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Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment

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Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment†

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The economic analysis of law has produced a great bounty in a number of fields, including those of tort, contract, and property law, among others.[1] However, the economic analysis of the criminal law has failed to gain the same widespread acceptance, and has not entered the "mainstream of legal scholarship."[2] Since Gary Becker's seminal article,[3] various scholars have either endeavored to resolve the economic model's inherent inconsistencies[4] or have rejected the model entirely.[5] While I tend to side with those who reject the economic model, the purpose of this Note is not to suggest that law and economics scholars wholly refrain from commenting on the criminal law.[6] Rather, in discussing the limits of the economic model as a useful tool for enhancing our

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1. Indeed, the body of work related to the various issues in these areas is so vast and rich that to cite all these works would be virtually impossible. For a general discussion of an economic analysis of various bodies of law (including the criminal law), see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977). *See also* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (1988).

2. Alvin K. Klevorick, *On the Economic Theory of Crime, in* NOMOS XXVII: CRIMINAL JUSTICE 289, 289-90 (J. Roland Pennock & John W. Chapman eds., 1985); *see also* Jules L. Coleman, *Crimes, Kickers, and Transaction Structures, in* NOMOS XXVII: CRIMINAL JUSTICE, *supra*, at 313, 313.

3. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

4. *See, e.g.*, Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

5. One author's characterization of critics' arguments against the economic analysis of the criminal law is particularly cogent:

> The reason there is a debate among scholars about deterrence is that the socially imposed consequences of committing a crime, unlike the market consequences of shopping around for the best price, are characterized by delay, uncertainty, and ignorance. In addition, some scholars contend that a large fraction of crime is committed by persons who are so impulsive, irrational, or abnormal that even if there were no delay, uncertainty, or ignorance attached to the consequences of criminality, we would still have a lot of crime.

JAMES Q. WILSON, THINKING ABOUT CRIME 118 (rev. ed. 1983).

6. Some critics of the economic analysis of criminal law have so suggested. Jules Coleman, for instance, states that "[a] purely economic theory of crime can only impoverish rather than enrich our understanding of the nature of crime." Coleman, *supra* note 2, at 326.

understanding of the criminal law, I hope to define more precisely the benefits of an economic analysis of crime and punishment. As Professor Klevorick has noted, "[s]trengths sometimes appear more clearly when inherent limitations are recognized."[7]

In Part I of this Note, I will first outline the competing theories of utilitarianism and retributivism,[8] the doctrines that academic commentators have traditionally employed in their attempts to explain the existence of crime and the justifications for criminal punishment. Against this broad background I will contrast the relatively narrow focus of most law and economics scholars who comment on crime and punishment. I will argue that by basing their analyses primarily on only a small part of the traditional framework—deterrence, which is itself merely a sub-category of the utilitarian theory—law and economics scholars have limited the effectiveness of their positive models of the criminal law.

Part II will take a closer look at some law and economics scholars' theories of crime and punishment. Specifically, I will examine Becker's discussion of optimal allocation of resources in law enforcement,[9] Posner's economic analysis of substantive criminal law,[10] and Dau-Schmidt's alternative view of the criminal law as a preference-shaping policy.[11] I will demonstrate that these authors indeed presuppose deterrence to be the primary theory or goal underlying the criminal law, and that the failure to account for competing theories impoverishes their analyses. I will then examine some additional assumptions made by law and economics scholars: that behavior can be best explained by assuming that people weigh the costs and benefits of any action and choose the action that provides the greatest utility (the "rational actor" assumption); and that an economic analysis provides a complete explanation of any field of law (the "universality" assumption). I will show that these assumptions are particularly ill-suited to an analysis of criminal law, and that they, like the deterrence assumption, detract from the usefulness of the economic theory. The assumption of actors' preferences[12] will also be explored, in an attempt to discover whether Dau-Schmidt resolved any of the problems of the economic analysis of the criminal law in his alternative view of the criminal law as a preference-shaping policy.

Finally, in Part III, I will offer some suggestions that might improve the effectiveness of the economic model of criminal law. Most importantly, I will suggest that law and economics scholars recognize and account for all of the competing values in the criminal law and understand the varying extent to which these values are present for different categories of crime. Applying my suggestions, I will revisit Becker's social loss function, and show how different categories of crime might be analyzed, depending on the values associated with each category of crime.

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7. Klevorick, *supra* note 2, at 290.

8. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

9. Becker, *supra* note 3.

10. POSNER, *supra* note 1, at 163-77; Posner, *supra* note 4.

11. Dau-Schmidt, *supra* note 4.

12. That is, whether actors' preferences are exogenous or endogenous to the "market" of crime. *See id.* at 9-17.

I. TRADITIONAL THEORIES OF CRIMINAL LAW

The criminal law seems to occupy a position of great importance for many Americans. The public's right of access to criminal trials is guaranteed by the Constitution;[13] many criminal trials have been well-publicized and sharply divisive in public debate;[14] and criminal law and trials are the subjects of numerous television dramas, movies, and works of literature. This social awareness is sparked in part by the competing values born of the robust history of the American criminal law.[15] At its founding, American penal justice was influenced by prevailing social theory, which disfavored revenge-based punishment. American penitentiaries of the 1820s enjoyed world renown as an "experiment" in which the purpose behind incarceration had shifted from "exacting revenge upon the convicts' bodies to reforming the convicts' souls."[16] Yet despite this progressive flavor to American criminal justice, primal vengeance[17] as a justification for the criminal sanction has never been completely abandoned. Ideas about the nature of the criminal law and the justifications for the state to punish its citizens[18] have vacillated over the years, but have consistently been drawn from one of two broad categories: utilitarianism and retributivism.[19]

A. Utilitarianism

American criminal law today is largely the creation of European reformers of the late eighteenth to early nineteenth centuries who advocated an end to the arbitrary "justice" of the time in favor of milder, more regular, swifter, and more certain penalties. Two of the most notable utilitarian advocates of that era were

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13. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980).

14. A few recent examples of well-publicized criminal trials involve the following defendants: O.J. Simpson, Timothy McVeigh, and Terry Nichols. *See* Official Transcript of Jury Verdict, People v. Simpson, No. BA097211, 1995 WL 704381 (Cal. Super. Oct. 3, 1995); United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (providing factual background for Oklahoma City bombing trial).

15. For a discussion of the history of criminal law in America, with a focus on the novel ideas of rehabilitation in the American penal system, see generally DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971).

16. *Id.* at 79.

17. For a discussion of the economic role of vengeance in primitive societies, see RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981). Posner attempts to explain the decline of vengeance in society from an economic standpoint; that is, in modern society, the benefits of retaliation do not outweigh the costs. *Id.* at 209. This Note takes the position, however, that revenge and retribution still play an important role in our society (though unlike personal revenge in primitive societies, the revenge we exact today is vicarious, through the criminal justice system). *See infra* text accompanying notes 58-74.

18. Jeremy Bentham recognized that one of the evils of every penal law was that of state coercion. JEREMY BENTHAM, THE THEORY OF LEGISLATION 323 (C.K. Ogden ed., Richard Hildreth trans., 1931). Perhaps all scholars endeavoring to explain the criminal law are, in a sense, attempting to find justifications for the state to exert extreme power over its citizens.

19. *See* Rawls, *supra* note 8, at 5.

Cesare Beccaria and Jeremy Bentham.[20] The utilitarian view, in general, holds that "if punishment can be shown to promote effectively the interests of society it is justifiable, otherwise it is not."[21] Past conduct is not a relevant consideration in deciding how to treat a criminal, and punishment is justifiable only if it can be shown to be an effective instrument of maintaining, or even shaping, social order.[22] Three specific utilitarian goals that commentators have defined are deterrence, rehabilitation, and incapacitation[23] (though it has been argued that incapacitation may also ring with a retributivist timbre[24]).

1. General Deterrence

When a criminal is apprehended, of course, it is already too late to deter that criminal from committing that particular crime. However, by punishing the criminal and making society at large aware of the punishment, members of society will be discouraged from engaging in that activity, lest they be caught and subjected to the same punishment.[25] This is known as general deterrence.[26] Additionally, as will be discussed below,[27] the criminal who was apprehended can

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20. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963) (arguing for moderate but regular penalties sufficient only to deter, and arguing against excessive penalties as being contrary to the interests of society and the rights of its members); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), *reprinted in* 1 THE WORKS OF JEREMY BENTHAM 1 (John Bowring ed., 1962) (hypothesizing a systematic theory of the law—that laws should take form in legislatively enacted codes which aim to achieve the greatest happiness for the largest number of people). Social commentators noted the spread of these authors' utilitarian theories across the Atlantic. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 104-05 (J.P. Mayer ed., George Lawrence trans., Perennial Library 1988) ("In the Middle Ages, it being very difficult to catch criminals, when the judges did seize a few they often inflicted terrible punishments on these unfortunates .... [B]y making justice both more sure and milder, it has also been made more effective.").

21. Rawls, *supra* note 8, at 5.

22. *See id.*

23. *See, e.g.*, Stanley E. Grupp, *Introduction*, *in* THEORIES OF PUNISHMENT 3, 6-8 (Stanley E. Grupp ed., 1971); WILSON, *supra* note 5, at 145-61.

24. Although giving longer sentences to either very dangerous criminals or to repeat offenders may reduce the level of crime in the "outside world," in-prison crime actually increases as a result of "incapacitating" such offenders. Since society tolerates this increase in crime, some have argued that society discounts the seriousness of in-prison crimes and feels that criminals deserve less protection from crime. *See* Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 710 (1995).

25. *See, e.g.*, BENTHAM, *supra* note 18, at 337.

26. *See* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 3 (1990).

27. *See infra* Part I.A.2.

be specifically deterred[28] from engaging in that crime, or any crime, through rehabilitation[29] or incapacitation.[30]

Of any theory of crime and punishment, that of general deterrence has been the most embraced by law and economics scholars.[31] There is some support for the propositions for which general deterrence stands—that the certainty and severity of punishment correlate to the level of crime committed.[32] However, the theory of general deterrence has also been roundly criticized, with commentators observing that the theory is hampered by such realities as legislatures' and criminals' imperfect information, and by the apparent oxymoron created by hypothesizing a criminal "rational actor."[33] Some sociological studies suggest that attempts at general deterrence are a waste of resources, because crime may be a necessary by-product of our society.[34] Other critics, increasingly dissatisfied with the justice and prison systems, claim that general deterrence (and rehabilitation, discussed below) have not been, nor can be, successfully accomplished in America.[35] As a result of this widespread criticism of general deterrence, there

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28. *See* BRAITHWAITE & PETTIT, *supra* note 26, at 3.

29. *See id.*; *see also* BENTHAM, *supra* note 18, at 338-39.

30. *See* WILSON, *supra* note 5, at 145; *see also* BENTHAM, *supra* note 18, at 339 ("Taking away the power of doing injury.—It is much easier to obtain this end than [to rehabilitate the criminal].") (emphasis omitted).

31. *See, e.g.*, Dau-Schmidt, *supra* note 4, at 5 (arguing that the purpose of the criminal sanction is to deter certain behavior by shaping both opportunities and preferences); Posner, *supra* note 4, at 1196 (arguing the purpose of criminal law is to deter criminals from bypassing markets). Shavell provides perhaps the most striking example of a monolithic view that deterrence is the overriding goal of the criminal law. He argues that while there may be some "undeterrable crimes" such as beneficial crimes and those involving "uncontrollable rage," that such crimes, given perfect information, would not be punished. Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1242-44.

32. *See, e.g.*, Isaac Ehrlich, *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence*, 71 AM. ECON. REV. 307 (1981).

33. *See supra* note 5.

34. Indeed, a sociologist would have an entirely different view of the "optimal level of crime" in society than does the law and economics scholar. Sociologists argue that crime is simply society's way of handling deviant behavior, and that both deviant behavior and the need to ostracize deviants will always exist; thus, crime will always exist regardless of any policy we have on crime. *See generally* CRIME AND DEVIANCE: A COMPARATIVE PERSPECTIVE (Graeme R. Newman ed., 1980) (presenting a variety of perspectives to crime which posit the inevitability of criminal behavior). In other words, crime will always exist despite all our best efforts; in fact, it exists because of our best efforts. Arguably, the simplest way to eliminate crime is to eliminate laws defining crimes. That we have a need to outlaw certain acts, especially consensual acts with no external costs (so-called paternalism, which troubles economists) says much about our society. If crime is truly a by-product of our society and will always exist, then attempts at deterrence and rehabilitation are both futile and wasteful.

35. *See* BRAITHWAITE & PETTIT, *supra* note 26, at 3-5; ELLIOTT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE 236 (1985).

has been a reawakening of retributivist attitudes[36] in most (the law and economics scholars being the notable exception) who seek justifications for the criminal law.

2. Rehabilitation and Incapacitation

Rehabilitation is the theory that some evil influence causes a criminal to stray from social norms and break the law, and that proper punishment can cure the criminal of these evil tendencies.[37] Incapacitation, on the other hand, holds that certain criminals should be "kept off the streets" because they can do no harm, at least to society-at-large, while in prison.[38] Of course, buried within this latter theory are questions of whether, and how much, the well-being of prisoners matters.[39] Is a murderer really incapacitated if he murders other prisoners while behind bars?

These utilitarian theories of specific deterrence have received less attention from scholars of the economic analysis of law than has that of general deterrence,[40] perhaps because such theories are at odds with the "rational actor" assumption made by economists.[41] According to economists professing this assumption, although valuations of different choices may vary, each "actor" will value costs and benefits and make a choice, given all the circumstances, that the actor perceives as providing the greatest utility.[42] With regard to the theory of

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36. *See* BRAITHWAITE & PETTIT, *supra* note 26, at 2-7. The authors discuss the "flight to retributivism" after the "deterrence literature . . . failed to produce the expected evidence that more police, more prisons, and more certain and severe punishment made a significant difference to the crime rate," and cite criticisms that utilitarians deny "the human dignity of offenders by treating them as determined creatures whose behavior could not be accounted for by their own choices to break the law." *Id.* at 3-4.

37. *See* BENTHAM, *supra* note 18, at 338-39. The concept of rehabilitation is expansive. It can refer to "moral reformation" of the criminal, Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 143 (1998); to the training of the criminal in some skill or trade so that the criminal would no longer rely on criminal activity as a livelihood, *see* Tiffany Zwicker Eggers, *The "Becca Bill" Would Not Have Saved Becca: Washington State's Treatment of Young Female Offenders*, 16 LAW & INEQ. J. 219, 255 (1998); or even to "scar[ing]" the criminal "straight," George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1278 (1995). The common goal of any type of rehabilitation is to change the behavior of a specific individual.

38. *See* WILSON, supra note 5, at 145-61. Comparing incapacitation to general deterrence and rehabilitation, Wilson states that unlike those two theories that require certain assumptions about human nature, incapacitation "works by definition: Its effects result from the physical restraint of the offender and not from his subjective state." *Id.* However, Wilson also recognizes that for incapacitation to be successful in a larger sense, three conditions must be present in society: that some criminals are repeat offenders, that offenders taken off the streets are not immediately replaced by new recruits, and that prisons are not "schools of crime." *Id.* at 146-47.

39. *See* Dubber, *supra* note 24, at 710.

40. *But see* Ehrlich, *supra* note 32.

41. That is, individuals are rational utility maximizers. For a discussion of this and other simplifying assumptions made by economists, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7-10 (2d ed. 1989).

42. *See* COOTER & ULEN, *supra* note 1, at 11, 16-17.

general deterrence, those individual differences in valuation of choices can easily be accounted for. The punishment must involve penalties that exceed the maximum expected valuation of utility gained from the commission of the crime sought to be deterred, plus, as many economists have stated, some "kicker" that either compensates society for the costs of catching the criminal or acts as an additional negative incentive to the criminal for having avoided the market.[43]

However, the assumption of the rational actor seems to have little application to the theories of specific deterrence, in part because of the nature of general deterrence and the interplay between general and specific deterrence. General deterrence focuses on the aggregate of criminal behavior, while specific deterrence focuses on individual criminals. Criminal law as a general deterrent is a device[44] that presupposes the existence of prior criminal activities. In other words, in order for would-be criminals to be deterred, some crime must have already been committed, and some punishment already meted out, so that the threat of punishment is not empty.[45] Presumably, this perceived threat of punishment will deter those who would have engaged in crime but for the threat of punishment—for them, the increased cost of crime renders the criminal transaction inefficient from their point of view.[46]

One of the shortcomings of general deterrence is that it does not adequately provide for the fate of those individuals who, as part of the general deterrence mechanism, must be caught and punished. Traditionally, criminal law scholars have recognized that theories of specific deterrence—rehabilitation and incapacitation—complement general deterrence by focusing on the concerns of the individual criminal. But is there any room for these theories under an economic analysis?[47] How does one reconcile, for example, the theory of rehabilitation with the assumption of the rational actor—why would a rational actor stray from the path of rationality and decide to commit the crime anyway, assuming that optimal penalties, including the "kickers," have been discovered and implemented?[48]

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43. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972); *see also* Posner, *supra* note 4, at 1203.

44. Indeed, this has been another of the many criticisms of general deterrence—that it uses convicts as tools to promote the ends of society. *See* Rawls, *supra* note 8, at 15. A larger, related criticism of all utilitarian goals has been that "instead of holding [criminals] responsible for their wrongdoing, [utilitarian preventionists] sought to manipulate them by curing their sickness (rehabilitation), changing the reward-cost calculations that determined their offending (deterrence), and keeping them away from criminal opportunities (incapacitation)." BRAITHWAITE & PETTIT, *supra* note 26, at 4 (parentheticals in original).

45. *See* POSNER, *supra* note 17, at 210-11.

46. *See* Posner, *supra* note 4, at 1203-04.

47. *See* Ehrlich, *supra* note 32, at 311. Ehrlich argues that deterrence attempts to change the "price of crime" for potential criminals, while rehabilitation attempts to remove criminals from the market of crime. *Id.* While Ehrlich does involve the concept of rehabilitation in a certain type of economic analysis (thus answering the question of whether there "is any room for these theories under an economic analysis"), he does not specifically address the problems of a "rational actor" assumption at the level of individual decisions.

48. *See* Becker, *supra* note 3, at 180, 201-04.

Perhaps one could argue that the criminal could be "rehabilitated" in the sense that the criminal's imperfect information[49] could be cured through punishment. That is, the actor committed the crime only because the actor did not possess all of the information regarding the chances of being caught and subjected to punishment. This lack of information in turn led to an incorrect valuation of costs and benefits. Consequently, the actor rationally (albeit mistakenly) decided to commit the crime.

This explanation, besides being at odds with the traditional concept of rehabilitation,[50] does not account for recidivism, which is present to a large degree for many types of crime.[51] If criminals are rational, and make poor choices only because of imperfect information which leads to an incorrect valuation of costs and benefits, then being caught one time should be enough for them to adjust their cost-benefit analysis. Moreover, for each subsequent time that the criminal is caught and subjected to punishment, the criminal's information regarding the true chances of being caught and subjected to punishment should become incrementally more "perfect." If criminals are thus made aware of the costs and benefits but persist in criminal behavior because they simply value crime or the spoils of crime too highly, then they are either irrational,[52] or it would seem patently unfair to punish them under any theory of deterrence. Because of their values, certain criminals (under a theory of specific deterrence) or people like them (under a theory of general deterrence), would never be deterred under the current law.[53]

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49. Perfect information is a simplifying assumption often employed by economists. *See* POLINSKY, *supra* note 41, at 6-11. This assumption, often inaccurate in a strict sense, is especially troubling in the context of criminal law. *See* WILSON, *supra* note 5, at 118.

50. *See supra* text accompanying note 37.

51. In 1989, the Bureau of Justice issued a statistics report on the recidivism rate of convicted criminals. Three years after release, 62.5% of the convicts had been re-arrested. *See* ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 3 (1989).

52. Here, the concept of "rationality" (or "irrationality") may be confusing. When we say that someone is "irrational" because that person persists in a harmful activity (in this case, crime), we are imposing our own view of how someone must value crime and weigh the likelihood of being caught after having been caught many times before. However, many economists would argue that such valuation must be subjective (that is, from the criminal's personal point of view), and thus use a definition of "rational" that is based on the criminal's personal valuation of different outcomes. Indeed, this has been one of the criticisms of law and economics scholarship in general—that the assumptions made are not valid, yet still unfalsifiable (because of their subjective nature). *See, e.g.*, Cento. G. Veljanovski, *The Economic Approach to Law: A Critical Introduction*, 7 BRIT. J.L. & SOC'Y 158, 162-63 (1980).

53. The response of some economists, to salvage the assumption of rational actor, has been the following: a criminal, having learned further criminal skills in prison, and facing hostile employers upon being released, "would be irrational if he did *not* return to crime." Richard F. Sullivan, *The Economics of Crime: An Introduction to the Literature*, 19 CRIME & DELINQ. 138, 142 (1973) (emphasis in original). This view, however, assumes that prisons have no rehabilitative value, assumes that a rational criminal assigns an inordinately high value to crime and a low value to punishment (especially considering the increased awareness of the chances of apprehension), and ignores sociological or psychological factors that may contribute to recidivism.

One encounters similar problems when applying the economic model to incapacitation.[54] Wilson argues that one advantage to incapacitation is that "it does not require us to make any assumptions about human nature."[55] Wilson continues, "By contrast, [general] deterrence works only if people take into account costs and benefits of alternative courses of action and choose that which confers the largest net benefit . . . . Rehabilitation works only if the values, preferences, or time-horizons of criminals can be altered by plan."[56] However, contrary to Wilson's view, implicit in the assertion that a particular criminal must be specifically deterred by incapacitation is the assertion that the criminal cannot be deterred any other way. That is, the criminal is not a rational actor subject to general deterrence, and cannot be rehabilitated.[57]

B. Retributivism

The law is replete with retributivist influences, including the *lex talionis* of Early Roman law, the "eye for an eye, tooth for a tooth" concept found in the Old Testament, and the influential writings of the philosopher Immanuel Kant.[58] Retributivism generally holds that the reason to punish is desert—wrongdoing merits punishment, and punishing a wrongdoer is good, irrespective of any consequences of punishing that wrongdoer.[59] However, because of the prevalent

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54. Although the traditional type of economic analysis of criminal law does not seem to lend itself to the theory of incapacitation, there have been attempts to quantify behavior and, in essence, describe the conditions under which it is "rational" to selectively incapacitate individuals. In the Rand Study, Peter Greenwood discovered seven factors, that, taken together, are highly predictive of a high-rate offender: the offender (1) was convicted as a juvenile (before 16); (2) used illicit drugs as a juvenile; (3) used illicit drugs during the previous two years; (4) was employed less than 50% of the time during the previous two years; (5) served time in a juvenile facility; (6) was incarcerated in prison more than 50% of the time over the previous two years; and (7) was previously convicted for the present offense. PETER W. GREENWOOD, U.S. DEP'T OF JUSTICE, SELECTIVE INCAPACITATION 50 (1982). When these factors are present, it is arguably rational from a societal point of view to apply the theory of incapacitation and to give such offenders longer sentences. In addition to such "person-specific" criteria for predicting recidivism, studies have identified rates for certain types of crimes and categories of crimes. *See* BECK & SHIPLEY, *supra* note 51, at 6. Other "economic" studies involving incapacitation dealing with societal allocation of resources have been motivated by scarce prison resources. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION 131-33 (1995).

55. WILSON, *supra* note 5, at 145.

56. *Id.*

57. One recent example of society deciding that certain individuals cannot be deterred or rehabilitated is found in civil commitment statutes for sex offenders. The Supreme Court recently affirmed the validity of a Kansas statute that provided for civil commitment of sex offenders after the penal sentence had been served. *See* Kansas v. Hendricks, 521 U.S. 346 (1997).

58. *See* POSNER, *supra* note 17, at 208; IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie trans., 1887) ("Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society . . . . He must first be found guilty and punishable . . . .") (emphasis omitted).

59. *See* Rawls, *supra* note 8, at 3-5.

reformist attitude during the early years of the American criminal system,[60] retributivism fell into disfavor, where it remained until fairly recently.[61] Today, most criminal law scholars (aside from law and economics scholars) recognize that there is an element of retributivism in crime and punishment.

Michael Moore, a scholar in the discipline of law and psychology, provides a useful illustration of the retributivist element of criminal law:

> Imagine in such a case that after [committing a brutal rape] but before sentencing the defendant has gotten into an accident so that his sexual desires are dampened to such an extent that he presents no further danger of rape; if money is also one of his problems, suppose further that he has inherited a great deal of money, so that he no longer needs to rob. Suppose, because of both of these facts, we are reasonably certain that he does not present a danger of either forcible assault, rape, robbery, or related crimes in the future. Since [the rapist] is (by hypothesis) not dangerous, he does not need to be incapacitated . . . or reformed. Suppose further that we could successfully pretend to punish [him], instead of actually punishing him, and that no one is at all likely to find out. Our pretending to punish him would thus serve the needs of general deterrence and maintain social cohesion, and the cost to the state would be less than if it actually did punish him.[62]

Moore then poses the question of whether there is anything remaining that urges the punishment of the hypothetical rapist.[63] If there is anything left, that "something" is the retributivist element to crime.

Retributivism means more than bare revenge.[64] Besides being an affirmative justification of punishment, retributivism can be a limiting principle.[65] Therefore, in many cases, punishment guided by this principle may seem more "just" than a utilitarian approach. For example, if one were a strict adherent to the theory of rehabilitation, one would want to maintain custody of the offender until that offender was completely "cured."[66] If, then, a convict of petit larceny still had not been reformed after, say, fifty years, she would still be required to remain in prison until such time as she could return to society free of those antisocial urges which caused her to become a thief. But retributivism (as a limiting principle) mandates proportionality of the punishment to the crime, and is at least one

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60. *See* ROTHMAN, *supra* note 15, at 57-78.

61. *See* BRAITHWAITE & PETTIT, *supra* note 26, at 2.

62. MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 241 (1984) (parenthetical in original).

63. *Id.*

64. And revenge may be more complicated than it may seem at first blush, or than is described in Posner's *Economics of Justice*. POSNER, *supra* note 17, at 208. For example, Jean Hampton describes the "revenge" element of retributivism differently. "Those who wrong others . . . demean them." Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 124 (Jules Coleman ed., 1988). Assailants gain a moral superiority to the victims, by impliedly (through their wrong) asserting that the victims' rights are less worthy than their own. *See id.* at 124. Retributive punishment of the assailant asserts the "moral truth" that the victim and assailant are of equal moral worth. *Id.* at 125.

65. *See, e.g.*, KANT, *supra* note 58, at 195.

66. *See* Rawls, *supra* note 8, at 15.

element[67] in condemning such practices as unfair. Indeed, this feeling is so deeply rooted as to be a part of our constitutional protection against cruel and unusual punishments.[68]

Retributivism as a limiting principle may provide a superior explanation, in the context of Becker's social loss function,[69] of why extremely high fines and extremely low probabilities of detection would not be feasible.[70] Some hypothesize that potential offenders' risk aversion, leading to over deterrence of socially useful incidents of crime, is the primary concern.[71] However, the retributivist theory is able to account for those categories of crime which apparently have little or no social value,[72] to which the concept of over deterrence is foreign.

These two sides of retributivism—revenge and proportionality—are related. If one accepts retributivism as a limiting principle (proportionality), one has more difficulty in denying the logic of using retributivism as an affirmative justification for punishment (revenge). Still, some may resist accepting that revenge is a valid justification for punishment. If the objection to accepting revenge as a justification for punishment is that past conduct should be irrelevant,[73] such logic surely fails in the light of the principle of proportionality. If the objection is that revenge is simply a base vestige of a more primitive society, one might reconsider in the light of different definitions of "revenge," such as that of Jean Hampton.[74] Indisputably, retributivism plays at least some role in the criminal law, and this role has been largely ignored by law and economics scholars.

II. THE ECONOMIC APPROACH TO CRIME AND PUNISHMENT IN GENERAL

Against this background of general scholarship on the theory of punishment in criminal law, we can see more clearly wherein the economic analysis of criminal law fits. As does this general scholarship, law and economics scholarship seeks to explain the existence and nature of the criminal law. Law and economics scholarship focuses on the necessity of the criminal law, given the similar function of tort law.[75] Due to the narrow focus of the economic analysis of criminal law on general deterrence, it provides inadequate positive models.

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67. Another element, which law and economics scholars may find more palatable, is that giving such harsh sentences for small crimes does not deter properly, as criminals will be encouraged to engage in more serious crimes if they will be punished harshly in any case. *See* Posner, *supra* note 4, at 1207.

68. *See* U.S. CONST. amend. VIII.

69. Becker, *supra* note 3, at 180.

70. *See, e.g.*, POLINSKY, *supra* note 41, at 78-84.

71. *See id.*

72. *See, e.g.*, Dau-Schmidt, *supra* note 4, at 36.

73. *See* Rawls, *supra* note 8, at 3.

74. Hampton, *supra* note 64, at 125.

75. *See* Dau-Schmidt, *supra* note 4, at 2.

A. General Theories

Since Becker's revival of Bentham's theories on the subject,[76] three strands of thought throughout the literature have been identified.[77] The first strand of thought, "The Optimal Criminal Justice Policy,"[78] which was the theme of Becker's article,[79] is concerned with a cost-benefit analysis at a social level. These articles, in an attempt to derive an optimal allocation of societal resources to combat crime, hypothesize a social loss function. The theory is that if punishments are sufficiently severe, every criminal need not be caught to produce the desired deterrent effect that will ultimately reduce crime.[80] There has been debate in these papers about what level of crime is "optimal" to accomplish the deterrent effect, and whether the criminals' utility (i.e., the benefits of crime garnered by the perpetrators) should be at all accounted for in the social loss function.[81]

Another strand of thought is "The Individual's Decision About Criminal Activity," which applies to the microeconomic theory of choice under uncertainty to the decision process of the criminal.[82] In these works, the criminal is a rational actor who takes costs and benefits into account, and allocates time and resources among criminal or noncriminal activities, according to which will bring the greatest utility.[83]

The third main strand of thought is "The Existence of the Criminal Category."[84] This body of work analyzes the substantive criminal law and endeavors to explain the need for criminal law. Two of the leading articles in this area, one by Posner[85] and another by Calabresi and Melamed,[86] argue that criminal sanctions are proper for making the costs sufficiently high to discourage criminals seeking to either bypass market transactions,[87] or undermine property and alienability rules.[88] These articles have struggled with, and failed to adequately explain, inchoate crimes and the element of intent, both of which seem to elude economic analysis. Dau-Schmidt, in an attempt to resolve these issues and perhaps salvage the

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76. Becker, *supra* note 3, at 170; *see also* Posner, *supra* note 4, at 1193.

77. *See* Klevorick, *supra* note 2, at 290.

78. *Id.* at 292.

79. Becker, *supra* note 3.

80. *See id.* at 207; Klevorick, *supra* note 2, at 292.

81. Since an overarching goal of economists is to maximize the benefits to society, it is debatable whether one should consider the individual benefits that criminals gain from committing crime (whether material or otherwise), because of crime's overall harm to society, which is often difficult to measure against the benefits accrued to criminals. *See, e.g.*, POLINSKY, *supra* note 41, at 84-85; Dau-Schmidt, *supra* note 4, at 36.

82. Klevorick, *supra* note 2, at 290-91.

83. *See id.*

84. *Id.* at 295.

85. Posner, *supra* note 4.

86. Calabresi & Melamed, *supra* note 43.

87. *See* Posner, *supra* note 4, at 1196.

88. *See* Calabresi & Melamed, *supra* note 43, at 1125.

economic model of crime and punishment, has proposed that the criminal law is really a preference-shaping device.[89]

One of Professor Klevorick's criticisms of the economic analysis of law is that these three strands of thought are incomplete and unconnected.[90] On the contrary, they are in fact related in important ways. Weaving these strands of thought together, a "comprehensive" economic theory might be enunciated as in the following paragraph:

All people are rational actors who subjectively weigh the costs and benefits of many possible activities. Some people choose activities that are labeled "criminal," because, for those people, the benefits of those activities outweigh the costs. To deter these people from those criminal activities, the costs of crime must either be made greater, or the benefits smaller. Costs can be made greater by increasing either the amount of punishment or the chances of being caught, and benefits can be made smaller by shaping preferences, so that certain activities simply are not as desirable. At the same time, however, the social cost of law enforcement must be kept at a minimum—at the very least, the cost of law enforcement should not exceed the societal harm prevented by law enforcement; otherwise, such law enforcement would not be rational, from a societal point of view, because the benefits would not exceed the costs. Since the cost of crime to a criminal equals the potential punishment multiplied by the chances of getting caught,[91] the social costs of enforcing the law can be minimized by increasing the punishment greatly and by keeping low the number of criminals actually caught.

B. Assumptions Underlying the Economic Analysis of Crime and Punishment

Law and economics scholars make a number of assumptions in creating models that describe the law. Four of the most important assumptions made in the context of the economic analysis of crime and punishment are that deterrence is the primary function of the criminal law, that individuals are rational utility maximizers, that the economic model provides a universal and complete explanation of the criminal law, and that actors' preferences are exogenous (or perhaps endogenous) to the system of criminal law. An analysis of these assumptions will further elucidate shortcomings of the economic analysis as a complete description of the criminal law and punishment.

1. Deterrence

It has been recognized that, at a time when the theory of general deterrence has fallen into relative disrepute, "[t]he current economic approach to criminology has reopened the question of deterrence by seeming to make a stronger case for deterrence than has been made before."[92] However, at first blush, it may not be

89. Dau-Schmidt, *supra* note 4, at 25-30.
90. Klevorick, *supra* note 2, at 290.
91. *See* Becker, *supra* note 3, at 177; *see also* discussion *infra* text accompanying note 94.
92. Sullivan, *supra* note 53, at 143.

so apparent that some scholars, at least, base their analyses on the assumption that general deterrence is the primary goal of the criminal law. Becker, for instance, purports to argue that his social loss function can incorporate the theories of "vengeance, deterrence, compensation, and rehabilitation."[93] Upon closer examination, however, one discovers that his social loss function itself is essentially a restatement of the theory of general deterrence. The social loss function is based upon the relationship: $O_j=O_j(p_j, f_j, u_j)$.[94] In other words, the number of offenses will decrease as the probability of conviction and the severity of punishment increase. As discussed,[95] this is the principle of general deterrence—that criminals, as rational actors, will be deterred from criminal activity when they see that others are being caught and punished. Becker's underlying assumption, despite his statements to the contrary, seems to be that the goal of the criminal law is general deterrence. Other law and economics scholars are more forthright in their view of the goals of the criminal law. According to Posner, for example, the primary function of the criminal law is to deter people from bypassing market transactions.[96]

As demonstrated, general deterrence is only a small ingredient in the hodgepodge of theories advanced by most criminal scholars.[97] Rehabilitation, incapacitation, proportionality, and revenge are also important factors in determining proper punishment. It comes as little surprise that economists, focusing foremost on deterrence, have been unable to produce a model that adequately explains the criminal law.

2. Rational Actor

One of the overarching assumptions in any work of the economic analysis of law is that of the rational actor—that an individual, when making decisions, will weigh costs and benefits and choose the course of action that the actor perceives as providing the greatest utility.[98] As discussed above, this assumption is at odds with the traditional doctrines of incapacitation and rehabilitation.[99] Along the same lines, the rational actor assumption has been criticized more generally by those who claim that criminals are inherently irrational[100] (though this criticism probably stems from a misunderstanding of economists' definition of the rational actor, which is generally so broad and subjective that it is unfalsifiable[101]). However, the assumption of rationality, even as defined by economists, seems most problematic when an element of the crime itself is some kind of

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93. Becker, *supra* note 3, at 170.

94. *See id.* at 177. O_j is the number of offenses an actor will commit during a particular period, p_j is the probability of conviction per offense, f_j is the punishment per offense, and u_j represents all other influences. *See id.*

95. *See supra* text accompanying notes 25-26, 32.

96. Posner, *supra* note 4, at 1196, 1230.

97. *See supra* text accompanying notes 15-74.

98. *See supra* text accompanying notes 41-42.

99. *See supra* text accompanying notes 47-57.

100. *See* WILSON, *supra* note 5, at 118.

101. *See* Veljanovski, *supra* note 52, at 163.

irrationality—for example, second degree murder and manslaughter.[102] The common law for these crimes requires that the offender have acted in the heat of passion, before reason has had time to reassert itself.[103] These offenders would have to be, by definition, "irrational actors"—for if one weighs the costs and benefits of committing murder and then does in fact commit the murder, the offender has committed first degree murder, not second degree murder or manslaughter. Like the assumption of deterrence, the "rational actor" assumption makes it difficult for law and economics scholars to produce sound theories about the criminal law.

3. Universality

As one law and economics scholar has stated, "We all crave simple elegance."[104] In any field, law and economics scholars attempt to create an overarching theory that explains everything (whether elegant or not). The economic analysis of criminal law is no different. "[E]conomists are saying that most concepts taught by schools of criminology are irrelevant . . . . They now contend . . . that their explanation of criminal behavior is superior to psychological or sociological explanations."[105] Posner, for one, asserts that the economic analysis is *the* proper positive analysis for criminal law, superior to the "moral" theory.[106]

A similar, though analytically distinct, aspect of this principle of universality is that scholars usually do not distinguish among the different categories of crime; or even if they do so nominally, ultimately treat all crime identically under their models. Becker, for instance, claims that his analysis could be applied indiscriminately across the gamut of crimes, including murder, robbery, assault, tax evasion, white-collar crimes, and traffic and other violations.[107] Posner, on the other hand, initially divides crime into different categories, seeming to recognize that different categories of crime need to be analyzed separately.[108] However, Posner ultimately treats all crime as a pure economic problem, using his model to explain how the criminal sanction can be used to avoid the circumvention of market transactions.[109]

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102. Shavell, steadfastly insisting that deterrence is the only justification for punishment of these crimes, views such punishment as an anomaly caused by imperfect information. Shavell, *supra* note 31, at 1242-43. Instead, they should be analyzed, as I have suggested, as crimes whose purpose is something other than general deterrence.

103. For an example of the codification of these crimes, see MODEL PENAL CODE §§ 210.2-.3 (1962).

104. Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2386 (1997).

105. Sullivan, *supra* note 53, at 139.

106. Posner, *supra* note 4, at 1230-31.

107. Becker, *supra* note 3, at 170.

108. Posner, *supra* note 4, at 1199-1200, 1215-16.

109. One notable exception is so-called "victimless crimes," that involve voluntary transfers, which Posner admits may not be substantially explained through economic analysis. *Id.* at 1200. However, he quickly retreats from this position, suggesting a possible economic explanation—that such crimes cause disutility to highly moral people who are pained by the mere existence of such acts. *See id.*

This approach of seeking a "one-size-fits-all" solution typifies law and economics scholarship. It is particularly troubling in the analysis of criminal law, however, because of the complicated history of this body of law, and its many varied justifications and goals.[110] A superior alternative to grouping all crimes together in a vain attempt to derive a simple, universal model, lies in recognizing the limitations of the economic model and supplementing it with other approaches.[111]

4. Preferences—Exogenous or Endogenous?

Normally, economists assume that preferences are exogenous—people's tastes are not affected by public policy.[112] However, Dau-Schmidt suggests that preferences should be treated as endogenous.[113] The criminal law, according to Dau-Schmidt, is designed to shape preferences. Society will impose criminal sanctions that shape not just opportunities, but preferences themselves, whenever it is efficient to do so.[114] In addition to distinguishing criminal from tort law,[115] his model also attempts to address areas of the criminal law that many law and economics scholars have found perplexing: inchoate crimes and intent.[116]

Although this approach may be seen as a departure from the conventional approach of law and economics scholars writing on crime and punishment,[117] it might be more properly seen as an attempt to salvage most of the economic model, and to engender a more widespread acceptance of the economic analysis of criminal law.[118] Most of the other assumptions of an economic analysis remain intact—importantly, Dau-Schmidt does not seem to question that the primary purpose of the criminal law is to deter criminal behavior.[119] The question, for purposes of this Note, is whether Dau-Schmidt's view of the criminal law as a preference-shaping device resolves all of the deficiencies of an economic approach to crime and punishment, or whether something more is needed.

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110. *See supra* Part I.

111. This is the reasoning behind Professor Dau-Schmidt's departure from the traditional assumption of exogenous preferences; he desires to use the disciplines of sociology and psychiatry to supplement the understanding of the economic analysis. Dau-Schmidt, *supra* note 4, at 15-16 & n.76, 17.

112. *See* POLINSKY, *supra* note 41, at 10.

113. Dau-Schmidt, *supra* note 4, at 24.

114. *See id.* at 5.

115. *See id.* at 35.

116. *See id.* at 25-31.

117. *See* DAU-SCHMIDT & ULEN, *supra* note *, at 454, 468.

118. *See* Dau-Schmidt, *supra* note 4, at 2; Klevorick, *supra* note 2, at 290.

119. Dau-Schmidt, *supra* note 4. Professor Dau-Schmidt's article, like other law and economics analyses of criminal law, seems to suggest that the main purpose of the criminal law is general deterrence; the only difference between Professor Dau-Schmidt's work and those "traditional" economic analyses regarding this assumption is the proposed manner in which people are supposedly deterred from criminal activity. Another assumption, however, that Dau-Schmidt seems to reject is that of universality. He has personally suggested to me that his preference-shaping analysis may well fit into the framework I have set forth *infra*, in Part III, for certain categories of crime.

One means of approaching this problem is to question the viability of Dau-Schmidt's assertion that the criminal law can properly be seen as a device to shape societal preferences. As an initial matter, it seems obvious that criminal law must shape preferences to some extent. Arguably, when one is first born into society, one has no preferences. The great body of laws, mores, and all other bands of society created over the millennia inevitably shape preferences. Dau-Schmidt seems to argue that given this initial allocation of preferences, a legislative body intends to further mold societal preferences whenever it enacts a law with a sanction that involves pain, isolation, or moral condemnation.[120] To do so, according to Dau-Schmidt, is more efficient than to discourage the action merely through tort law.[121]

This view is subject to a number of criticisms. First, such blatant social engineering and wholesale encroachment upon free will is a bleak view of the role and practice of legislatures.[122] Secondly, a good majority of criminal laws passed seem to reflect existing societal norms. If societal preferences are opposed to murder or marijuana use, then the preference-shaping hypothesis would suggest that there is no need to outlaw these practices. Third, there are numerous examples of criminal laws that have been ignored by a substantial number in the populace, and have subsequently been repealed. For example, the familiar failure of Prohibition[123] suggests that the imposition of criminal sanctions does not shape preferences, at least in some instances. Additionally, some criminal laws, while not technically repealed, either fall into desuetude or are substantially ignored by the populace, regardless of criminal consequences. For example, marijuana possession is illegal, but the use of marijuana has not significantly decreased as a result of its illegal nature.[124] Again, this suggests that for some types of crime at least, the purpose of the criminal law is not to shape preferences (or,

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120. Dau-Schmidt, *supra* note 4, at 15-20.

121. *Id.*

122. Dau-Schmidt recognizes this criticism, but, in my opinion, dismisses it too quickly. *Id.* at 20 & n.98.

123. U.S. CONST. amend. XVIII (repealed 1933).

124. After an initial decrease when first outlawed in the 1930s, marijuana use has fluctuated, with a sharp rise in use throughout the 1960s up until the 1980s, and a gradual decline since then among the general population (though use among high school students has increased since the 1980s). *See* Abbie Crites-Leoni, *Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization?*, 19 J. LEGAL MED. 273, 275 (1998). What purpose do laws such as these serve? If they are ignored and rarely enforced, they cannot serve any of the goals of general or specific deterrence, or revenge. Perhaps they are passed not to reform society's morals, or accomplish any of the traditional goals of criminal law, but rather to ease our social conscience.

An example even more striking than laws prohibiting marijuana use is that of certain laws outlawing use of peyote, even for religious purposes. For example, the dissent to a recent Supreme Court case upholding the validity of such a law cited evidence that the state never made "significant enforcement efforts against . . . religious users of peyote," and that the law "amounts only to the symbolic preservation of an unenforced prohibition." Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 911 (1990) (Blackmun, J., dissenting) (footnote omitted).

coincidentally, to deter by any means), and that criminal law therefore serves some other purpose.

Dau-Schmidt's analysis, then, does not provide a complete answer in its attempt to explain the existence of the criminal law from an economic standpoint. Perhaps Dau-Schmidt is correct that for certain categories of crimes, an element of preference-shaping is present in the legislative intent; however, his model ultimately fails as a complete explanation for one of the same reasons that other economic models of crime and punishment fail: it does not account for the competing justifications for criminal law that scholars have traditionally discussed. However, it does depart from the assumption of universality somewhat, drawing the distinction between "malum prohibitum" and "malum in se" crimes.[125]

III. SUGGESTIONS TO LAW AND ECONOMICS SCHOLARS

What then, is the role reserved for law and economics scholarship in the analysis of criminal law? I propose that, depending on the category of crime at issue, the usefulness of an economic approach will vary. While the five mentioned justifications for punishment (deterrence, rehabilitation, incapacitation, revenge, and proportionality) can be found in most crimes to some extent, these justifications are implicated differently, depending on the category of crime.[126] Since the economic analysis of crime and punishment presumes deterrence to be the central justification for any crime, an economic analysis will be the most predictive and descriptive of those categories of crime in which the theory of deterrence does in fact play a greater role. Many authors engaged in the economic analysis of the criminal law endeavor to delineate crimes to a certain extent; yet in the end these delineations serve no real purpose, as the categories are treated quite similarly.

The two basic categories of crime proposed for analysis in this Note are "malum prohibitum" and "malum in se" crimes. Malum prohibitum crimes are further divided into "social torts" and "paternalistic" crimes; and malum in se crimes are divided into the categories of "crimes against property," "crimes against persons," and "inchoate crimes." Each category of crime implicates

125. Dau-Schmidt, *supra* note 4, at 36 n.189.

126. It has been suggested that incapacitation is an element that is person-specific, not crime-specific. *See, e.g.*, GREENWOOD, *supra* note 54, at 50. As Wilson has noted, "most street criminals do not specialize. Today's robber can be tomorrow's burglar and the next day's car thief." WILSON, *supra* note 5, at 154. However, there is some evidence of certain recidivism rates for various categories of crime. For example, Beck and Shipley's study found that "[r]eleased prisoners were often re-arrested for the same type of crime for which they had served time in prison." BECK & SHIPLEY, *supra* note 51, at 6. The study found that such rates for various types of crime included the following: Homicide—6.6%; Rape—7.7%; Robbery—19.6%; Assault—21.9%; Burglary—31.9%; Larceny/Theft—33.5%; and Public Order Offenses—33.7%. *See id.* Thus, with the proper classifications of crime, generalizations about the recidivism rates can be drawn—as the level of violence decreases and the focus moves from crimes against the person to property crimes, the recidivism rate increases.

different values and different justifications for punishment. Therefore, the usefulness of an economic analysis will vary according to the category of crime.

A. Model—Values as They Relate to Specific Types of Crimes

Proportionality will always play a role in determining punishment, regardless of the type of crime—the punishment should always fit the crime. Concerns of general deterrence will also almost always be present (though not to the extent that economists would have us believe), except for those categories of crimes for which general deterrence has proven to be ineffective.[127] Furthermore, multiple justifications for punishment may be found relevant to a single category of crime. When more than one justification is present, the impact on deterrence will be proportionately less, and the predictive power of an economic model will be accordingly less.

While the justifications of proportionality and general deterrence will remain fairly constant for most categories of crime, the other justifications will vary broadly with the level of violence present in the type of crime. Depending upon this level of violence, the primary justification for punishment for any given crime will be some kind of specific deterrence (rehabilitation if the crime is not too violent and the recidivism rate is at a moderate level, and incapacitation if the level of violence or recidivism is very high) or revenge, or both.[128]

In analyzing the presence of the various justifications for punishment for the different categories of crime, the effectiveness of Becker's social loss function as a tool for determining the optimal level of crime and allocation of resources can be predicted.[129] Becker's function will be most useful for those crimes which may hold some value to society, and for which general deterrence plays a prominent role as a justification for punishment. However, when revenge takes precedence as a justification for punishment, Becker's model will become less useful. Murder, for example, does not lend itself to the social loss function—because of the great desire for revenge, society arguably hopes to allocate as many resources as possible in an attempt to catch every single murderer. Whereas a social loss function hypothesizing general deterrence as the main justification for any crime would predict that a relatively low number of offenders be punished, as long as the punishment were sufficiently stringent.[130]

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127. Some common examples are narcotics trafficking, prostitution, and organized crime. For such crimes, new criminals automatically emerge as quickly as the old ones are incarcerated. *See* WILSON, *supra* note 5, at 146. Additionally, certain types of crimes are "undeterrable" because of the elements of the crime. *See* Shavell, *supra* note 31, at 1242-44.

128. The *U.S. Sentencing Commission Guidelines Manual*, for instance, suggests that crimes with higher recidivism rates indicate a greater need for incapacitation, and a lesser likelihood of rehabilitation. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL 283 (1997) (Introductory Commentary to ch. 4, pt. A) [hereinafter MANUAL].

129. Becker, *supra* note 3.

130. *See id.* at 180.

1. Malum Prohibitum Crimes

Literally, "malum prohibitum" means wrong only because prohibited (by law), while "malum in se," discussed in the following section, means wrong in and of itself.[131] However, these phrases have evolved into "terms of art" with precise definitions for some purposes. For the limited purposes of this Note, these terms will be used according to the more literal meanings. I have divided malum prohibitum crimes into two categories for analysis: "social torts" and "paternalistic crimes."[132]

a. Social Torts

For social torts, which include such "crimes" as parking violations, the only real concern besides proportionality is that of general deterrence. Since society places some value on such acts as parking violators' "crimes,"[133] one would predict Becker's social loss function to be extremely useful for these crimes. Indeed, the example of parking violations used by Polinsky[134] to illustrate Becker's model[135] demonstrates that the model was virtually designed for social torts. That is, there truly can be an "optimal" level of crime that is greater than zero, since there is no element of revenge present for social torts, and since some commission of torts have utility for society, and not just for the individual perpetrator.[136]

b. Paternalistic Crimes

This second category of malum prohibitum crimes includes such crimes as prostitution, gambling, and drug and alcohol use.[137] Often such crimes involve the state simply outlawing consensual transactions, which economists generally

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131. *See* BLACK'S LAW DICTIONARY 959-60 (6th ed. 1990).

132. This definition of "malum prohibitum" seems to be intuitively appealing. It is difficult to argue that the commission of a social tort, such as a parking violation or traffic law, is malum in se (wrong in itself). Furthermore, though they may be more difficult to defend, "paternalistic crimes" such as laws against alcohol, drugs, gambling, and prostitution do not seem to be inherently wrong, as they involve consensual transactions and do not have any external costs. At the least, these crimes are more morally ambiguous than are crimes such as murder. As is evident, even when trying to give these terms their "literal" meaning, lines must be drawn, and such lines cannot always be drawn without a pang of conscience.

133. *See* POLINSKY, *supra* note 41, at 75-86; Dau-Schmidt, *supra* note 4, at 15-20. As an example, consider a father hurrying to the pharmacy to fill a prescription for his sick infant. Parking in an illegal zone outside the pharmacy may be useful to society, and even worth the fine.

134. POLINSKY, *supra* note 41, at 75-86.

135. *See id.* at 86.

136. *See supra* text accompanying note 81.

137. For simplification, "serious" drug crimes will not be treated here.

believe should be unfettered by state interference.[138] For these crimes, the mechanism of general deterrence operates to a lesser extent than it does for social torts. To ease our social conscience, we sometimes flex our paternalistic muscle,[139] but our fickle conscience does not seem to allow us to flex too much. Of the other potential justifications for punishment, it seems clear that incapacitation plays virtually no role,[140] but that rehabilitation may indeed be present.[141] Revenge is not a factor, since there are no victims.[142] One would predict that Becker's social loss function would be very helpful in analyzing such crimes, since the general deterrent element is present, no element of revenge is present, and the proscribed acts may have some societal value and may thus be encouraged in certain instances.[143] The two factors that detract from the function's usefulness are the presence of elements of incapacitation and rehabilitation (which may interfere somewhat with the process of general deterrence),[144] and the halfhearted pursuit of deterrence of such crimes.[145]

2. Malum In Se Crimes

The categories of property crimes and crimes against the person which I have chosen may be seen as largely arbitrary,[146] and better and further classifications can certainly be made.[147] However, these categories seem to correlate with factors

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138. *See* Posner, *supra* note 4, at 1200. Posner himself believes that marijuana should be legalized. *See* Tony Mauro, *Legalize Marijuana, Prominent Jurist Says*, USA TODAY, Sept. 14, 1995, at A2.

139. *See supra* text accompanying note 124.

140. Even though recidivism rates for such crimes may be high, suggesting a need for incapacitation, to lock up offenders for such relatively minor offenses would be a waste of resources, because it probably would not reduce the crime rate significantly for such crimes. *See* ZIMRING & HAWKINS, *supra* note 54, at 63.

141. To make this claim, the category must be further divided. It is doubtful that offenders of certain paternalistic crimes would be reformed by a jail term. However, a penal sentence of professional counseling could be employed to attempt to reform the offenders. For some types of crimes in this category, such as prostitution and bribery, the traditional theory of rehabilitation through penal servitude may apply; of course, the effectiveness of such methods of reformation have been questioned. At any rate, for any theory of rehabilitation to be effective, jails must not be "schools of crime." WILSON, *supra* note 5, at 146.

142. Although it may be argued that the people who are upset by seeing the prohibited acts occur are the victims. *See* Posner, *supra* note 4, at 1200-01.

143. One example of such a crime that might have societal value is the religious use of peyote for sacramental purposes in the Native American Church. *See* Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990).

144. *See supra* text accompanying notes 47-57.

145. That is, since we cannot decide whether some of these acts are truly wrong, we are not sure whether we should enforce a criminal sanction, and thus discourage the commission of those acts. *See supra* text accompanying note 124.

146. Actually, they are borrowed from Becker. *See* Becker, *supra* note 3, at 171 (incorporating a table citing as its source the President's Commission on Law Enforcement and Administration of Justice (1967)).

147. There will be considerable overlap between the categories, based on the level of severity of the crime. Beck & Shipley, for instance, divide crimes into "violent offenses," which include homicide, rape, robbery, and assault, and "property offenses," which include

that have a bearing on which justifications for punishment are present in any particular crime. For example, whether the crime was committed against the person, or was merely a property crime, appears to have a bearing on a need for revenge associated with that crime. Furthermore, crimes against the person have relatively low recidivism rates.[148] Recidivism rates for the crime are indicators of whether the goal of punishment should be incapacitation or rehabilitation.[149]

a. Property Crimes

Property crimes include not only crimes committed against property, such as arson and vandalism, but also such crimes as burglary and unarmed robbery. While extremely violent property crimes are committed, these crimes are usually not capable of inflicting as much damage as are crimes against the person.[150] Even as compared to less violent crimes against persons, having the physical person violated is often more offensive than having property taken or destroyed.[151] Accordingly, one would expect the need for revenge to be somewhat less for crimes against property than for crimes against the person. Regardless, the need for revenge in punishing perpetrators of crimes against property is much greater than the corresponding need regarding malum prohibitum crimes.

The other factor to consider is recidivism. Generally, recidivism rates for property are somewhat higher than crimes against the person.[152] The higher the recidivism rate, the greater the need for incapacitation, and the lower the chance of rehabilitation.[153] Because incapacitation and revenge play a substantial role in crimes against property, the competing role of general deterrence is proportionately less than the role of general deterrence in malum prohibitum crimes, where it is an overriding concern.[154] Therefore, Becker's model will be less effective in describing these crimes than malum prohibitum crimes.

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burglary, larceny, motor vehicle theft, and fraud. BECK & SHIPLEY, *supra* note 51, at 6. I have chosen the categories of "crimes against the person" and "property crimes" because the recidivism rates, which bear upon rehabilitation and incapacitation, *see supra* note 128, seem to be more closely grouped under my classification. Additionally, the need for revenge may be greater in regard to crimes against the person (though, clearly, the level of violence probably also closely correlates to the need for revenge).

148. *See* BECK & SHIPLEY, *supra* note 51, at 6.

149. *See supra* note 128.

150. Despite attempts to value a life for purposes of tort law, *see generally* Steven E. Rhoads, *How Much Should We Spend to Save a Life?*, 51 PUB. INTEREST 74 (1978), it is obvious that no amount of money will induce a voluntary exchange of money for life ex ante, while the same is not true for property, *see* Posner, *supra* note 4, at 1202.

151. *See* Thomas Bak, *Does the Offense Charged Predict the Type and Frequency of Pretrial Violations?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65, 75 (1998) (citing "societal notions that crimes against property are less heinous than crimes against persons").

152. *See* BECK & SHIPLEY, *supra* note 51, at 6. Violent crimes against the person, such as murder and rape, have extremely low recidivism rates compared to property crimes such as burglary and larceny. *See id.*

153. *See supra* note 128.

154. *See supra* text accompanying notes 47-53.

Furthermore, since these crimes have little or no social value,[155] Becker's social loss function becomes even less valuable for this category of crime.

b. Crimes Against the Person

Crimes against the person include extremely violent crimes such as murder and rape, as well as the somewhat less violent crimes of armed robbery and assault. Since these crimes are more violent than any other category,[156] a need for revenge ascends to primacy, and will outweigh general deterrence by a great deal. Incapacitation and rehabilitation may also play minor roles,[157] but the need for revenge, especially as the crimes become more violent, is the overriding factor. To satiate the need for revenge, society desires to catch all of the perpetrators of violent crimes against persons if it can, and will therefore allocate more resources for apprehension of those perpetrators than it will to catch perpetrators of other crimes. Consequently, Becker's analysis will be least useful for this category of crime.

3. Inchoate Crimes

The final category is that of inchoate crimes, which include solicitation, attempt, and conspiracy. These crimes comprise a separate category in this model since law and economics scholars have struggled so much with this category of crime.[158] Indeed, it seems difficult to explain. On the one hand general deterrence would not seem to be a principal justification for punishing inchoate crimes—after all, is there really any need to deter actions that turn out to be harmless? However, viewed through a different lens, general deterrence can be seen as the foremost justification in punishing attempts and conspiracies—not to achieve deterrence of a harmless act, but rather deterrence of the completed crime.

On the other hand, the need for revenge is in fact low for such crimes. When there is no "real harm" and no victim, the need for revenge simply does not arise. Therefore, one would predict that Becker's model would be highly predictive for this category of crimes. Accordingly, to successfully deter such crimes, penalties

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155. It has been argued that in some cases, theft is desirable, such as when a starving person steals a slice of bread. *See* Posner, *supra* note 4, at 1230. However, these instances are better categorized as not criminal at all. Because of the defense of necessity, there will be no punishment. With no potential ill consequences, there is no cost to weigh against the benefit of staving off starvation.

156. As has been stated, some crimes against property are more violent than crimes against persons. In those cases, the model may be adjusted accordingly.

157. Because of the relatively low recidivism rates for these crimes, *see supra* note 126, one might predict that the need for incapacitation is lower and the need for rehabilitation is higher for these crimes. *See* MANUAL, supra note 128, at 283. However, because of the overriding need for revenge, especially in cases of murder, this may not be the case. Furthermore, in cases of sex crimes, society has in some cases decided that sex offenders are akin to mentally ill people who need to be incapacitated for the protection of society, and have little hope of rehabilitation. *See* Kansas v. Hendricks, 521 U.S. 346, 348 (1997).

158. *See* Dau-Schmidt, *supra* note 4, at 2, 28.

should be made artificially high in relation to the individual harm suffered as a result of the crime.[159] Perhaps this explains why the penalties for inchoate crimes are the same as the penalties for the corresponding "choate" crimes,[160] even though the harm done by inchoate crimes is much less.

CONCLUSION

Professor Coleman argues that an economic approach to crime and punishment is fundamentally implausible because of the strong element of desert present in criminal punishment. He contrasts crime against tort, where economic analysis has been more successful, because tort involves simpler questions of efficient allocation of loss:

> [I]n crimes the question is whether the state has a right to deprive a particular person of his liberty by incarcerating him. In torts, it is whether a state has sufficient grounds for shifting a loss from the party upon whom it has initially fallen to another individual, when the loss must fall on one or the other of them. In [crimes], the state must be satisfied that the individual *deserves* to be punished.[161]

Coleman further argues that this difference between tort and criminal law is the defining element of criminal law—that when the state strips a party of the fundamental right to liberty, the state must be sure that the party *deserves* punishment.[162]

I agree with Coleman that desert, or retributivism, is an important element in defining the need for the criminal law and punishment. Furthermore, I postulate that economic theories of crime have been relatively unsuccessful because they have largely ignored the retributivist elements in crime and punishment. Criminal law is enacted by and for the benefit of people, most of whom have not "transcended" that need for some kind of revenge or reckoning after they have been wronged.

As I was watching the evening news, I happened to see a report regarding the verdict in the trial of Terry Nichols (in connection with the Oklahoma City bombing).[163] I was struck by the comments of a victim's relative. She was utterly disgusted that Nichols had "gotten off" with involuntary manslaughter, and had been acquitted of murder. To me, at least, it seems unlikely that this woman was so upset because she felt that the mechanism of general deterrence was not working. It seems more likely that her need for revenge had been frustrated.

Still, retributivism is not the entire story—utilitarian elements also pervade the criminal law. The abundance of crimes, categories of crime, and purposes behind the criminal law indicate that any one positive theory of crime and punishment is inadequate. The interplay between competing theories is a part of what makes the

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159. *See* Becker, *supra* note 3, at 176-79.

160. *See* MODEL PENAL CODE § 5.05 (1962).

161. Coleman, *supra* note 2, at 326 (emphasis in original). Notice, however, that Coleman's analysis does not account for those crimes in which the state deprives a person of the fundamental right to property.

162. *Id.*

163. *See supra* note 14.

study of criminal law so engaging. An economic analysis of crime and punishment, while useful to an extent (and very useful in explaining certain categories of crime), is not the authoritative positive model that some would have it be. An attempt to explain the entire body of criminal law under an economic analysis is fruitless.