved the ancient philosophical problem of self-interest and the public interest. By bargaining, people obtain “the far greater part of those good offices which we stand in need of.”²³ In other words, fair exchange is achieved by appealing not to our need but to the gain

¹⁸ Even these criticisms are arguably unfair because Aristotle’s main concern was not with precise market mechanisms, but with broader concerns of society. Furthermore, these critics ignore how Aristotle’s thoughts on scarcity and value helped pave the way for modern economics. MÉDAILLE, *supra* note 16, at 39-49.

¹⁹ William Stanley Jevons attributed some of his later work to Aristotle as late as the 1870s. EKELUND & HERBERT, *supra* note 14, at 16, 312-24.

²⁰ MÉDAILLE, *supra* note 16, at 47.

²¹ For a good discussion of labor theory of value and self-interest (invisible hand), see MÉDAILLE, *supra* note 16, at 44-50.

²² Common misconceptions of the complexity of Smith, especially in the context of his first work, *Theory of Moral Sentiments*, are typified by his distrust of mercantile interests. While he is often best remembered for the “invisible hand,” that term is only used once in *Wealth of Nations*, unlike the frequently used “liberal reward of labor.” Furthermore, Smith rejected utility as an element of price. Instead he writes about the “flourishing and happy” society more reminiscent of the Aristotelian notion of the *eudaimonia*, or the “good life.” MÉDAILLE, *supra* note 16, at 46; ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 88 (Edwin Cannan ed., Univ. of Chicago Press 1976) (1776) [hereinafter WEALTH OF NATIONS]; ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1776).

²³ WEALTH OF NATIONS, *supra* note 22, at 88; see also MÉDAILLE, *supra* note 16, at 49 (this notion of self-interest was not synonymous with “selfishness,” but should be understood more along the lines of scholastic thinkers—in relation to one’s station in life and responsibility to family).

of the other party, which—incidentally—is mutually beneficial.²⁴ The era that followed Smith was defined by a flurry of change and development within (or against) the paradigms of his *Wealth of Nations*.

3. *Jeremy Bentham*

Bentham produced a vast amount of literature on the topics of law, morals, and economics.²⁵ For the purposes of this Note, his most powerful and enduring ideas were the principle of utility in general interest, the Felicific calculus, and a narrow view of what animates human behavior.²⁶

Bentham thought that all human behavior was subject to two masters: pain and pleasure.²⁷ This was consistent with the then-prevailing understanding of self-interest, also called utility.²⁸ Bentham thought the interest of the individual should to be compared with that of the general interest of society—the sum of individual utilities.²⁹ Utilitarianism combined the two towards the moral goal of achieving “[t]he greatest happiness for the greatest number.”³⁰

Bentham’s moral arithmetic found expression in the Felicific calculus, which used a handful of factors of pain.³¹ The calculation of welfare required the evaluation of acts by their tendency to increase or decrease general utility and, as a result, promoted whichever law produced the greatest happiness.³² Measurement of welfare was an initial problem, and still is, but to a lesser extent given the development of modern statistics and economics.

Bentham’s view of human nature and motivation was influenced in part by his pain-pleasure principle. He saw people as rational pleasure-seekers, which provided an explanation for each and every human act—conscious or otherwise.³³

²⁴ WEALTH OF NATIONS, *supra* note 22, at 88; *see also* MÉDAILLE, *supra* note 16, at 49.

²⁵ Interestingly, many of his works were never published.

²⁶ EKELUND & HERBERT, *supra* note 14, at 108-12.

²⁷ *Id.* at 108 (citing JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789)).

²⁸ *Id.* at 108; MÉDAILLE, *supra* note 16, at 20.

²⁹ EKELUND & HERBERT, *supra* note 14, at 109.

³⁰ *Id.*

³¹ *Id.* at 110.

³² *Id.*

³³ *Id.* at 112.

4. Nassau Senior and William Stanley Jevons

In line with Bentham, Nassau Senior focused on making economics a purely scientific discipline. According to Senior, this science should be grounded in “a very few general propositions, the result of observation, or consciousness, and scarcely requiring proof.”³⁴ From this, Senior derived his four “scientific” principles.³⁵

Despite Smith’s groundbreaking *Wealth of Nations* and the “scientific” approach of Senior and others, the utility and labor theory of value did not provide a coherent concept of pricing. The answer was *marginal* utility. While several towering figures of economic thought developed this idea around the same time,³⁶ Jevons, apparently unaided, discovered it first.³⁷

Jevons did not depart from Bentham’s work. He refined it by scrapping any pretension of measuring utility directly; Jevons asserted that utility would be *revealed by behavior*.³⁸ Jevons wrote, “I have attempted to treat economy as a calculus of pleasure and pain and have sketched out . . . the form which the science must ultimately take.”³⁹ This only makes sense premised on the notion that people act as “marginal” pleasure or utility maximizers. The Newtonian principle of economics had been discovered, opening economic inquiry to the tools of math and statistics. Even Jevons remarked that a “perfect system of statistics . . . is the only . . . obstacle in the way of making economics an exact science,” even “as exact as many of the physical sciences.”⁴⁰ This “marginalist revolution” would undergo changes not important to this Note, except that the revolution would be virtually complete in the

³⁴ *Id.* at 136; MÉDAILLE, *supra* note 16, at 59.

³⁵ “[A]ll men desire more wealth with as little sacrifice as possible; Malthus’s law of population; industrial production can be indefinitely increased; farm production . . . is subject to diminishing returns.” MÉDAILLE, *supra* note 16, at 59 (paraphrasing Senior); *see id.* at 137. *See also id.* at 59 (Médaille criticizes how Senior wraps the mantle of science around these four postulates because they do not provide principles to evaluate, but rather are arbitrary and prescriptive).

³⁶ Léon Walras (1834-1910), Carl Menger (1840-1921), and Alfred Marshall (1842-1924). MÉDAILLE, *supra* note 16, at 63.

³⁷ EKELUND & HERBERT, *supra* note 14, at 312.

³⁸ Jevons wrote that Bentham’s ideas are “the starting point of this work.” MÉDAILLE, *supra* note 16, at 64.

³⁹ *Id.*

⁴⁰ *Id.* at 67.

Chicago and Austrian schools of economics of the twentieth century.⁴¹

B. Origins of Economics in Law

1. John Austin

While economic inquiry began before Jeremy Bentham, it was he who founded the modern synthesis of economics and law.⁴² Following Bentham's lead, John Austin purged all notions of morals or ethics from legal inquiry in order to make it a "scientifically respectable body of fact, the *sin qua non* of inquiry."⁴³ As with Bentham, Austin and Oliver Wendell Holmes were members of the intellectual zeitgeist of positivism in social thought, a movement attributable to thinkers such as August Comte who desired to bring law into the realm of "empirical science [thereby] freeing all human knowledge from traditional and unverifiable assumptions of religion and metaphysics."⁴⁴ This movement desired to take law from superstition to certainty, epistemologically speaking.

2. Oliver Wendell Holmes

Holmes was a student of Austin—though not a disciple—and would later reject some of Austin's bolder legal claims.⁴⁵ That said, it was within Austin's paradigm that Holmes's jurisprudence would take shape,⁴⁶ such as his assertion that in "the rational study of law the black-letter man may be the man of the present, *but the*

⁴¹ *Id.* at 80-83. It should be noted that Austrians and Chicagoans are not classical Benthamites. EKELUND & HERBERT, *supra* note 14, at 500.

⁴² FREDERIC ROGERS KELLOGG, *FORMATIVE ESSAYS OF JUSTICE HOLMES* 17-22 (1984). While others, such as Joseph Priestly and Cesare Baccaria, are rightly included, it was Bentham who took their ideas to the next level in terms of synthesis and ardently advocating legal change.

⁴³ "It was as imperative as using clean test tubes in a laboratory." KELLOGG, *supra* note 42, at 5.

⁴⁴ "[Austin and Holmes] were members of an intellectual movement whose mission was . . . to advanc[e] the cause of empirical science and free[] all human knowledge from traditional and unverifiable assumptions of religion and metaphysics." *Id.* at 4.

⁴⁵ *Id.* at 9-10.

⁴⁶ "The basic landscape forming the background of Holmes's thought, painted on a canvas of Comtean positivism, was Bentham's analysis of the law, legislation, and the principle of utility, for these gave form to John Austin's jurisprudence and the long-to-endure school of legal positivism." *Id.* at 5; *see generally* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

man of the future is the man of statistics and the master of economics."⁴⁷ Taking this notion further, Holmes wrote:

I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research *we shall spend our energy on a study of the ends sought to be attained* and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. *The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made.*⁴⁸

But the logical extensions of relying on the science of economics to furnish the truest and best answers are revealed by Holmes's discussion of tort law, which is strikingly similar to the L&E analysis that would emerge over seventy years later. This theory evolved, for want of logical end, into one of asserting that "the economic value even of a life to the community can be estimated," with recovery capped at that sum, and that "some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in the *Leges Barbarorum*."⁴⁹ No doubt this "higher plane" is one of economics.

C. Modern Law and Economics

It is this higher plane, now known as modern L&E, to which we turn our attention. It must be mentioned at the outset, however, that in any field of academic inquiry as large and involved as L&E, there is bound to be a difference of opinions over even the fundamentals. An attempt has been made to provide a general description of the main concepts that form its basic intellectual structure.

⁴⁷ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (emphasis added).

⁴⁸ *Id.* at 474 (emphasis added). Note the pragmatism of justifying means to ends coupled with an increased reliance on economic analysis.

⁴⁹ *Id.* at 467.

1. Ronald Coase—Origins of L&E

This structure is fairly considered to begin with Ronald Coase's work, *The Problem of Social Cost*, which brought the economic reality of externalities to the legal context.⁵⁰ Coase is also a good example of one who, instead of creating a closed system or "grand thesis" of L&E, made the interesting claim (now called the Coase Theorem) that "if transaction costs are zero, the allocation of legal entitlements will not stand in the way of an efficient allocation of resources."⁵¹ The principle was simple: "everything has costs: [t]here is a cost to liability [approaches] of shifting entitlements, and there is also a cost to any other way of doing it."⁵²

This was to be the powerful paradigm with which Guido Calabresi, Gary Becker, Richard Posner, and others would create a grand framework that would shift the L&E approach to "the economic analysis of law."⁵³ The general assumptions for this approach were broadened, asserting that people "are rational utility maximizers in all areas of life" in a world "in which resources are limited in relation to human wants."⁵⁴

However, this Note argues that within the L&E movement lies a tacit form of utilitarianism, the misuse of which presents grave dangers for the study and practice of law because it is premised on a misunderstanding of human anthropology and requires a redefinition of justice.

This next section will focus on two sub-movements of L&E as typified by three distinguished scholars: Judge Richard A. Posner, Louis Kaplow, and Steven Shavell. Judge Posner is of the wealth-maximizing movement, has been affectionately called the "dean of modern law and economics scholars,"⁵⁵ and holds the distinction of being one of the most cited legal scholars of all time.⁵⁶ Kaplow and

⁵⁰ Coase, *supra* note 6.

⁵¹ PIONEERS, *supra* note 12, at 227.

⁵² *Id.* at 29 (citing Guido Calabresi, *Remarks: The Simple Virtues of the Cathedral*, 106 YALE L. J. 2201, 2206 (1997)).

⁵³ PIONEERS, *supra* note 12, at 145-46, 224. *See generally*, ECONOMIC ANALYSIS OF LAW, *supra* note 3; GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

⁵⁴ ECONOMIC ANALYSIS OF LAW, *supra* note 3, at 3-4.

⁵⁵ PIONEERS, *supra* note 12, at 29.

⁵⁶ Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 419-26 (2000) (Judge Posner overshadows the next most-cited author, Ronald Dworkin, by over 4,000 citations, although there has been some debate about Shapiro's methodology, and presumably not all citations are L&E-related). *See*

Shavell have also been enormously influential in a relatively short amount of time and appear to represent the next generation of legal analysts with their progression of normative economics into welfare economics.⁵⁷

2. Richard Posner—Wealth Maximization

When the word “utilitarian” is used in conjunction with an idea or belief one holds to be true, the tendency of most is to either distinguish utilitarianism on some grounds or to unflinchingly admit the connection. Judge Posner takes the former option. After pointing out Bentham’s pain-pleasure and rationality principles, he criticizes Bentham for the “sponginess” of utility to guide policy, empirical shortcomings, and belief in the “plasticity” of human nature and institutions.⁵⁸ Posner then preempts the attack from those who would compare his view with utilitarianism by criticizing utilitarianism and attempting to distance his alternative morality, “wealth maximization,” from it.⁵⁹

Judge Posner also chooses the “positive” economics of wealth maximization because it is a better rule, not because the premises—which his theory and utilitarianism share—necessarily lead in opposite directions.⁶⁰ After a harsh critique of utilitarianism, Judge Posner’s basis for evaluating the lack of logical boundary is “conventional moral notions,” but nowhere in this discussion does he mention the content or origins of that tradition.⁶¹ Judge Posner then points out the shortcomings of Kantianism, namely that it is as logically indefinite as utilitarianism and eventually merges into utilitarianism by creating exceptions to absolutes.⁶²

also Commemorating Twenty-five Years of Judge Richard Posner, 74 U. CHI. L. REV. (Special 2007) (special issue dedicated to Judge Posner).

⁵⁷ PIONEERS, *supra* note 12, at 267.

⁵⁸ “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure . . . they govern us in all we do, in all we say, in all we think.” “Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate.” ECONOMICS OF JUSTICE, *supra* note 3, at 42 (citing JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 293-94 (W. Harrison ed., 1948)).

⁵⁹ ECONOMICS OF JUSTICE, *supra* note 3, at 47-114.

⁶⁰ *Id.* at 48.

⁶¹ After creating a hypothetical situation where utilitarianism would condone murder, Posner, presumably appealing to the shared values of the reader, claims that, “to call the murderer . . . a ‘good man’ does unacceptable violence to conventional moral notions.” *Id.* at 57.

⁶² *Id.* at 50-59.

The implication is that neither utilitarianism nor Kantianism is sufficient. Posner's answer is the ethic of wealth maximization, which is a "blend" of competing philosophies.⁶³ While wealth is related to utility, Posner argues that it is not a proxy for utility; plus, the theory enjoys the added elements of consent and individual autonomy while maintaining its empirical rigor.⁶⁴ At the outset, it is important to note that the theme of Posner's argument is reminiscent of the style of William James; it is a philosophy that "works" or has "cash value."⁶⁵ By the use of adjectives like "adequate," "acceptable," or "attractive," Posner's jurisprudence is also similar to the pragmatism of Justice Holmes by implying that no true concept of justice is attainable, so we choose the best from among competing theories.⁶⁶ But what standard does he use to differentiate the best from the worst?

In Posner's explanation of why wealth maximization efficiency is *morally* superior to utility maximization, the standard appears to be *wealth maximization* itself: the necklace purchaser who lawfully spends \$10,000 is morally superior to the necklace thief who incurs a disutility of \$10,000 because a *benefit* is conferred to the seller, and the productive activity required for the buyer to earn \$10,000 benefits others. Conversely, the utilitarian would honor the *disutility* of the thief.⁶⁷ Essentially, the argument states that more wealth is promoted by the purchaser than by the thief; therefore, the wealth-maximizing rule is morally superior to the utilitarian act.

The same circularity is observed when Posner compares other values, such as (1) *economic liberty*, which is empirically proven to "maximize wealth," (2) *piety* traits of *truth-telling* and *promise-keeping*, which "promote[] trade and hence wealth," and even (3) *benevolence*, which can avoid "costly market and legal processes," and presumably increases wealth.⁶⁸ It is difficult to see how this comparison between utilitarianism and wealth maximization is fair. Posner claims that maximizing wealth is more morally defensible because it provides a "firmer foundation for a theory of distributive and corrective justice," and he argues that Aristotle's corrective justice "is indeed required by" wealth maximization.⁶⁹ Normally,

⁶³ *Id.* at 65.

⁶⁴ *Id.* at 59-74.

⁶⁵ See generally WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (Dover 1995) (1907).

⁶⁶ KELLOGG, *supra* note 42, at 14, 49-57.

⁶⁷ ECONOMICS OF JUSTICE, *supra* note 3, at 66.

⁶⁸ *Id.* at 67-68.

⁶⁹ *Id.* at 69, 73.

scholars defend their theory using some other basis for morality and justice, such as utility, Kant, or Aristotle, but outside of the economic efficiency of wealth maximization, Judge Posner does not appeal to another basis of morality. Rather, this is the blending of pragmatism.

Efficiency remains the overriding concern for Judge Posner. But were it not for the “queasiness”⁷⁰ of philosophers, the need to replace utility maximization with wealth maximization and the reasons for Posner’s focus on consent and individual autonomy become less clear.⁷¹ Posner goes to great lengths to distinguish wealth maximization from pure utilitarianism. But in light of his comparison of the two, is it a difference of kind or degree? This question is especially relevant after acknowledging that “wealth maximization as an ethical norm gives weight both to utility, though less heavily than utilitarianism does, and to consent, though perhaps less heavily than Kant himself would have done.”⁷²

In short, wealth maximization is at best a kinder, gentler form of utilitarianism, though not entirely distinct.⁷³ But there is no logical stopping point inherent in Posner’s position—only the vague, unexplained backstop of conventional notions of morality, which seems to have little to do with the justification of wealth maximization as a norm.⁷⁴ Posner’s pragmatism “works,” but it is only a matter of time before the premises must be taken to their logical end.

3. *Louis Kaplow and Steven Shavell—Welfare Economics*

Some scholars separate themselves from normative economics, while others find that wealth maximization is too narrow and argue instead for “the encompassing framework of welfare economics.” In their monumental article, Louis Kaplow and Steven Shavell argue for making welfare economics the standard for evaluating rules of law.⁷⁵ Specifically, wherever adherence to “abstract

⁷⁰ *Id.* at 64.

⁷¹ Posner justifies wealth maximization using notions of justice and grounds notions of justice in wealth maximization by arguing that “wealth maximization is a more defensible moral principle in that it provides a firmer foundation for a theory of distributive and corrective justice.” *Id.* at 69.

⁷² ECONOMICS OF JUSTICE, *supra* note 3, at 98.

⁷³ *Id.* at 84 (Posner admits that the utility monster of aggregation of interests is “a less serious problem,” but does not deny that it is a problem).

⁷⁴ *Id.* at 57.

⁷⁵ Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001) (over 400 pages and 1,000 footnotes).

notions of fairness” would make everyone “worse off,” fairness should be discarded in favor of an idea that increases welfare.⁷⁶

Under their view, the authors make “normative evaluations . . . based on the well-being of individuals.”⁷⁷ Their definition of well-being includes “everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth.”⁷⁸ This includes, but is not limited to, “hedonistic” pleasure and pain.⁷⁹ The authors claim that “well-being” is more expansive than traditional utilitarianism because notions of fairness are also taken into consideration, on an empirical level, just as one would consider a preference for fine wine.⁸⁰ What is troubling about the notion of “well-being,” and the moral weight accorded to it, is that the authors claim that all people understand “well-being” innately.⁸¹ It is difficult to see how well-being is different from utility or happiness. But it *is* easy to see how this is at variance with the classical notion of “the good life.”⁸² Without utilitarianism, it is difficult to define or justify this notion of well-being.

After a discussion of well-being, the authors claim that “a method of aggregation is of necessity an element of welfare economics, and value judgments are involved in aggregating different individuals’ well-being into a single measure of social welfare.”⁸³ The authors do not choose one particular method of aggregating welfare, be it Rawlsian or utilitarian; they only say that it should be “coherent.”⁸⁴ It is this guiding principle—or

⁷⁶ The authors are not concerned when notions of fairness comport with increasing welfare, only where the two lead to different conclusions. *Id.* at 970.

⁷⁷ *Id.* at 979.

⁷⁸ *Id.* at 980.

⁷⁹ *Id.*

⁸⁰ *Id.* at 975, 983.

⁸¹ “[W]e observe that we will usually assume that individuals comprehend fully how various situations affect their well-being and that there is no basis for anyone to question their conception of what is good for them. Therefore, when we say that an individual is better off, there will be no doubt about what we mean.” *Id.* at 984.

⁸² The classical notion of the good life is action or happiness in conformity to virtue, with justice being the greatest comprehension of the virtues, and is connected to the ever-present discussion of ends, or *telos*. A life of leisure, amusement, and disregard for others might increase “well-being” as defined by the authors, but it would not be the good life. ARISTOTLE, NICHOMACHEAN ETHICS, 16, 17, 286-88 (Prentice Hall 1999). See also J. BUDZISZEWSKI, NATURAL LAW FOR LAWYERS 31-34 (2006).

⁸³ Kaplow & Shavell, *supra* note 75, at 977, 987-88.

⁸⁴ *Id.* at 987-88.

metaprinciple—that is favored over the indefinite, arbitrary notion of fairness.⁸⁵ However, this provides no explanation for why principles of fairness should not be allowed to reduce the overall “welfare” of society. The implicit explanation is that, for Kaplow and Shavell, reducing societal welfare for reasons of fairness would be *unfair*. But this kicks fairness out the front door only to smuggle it in through the back.

Whether dealing with wealth maximization, welfare economics, or pure utilitarianism, L&E consists of the same basic formula: the view that people are essentially rational maximizers responding to stimuli; a calculus to determine some form of societal utility; and a normative prescription based on maximizing the aggregate utility.⁸⁶ In history and logic, the different iterations are quite similar, and yet the connections are rarely made. Moreover, all three share the same basic assumptions about human nature and an extreme reliance on empirical data and the scientific method, which bring their own problems to the study and practice of law. Indeed the most tempting characteristic of L&E is its tantalizing promise of certitude through empirical knowledge:

Suddenly everything looked simpler and clearer . . . Economics would tell what was the cheapest. Science would tell what might beneficially have been avoided . . . Many judges protested that they were ill equipped to deal with scientific questions, and didn't wish to. But they steadily reoriented law towards science anyway. *The legal lips murmured no, no, to seductions scientific, but the eyes and arms said yes.*⁸⁷

II. EMPIRICISM: THE TEMPTATION OF SCIENCE AND THE LAW

Because L&E arose during a period when knowledge determined by the scientific method was valued as superior to all

⁸⁵ The authors argue that corrective justice requires compensation for wrongs, regardless of impact on welfare, “favor[ing] some types of individuals over others based solely on characteristics determined by chance elements that seem morally arbitrary from any plausible perspective.” The authors further find that fairness notions distinguishing between victim and injurer are arbitrary. *Id.* at 1006, 1019, 1092.

⁸⁶ EKELUND & HERBERT, *supra* note 14, at 108-12.

⁸⁷ PETER W. HUBER, GALILEO'S REVENGE 12-13 (1991) (emphasis added).

other forms of knowledge, as already argued above,⁸⁸ the quest for certitude remains a mainstay of the modern L&E movement.⁸⁹ Judge Posner, writing in the first volume of the *Journal of Legal Studies*, remarked that “[our aim] is to encourage the application of scientific methods to the study of the legal system. As biology is to living organisms, astronomy to the stars, or economics to the price system, so should legal studies be to the legal system.”⁹⁰ But why is science better (or more useful) in the legal field than other forms of knowledge? The answer lies in its claim of truth and certainty. As Robin Feldman powerfully argues, the law deals with difficult, imprecise matters replete with value judgments creating a distinct temptation to export those problems to the experts of science in the hopes of then importing elegant rules and perfect results.⁹¹

A. *The Experts*

One problem with grounding legal rules in sophisticated empirical theory is that most judges lack the requisite expertise to work with intricate economic analysis.⁹² The result becomes an extreme reliance on experts for the deliverance of justice. A similar problem was implicated by the Humanitarian theory of punishment of the mid-twentieth century. This theory viewed criminal behavior as an illness to be cured and deterred, instead of the barbarity of punishing criminals based on just deserts. C.S. Lewis wrote that retribution should always be a part of the criminal justice concept, because it is the only humane way to treat the *criminal*.⁹³

First, there is no such thing as a “just deterrent” or a “just cure”—the former is to be measured by how well it deters and the latter by how well it cures.⁹⁴ By rejecting the discussion of what a

⁸⁸ See KELLOGG, *supra* note 42.

⁸⁹ As contrasted with the more “old-fashioned” economists such as Ronald Coase, who appreciated more the prose form of Adam Smith and applications of economics to market scenarios. Coase still considered himself an empiricist, but one who also “dismissed econometrics” on the grounds that “if you torture the data enough nature will always confess.” PIONEERS, *supra* note 12, at 28 n.9.

⁹⁰ FELDMAN, *supra* note 8, at 19. This is also similar to the fascination of Oliver Wendell Holmes with the scientific method. KELLOGG, *supra* note 42, at 11-14; *see also* Holmes, *supra* note 47, at 470.

⁹¹ FELDMAN, *supra* note 8, at 1-10.

⁹² *Id.* at 40-42.

⁹³ C.S. LEWIS, *Humanitarian Theory of Punishment*, in GOD IN THE DOCK 288 (Walter Hooper, ed., 1970).

⁹⁴ *Id.*

criminal *deserves*, the Humanitarians have “tacitly removed [the criminal] from the sphere of justice altogether.”⁹⁵

Instead, the criminal is treated as a patient and receives treatment until “well.” But this consigns the debate of how to deal with criminals into the realms of criminology, penology, and psychology, which have their own “experts with perfect logic” and statistics to prove the efficacy of their methods.⁹⁶ By placing this debate into the hands of experts of science, the debate is, by definition, taken out of the hands of “the rest of us, speaking simply as men,” which includes lawyers and judges.⁹⁷ Finally, it is crucial to remember that these scientific “cures” are every bit as coerced as any other punishment ever devised.⁹⁸ By redefining criminal behavior from badness to illness, we grant the license to “treat” the convicted until cured, and at no point along the way can one coherently argue that the cure is too severe.

Analogies to L&E come easily. There is little room for a discussion of traditional justice if human behavior is couched in terms of efficiency, as Posner does.⁹⁹ How does one argue with the refined empirical studies and sophisticated equations that modern economic analysis produces? Not only do some L&E problems take the notions of law and justice out of the hands of the common person, oftentimes they are taken out of the hands of judges as well.¹⁰⁰

This discussion should not be taken to trivialize the condition of individuals who suffer from mental illness. The point is that redefining crime as an illness is a reach for the certitude of science, to the exclusion of common notions of justice, which has the potential to give our rulers “a finer instrument of tyranny than

⁹⁵ *Id.*

⁹⁶ ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 527 (5th ed. 2008) (referencing *Barefoot v. Estelle*, 463 U.S. 880 (1983) (Supreme Court upheld the use of psychiatric evaluations to predict future criminal conduct in the context of a capital murder case)).

⁹⁷ LEWIS, *supra* note 93, at 288-89. Lewis is using the word “men” in gender-neutral sense, focusing more on the common person with human inclinations shared by all.

⁹⁸ *Id.* at 290.

⁹⁹ “If a wrongful act results in injury, rectification in some form is necessary if the efficiency of resource use is not to be undermined. To be sure, this requires equating wrongful with inefficient, an equation Aristotle did not make. But the concept . . . is a procedural, rather than substantive idea.” *ECONOMICS OF JUSTICE*, *supra* note 3, at 73. *But see* MORTIMER J. ADLER, *SIX GREAT IDEAS* 184 (1981) (Justice between individuals is a substantive concept in the Aristotelian tradition).

¹⁰⁰ FELDMAN, *supra* note 8, at 43.

wickedness ever had before.”¹⁰¹ A similar reach for science is seen through redefining justice as that which is efficient.¹⁰²

The Humanitarian emphasis on deterrence is clearly in agreement with the utilitarian approach described above, which is accepted or embraced by some commentators who assert that “an act should be treated as a crime if doing so increases social welfare,” and “[t]he crime should be punished to the extent that maximizes social welfare.”¹⁰³ Such an approach enjoys the trappings of science while simultaneously reinforcing the morality of “the economic theory of crime in a long tradition of utilitarian thought.”¹⁰⁴

B. The Statistics

Defining values based on efficiency places an intense pressure on the quality of empirical data, and therefore on statistics. Thus, the debate over method has become crucial when debating life-and-death legal norms. Recent debates over the death penalty are one example of this phenomenon. The focus has been on whether the effect of the death penalty has resulted in a net gain—i.e. whether it saves more lives than it takes. Not only does this put extreme pressure on the limits and potential for statistics to answer questions about what takes place in society and why,¹⁰⁵ but it appears that the debate about what things are (e.g. government taking life) is subordinate to whether there is more or less of a thing (e.g. life or welfare).¹⁰⁶

¹⁰¹ LEWIS, *supra* note 93, at 293.

¹⁰² ECONOMICS OF JUSTICE, *supra* note 3, at 73.

¹⁰³ COOTER & ULEN, *supra* note 96, at 486.

¹⁰⁴ *Id.*

¹⁰⁵ “Whether or not the death penalty has a deterrent effect is—Sunstein and Vermeule argue—a very important question. If policymakers are willing to debate the issue based on the consequences of capital punishment (as Sunstein and Vermeule urge them to do), then it is crucial to try to establish reliable evidence on whether executions deter or stimulate crime [I]t seems reasonable to appeal to econometric pyrotechnics. Unfortunately, our survey of the literature suggests that too often these pyrotechnics have yielded heat rather than light The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates. As to whether executions raise or lower the homicide rate, we remain profoundly uncertain.” John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 841-43 (2005); see also COOTER & ULEN, *supra* note 96, at 549.

¹⁰⁶ Donohue & Wolfers, *supra* note 105; see also COOTER & ULEN, *supra* note 96, at 549.

Sunstein and Vermeule acknowledge these legitimate concerns about empirical evidence. The obvious solution is better empirical studies—a possibility that is presumed in their article¹⁰⁷—but they stop short of qualifying their views by writing that “[e]ven if better data were not available, the ‘precautionary principle’ should suggest that we err on the side of saving victims, presumably at the cost of the convicted, because it would at least incapacitate convicted murderers from killing again.”¹⁰⁸

The argument is simple: if economics, econometrics, and statistics can empirically prove that the death penalty deters murders from taking place, then the law should honor its moral obligation to would-be victims and take the life of the convict.¹⁰⁹ But this is another example of the way in which economic language tacitly employs morally evaluative language while enjoying the epistemic force of scientific knowledge. It must not be forgotten that the underlying empirical studies are economic. The logical framework is inescapable even for questions of “exchanges” that do not involve a life for a life, such as rape, which the authors describe as “most unclear how to think about.”¹¹⁰ Once the normative foundation is laid, however, the unavoidable implication is that when empirical certitude has adequately developed, then the policy debates over impassioned life-or-death issues are a nullity if a practice is shown to reduce crime.¹¹¹

It is not within the scope of this Note to give a full treatment of capital punishment. Rather, the discussion of capital punishment points out that the authors never discuss what the criminal deserves. Cures are evaluated by how well they cure and deterrence measures are evaluated by how well they deter.¹¹²

¹⁰⁷ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required?: Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005); see also COOTER & ULEN, *supra* note 96, at 549.

¹⁰⁸ “Even if we reject strong versions of the precautionary principle, it hardly seems sensible that governments should ignore evidence demonstrating a significant possibility that a certain step will save large numbers of innocent lives.” Sunstein & Vermeule, *supra* note 107, at 715, 718.

¹⁰⁹ “To the extent possible, we intend to bracket the most fundamental questions and to suggest that whatever one’s view of the foundations of morality, the objection to the death penalty is difficult to sustain under the empirical assumptions that we have traced.” *Id.* at 718. These assumptions include the theory that, “like most people, criminals are boundedly rational, assessing probabilities with the aid of heuristics.” *Id.* at 714.

¹¹⁰ Sunstein & Vermeule, *supra* note 107, at 748.

¹¹¹ John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379 (2001).

¹¹² LEWIS, *supra* note 93, at 288.

Without appealing to “abstract injunctions against the taking of life,” how do the authors succeed in saying there is a moral requirement to kill the convict to certainly—or even possibly—save one or more innocent victims?¹¹³ The only possible explanation is by fitting deontological moral judgments, and obviously consequentialist moral judgments, into utilitarian paradigms.

Sunstein and Vermeule thoroughly avoid questions outside the narrow “life for a life” exchange paradigm. But once the debate is framed in terms of the cost-benefit analysis of a law’s effects, then it is difficult to avoid drawing the same conclusion when empirical research strongly suggests that a given action significantly lowers crime.¹¹⁴

Much of the cited empirical data utilizes the model of *homo economicus*, which, in addition to the lore and conflict surrounding the figure, has come to epitomize the core assumptions of people viewed through the economic lens: people are rational and seek utility equilibrium—a downward-sloping demand curve.¹¹⁵ That is, people are utility (or wealth) maximizing calculators in all areas, so in order to produce efficiency, the law should provide the “correct” stimuli to promote efficient decisions. This assumption about human decision-making relates back to Jevons’s study of the effects of decisions, but was not employed in the field of law until the L&E movement.¹¹⁶

C. Homo Economicus, Captain Economicus & Homo Moralis

1. Margate Shipping

Lest one doubt the influence of L&E scholarship outside the academic context, the federal case of *Margate Shipping* is insightful.¹¹⁷ In the middle of a tropical storm, the captain of the Cherry Valley tanker risked the lives of his crew, his ship, environmental disaster, and the fate of a large corporation in order to aid the five-man crew aboard the distressed tug boat J.A.

¹¹³ Various studies concluded that anywhere from zero to eighteen murders are deterred per execution. Sunstein & Vermeule, *supra* note 107, at 706, 710-16.

¹¹⁴ Donohue & Levitt, *supra* note 111.

¹¹⁵ PIONEERS, *supra* note 12, at 149.

¹¹⁶ *Id.*

¹¹⁷ *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976, 987-89 (5th Cir. 1998).

Orgeron.¹¹⁸ The Court in *Margate Shipping* relied heavily on the work of influential L&E scholars when it reduced the plaintiff's salvage award from trial by over two million dollars.¹¹⁹ The L&E model used compressed a broad array of human motivations into the confines of *homo economicus* by imposing a hypothetical bargaining scenario between the two parties.¹²⁰

Salvage law is unique. It has no counterpart on land and only rewards the salvor for saving the property of the savlee, not human life.¹²¹ Yet it is widely known, as the *Margate Shipping* facts demonstrate, that mariners save distressed vessels primarily to save their crew and passengers.¹²² In other words the reward is *separated from the motivations* of the rescuing mariner.¹²³

In 1994, Tropical Storm Gordon pounded Florida's eastern coast with winds up to seventy miles per hour and twenty five-foot waves at sea.¹²⁴ In the middle of the night, the Orgeron was plagued with engine failure and gave the distress signal as it drifted towards Bethel Shoals and certain destruction.¹²⁵ The Cherry Valley tanker was the only vessel remotely close to the Orgeron.¹²⁶ Although captains have a legal obligation to aid ships in trouble, that duty ends where doing so would put the potential rescuer in danger.¹²⁷ The Cherry Valley was under absolutely no obligation to offer help. At two football fields in length and carrying ten million gallons of fuel oil, going anywhere near the shoals during a gale was plainly hazardous—and heroic.¹²⁸ After a herculean effort, the tug and barge were secured and, against all odds, the Cherry Valley slowly pulled the tug and barge to safety.¹²⁹

At no point during the rescue did Captain Prentice Strong, the tanker's skipper, ever ask what the tug was transporting.¹³⁰ Only later did he discover that the NASA rockets aboard the barge were

¹¹⁸ The tug boat was transporting a barge named Poseidon, which was carrying rockets for the NASA space shuttle. *Id.*

¹¹⁹ William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEG. STUD. 83 (1978); see *Margate Shipping*, 143 F.3d at 986-89.

¹²⁰ M.B.W. Sinclair, *The Cherry Valley Case: How Wrong Can Economists Be About Salvage?*, 31 TUL. MAR. L.J. 57, 73 (2006).

¹²¹ *Id.* at 71.

¹²² *Id.* at 62-63, 71-80.

¹²³ *Id.* at 71.

¹²⁴ *Id.* at 58-59.

¹²⁵ *Id.* at 61.

¹²⁶ *Id.*

¹²⁷ *Id.* at 61-62.

¹²⁸ *Id.* at 64.

¹²⁹ *Id.* at 64-65.

¹³⁰ *Id.* at 65-66, 79, 93.

worth millions.¹³¹ The Circuit Court used the L&E approach of a hypothetical bargain, despite Supreme Court precedent giving trial courts the discretion to take into account a broad array of facts concerning the values and motivations peculiar to sailors and their culture.¹³² If these values exist at all they were present in the case of *Margate Shipping*.¹³³

While the heroism of seafaring men and women is the stuff of epic novels, it is no less real today. In fact, our history and laws recognize this.¹³⁴ The altruistic motives of the actors involved, despite being prevalent in seafaring culture (not to mention legally significant), was ignored by the Fifth Circuit in favor of a hypothetical bargain.¹³⁵ This approach imposes an “efficient contract” between the parties and is premised upon a perfect market, which essentially assumes a competitive industry for rescue services where each firm’s primary consideration is maximization of profits.¹³⁶

Nothing could be further from reality. The Cherry Valley was the Orgeron’s only hope and indeed saved the tug without inquiring about the value.¹³⁷ But Captain Strong *did* know the risks of attempting the rescue. Had the Cherry Valley lost control and run aground along the upscale Florida coastline it would have spilled millions of gallons of oil.¹³⁸ The tanker’s owner, Keystone, Inc., would have been bankrupt, ending thousands of careers and devastating shareholders.¹³⁹ Furthermore, he would have personally joined the ranks of several “eco-demons,” like the captain of the Exxon Valdez, not to mention jeopardizing his captain license.¹⁴⁰ If the salvage value of the cargo—unknown at

¹³¹ *Id.*

¹³² *Id.* at 73-75.

¹³³ “In *The Blackwall*, Justice Clifford may have produced a messy and under-determinate list of factors, but in so doing he gave trial court judges the opportunity to take into account motivations, risks, and values.” *Id.*; see also *The Blackwall*, 77 U.S. (10 Wall.) 1, 12 (1870)

¹³⁴ Sinclair, *supra* note 120, at 73-75.

¹³⁵ “The difference in attitude between [the trial and appellate judge] reflects the difference between the abstract, otherworldly calculus of law and economics, and the real world mariner community. Our historically developed salvage law has adapted to better reflect the mariner community’s values and ethos. The . . . economic analysis illustrates only homo economicus’s impoverished spirit If homo economicus models anybody, it certainly does not model those who venture to sea in ships.” *Id.* at 94.

¹³⁶ *Id.* at 93.

¹³⁷ *Id.*

¹³⁸ *Id.* at 76, 80.

¹³⁹ *Id.* at 62.

¹⁴⁰ *Id.* at 62, 93.

the time—yielded in the hundreds of millions of dollars, the risk would have remained “too high.” But Captain Strong knew the lives of five sailors were at stake and that is all he needed to know.¹⁴¹

The trial court granted \$6.4 million using the traditional salvage calculation.¹⁴² The Circuit Court reduced that sum to \$4.1 million dollars under the fiction that a perfect market existed during Tropical Storm Gordon.¹⁴³ The L&E approach, of course, aims at “maximize[ing] social utility,” and “assumes the purpose of the law is to promote economic efficiency.”¹⁴⁴ Under the L&E approach giving the salvor the entire value of the rescued ship and cargo is too high, yet no award is too low.¹⁴⁵ So what is efficient? The answer is simple: a bargained for contract! Under this regime many distressed sailors will be saved, but not *too many*, because after all that would be inefficient.¹⁴⁶ This is no doubt easy for the “armchair empiricist” to say as they remain safe from Davy Jones.¹⁴⁷

Notwithstanding the discussion of this Note thus far it is easy to see how arm’s-length commercial transactions are potentially solved when courts engage in hypothetical bargaining using the *homo economicus* model. But to write “Captain Economicus” into a scenario with life on the line, billions at stake, in the middle of a gale, and in the face of maritime law history, demonstrates the pervasiveness of *homo economicus* in and its inadequacies outside the marketplace.¹⁴⁸ The truth is seafaring culture thrives on—and perhaps because of—“the mariners’ unshakeable code of reciprocal altruism” long recognized under maritime law.¹⁴⁹ The L&E approach, however, favors the simple elegance of reducing everything to a calculation of market values. When L&E holds sway under the facts of *Margate Shipping* then nothing is beyond its reach.

¹⁴¹ *Id.* at 90-91.

¹⁴² *Id.* at 50, 70; *Margate Shipping*, 143 F.3d at 995.

¹⁴³ Sinclair, *supra* note 120, at 59, 91-92; *Margate Shipping*, 143 F.3d at 995.

¹⁴⁴ Sinclair, *supra* note 120, at 78.

¹⁴⁵ *Id.* at 76, 81.

¹⁴⁶ *Id.* at 89, 92.

¹⁴⁷ *Id.*

¹⁴⁸ “Imagine . . . saying [to a fellow sailor in distress], ‘[I]n my calculation of the risks here, \$6 million won’t do. And don’t forget, it’s you and your crew who are about to die; we are just uncomfortable [with the deal] . . .’” This might be the approach of “Captain Economicus, [but] it is utterly foreign to mariners. Lives are not at stake in the hypothetical bargain, only market values.” *Id.* at 93-94.

¹⁴⁹ *Id.* at 72-73, 91.

2. *Homo economicus is obsolete*

An undue reliance on the science of the times is not necessarily new in legal theory. Even the learned Oliver Wendell Holmes wrote his infamous and regrettable *Buck* opinion based on the prevailing winds of social science—eugenics—which enjoyed all the vestiges of the scientific method.¹⁵⁰ Also joining Holmes in the *Buck* opinion was Justice Brandeis, who was no stranger to incorporating economics and other social sciences into his opinions.¹⁵¹

A reoccurring theme in modern legal thought is that analysts wish to draw upon science as a fount of truth (either in method or result).¹⁵² But they are not generally scientists,¹⁵³ which then converts their reliance on empirical or scientific knowledge into a strange sort of faith.¹⁵⁴ Put another way:

Modernism promises knowledge free from doubt, metaphysics, morals, and personal conviction; what it delivers merely renames as Scientific Method the scientist's and especially the economic scientist's metaphysics, morals, and personal convictions. It cannot, and should not, deliver what it promises. Scientific knowledge is no different from other personal knowledge. *Trying to make it different, instead of simply better, is the death of science.*¹⁵⁵

¹⁵⁰ “The judgment finds the *facts* that have been recited and that Carrie Buck ‘is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be...sterilized without detriment to her general health and that her welfare *and that of society* will be promoted by her sterilization . . .’ It is *better for all the world*, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Buck v. Bell*, 274 U.S. 200, 207 (1927) (emphasis added).

¹⁵¹ Richard Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1, 9 (1996).

¹⁵² FELDMAN, *supra* note 8, at 120.

¹⁵³ Although exceptions to this rule seem to be growing, Shavell and Polinsky have PhDs in Economics. *PIONEERS*, *supra* note 12, at 267.

¹⁵⁴ FELDMAN, *supra* note 8, at 34.

¹⁵⁵ MÉDAILLE, *supra* note 16, at 81 (citing D. McCloskey, *The Rhetoric of Economics*, 21 *Journal of Economic Literature* 481 (June 1983)). See also EKELUND & HERBERT, *supra* note 14, at 500 (Friedrich A. Hayek also provides clarity on this point with his distinction between scientism and scientific inquiry); [1 RULES AND ORDER] FRIEDRICH A. HAYEK, *LAW LEGISLATION & LIBERTY* 15-17 (University of Chicago Press 1983).

As mentioned before, *homo economicus* has long been questioned—if not outright attacked—but rarely on scientific grounds. Recently, however, a two-year study was completed concerning the motivations and decisions of people in the marketplace.¹⁵⁶ This study drew upon many different fields of expertise, including neurology and evolutionary biology, in addition to philosophy and law.

The overwhelming consensus of the team who conducted the study was that people are morally-oriented by nature and that the pursuit of virtue (or *homo moralis*) does more than play a role in decision-making. In fact, it may be the very thing that makes markets possible. *Homo economicus* is a myth. Greed and selfishness are not the dominating motivators of human action. Instead, character values may very well be the currency in which markets trade.¹⁵⁷

Adam Smith saw the value of natural moral sympathy, or fellow-feeling, in the Aristotelian sense. With this view in mind, the “distinction between self-interest and social-mindedness is all but unintelligible.”¹⁵⁸ This raises serious questions about the end, or *telos*, of business affairs that are deeper than economists are able to address.

These deeper questions are not only for philosophers to contemplate. Even the most dedicated economist, econometrician, and L&E advocate should consider the evidence of the above study, because it bears upon markets in a real way. Without virtue in the markets, transaction costs rise to the point of market failure.¹⁵⁹ Economists who understand more about human nature and choices will be able to create more complete concepts of how markets truly work.

The two-year study enlisted experts in neuroscience and evolutionary biology who corroborate the Aristotelian view of humans as naturally displaying other-regarding behavior. Note that even Charles Darwin observed that every “human population has essentially the same mental and moral faculties,” without which society would not be possible.¹⁶⁰

¹⁵⁶ MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY (Paul J. Zak ed., 2008) [hereinafter MORAL MARKETS].

¹⁵⁷ Ronald J. Colombo, *Exposing the Myth of Homo Economicus*, 32 HARV. J.L. & PUB. POL’Y 737, 742-43 (2009).

¹⁵⁸ Robert Solomon, *Free Enterprise, Sympathy, and Virtue*, in MORAL MARKETS, *supra* note 156, at 35.

¹⁵⁹ Colombo, *supra* note 157, at 752.

¹⁶⁰ *Id.* at 746.

From a psychological perspective, *homo economicus* possesses all the traits of a sociopath.¹⁶¹ Furthermore, people often display random altruistic behavior, or refrain from cheating even where the risks of apprehension are low. The authors of the study conclude that while social values and institutions influence thought and behavior, “some moral values appear to be universal and difficult to suppress neurologically.”¹⁶² For some time virtue ethics and natural law advocates have had limited influence with modern legal scholars because their foundations are perceived to be either entirely religious or socially constructed.¹⁶³ This needs to change. While the study’s findings do not necessarily “prove” philosophical theories, they do shake the assumptions that have long guided economic thinking—especially L&E thinking—and cannot be ignored.

CONCLUSION

L&E has effectuated a sea change in the way a generation of lawyers, law students, and legal scholars understand law. Now that the proverbial canon of L&E literature has settled into several well-worn paths, it is important to look at where these paths lead to and from. Whittling back utilitarianism to wealth maximization or expanding utility to include welfare or well-being does not change the logical implications of its premises. The history and origin of the assumptions underlying L&E are far-reaching and problematic and should be reconsidered. As L&E creeps into positive law, it is imperative that jurists and scholars resist the temptation to reach for empirical certainty as an epistemological life-preserver in the ocean of value judgments and imperfection.

The clean, precise logic of L&E does not change the complexity and imprecision of deciding real cases. Furthermore, recent scholarship across many disciplines reveals that the empirical model of *homo economicus* serves as a grossly incomplete guide to predicting human behavior outside—and even inside—the marketplace. The moral virtues that define our humanity are the same virtues that might just save our marketplace and maintain the integrity of the study and practice of law.

¹⁶¹ MORAL MARKETS, *supra* note 156, at 159.

¹⁶² Colombo, *supra* note 157, at 748.

¹⁶³ Gerson Moreno-Riano, *Natural Law and Modern Economic Theory*, 8 J. MARKETS AND MORALITY 387, 388 (2005).