

SPECIAL REPORT

The limits of markets in a world where values matter

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Abstract Gillian Hadfield's astute *Rules for a Flat World* proposes a private market solution to rule-making because the current legislative or regulatory framework no longer meets the needs of a fast-paced digital economy. Further, lawyers have largely priced themselves out of the reach of many who would benefit from their services. By laying out Habermas's criticisms of the flaws in social integration created by market mechanisms, the paper warns that Hadfield's reliance on the market may import undesirable consequences into her proposal because the market structurally fails to address the human rights of many workers in the global economy. The paper then considers values such as dignity as proposed in Catholic Social Thought as a leavening agent to strengthen Hadfield's paper from the standpoint of human rights.

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Professor Hadfield's *Rules for a Flat World* uncovers flaws in the current legal delivery system that result in many being excluded from the world of defensible rights and responsibilities, protections and profits that a robust legal system provides. Professor Hadfield rightly observes that law helps a multifaceted plurality of persons determine how best we can be, work, and associate through a robust infrastructure of rules and, presumably, unwritten norms that make those rules work.

Hadfield identifies two of the biggest obstacles to justice, broadly defined, as the costs lawyers impose and an unwieldy legal framework that favors those with resources and political clout. The "haves" can influence, persuade, maneuver and even bend the available mechanisms to their will. By contrast, the "have-nots" find the legal system an opaque structure, and their needs are not attended to by individual legal actors or indeed by the system itself.

Furthermore, in our fast-paced digital economy, the cumbersome legislative or regulatory process simply fails to work as nimbly as is needed. Therefore, where trading and innovation occur at lightning speed, certain areas in the market are essentially unregulated. And as we have learned through years of sad experience, when an area is essentially unregulated, might makes right – the biggest player wins.

To address these difficulties, Professor Hadfield intriguingly proposes a series of private or local markets that would break the government monopoly on justice. Different groups could combine and contract to select private decision-makers to serve as generators of rules and arbiters of differences when conflicts or misunderstandings arise. Some enforcement mechanisms could be delegated to these private enclaves, and some might have to be delegated back to the government where more robust sanctions seem to be warranted for a particularly egregious breach of rules or protocol.

In the formation and regulation of these markets, as I understand her argument, Professor Hadfield defers to market mechanisms. I suggest that this deference might import unrecognized difficulties into her approach. I propose that a commitment to values such as human dignity as articulated in Catholic Social Thought might improve her position.

On its face, there is much to approve and admire about free market capitalism. In classic libertarian theory, the central issue in economics is how one ensures the cooperation of free individuals without coercion. Milton Friedman reaches back to Adam Smith's *Wealth of Nations* wherein Smith observes that, in the absence of external coercion, two parties will enter into exchanges because it will be mutually beneficial for them to do so, "provided the transaction is bilaterally voluntary and informed." (Friedman, 1962, p. 13) Per Smith, no exchange will take place unless both parties benefit.¹

The consumer is protected from coercion by the seller because of the presence of other sellers with whom he can deal; the seller is protected from coercion because of other consumers to whom she can sell; the employee is protected from coercion by the employer because of other employers for whom he can work, and so on. And the market does this impersonally and without centralized authority. (Friedman, 1962, pp. 14-15)

State authority is necessary to maintain the context for the market. (Cavanaugh, 2008, p. 3) The state must provide and protect general law and order, and it must enforce contracts that are voluntarily entered into, but the state must not interfere with the market. (Cavanaugh, 2008, p. 3) Rather, the state's main job may be rather to prevent any interference in the market. (Cavanaugh, 2008, p. 3)

The definition of free market is necessarily yoked to insisting that exchanges be voluntary and informed. Friedman seems remarkably sanguine that informational asymmetry is largely avoided in the market, solely through the mechanism of pricing structures. "The price system transmits only the important information and only to the people who need to know." (Friedman & Friedman, 1980, p. 7) Presumably, because people are willing to pay for some good or service, they thereby vote to accept that product or service and all that goes with it, barring actual deception by one of the parties. (Friedman & Friedman, 1980, p. 7) By paying for something, in this view, the consumer presumably knows enough or chooses to waive rights to any information she doesn't know.

But surely Smith's vision of "bilateral" information and voluntariness is far too thin a description for the current marketplace that is defined by layers of complexity and interests. In the purchase of something as simple as a t-shirt, it is likely that ordinary consumers know nothing about where the cotton was grown, under what conditions for laborers, including wages and possible pesticide exposure; where the fabric was woven, including issues of wages, hours, and factory working conditions such as ventilation, opportunity for breaks, and fire safety; where the shirt was sewn, including wages, hours, conditions, equipment provided; packaging of the shirts, including wages, hours, exposure to contaminants, and hazards arising from the cleanliness of the working environment; and finally shipping and receiving, including wages, hours, environmental hazards arising from fuel, workplace safety, and other labor conditions.

Habermas provides analytical categories for undermining this too-easy reliance on purchase price as sufficient information for consumers in his book on law and legal systems. (Habermas, 1996) He finds market mechanisms problematic because they are frequently far too abstracted from the rich interplay needed for ethical communicative action. A portion of his more robust argument is applicable here.

Habermas describes money as a "nonverbal steering mechanism" (Habermas, 1996, pp. 39-40) that permits people from different backgrounds and language groups to exchange goods and services because, even if they do not know anything else about each other or the deal, they clearly understand the value of cash and can somehow reason through the rest. (Habermas, 1996, pp. 39-40) The difficulty in relying upon this "nonverbal steering mechanism" is that money and the administrative apparatus that makes it function can serve

¹ I found Professor William Cavanaugh's discussion of Milton and Rose Friedman's work in his book, *Being Consumed: Economics and Christian Desire*, most helpful and instructive.

to camouflage an exercise of naked power that is opposed to the values of people who rely upon it. (Habermas, 1996, p.39)

Contrast the social integration of law with the sort of social integration money provides. Law serves a socially integrating function by developing a “consciously enacted framework of norms.” (Habermas, 1996, p.38) Law assumes its binding force in the society by uniting (1) a framework for decision-making, thereby securing rule acceptance as rationally acceptable, with (2) the idea of self-legislation (or a strong presumption of political autonomy of united citizens) which in turn makes the framework itself acceptable. (Habermas, 1996, p.39) By contrast, the nonverbal steering mechanism of money achieves a certain level of social integration, but it does so “behind the scenes” of the participants who use it. (Habermas, 1996, p.39) Monetary systems work amorally; those who use or possess money need not ascribe to any particular set of values. Law needs buy-in from participants in society to be seen as legitimate. Money, by contrast, does not. Thus, insofar as the market relies solely on pricing structure as defining all the “information necessary” for bilateral exchange, distortions can develop because the reliance upon money alone operates outside the realm of communicative systems and agreed upon values. (Habermas, 1996, p. 40)

If people cannot explore deeper issues than pricing, such as labor conditions or wage structures of the workers who produced an item, then people may not know all the information they need to make a choice in line with their values. The information conveyed by price alone can be remarkably unhelpful in this regard. For Habermas, if pricing structure is the only information conveyed, societal ties wither because values are ignored and communication constricted or denied. As the market separates itself from conscious assent by the people, by relying more and more on market choices that are divorced from these considerations, the less law and the market can be seen as self-legitimizing. (Habermas, 1996, p. 40)

For Friedman, a market is free if people can satisfy their wants without harming others, and the market seems agnostic about the content of wants or desires. Friedman observes that a free market economy “gives people what they want instead of what a particular group thinks they ought to want. Underlying most arguments against the free market is a lack of belief in freedom itself.” (Friedman, 1962, p. 15) But this claim undermines the price-as-the-only-information-needed point above. My participation in certain exchanges may have the effect of solidifying the marginalization of workers and the poor in a system where they are oppressed by employers or polluters in their job or home. When I rely solely on the price for an object, I may simply lack the information I need to make an ethical choice that does not harm others.

How might Catholic Social Thought help? This tradition imports a more nuanced picture that more adequately represents the different dimensions underlying monetary exchanges and gives voice to some people who have been left out of the high abstraction of the market as described by Friedman and his followers.

Almost sixty years ago, Pope John XXIII “systematized claims of human dignity as the source of human rights” in his Encyclical *Pacem in Terris*. (Schuck, 1991, p. 179) In so doing, he set up human dignity as the “hub” of a wheel from which all human rights flow.² This concept of human dignity undermines and challenges claims that “irrational elements of the universe” (such as the “invisible hand of the market”) are sufficient to govern social and economic relationships. (*Pacem in Terris* [6], in O'Brien & Shannon, eds., 1992, p. 132) By contrast, a well-ordered and productive society needs a foundation rooted in a recognition of human rights and responsibilities inhering in each person. (*Pacem in Terris* [9], in O'Brien & Shannon, eds., 1992, p. 132) These rights and obligations are “universal and inviolable, so

² Schuck here comments on David Hollenbach, S.J., *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition*, (New York: Paulist Press, 1979) 68.

they cannot in any way be surrendered.” (*Pacem in Terris* [9], in O’Brien & Shannon, eds., 1992, p. 132)

In enumerating these rights, Catholic Social Thought highlights bodily integrity and the means necessary to sustain human life including food, clothing, shelter, rest, medical care and necessary social services. (*Pacem in Terris* [11], in O’Brien & Shannon, eds., 1992, p. 132) What emerges from this short list of basic concerns is the beginnings of a robust and integrated sense of a human self. Unlike the willful blindness of market mechanisms, which appear to be unconcerned with the flesh and blood conditions of people who work within the market system, Catholic Social Thought begins by considering the bodily, cultural, and political conditions of workers and insists that these basic components of human flourishing need to be met before the society can be seen as acceptable.³ The measure of the society is how it contributes to human life rather than how profitable it is in shallow monetary metrics.

Where the human-centered anthropology of Catholic Social Thought is underscored is in its insistence that human persons have a right to work, free of coercion. (*Pacem in Terris* [18], in O’Brien & Shannon, eds., 1992, pp. 133-134)⁴ Catholic Social Thought emphasizes that working conditions must be such that the workers’ physical health cannot be endangered, “morals are safeguarded and young people’s normal development is not impaired.” (*Pacem in Terris* [19], in O’Brien & Shannon, eds., 1992, p. 134) The teaching also emphasizes that the worker has right to wages that are determined according to “criteria of justice, and sufficient, therefore, in proportion to the available resources, to give the worker and his family a standard of living in keeping with the dignity of the human person.” (*Pacem in Terris* [20], in O’Brien & Shannon, eds., 1992, p. 134) These rights should be enforced through juridical protections. (*Pacem in Terris* [27], in O’Brien & Shannon, eds., 1992, p. 135)

In adopting this framework which prizes the viewpoint of the worker, Catholic Social Thought does not deviate from a goal Adam Smith wove into the fabric of *The Wealth of Nations*. (Chmielewski, SJ, 1992, p. 10)⁵ Insofar as workers are treated as subjects of their own lives, as co-creators of social order, then that system which permits people to constitute themselves is seen as good. (Baum, 1982, p. 19)

The Christian message proclaims that God is redemptively at work in present history. God graciously summons people to struggle against the powers that damage their humanity. Thanks to this divine presence, it is possible to speak of man becoming the subject of history and thus of man’s making man. (Baum, 1982, p. 19)

³ See e.g., *Encyclical Letter of his Holiness Pope Paul VI, On the Development of Peoples* (New York: Paulist Press, 1967) 33. [21]

Less human conditions first affect those who are so poor as to lack the minimum essentials for life, or who are menaced by the moral deficiencies to which they have succumbed through selfishness; then they affect those who are oppressed by social structures which have been created by abuses of ownership or by abuses of power, by the exploitation of workers or by unfair business deals. On the other hand, more human conditions of life clearly imply passage from want to the possession of necessities, overcoming social evils, increase of knowledge and acquisition of culture. Other more human conditions are increased esteem for dignity of others, a turning toward the spirit of poverty, cooperation for the common good and the will for peace....

⁴ “[I]t is clear that man has a right. . . not only to an opportunity to work, but also to go about his work without coercion” (Chmielewski, SJ, 1992, p. 10).

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The measurement central to the project of economic analysis is, for Smith, anthropocentric. In a world suffused with change, Smith sought a stable measure within the human activity of work. Smith intends to establish this measure on the basis of personal equality.

Now intelligent minds may differ on how well Smith intended to make this goal a reality, but surely a market system interested in how business and wages cash out for workers seems a far cry from the free market as proposed by Milton Friedman.

It seems to me that Hadfield can consider the call of human dignity and the worker as subject of his or her own destiny and still hold on to her goal of providing a legal framework that can address the fast-changing needs of a digital economy. It is a question of asking what sort of assumptions are both desirable and necessary as we try to forge rules that truly address the needs of people who live in a flat world.

References

- G. Baum (1982) *The Priority of Labor*. New York: Paulist Press
- W. Cavanaugh (2008) *Being Consumed: Economics and Christian Desire*. Grand Rapids, MI: Wm. B. Eerdmans Publishing Co.
- P. Chmielewski, S.J. (1992) *Bettering our Condition: Work, Workers and Ethics in British and German Economic Thought*. New York: Peter Lang.
- J. Habermas (1996) *Between Facts and Norms*. Cambridge, MA: MIT Press (Tr. W. Rehg).
- M. Friedman (1962) *Capitalism and Freedom*. Chicago: University of Chicago Press.
- M. Friedman & R. Friedman (1980) *Free to Choose*. New York: Avon Books. *Pacem in Terris, Encyclical Letter of His Holiness Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity and Liberty*, (1963) in *Catholic Social Thought, The Documentary Heritage*, (Eds. D. O'Brien & T Shannon) Maryknoll, NY: Orbis Books, 1992.
- M. Schuck (1991). *That They May Be One: The Social Teaching of the Papal Encyclicals 1740-1989*. Washington D.C.: Georgetown University Press.