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## Law and Economics

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LAW AND ECONOMICS.

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I.

THE CONCEPTS OF UTILITY AND NEED AS THE BASIS OF THE SCIENCE  
OF ECONOMICS—RELATIVITY AND AMBIGUITY OF THESE  
CONCEPTS.

AS IS WELL KNOWN, the science of economics is founded on the concept of utility, that is on the hypothesis that "men are motivated to act exclusively by the desire to achieve maximum satisfaction of their needs via minimum possible personal sacrifice."<sup>1</sup> When considered superficially, these concepts might seem clear and precise. Actually they are extremely equivocal and ambiguous, and pose serious difficulties.

Utility connotes a relationship of means to ends. Nothing is useful by itself, and anything can be useful if it can be used (even only hypothetically) as the means of achieving a particular end. Thus, even things generally considered to be most harmful (*i.e.*, poison, pestiferous bacilli, etc.) may be extremely useful when, for a particular reason (which need not necessarily be illegal [for instance, a scientific research project]), one desires to use them for experimental purposes.

The preceding is quite evident. Just as evident is the fact that utilitarian concepts (being related to a desire or a purpose, that is to subjective states of mind which are infinitely variable) can give us no criteria by which we can determine what is good. In other words, they cannot provide any objective values. Antonio Scialoja, Sr. has already written that

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1. PANTALEONI, PRINCIPII DI ECONOMIA PURA 10 (Italy 1887).

"objects, or forces which enable the individual species to survive are not the only things considered useful in economic analysis. Objects or forces which can be used in any manner whatsoever [are also useful] . . . and since our desires are produced by judgments which can be proper or improper, true or false, it follows that we may consider [as useful] certain acts which actually are harmful."<sup>2</sup>

The argument does not change if, as proposed by Pareto, we use the word *ofelimity* instead of the word "utility." *Ofelimity* would denote a concept of relationship between a thing and the need (whether or not the need be legitimate or advantageous). However, it has already been observed (for instance, by Valenti) that this is precisely the significance of the word "useful."

Nor do we clarify the problem if "need" instead of "utility" is adopted as the fundamental concept, because "need" also has an extremely subjective significance, and eludes a truly objective description. "Need" has been defined as "the stimulus which via the sanction of pleasure or pain moves man to acquire one or more objects of the exterior world in order to employ it in achieving the ends of life."<sup>3</sup> However, pleasure and pain are elements which, subject to an infinite number of factors, vary extremely in different individuals.

In order to give a more definite significance to this concept (which is fundamental in all economic analysis) some authors have tried to distinguish *real* needs from *imaginary* needs. It has been justifiably observed that such a distinction is not possible in economic analysis, because the reality of the need can be evaluated by the individual only subsequently, or concurrently only by others. The need is naturally always real for the individual who feels it.<sup>4</sup> Man has dissipated an abundance of energy in all ages to achieve impossible or fantastic ends or to defend himself against imaginary dangers. The case of sacrifices and the exorcising of supposed spirits or of attempts to render them innocuous is perhaps the most obvious example of a vast and complex phenomenon which is not found solely in antic times and which cannot be ignored in a scientific consideration of historical facts. Every need which is actually felt, whatever be its nature or foundation, is the beginning of an economic relationship for the simple reason that it assigns

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2. SCIALOJA, I PRINCIPII DELLA ECONOMIA SOCIALE ESPOSTI IN ORDINE IDEOLOGICO 21 (2d ed. Italy 1846); VALENTI, PRINCIPII DI SCIENZA ECONOMICA 124 (Italy 1906).

3. VALENTI, *op. cit. supra* note 2, at 91. Pantaleoni's definition is not substantially different. He states: "A need is the desire to be able to have at one's disposal a means which is reputed to be able to put an end to or to avoid a painful situation, or to conserve or produce a pleasing sensation." PANTALEONI, *op. cit. supra* note 1, at 52.

4. VALENTI, *op. cit. supra* note 2, at 94.

an end to be achieved by the activity, and it, therefore, makes the activity appear useful.

One could (and in fact, it has been attempted) establish a scale or a hierarchy of needs, beginning with the most elementary, which would be the physical and physiological conditions of life, and subsequently listing the less essential and, therefore, less potent needs. But would such a hierarchy, when actually applied to an analysis of human activity, correspond with reality? It is doubted that it would. Needs which seem secondary to us have sometimes taken precedence over others which we consider extremely more important. For instance, it seems to have been demonstrated that the first clothing was used for decorative purposes rather than for protection from the elements. The most varied human passions have on various occasions exercised a predominate influence in determining human acts. Therefore, no absolute scale can be formulated regarding the potency of various motives. One might believe that the conservation of one's life, and correlatively the fear of death, should always be the preponderant motive. However, Bacon observed that there is not a single passion which has not at some time overcome this fear. For instance, the most atrocious physical pain was often voluntarily endured in order that certain ends, frequently solely moral, might be achieved.

In this respect, it is worth considering Macaulay's acute observations in his critical essay on John Mill's work. Summing up briefly, Macaulay reasoned as follows: The proposition that men always act for personal interests is certainly true, but completely tautological. It states only that men, when they can, do that which they prefer to do. By observing the actions of a man, one knows with certainty that which he considers to be his interest. The alleged discovery of the formula of maximum utility is a simple tautology stating that man likes to do that which he likes to do. However, if that formula is intended to have another meaning, namely that of excluding any motives which can determine the actions of a human being, then that maxim ceases to be tautological, but at the same time ceases to be true.<sup>5</sup>

Even in the domain of economics, the principle of utility and its correlative of need, in the widest significance of these terms (*i.e.*, as general rules of action) merely translate in less adequate terms (yet dangerous because of their ambiguity) a truth already known a priori. Philosophically this is expressed by the principle of sufficient reason, which compels us to admit that, just as every phenomenon must have

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5. Macaulay, *Mill on Government*, in MISCELLANEOUS WRITINGS AND SPEECHES 180 (1871).

a cause, so every action must have a motive. On this matter it is sufficient to refer the reader to Schopenhauer's classic work.<sup>6</sup>

## II.

### THE HEDONISTIC HYPOTHESIS AND L'HOMO OECONOMICUS— CONTRAST OF THESE ABSTRACTIONS WITH REALITY— ECONOMICS AND MORALITY.

Generally, however, economists are not content with this general definition, but attempt to define in a more exact manner the concepts of utility and need. They accept the so-called "hedonistic hypothesis"<sup>7</sup> which attributes a fundamental egoism to the human being and supposes that all human actions are determined exclusively by this motive. However, one is compelled to recognize the existence of altruistic motives, *i.e.*, of numerous human actions requiring self-sacrifice which are solely for the benefit of others. History presents many examples of such acts. It is not necessary to cite examples of magnanimous acts of self-denial, which will forever remain as monuments to the glory of mankind. It is sufficient to note that families and nations, and, therefore, also individuals, could not survive without overcoming this egoism. Briefly, one can say that history is meta-egoistic.

Nevertheless, economists, or at least many of them, continue to defend their hypothesis with tranquility, justifying their action precisely because it is only an hypothesis, and explicitly declaring that they wish to separate this motive from all others. This they do even though other motives actually do exist which, in conjunction with the egoistic motive, help to determine human actions. For instance, Pantaleoni considers as "completely irrelevant" the degree to which the hedonistic hypothesis actually corresponds with reality.<sup>8</sup> Apart from this correspondence with reality he argues that

"all economic theorems are incontestable truths within the limits of the hypothesis (if one assumes that they are vigorously deduced from the original promises). These theorems are hypothetical truths and they demonstrate the effects of egoism in varying circumstances, more precisely of self-interest when it is the exclusive motivating factor."<sup>9</sup>

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6. SCHOPENHAUER, UEBER DIE VIERFACHE WURZEL DES SATZES VON ZUREICHENDEN GRÜNDE (Germany 1813); Italian translation, LA QUADRUPLICE RADICE DEL PRINCIPIO DI RAGION SUFFICIENTE (Italy 1915); English translation, ON THE FOURFOLD ROOT OF THE PRINCIPLE OF SUFFICIENT REASON AND ON THE WILL IN NATURE (London 1891).

7. See PANTALEONI, *op. cit. supra* note 1, at 20.

8. *Id.* at 15.

9. *Ibid.*

This hypothesis is represented, as is well known, by the concept of the *homo oeconomicus*.<sup>10</sup>

One certainly cannot deny, and no one ever has denied, that egoism or self-interest is one factor which motivates man. Therefore, one must admit the logical possibility of constructing such a hypothetical system. This is quite proper so long as one keeps clearly in mind the fact that a mere hypothetical system has been created and avoids confusing this hypothetical creation with reality. Analogously, it would be possible to create other systems founded on the hypothesis of the exclusive efficacy of some other motive which can determine human action. For instance, one could create the hypothetical concept of the *homo sexualis*, i.e., a man motivated solely by a sex drive; or else that of the *homo hygienicus*, interested only in conserving his health, or else that of the *homo politicus*, interested only in public life, etc.<sup>11</sup> However, all of these concepts would convey a limited representation or a caricature of reality. The task of determining whether

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10. This abstract concept of the *homo oeconomicus*, which has been utilized with varying degrees of accuracy by many economists, has recently been the object of various disputes. See Contento, *Ancora Sulla Realta dell'Homo Oeconomicus*, 1932 *GIORNALE DEGLI ECONOMISTI* 265-285 (Italy), and the works of Spirito, Arias, etc. cited therein; Contento, *Difesa dell'Homo Oeconomicus—L'homo Oeconomicus nello Stato Corporative*, 1931 *GIORNALE DEGLI ECONOMISTI* 485-522 (Italy); Vella, *Homo Oeconomicus e Uomo Reale*, 5 *ARCHIVIO SCIENTIFICO DELL'IST. SUP. DI SCIENZE ECON. E COMM. DI BARI* (Italy 1930-31). One should note that Contento in defending the *homo oeconomicus* concept has modified it to the extent of maintaining that "the *homo oeconomicus* can desire ends which are eminently altruistic." Contento, *Difesa dell'Homo Oeconomicus—L'homo Oeconomicus nello Stato Corporative*, 1931 *GIORNALE DEGLI ECONOMISTI* 522 (Italy). However, it is obvious that the concept loses its unique significance and would no longer be useful even as an hypothesis if the above definition is accepted.

On the abstract quality of the *homo oeconomicus* concept see Mazzei, *Principi Etici ed Economici*, in *XL ANNIVERSARIO DELLA ENCICLICA RERUM NOVARUM* 304-375 (Italy 1931); see also the observations of Brucculeri, *Il Carattere Etico dell'Economia Politica*, 84 *CIVILTA CATTOLICA* 151-163, 462-475 (Vol. 4) (Italy 1933); Brucculeri, *Le Doglie dell'Homo Oeconomicus*, 85 *CIVILTA CATTOLICA* 359-369 (Vol. 1) (Italy 1934); Brucculeri, *Ancora sulle Doglie dell'Homo Oeconomicus*, 85 *CIVILTA CATTOLICA* 172-178 (Vol. 2) (Italy 1934); and the reply of Mazzei, *Sul Carrattere Etico della Scienza Economica*, 42 *REVISTA INTERNAZIONALE DI SCIENZA SOCIALI* 75-87 (Italy 1934); Mazzei, *A Proposito del Carattere Etico della Economia Politica*, 42 *REVISTA INTERNAZIONALE DI SCIENZA SOCIALI* 268-273 (Italy 1934), see also Gentile, *Economia et Etica*, in *MEMORIE ITALIANE E PROBLEMI DELLA FILOSOFIA E DELLA VITA*, 271 (Italy 1936).

11. On the concept of the *homo juridicus* see Del Vecchio, *L'homo Juridicus e l'Insufficienza del Diritto Come Regola della Vita*, 16 *RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO* Fasc. II (Italy 1936). Other analogous formulae and concepts are found in ancient writings, sometimes also to indicate exemplary ways of life. For instance the formula *homo spiritualis* was used by Cardinal Enrico da Susa. Nicolo de' Tudeschi wrote that canon law applies to the "*homo catholicus, dirigibilis constitutionibus ecclesiasticis*," while the civil law instead applies to the "*homo politicus, dirigibilis constitutionibus legalibus in bonum simpliciter humanum*." TUDESCHI, *COMMENTARIA PRIMAE PARTIS IN PRIMUM DECRETALIUM LIBRUM* Fol. 6, n. 17 (Italy 1582); cf. Fedele, *Conscientia Angelica, Bestialis, Rationabilis*, 2 *ARCHIVIO DI DIRITTO ECCLESIASTICO* 412 (Italy 1940).

and to what degree these unilateral conceptions enable us to expand our knowledge of reality would remain.

Actually (as we have already suggested) the "economic man" does not exist. Only the integrated man really exists.

But notwithstanding the confessed hypothetical character of the *homo oeconomicus*, many economists attribute a certain element of truth to this concept. Without this admission their science would be completely sterile. Pantaleoni notes that if the nonexistence of egoism were proven "economics would be a true but frivolous science." On the contrary he maintains, in accord with the theory generally sustained by economists, that "egoism," or self-interest, is one of the most frequent or general causes of human action."<sup>12</sup> From this results not only the theoretical but also the practical importance of economics, as a "prescriptive discipline."<sup>13</sup>

Despite the numerous instances in which economists have declared that their science does not in any way contradict ethics, and that the science of economics is actually completely distinct from ethics it is undeniable that a certain confusion between the two systems can easily occur.<sup>14</sup> The basic undertaking of economics, namely that of deducing a series of laws and a system of causal relationships from the hypothesis that man is motivated only by egoism, seems to give a sort of scientific validity to this motive. On the other hand ethics seems to condemn this egoism or, to be more precise, desires that this egoism be tempered with other motives and made subservient to a higher principle. The ambiguity arises almost inevitably when theoretical economics is reduced to formulae which attempt to prescribe norms of conduct as well as to describe reality.

It is interesting for a student to observe the various positions taken by economists when they define the relationship of their science with ethics. There are those, for instance Pareto, who display a general skeptical disparagement of ethics,<sup>15</sup> considering it to possess no scientific value. It would be simple, were it not superfluous (at least here) to demonstrate that this disparagement is purely and simply a case of lack of comprehension. More frequently, however, economists argue the difference between the domains of the studies and, therefore, their reciprocal independence. Cossa, for instance, argued that

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12. PANTALEONI, *op.cit. supra* note 1, at 16-18; VALENTI, *op.cit. supra* note 2 at 7-8.

13. PANTALEONI, *op.cit. supra* note 1, at 16.

14. For instance H. Sidgwick noted that, "The principles of political economy are still most commonly understood, even in England, and in spite of many protests to the contrary, to be *practical* principles—rules of conduct, public or private."—SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 401 (3d ed. 1901).

15. See PARETO, *MANUALE DI ECONOMIA POLITICA CON UNA INTRODUZIONE ALLA SCIENZA SOCIALE* 46 (Italy, 1906).

"economics is part of the group of moral sciences, which are called social and political, because . . . they study the relationships of man living together in civil and political society. However, it should not be confused with ethics (the doctrine of virtue or of absolute duties), nor with law (the doctrine of justice or of enforceable duties), nor with general politics. The vaunted importation of ethical, juridical, or political elements into the study of economics does not ennoble such a study but confuses it."<sup>16</sup>

Another author, Nazzani, argued as follows:

"Political economy is the science of wealth: but it does not claim that human happiness is especially dependent on acquiring and using wealth; and even less that all individual and social life, must proceed in the material field. . . . If it considers the efficacy of self-interest as extremely important in influencing the human will, it is far from denying the existence of other factors. Actually it argues against the excesses of egoism by combatting monopolistic producers."<sup>17</sup>

Graziani noted that "political economy does not study the ultimate ends of man. It explains facts but it does not judge them on the basis of ethical principles."<sup>18</sup> Similar counsel is found in numerous other writers.<sup>19</sup>

### III.

#### PRACTICAL VALUE OF ECONOMICS—ECONOMIC AND ANTI-ECONOMIC MOTIVES—INSUFFICIENCY OF ECONOMIC PRINCIPLES AS STANDARDS OF CONDUCT.

It would seem, on the basis of the previous discussion, that one should exclude prescriptive or normative functions from the domain of economics. Actually this is not so, for many of those authors who

16. COSSA, *ECONOMIA SOCIALE* 12-13 (10th ed. Italy 1895); COSSA, *INTRODUZIONE ALLO STUDIO DELL'ECONOMIA POLITICA* 32 (3d ed. Italy 1892).

17. NAZZANI, *SUNTO DI ECONOMIA POLITICA* 3-4 (3d ed. Italy 1882).

18. GRAZIANI, *ISTITUZIONI DI ECONOMIA POLITICA* 20 (4th ed. Italy 1925).

19. In particular, economists of the Catholic school have always carefully noted that economic doctrine does not effect or diminish the value of ultimate moral principles. But it has not always been completely clear whether by this notion they intended simply to affirm the separateness or the subordination of economics to morality, or else a partial overlapping of the two disciplines. G. Toniolo, one of the most important representatives of that school, in taking a position against those who "create a system of economics, which is the result of a single egoistic force, an arithmetic and mechanical system of economics, a system of cold and inflexible formulas," stated his position as follows: "We, and along with us the new school of thought without pretending to completely revolutionize the old school of thought, merely ask that its clay skeletal system assume flesh, vitality, and human characteristics. Economics should relate itself to anthropology and the history of civilization, it should live and develop with thinking and acting humanity. It thereby would simultaneously contribute more efficaciously in



affirm the distinction between economics and ethics, nevertheless, consider economics to have a "consultative" function. A typical example is the distinguished writer, Marco Minghetti, who states in a justifiably famous book that economics is and must be subordinated to ethics, but, nevertheless, maintains that economics "must be considered as the best counselor in private and public transactions."<sup>20</sup> Economics considered as a science is often distinguished from economics considered as an art. In this second significance, it is sometimes maintained that it can and must provide precepts, at least for those who work with large groups (especially to rulers of States, in which case the science is called political economy),<sup>21</sup> if not for individuals regarding their private conduct. In this regard, the distinction between pure economics and applied economics is worth considering. This enables us to assert that the first, but not the latter, is independent of ethics.<sup>22</sup> From this observation we meet once again the difficulty to which we previously referred. The existence of an egoistic drive in human beings (along with other drives) may make legitimate the attempt to evaluate sepa-

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solving the great problem of our century, which is that of reconciling the new industrial systems and the new economic life which determine the principle of utility, with the need to renovate the ethical sentiments on which the destiny, dignity, and peace of society depend." Toniolo, *L'elemento Etico nelle Leggi Economiche*, in SCRITTI SCELTI 52 (Meda ed. Italy 1921); see also Billia, *Sulle piu Riposte Armonie Fra l'Economia e la Morale*, 13 ATTI DELLA R. ACCADEMIA DEI GEORGOFILI 5th series (Italy 1916); Bianchi-Cagliosi, *Armonia Fra la Legge Morale e le Leggi Economiche* in PRINCIPI E DIRETTIVE, SETTIMANE SOCIALI L'ITALIA. XII SESSIONE (Italy 1925). In these works the attempt to make a moral system out of economics makes the definition and boundaries of this science uncertain.

This uncertainty was already evident in the works of BAUDRILLART, DES RAPPORTS DE LA MORALE ET DE L'ECONOMIE POLITIQUE (France 1860), wherein an "alliance de la philosophie morale et de l'economie politique" is recommended, and it is affirmed that "l'economie politique trouve dans la philosophie morale une inspiration et une direction superieure." *Id.* at 28, 32. See also GOMES, ESSAI SUR LA THEORIE DE L'ECONOMIE POLITIQUE ET DE SES RAPPORTS AVEC LA MORALE ET LE DROIT (France 1867); LUPORINI, IL PRINCIPIO ETICO E GIURIDICO IN RELAZIONE ALL'ECONOMIA CIVILE (Italy 1892); SALOMONE, MOTIVI ETICI E FENOMENI ECONOMICI (Italy 1905); ZORLI, L'ELEMENTO GIURIDICO E MORALE DELLA CONVENIENZA ECONOMICA (Italy 1906).

A clear affirmation of the "instrumental" character of economics (as a science of means) as compared with ethics (as the science of ends) is in the work of Lorenzoni, *Economia ed Etica*, 40 RIFORMA SOCIALE 160-169 (Vol. XLIV) (Italy 1933).

According to G. U. Papi, "even though economic activity is distinct from moral activity, it integrates moral activity—just as intellectual activity integrates intuitive activity in order to acquire more complete knowledge. In the final analysis economic activity controls moral activity encouraging man to reason assiduously, and thereby disallowing *contradictory* ends, and ends which are *disproportionate* to the available means." PAPI, I PRINCIPII DI ECONOMIA 8 (2d. Italy 1952).

20. MINGHETTI, DELL'ECONOMIA PUBBLICA E DELLE SUE ATTINENZE COLLA MORALE E COL Diritto 55 (2d ed. Italy 1868); SIDGWICK, *op. cit. supra* note 14 at 12.

21. VALENTI, *op. cit. supra* note 2, at 13.

22. COSSA, INTRODUZIONE ALLO STUDIO DELL'ECONOMIA POLITICA 32, 34 (3d. Italy 1892); Mazzei, *supra* note 10 at 353. Schmidt, in a work on the *Rapports de l'Economie Politique avec la Morale et le Droit*, 14 REVUE D'ECONOMIE POLITIQUE 333-348 (France 1900), in a reference to the distinction between theoretical and practical economics attributed a certain influence on morality and law to the latter.

rately the efficacy of this drive within the framework of the complex which constitutes human and social phenomena. This is so even though it is always extremely difficult to define this drive which manifests itself in many varying degrees and forms. An example of this is found in Pantaleoni's attempt to distinguish between "individual egoism" and "group egoism."<sup>23</sup> In this case, the difficulty arises from the fact that this latter form of egoism often contradicts "individual egoism." We certainly admit the scientific legitimacy of an investigation which attempts to determine (in mathematical form) the significance and force of the egoistic drive by establishing, for instance, (to mention the best known and most certain so-called economic law) that when two buyers seek a seller, prices tend to rise, and conversely, when two sellers seek a buyer prices tend to fall. But all this represents only a tendency which can be separately defined in the abstract, but which never constitutes concrete or complete reality, wherein divergent and opposing drives meet and influence each other.

One must keep clearly in mind the fact that economics does not consider all human activity. Quite properly it considers only that part of human activity which relates to the exterior world, that is to say that part which is capable of satisfying material needs. In this sense one speaks of "economic facts," and "economic goods" or else "wealth." For instance, Say defined economics as "the knowledge of laws which govern the production of wealth" or "the method by which wealth is produced, distributed and consumed." It is obvious that all activities which are not a part of this segment of human activity (as, for instance, religious, poetic, or artistic activity, etc.) remain completely independent of the so-called economic laws; unless these laws are understood and applied in a completely improper manner.

An elementary but extremely important fact comes to the attention of every objective student even if the analysis is confined to this restricted area of human activity. This is simply the observation that even economic relationships actually do not develop according to the pure law of self-interest. Innumerable human actions (which also involve the circulation of wealth and, therefore, have an economic character) are determined by motives which are completely anti-economic. Typical of this is the gift or donation which in various forms play such an important role in all social life. According to Savigny's definition: "A gift is the acquisition of wealth by one party, and the loss of wealth by the other party" or in other words, "an increase in the donee's patrimony, with a corresponding decrease in the donor's

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23. PANTALEONI, *op. cit. supra* note 1, at 28.

patrimony.”<sup>24</sup> It is also true that a gift must have a cause, that is to say a motive, and if one conceives of every action which has a motive as being economical, then the giving of a gift must also be considered as an economic action, since one cannot act without will and cannot will without motive. However, if this reasoning is followed, economics would lose its specific qualities and would cease to be a science. This science presupposes the possibility of distinguishing between economic and anti-economic actions. It considers self-interest or the profit motive as the only economic drive and contrasts this drive with other drives which are also possible, but not relevant for economic analysis. In this regard, Messedaglia, for example, taught that “economic motivation does not exclusively determine all action, often—especially regarding actions of a State—other motives simultaneously play a role, either modifying or overcoming the egoistic drive.”<sup>25</sup>

The economic evaluation of a situation, therefore, represents only one aspect of reality, which is never actually merely economic. We can consider some very simple examples from everyday life to illustrate this. The majority of passengers prefer third-class passage in trains because of reduced rates. However, some passengers prefer the first or second-class passage and disregard the economy of third-class passage in order to enjoy the comfort and distinction of the former. Another example is found in the fact that some people prefer to purchase tickets to visit museums and art galleries on non-holidays rather than to visit these places free of charge on holidays. They do this so that they need not contend with large crowds. Everyday experience also provides examples of voluntary renunciation of certain rewards which are spontaneously offered or legally collectible (for instance, for finding lost objects; for medical or legal assistance provided among certain friends; also the refusal of interest on loans granted as a favor, etc.) and besides this, cases of gifts and acts of liberality in general. Even in the process of making contracts (wherein economic considerations are most strongly felt) other factors limiting the preponderance of the egoistic motive often intervene. Actually, if one delves more deeply into this type of relationship, one sees that the very fact of giving a contractual form to these exchanges (which implies the requisite of freedom of consent) signifies that the mere economic consideration (*i.e.*, the self-interest or egoistic drives) according to which the stronger should overcome the weaker has been transcended.

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24. SAVIGNY, 4 SYSTEM DES HEUTIGEN ROMISCHEN RECHTS, § 145 (Germany 1841); *cf.* ASCOLI, TRATTATO DELLE DONAZIONI 10 (2d ed. Italy 1935).

25. VALENTI, *op. cit.* *supra* note 2 at 14-15, *citing* Messedaglia.

Cardinal Faulhaber, in his book *Judentum, Christentum, and Germanentum*, (which because of its noble inspiration will remain one of the most memorable books of our times) in illustrating the "social values of the Old Testament," cites the following from Leviticus:

"When you reap the harvest of your land, you shall not reap your field to its very border, neither shall you gather the gleanings after your harvest. And you shall not strip your vineyard bare, neither shall you gather the fallen grapes of your vineyard; you shall leave them for the poor and for the sojourner."<sup>26</sup>

These maxims represent, in their ingenuous and embryonic form, the principle of the "rights of the poor" which was to have so vast and profound a development in modern social legislation. It is well worth noting the fact that in such an early era an element (even though small) modifying the egoistic drive was introduced into a matter so typically economical as the harvesting of products from one's field.

Minghetti was quite right in making the following observation while analyzing the interrelationship between economic and ethical motives in producing human action. He states: "Let us suppose that the contention which some people have sustained, namely that in some regions and in certain types of industries slave labor is more efficient than that of free labor, is true. What does this prove? Does this entitle one to consider slavery as an economic principle"? Furthermore, suppose that "forcing children to work sixteen hours a day was an efficient method of producing national wealth. Which economic treatise would dare enumerate amongst its principles that of forcing children into this type of work"?<sup>27</sup>

If one considers the actual status of the science of economics (which has developed a more rigorous methodology especially insofar as it has assumed the form of a mathematical theory) it is true that this criticism by the great statesman might seem less appropriate today. But one cannot deny that much uncertainty and confusion still exists, especially when attempts are made to add a practical or prescriptive significance to economic theory. In this regard, as we have already noted, one readily admits the relative truth of economic theorems, insofar as they are based on the hypothesis of the exclusive efficacy of the egoistic drive. In the same manner, for instance, a student of physics may consider the efficacy of one of a number of existing forces

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26. Leviticus c. XIX, 9-10; FAULHABER, *JUDENTUM, CHRISTENTUM, GERMANENTUM* 53 (Germany 1933).

27. MINGHETTI, *op. cit. supra* note 20, at 79; see also ROSSI, 1 *COURS D'ECONOMIE POLITIQUE*.

(by abstracting a given force from the complex of forces which actually exists) and then proceed to translate its efficacy into a mathematical formula (on the basis of the assumption, which is scientifically sound, that it was not disturbed by any other force). But it is an entirely different matter if, more or less consciously, this abstraction is considered as representing reality, or instead—and this constitutes an even more serious error—it is considered to possess a normative value which should determine a course of conduct.

In the case of economics, the error arises more easily because of the ambiguity, which we have already considered, in the concept of utility or self-interest. After having quite properly demonstrated that every human action is necessarily determined by an interest (in the broad sense of the word) one proceeds to consider, by means of abstraction, only self-interest or the egoistic drive. It is assumed that egoism determines all human conduct, and all actions which are not the result of an egoistic motive are condemned as being anti-economic. The fallacy is evident. In the first part of the demonstration the possibility of a disinterested action is denied, while in the second part the possibility of such an action is admitted, contrasting it with those actions which are exclusively considered to possess an economic character.

The economic principle then, almost imperceptibly takes on the characteristic of a norm for regulating human action. It is assumed that it would be a good rule for the individual to always seek his own interest. The objections which immediately arise against this thesis are answered first by enlarging, in various ways, the concept of interest (distinguishing, for example, self-interest or individual egoism from that of the group interest), and finally seeking refuge in the tautology, according to which interest is merely equivalent to the motive (regardless of its nature) for an action. Once this point has been reached, the interest criterion obviously ceases to be useful for it no longer can serve as a standard for determining an action. If interest is used in this sense, all actions would be equally economic in character and even the most wanton destructive behavior (for instance, that of the individual who burns a five dollar note by igniting it with a cigarette) would be justified by his "interest" in focusing public attention on himself in wishing to *épater les bourgeois*.

Therefore, no norm which can serve as a guide to conduct or as a true criterion for determining choice of actions can be derived from the economic principle. When used in the general sense indicated above, it represents a characteristic which is necessarily found in all

actions. If, however, one maintains that in deciding on a course of action it is convenient to follow the demands of self-interest (*i.e.*, interest in the narrow sense) then a normative character is attributed to the "economic principle." But this normative character is not acceptable because it contrasts with the real basis of ethics, which is reflected not only in individual consciences, but also in the laws and customs of all peoples.

#### IV.

##### LEGITIMACY OF ECONOMICS AS A THEORETICAL SCIENCE—ITS LIMITS.

As a theoretical science, economics can very legitimately investigate the facts which are related to the production and distribution of wealth, attempting to thereby discover causal relationships and the regularity of sequences which constitute so-called economic laws. Actually, these relationships and sequences only express tendencies. However, within these limits, no one can reasonably challenge the scientific validity of this type of research. Nevertheless, it is important to clearly understand that from all observations of this type no principle of obligation, duty, or right can be derived.

All theoretical knowledge can acquire a practical significance insofar as it defines a means capable of achieving a certain end. But in no case can the value of the end and, therefore, of the desire to achieve that end be deduced from this definition of means. For instance, the theory of physics and chemistry concerning the properties of bodies and the laws relating to their modification and combination can be utilized by anyone who possesses the necessary materials and desires to achieve a certain end. In the same manner the discovery of tendencies and causal relationships regarding economic phenomena can and should be considered by those who work in this field. However, the ends and prescriptive norms which are applicable in this field do not result from a knowledge of these causal relationships but are a presupposition for their use.

It is a pure and simple illusion to believe that the norms which direct human economic activity are derived directly from the economic matter being analyzed. Actually, if it were possible to deduce norms of conduct from the data or the theoretical premises of economics, such norms could be illustrated by the following examples: Everyone must acquire the maximum wealth possible; everyone must spend as little as possible; etc. But these maxims may represent limited conceptions of reality, or hypothetical tendencies, but can never, by themselves, actually

direct human actions. This is so precisely because no real obligation exists, and because human actions are determined by other more complex and higher ends.

One of the most frequent reasons for the errors in this matter arises from the fact that relationships involving production and exchange of wealth actually develop in subordination to moral and juridical norms. These norms give a determined and obligatory character to terms like property, labor, commerce, etc. If one prefers one can call these norms economic laws because of the objects to which they are applied. But certainly they are not identical to those economic laws which interest economists when they consider cause and effect relationships in "natural economic actions." In fact, economists explain that the "natural laws which govern the acquisition of wealth are not sanctioned by the authorities," but are dependent on the nature of things, and "reveal the degree of similarity and stability which exists in the various forms of economic activity."<sup>28</sup> The true task of economic analysis is to attempt to discover regularity in facts and causal connections which have no exceptions and cannot be violated, precisely as occurs in the physical sciences. But difficulty arises immediately because of the ambiguity of the term "law," which also denotes an ethical or deontological principle (moral or juridical). This ethical principle can be obeyed, but can also be disobeyed. The danger of the ambiguity is all the greater insofar as this latter type of law applies also to economic relationships, without, however, constituting the specific object of economic analysis. "Economic legislation" undoubtedly belongs to the science of law, and as a branch of this field of learning is subject to the same principles as all the other branches of law.<sup>29</sup>

It is easy to understand how some writers (especially in the past, like Rousseau, for instance) could treat questions entirely extraneous to the production and distribution of wealth under the title of political economy and in substance could give counsel regarding the best form of governing by a State precisely by referring to the name of that science. Rousseau says, "the word 'economie' originally merely signified the wise and proper management of the home for the common good of the entire family. This term subsequently came to refer to the management of the larger family, which is the state."<sup>30</sup>

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28. VALENTI, *op. cit. supra*, note 2 at 6; *id.*, citing Messedaglia.

29. DARMSTAEDTER, *DAS WIRTSCHAFTSRECHT IN SEINER SOZIOLOGISCHEN STRUKTUR* 8 (Germany 1928).

30. ROUSSEAU, *De l'Economie Politique*, in 4 *OEUVRES COMPLETES* 220 (Lefevre ed., France 1912). However, Rousseau makes a distinction between "economie generale ou politique" and "economie domestique ou particuliere," declaring that he wishes to concern himself only with the former (which he later refers to also as "economie

Under the influence of the same pragmatic and illuministic ideology Romagnosi also has left us profound treatises which tend to be hybrids of economic and legal discussions. For instance, he speaks of "natural law" in an extremely ambiguous manner.<sup>31</sup> The unfortunately famous definition of economics proposed by Romagnosi defining this term as "the social ordering of wealth"<sup>32</sup> is not immune from this defect because it is not clear whether or not this formula includes the moral and juridical order which is of a quite different nature than

publique"). However, the sense in which he uses this term is evident from the fact that in his opinion, "la premiere regle de l'économie publique est que l'administration soit conforme aux lois." *Id.* at 229.

C. Cattaneo clearly indicated that the term economics actually has two different meanings. In criticizing one school of economists (socialists) he wrote: "For them, it was not sufficient that economics should be, as was actually the case, *the natural history of wealth*; they wanted economics to be (as was originally the case) the analysis of the norms governing the social organization." Cattaneo, *Del Pensiero come Principio d'Economia Publica*, 5 OPERE 367 (Italy 1888).

31. As is well known, this ambiguity is also encountered in earlier works, by which Romagnosi was certainly influenced to some degree. One notes particularly Montesquieu's celebrated work according to which law is "les rapports nécessaires qui dérivent de la nature des choses." MONTESQUIEU, *Esprit des Loix*, in OUVRES DE MONTESQUIEU c.1 (France 1826). The ambiguity is present particularly in the physiocratic school (it is superfluous to recall the fundamental importance of this school in the history of economics) wherein one might say that it was elevated to the dignity of a basic principle. For instance, Quesnay considers the "loi phisique" as "le cours réglé de tout événement physique de l'ordre naturel évidemment le plus avantageux au genre humain." Quesnay, *Le Droit Naturel*, 1 PHYSIOCRATES 52-53 (France 1846); in other words (as Daire notes in the *introduction to id* at p. XI), "*par lois physiques*, Quesnay ne entend pas precisement les lois de la matiere, mais bien plutot la direction utile que l'intelligence humaine peut donner a ces lois." Similarly Mercier de la Riviere, in his work similarly entitled, declares the existence of an "ordre naturel et essentiel des societe politiques", intending to unite physical imperatives with moral and juridical imperatives in this formula. He states, "L'ordre naturel, dont l'ordre social fait partie, n'est et ne peut etre autre chose que l'ordre physique." RIVIERE, 1 LE DROIT NATUREL c. VI (France).

Analogously, Romagnosi maintains that the "theoretical moral order is founded completely on the physical order, and is determined by the physical order."—ROMAGNOSI, *Introduzione allo Studio del Diritto Pubblico Universale*, in 3 OPERE 89 (De Giorgi ed.); and therefore affirms the "necessity of extracting the rules of public affairs from the actual and necessary relationships of things." *Id.* at 277. In his opinion economics, (Romagnosi uses the term "economia publica lucrativa") should therefore be founded "on another science which logically precedes political and legal science." This science "demonstrates the necessary order of things from which one must therefore extract rules. It is a branch of natural science considered factually." ROMAGNOSI, *Diritto Naturale Politico*, in 3 OPERE 806 (De Giorgi ed.). Besides a "factual economic science," (scienza economica di fatto) there would also be an "economic science based on reason" (scienza economica di ragione) whose function would be "to conserve and perfect the human species in society, via the production of national wealth," thereby forming "an integral part of the science of public law." *Id.* at 811. In conclusion, admitting the "identity of justice and utility," Romagnosi maintains that law and economics are one and "constitute a single science and a single entity." ROMAGNOSI, *Della Necessità di Unire lo Studio della Politica Economica con quello della Civile Giurisprudenza*, in 6 OPERE 175, 222 (De Giorgi ed.). Actually, it does not seem to us that this methodological point of view (notwithstanding the authority of the distinguished thinker and his noble intentions) constitutes real progress. Nor has his point of view been confirmed by subsequent economic or legal studies.

Minghetti, who in the previously mentioned work (wherein Romagnosi's influence is obvious) forces himself to establish the identity of the rules of economics with those of morality and law, does not achieve the precision in defining concepts which might be desirable.

32. *Id.* at 12.



that founded on the laws of causality and motivation (*i.e.*, the principle of sufficient reason).<sup>\*</sup> Nothing is more damaging to scientific progress than leaving fundamental concepts indefinitely or badly defined.<sup>33</sup>

However, epistemological criticism, viewing all the sciences, has clarified their respective limits and has indicated the varying level of truth which each science can achieve and the methodology of each. Similarly, also with regard to human actions (which have various aspects and, therefore, can be studied by various sciences) the possibility of a rigorous phenomenological analysis has been demonstrated insofar as these activities are a part of empirical reality. On the other hand the possibility of a deontological or ethical valuation (insofar as these activities have a spiritual basis) has also been demonstrated.

In the first case, a descriptive analysis explaining causal connections and the consequent regularities which occur empirically in human activity is undertaken. In this manner one can consider all of the complex factors which concurrently are the basis of human actions. In this manner it is also possible through a process of abstraction to attempt to isolate and measure the force of a single motive or factor, even though this actually always presents itself concurrently with others and is, therefore, obviously modified in its efficacy. If one considers motivation as consisting of a self-interest which is directed towards the acquisition of wealth (*i.e.*, via those activities which occur in the relationships of production and exchange) then one has defined with adequate clearness the domain of economics. But none of these regularities and tendencies, *observed and observable in this sense*, can ever be translated into rules of conduct having an ethical value.

## V.

### NATURE OF THE ETHICAL PRINCIPLE AND ITS REALIZATION IN THE FORM OF MORALITY AND LAW—THE NECESSITY OF APPLYING MORAL AND LEGAL PRINCIPLES TO ECONOMIC ACTIVITY—SUBORDINATION OF ECONOMIC CRITERIA TO ETHICAL CRITERIA.

Ethics imposes its rules on all human actions, and also on the type of action which we have been discussing; but not on the basis of

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\* Translator's note, *cf.* note 6 *supra*.

33. The generic affirmations of Miraglia indicate more a *desideratum*, than a scientific solution of the problem. He states: "Economics is a part of ethics in its fullest and most universal significance . . . [it] cannot be indifferent towards good and evil." MIRAGLIA, *I FILOSOFIA DEL DIRITTO* 137, 138 (3d ed. Italy 1903). This proposition is affirmed by such writers as Ahrens, Trendelenburg and Arnold. For various attempted solutions or clarifications of this problem see BATTAGLIA, *DIRITTO E FILOSOFIA DELLA PRATICA* 62 (Italy 1932); DE MONTEMAYOR, *PRIMO ABBOZZO D'UNA GIURIDICA-DELL'UGUAL BENE DI CIASCUNO* 149, 164 (Italy 1914); MAGGIORE, *L'UNITÀ DEL MONDO NEL SISTEMA DEL PENSIERO* 221-231 (Italy 1913).

the observation of that which actually occurs, nor on the basis of what would happen if only one of the existent forces were active; but on its acceptance of the principle of the integrated value of human personality and the universality of the ends which this human personality is to achieve. This principle represents a criterion which exists apart from physical phenomena, and which is binding on individuals as a rule of conduct. Individuals can violate the precepts of this ideal principle, but it, nevertheless, retains its deontological value. From this ideal principle one logically deduces two types of ethical orders, namely the moral and legal orders. It is worth noting that every human action is simultaneously subject to either a moral or juridical evaluation, depending on whether it is judged (deontologically) in its relation merely to the individual who acts (moral evaluation) or on the basis of the actor's relationship to other subjects of the legal order (juridical evaluation).

Therefore, actions which tend to satisfy needs in the restricted sense (*i.e.*, the acquisition and exchange of economic goods) are also always subject to this moral and juridical evaluation. This ethical principle always has a certain historical or positive existence. This statement is not made in the sense that its norms always must be explicitly formulated (these norms can also be the result of a conviction not reduced to writing), nor in the sense that they are universally adhered to (transgressions of these norms are always possible); but in the sense that the necessity of an evaluation or of an obligatory rule, either in the form of morality or in its juridical form, must make itself felt in all phases of human life whether considered from the individual or social point of view. It is superfluous to note that these two types of positive norms, just like everything else in history, are subject to an evolutionary process. Therefore, this ethical principle manifests itself in a certain relative character which, however, does not destroy its fundamentally absolute character.

Despite the existence of particular variations, the ethical system (which in both its forms provides norms for governing human activity) always possesses an integrated character. This is so because all human activity (whether it be considered from the point of view of the individual subject or whether the relationships between subjects are considered) must be regulated. In brief, all of the complex factors of which human personality is composed are ethically relevant. The ethical system embraces all of the instincts, the needs, the motives of whatever type, from the most infamous to the most sublime. Morality provides a rule of conduct for each subject and arranges in a certain

harmony the various elements and motivations of his actions. That morality which includes man in his pure and absolute spiritual essence, subordinating inferior elements belonging to the material world to this spiritual essence, is more exalted and possesses more truth. This is mentioned only in passing, because our present purpose is not to establish a hierarchy or to evaluate the various moral systems.

Law also embraces the entire man considered in his relationships to other men (from this results the intersubjective or bilateral nature of law, which is characteristic of all juridical determinations). Precisely because the legal order considers social relationships and the limits of enforceable rights amongst coexisting individuals, juridical determinations are not always in the form of commands or prohibitions (as is the case of moral determinations) but also may permit and guarantee a certain sphere of liberty. It is well understood, however, that this permission and guaranty exist only insofar as other subjects are required to respect them (from this fact one deduces that also the so-called permissive norms have, at least indirectly, an imperative character). It is a serious error to assume that the legal order is not concerned with what is permissible, and therefore, that a great portion of human activity is extraneous to the legal order. Actually, however, it is always true that (given a juridical system) all human actions or omissions must necessarily be considered legal or illegal and, therefore, in either case juridically relevant.

If we now apply these concepts to that part of human activity which, in order to satisfy the elementary needs of existence, is concerned with the production, acquisition, or the circulation of wealth (called economic activity) we discover that it is always, of necessity, regulated by the legal order in some way. In a form which belongs uniquely to the juridical order, that is to say by means of correlative rights and duties, social relationships are established. Within this framework the production, acquisition, and distribution of goods is also regulated. In summary, economic activity is always subordinated to a complete system of norms.

Every regulatory system expresses and reflects a more or less perfect (but nevertheless integrated) conception of the ends of life and of all the tendencies and aspirations of the human mind (certainly not only of the economic tendencies). A brief reference to a schematic analysis, which falls far short of adequately reflecting the complete and dynamic reality of the process, indicates that human nature manifests sentiments, desires, and needs of many varying types which are partly material and egoistic and partly spiritual and altruistic.

Without a doubt, even from a purely biological point of view, the instinct to preserve the species is as deeply rooted in human nature as is that of self-preservation. Only because of a most artificial abstraction can one suppose that human love, which motivates and dominates life in innumerable forms, is nonexistent in the world. Only because of the prejudices of certain schools of thought can one consider as secondary and unnatural the sentiment of compassion, or of love for one's neighbor; qualities which all religions and the more profound philosophies (not excluding those which are anti-dogmatic and pessimistic, as, for example, that of Schopenhauer) have recognized to be innate in man.

Without pretending to give a precise definition of factors which are so complex, we can affirm without fear of error that human nature and the history of mankind always represent a concrete synthesis of egoism and altruism. Neither of these opposing elements can be eliminated without eliminating the possibility of human existence. Actually, a system of norms inspired completely by egoism has never existed, nor will it ever exist because it would signify the end of society and life. However, if the term "economics" is used in its most rigorous sense, namely as that science which is founded on the hypothesis that self-interest or egoism is the only drive which motivates man, then no economic rule can have a truly prescriptive value. Minghetti was quite correct when he observed that economists often unconsciously presuppose moral criteria, which are a priori and superior to the science of economics.<sup>34</sup> Actually, economic theories really cannot guide human action unless their applicability is limited almost by tacit understanding within the confines designated by morality and the legal order (both of which are forms of the ethical ideal which accompany the development of economic activity).

But morality and law encompass all of life, and not only its economic aspect. They impose principles and necessary ends, depriving capricious wills of this right. They not only prescribe that certain acts are necessary to reach certain ends; but they also state that it is absolutely necessary to act in a given manner—to desire certain ends—to respect certain values. Knowledge of causal relations and the so-called technical norms (which are only inverted expressions of these causal relations) can be utilized only in subordination to these ethical norms.

All moral and juridical systems protect the essential values of life. That is to say they impose absolute norms and nontransgressible

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34. MINGHETTI, *op. cit. supra* note 20, at 79.

limits. Within these limits they permit the individual to choose the specific action. This element of categoric absoluteness must be considered by anyone who wishes to understand the true nature of ethics, and, therefore, also of the legal order. It follows that the economic order is subservient to the legal order. Analogously, one notes that the same is true for all other types of activity, as, for instance, artistic, military, political, etc. Each of these activities is subject to its own rules of development; but all of these activities are actually carried out as a particular human activity which is subordinate to the fundamental regulations which govern human life. These fundamental regulations manifest themselves in the form of morality and the legal order.

The subject matter of these various activities does produce a series of technical analyses. However, these constitute norms only in a hypothetical sense. He who wishes to perform a particular act in a given field of activity must undoubtedly duly consider the conditions which apply uniquely to that particular field, but the theoretical or technical knowledge of these conditions by themselves cannot tell him whether his action is legally or morally permissible.

Action and theory—will and knowledge—are certainly interrelated terms. Every action which is really an action, undoubtedly presupposes some knowledge, more or less clear or conscious. However, this action is always *something more* than mere knowledge. Even when knowledge assumes its most perfect scientific form, in accord with the laws of causality, it does not produce action unless an *effect* in the theoretical order is assumed as an *end* which an individual desires. This higher criterion, which affirms the individual's capacity to choose, opens the door to a new series of problems, and discloses a new horizon which constitutes the domain of ethics.

So-called techniques (*i.e.*, those conditional precepts which as we have already indicated, represent mere inversions of theoretical knowledge) do not constitute a part of this domain. For instance, tactics and strategy teach the methods of achieving desired results in war, but they certainly do not answer the question of whether or not nations should engage in war. If technical formulas seem to be real norms of conduct, this is a result of the fact that the effects under discussion are presumed to conform to the ethical regulations which govern the situation. For instance, scientific analysis demonstrates that living in malarial zones, or drinking impure water produces certain pathological effects in a human being, and that these effects are also produced by exposure to excessive heat or cold. All this analysis is considered to be equivalent to the maxims that one should not live in malarial

zones, nor drink impure water, nor expose oneself to excessively warm or cold temperatures; the rule that everyone can and must take care of his health supposedly being obvious and, therefore, understood. Actually this rule is not deduced from the theoretical and technical knowledge mentioned. That this is so, becomes evident if one considers that the above-mentioned hygienic rules (just like all the analogous technical knowledge), even though apparently normative, can and must be ignored when a higher end makes it imperative to do so (just as when it becomes imperative to confront, let us suppose in war, risks and hardships including that of sacrificing one's health).

The difficulty becomes particularly serious when one is not dealing (as in the example just given) with maxims which, although conditional or hypothetical, are, nevertheless, generally accepted, but instead with controversial maxims, or more precisely those which are by themselves erroneous until they are clearly subordinated to the principles of the ethical order. This is the situation of economics, because all of the knowledge relating to methods of satisfying material needs, and the description of what human life would be like if all men were motivated exclusively by self-interest (although such a description may possess a certain theoretical validity) cannot be converted into absolute prescriptive norms without more or less contradicting the ethical system, which is actually developed by our conscience, and which is expressed in varying degrees of perfection amongst all peoples in all times.

If some "economic rules" (like those, for instance, which counsel thrift and condemn prodigality, and those which reduce themselves to the so-called law of minimum means, etc.), nevertheless, appear to be valid, it is worth repeating again that this results only if one implicitly admits that such rules are integrated by more general rules and are, therefore, subordinate to them. The distinction between "mine" and "yours" (with the resulting right and duty of respect) is a pre-supposition (moral and juridical) of economics. The normative value of "economic principles" is, therefore, at best only a reflection of other higher principles.

## VI.

### CRITICISM OF VARIOUS THEORIES—HISTORICAL MATERIALISM OR ECONOMIC DETERMINISM—THE SUPPOSED REDUCTION OF LEGAL PHILOSOPHY TO A PHILOSOPHY OF ECONOMICS—ECLECTIC TENDENCIES.

It is well known that even in recent times doctrines have been defended which vary considerably from that which we have suggested.

A lengthy confutation of these doctrines is beyond the scope of this Article. However, some of those which differ from the one developed herein will be briefly examined.

The most famous and radical denial of the autonomy of the law and morality vis-a-vis economics is the so-called theory of historical materialism or economic determinism. The formulation of this theory which Marx gave in the preface of his work *On the Criticism of Political Economy*, is worth considering:

"In the social development of their lives men enter into relationships which are obligatory, necessary and independent of their wills. These are production relationships, which correspond to a definite stage of development of their productive capacity. The totality of these productive relationships forms the economic basis of society, the real foundation on which a juridical and political superstructure (to which determined social manifestations of conscience correspond) is built. The means of production of the material needs of life determines the social, political, and spiritual processes of life. It is not man's conscience which determines his state of being, but on the contrary, it is his state of being which determines his conscience."<sup>35</sup>

The fundamental error of this concept lies in the fact that it considers economic relationships as something existing a priori or independently of the essential psychological elements out of which such relationships develop.<sup>36</sup> This type of activity (which may be referred to as economic) which is concerned with the satisfaction of the material needs of life, always remains an activity and, therefore, presupposes man in all his complex nature. This nature does not consist merely of a drive which seeks to satisfy material needs but is composed of sentiments and concepts (which are often only embryonic) which by their very nature are beyond the field of economics. Sentiments and moral concepts exist in every phase of life (for instance, sympathy and

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35. MARX, ZUR KRITIK DER POLITISCHEN OEKONOMIE XI (2d ed., Kautsky, Germany 1903). Amongst the many works written in defense of this thesis we note especially that of LORIA, LE BASI ECONOMICHE DELLA COSTITUZIONE SOCIALE (4th ed. Italy 1913). Analogously, particularly with reference to the legal order see Graziani, *Il fondamento economico del diritto*, in *TEORIE E FATTI ECONOMICI* 67-114 (Italy 1912).

36. Cattaneo correctly observed that "there is no labor, there is no capital, which does not originate with an act of intelligence." Cattaneo, *supra* note 30, at 368. Lorenzoni, another distinguished economist, recently wrote that "one should never forget that the invention and evolution of productive technique and the economic system is not a fact which occurs spontaneously, via an obscure mechanical mysticism, but a consequence of the functioning of the human mind and personality in adopting to its own ends external nature." Lorenzoni, *supra* note 19, at 169. History manifests itself as the evolution of psychic activity which determines the evolutions of economics, and not as the evolution of economics which determines the evolution of the man's psychic nature." *Id.* at 168.

compassion, especially amongst members of a family). There are juridical sentiments and concepts like the need for a degree of self-respect, and the recognition, even though vaguely, of the obligation to equally respect the personality of others. These ethical motives are evident in human activity and also in that part of human activity which has an economic aspect. In fact no one has ever discovered any evidence indicating that a human society possessing only an economic aspect without a corresponding juridical aspect has ever existed. Likewise no one has ever discovered an *homo oeconomicus*, who was not simultaneously an *homo juridicus*, and *homo moralis*, etc., or in other words a man possessing a psycho-physical integrity.

This can also be expressed by stating that economic relationships are never *merely* economic relationships. They are also *human* relationships and, therefore, also moral and juridical. They, therefore, can be evaluated by moral and juridical criteria. Economic analysis is based exclusively on the abstraction of a particular motive which actually is always intermingled with others.

The substitution of an essentially hypothetical methodology (which has no empirical basis) for objective data does not provide a scientific basis for attributing a chronological supremacy or a preponderant causal efficacy to this motive.

It is quite true that the legal order and the economic system develop in a certain parallel fashion. Juridical norms which encompass and limit economic phenomena and institutions (as, for example, property, contracts of sale, etc.) obviously exist. But it is also true (and this is often overlooked by the followers of the above mentioned school) that a large portion of the legal order concerns itself with relationships which have no economic content (for example, the fundamental rights of a person, the right to preserve his good reputation and honor, liberty of conscience, the right to vote, etc.). Law is a general ordering of all human activity,<sup>37</sup> and it encompasses all possible human acts. With regard to that portion of the legal order wherein a parallelism exists with the economic system, one must clearly state that this is only a parallel construction and not a logical or chronological precedence of the economic system with relation to the legal order. Human nature remains the basis of law as well as economics. Vico's illuminating axiom that "this civilized world certainly was made by

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37. It is not, therefore, only "die aussere Regelung der sozialen Wirtschaft" as Stammler defines it in the famous work. Stammler, *WIRTSCHAFT UND RECHT NACH DER MATERIALISTISCHEN GESCHICHTSAUFFASSUNG* 147 (4th ed. Germany 1921). On this problem (opposed to Stammler's theory) see DARMSTAEDTER, *op. cit. supra*, note 29 at 27.



man, therefore, one can, because one must, rediscover its principles in the development of our human minds" <sup>38</sup> is also applicable here.

A more recent doctrine, which has had a considerable vogue (although not comparable to that of the theory previously discussed) is that of Croce who attempted to "reduce" (as he expresses it) "legal philosophy to a philosophy of economics." Croce assumes he has adequately defined the economic principle when he describes it "as the concept of the element of utility as an independent factor in the manifestation of the spirit." <sup>39</sup> In his opinion philosophy has not "recognized up to this time the category of an economic principle of usefulness, as a distinct form of activity of the spirit." <sup>40</sup> Reservation is entered regarding the novelty of this thesis; but this is not presently our main purpose. For Croce, "economic activity is nothing more than practical activity, considered simply as such and independently of evaluations as to its morality or immorality. It is the action of man who as an individual wants, and must want, to achieve the desires of his individual will." <sup>41</sup> From this and all the other elaborations and clarifications which Croce gives of his concepts, it appears that he considers that all human activity is necessarily economic activity because economic activity is that activity which "seeks to achieve those needs which correspond to the individual's subjective state." <sup>42</sup> This thesis is acceptable so long as it is clear that "economic action" means only "motivated action," *i.e.*, an action determined by a motive which is subjectively sufficient. One should note that this deprives the economic principle of all its descriptive or specific function and that this is not the significance attributed to the term by the science of economics. If one wishes to give economics a truly scientific content by which it can be distinguished from a mere and perfectly useless affirmation of the principles of causality or of sufficient reason, one must do what other economists do. This requires that more restricted meanings be attributed to terms like utility, interest, benefit, etc., even though these meanings may be philosophically less precise or actually also completely empirical.

But the part of Croce's discussion which is most interesting for us is that part in which he states that juridical activity is synonymous with economic activity. In fact he argues that "every action can be

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38. VICO, *PRINCIPII DI SCIENZA NUOVA D'INTORNO ALLA COMUNE NATURA DELLE NAZIONI* 172 (Nicolini ed. Italy 1911).

39. CROCE, *RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA* 30 (Italy 1907).

40. *Ibid.*

41. *Id.* at 32.

42. CROCE, *FILOSOFIA DELLA PRACTICA* 203 (6th ed. Italy 1950).

considered either as pure action (pure will); and this is the economic point of view; or it can be considered as an action which is directed or not directed towards the ultimate end of man; and this is the ethical point of view."<sup>43</sup> Therefore, according to Croce:

"the problem of the nature of law can only be posed as follows: Is law mere economic activity, or is it moral activity? One must certainly exclude the possibility that a third form of practical activity, which is neither economic nor ethical exists, because the above mentioned division coincides with that of individual and universal and, therefore, completely exhausts the area of activity, leaving no place for a third form of activity."<sup>44</sup>

The objections which arise against this thesis are so serious and numerous, that perhaps the only difficulty is that of listing them in a proper fashion. The fundamental error is probably in considering law as activity. The truth is (and this is so well known that it should not be necessary to demonstrate by recalling various doctrines) that law is not essentially activity, but a criterion for evaluating activity. It is a criterion which distinguishes just from unjust, legal from illegal. Perhaps it is necessary to recall the elementary statement never yet contradicted, of the Roman Jurists who summed up their duties as follows: "Justitiam namque colimus . . . aequum ab iniquo separantes, licitum ab illicito discernentes"? It is well known that right is in a constant struggle against wrong. There cannot be a right without the possibility of a corresponding violation of that right. Therefore, every juridical affirmation is actually a value judgment of a non-phenomenological nature. The juridical order does not merely note the occurrence of a particular act nor does it merely seek the motives for its occurrence, but it asserts the legitimate or illegitimate nature of the action, judging it on the basis of an ethical criterion. To state, as Croce does, "that a juridical act . . . consists, in the practical resolution of a situation in a willful act"<sup>45</sup> leaves undetermined precisely what has to be determined. Nor is this mere verbal imprecision. The concept itself, as appears in the following passage, is completely erroneous. "If I am aware of the existence of a law which prohibits a strike, my personality has not yet entered the juridical

43. CROCE, RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA, 32 (Italy 1907). Translator's note: this passage continues "in the first form of activity the criterion of individuality is applicable, in the second the criterion of universality is applicable."

44. *Ibid.* Translator's note: see the preceding note for an understanding of the terms individual and universal in the context in which Croce uses them.

45. CROCE, RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA 32 (Italy 1907).

domain . . . . Only when I resolve to obey or violate this law (that is only when my will decides to act) does a juridical activity exist." 46 Therefore, according to Croce, the activity of the individual who violates the law is as juridical as he who obeys the law. Briefly, every activity is necessarily economic and juridical. This is equivalent to denying the existence of law in its logical essence or in its ideal form. It also denies the actual function of law which via innumerable daily applications is required to distinguish legitimate from illegitimate.

If one probes beyond the words and considers the intrinsic significance of the thesis, one easily discovers that this thesis, far from being a discovery, as Croce and some of his followers proclaim, 47 merely reproduces an old sophism which has already been disproved many times in treatises on legal philosophy. This thesis is merely the sophism of Hobbes and Spinoza (not to go even further back in history to the actual Sophists), according to which in the *status naturae* each individual's rights depend on the force which he possesses. Individual will is the only sovereign. One notes that in these antic theories of natural law, the hypothesis of a *status naturae* at least had a logical function insofar as it served as a point of departure for the deduction of a *status societatis*, or of a legal order. Here, however, in this new attempt to "reduce" or eliminate law, law would absolutely cease to exist as such. It would cease to exist, even before coming into existence. In summary there would no longer even be a difference between individual activity and law because generality (which even Croce considers as a unique character of the law) would be found also in all the other activities of man. Law becomes a right only "when it ceases to be general and is applied to an individual action." 48 Croce finds no difference between juridical laws and arbitrary individual programs. 49 It is easy to understand that Croce a fortiori equates all other types of precepts to laws. He states:

"understanding as law and juridical fact all that belongs to social custom, there are, therefore, no practical or willed facts which can be excluded from this concept. Therefore, not only the civil and penal codes, but also the codes of chivalry and of politeness; not only the statute and fundamental laws of the state, but also the rules of games and various sports," 60

46. *Id.* at 32-33.

47. See, for instance, the apologetics of Attisani of Croce's thesis in the introduction to the subsequent printing of the *RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA* (Italy 1926).

48. CROCE, *RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA* 41 (Italy 1907).

49. CROCE, *FILOSOFIA DELLA PRATICA*, 309 (6th ed. Italy 1950).

50. CROCE, *RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA* 38-39 (Italy 1907).

constitute part of the juridical order. All the differentiating characteristics of laws (centuries of logical analysis which has been particularly intensified and advanced in modern times has demonstrated these differentiating characteristics in order to distinguish clearly juridical norms from the other rules governing life) are deliberately refuted or ignored by Croce who actually demonstrates a great lack of knowledge of this subject matter. In this regard it is sufficient to note what he writes concerning the extremely elementary distinction (which he obviously misunderstood) between *droit subjective* and *droit objectif*.<sup>51</sup> Juridical science distinguishes, for example, (quite justly and with perfect clarity) juridical activity in a broad sense (which includes all legal human actions, that is to say those which conform to the requirements of the law) from juridical activity in a stricter sense (which includes those actions which in addition to being legal, also produce certain juridical effects as, for instance, contracts, testaments and in general those acts which make up the category of *negozio giuridico*). However, Croce means by the term "juridical activity" (as we have seen) also those actions contrary to the requirements of the law. Is it, therefore, worth pursuing such a thesis any further?<sup>52</sup>

There is perhaps an additional observation which is worth making. Modern studies in legal philosophy have clearly demonstrated not only the ethical character of law, which was already recognized *ab antiquo* (in so far as law implies a normative evaluation, that is to say an *ought*, attributing an ideal value to certain norms, which exist even when they are actually violated); but also the specific difference which exists between law and the other form of ethical evaluation, which is represented by the term morality, used in a restrictive sense. Briefly stated it has been convincingly demonstrated that the ethical principle manifests itself in two types of orders. In one type we are dealing solely with the individual's sense of responsibility for his actions. This is the domain of morality—a unilateral domain in which rights remain unenforceable. In the other type we are dealing with a bilateral relationship. This is the domain of law—a bilateral domain in which rights are enforceable. Against this precise and rigorous demonstration Croce argues simply that law must be identical with morality or with economics because this division coincides with that of universal and

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51. *Id.* at 41.

52. Croce writes, "If I strike an individual, I satisfy a desire (undoubtedly morally deplorable) and I simultaneously involve myself in a penal code, that is to say I have acted juridically; in this case the juridical act is a violation of the law (philosophical terminology contrasts with that of the jurists, but this does not matter)." Appendix to CROCE, *RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA* 74 (Italy 1926). However, the logic of this argument and not only the language contrasts philosophically.

individual; and since universal is correlated with morality, law must be individual, that is to say economic. With this empty play of formulae one denies the existence, already unopposedly demonstrated, of a juridical universal which exists beside the moral universal. These are the two forms of the ethical principle. It seems as though we have returned to the time of the *ipse dixit*, or of those useless maxims which vainly attempted to confine the progress of knowledge within artificial barriers. We certainly do not wish to be lacking in the respect due to a scholar as learned as Croce. However, we must confess that we do not see the difference between the reasoning by which he denies the existence of the logical universal of law and that of Manzoni's well known Don Ferrante who, because a plague could be neither substance nor accident, denied the existence of a plague while it was running wild around him.<sup>53</sup>

It is not necessary to pause to examine other doctrines which are analogous to those already considered. Many of these have to some degree been influenced by the originals and continue to more or less reproduce the same errors. We only wish to briefly discuss Professor Alessandro Levi's attempt to eclectically reconcile Croce's doctrine (which, as we have noted tends to conceive of economics as an autonomous category which completely absorbs legal phenomena) with the classic doctrine (which affirms the autonomy of law and morality).

Levi recognizes that law, along with morality, is a universal criterion for judging actions. However, he maintains, obviously under Crocean influence, that this is also the situation of economics.<sup>54</sup> In his opinion economics "as a manifestation of spirit also encompasses all human action, that is to say it is the individual evaluation of each human action with regard to its effectiveness as an attempt to satisfy a need of the individual."<sup>55</sup> In economic terms "the evaluation of an action," he explains, means to evaluate it "in relationship to the needs,

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53. It is curious that Croce far from being insulted by the comparison with which he was already familiar, proceeds to defend Don Ferrante: "Granted the truth of the division of genera, substances, and elements in which Don Ferrante believed, he was perfectly justified in refusing to recognize the existence of the plague, because it was not a part of any of those categories." *Id.* at 76. Don Ferrante would have been justified in so arguing if the plague was not clearly present before his eyes. However, since he could observe the phenomenon, he should have believed in its existence, and should have corrected those categories which his experience demonstrated to be erroneous or inadequate. Croce's error is analogous. He refuses to recognize the existence of a phenomenon like the law which, although not as readily observable by the senses as the plague, nevertheless, has been and is rationally demonstrable.

54. LEVI, CONTRIBUTI A UNA TEORIA FILOSOFICA DELL'ORDINE GIURIDICO 95 (Italy 1913); Levi, *A Proposito del Principio Economico*, 24 RIVISTA DI FILOSOFIA (Italy 1933).

55. LEVI, CONTRIBUTI A UNA TEORIA FILOSOFICA DELL'ORDINE GIURIDICO 99 (Italy 1913).

to the interests of the individual who acts." <sup>56</sup> It is undoubtedly true (Levi himself has noted this) that every action corresponds to a certain need or interest of the individual who acts. What evaluation is then possible, rigorously speaking, given this character which is necessarily common to all actions, which represents an a priori certainty? Levi maintains that "one should evaluate from a dogmatic and not critical point of view, sustaining that all human actions, solely because they are performed are economic by definition." <sup>57</sup> But it is not dogmatism, but critical analysis which has taught us the principle of sufficient reason, and, therefore, the maxim that every action must have an adequate motive.

A choice must be made between one or the other. Either one assumes that all human motives reduce themselves to the "economic" motive (in this case no criterion is given for directing activity for obviously all actions will be equally motivated "economically," and in addition no distinction of a deontological character can be made between them) or else one assumes that human activity can be determined by economic and non-economic motives, egoistic and altruistic, or any other manner in which one wishes to distinguish these terms. Under the latter thesis a new criterion which can establish a hierarchy of values and provide norms to resolve conflicts between these opposing motivations is needed to direct human activity. However, this criterion obviously cannot be identical with the economic motive, which is one of the motives which must be regulated. Economics can, therefore, never provide an ethical principle, nor place itself on the same level as law or morality.

The general considerations previously discussed are also applicable here. As we have seen, the demonstrations of the science of economics have a theoretical value, insofar as they can help us understand certain tendencies of reality. They can also have a practical value insofar as they are affirmed and not in contrast with the real ethical norms. For instance, let us consider the principle which maintains that it is best to choose the least costly method of achieving a particular result. This rule could serve as a rule of conduct, but only in those cases where law and morality make it permissible to do so. Many times legal or moral norms, for various reasons, require adherence to different criteria (for instance, in order to prevent the economically stronger contracting party from abusing the weakness of the other party, or to protect national industries against foreign competition, etc.).

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56. *Ibid.*

57. *Id.* at 98.

All knowledge obviously can become a basis for acting and in this manner acquire a more practical value. It is trite to state that he who knows more can achieve more.<sup>58</sup> But the use of knowledge and its translation into action always remains subordinate to the prescriptive norms governing human activity. Legal and moral norms are the only norms which have a categorical character.

It is, therefore, a mere paralognism to convert the necessary dichotomy of the ethical forms into a trichotomy by adding a third form (*i. e.*, economics) which is completely extraneous.

## VII.

### CONCLUSION—LAW AS A REGULATORY SYSTEM OF ECONOMIC ACTIVITY—HARMONIZING FUNCTION OF THE STATE.

The conclusions of our study are sufficiently clear. They can, therefore, be restated briefly. Law is a universal principle governing (in conjunction with morality) all human actions, and, therefore, also those which tend to satisfy needs and the acquisition of material goods. The norms of these two forms of the ethical principle dominate all human actions, and, therefore, also those of an egoistic or utilitarian nature. Briefly stated, the norms of the legal order determine the use of economic theories.

These norms which determine the use of economic theories constitute only a part of the matter regulated by law. In every place and every epoch—so long as people have had to live together—economic activity has in some manner been disciplined by the juridical order. This order does not necessarily (is it necessary to make this observation?) have to exist in the form of codes or written laws (which may actually not exist as is the case in certain phases of historical development), but in the reciprocal limitation of fields of activity, that is to say in correlative rights and duties.

Juridical norms can be as varied as the economic activity to which they are applied. For instance, a law which leaves a great deal of discretion to individual initiative or to the power of acquisition and free commerce (sometimes even to the point of making it possible for the stronger or more fortunate classes to suppress weaker individuals or

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58. Bacon expressed this concept: "Knowledge and human power are synonymous, since the ignorance of the cause frustrates the effect; for nature is only subdued by submission, and that which in contemplative philosophy corresponds with the cause in practical science becomes the rule." BACON, *NOVUM ORGANUM*, Book 1, Aphor. III (Devey trans. 1901); "Nature is only to be commanded by obeying her." *Id.* Aphor. CXXIX; This concept was also expressed in ROMAGNOSI, *Vedute Fondamentali sull'Arte Logica*, in 1 *OPERE* 218 (Italy, De Giogo ed.); see also *id.* at 499; *id.* vol. III at 174-175.

classes in disregard of the demands of justice and social peace) may be adopted. On the contrary the concept of reducing individual initiative to a minimum and instituting numerous prohibitions and controls to achieve this end (to the point of abolishing or excessively limiting private property and impeding the exercise of human liberty in many of its natural fruitful inclinations) may predominate. The defects of these opposing extremes are obvious.

In this matter numerous varying doctrinal systems have been developed and experimented with in the course of history. This development and experimentation has occurred in the midst of continuous and often intense differences of opinions and interests. We are here interested in noting that all these systems are and remain juridical, even when applied to economic matters. None of the practical or political programs of the various "economic schools" can avoid regulating in some manner the respective rights and duties existing between the collective entity and the individual, and those existing between individual and individual. Therefore, both the individualistic and socialistic concepts and all of their hybrids, insofar as they concern themselves with relationships of production and exchange, necessarily involve a political system, that is to say, in the final analysis, a system of law. The bases of such a system always consist in an estimate, whether it be correct or incorrect, of the unique ends of human nature, and of the best and most representative rules of life. Therefore, one cannot deny that these determinations lie in the deontological, that is to say ethical domain, in its intersubjective or social form,\* which precisely constitutes the law.

From the fluctuating tendencies and schools of thought which exist in this subject, it is worth seeking some point of orientation. The fundamental principle of political organization is that the juridical order (that is to say the State) must create harmony amongst the various elements of which it is composed. This harmony must be achieved with respect for natural rights, which constitute the presupposed ideals and the fundamental notions on which the State is based. Good politics consists in encouraging and not shackling the natural development of individual and cooperative activity. Cooperative activity is the means by which the gregarious inclination of human nature manifests itself. This gregarious inclination finds its highest expression in the State. Individual initiative as well as the formation and activities of social groups must be protected by the State so that this natural energy can achieve its desired ends. In this manner they

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\* Translator's note, cf. DEL VECCHIO, *PHILOSOPHY OF LAW* 263 (Translation of 8th ed., by Martin, 1953).



will reciprocally strengthen each other and also increase the vitality of the State which, in the positive order, represents their highest unification.

In this manner the primacy of the ethical norm, and more precisely of juridical norms, over the economic elements of life is established and reaffirmed. However, the same relationship of supremacy and subordination is also observed in less perfect and less stable forms of social organization (as for instance, subservient juridical entities which exist in a State but are not completely subjected to it, and likewise in forms of supernational or international organization).

#### POSTILIA.

An article by one of the most distinguished Italian economists, Professor Luigi Einaudi, former president of the Italian Republic,<sup>59</sup> which was among the discussions which this brief study produced when it was first published, is especially worth considering.

After having diligently restated the thesis developed in my article, according to which economics is, as he expresses it, "a science which is simultaneously hypothetical and partial," and after having observed that many economists are inclined to be satisfied with this "subordinate role assigned to that science," Einaudi declares that economics does not have as its ultimate end that of prescribing rules of conduct to men, but only to indicate certain consequences of their acts to them. He states that, "economics does not tell man that he must act in a given manner; but rather that certain acts will have certain economic consequences. For example, particular buying and selling activities will have a definite effect on prices, salaries and profits." This definition of the domain of economics, and especially its clear separation from that of ethics seem to precisely confirm that which this study has attempted to demonstrate. However, Einaudi does not believe that this separation implies a subordination of economics to ethics. This may be true if the two fields are considered separately and in an abstract sense. However, in my opinion, this ceases to be true if the reality of human activity is considered. This activity proceeds on the basis of a desire to achieve certain ends, and then seeks to find the means which are capable of achieving these ends. It, therefore, would seem that the primacy of ethics (as a discipline which regulates the ends of life) over the limited and hypothetical theories of economics cannot be denied. On the other hand, if Einaudi's lucid mind has expressly

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59. Einaudi, *Morale et Economique*, REVUE D'ÉCONOMIE POLITIQUE (France March-April 1936).

rejected the position which would relegate to economics the task of providing "moral" counsel (and unfortunately other economists, as we have seen above, have fallen into this error) then the fundamental importance of the question justifies further clarification.

In fact Einaudi himself, recognizes, with rare equanimity, that economists are "les coupables involontaires" of this error which results from their past adherence to Bentham's school, and "brûlé leur encens pour l'idole utilitariste." From this he justifiably notes that economics was subjected to an influence which has not yet been removed.

According to Einaudi, the hypothesis that human actions are exclusively determined by an egoistic motive or a utilitarian criterion is not essential to the science of economics. Actually this science must liberate itself from this hypothesis, and, therefore, also from the concepts of the *homo oeconomicus*. Einaudi maintains that Pantaleoni and other great economists erroneously thought it necessary to construct their science on such a basis. At the present time this basis has revealed itself to be uncertain and unnecessary. This is illustrated, for example, by Robbins' introduction to Wicksteed's work.<sup>60</sup>

The real premise on which economists have based their science (tacitly and unconsciously in the past and consciously at present) is the axiom that regardless of the variation in the motives of human actions, the means which man has at his disposition to achieve his desired ends are *limited in quantity*. Economics is not concerned with situations in which limitations do not exist. Conversely economics concerns itself with problems of allocation of scarce resources. The necessity of choosing is a result of the limitation of means. Economics in itself does not impose this choice. However, by means of the calculations which it furnishes it helps to bring all the relevant facts and possible consequences to light. From this Einaudi concludes that economics is just as useful as law and morality in the process of searching for truth. He does not at all consider economics to be inferior to law and morality but he attributes to it the same "dignita universale."<sup>61</sup>

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60. WICKSTEED, COMMON SENSE OF POLITICAL ECONOMY, introduction (1933).

61. Einaudi, *supra* note 59 at 25. However in some places Einaudi seems to admit the superiority of ethics, at least in a certain sense. He states "La morale seule évalue les actions des hommes d'un point de vue absolu. L'économique, en appréciant les résultats obtenus, facilite l'évaluation absolue qu'elle n'est pas appelée à faire." *Id.* at 19. In a subsequent work he refers, with admirable frankness, to a possible modification or integration of his thesis. He states, "after having believed for a long time that it was not the economist's function to propose desirable ends to the legislature but rather to describe the passage from servitude to master, to note the proximity of the Rupe Tarpea to the Campidoglio, that is to say that he must assure that whatever be the end sought by politicians the means used must be sufficient and efficient; I presently doubt the validity of this position. Perhaps I will later conclude that it is impossible for the

Einaudi's scholarly and penetrating analyses obviously are very important. It is an honor to have stimulated this study. However, one must comment briefly. This comment will also help to emphasize certain essential aspects of the study.

The distinguished author has gone so far in excluding all moral judgments from economics that he even objects to the use of the term "value" in this subject.<sup>62</sup> It is doubtful even considering the universally recognized authority of the writer, that all economists would agree with him.

In his opinion, the only function of economics is to enlighten men on the possibilities and effects of their acts, irrespective of the motives behind these acts and regardless of their moral worth or defectiveness. He maintains that economics need not establish a selection or hierarchy of the motives, the needs or ends of man. Economics accepts all possible motives, needs or ends and refers itself on these matters exclusively to the choice made by man himself. The sordid preoccupations of a miser or the spirit of sacrifice which motivates a soldier or a martyr to give even his life are equally a part of the human action with which economists are concerned. Therefore, egoistic and altruistic elements are equally relevant. Economics does not even have the purpose of "teaching men how to become wealthy" or to educate them to be thrifty.

Einaudi further sustains, contrary to commonly held opinion, that economics must not only consider material needs. Even when man acts to achieve spiritual or moral ends, the "economic point of view" must be considered. He admits that it is true that up to the present time economics has limited itself to applying its analysis to actions concerned with achieving material ends, which generally are called economic ends. But, since actions directed toward achieving spiritual or moral ends also require that the individual possess a knowledge of the efficacy of the available means, it follows that these actions are also part of the domain of economics.

This enormous extension of the field of investigation which up to the present time has been assigned to economics is not likely to be

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economist to separate his duty of analyzing means from that of clarifying ends and that the analysis of ends is just as much a part of the science of economics as is the analysis of means (to which economists limit themselves). However, I must recognize that the analysis of the adequacy of means in achieving ends and of the logical coexistence of ends is much more difficult and morally significant than that of determining the worthiness and acceptability of ends." Einaudi, preface to TURRONI, *INTRODUZIONE ALLA POLITICA ECONOMICA* 15-16 (Italy 1942). However, the real question is not which of the two types of analysis (i.e., that of means or that of ends) is morally more important, but whether the analysis of ends belongs to the study of economics or morality.

62. Einaudi, *Morale et Economique*, *REVUE D'ÉCONOMIE POLITIQUE* 8 (March-April 1936).

acceptable to the students of this science. It seems to us that one might object that the acceptance of the previous proposition creates the risk of destroying all limits placed on economic analysis. Under Einaudi's theory economic analysis would coincide with and invade the domain of many other sciences which also provide necessary and useful data which must be considered by anyone who wishes to act intelligently. Even common experience tells us that we cannot act reasonably if we are not aware of or ignore those elementary notions of arithmetic, physics, hygiene, and other materials which everyone in fact becomes aware of and experiences to some degree from infancy and clarifies for himself in varying degrees in later life. Furthermore, every art, profession, or trade has its own particular technique (that is to say it supposes the knowledge and use of certain data related to a particular field of activity). Does it, therefore, follow that since economics attempts to make experts of men in all types of actions it also includes all these various branches of knowledge. Or should one not perhaps be inclined to think that it is more convenient to retain the traditional concept, according to which economics specifically limits itself to an analysis of the facts and problems which are related to the production and circulation of wealth.

However, this larger area of activity is acceptable in a general sort of way insofar as the expansion leaves intact the principles of ethics and does not imply the adoption of any normative criteria. Einaudi's declarations on this point are so clear as to leave no grounds for uncertainty.

Let us, nevertheless, pose the following case. Does the delinquent who accurately ascertains that the instruments and weapons which he is to use in committing theft or aggressive acts are in good condition and who furthermore takes all possible precautions to achieve his end and escape arrest and punishment thereby commit an economic act? It seems that a rigorous logical interpretation of the thesis presented by Einaudi would require an affirmative response to this question. However, in reaching this conclusion the author does not presume to have refuted the methodological assumption which consists, in substance, in the well-known maxim that it is always worth pondering in advance the effects of one's acts and to adjust the means to the ends desired. This should be sufficient to illustrate that this maxim by itself is not sufficient as a rule of conduct, but must be accompanied, or more precisely, must be preceded by another which determines legitimate or honest ends, distinguishing them from illegitimate and dishonest ends.

The necessity of premeditating, even though this premeditation is translated into rigid and mathematical formulae, forms part of the general rule counseling prudence, which has a place in all ethical systems. However, this rule of prudence is therein always joined and subordinated to other fundamental precepts such as those of love for one's neighbor, of charity, and of respect for other's rights, that is to say justice.

One readily admits, as Einaudi observes, that all science insofar as it tends to discover truth, merits equal respect. Certainly the author has never denied this respect to economics, even when he has sought to define its nature and limits in relation to other branches of knowledge. In the same way it is quite obvious that all who perform their particular duties well are equally worthy of respect, regardless of the grade or position which they occupy in a given organization. But if from the ethical point of view, evaluation is not based on the importance or hierarchical position of the function, but rather on the manner in which the function is performed (for instance, a morally good soldier is worth more than a morally bad general), this does not alter the fact that from a logical and technical point of view it is necessary to establish a certain order and also a certain hierarchy (attributing diverse grades to diverse functions according to their respective importance in achieving the desired end) in the ordering of knowledge and in all organizations and cooperative work. In this sense, the problem of establishing criteria on which to base human action is posed. One must recognize the primacy of the two branches of deontology (law and morality) over those subjects which can offer only phenomenological data or causal explanation but cannot offer principles which bind the individual. This is precisely the status of economics.<sup>63</sup>

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63. It does not seem necessary to note the various opinions written (in addition to the authoritative one by Einaudi) regarding the problem discussed in this work. The majority of the critics who referred specifically to this work (in its first edition) were in accord with the thesis expounded. Others posed various objections which however do not, in the author's opinion, invalidate the substantial truth of the thesis.