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**Agape, the Golden Rule, the Rule of Law, and Wealth Maximization: All the Same Idea?**

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*Abstract*

 A*gape*-based law, if based on the Golden Rule, would look much like our own, a variety of “the rule of law” as opposed to “the rule of man”. It would achieve a rough approximation to what economists call “wealth maximization”--- rules that best enable the satisfaction of human desires. This is what U.S. law does, and that of other countries under the rule of law. Whether the state should compel redistribution of wealth is a separate question, and redistribution is better achieved by taxes and transfers (e. g., by progressive taxation) than by distorting the incentives law provides (e.g., by allowing theft if the thief is poor). On the other hand, current U.S. law does little to protect the souls of those under its jurisdiction, and it does very little to satisfy “the first and great commandment”--- “Thou shalt love the Lord thy God with all thy heart.”.

*[This paper was written for the February 2014 Pepperdine conference on “Love and the Law”. It is a very rough draft, with important unfinished sections in brackets. I do not know where I will send it when it’s done; perhaps a law review would be appropriate. I might change my conclusions 180 degrees on some points, so keep that in mind.]*

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I. Introduction.

 In this essay I will argue that *agape*-driven law is not dissimilar to current American law, a form of the “rule of law” which, like much but not all of human law across history, is a rough approximation to a set of rules achieving what economists call “wealth maximization”. To make this argument, I will start out with a discussion of the various forms law can take, then bring in the idea of *agape*, and finally explain how this relates to wealth maximization. I should, however, say one thing immediately so that the reader will see whither the argument is tending: “Wealth maximization” is a term of art that does not mean trying to maximize a country’s gross domestic product or the value of people’s assets. Rather, it is closer to utilitarianism, the idea of trying to increase happiness generally even at the cost of sometimes hurting individuals. That said, let us begin.

II. The Varieties of Law.

 First let us think about the different varieties of law so that we can know from what possibilities *agape* can choose. We have divine law in its categories of civic, ceremonial, and moral law.[[1]](#footnote-1) And we have natural law: the law that men can derive from common grace and without inspiration— perhaps by God putting it in our hearts directly, perhaps by study, experience, and deduction. There is just one divine law and one natural law, though it is of course difficult to know what the law says. Is all divine law written in the Bible and in our hearts, or available through natural law? I will not try to answer here, but while natural law is often difficult to pin down, even the law of the Bible can be hard to understand. This is neither a bug nor a feature, but an inevitability. Written law can include only so much explanation and when borderline cases come up, someone must interpret the law— the person trying to obey it, the prosecutor, or the judge. God is the final judge for divine law and natural law, but we must wait till Judgement Day for the precedents to be set.

Moreover, our real problem is that we are fail to obey even the parts of the law that are clear to us. It is as Portia said to her maid Nerissa in *The Merchant of Venice.*

NERISSA: They are as sick that surfeit with too much as they that starve with nothing. It is no mean happiness therefore, to be seated in the mean: superfluity comes sooner by white hairs, but competency lives longer.

PORTIA: Good sentences and well pronounced.

NERISSA: They would be better, if well followed.

PORTIA: If to do were as easy as to know what were good to do, chapels had been churches and poor men's cottages princes' palaces. It is a good divine that follows his own instructions: I can easier teach twenty what were good to be done, than be one of the twenty to follow mine own teaching. The brain may devise laws for the blood, but a hot temper leaps o'er a cold decree: such a hare is madness the youth, to skip o'er the meshes of good counsel the cripple.

 And then there is the Law of Man. It includes such things such as tort law, criminal law, anti-trust law, and administrative law. The Law of Man, unlike the Law of God, is multitudinous, varying across both place and time. It is legal now in America to abort your baby; 100 years ago it was illegal. It is legal in America to own a Bible; in North Korea it is not. American drivers are limited to 70 miles per hour; Germany has no speed limit on the autobahns. In America, sodomy is legal; in India it is not.[[2]](#footnote-2) In America, a jury decides contract disputes; in most countries only judges are involved. But there are also universals. Murder and theft are illegal everywhere. People must follow their contracts. Injuring someone else requires compensation. Property is owned by someone. To be sure, the courts enforce the law so poorly in some places and times that the law is near-useless, but lip service at least is paid to these principles.

III. The Rule of Law.

 Most importantly, however, in many countries the Rule of Man is as important as the Rule of Law. Instead of a system in which the judges follow a set of laws which changes only slowly and by observable processes, the judges do what they think best. If the judge is selfish, he proclaims as the law what is best for himself, saying that justice is the will of the stronger, as Thrasymachus said in Book I of *The Republic.* “The stronger” in this context is not usually the judge, but whichever of the litigants can most reward or punish the judge. If the judge is unselfish, he proclaims as law what he thinks is best according to whatever his own notion of justice may be. This will generally be according to how he thinks a particular case should turn out, rather than according to any external set of laws that people can use to determine their behavior. If he changes his mind about what he thinks best for society, his decisions— which in effect is the law— change instantly too.

 We in America have heard the Rule of Law praised so much that we all do give lip service to it, at least. But its superiority is not obvious, and in practice many of us dislike it, and dislike it not for selfish but unselfish reasons. Suppose a Mr. Smith is guilty of murdering two policemen who had killed his wife but escaped punishment because of technical errors made by the prosecutor. You are a juror at Smith’s trial, and the law clearly says that if you find him guilty that he must be executed. Will you find him guilty? Many of us would say “not guilty”, resulting in “jury nullification” of the law, whether because we believe Smith’s action resulted in justice that the courts had failed to provide or because we find the death penalty morally repugnant. The judge in Smith’s case faces the same decision. Is it moral for him to deliberately distort the law so as to pretend that Smith should be released or that he is only guilty of some lesser version of murder not eligible for the death penalty?[[3]](#footnote-3) Back when American law was more formalist and the death penalty more frequently applicable, this kind of situation came up all the time. There was the “unwritten law” that juries should acquit a man who had murdered his wife’s paramour.[[4]](#footnote-4) In other cases, juries and judges would convict the defendant and sentence him to death, but the judge would recommend to the governor that he pardon him or reduce the sentence.[[5]](#footnote-5) The executive’s pardoning power was never used widely and has shrunk in its use since those days, but it is an example of the Rule of Man formalized into our Rule of Law.[[6]](#footnote-6)

Throughout history, the Rule of Man and the Rule of Law have contended. Plato said that we would not have good government until philosophers became kings. Madison said that we could rely on contending selfish factions. It is the same contention as between Virtue and Incentives, Ancient Philosophy and Enlightenment Philosophy, Plato and Hobbes, Rousseau and Montesquieu, Hegel and Madison, The Continent and Britain, the Unconstrained Vision and the Constrained.[[7]](#footnote-7)

###  One of the best examples is the contention between the Confucians and the Legalists in China. Confucius said[[8]](#footnote-8)

2.1 The Master said: When one rules by means of virtue (*de*) it is like the North Star – it dwells in its place and the other stars pay reverence to it.

2.3 The Master said: Guide them with policies and align them with punishments and the people will evade them and have no shame. Guide them with virtue (*de*) and align them with *li* and the people will have a sense of shame and fulfill their roles.

12.18 Ji Kangzi was concerned about bandits, and asked Confucius about it. Confucius replied, “If you yourself were truly not covetous, though you rewarded people for it, they would not steal.”

12.19 Ji Kangzi asked Confucius about governance, saying, “How would it be if I were to kill those who are without the *Dao* in order to hasten others towards the *dao*?”

 Confucius replied, “Of what use is killing in your governance? If you desire goodness, the people will be good. The virtue of the *junzi* is like the wind and the virtue of common people is like the grasses: when the wind blows over the grasses, they will surely bend.”

12.22 The Master said, “If you raise up the straight and place them over the crooked, they can make the crooked straight.” …

13.2 Zhonggong was serving as steward for the Chi family. He asked about governance. The Master said, “Provide a leading example to your officers. Pardon minor offences. Raise up the worthy.” …

13.11 The Master said, “’If good men governed for a hundred years, cruelty could indeed be overcome and killing dispensed with.’ How very true that saying is!”

13.13 The Master said, If one can make his person upright, then what difficulty will he have in taking part in governance? If he cannot make his person upright, how can he make others upright?

Three hundred year later Han Fei, of the Legalist School, took a different attitude:

 “Now there are not more than ten truly merciful and faithful men in this country, whereas there are hundreds of official posts. So if only merciful and faithful men are selected for public service, the candidates will not be sufficient for filling all the official posts. In that case, those who maintain order would be few while disturbers would abound. Therefore, the way of the enlightened lord is to unify laws instead of seeking for wise men, to solidify policies instead of yearning after faithful persons. In consequence, as long as laws do not fail to function, the body of officials will practise neither villainy nor deception.”[[9]](#footnote-9)

 Han Fei turns this idea onto the Confucians themselves:

“For such reasons, it is a common trait of the disorderly state that its learned men adore the ways of the early kings by pretending to benevolence and righteousness and adorn their manners and clothes and gild their eloquent speeches so as to cast doubts on the law of the present age and thereby beguile the mind of the lord of men…”

[Here discuss the rule of law more. Make the point that the Old Testament is about the Rule of Law. Cite Samuel on the tyranny of kings.]

IV. What Is the Law? Holmes’s Good Man and Bad Man.

 Before we come to agape, I wish to address one more way to classify law. It is useful to distinguish between *de facto* law and *de jure* law, incongruous though “of-law law” may sound— between law as it operates in the real world and law as it is stated to be. Which one is the real law?

 If everyone understands that the de jure law is not meant to be followed, the question is easiest. Suppose the city statute and the speed limit sign— the written laws— say that the speed limit is 30 miles per hour on a certain stretch of road, but in practice it is safe to drive up to 40 miles per hour, everyone does, everybody agrees that that is reasonable, and nobody slows down even when a police car is behind them because they know the police tolerate that speed unless road conditions are bad or someone is driving recklessly. In that case, we would commonly say that “the law” is to drive under 30 miles per hour, but “in effect, the law” is to drive under 40 miles per hour. While we would say “what is written on the sign” is a limit of 30, we would say that “what it really means” is 40, and when you see the limit “30” on a sign, that means to be careful not to drive more than 40 miles per hour. Here, the reality is not the number on the sign. This city is using the symbols “30” to mean forty miles per hour. The city could have used the symbols “40” or “*quarante*” or “\*&#%”— what matters is the meaning people receive in their minds when they see a combination of symbols, and that they all understand the symbols in the same way. Indeed, one might well argue in this situation that not only the de facto but the de jure speed limit is 40 miles per hour, because that is the legitimate custom and custom is more legitimate law than statute. A judge would like to throw out any speeding case brought before him. The mayor would pardon the offender if he had the pardoning power.[[10]](#footnote-10)

 I start with this because it introduces a more important problem for thinking about *Agape* and Law: what to think when different people react to the legitimate, intended, law differently. Again, let the speed limit be 30 miles per hour, but now suppose that higher speeds are unsafe, that everybody does drive 30 miles per hour, that everybody agrees that they would like everyone else to drive no more than 30 miles per hour, and that the police would ticket anybody they caught speeding. Crucially, however, suppose that the police do not have time to patrol that stretch of road. What now is the law? For the law-abiding citizen, the legal speed limit is 30 miles per hour, but for the conscienceless citizen the speed limit is infinite.

This problem is the subject of Oliver Wendell Holmes’s famous essay, “The Path of the Law.”[[11]](#footnote-11) He distinguishes between the Good Man and the Bad Man. The Good Man does what is right. He doesn’t need the *de jure* law; he knows how to behave. The Bad Man does what is expedient. All he wants to know is the *de facto* law, that is, what will happen to him if he takes a particular action. For him, the law against speeding amounts to: “You have a choice. You may drive under 50 miles per hour, and the police will not stop you. You may drive between 50 and 60 miles per hour, but face a 30% chance of being stopped and having to pay $100.” Holmes notes that the Bad Man is keenly interested in the law, because he wants to do bad things, but not if they are too expensive for him. Thus, Holmes argues, when we think about law, we should ignore the Good Man— who doesn’t really need law at all— and focus on the Bad Man, who will react to changes in the law. Also, Holmes argue, the probability and method of enforcement is just as important as the penalty, so legislators should think just as carefully about those things as about what law they put on the books.

 In the Good Man and the Bad Man we can imperfectly see the Christian and the Unbeliever.[[12]](#footnote-12) When we think about *agape* and the Law, we must think about making law for both kinds of people. A given law will have different implications for the Christian and for the unbeliever. Yet we must have one law for both— not just because of our Constitution, but because our Christian here is the true Christian, not just someone who says he is a Christian or who lives what appears to be a devout Christian life. When we consider Agape and Law, we will need to think first about how the Christian would construct a legal system according to *agape*, but also about how a Christian will behave under that legal system according to *agape,* knowing that the Unbeliever will behave according to expedience.

 V. What Is Agape?

 We now can come to *agape*. What does it mean in English? That has been the topic of many pages of scholarly and nonscholarly writing. *Agape* love is famously contrasted with *philia* love and *eros* love, the emotion of affection towards friends and family and the emotion of desire.[[13]](#footnote-13) Also, Greek lacks a word for “to like”, so it has to use *agape*, *eros,* and *philia* to mean “mild love”. Thus, we must not think that when a Hellenistic Greek said some word we translate as “love” he meant something as strong as an Englishman means. Our Bibles translate *agape* and “love”, but St. Jerome translated *agape* by *caritas* in the Vulgate, not *amor*, and the King James translators agreed with him when they chose the awkward word “charity”, which is appropriate since *agape* is not naturally translated by any word in English.

 What, then is *agape*? It seems to be an attitude, not an emotion. One can choose to *agapeo* someone else, as an act of will. Thus, one can *agapeo* one’s enemy. In contrast, one cannot choose to *philia* or *eros* someone else.[[14]](#footnote-14) That is why it makes sense to command Christians to *agape* one another. You can dislike them, but still *agape* them. Agape is thus the opposite of the “unconditional love” it is so often claimed to be. *Eros* and *philia* are unconditional, because they are involuntary emotions. I cannot choose but to lust after a beautiful woman or to hold my child in affection. I can, however, choose to love my enemy, and, if I so wish I can choose to love him only if he accepts certain conditions. It is an entirely different question as to whether I should impose conditions, or whether God imposes conditions in his love for us; what is relevant is that willed love can be either conditional or unconditional.

 I may well be wrong on this; I do not even read Greek, so do not take me as an authority. One of the most eminent of scholars of *agape* concluded that *agapan* (to use the infinitive) became just a synonym for *philein*, replacing *philein* because (a) *kinein,* the word for “to kiss”, went out of use because it was embarassingly close to the word for “to impregnate”, *kouein*, (b) *philein* replaced *kinein* as the word for “to kiss” since some word was needed for that concept, (c) *philein* went out of use for “to love” because it was embarrassingly close to “to kiss”, and (d) *agapein* was pulled in to replace the disappearing *philein* as the word for “to love”.[[15]](#footnote-15) But for this essay let us take the conventional position and consider *agape* an attitude, to be willed not felt, and shading over into esteem and respect. Thus, we will be thinking about law based on the attitude of love/value/esteem/respect, not about law based on the emotions of affection or desire.

 Examining the historical evidence on Hellenistic speech, however, is not the only approach to determining the meaning of *agape.* Another is to look specifically at the Bible’s use of *agape*, where it might be used as a term of art quite different from the extrabiblical use. The Bible verse which most clearly links *agape* and law is Matthew 22:37-40:

“Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets.”

  *Agape* is thus an attitude mingling respect, esteem, and care. It is the attitude a Christian should have towards both Christians and non-Christians. It is not just caring about the other person’s happiness. To that it adds respect for them as a fellow citizen of the world, and esteem for them as creatures made in the image of God. It is not the benevolence of a king towards his subjects. Rather, it implies a sort of equality.

When we apply the idea of *agape* to God’s love for us, thinking of *agape* as respect is almost blasphemous. God *is* the benevolent king, and Christians make no claim to be equal with him in honor. Yet, actually, we do claim to be equal with him in honor. We claim adoption as sons of God. That makes us brothers of Jesus. And that, to a trinitarian, makes us brothers of God— younger brothers, to be sure, but part of the family.

 This is a mystery, but even if we can’t understand the details, the concept is useful for thinking about law. God can *agape* Christians, so Christians can *agape* unbelievers. And just as God punishes Christians, so can *agape* law punish Christians and unbelievers alike, as a matter of justice (despite Judgement Day providing more adequate and accurate punishment), but also as a matter of providing incentives to avoid harming oneself and others, and of deciding who should bear the cost of unfortunate occurrences even if nobody is to be punished. Most important, the Christian, while not ignoring the outward earthly consequences of law, must ask with Professor Murphy, “What effect will punishments of a certain sort have on the soul of the person being punished and the souls of other persons in the community?”[[16]](#footnote-16)

 V. Agape-Driven Criminal Law for Christians Alone.

 Let’s think first of designing laws for Christians according to *agape*, and come to unbelievers later. Suppose we are designing laws for people who are generally trying to please God with their behavior but frequently fail. Failures come in two kinds. First, we willfully sin. I steal a parking permit someone has left unguarded, with the rationalization that I need it more than they do. Second, we accidentally do wrong. I sideswipe someone else’s car in the parking lot, not because I dislike them or enjoy it but because I did not exercise great care. Let us consider these two kinds of failures in turn.

Consider larceny. This is a criminal, not a civil, offense. The difference is not in severity or immorality. Stealing a parking permit does not cause as much harm as accidentally killing someone with your car, and is not as immoral as intentionally destroying someone’s marriage with slander. Rather, actions are criminalized if we think they are never proper and their impropriety is clear enough that the actor has no excuse.[[17]](#footnote-17) They are nonetheless subject to civil penalties because we think that even if the action is often justifiable, the actor should pay for any harm he causes. Being a little careless in driving is often excusable, and even desirable. We don’t want to force everyone to be as careful in their daily commute as we force airline pilots to be in commercial flights— it would be silly to insist on co-pilots in commuter cars, for example. Intentionally destroying someone’s marriage with slander is always wrong, but it can be very difficult to prove intentionality; how do we know that the slanderer’s intent was evil and that he knew his speech was false?

The traditional functions of criminal punishment are retribution, deterrence, incapacitation, and rehabilitation, to which I like to add stigmatization. God’s will or natural law requires retribution; more simply, we feel injustice has been done if someone such as an elderly Nazi prison guard escapes punishment for his crimes even if it is clear he will never repeat them. Rehabilitation does not have to be unpleasant for the criminal and is punishment only in the sense that some criminals do not think the process is worth being rehabilitated or do not want to leave a life of crime. It has a moral component— the Christian is glad that the criminal will sin less— and a deterrent/incapacitative component— the criminal is less likely to cause us trouble later. Deterrence arises from the prospect of punishment reducing the incentive for crime; incapacitation is the use of a penalty to prevent the criminal from repeating his offense whether he looks ahead to future penalties or not. Stigmatization is the publicizing of the fact that the criminal committed the particular crime, so that others in society can be wary in their future dealings with him— and also so that the extent of his crime is carefully delineated and they are not overly wary of him because they suspect him of worse than he actually did.[[18]](#footnote-18)

*Agape* supports all these purposes of punishment. As a Christian, I should want to be saved from sinning. Thus, if I feel my will too weak to stop me from sin, I should be happy if I am incapacitated or rehabilitated. I should also be happy if my weak will is given the extra help of fear of punishment that deterrence gives. If I am tempted by pedophilia, for example, I should tell that to my church leaders. They will then deny me the opportunity to be a vacation bible school counsellor, which I might otherwise in a moment of weakness ask to do. That’s incapacitation. They will counsel me and try to redirect my evil desires. That’s rehabilitation. They will, I hope, tell the police about my predilection if I am arrested for child molesting.[[19]](#footnote-19) My fear of that extra evidence provides deterrence. They will inform anyone who needs to know about my temptations, revealing it if, for example, they hear that I have become a Cub Scout cubmaster. That’s stigmatization. Retribution is missing, but all of this occurs before any actual misbehavior on my account, so retribution is inapplicable.[[20]](#footnote-20)

Retribution is more problematic, however, when it is applicable. Jesus died on the Cross in payment for the Christian’s sin, including the particular sin at issue. If so, should I feel that justice demands retribution for my stealing of the parking permit? After all, Jesus died as payment for that act of larceny; retribution has already been inflicted. If not, then the punishment should be limited to fulfilling the other four purposes, and, in fact, it is close to blasphemous for me to think that my personal acceptance of additional punishment matters.

Fortunately, we can avoid that issue in many situations. The five purposes of punishment are not additive. It is not that every crime demands equal levels of punishment in the form of retribution, deterrence, incapacitation, rehabilitation, and stigmatization. The last four kinds of punishment are prudential, so if any one of them is effective enough at preventing future offenses, all the others can be set to zero. All together, however, they are not additive with retribution. If there is no possibility of future offenses, as with the elderly Nazi prison guard, there should be a punishment for retribution, but no extra punishment for the other purposes.[[21]](#footnote-21) Usually there is the possibility of future offenses, however, so the prudential purposes *are* operative, and if they inflict a high enough level of punishment, it reaches or exceeds the level appropriate for retribution and no further punishment is needed for justice’s sake. The level of surplus-maximizing deterrence penalties that pure prudence suggests rise with the magnitude of the harm from the crime, just as the level of retribution penalties do, so often the same schedule of penalties would result even if we ignore retribution. The prison guard hypothetical is the exception, not the rule.

As we develop the economic analysis of law we will observe a surprising correspondence between justice and efficiency. In many cases, principles we think of as just correspond fairly closely to rules that we discover are efficient. Examples range from "thou shalt not steal" to "the punishment should fit the crime" to the requirement that criminal penalties be imposed only after proof beyond a reasonable doubt. This suggests a radical conjecture—that what we call principles of justice may actually be rules of thumb for producing an efficient outcome, rules we have somehow internalized.[[22]](#footnote-22)

 I have been using myself as the hypothetical Christian criminal. The next two steps come from the Golden Rule.

First, if I love another Christian as myself, I should want him to be prevented from future sinning, just like myself. He, too, should wish to be held back from sin. I should therefore support punishment for him just as for myself.

Second, I should be concerned about the implications of crimes for victims and potential victims, whether Christian or unbeliever. In most crimes, it is not just God I displease, but other people. Whoever’s parking permit I stole will be inconvenienced. Hence, I should want to stop myself from stealing for the sake of present and future victims, both because of the direct harm and because if they fear theft they will have to take precautions against it.

Finally, it is worth talking about the role of the Church in criminal law. The Church should help with rehabilitation, and, indeed, can probably be much more effective than the State. That should not be surprising, since the Church is supposed to be a specialist in sanctification, which is neither the priority nor the expertise of the State. I heard about a good example recently. A deacon decided to take action against abortion. Without telling anyone in advance, even his wife, he broke into an abortion clinic one night, smashed up the offices, and was promptly arrested. His church’s response was for the elders to administer lengthy tongue-lashings and admonishment against engaging in civil disobedience without careful thought and advice. He soon admitted that he was wrong, to the elders and the court, but he was nonetheless removed as a deacon and pleaded guilty. His sentence was light, however, and at sentencing the judge explained that it was evident his church would watch him carefully, better than a state probation officer could. Unfortunately, the judge also said that this was unusual in his experience; ordinarily a criminal’s church would either disown him completely or pretend that nothing had happened. With the Church, as with the State, theory doesn’t always match practice. But under law driven by agape the Church would play a large part.

 *[Unfinished items:]*

*1. What about the victim’s desire for revenge? Should it be treated at legitimate? No, probably. No victims’ rights stuff. Or would that just stoke bitterness?*

*2. What about third parties’ desire for retribution? Should it be treated at legitimate? Yes.*

*3. What about pardons? They are OK. Political pressure, so not quite Rule of Man.*

 VI. Agape-Driven Criminal Law for Unbelievers.

[Unfinished: What about the unbeliever? A similar logic holds, but not identical. The non-Christian does not care about pleasing God. He may be quite happy to sin. That, however, is because he does not realize how badly God will punish him. While the Christian cannot redeem the sinner, he can at least diminish his punishment by diminishing his sin.]

 VII. Agape-Driven Civil Law

Here the considerations are the same for Christians and for unbelievers. Part of human law is the Moral Law. Thus we have a law against burglary. The Christian should, as Holmes’s Good Man, know enough not to steal even without that law. But Christians sin. How should we treat a Christian who has committed burglary? As a Christian, he will sincerely repent and return the stolen property. But that is not enough. Justice demands punishment. He should confess and accept some suitable punishment. It is hard to know what— but that is one purpose of law. His church leaders should punish him, even if the law does not, perhaps with a denial of the Lord’s Supper for some period of the time, perhaps with by telling him he should restore double what he stole, or write a humble apology. These punishments will be good for his soul. And so should the State punish him, unless for “Bad Man” reasons it has decided to merely admonish offenders who come forward and confess. How much should the punishment be? We will return to that question later.

[Unfinished.Another part of law is morally neutral. Parking securities. Releasing amount X of nitrogen dioxide. CHristians need those laws as a guide. ]

 Suppose I have a dispute over property. When I rented to the Ummels, we had a formal contract that said the terms of the lease and that the Ummel’s chruch elders, with relatives recusing (Mrs. Ummel was the pastor’s daughter), would decide any disputes. Sometimes companies use arbitrators. For complicated legal conflicts, church elders are not good— you need full-timers because it is time-consuming, and experts— judges. And to get real justice, you need lawyers, because the judges rely on them. It works best to have one lawyer on each side, in rivalry. But— crucially for the Christian— you don’t have to press every advantage. The Christian client and lawyer would be like the ideal in Anglo-American law— presenting the other side’s case fully and fairly while presenting the best arguments against it, and telling the other side what precedents they have missed that would bolster their case.[[23]](#footnote-23)

*Agape*, in particular, does not mean that you need to always give in to the other side. *Philia,* maybe— it is an emotion of caring about the other side, and maybe wanting to do what is best for them. *Agape* is more like respect, and means giving the other side what is fair—loving them as yourself, not more than yourself. *Agape* means having an unbiased outsider deciding what should happen. Then, if you want to exercise *philia*, you can give the other person some money if you want. You don’t need to concede to them in legal disputes. Indeed, going to court can mean the avoidance of conflict. When my father rented the Jones Farm to my cousin, there was the awkward question of what the rent per acre should be. They let the farm agent—a respected expert on farm management, accounting, and taxes— decide for them. In the same way, two people who disagree can avoid acrimony by leaving it to their lawyers and the courts— though only if they are mature enough to accept that whatever the courts decide, that is fair enough. Between Christians, who are willing to concede in the first place but do not want to be in the silly position of conceding to each other, a lawsuit is simply handing the decision over to a neutral third party to avoid one’s own bias. A low-cost and convenient third party is the church. Thus, I Corinthians says the Christian should not “ having a matter against another, go to law before the unjust, and not before the saints.” Moreover, the elders can deal not just with the dispute but with any sinful feelings that go with it.[[24]](#footnote-24)

[Unfinished: xxxIn between are laws that govern human interactions in which the degree of obligation is unclear. Tort law— what is negligent? We all know what gross negligence is, but what about the fine lines? The law of intestate succession. It is good to have the state say what is fair. If the state gets it wrong, the Good Man can correct it voluntarily. ]

[Unfinished: Property and contract law follow this too. Suppose a Christian is trying to decide on a building project. It is important that he know which land is his, and which is his CHristian neighbor’s. If all land is held in common, then either people will come up with conflicting plans or there must be lots of discussion and approvals. It is easier just to divvy it up. Then, if someone wants to use my land, he can come to me with a project, and I, as a fellow Christian, can just give him the land anyway.

 Also, tragedy of the commons, in an abbreviated way. Suppose fishing is not regulated. We all go fishing, unaware that so many other people are, and the fish are all wiped out.

Usury laws— find out who has the best investment opportunity. As for consumption, there is opportunity cost, so if we think that the borrower should repay the loan at all, he should repay it with interest. But maybe the poor person shouldn’t hve to repay at all.]

 [What about the Rule of Man vs. Rule of Law? We could simply have the Christian judge decide everything. First, though— who is a real Christian? Second— we think all Chrsitians are sinners, so we won’t trust him. We avoid favoritiwsm, which is inevitable with sinful man, and we avoid each man creating his own law. We prefer Numbers 15:39b-40: “Remember all the commandments of the LORD, and do them; and that ye seek not after your own heart and your own eyes, after which ye use to go a whoring: That ye may remember, and do all my commandments, and be holy unto your God.]

 I quoted from *The Merchant of Venice* earlier to make the point that the hard thing is not knowing what to do, but to do it. I would like to quote it now for one of the play’s primary themes: the relationship between Law and Mercy.

ANTONIO. The duke cannot deny the course of law:

For the commodity that strangers have

With us in Venice, if it be denied,

Will much impeach the justice of his state;

Since that the trade and profit of the city

Consisteth of all nations. …

BASSANIO: Yes, here I tender it for him in the court;

Yea, twice the sum: if that will not suffice,

I will be bound to pay it ten times o'er,

On forfeit of my hands, my head, my heart:

If this will not suffice, it must appear

That malice bears down truth. And I beseech you,

Wrest once the law to your authority:

To do a great right, do a little wrong,

And curb this cruel devil of his will.

PORTIA: It must not be; there is no power in Venice

Can alter a decree established:

'Twill be recorded for a precedent,

And many an error by the same example

Will rush into the state: it cannot be.

SHYLOCK: A Daniel come to judgment! yea, a Daniel!

O wise young judge, how I do honour thee!

 Was Shylock’s contract good law? For the play it is, which is enough for us, unless we think there is the hidden meaning that in the end Venetian Law is not the rule of law after all.[[25]](#footnote-25) Actually, any reasonable legal system would look at contracts and say that if one term of the contract is unenforceable except for an illegal act, then the court will not enforce that contract as written. Rather, it would (1) void the entire contract--- in which case Antonio would just have to return the money owed, perhaps with interest; (2) void just the unenforceable part of the contract--- in which case, without a penalty clause, Antonio would have to return the money plus pay whatever default penalty local law ordinarily imposes (e.g., consequential damages); or (3) replace the unenforceable part of the contract with something the court decides is close to the intent of the parties but enforceable, a *cy pres* approach such as requiring Antonio to pay back what he owed plus triple that as a lateness penalty.

 The Rule of Law is one feature of *agape*-driven law. I will suggest than another is what economists variously call efficiency, surplus maximization, the Kaldor-Hicks criterion, and wealth maximization.[[26]](#footnote-26) Wealth maximization means putting resources to the use which people value the most, according to their own tastes and based on what they own that they can trade for other goods. This involves what are known as productive efficiency, allocative efficiency, and the minimization of transaction costs. Productive efficiency requires goods to be produced in the least costly way, measuring costs in terms of what goods the inputs could produce in other uses. If, for example, we could produce one complex computer program using two unskilled programmers and three simple ones using a single skilled programmer, that would be productively inefficient if we could instead produce two complex computer programs using the skilled programmer and four simple ones using two unskilled programmers. Clearly, that would raise wealth too, in the sense that the monetary value of output would rise with productive efficiency.

 Allocative efficiency is a more difficult concept. An example of allocative inefficiency would be if Smith owned a house worth $100,000 to him, and Jones is willing to pay $150,000 for the house, but the sale doesn’t take place. If it does take place, then economists would say that societal wealth rises by $50,000. Note that wealth is here defined as the monetary value the owners put on their property, not on the market price. “Wealth” in economics is a mixture of subjective and objective elements.

[Here talk about transaction costs.]

[Here talk about the Coase Theorem and the Invisible Hand.]

The principle behind wealth maximization is one of respect for other people’s preferences, of de gustibus non est disputandum. Using someone’s own tastes is to *agape* them, to treat their values, in the consumption realm at least, as being as good as your own. They may have bad information, though. In essence, the lesson of the Coase Theorem and the Invisible Hand is to say that society shoudlclearly define what everybody can do, to avoid confusion, and then let them give away or trade property rights as they please, to obtain productive and allocative efficiency. Put differently, we want people to “Make, not Take”; we want them to devote their efforts to making the most of what they own rather than trying to use coercion, either via crime or via government power, to take away things from other people.

[Relate wealth maximization to Plato, as quoted next:]

[Cephalus is speaking to Socrates] “For this I count the possession of money most worthwhile, not for any man, but for the decent and orderly one. The possession of money contributes a great deal to not be cheating or lying to any man against one's will, and, moreover, to not departing for that other place frightened because one owes some sacrifices to a god or money to a human being. It also has many other uses. But, still, one thing reckoned against another, I wouldn't count this as the least thing, Socrates, for which wealth is very useful to an intelligent man. "

"What you say is very fine indeed, Cephalus," I said. "But as to this very thing, justice, shall we so simply assert that it is the truth and giving back what a man has taken from another, or is to do these very things sometimes just and sometimes unjust? Take this case as an example of what I mean: everyone would surely say that if a man takes weapons from a friend when the latter is of sound mind, and the friend demands them back when he is mad, one shouldn't give back such things, and the man who gave them back would not be just, and moreover, one should not be willing to tell someone in this state the whole truth. "

"What you say is right," he said.

"Then this isn't the definition of justice, speaking the truth and giving back what one takes."

"It most certainly is, Socrates," interrupted Polemarchus, "at least if Simonides should be believed at all."

"Well, then," said Cephalus, "I hand down the argument to you, for it's already time for me to look after the sacrifices."

"Am I not the heir of what belongs to you?" said Polemarchus.

"Certainly," he said and laughed. And with that he went away to the sacrifices.”[[27]](#footnote-27)

 Law helps us to make good use of our resources. It doesn’t tell us how property should be divided in the first place, except for inheritance laws and that a person owns his own labor. If we wish to redistribute, Christians can do that too.[[28]](#footnote-28) Christians could use the law to take wealth from unbelievers— I will not get into that, except to note that it is in effect acting on the principle that a person doesn’t get to keep all his own labor. A system like that can be set up, but like slavery, it tends to be inefficient.[[29]](#footnote-29)

Property does need to be broadly construed. It does not just mean ownership of physical objects. James Madison said of “Property”:

“This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*

In the former sense, a man's land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights….

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own.*”[[30]](#footnote-30)

[Here explain the Madison quote.]

[Unfinished: big, controversial section on morals and religious law.What about morals law? That is derived from natural law. The Christian wants it not only as a matter of paternalism over earthly good, but from a desire to lessen evil and the punishment of evil-doers. ]

[Unfinished:What about religious law--- not ceremonial, but civic? Blasphemy, for example. That doesn’t fit with wealth maximization.It is part of “love Your God with all your might”, however, and like morals law is it sin reducing and hence good for sinners. It seems different, though, and it is NOT in mcuh of current American law, though it used to be. ]

[Another aspect of religious law is the regulation of religious behavior, such as compulsory church attendance. The state cannot compel belief; such a law would be unenforceable and worse than useless. I think this was understood even at the time of the Reformation and before. The state can, however, discourage the spreading of false information in religion just as much as in quack medicine. And, it can spread true information, as Christian schools do. The government could require Christianity to be taught in schools, and though private Christian schools would operate better, the problem is just administrative, and is no more true in principle of teaching divine truth than of teaching chemistry. The state could also mandate church attendance--- I think that was done in the 17th century. This would be an example of agape-driven law, because the Christian owes a duty to his neighbor to try to save him from unbelief just as much or more as to save him from outward sin or from poverty. ]

Of course, the national government in America has never established a religion, because the Constitution forbids it. Why? Because we cannot agree on what religion to establish. This is purely prudential. If we all agreed on one religion, it would be nonsense to forbid the government to teach it. If you believe that God created the world, then that truth should be taught just as much as any other. If you believe that Jesus rose from the dead, that is an important part of any history class. And, indeed, England and Scotland have state religions--- different ones, in fact, even under the same monarch--- and American states used to have established religions too for several decades after the U.S. Constitution, until the statehouses disestablished them via the democratic process--- the same process that had established them earlier.

 But just because religious laws are not politically possible in the present day does not mean they have no part in a theoretical discussion of what law would look like if it were motivated by love, and more than it would be useless, if legal, to discuss the rule of law in an oriental despotism.

 VII. American Law as Agape-Driven Law.

 [Unfinished: Now look to American law. It basically is trying to maximize wealth, though with plenty of mistakes. Divorce is way too easy. Morals law is too slack. Class-action law is bad.[[31]](#footnote-31) A lot of regulation is rule of Man rather than rule of law. Of course, blasphemy law isn’t there, compulsory church attendance, etc. But we get a good start from being rule of law, and we are pretty good at maximizing wealth.

 How about other countries? Any modern country with the rule of law does pretty well. Even ancient countries. Look back to CIvic Law in Israel, as seen in the Bible. Tort law, property law, etc. Jubilee seems inefficient,b ut OK if tribal preservation is important to wealth maximization. Usury laws not so bad if there isn’t investment.]

 VIII. Concluding Thoughts.

 We may again learn from Plato. After all, as Nietzsche said, “Christianity is Platonism for the masses.”[[32]](#footnote-32) Look back at Book I of *The Republic*. Socrates says to old Cephalus,

 "For my part, Cephalus, I am really delighted to discuss with the very old," I said. "Since they are like men who have proceeded on a certain road that perhaps we too will have to take, one ought, in my opinion, to learn from them what sort of road it is— whether it is rough and hard or easy and smooth.”[[33]](#footnote-33)

  *The Republic* ends inconclusively, without Socrates and the young men having been distracted from the question of what is just by the quite different question of why a man ought to be just. In the end, Socrates answers that question not by dialectic but by The Myth of Er, which can be translated as either The Story of Er or the Lie of Er. The point of that story is that you ought to do justice because injustice will hurt your soul and damage you in the afterlife. But perhaps the reader ought to circle back to the beginning and realize that Cephalus has the last laugh. In practice, having debated back and forth what justice is, maybe at the end of the road it is, at least for purely secular purposes, “paying your debts and giving back what you take.”

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1. [Cite Calvin here.] [↑](#footnote-ref-1)
2. “[Supreme Court Refuses Rethink on Gay Sex”](http://blogs.wsj.com/indiarealtime/2014/01/28/supreme-court-refuses-to-rethink-ban-on-gay-sex/) *Wall Street Journal—Indi*a (January 28, 2014). [↑](#footnote-ref-2)
3. [Find evidence on judges’ opposition to the death penalty—Supreme COurt is easiest to find.] [↑](#footnote-ref-3)
4. [Find cites on the unwritten law. Texas, especially.] [↑](#footnote-ref-4)
5. [Find an article on this, and particular cases to cite.] [↑](#footnote-ref-5)
6. The Rule of Man in America by these methods has a big downside too. If we think it good that a juror should apply his own ideas of what is best rather than follow the law blindly, then we must accept the result that in Georgia in the 1920’s a white man would usually escape punishment for killing a black man. [↑](#footnote-ref-6)
7. On “the Unconstrained Vision and the Constrained” see Thomas Sowell, *A Conflict of Visions*. I won’t try here to defend all these claims, which would require a book to do. If you disagree, just forget I said it; the rest of this article will not depend on those particulars. [↑](#footnote-ref-7)
8. Confucius, *The Analects,* 2.1 and 2.3. Robert Eno translation (2012) [http://www.indiana.edu/~p374/Analects\_of\_Confucius\_(Eno-2012).pdf](http://www.indiana.edu/~p374/Analects_of_Confucius_%28Eno-2012%29.pdf). The concept of “governance” is *zheng,* 政. Professor Eno tells us, “The words for ‘governance’ (*zheng* 政) and ‘upright’ (*zheng* 正) are homonyms that overlap in both graph forms and corresponding meaning.” [↑](#footnote-ref-8)
9. Han Fei, ”Five Vermin: A Pathological Analysis of Politics”. [↑](#footnote-ref-9)
10. The mayor doesn’t. As a matter of tradition, and perhaps the unwritten Constitution, only the chief executive of a fundamental government does— a state governor or the United States President. American cities are not fundamental— they are the creation of state statutes, and the mayor’s office can be abolished by an act of the legislature. [↑](#footnote-ref-10)
11. Oliver Wendell Holmes, Jr. “The Path of the Law,”10 *Harvard Law Review* 457 (1897). [↑](#footnote-ref-11)
12. Bear with me; this sentence is hyperbole. All Christians are sinners, and will frequently behave as Bad Men. All unbelievers have a conscience, and will frequently behave as Good Men. “Christian” is shorthand here for “*agape* follower”, and “unbeliever” is short for “*agape* ignorer”. The virtuous pagan can be lumped in with the Christian for most sentences of this essay. [↑](#footnote-ref-12)
13. I will use various grammatical forms of the Greek words as seems appropriate. *Agape*- is the noun, *agapao*- is “I love”, and *agapain*- is “to love”. The other words are *philia*-, “love” and *eros*-, “love”. [↑](#footnote-ref-13)
14. [Am I right on that? Check the Bible. ] [↑](#footnote-ref-14)
15. Robert Joly, *Le Vocabulaire Chrétien de l'Amour Est-il Original? et Αγαπάν dans le Grec Antique* (Brussels: Presses Universitaires, 1968) p. 33, as cited in Moises Silva, *Biblical Words and Their Meaning: An Introduction to Lexical Semantics* (1983), p. 96. The words are *agapain*-, *philein*-*kinein-*, and *kouein-.* See also , Donald A.Carson,“God Is Love,” *Bibliotheca Sacra**,* 156 no 622: 131-142 (Ap-Je 1999).

 A possible example of the interchangeability of the words is the Septuagint’s use not of *eros* or *philia* but of *agape* in the following passage about raping a sister: “Then Amnon hated her exceedingly; so that the hatred wherewith he hated her [was] greater than the love wherewith he had loved her.” II Samuel 13:15 (KJV) (translating *ahab***/** אָהַב). But two other explanations are that (a) The Seventy weren’t as accurate as the fable says (or were at least all equally inaccurate) and translated from Greek to Hebrew crudely, or (b) they believed, like Allan Bloom, that the translator should always use one-for-one translation of important words to avoid imposing his own meaning on the text (see Bloom’s introduction to his translation of *The Republic*). In support of (b): the Septuagint uses *eleos*/ελεος/mercy for *chesed*/חסד/lovingkindness (http://en.wikipedia.org/wiki/Chesed). Recall that Nietzsche said, “It was clever of God to learn Greek when he wanted to be a writer— and that he didn’t learn it better.” (My own nonliteral translation of “*Es ist eine Feinheit, dass Gott griechisch lernte, als er Schriftsteller werden wollte - und dass er es nicht besser lernte*”) <http://www.gutenberg.org/cache/epub/7204/pg7204.html>. The bad translation at <http://www.gutenberg.org/files/4363/4363-h/4363-h.htm> is “It is a curious thing that God learned Greek when he wished to turn author—and that he did not learn it better.” Friederich Nietzsche, *Beyond Good and Evil,* IV-121. [↑](#footnote-ref-15)
16. Jeffrey G. Murphy (2003) [“Christianity and Criminal Punishment,”](http://homepages.law.asu.edu/~jeffriem/Christianity_and_Criminal_Punishment.pdf) *Punishment and Society* 5(3): 261- 277, p.264. [↑](#footnote-ref-16)
17. What of the extraordinary case where everyone agrees that it is good that I steal the parking permit— perhaps because I need it to get my sick wife to the doctor in time to save her life? First, we must not sacrifice the normal to the extraordinary. Laws have to be made general if we are to have the rule of law. That is why “hard cases make bad law.” Second, the act only falls under larceny if the victim objects. In the sick-wife hypothetical it is unlikely the victim would press for prosecution, particularly if I offered him generous compensation later. Shakespeare’s Shylock, whom we discuss later, is fictional. Third, the law does contain exceptions for exceptional situations. Best known is the example of the lost hiker breaking into a cabin to find the food he needs to survive. He is not guilty of burglary, even though if he were not a lost hiker he would be. “Lost Hiker in Snow Storm Busts into Cabin to Survive,” *Hiker Hell* blog (2008) http://www.hikerhell.com/2008/11/lost-hiker-in-snow-storm-busts-into-cabin-to-survive/. [↑](#footnote-ref-17)
18. Stigmatization is not one of the traditional four functions, but often it is the only punishment for first offenders and a significant one, as well as being an important source of deterrence and incapacitation. Think of the harm that would have been prevented if the details of individual Roman Catholic priest pederasty cases had been revealed when first detected, even if there had been no jail time served. See Eric Rasmusen, “Stigma and Self-Fulfilling Expectations of Criminality,” Journal of Law and Economics, 39: 519-544 (October 1996). [↑](#footnote-ref-18)
19. Our local police, I have heard, say that it is rare for a church to react this way. The usual response of a church to member criminality, alas, is either to defend the member to the bitter end or to shun him. But I am talking of the ideal. [↑](#footnote-ref-19)
20. Another example is the reformed alcoholic. Alcoholics Anonymous encourages its members to self-stigmatize, announcing to all the world that they are alcoholics, which warns the hearers not to offer them drinks. That’s also a form of incapacitation. The rehabilitation of Alcoholics Anonymous is voluntary, except perhaps for people directed there by the courts after drunk driving. And letting people know about one’s alcoholic past makes it much more difficult to conceal relapses, since everyone will immediately suspect that one’s slurred speech or minor car accident was the result of drink. It’s interesting to note that while we do still have laws paternalistically banning sale of liquor to children, the Supreme Court has said that state laws differentiating between male and female ages for permission to buy liquor violate Equal Protection, and as dictum said that already-repealed federal and state statutes forbidding sale of liquor to Indians would violate it also. *Craig v. Boren* 429 U.S. 190 (1976)*.* This reminds me of the unpleasant person who said, “I support the right to have an abortion— but only for blacks.” [↑](#footnote-ref-20)
21. I should insert a caveat for stigmatization. Preventing future offenses is not the only purpose of stigmatization. Equally important is that publicizing the offense conveys useful information to everyone else. If grandpa turns out to have been the Nazi prison guard Johann Schmidt, for example, his son can avoid naming their new baby after him, and some other old man is spared the suspicion that *he* might be the notorious Schmidt. [↑](#footnote-ref-21)
22. David Friedman, *Law’s Empire*, chapter 2, http://www.daviddfriedman.com/Laws\_Order\_draft/laws\_order\_ch\_2.htm. [↑](#footnote-ref-22)
23. American Bar Association, *Model Rules of Professional Conduct*, “Rule 3.3 Candor toward the Tribunal,” <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/>: “(a) A lawyer shall not knowingly:.. (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;… (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” The Christian should probably go further, and disclose material facts even if the proceeding is not ex parte. We might add that in a Christian legal system, the attorney who violates these rules should be severely punished, unlike in the current American system, where ethical lapses are treated with leniency. [↑](#footnote-ref-23)
24. “Dare any of you, having a matter against another, go to law before the unjust, and not before the saints? Do ye not know that the saints shall judge the world? and if the world shall be judged by you, are ye unworthy to judge the smallest matters? Know ye not that we shall judge angels? how much more things that pertain to this life? If then ye have judgments of things pertaining to this life, set them to judge who are least esteemed in the church. I speak to your shame. Is it so, that there is not a wise man among you? no, not one that shall be able to judge between his brethren? But brother goeth to law with brother, and that before the unbelievers. Now therefore there is utterly a fault among you, because ye go to law one with another. Why do ye not rather take wrong? why do ye not rather [suffer yourselves to] be defrauded? Nay, ye do wrong, and defraud, and that [your] brethren.” I Corinthians 6:1-8.

 [↑](#footnote-ref-24)
25. That has some support in what happens later. Venetian law allows the Duke to decide what happens to half of Shylock’s property if he is guilty of plotting to kill a Venetian--- the Rule of Man encapsulated within the Rule of Law. Moreover, the Duke first says he will remit that part of the punishment completely out of mercy, but after hearing Antonio’s ideas on reducing the rest of the punishment changes his mind and says he won’t unless Shylock turns Christian. [↑](#footnote-ref-25)
26. It is possible to make distinctions between these variants on the idea. See, for example, David D. Friedman, “[Does Altruism Produce Efficient Outcomes? Marshall versus Kaldor](http://www.jstor.org/stable/3085593),” *The Journal of Legal Studies*, 17: 1-13 (January 1988). See, too, Richard Posner, “Wealth Maximization Revisited,” *Notre Dame Journal of Ethics and Public Policy,* 2: 85 (1985). Donald Keenan, “[Value Maximization and Welfare Theory](http://www.jstor.org/stable/723987),” *The Journal of Legal Studies*, 10: 409-419 (June 1981). Thomas S. Ulen, “Professor Crespi on Chicago,” *Law & Social Inquiry,* [22:](http://onlinelibrary.wiley.com/doi/10.1111/lsi.1997.22.issue-1/issuetoc) 191–199 (January 1997). [↑](#footnote-ref-26)
27. Plato, *The Republic*, Book I, near 330a. Allan Bloom translation, 2nd edition, <http://www.archive.org/stream/PlatosRepublicallanBloomTranslation/PlatosRepublictrans.Bloom_djvu.txt>. Plato ends this passage with Polemarchus inheriting the argument--- property law at work. [↑](#footnote-ref-27)
28. Louis Kaplow and Steven Shavell, *Fairness and Welfare* (2006), on why law shouldn’t redistribute. [↑](#footnote-ref-28)
29. [Check but I think Cephalus and his family lost their lives and property to The Thirty, partly because they were metics, foreigners rather than Athenian citizens.] [Slavery law. Note that it was illegal to teach slaves to read, or to free them. That is a huge restriction on property rights, and not wealth-maximizing. ] [↑](#footnote-ref-29)
30. James Madison, ``Property,’’ 29 Mar. 1792 *Papers* 14: 266--68. Emphasis is in the original. [↑](#footnote-ref-30)
31. J. Mark Ramseyer and Eric Rasmusen (2013) “Are Americans More Litigious? Some Quantitative Evidence," in *An American Illness*, edited by Frank Buckley, Yale University Press (2013), <http://buckleysmix.com/american-illness4/>.

http://www.rasmusen.org/papers/litigation-ramseyer-rasmusen.pdf. [↑](#footnote-ref-31)
32. “The masses” is my nonliteral translation. You may prefer “the people” or “the common folk”. The original is “*Christenthum ist Platonismus für's ‘Volk*’”. <http://www.gutenberg.org/cache/epub/7204/pg7204.html>. From the preface to Frederiech Nietzsche, *Beyond Good and Evil* (1885?) <http://www.marxists.org/reference/archive/nietzsche/1886/beyond-good-evil/preface.htm>. [↑](#footnote-ref-32)
33. Plato, *The Republic*, Book I, near 328e. Allan Bloom translation, 2nd edition, <http://www.archive.org/stream/PlatosRepublicallanBloomTranslation/PlatosRepublictrans.Bloom_djvu.txt>. [↑](#footnote-ref-33)