Do We Need Behavioral Economics to Explain Law? [*]

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Abstract

No.

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1 Introduction

Like scholars in other fields touched by economics, those working in the field of law and economics are increasingly turning to "behavioral" theories to explain phenomena in their domain. The problem with traditional economic theory, the common complaint goes, is that it's unrealistic. In traditional theory, people are rational; in reality, often they're not. In traditional theory, people care only about their own welfare; in reality, their preferences often extend to the mechanisms used to allocate resources—so-called "merit goods"—and to the welfare of others—altruism.

The most recent law and economics scholarship to champion the behavioral turn is Judge Guido Calabresi's (2016) *The Future of Law and Economics*. As a founding founder of the field, Calabresi's view about what law and economics needs for a bright future warrants special attention, and his argument is refreshingly direct: "legal structures that govern much of our lives" but don't maximize wealth—from the criminalization of kidney sales to the military draft—"can be explained only if" widely held preferences for merit goods and altruism "are recognized," for these "legal structures [are] established in response to them" (Calabresi 2016: 146). Traditional economic theory, which ignores such preferences, is therefore a dead end; to explain legal structures that don't maximize wealth, law and economics requires an "altered" or "expanded economic theory"—a behavioral one (Calabresi 2016: 12, 4).

This paper examines the need for a behavioral turn in law and economics by investigating Calabresi's (2016) central claims. Is it likely that widely held preferences for merit goods and altruism account for legal realities that don't maximize wealth? And is traditional economic theory unable to persuasively explain them?

My answer to both questions is "no." A well-known application of traditional economic theory to democratic lawmaking—rent-seeking—explains such legal structures readily. Moreover,

rent-seeking suggests that popular preferences for merit goods and altruism are unlikely to account for these structures.

Ironically, the foregoing facts are obscured only if one relies on an unrealistic model of democratic lawmaking, whereby popular voting replicates popular preferences in law. In contrast, the rent-seeking model furnished by traditional economic theory acknowledges that democratic governments are plagued by agency problems, which throw a wrench in the majoritarian gears they rely on to reflect median preferences in law. These problems create scope for interest groups to bend law to their members' preferences, yielding legal structures that don't maximize wealth—illegal organ markets and conscription included.

My analysis points to two conclusions. First, the fact that traditional economic theory ignores preferences for merit goods and altruism is weak footing for a behavioral turn in law and economics. Second, behavioral economics isn't needed to explain legal structures that don't maximize wealth; traditional economic theory can do so, and public choice scholars have been fruitfully applying the rent-seeking model to this end for decades.

2 Society's Preferences and the Law

The claim that widely held preferences for merit goods and altruism explain important legal structures presupposes that a society's legal structures tend to reflect what Calabresi (2016: 157) calls "the tastes and values of a society"—those belonging to what he variously describes as a "large number of people," a "significant number of people," "many people," a "wide group of people," and in one case, a "majority" of people (2016: 44, 26, 73-74, 86). As Calabresi (2016: 157) puts it, "The laws and legal structures of a polity depend directly on the tastes and values of

that polity." Which raises a question: By what mechanism might "the tastes and values of a society" be reflected in its law?

The examples Calabresi considers come predominantly from the United States. Moreover, he variously refers to "collective decisions," "collective determinations," and "actions taken by the collectively" for achieving what is "collectively desired" (Calabresi 2016: 112, 143). Thus, the mechanism Calabresi seems to have in mind is representative democracy, whereby citizens elect representatives who make law on their behalf—directly, as in the case of legislators and elected judges, or indirectly, as in the case of judges appointed by lawmakers who citizens have elected.

Economists have a model of this mechanism: the median voter model (Black 1948; Downs 1957). Given some assumptions, such as that voters' preferences can be ordered along a single dimension and are "single peaked" (the further an alternative is from her ideal, the less a voter likes it), in a majoritarian electoral contest between two candidates for lawmaker, the winning candidate is he who offers to make law that satisfies median preferences. The median voter model gives precise meaning to "the tastes and values of society": the preferences of the median voter.[1] And by that definition, at least, this model delivers a result consistent with the supposition that underlies Calabresi's claim: the lawmaker that society wants is the lawmaker that society gets.

The median voter model has been criticized in a variety of ways, most reducing to the observation that one or more of the assumptions it requires for the democratic mechanism to produce the foregoing result, such as single-peaked preferences, do not hold (see, for instance, Rowley 1984). I want to consider a different problem: What ensures that the lawmaker society wanted, hence elected—he who promised to satisfy median preferences—will, once in office, actually do as he promised?

[1] On the difficulty of giving meaning to "society's preferences" under assumptions more general than those that underlie the median voter model, see, for instance, Arrow (1951) and Buchanan (1954).

The ability of representative democracy to deliver lawmakers who say that they'll make law that society wants doesn't automatically imply the ability of representative democracy to deliver such law for a simple reason: elected lawmakers aren't voter-programmed robots. They're humans, in many ways not terribly different from the humans who elect them. Unlike robots, humans are prone to deceive when deception is to their benefit. And human lawmakers often stand to benefit considerably from deception, for example by telling citizens when seeking election that they'll do one thing and then, after being elected, doing another.

In economic terms, representative democracies confront a principal-agent problem (see, for instance, Barro 1973; Ferejohn 1986; Besley 2006). Citizens are the principals, who delegate power to make law that reflects their preferences to lawmakers, the agents. If the interests of lawmakers align with the interests of citizens, that's just what lawmakers will do. If not, lawmakers will be tempted to use the power delegated to them differently—in ways they inure to their benefit at society's expense.

On the face of it, the democratic mechanism solves this problem—at least if lawmakers are permitted to run for reelection (or some long-lived proxy, such as political parties, exists). In that case, the prospect of reelection incentivizes lawmakers to follow through on their promises to make law that citizens want. Voters reward the faithful, punish the unfaithful, and in doing so discipline the agents, aligning their incentives with those of the principals.

It's an elegant theory—and a predictively accurate one in some cases. But in others, from law affecting education to law affecting commerce, reality rejects the median-preference result. A few contemporary examples, gleaned from a perusal of the public opinion data reposited by Cornell University's Roper Center for Public Opinion Research, serve to illustrate: The majority of Americans believe it should be legal for parents to use their federal tax dollars to send their

children to their K-12 schools of choice; yet this is illegal. The majority of Americans believe it should be illegal to work for less than $12/hour; yet this is legal. The majority of Americans believe the sale of marijuana for recreational use should be legal under federal law. In fact, it's illegal. The majority of Americans believe the sale of assault weapons should be illegal under federal law. In fact, it's legal.

The divergences between the law that society wants and the law it gets aren't limited to minor differences on insignificant matters. They can be major differences on significant matters, and research suggests they're common. One recent empirical study, which uses data covering 1,179 policy issues between 1981 and 2002 to estimate the importance of the average American's influence on US public policy, finds that "the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact" (Gilens and Page 2014: 575). More than 30 years ago, Gary Becker (1983: 392) put it this way: "I believe that voter preferences are frequently not a crucial independent force in political behavior." It seems that Becker was right.

Unlike the democratic mechanism of theory, the democratic mechanism of reality leaves the citizen-lawmaker, principal-agent problem largely unresolved. This poses two questions: Why does the democratic mechanism of reality fail so often? And if society's preferences aren't driving legal rules in many cases, whose are?

3 Interest Group Preferences and the Law

The public choice literature, which applies traditional economic theory to democratic lawmaking, suggests numerous answers to the first of these questions (see, for instance, Rowley and Schneider 2004). I'll consider just one: information. The basic predicament is often described as "rational ignorance." In order to effectively discipline an elected lawmaker, voters must know when he has

"misbehaved." But acquiring that knowledge isn't free. To learn it, voters must invest in learning about a lawmaker's behavior, and the investment required can be substantial.

Consider an elected lawmaker's pledge to create a federal minimum wage of $12/hr. Surely it's straightforward for voters to evaluate his behavior on something as simple as this. When the next election rolls around, if the minimum wage has been raised to $12/hr, they can reward the lawmaker—support his campaign, vote for reelection. If not, they can punish him—support the campaign of his opponent, vote for someone else.

Except, even here, evaluating the lawmaker's behavior is far from straightforward. Suppose its election time: the minimum wage is exactly where it was when the lawmaker took office, and voters know this. By itself, that isn't enough for voters to make an informed decision.

Maybe the lawmaker tried to raise the minimum wage but was foiled by other lawmakers. Maybe a more pressing concern came up, requiring, quite reasonably in voters' minds, that the lawmaker's energies and attention be devoted elsewhere. Maybe economic conditions deteriorated during the course of the lawmaker's tenure, rendering a minimum-wage hike imprudent. These circumstances and innumerable others that might arise make it hard for voters to know whether the fact that they didn't get the law they were promised reflects legitimate reasons outside the lawmaker's control or reflects his misbehavior. And that makes holding him accountable hard to do.

This fact is not lost on the lawmaker, who is aware that any number of plausible excuses for breaking his pledge to raise the minimum wage to $12/hr may be available to him to evidence to voters that he hasn't broken his pledge after all. If not, without too much trouble, a creative lawmaker can concoct an excuse. His ability to obfuscate the reasons for his behavior adds another layer of difficulty, hence cost, for voters to become informed.

With enough investment, voters could learn the "facts of the matter." But the cost of investment must be weighed against the benefit of being informed. And for the typical voter, that benefit is miniscule. On the one hand, his probability of affecting the outcome of the lawmaker's election, and thus the voter's expected benefit of becoming informed about the lawmaker's behavior, is nearly zero. On the other hand, even if his vote were decisive, the value that the voter attaches to the law in question will usually be small. Unless he earns less than $12/hr or cares a lot about people who do, he's unlikely to find it worthwhile to make the substantial investment required to cast his decisive vote "correctly."

I don't want to overstate the magnitude of the typical voter's ignorance about lawmaker behavior in most realms. But that would be hard to do. A large majority of Americans—nearly two-thirds in a 2013 Gallup Poll—don't know the identity of the congressional lawmaker who represents them. Leading up to the 2014 election, which determined control of Congress, a similar percentage of Americans were unaware of which party of lawmakers controlled Congress. Less than half of Americans are aware that "common core" has something to do with education. And 80 percent of them don't know that the federal government spends more on Social Security than on transportation, interest on the debt, or foreign aid (Somin 2016). When it comes to the specifics of lawmaker behavior and the specific circumstances that surround it, the typical voter knows even less.

In the example above, society's preference—that no worker be permitted to sell his labor for less than $12/hr—is precise, and the law that might be used to satisfy it—a federal mandate—is simple. This makes it relatively easy for voters to hold the lawmaker accountable, which, as I've described, isn't so easy even then. But often society's preferences aren't so precise, and the laws

that might satisfy them are more complex, which makes voters' cost of becoming informed higher still.

Suppose the median voter's preference is vague: "I want law that will raise the incomes of working-class Americans." Now voters have to invest not only in learning about the law that the lawmaker created but also in scientific learning to determine how the policy which that law reflects affects the income of American workers who lack a college degree. Or suppose that in the name of raising the incomes of working-class Americans, the lawmaker creates a border adjustment tax. Voters must make another investment, this one in learning about how a destination-based cash flow tax functions.

In this case, voters could, and probably would, try to gauge how working-class Americans fared during the lawmaker's tenure instead of trying to ascertain the details of his behavior; that would be much cheaper. But since the welfare of working-class Americans is influenced by many factors outside the lawmaker's control and unrelated to his behavior, if voters do that, the lawmaker's electoral fate is unlikely to hinge significantly on whether he takes action to satisfy the median preference. So he has weak incentives to do so.

Not all voters are rationally ignorant—not about every law, anyway. When it comes to issues on which they have intense preferences, some voters are rationally informed about what lawmakers do, how those actions relate to lawmakers' promises, the intricacies of how certain policies affect their and others' welfare, and the details of how various laws function. Unlike their rationally ignorant counterparts, these voters are in an excellent position to reward and punish lawmakers based on the law they make affecting such issues. Thus, lawmakers are highly sensitive to reflecting these voters' preferences in law. Bringing me to the answer to the second question

posed above, "If society's preferences aren't driving the law in many cases, whose are?" The preferences of the members of interest groups.

An interest group is an organization of voters who share an intense preference for some legal rule(s) that is not shared by the median voter. The National Rifle Association (NRA), for example, is an interest group. The NRA's members have an intense preference for law that leaves gun ownership unencumbered, a preference that is not shared by the median voter, who desires more stringent regulations on gun ownership. Or consider the National Education Association. Its members have an intense preference for law limiting K-12 school choice, a preference that is not shared by the median voter, who desires law more permissive of school choice.

Interest groups actively encourage lawmakers to make law that satisfies their members' preferences. Alternatively, they actively discourage lawmakers from making law contrary to their members' preferences. The activity that interest groups engage in for this purpose is called rent-seeking, and in rent-seeking, interest groups are often successful. The reason for this, traditional economic theory shows, is straightforward: compared to voters in general, the members of an interest group have strong incentives to invest in learning about lawmakers' actions relating to laws of concern to their group and to use that information to hold lawmakers accountable to their preferences.

Consider the typical NRA member. He cares strongly about liberalizing gun law, and he cares more about liberalizing it than the typical voter cares about restricting it. Thus, the benefit an NRA member enjoys if a gun law goes his way, or the cost he suffers if it does not, is large and larger than the typical voter's. Moreover, since the NRA member is bound together with other NRA members by a single issue, he can, and frequently does, vote in a coordinated fashion with his group. In this sense, "his" vote is actually his vote plus the votes of other NRA members, which

makes it more likely that "his" vote will be decisive. Not so for the typical voter. Although most other voters share his distaste for liberal gun law, these voters aren't organized. Further, they care more intensely about other laws—those that affect their own interest groups—which may pull their votes in different directions.

Elected lawmakers respond to this situation predictably: by concentrating benefits on well-informed and well-organized voters and diffusing the costs of providing those benefits on ill-informed and poorly organized voters. In other words, lawmakers often make laws that cater to the preferences of interest groups, which deviate from median preferences.

Often doesn't mean always. The logic of interest groups does not imply that every law a lawmaker makes is made to satisfy the preferences of an interest group and veers wildly from the preferences of the median voter, for at least three reasons. First, not every issue has an interest group—an organization of voters with intense preferences on the issue that diverge from the median voter's. For example, one doesn't hear clamoring from any quarter to decriminalize murder.

Second, the members of some interest groups share the qualitative preferences of the median voter; they just hold those preferences with greater intensity. For example, the median voter may support gay marriage. So do the members of the Human Rights Campaign, an LGBTQ advocacy group, but their preference for legal gay marriage is much stronger. Thus, the Human Rights Campaign is an effective advocate for the median voter's preferences on the issue of gay marriage. Rent-seeking by this interest group may actually lead to marital law that more closely reflects median preferences than if it did not rent-seek, in which case an interest group with equally intense but opposing preferences on the issue of gay marriage, such as the Christian Coalition of America, might have greater influence on marital law.

Third, many voters who are not, for instance, NRA members still vote. If the gun law that lawmakers make becomes too costly from their perspective, say by permitting anyone to own a hand grenade who is willing to pay for one, the benefit of becoming informed about a lawmaker's behavior on this issue and organizing resistance to it will rise above the cost, stymying the NRA's rent-seeking effort.

In these ways, median preferences constrain and check interest group preferences. But the constraints they impose are wide and flexible rather than narrow and rigid, and the check they provide leaves plenty of "slack" for interest groups to effectively rent-seek. For example, in general, the broader and more basic a governmental function is, the less likely it is that one group of citizens' preferences will diverge in significant ways from those of other citizens; hence, the less potential there is for interest groups to emerge. However, since many of the functions that the US government performs are not so broad and basic, there remains ample scope for one group of citizens' preferences to diverge from those of other citizens—and thus ample room for interest groups.

Likewise, the existence of interest groups whose members share the qualitative preferences of the median voter but hold those preferences more intensely does not guarantee the reflection of median preferences in law. Interest groups whose members have equally intense but opposing preferences also exist. Which of these camps will have more influence on the legal issues they contest depends largely on which of them has more political clout—which matters more to lawmakers politically. That, in turn, depends largely on which camp is better organized and funded, which needn't be the one whose members share the qualitative preferences of the median voter (Olson 1965).

Perhaps most important, there are steps that interest groups may take to loosen the constraints imposed on them by median preferences. By "educating" the public about its pet issue, an interest group can shape the public's preferences to comport better with its own. This may involve the presentation of "alternative facts"—"98 percent of violent crimes that are prevented are prevented by firearms"; the presentation of selective facts—"Not one American child was accidentally killed by a hand grenade last year"; or simply the adoption of helpful rhetoric—"Guns don't kill people; people kill people." When the median preference on some issue is vague rather than precise, interest group "education" can be highly effective, for if what citizens want is to, say, "help working-class Americans" rather than to "raise the federal minimum wage to $12/hr," there's more scope to "teach" the public about the particular law it "really prefers."

Interest groups may also move median preferences toward their own by coopting the support of causes that are beyond reproach—pursuing the "bootleggers and Baptists" strategy (Yandle 1983). Consider Mothers Against Drunk Driving (MADD), an organization of parents whose children's' lives were tragically taken by intoxicated drivers, which seeks to raise public awareness about, and address the problem of, drunk driving. Suppose you're a bar owner engaged in profit-eroding but consumer-satisfying happy-hour competition with other bar owners. If you and the other bar owners can agree to restrict happy hours—to collude—each of you will gain. How can you enforce such collusion? Get lawmakers to make a law that restricts happy hours. And how can you shift the preferences of thirsty citizens toward support of such a law? Join your cause with MADD's. It's a pretty good trick if you can pull it off, and since most voters don't have intense preferences on the length of happy hours, you probably can. In this manner, what the typical voter "wants" may end up being reflected in law after all—but only after having been molded by an interest group for its own purpose.

4 Rent-Seeking Explanations for Calabresi's Legal Realities

Calabresi (2016) invokes several observed legal structures to illustrate his claim that widely held preferences for merit goods and altruism explain important legal realities that do not maximize wealth. Here, I consider a few of them to illustrate my argument that rent-seeking by interest groups can be, and in fact has been, used to explain those realities instead. I do not claim that the rent-seeking explanations I consider are the "correct" explanations. What I do claim is that they evidence that a different kind of economic explanation for such legal structures is possible, plausible, and exists—one that doesn't require any modification of traditional economic theory and thus is probably worth considering before declaring the need for behavioral theories.

4.1 Human Organ Sales

For Calabresi, the legal ban on selling human organs in the United States is an example of law that reflects the fact that many people object to the commodification of certain goods under the prevailing distribution of wealth—a preference relating to merit goods. As he puts it, widely felt external moral costs "that attach to a wealth dependent market in body parts, seem…to be largely responsible for the common prohibition of such a market as to many body parts" (Calabresi 2016: 145). Or perhaps rent-seeking is responsible.

The law in question is the National Organ Transplant Act of 1984, which criminalized the sale of human organs (from living or deceased persons) and, in doing so, effectively imposed on them a price ceiling of $0. The predictable effect of this ceiling is a smaller supply of organs than would be available if organ sales were legal.

As Kaserman and Barnett (1991) point out, since the supply of available organs limits the supply of organ transplants, and a smaller supply of organ transplants raises the price of

transplants, which do not face a legal ceiling, the suppliers of non-organ transplant-related inputs—such as transplant surgeons and transplant centers—earn rents when the maximum legal price that may be paid for organs is zero. The suppliers of complementary inputs to organ transplants thus have a significant economic stake in law that criminalizes the sale of human organs, which effectively enforces complementary-input supplier cartels for restricting output. That stake motivates interest groups consisting of such suppliers to encourage lawmakers to make law banning organ sales—to rent-seek.

The suppliers of complementary inputs to organ transplants aren't the only economic beneficiaries of law that criminalizes the sale of human organs. The suppliers of transplant substitutes benefit too, for example the providers of kidney dialysis treatments. A restricted supply of kidney transplants increases the demand for such treatments, creating rents for their suppliers, who thus also have an incentive to encourage lawmakers to make law that bans kidney sales.

I know what you're thinking: "This is just too crass, too plainly profit-driven on the part of transplant surgeons and dialysis providers, to explain the criminalization of human organ sales. The vast majority of Americans *want* such sales to be illegal; they abhor the idea of commercializing organs given the prevailing distribution of wealth!"

Perhaps. But that thought might be worth reconsidering. According to a survey of Americans taken in 2008, less than 17 percent said that selling kidneys should be illegal if the provider is deceased and the buyer is the government; less than 20 percent, if the provider is living. When asked about a private party buying kidneys, substantially more respondents were against commodification. Still, only a third said that selling kidneys should be illegal, and for each combination of provider-buyer status, a larger percentage said that selling them should be legal than said that it should be illegal (Leider and Roth 2010). In another survey, this one administered

in Canada using different, more stylized questions about whether one should be able to buy a kidney, between 69 and 74 percent of the public said that one should be able to do so. In contrast, members of the transplant community were markedly less enthusiastic about the idea: only between 21 and 43 percent were in favor (Guttman and Guttman 1993). Maybe the median voter isn't getting the human-organ-sales law he wants after all.

The interest group beneficiaries of existing human-organ-sales law, however, seem to be getting exactly what they want. "[H]ospitals and physicians who are the suppliers of organ transplants" are "the principal opponents of a market-based system of organ procurement" (Barnett, Beard, and Kaserman 1993: 676). "In 2003," for example, "Representative Jim Greenwood…proposed to sponsor a handful of demonstration projects in which the government would pay for the purchase of life insurance policies payable to a living donor's designee. This modest proposal…was opposed by the National Kidney Foundation and the American College of Surgeons" and died (Satel 2006: 45). That same year, the idea was proposed to "Congress for pilot programs to test the effects of paying the relatives of post-mortem donors a modest sum…Predictably, the idea was rejected by the National Kidney Foundation and…the American Society of Transplant Surgeons" and also died (Satel 2006: 45). Interest group objections to permitting organ markets aren't couched in terms of cartelization, of course. They tend to be offered in ethical terms that hearken to merit-good considerations, which offer excellent rhetorical cover for rent-seeking.

4.2 The Minneapolis Five-Percent Tradition

To illustrate a legal structure that reflects what Calabresi (2016: 108) calls "our desires for altruism," he points to "the legendary Minneapolis 5 percent tradition":

> It is said that the old Minneapolis families, those that ran the old Minneapolis milling, lumber, and other like companies, agreed at some point (for whatever reasons) that their companies would give 5 percent of their incomes to charities. In due course, it was made clear to the new arrivals…that their owners would only be "accepted" if their companies adhered to the same giving tradition. And so, apparently, it came to be.

Before reading Calabresi's book, I'd never heard of this "legendary tradition," which immediately caught my attention. The reason it did so is that the five-percent tradition displays a suspicious righteousness characteristic of crafty rent-seeking.

Beginning in 1935, corporate contributions to charities became legally deductible against corporate federal income tax liabilities, up to five percent of corporate income. When the income tax code is progressive, as it was for corporations (and individuals) in 1935 and has remained since, charitable contributions cost corporations (and individuals) that earn higher incomes less than they cost corporations (or individuals) that earn lower incomes. Suppose there are two corporate income tax brackets—income up to $100,000 is taxed at 10 percent, anything over $100,000 is taxed at 50 percent—and two companies—one with an income of $50,000, another with an income of $200,000. If the first company contributes five percent of its pre-tax income to charity, $2,500, that contribution costs it (2,500 – .1*2,500 = 2,250) 4.5 percent of its pre-tax income. If the second company does the same and so contributes $10,000 of its pre-tax income to charity, that contribution costs it only 2.5 percent of its pre-tax income.

Companies with higher incomes tend to be larger, existing ones: industry incumbents. Those with lower incomes tend to be smaller, newer ones: industry entrants. Thus, a rule that

commands corporations to give five percent of their pre-tax incomes to charity raises barriers to entry that provide incumbents greater protection against competition from entrants.

Under the Minneapolis five-percent tradition, the command to do that was informal—the result of pressure applied by a (supposed) culture of altruism rather than legislative mandate. But if my explanation for that tradition described above is correct, it would nevertheless reflect a legal structure driven by rent-seeking. Typically, the legal rules that interest groups aim to affect are formal ones, and their rent-seeking for this purpose is directed at formal lawmakers. However, affecting informal rules, which requires attempting to shape norms, can be equally effective and thus is also a potential strategy that interest groups may employ, albeit probably with more difficulty in most cases.

Was such a strategy behind the pact entered into by the old Minneapolis milling, lumber, and other industry incumbents to give five percent of their pre-tax incomes to charity and to require new entrants to do the same? More research on the Minneapolis five-percent tradition would be required to say. What can be said is that rent-seeking is no less plausible as a potential explanation for that tradition than altruistic preferences. After all, rent-seeking under the guise of altruism is no less common than actual altruism.

4.3 The Military Draft

For Calabresi, the military draft—an important legal structure in the United States until 1973 and an important one in some countries still today—is another example of law that reflects widely held preferences relating to merit goods under the prevailing distribution of wealth. As he puts it, "the external moral costs of wartime military service based on wealth, have…been the core reasons for

the selective service systems that have been established" (Calabresi 2016: 145). Alternatively, the core reason for those systems may be rent-seeking.

The draft predominantly affects young, low-skilled laborers. It's they who are eligible for conscription and typically unable to finagle an out if called on by Big Brother. In contrast, older people are typically not eligible for military conscription—the American Selective Service Act of 1948, for example, required registration of all men between the ages of 18 and 26. And deferments are typically permitted for those who are highly skilled or are in the process of becoming so, such as the educational and occupational deferments granted by the US government during the Korean War.

Higher-skilled laborers working in craft and industrial occupations compete with lower-skilled laborers in such occupations, whose labor is less expensive. The former are often organized in interest groups: labor unions. Rent-seeking by labor unions takes the form of encouraging lawmakers to make law that renders lower-skilled labor less competitive, hence higher-skilled labor more competitive. One example of this historically is successful lobbying by labor unions for law that regulates the employment of children. In the US, the Federal Labor Standards Act of 1938 legally restricted (with some exemptions) the work hours of laborers less than 16 years old. Among this law's chief proponents were labor unions: "Virtually every icon of the American labor movement appeared before Congressional committees to urge [its] passage" (Davidson, Davis, and Ekelund 1995: 92).

Another example of successful lobbying by labor unions for law that protects their members from the competition of lower-skilled labor may be military conscription. Similar to law that restricts the number of hours that young laborers may work, a draft that targets younger, unskilled workers and exempts or permits deferment for older, higher-skilled workers removes

predominantly lower-skilled labor from the market. In doing so, it raises the wage of higher-skilled labor, giving labor unions a significant economic stake in law affecting how government mans the military. That stake may motivate labor unions to encourage lawmakers to make such law.

If the idea that labor unions would rent-seek to influence law relating to how government mans the military seems farfetched, consider some evidence. In a cross-country study, Anderson, Halcoussis, and Tollison (1996) empirically analyze the relationship between labor-force unionization and laws affecting military employment. Their finding: "where organized labor has relatively greater clout, the draft is more likely to be employed as a device for restricting labor market competition" (Anderson, Halcoussis, and Tollison 1996: 198).

This result doesn't "prove" that rent-seeking explains the military draft, of course. Other persuasive accounts of the draft are also possible, unrelated to widely held preferences or rent-seeking. Mulligan and Shleifer (2005), for example, present compelling evidence that the fixed costs of introducing and administering the draft may be an important determinant of its use. Still, rent-seeking is also a plausible explanation for military conscription, and given the not infrequent success of labor unions in influencing law affecting labor, one that is worth considering before concluding that traditional economic theory cannot explain military conscription.

5 Final Thoughts

It's useful to comment briefly on the "efficiency" of the legal structures that Calabresi is concerned with from the rent-seeking perspective that I've offered vis-à-vis the widely-held-preferences perspective that Calabresi offers. The critical point is this: To find that some legal reality is driven by rent-seeking rather than by widely held preferences is not to find that it's "inefficient." George Stigler (1992: 459) famously argued "that all durable social institutions, including statute and

common laws, are efficient," or they would not persist over time. I agree; and so, it seems, does Calabresi (see, for instance, 2016: 147-149). In this respect, at least, Calabresi differs from other champions of behavioral economics, who maintain that traditional economic theory requires "expansion" or "alteration" because people are often "irrational."

In the realm of law, as in others, efficiency—maximum value of output for minimum value of inputs—must be judged with respect to the goal that the legal structure in question seeks to achieve. That many observed legal structures do not maximize wealth does not imply their inefficiency from the rent-seeking perspective because the many observed legal structures that are products of rent-seeking are not made with the goal of maximizing wealth. They're made with the goal of catering to the preferences of the interest groups that encourage them. Again, Stigler (1992: 459):

> Consider the following example. The United States wastes (in ordinary language) perhaps $3 billion per year producing sugar and sugar substitutes at a price two to three times the cost of importing the sugar. Yet that is the tested way in which the domestic sugar-beet, cane, and high-fructose-corn producers can increase their incomes by perhaps a quarter of the $3 billion—the other three quarters being deadweight loss….Lacking a cheaper way of achieving this domestic subsidy, our sugar program is efficient.

Thus, to explain a legal structure as the result of rent-seeking is not to decry it as "inefficient," let alone as "nonsensical" or "irrational." Just the opposite. I point this out because it highlights a feature that Calabresi sees as desirable for explanations of legal structures, including those that don't maximize wealth: namely, that the explanation render the structure in question as

a sensible outcome from the perspective of the persons driving it. Explanations grounded in widely held preferences for merit goods and altruism exhibit this feature, but so, too, do explanations grounded in rent-seeking.

In *The Future of Law and Economics*, Calabresi (2016) leverages some simple facts about widely held preferences, ignored in traditional economic models, to argue that those preferences explain legal structures that are challenging to explain as wealth maximizing and cannot be explained by traditional economic theory. In this paper, I've leveraged some equally simple facts about real-world lawmaking, ignored in approaches to representative democracy that assume away its agency problems, to argue that such legal structures are unlikely to be explained by widely held preferences and can be readily explained by traditional economic theory via rent-seeking. To the extent that the behavioral turn in law and economics is motivated by the idea that traditional economic theory cannot persuasively account for legal realities like those Calabresi highlights, scholars in law and economics may want to turn back. By considering rent-seeking explanations, scholars will find that much more of legal reality can be accounted for by traditional economic theory before any behavioral theorizing becomes necessary.

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