ECONOMIC ANALYSIS OF LEGAL METHOD AND LAW: THE DANGER IN VALUELESS VALUES

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I. INTRODUCTION

Beset by an era of "liberal" judges following an ostensibly humanistic approach to law, I initially read fellow "conservative" Richard A. Posner's economic analyses of law[1] with hope and with a waiting sympathy. After a more thorough study of his works, I have come to conclude this approach to be of the gravest danger to ours and any legal system. The approach is simplistic, misleading, de-humanizing, and destructive of justice. It is the aim of this article to prove just that. Although I continue to have respect for Judge Posner's legal scholarly abilities, I regard the approach, which puts procedure (economic efficiency) in front of substance (individualism and ethics), as open to abuse.

The economic analysis of law is a jurisprudential or philosophical attitude toward law. In order to understand "economic law," placing it in the context of other paradigms of law is necessary—and is the subject of the next section. Of course, this will include an explanation of economic law. Although there are an increasing number of pieces on economic law, those by Posner, in this author's opinion, are the most detailed, best thought out, and also, have gained the most notoriety. For these reasons, a brief summary of the salient points of Posner's philosophy will be set out. The focus here will be on the criminal law—where economics can do the most damage, and also, incidentally, where Posner has

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1. *See e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (2nd ed. 1977) [hereinafter cited as Posner I]; Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979) [hereinafter cited as Posner II]; POSNER, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) [hereinafter cited as Posner III].

devoted significant attention.[2] An alternative theory of criminal law and law in general will be offered, which will be followed by a critique of economic law.

II. THE BACKDROP: LAW AND LEGAL ANALYSIS

Since time immemorial two conceptions of *what law is* have conflicted. The one conception focuses on the *substance* of the law, that is, on its content. The other conception emphasizes the external form or method of analysis of the law, that is, the *procedure* of how a law is enacted.

The primary conception of law, that placing focus on substance, has attempted to delineate what law should be, and has, since primordial days, linked the law with ethics.[3] Ethics, as a personal, non-legal, subjective tenet is simply doing "good" actions.[4] Alternately stated, ethics is avoiding that conduct which is known to be wrong. Goodness is a ground concept which is, if not self-defining, then meaningless. The intent of the action and the action, itself, are the paramount inquiries of ethics.

Ethics in the law has not merely promoted goodness in legal rules. Instead, it has promoted several fundamental human values. The ethical concept of goodness has translated into a less demanding legal concept: *fairness*. The law, unlike ethics, does not *mandate* good behavior. Instead, it prohibits very bad behavior and leaves to human free will the choice whether to do good.

This one word, "fairness," has been thought to be synonymous with the correct functioning of law (justice) from the Romans[5] to even many of the quasi-skeptic American Realists.[6] The quintessential summary of the United States Constitution, "due process," has been defined from the time of Justice Cardozo onwards to

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2. *See, e.g.*, POSNER I, *supra* note 1, at 163-91; Posner III, *supra* note 1.

3. *See, e.g.*, THE PRESOCRATICS 26, 30 (P. Wheelwright ed. 1975)(quoting Hesiod of ancient Greek and Epicharmus, repectively); XXV THE SACRED BOOKS OF THE EAST 29 (F.M. Muller ed. 1886) (quoting Manu of ancient India).

4. Professor George Edward Moore of Cambridge University set out this proof in his seminal work. *See generally* G.E. MOORE, PRINCIPIA ETHICA 1-11 (1971) [hereinafter cited as MOORE].

5. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, in JURISPRUDENCE 525 (G. Christie ed. 1973).

6. *See, e.g.*,, J. FRANK, *Law and the Modern Mind*, in JURISPRUDENCE 719 (G. Christie ed. 1973) [hereinafter cited as FRANK].

mean "fundamental fairness."[7]

One school of jurisprudence has placed its focus on the *content* of legal rules, and, in short, has required that legal rules be "fair." This school has been known as the "natural law" school because of its belief that right law is based on the eternal qualities inherent in nature[8] and the eternal qualities based on the nature of man.[9] Although this school pre-dated the Christian era,[10] it has borne the mark of religious undertones because of the brilliance of one of its early Christian writers, Thomas Aquinas.[11]

Natural law was the avowed source of the United States Constitution[12] and the French Civil Code.[13] By that period, however, most of its religious undertones were thought to be unnecessary (though not necessarily contradictory) to its doctrine.[14] The doctrine of natural law was dedicated to promoting human *liberty* and *equality*. By promoting these, law was to promote fairness. The freedom of commerce and of contract which characterized the French Civil Code is indicative of that liberty value. Similarly, the separation of powers, popular election, and the so-called "First Amendment" freedoms in the United States Constitution are also indicative of the primacy of the human values of liberty and

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7. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660 (1983); Malloy v. Hogan, 378 U.S. 1 (1964); Palko v. Connecticut, 302 U.S. 319 (1937) overruled in part by Benton v. Maryland 395 U.S. 784 (1969).

8. *See generally*, PLATO, *Minos*, in IV THE WORKS OF PLATO, 449 (1851).

9. *See generally*, ARISTOTLE, THE POLITICS 25-30 (1975); C. CONWAY, JURISPRUDENCE 22 (1971).

10. The school referred to in the text is Plato's Academy, which pre-dates the Christian era by at least 400 years.

11. *See* T. AQUINAS, *Summa Theologica*, in THE POCKET AQUINAS 181 (V. Borke ed. 1960).

12. This is indicated by Thomas Jefferson's Declaration of Independence. *See* T. JEFFERSON, *The Declaration of Independence*, in THE PORTABLE THOMAS JEFFERSON 235 (M. Peterson ed. 1975). Further, much of the Bill of Rights bears the stamp of this Enlightenment period philosophy. *See* U.S. CONST. amends. IX, X; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 427 (1978).

13. The French Civil Code, or Code Napolean, was also written during the Enlightenment Natural Law period. *Cf.* Audit, *Recent Revisions of the French Civil Code*, 38 LA. L. REV. 747, 777-81 (1978).

14. In fact, the American proponents of natural law, Thomas Jefferson and James Madison, wished to separate church and state. *See, e.g.*, T. JEFFERSON *A Bill for Establishing Religious Freedom*, in THE PORTABLE THOMAS JEFFERSON 251-53 (M. Peterson 1975); J. MADISON, *Memorial and Remonstrance Against Religious Assessments*,in Everson v. Board of Education, 330 U.S. 1, 63 (1946) [hereinafter cited as MADISON].

equality.[15]

Although this school of legal philosophy, by name, has come into disfavor in the recent past, it continues to have its followers. The followers are simply those who place their focus on the content of what law and legal decision should be. The American Realist school of jurisprudence repopularized this approach by indicating that law is fairness first, with procedure a distant second.[16] Thus, they believed that the judge's method of decision was to intuitively grasp fairness (morality) and then to translate this into legal terms.[17] Analogously, where the United States Supreme Court has applied provisions of the Bill of Rights to the states by way of the due process clause of the fourteenth amendment, they have done so by calling the to-be-incorporated right fundamental to *fairness* and to ordered, civilized *liberty*.[18]

More recently, Professor Dworkin has put attention on the content of legal rules by attempting to prove that rules of law have, at their source, fundamental *principles* of law which are finite in number and basic to law.[19] His essential principle is equality.[20] Although the specific words of legal rules change, the underlying principles, for instance, the prohibition against profiting from your own wrong, do not.[21]

Even more recently, the Critical Studies proponents have attacked the notion that legal rules can be objective. They have argued that the law, inherently and only, can be a system of values—which incidentally, should be based on fairness.[22]

A synthesis of contemporary case law decisions as well as the literature of the past indicates that the content of law should max-

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15. *See generally* DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1945). The point, however, is obvious.

16. FRANK, *supra* note 6.

17. *Id. See also* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, in JURISPRUDENCE 984 (G. Christie ed. 1973).

18. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937), overruled in part by Benton v. Maryland, 395 U.S. 784 (1969) or any of the selective incorporation cases.

19. *See, e.g.*, DWORKIN, *Is Law a System of Rules?*, in THE PHILOSOPHY OF LAW 38 (R. Dworkin ed. 1979).

20. R. DWORKIN, TAKING RIGHTS SERIOUSLY 272 (1978).

21. *Id.* at 23-4.

22. *See, e.g.*, R. UNGER, LAW IN MODERN SOCIETY, TOWARD A CRITICISM OF SOCIAL THEORY (1976).

imize and harmonize the following legal principles: fairness, liberty, dignity, equality, and truth.[23]

Historically, the schism between those placing emphasis on the content of rules and those placing emphasis on the form of rules came to dramatic manifestation in the two court systems of Renaissance England. Their formalistic "common law" courts were unable to reach an acceptable resolution to too many disputes because of their unwillingness to allow legal actions which deviated even slightly from the norm.[24] The other system, fairness-based, "equity" courts arose as a necessary alternative to the efficient but overly formalistic common law courts.[25] Simply stated, the view of the common law courts was, the law is the procedure of the law which has been accepted . . . and nothing more. The view of the equity courts was that the law was fairness, first, and form, second.[26]

Returning now to the literature, the classical formalistic definition of law, espoused by John Austin and incidentally adopted by Posner,[27] is that law is the command of the sovereign enforced by sanction.[28] This jurisprudential definition of law has been known as *positivism.* Instead of focusing on the content of legal rules, focus is placed on the external form of legal rules. Alternately stated, instead of focusing on *what* a law should be, it focuses on *how* a law is enacted.

The English positivist, Jeremy Bentham, steered the emphasis of positivism away from individualist ethics and towards socialism. His classical utilitarian formula for creating law was: greatest good for the greatest number.[29]

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23. *See generally* Miller, *The Science of Law: The Maturing of Jurisprudence into Fundamental Principles in Fairness,* 13 W. ST. U.L. REV. 367 (1986) [hereinafter cited as Miller].

24. *See,* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 673-81 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

25. *Id.*

26. *Id. See also* F. BACON, *Maxims of the Law,* in XIV WORKS OF FRANCIS BACON 165 (Spedding, Ellis, Heath ed. 1864).

27. Posner qualifies this somewhat, but Austin is clearly and categorically his basis. *See* POSNER I, *supra* note 1, at 189.

28. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 133-34 (1965).

29. *See e.g.* J. BENTHAM, *An Introduction to the Principles of Morals and Legislation,* in APPROACHES TO ETHICS 307-08 (2d ed. 1969) [hereinafter cited as BENTHAM].

More recently, H.L.A. Hart refined both the positivist theories of Austin and those also of Bentham. Responding to criticism that the people must accept a law for it to have force, Hart redefined law as, approximately, the command of the sovereign, *accepted by the people*, and enforced by sanction.[30] Further, due to criticism that utilitarianism allowed individual injustice by its preoccupation with "the greatest number," Hart injected into his modern positivism the principle of liberty.[31] In this, he differed little with John Stuart Mill's quasi-libertarian-utilitarian philosophy.[32]

Posner's economic analysis of law fits far more neatly into this latter positivistic framework than perhaps he would wish to admit, as the second following section demonstrates. First, however, a discussion of earlier economic law theory will provide the context for Posner's approach.

III. Prior Modes of Economic Law

Economic law has meant different things to different proponents. Above all, it has placed emphasis on maximizing collective wealth (not always the same as money); on shaping rules to do so efficiently; and on the relative and secondary importance of the rules themselves. In general, this mode of analysis has been unconcerned with individual grievance or the concept of ethics. It has deemed the good of the whole to overshadow in importance the good to the individual; and it has deemed ethics to be a relativistic, meaningless approach. Legal formalists have subscribed to an economic-socialistic view of law, in the past as well as the present. Greek literature is replete with example of such theories.[33] However, according to Posner, modern economic law was first expressed by Bentham.[34]

For Bentham, the method of law-making should be to calcu-

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30. This is a simplified statement of Hart's "rule of recognition." *See, generally* H.L.A. Hart, The Concept of Law 92 (1961).

31. Such was first intimated in Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 Ga. L. Rev. 969, 989 (1977) [hereinafter cited as Hart I]; *See also* Hart, *Between Utility and Rights*, 79 Colum. L. Rev. 828 (1979).

32. *See generally* J.S. Mill, On Liberty (1859).

33. Such, for example, characterized the "Spartan," anti-democratic, life-style and rule of 404 B.C. *See, e.g.*, 8 World Book Encyclopedia 369 (1986).

34. Posner II, *supra* note 1, at 281-82.

late the greatest good for the greatest number.[35] He equated "good" with pleasure.[36] Rules of law should be judged by their usefulness or *utility*. That is, they should be judged by their ability to increase the social good.[37] Bentham's theory was criticized both for its lack of concern for morality, and for its willingness to sacrifice even worthy and innocent individuals to the common good.[38]

An equally influential economic lawyer, Karl Marx, whom American economists would just as soon forget, also villified the status of individualism. He defined law as the relativistic promoter of one class' manipulation of another.[39] He denigrated traditional ethics and, via his own brand of economic analysis, forecasted the demise of all free market capitalistic systems.[40] To implement his communistic society, he felt little remorse over unjust treatment of individuals and over the massive bloodshed of revolutions to come.[41] Much like the more modern economic lawyers, Marx viewed law as a relativistic concept. Law was the means by which one class of society kept power.[42] The theory was radical and futile,[43] but this statement is possible only via 100 years of hindsight.

The theories of Bentham and Marx are indicative of the breadth of economic legal analysis. It is one method, but it is not one system of philosophy. The method is devoid of underlying *values*. This observation is the cornerstone of this author's criticism.

IV. Economic Analysis Under Posner

A. *Posner's Economic Legal Theory*

Posner writes that there are two aspects to the theoretical study of law: normative and positive. He defines normative as what

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35. Bentham, *supra* note 29.
36. *Id.* at 307.
37. *Id.* at 308, n.1.
38. *See, e.g.*, J. Rawls, A Theory of Justice 26-32 (1971) [hereinfater cited as Rawls].
39. *See generally* K. Marx & F. Engels, The Communist Manifesto (S. Moore trans. 1964).
40. *Id.*
41. *Id.*
42. *Id.*
43. Communist China as of 1986 has significantly departed from this philosophy, as perhaps best evidenced by her de facto leader's being named Time Magazine's "Man of the Year" 1985.

the law should be, and positive, as what the law is.[44] This distinction neglects the equally fundamental point that in *interpreting* what the law is and how it came to be (his positive aspect to law), one is creating a blueprint for what the law is to become (his normative aspect of law). Economic law is concerned with both of these aspects of law. Its concern with existing law is to evaluate its efficiency. Its concern with law-making is to stamp an economic mode on its creation, i.e., to encourage that all future law be more efficient.[45]

Posner defines economics as "the science of rational human behavior."[46] In essence, rational human behavior maximizes *efficiency*.[47] The definition is noteworthy for several reasons. First, in defining *economics* as a science, Posner also clearly sees *law* as having the potential to be a science. Although the highest modern conception of science includes a subjective element and perhaps the human psyche,[48] Posner's science is, instead, a more archaic discipline—it is purely objective.[49] This view of law as a purely objective science was last stated by Dean Langdell in the 1800's,[50] and has come into severe disrepute.[51]

Second, in heralding economics as the means of exercising human choice, Posner has substituted it for the traditional means, ethics. His theory is wide-reaching and radical. Finally, critical to his above definition of economics, is the concept of efficiency, which is the maximizing of human resources and the minimizing of cost.[52] Efficiency is the quintessence upon which all of Posner's theory is built. Efficiency is the modern synonym to utility. Clearly, it is but a simplified statement of Bentham's "greatest good for the greatest number" equation. Efficiency has replaced a different guiding essence in law: fairness. For this reason, he notes

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44. Posner II, *supra* note 1, at 285.

45. *Id.* at 10.

46. *Id.* at 287.

47. *Id.* at 4, 10.

48. *See, e.g.*, E. SCHRODINGER, WHAT IS LIFE? (1963); *See generally* A. BAKER, MODERN PHYSICS AND ANTIPHYSICS 192 (1970) [hereinafter cited as BAKER].

49. It is devoid of the subjective element, the element of the perceiver, and is truly more akin to the elementary, solely materialistic Newtonian Mechanics. *See Baker, supra* note 48, at 194; I. NEWTON, PHILOSOPHY OF NATURE (H.S. Thayer ed. 1960).

50. *See* J. FRANK, COURTS ON TRIAL 226 (1973).

51. *Id.* at 225-46.

52. POSNER I, *supra* note 1, at 10-12.

that even the common law is economics/efficiency, based.[53] He also notes that because the concept of "fairness" is subjective, it is uncertain and therefore useless to the law.[54] Efficiency, in fact, "may be the *only* value that a system of common-law rulemaking can effectively promote."[55] According to Posner, efficiency "has been the predominant . . . factor" in the Anglo-American legal tradition![56]

In economic law, as in economics in general, there is the presumption that human *resources* are limited.[57] For this reason, evidently, is "efficiency" so important. The presumption of the paucity of human resources has not been proven, and has come under attack as non-helpful and possibly incorrect.[58] The policy of economic law is to most efficiently utilize society's resources. Posner, unlike most legal economists, does not equate resources only with money:[59] resources can be whatever society deems them to be—but he takes this analysis no further.[60]

Because of its emphasis on efficiency, economic law is not concerned with ethical tenets. For example: "Punishment is the price that society charges for a criminal offense."[61] This is, of course, in contrast to the more traditional ethical understanding that punishment is what a wrongdoer personally deserves. However, a hidden principle in Posner's brand of economic law is that of liberty. He notes that resources are most efficiently utilized when there is a "free" market.[62]

Posner's analysis seems somewhat uncertain in two areas. The first is whether economic law is merely a refinement of utilitarianism. In his earlier writing he drew a sharp distinction between the

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53. Posner II, *supra* note 1, at 290.

54. *Id.* at 292.

55. *Id.*

56. *Id.* at 294.

57. POSNER I, *supra* note 1, at 2-3, 23.

58. *See, e.g.*, R.B. FULLER, SYNERGETICS XXXii (1982).

59. *See, e.g.*, A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983).

60. POSNER I, *supra* note 1, at 10, 23. However, Posner fails to perceive that once economic analysis is off money, it becomes but a hyper-formalized legal-ethical analysis. *See* Hart I, *supra* note 31, at 988-89.

61. POSNER I, *supra* note 1, at 6.

62. *Id.* at 9.

two;[63] in later work, however, he made no such qualification.[64] Economic law, as utilitarianism, of course, therefore attracts all the criticism leveled at that philosophy—the foremost of which is its willingness to sacrifice individual values for pragmatic socialistic reasons.[65] Second, Posner's work is contradictory regarding economic law's so-called "normative" aspect. He writes in one instance that the economic lawyer "cannot prescribe social change."[66] Yet, in other instances, he seems clearly to be prescribing social change via a use of economics as opposed to ethical analysis, and lauds the "reformative power"[67] of economic based law. His theory is far-reaching, and only in phases does he wish to indicate its breadth.

In one such phase he boldly asserts that efficiency is the most basic legal *value*. In doing so, he candidly dismisses the importance of the concepts of fairness or justice to the law.[68] He therefore admits that economic law has no concern whatsoever with righting the wrong between a tortfeasor and his victim[69] or with punishing a criminal for the wrong he has done to his victim and society. The economic lawyer deems the wrong a "closed chapter."[70] His concern is only with the future.

Posner's estrangement from the concept of fairness is profound. In his effort to harmonize economics with traditional notions of law, he attempts to define fairness in economic terms. Fairness or justice he calls simply the redistribution of societal resources.[71] When one wastes resources, one is "immoral."[72] The very different concept of fairness, which labels humans as essentially moral beings, whose virtuous qualities of dignity, equality, liberty, and truth should be maximized, is strangely ignored.

In taking judgment of economic law, Posner, admits its previ-

63. POSNER I, *supra* note 1.
64. Posner III, *supra* note 1.
65. *See* RAWLS, *supra* note 38.
66. POSNER I, *supra* note 1, at 10.
67. *Id.* at 17.
68. POSNER I, *supra* note 1.
69. *Id* at 18.
70. *Id.*
71. *Id.* at 22.
72. *Id.* at 23.

ous failures in predicting the efficient solution.[73] Nevertheless he wishes it to be judged solely by its ability to predict what is efficient.[74] Unfortunately, he does not indicate the *time-scale* of prediction. The success of a society's programs and law may take several years—or even centuries—to accurately judge. It has taken perhaps one or two hundred years to see that the United States system, which favors individual liberty, is also stabilizing and wealth-producing. Similarly, it has taken the Chinese at least one generation to perceive that pure socialism is a destructive force.

It is not an oversimplification to label Posner as the latest proponent in the positivist (proceduralist-formalist) school of legal philosophy. He admits so, himself.[75] However, he tempers the harsh positivism of Austin (law as command by sanction) with certain of the above mentioned values, e.g., equality, truth.[76] And, for the first time in the history of positivist jurisprudence, Posner, as an admitted proponent, has taken the natural law position that some "laws" should be disobeyed[77] (if they decrease social efficiency).

What we now call the "common law" was the judge-made law of England, supplemented, from time to time by statute. Many of its tenets and "flavor," characterize the present law particularly in the English speaking countries of the world. The common law has been thought to be reason, natural law, and religion-based.[78] Judge Posner, however, sees in it instead the stamp of economics.[79] Although not ignoring ethical-legal concepts such as truthfulness, he nevertheless redefines morality, more fundamentally, as efficiency.[80] The morality of the common law was *implemented* by economics, by making "immoral" behavior *costly*.[81]

Were the common law economics based, then the use of economics, right now, in the United States legal system, would neither

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73. *Id.* at 13.
74. *Id.*
75. POSNER I, *supra* note 1.
76. *Id.* at 190.
77. *Id.* at 191.
78. *See* W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 9-10 (1972) [hereinafter cited as LAFAVE & SCOTT]; 4 W. BLACKSTONE, COMMENTARIES *2-3, 17-18.
79. POSNER I, *supra* note 1, at 179.
80. *Id.* at 185.
81. *Id.* at 186.

contradict *stare decisis*, nor would it be unconstitutional. The importance, therefore, of proving that the common law was economic law is unquestionable. A revolution would not be required and a sitting judge could act in good faith, using economic analysis to decide his American legal decisions.

B. Judge Posner's Economic Theory of Criminal Law

The criminal law forms the backbone of a nation's legal system; its concerns touch the life and lifestyles of the highest number of its citizens. Its punishments are potentially severe and its regulative effects are profound. Further, in historically adjudging societal worth, virtues or shortcomings in the criminal law have been central to that inquiry.[82]

With their pragmatic, socialistic, cost-efficient approach to civil (tort) law, the economists have made inroads. Such is the case because civil law concerns primarily money and its redistribution, and civil law is not always based on wrong.[83] In the United States, the gross ineptitude of the civil court systems, and monetary judgments based on neither reason nor fairness, have prompted demand for reform.[84] It is nearing the point at which *any* change should be tried.

The stakes are different in criminal law, which is more fundamental to society and more important to the individual. Although the economic approach is incorrect also in civil law, nevertheless, its major danger is in the area of criminal law. Posner and others have placed increasing attention to this area.[85]

Recently, Posner has categorized Bentham as the founder of economic law, and as having shaped much of the present criminal

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82. For example, Athens was condemned for its prosecution of Socrates; Rome, for that of Jesus; ancient Ramses II of Egypt for his regime's prosecution of Jews; etc.

83. W. PROSSER, LAW OF TORTS 7, 458 (4th ed. 1971).

84. Civil court delays range into the years. Many an issue of a legal periodical or journal contains some proposal for civil reform. Non-court arbitration is, for this reason, on the rise. *See* for example Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice *in*; 70 F.R.D. 79 (1976); Schiller, Wall, *Judicial Settlement Techniques* 5 AM. J. TRIAL ADVOC. 39 (1981); Fuller, *The Forms and Limits of Adjudication* 92 HARV. L. REV. 353 (1978); GETMAN, *Labor Arbitration and Dispute Resolution* 88 YALE L.J. 916 (1979) (the entire issue is devoted to issues in dispute resolution).

85. Posner III, *supra* note 1; Polinski, *supra* note 59, at 73.

law.[86] Further, and typically, he has denigrated the moral approach to law and, in particular, to the criminal law.[87] The language of his exposition of the economic basis of criminal law contains a few key concepts. First, of course, Posner's focus is "efficiency." The criminal law should, promote efficiency foremost. Its method of doing this is to decrease "social costs."[88] This social cost formulation, incidentally, has been adopted in great part by the United States Supreme Court.[89]

Second, since the concern of economic-based criminal law is not giving to the wrongdoer what punishment he, personally, deserves, it is no surprise that central to its form of punishment is the concept of *deterrence*.[90] Economic criminal law is concerned with *preventing* crime by efficiently deterring it.[91]

To the educated economist, crimes are highly inefficient acts.[92] They waste resources and disrupt society's efficient functioning. However, to a certain class of people, criminals, crimes are thought to maximize personal benefits, by by-passing the difficult market.[93] Therefore, as rational speculators in unpopular markets, criminals should be shown that what they wish to do (crime) is, in fact, a bad strategy.[94] Criminal law, as solely economic, should solely be concerned with deterrence. Its penalties should be high enough to effectively deter the particular crime. Once deterrence has been gained, social costs will be minimized and efficiency will be maximized.

Although it is a beneficial influence in increasing social efficiency by deterring some wrong conduct, private civil law (torts) does not provide enough "social control."[95] More serious penalties (e.g., imprisonment) are required and administered by a different

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86. Posner III, *supra* note 1, at 1230.
87. *Id.* at 1230-31.
88. *Id.* at 1230.
89. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); Camara v. Municipal Court, 387 U.S. 523 (1967).
90. Posner III, *supra* note 1, at 1195, 1214; *see also* POSNER I, *supra* note 1, at 190.
91. Posner III, *supra* note 1, at 1224.
92. *Id.* at 1195.
93. *Id.* at 1196.
94. *Id.* at 1195.
95. *Id.* at 1201.

necessary branch of law—the criminal law.[96] Nevertheless, Posner does impliedly suggest an increased use of tort law, whenever possible, instead of criminal law.[97]

Posner makes other reformative suggestions as well. Because of the high social costs of imprisonment,[98] Posner suggests instead that *fines* be the preferred penalty.[99] His discussion here is thought-provoking not only for what it does state, but also for what it does not. In stating the preferability of fines, Posner admits that if the poor cannot pay a fine, then they will have to go to jail; thus, there will be two punishments—one for the rich and one for the poor.[100]

In some instances, of course, the above must be the result. However, in others, and as it stands, this is obviously overly harsh.[101] Alternative methods of punishment, short of confinement must be utilized, even if inefficient to societal wealth.[102] Aside from whatever jurisprudence one follows, constitutional equal protection so mandates.[103]

More interestingly, Posner neglects to discuss the better reason for imprisonment. Certainly, its failings in future deterrence and its high social costs are factors for the decline of its use, but imprisonment should remain the preferred punishment for crimes of *violence*. Non-violent monetary thefts and other such crimes are not as severe, not as "wrong," as violent crimes such as murder, rape, kidnapping, arson, burglary, and mayhem.[104] Nevertheless, to the economist, many of these perpetrators should not be jailed if a severe fine would as effectively deter them and others from similar further action. Fines allow the high *social cost* of imprisonment to be avoided.

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96. *Id.* at 1201-03.

97. *Id.* at 1203.

98. POSNER I, *supra* note 1, at 168.

99. *Id.* at 166.

100. *Id.* at 23 n.15; Posner states, however, at 167, that there is no inherent discrimination. *See also* Posner III, *supra* note 1, at 1204-05.

101. *See* Bearden v. Georgia, 461 U.S. 660 (1983).

102. *See Id* at 668-69.

103. *See also*, J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 731-34 (2d ed. 1983).

104. These are the so-called "inherently dangerous" common law felonies. *See, e.g.*, R. PERKINS & R. BOYCE, CRIMINAL LAW 63-64 (3d ed. 1982) [hereinafter cited as PERKINS].

Since the purpose of economic-based criminal law is to deter crime, common notions of individual-based "fair play" become less important. For instance, it is acceptable to make an example of the apprehended perpetrator.[105] When a difficult to catch perpetrator receives a punishment which corresponds *not* with the evil of the crime, but instead with 1) the difficulty in catching him, and 2) the severity necessary to scare (deter) others from doing this prohibited action, social efficiency is maximized.[106] Using a similar economic formulation, Posner implies it would be more efficient to administer public whippings to some criminals, than it would be to jail them. The social cost of punishment would be decreased, and the deterrence to others would be similar to incarceration (because such public whipping is also physically painful and emotionally humiliating).[107]

Posner writes that the common law criminal law is economic-based,[108] but he is inconsistent when he argues against the efficiency of a jury[109] and other criminal procedural rights.[110] These were common law legal principles. Although many have questioned recent expansions of the protections given by the fourth, fifth, and sixth amendments to the United States Constitution,[111] the historical origins of these protections is beyond dispute. They were derived from the common law and common law tradition as embodied in the Magna Charta.[112] An economic lawyer is, no doubt, uncomfortable with much of the Bill of Rights because it places the *individual values* of dignity, liberty, and equality above social efficiency. The right to have a jury of one's peers decide a case was felt to offset the governmental interest (i.e., social efficiency) in deciding a case against the lone individual.[113] Likewise, the fourth amendment protection of security (particularly in the home) against unreasonable search and seizure was felt by the Framers of the United States Constitution to protect the individual intangible

105. POSNER I, *supra* note 1, at 171.
106. *Id.*
107. *Id.* at 187.
108. Posner III, *supra* note 1, at 1194.
109. POSNER I, *supra* note 1, at 457.
110. *Id.* at 445.
111. *See e.g.*, Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth Amendment,"* 22 AM. CRIM. L. REV. 25 (1984).
112. *See generally* PLUCKNETT, *supra* note 24, at 22-26.
113. C. WHITEBREAD, CRIMINAL PROCEDURE 430 (1980).

rights of personal security and self-esteem (dignity), against the social benefit derived from social control and increased revenue (via taxation of contraband goods).[114] The common law was not predominantly economic-based.

Posner does find one valid example of the economic basis of the English criminal law. He notes that at the common law more crimes were punished by death, because society possessed a lesser ability to catch wrongdoers. Therefore, society wished to make examples of the few who were caught (so as to deter others).[115] Further, because more crimes then were punished by death, and because their society wished to deter some crimes more than others (e.g., crimes against the Crown were desired to be most deterred), they devised particularly brutal methods of meting out death.[116] For the worst crimes, these methods included drawing and quartering or boiling in oil, as opposed to the less painful hanging or beheading.[117] Such gradations of capital punishments were definitely and decidedly economic-based. That is, they were unconcerned with the ethics of punishment, with human dignity.

To be guilty of a crime there must concur a guilty action (*actus reus*) and a guilty mental state (*mens rea*).[118] Therefore, of course, non-sloppy, accidental killings are *not* murders. The concept of *mens rea*, or what Posner less than accurately calls "intent,"[119] he admits has been "puzzling to the economist."[120] He demonstrates this inherent economic confusion regarding *mens rea* (guilty mind) by labeling the crime of statutory rape "strict liability."[121] Statutory rape is the unlawful carnal knowledge of a girl who is under the age of majority. Strict liability means that for

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114. *See generally,* M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978). The "general warrant" writs issued by the English Crown infuriated the American colonists, and led to the revolution.

115. Posner III, *supra* note 1, at 1211.

116. The punishment of the moralist English Chancellor, Thomas More, for his non-acquiescence to the King's Church plan, was at first to be by drawing and quartering, and was later lessened to that of beheading.

117. Posner III, *supra* note 1, at 1211.

118. PERKINS, *supra* note 104, at 826.

119. Posner III, *supra* note 1, at 1221. Not all crimes are intentional. Some are simply mentally *reckless* and others grossly negligent. There is *mens rea* in these crimes, but there is not "intent." *See generally,* PERKINS, *supra* note 104, at 826-86.

120. Posner III, *supra* note 1, at 1221.

121. *Id.* at 1222.

guilt no *mens rea* need be proven. However, at the common law, statutory rape was not strict liability.[122] Although a mistake on the male's part as to the female's age was not a defense, he still had *mens rea*. Such was evident by his willingness to *fornicate*, seduce, or commit adultery with a female known not to be his wife.[123] Incidentally, female "consent" was deemed irrelevant because of her immaturity. It should also be noted, incidentally, that *mens rea*, a fundamental concept of the criminal law, has been defined not as socially inefficient mind, but in the moral language of guilty or evil mind.[124]

Posner also shows his discomfort with the concept of *mens rea* in his discussion of the felony-murder rule. The felony-murder rule is a traditional common law concept which includes as murder not only the unlawful intentional or reckless killing of another, but also the "accidental" killing done in the perpetration of an inherently dangerous felony.[125] The *mens rea* element of murder at common law is "malice aforethought," which indicates killings done intentionally, those done recklessly by consciously taking an outrageous risk to human life (perhaps trying to severely injure the victim), and those killings accidentally done in the course of perpetrating an inherently dangerous serious crime.[126]

Not all common law murders were "intentional," but all such perpetrators did possess a guilty mind. Those killings which occurred during, for example, a (forcible) rape were examples of this.[127] The rapist may not have intended to further injure his victim, but if he kills her in this circumstance, even by accident, under the common law, he is still quite guilty of murder. Where, it should be asked, is the *mens rea*? Alternately queried, is not murder via the felony-murder rule a strict liability offense? The answer is definitely, "no."

The common law made a judgment of ethics and causation. When one embarks on the evil path of committing an inherently dangerous felony (e.g., murder, rape, robbery, burglary, arson,

122. PERKINS, *supra* note 104, at 885-86.
123. *Id.*
124. *See* BLACK'S LAW DICTIONARY 889 (rev. 5th ed. 1979).
125. *See generally* PERKINS, *supra* note 104, at 61.
126. *Id.* at 57-61.
127. *Id.* at 61.

mayhem, kidnapping), then it is objectively foreseeable that violent resistance or other life-endangering non-planned results will occur. Where there is the will to commit such a high degree of crime, the *mens rea* of murder is present. An *evil mental state* does thus coincide with the actual, albeit "unintentional," killing. Economist Posner, however, unwilling or unable to grasp the subtle ethical distinctions of the common law, denotes the felony-murder rule as a rule of strict liability.[128]

Nevertheless, in Posner's favor in his economic version of the criminal law, he admits the need for some (though not enough) gradation in punishment. He writes that since the impulsive crimes (e.g., of passion) are "less deterrable," they should be less severely punished.[129] This notion does correspond to the ethical notion that the punishment should fit the crime.[130] Also, in Posner's favor, is his citation of statistics indicating the unreasonable disparity of federal punishment regarding, e.g., murder (180 months), and kidnapping (251 months).[131] Although one must believe that such pattern represents neither an ethical nor an economic basis, the prudent observer must admit that reform is needed.

V. THE ALTERNATIVE BASIS OF CRIMINAL LAW AND THE LAW, ITSELF

Judge Blackstone, to whom is owed credit for the seminal statement on the common law, saw *immorality* as its basis.[132] The criminal law, likewise, perhaps more than other areas, "constitutes a rather stern moral code."[133] Of the two remaining world systems of law, the civil law and the socialist law, only socialist law is *not* morality-based. The civil law sprung from Roman law.[134] Central to Roman law was morality.[135] Only socialist law, that espoused by

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128. Posner III, *supra* note 1, at 1208-22.

129. *Id.* at 1223.

130. This has often been over-simplified as: "an eye for an eye, a tooth for a tooth." It means instead that the punishment should conform to the principle known as proportionality. *Cf.* Ingraham v. Wright, 430 U.S. 651 (1977).

131. Posner III, *supra* note 1, at 1209, n.33.

132. *See* LAFAVE & SCOTT, *supra* note 78; Blackstone, *supra* note 78.

133. PERKINS, *supra* note 104, at 453.

134. *See generally*, J. MERRYMAN, THE CIVIL LAW TRADITION (1969).

135. This was characterized by their influential, universal concept of *ius gentium*, and by the influence of the Stoic moralist jurists, Cicero and Seneca. *See generally* B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1962) [hereinafter cited as NICHOLAS]; CICERO, MURDER

the Soviet Union and her satellites, has an admittedly socialistic-efficiency basis.[136] It alone, places its concern on social welfare as opposed to individual benefit, and it alone de-emphasizes morality.[137]

The criminal law, to borrow from the Roman law (as did, also, the common law), is concerned with punishing those acts which are *malum in se*, or bad in and of themselves.[138] The criminal law is generally not concerned with punishing actions which are *malum prohibitum*, or bad only because they have been made illegal for governmental purposes of convenience. *Malum in se* crimes include the following: murder, rape, treason, arson, robbery, burglary, kidnapping, battery, assault, larceny, selling drugs to minors, etc. *Malum prohibitum* "crimes" include dumping of rubbish, traffic offenses, etc. In most jurisdictions they are not thought to be criminal—simply because they lack moral turpitude.[139] They become criminal when they are willfully disobeyed, but otherwise are punished publicly merely to maintain a semblance of order. Their punishment does not include *jail* time. This unwillingness to jail indicates the lack of moral culpability[140] and criminality.

Judicial ethics, in the field of criminal justice, doles punishment only to those so deserving,[141] unaffected by public whim,[142] matching the severity of the crime,[143] and not influenced by the desire to make an example of the perpetrator[144] (deterrence). The criminal law, although morality-based, is not synonymous to morality. Only actions which are bad and directly affect others are deemed the proper subject of the criminal law. Moral encourage-

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TRIALS (1980). The French civil law also has moral undertones, *supra* note 134.

136. *See* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 194 (2d ed. 1978).

137. *Id.*

138. NICHOLAS, *supra* note 135.

139. *See e.g.*, CAL. PENAL CODE § 19c (West 1970). In California such "non-crimes" are called "infractions," and are not given the usual procedural safeguards—nor are they given jail punishment.

140. *See, e.g,* Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959).

141. *See, e.g.*, Model Penal Code § 1.02(1)(e) (Proposed Official Draft 1962).

142. *See, e.g.*, CODE OF JUDICIAL CONDUCT §§ 2 (B), 3(A)(1) (1972).

143. *See e.g.*, MODEL PENAL CODE §§ 1.02(1)(e), 1.02(2)(e) (Proposed Official Draft 1962).

144. *Contra* United States v. John Fries, 9 Fed. Cas. 826 (C.C.D. Pa. 1799)(No. 5,126); S. PRESSER & J. ZAINALDIN, LAW AND AMERICAN HISTORY 177-87 (1980) (quoting Judge Samuel Chase's contrary charge to the jury that punishment was solely for example).

ment to do *good* actions is not the subject of the criminal law, nor is the regulation of primarily private activity. Overregulation of primarily private activity infringes too severely on human *dignity*, as protected, incidentally, by the fourth, first, and fourteenth amendments to the United States Constitution.[145] The respect for human dignity is central to law,[146] and is one of the major areas of overlap between law and ethics.

There are three broad areas of inquiry in the domain of knowledge.[147] The first is the area of individuality, or of the human psyche. This includes the study of intelligence, psychology, and physiology. The second is the physical world, which includes the study of biology, physics, and astronomy. The third area of knowledge is that relating the individual psyche to the physical world or environment. This process of relating includes three areas of inquiry: religion, ethics, and law.

In the area of the human psyche or self, there has been growing knowledge. For example, it is presently better understood that there are different states of human consciousness, with correct and incorrect functionings. With growing success, medicines and therapies have been devised to restore to balance incorrect psychological functioning.[148]

Analogously, in the area of understanding the physical world, tremendous breakthroughs have been made in the physical sciences. From the time of Einstein through that of the quantum physicists, a growing Unified Field theory or unified explanation of all of the forces in nature has surfaced.[149]

However, there has been turmoil in the third area of inquiry—that relating the individual to the world. Law is the most concrete or basic aspect of this field of knowledge. Law proscribes, in detail, how humans must act in their given societies. Law relates the *subjective* individual psyche to the *objective* physical world. As

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145. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

146. *See, e.g.*, McKastle v. Wiggins, 465 U.S. 168, 176-77 (1984).

147. The source of much of this classification is Vedic literature.

148. The therapies include chemicals, radiation, and also the subjective techniques of psychotherapy, behavior modification, and meditation.

149. *See, e.g., Schechter, The Moment of Creation*, DISCOVER, Apr. 1983, at 18-25; Love, *The Geometry of Grand Unification*, 23 INT'L J. OF THEORETICAL, PHYSICS 801 (Sept. 1984).

such, law contains both subjective and objective characteristics. However, law is neither solely subjective nor solely objective, but rather both.

Errors in legal functioning are caused when law loses its delicate equilibrium and takes on the characteristic of either primarily subjectivity or primarily objectivity. The errors in overly subjective law are the inability to give guidance to individual societal members, variability depending on whom is the judge, and oversimplification of the law into the principle of fairness. Subjective law, paying little attention to written rules, wreaks discord, disrespect, and havoc in all but the small custom-bound societies of the world.

The errors in overly objective law are inability to give guidance to societal members because of its volume and complexity, variability in performance due to its unmasterability by all but a few, and oversimplification of the status of law into objective formalism or procedure. Law gone astray via either of these two philosophical biases causes *similar* injustices, as above outlined. Posner's economic analysis is, of course, an overly objective-based system.

Realizing a balance in the law comes by a reasoned search to *explicate* the fundamental legal principles. The waning debate regarding the exclusionary rule can be characterized as one between two fundamental legal principles: *procedural equality* (which would mandate suppression of all illegally seized evidence in all cases), and *truth* (which would mandate use of all trustworthy evidence no matter how it was obtained). Similar legal debate has brought to the fore other fundamental legal principles. For example, proponents of the welfare state have favored *equality*, while those against such (and other similar governmental intervention) have favored *liberty*. Similarly, many of the debates, surrounding use of high technology to search individuals has indicated conflict between the fundamental principle of *dignity* and that of *truth*. Debates as to human sexual freedom, abortion, and human experimentation are essentially debates between those favoring human *dignity* and those wishing to allow *liberty*.[150]

These debates can be resolved only by allowing continuing ex-

150. For a more thorough explication of this classification *see* Miller, *supra* note 23.

pression of the conflicting fundamental legal principles. The vigor with which their proponents have argued indicates each side has found something of great value. Each side is, in part, correct. What has been discovered are fundamental legal principles. These include not only fairness, but also liberty, procedural equality, truth, and dignity. Only by allowing expression and maximization of these, does a legal system reach a correct balance. One example of such just compromise was the "good faith" exception to the exclusionary rule, which allows use of illegally obtained *truthful* evidence when the officer acted *fairly* and complied with the *procedure* of the warrant.[151]

The above listed fundamental legal principles are essentially *subjective* concepts. Alternately stated, they are descriptions of the *content* of good law. However, they are not purely subjective. They are far more descriptive than the quintessential legal concept of fairness.

Moreover, a just legal system should make every attempt to further crystallize these concepts into first a constitution[152] and then a legal code.[153] These writings objectify the system further. However, it is naîve to believe that mere written law will automatically be applied by any competent judge.[154] Nevertheless, if judges are willing to try to maximize and harmonize not efficiency, but human dignity, liberty, procedural equality, and the truth-finding function, in the spirit of fairness, then disparity in judicial opinion will be minimal. These concepts are based on subjective ethics, but because they are capable of even detailed written expression and use, they are also objective, and therefore strike the right balance in the law. There is an alternative to law-making based on maximizing efficiency. That alternative is law-making based on maximizing the human values of liberty, dignity, procedural equality,

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151. For more detail *see* Miller, *The Good Faith Exception to the Exclusionary Rule: Leon and* Sheppard *in Context*, 7 CRIM. JUSTICE J. 181 (1984).

152. The United States Constitution, which has crystallized these concepts in the most thorough and elegant manner, has, incidentally, formed the core of the constitutional documents of India and Japan and has been influential in a host of other nations.

153. The French Civil Code, which has likewise best crystallized these concepts, has also been widely accepted throughout the world, and forms the basis of most of the codes in, *e.g.*, Latin America and Europe.

154. *Cf.* Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274 (1929).

truth, and fairness. Punishment based on deterrence (or punishment just for example) is unfair. Punishment matching the severity (violence and immoral displacement of another) of the crime is punishment based on fairness.

VI. Problems With Posner's Economic Analysis

In making an overly rigid distinction between the law as it is and the law as it ought to be,[155] Posner denigrates the massive role subjective interpretation plays in stating what the law is. The American Realists devoted much of their work to proof of this.

If Posner wishes efficiency to be the inner light by which all legal rules should be measured and made, then he fails to give a time frame of analysis. For example, when he implies that some of the procedural protections of the fourth, fifth, sixth, and fourteenth amendments do not promote social efficiency,[156] he may be correct on a small time scale of one to five years. The costs borne by society in allowing some law-breakers to continue to be free is significant. However, since the fourth amendment also fosters human dignity, and comfort and trust in one's society, it may be possible that over one generation, society's benefits are more truly maximized. Why?

Happier people who have more personal autonomy and dignity may work more effectively in the market place, and when all is considered, produce more to society's total wealth. A comparison of the productivity of the Soviet Union to that of the United States may demonstrate this. If the maximization of dignity is one reason the United States has known success (including economic success), then it is dangerously misleading to omit this fundamental legal value from one's philosophy of law—as Posner does. Although he mentions that social benefits can include values,[157] by explicitly referring only to his value of efficiency, he denigrates all other values, many of which are more important.

Posner labels economics a science, [158] and means by this that it is a purely objective system whereby social resources are maxi-

155. *See* Posner II, *supra* note 1, at 285.
156. *See, e.g.*, Posner I, *supra* note 1, at 445.
157. *Id.* at 10, 23.
158. *See, e.g.*, Posner II, *supra* note 1, at 287.

mized. However, his understanding of science is archaic. Science is an objective system, but it includes a subjective value—that of the observer, the scientist, whose very presence alters the scientific data.[159] Further, the subtler levels of the physical creation do not follow a rigid, logical pattern of behavior. Instead, the behavior of sub-atomic particles follows a probabilistic, "free," wave pattern.[160]

The problem with Posner's economic analysis is that it omits the subjective "content" quality of law. Although, as stated and restated, he admits that social benefit can include some other values, nevertheless, putting a dollar and cents cost on something like "truth," or "fairness," is science gone sour. In stating that they can be given a monetary value, Posner has slandered and enslaved the sanctity of human life. Human ethical-legal values must be present in any just society. They cannot be discarded simply because they might *appear* at that moment to be impractical (inefficient). The subjective element of legal *science* is the sense of fairness,[161] and the admitted primacy of the other timeless human values of liberty, dignity, truth, and procedural equality.

Linear logic and deprecation of human life have been the hallmarks of utilitarian-economic theory. The problem with utilitarian-economic socialism is its willingness to sacrifice expense-causing individuals to the "good" of the whole. The philosophy hypothetical where one law-abiding human is killed to save others has been acted out several times in the world. Utilitarianism and economic law would allow such killing, based on its maximization of total social benefits.

The scenario, unfortunately, is not merely academic. Hitler's socialist Germany perceived one group (those of Jewish descent) to be acquiring control and resources. In order to *unify* the country and rid the many of the offending few, six million Jews were slaughtered. Hitler's Nazi Germany was an *efficient* state,[162] but it was not an ethical state. Economic law is the history of valueless

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159. *See generally* BAKER, *supra* note 48.

160. *Id.* at 123-229.

161. *See* Rochin v. California, 342 U.S. 165 (1952) (involuntary stomach "pumping" so as to gain inculpatory evidence against the accused "shocks the conscience," the sense of fairness, and is therefore illegal via due process.)

162. Hitler's mobilization of post World War I Germany was tremendously "successful"—if it is to be judged by its economic efficiency.

law wreaking human suffering in its efficient wake.

The United States government's "internment" of those of Japanese descent during World War II was another example of economic law. Although those interned had not committed treason, nor even was there particularized suspicion of criminality at individuals, nevertheless the social benefit (no possibility of espionage) outweighed the social cost (in confinement and displacing this minority's individual rights). The internment was *efficient* and was upheld.[163] However, the ethical-individualist view of law would hold it illegal. Since no crime was proven, confinement was unfair. In order to limit liberty, there must occur a criminal (self-serving) action which interferes with others. Humans, as essentially equal, should not be treated differently on the basis of race. No facts indicated that these Japanese were a danger, and, herding humans into confinement based only on racial characteristics, denigrating their sense of loyalty to their home, severely impinges dignity. Morally, the internment was unacceptable; economically it was regrettable, but would happen again.

When Posner writes that efficiency is the only usable common law value,[164] he has denigrated not only a common law tradition imbibed with a love of liberty and individualism,[165] but also has denigrated the United States Constitution, which was created to protect individualism (by the separation of powers); liberty (by the first and second amendments); dignity (by the fourth amendment), procedural equality (by the fifth, fourth, and fourteenth amendments); and truth (by the trial rights of the sixth amendment). The statement is radical and vapid. It shows profound bias that the law is only the form or procedure of the law. That is, only if the law promotes one judge's notion of social efficiency, is it "good" law.

However, to Posner's credit he seems to assign some importance to the principle of liberty.[166] Yet, the importance he gives to freedom is not that given by the Framers of the United States

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163. Korematsu v. United States, 323 U.S. 214 (1944).

164. Posner II, *supra* note 1, at 292.

165. This love of liberty found its first and perhaps its best British expression in the Magna Charta, but was by no means there complete.

166. *See*, POSNER I, *supra* note 1, at 9.

Constitution,[167] nor that given by the Anglo-American legal tradition. Posner defines liberty in terms of efficiency: *free* markets promote the best use of resources. This statement is likely correct. However, by making efficiency the more important criterion, Posner allows some future economic-based law the option of limiting individual freedom if some study indicates efficiency is being decreased by allowing freedom. An ethical view of law could not allow such loss.

For example, let us hypothesize that future America becomes overly intellectual. Too many pursue education, and too few the jobs of activity. To increase social benefit, certain highly intellectual books are burned and ordered out of print. Economically, this is an acceptable experiment in trying to solve the problem. However, in a system favoring freedom of the press and thought, it is not an acceptable course of action—even if it worked (which is unlikely). Posner is incorrect: the economic approach will lead to different result from the ethical approach[168]—except in *easy* cases.

Economic law, in its lack of concern for the victim of a crime or tort,[169] is unacceptable to significant portions of the public,[170] and will, because of that, breed disrespect for the law, in general. People who do not respect their legal system are more prone to disobey it and, in economic terms, make it inefficient. Efficiency may mandate no concern for the victim, but such a valueless standpoint can only lead to that system's demise due to lack of popular support. If the economist then adds concern for individual fairness into his system, his economic law becomes ethical law.

Although Posner clearly wishes to encourage an enlightened self-interest,[171] the effect of an economic-based legal system's statement to its public—that they are expected only to maximize their own wealth—inevitably will produce individual and societal *greed* on a scale never before seen. Posner would counter that

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167. *See generally* MADISON, *supra* note 14.

168. *Contra* POSNER I, *supra* note 1, at 179-91.

169. *Id.* at 18.

170. *See, e.g.*, California's so-called Victim's Bill of Rights, Proposition 8. There is considerable discussion of this in Symposium, 13 W. ST. U.L. REV. 1 (1985); *see also* Florida v. Casal, 462 U.S. 637 (1983) (where Chief Justice Burger discussed a similar Florida Provision).

171. POSNER I, *supra* note 1, at 185.

overly greedy individuals would hurt the society as a whole and accordingly eventually themselves. This is correct. However, a system which *emphasizes* wealth as opposed to one which emphasizes justice (and its values) is the more likely to fell itself by greed. There is no analogous danger in a system emphasizing liberty, truth, dignity, etc. Therefore, emphasis on efficiency, in fact, *lacks utility*. As such, it is terribly misleading to emphasize efficiency as a more important value than fairness, liberty, etc.

In extolling "deterrence" as the primary and essential function of the criminal law,[172] Judge Posner is not unique,[173] but he is, nevertheless, wrong. For him, the purpose of punishment is to prevent the perpetrator from repeating the act, and more importantly, to make an example of him so that others will refrain from similar wrongdoing.[174]

However, if deterrence were the key function of the criminal law, then perpetrators would often receive punishments which did not ethically correspond to their crimes. Since it is difficult to catch computer ("high tech") theft, it would be *economically* acceptable to make the punishment for such more severe than that for robbery, which is easier to discover (since robbery is a theft from the presence of a person). A more severe punishment would mean greater deterrence. Ethically, such legal behavior is unacceptable. Fairness dictates that the punishment fit the crime. A crime of violence (robbery) should be punished more severely than a lesser crime merely to chattels.

Posner's view that fines should be utilized more in the criminal law has merit. However, Posner's analysis is superficial. Fines are primarily appropriate to crimes of theft (e.g., larceny, embezzlement, false pretenses, receiving stolen property, forgery). Fines do not justly correspond to more violent, destructive, and evil crimes such as murder, rape, and treason.

Further, Posner's allowance of the punishment of a fine for the rich (who will feel money loss more) and jail for the poor (who have no money to lose) is simplistic. Moreover, it violates the equal

172. Posner III, *supra* note 1, at 1195.
173. PERKINS, *supra* note 104, at 5-6.
174. *See, e.g.*, Posner III, *supra* note 1, at 1224.

protection guarantee of the fourteenth amendment.[175] It is one matter to jail a poor person for inability to pay a fine for a non-violent crime *after* he has ignored alternative sanctions.[176] It is quite another matter to fine a wealthy man half of his savings for a crime of violence, and then to let him walk free. Posner does not adequately distinguish the fact that some crimes are *worse*, not based on their effect to society, but based, instead, on their intrinsic nature. Theft may injure society's economy more than rape, but rape is the worse crime, since it impinges on human dignity more severely than does non-violent (monetary) theft.

Posner also suggests public whipping as a more efficient sanction than jailing in many instances,[177] since the cost to society of confinement is tremendous. Further, the punishment of public whipping may correspond to several months in jail. Moreover, the deterrent value of such public reprimand and humiliation may just as effectively stop those criminally-minded from so acting. All in all, social costs could well be maximized by this alternative punishment. Posner does not note that such punishment might be more humane to the perpetrator by allowing him to trade a few hours of pain and humiliation for several months of despair in confinement. Prison life in the United States is a torture unto itself. Posner's suggestion, here, is not as unfeeling as it would first seem. However, by basing his analysis on merely efficiency, and not values (content), a less high-minded reformer could wreak abominable results.

Public punishments would likely be better for society and the perpetrator, and would likely have better results regarding societal and individual deterrence. Public whipping might be ethically acceptable for some crimes. With such, the perpetrator's *liberty* would be maximized (by only a few hours of confinement), and even his *dignity* would be maximized (by keeping him a free man and free from the abuses inherent in jail). Ethically, however, such punishment would not be appropriate to all crimes. It is only appropriate for *violent* crimes. Were there whipping for thefts, then

175. *Cf.* Bearden v. Georgia, 461 U.S. 660 (1983) (using, instead, a due process rationale to prohibit the disparate treatment); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

176. Bearden v. Georgia, 461 U.S. 660 (1983).

177. POSNER I, *supra* note 1, at 187.

the punishment would be unfair, because it did not fit the wrongdoing—i.e., it was not "proportional." As earlier stated, fines correspond more fairly to non-violent crimes.

Posner is blind to how economic law can be used. He suggests public whippings as an alternative punishment to incarceration. *Why* should whipping be the only alternative? The experience of incarceration can be far more severe than that. Public forced sodomizing well might be *economically* acceptable instead of whipping for those who were to be incarcerated. Rape, after all, is the fate of too many who are incarcerated. Subjecting a criminal to this might truly and forever *deter* similar culpable conduct. Ethically, however, such punishment could never be given, because it impinges too severely on the *dignity* value of human life, even that of a criminal. But, it is ethical law (law based on content) which precludes such punishment. Economic law (law based on efficient procedure) can offer no such preclusion; whipping would be no different from forced sodomy.

Posner perceives in the right to jury trial and other procedural protections a high social cost.[178] For that economic reason, he wishes to limit them. However, what he does not perceive is that the right to jury was installed to foster *truth* at trial and to protect the individual from the socialistic government.[179] Twelve independent jurors are less likely to be wrongly influenced by a corrupt government than is one judge. This and other procedural rights, such as the right to be free from governmental encroachment in one's home,[180] are not economic based, but rather are ethical-value based. These ethical values have allowed societal stability by promoting individual automony. The United States has endured 200 years under such values, with interruptions in peace caused only by the denial of these values to some citizens.[181] Ethics is economical.

Nevertheless, to label promotion of these expensive human *values*, "economics," begs the vocabulary. If personal human rights are the fundamental values which cause economic prosperity, then

178. *Id.* at 445, 457.

179. *Cf.* MADISON, *supra* note 14.

180. Such is the central thrust of the fourth amendment to the United States Constitution.

181. The Civil War was caused by a denial of fundamental rights to Negro Americans.

the analysis has been turned on its head by Posner—he makes little or no mention of them, and has devoted volumes to the amorphous valueless value of efficiency.

Judge Posner's confusion over the felony-murder rule and statutory rape indicates the distaste economists have with the moralistic aspect of criminal law. This confusion has been previously discussed. It is raised here, not because Posner is unique in his deemphasis of *mens rea* in the criminal law, but rather because his is a trend position.[182] Strict liability crimes, those devoid of the requirement of proof of a guilty mind, are on the rise.[183]

With the use of strict liability comes the demise of one of the two fundamental aspects of ethical law—the necessity to analyze not only the guiltiness of the resultant action, but also the guiltiness of the mental state present during that action.[184] Economic law can only but hasten this disintegrative process whereby distinctions in culpability, and thus punishment, are blurred. Certainly the well-meaning criminal should be punished, but the punishment should be of a lesser nature. Economic law would mandate no such result if punishment would deter this criminal.[185] Under economic law, Robin Hood would be more severely punished (because he, as a rational perpetrator, could be deterred) than would a perpetrator of a heat of passion killing. This unjust result would occur even though voluntary manslaughter is an ethically worse crime than theft.

CONCLUSION

Posner has set out a far-ranging theory, which attempts to integrate economic analysis into the law. His method of integration has been to demonstrate that social efficiency is the fundamental legal value. Moreover, Posner has also argued that efficiency *should be* the most important factor in creating and interpreting law. Efficiency is gained by the maximization of social wealth and the minimization of cost. Although the theory is pleasing in its simplicity and orderly explication, it is a disintegrative approach to

182. *See* Perkins, *Criminal Liability without Fault—A Disquieting Trend*, 68 IOWA L. REV. 1067 (1983).

183. *Id.*

184. PERKINS, *supra* note 104, at 826.

185. *See* Posner III, *supra* note 1, at 1223.

law.

Economic law is simplistic because it makes no gradations in types of crime or styles of punishment. It is misleading because it claims to include ethical values, but truly does not. It is de-humanizing because it qualifies all of human existence as self-serving, dollar-translatable, socially efficient greed. Economic law is destructive of justice because it sacrifices the building block of society—the individual—to the cost-benefit calculation of social worth. Posner is correct; economic law has always had proponents. Economic law, as positivism, is but one more overly formalistic approach to law. The economic approach to law has been what has been wrong with the law.

A different kind of "economic" law has also existed for some time. There are fundamental human legal values. These include liberty, procedural equality, dignity, truth, and the quintessence of law, fairness. The goal of societal law should be the efficient maximization of *these* human *ethical* values. Legal systems which ignore these are characterized by internal discord and individual suffering. Those systems emphasizing economic efficiency ignore these ethical values. Law should not be concerned with the valueless chameleon value of unqualified efficient greed.[186]

186. *See generally* MOORE, *supra* note 4, at 105-09.