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NORMS AND VALUES IN LAW AND
ECONOMICS

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Abstract

The discourse of law and economics, both as an intellectual enterprise and as a practice that takes place in the processes of the law, is rich with values. This article explores the substance and nature of these values. The values in law and economics discourse are not only heterogeneous in character but they can also be advanced for a heterogeneity of purposes.

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1. Definitions

The discourse of law and economics, both as an intellectual enterprise and as a practice that takes place in the processes of the law, is rich with values. In order to explore the substance and nature of these values, begin with a standard definition of economics:

Economics is the study of how people and society end up *choosing*, with or without the use of money, to employ *scarce* resources that could have alternative uses, to produce various commodities and distribute them for consumption, now or in the future, among various persons and groups in society. It analyzes the costs and benefits of improving patterns of resource allocation. (Samuelson, 1976, p. 3)

This definition proceeds from the assumption that resources are scarce, establishes the analytical focus as the allocation of resources to productive activities and the distribution of wealth among the members of society, and adopts efficiency in resource allocation as a fundamental criterion of evaluation.

Law might be defined in a material sense as the complex of constitutional provisions, bodies of legislative enactments, such as codes and statutes, and, particularly in common law systems structured with an independent judiciary, the continually developing body of judicial doctrine.

Functionally, the law defines the scope, powers and limitations of such elements of governance as the obligatory institutions of public agencies and defines the permissible ambit of relations among legal persons and between legal persons and entities of governance.

Proceeding from these definitions, law and economics is the use of the analytical techniques and values of economic analysis either for explanation or for prescription. In the realm of explanation, it is the enterprise of developing models that, in economic terms, accounts for the phenomena of human activity - the ongoing decisions and actions of such legal institutions as legislative bodies and the judicial process, and such practices as the legally permissible interactions of individuals. In the realm of prescription, law and economics discourse advocates the application of economic principles in the decision making of legal institutions, both substantively and procedurally, and the use of economic principles in shaping the permissible scope of interactions among legal persons.

A. Norms and Values

The discussion which follows will first describe the values that underlie the explanatory discourse of law and economics and then describe the values that underlie prescriptive discourse. This discussion will reveal that law and economics discourse is a substantially heterogeneous enterprise. And it is heterogeneous because the values that underlie it do not resolve into a unified, mutually consistent whole (Rakoff, 1996; Trebilcock, 1993).

2. Explanatory Discourse

Explanatory discourse seeks to develop models that explain in economic terms how humans interact both outside of, and within, social and political institutions. This discourse has given considerable attention to interaction among individuals, and to action within such public institutions as the judicial system, legislative bodies and administrative agencies. In general, the analytical approach to these models defines the basic agent of economic action in terms of a *homo economicus* understanding of human nature - that the individual is a self-interested actor, competitive in nature, who undertakes to achieve the rational maximization of personal utility (Cooter and Ulen, 1997).

Early work in law and economics proceeded from *homo economicus* assumptions to address the economic aspects of individual interaction. *The Tragedy of the Commons* (Hardin, 1968) explained the resource-destructive

course of activity when a number of individuals had access to a resource in circumstances in which entitlements to the resource were poorly defined. The seminal analysis in *The Problem of Social Cost*, which came to be known as the Coase Theorem, holds that, in the absence of transaction costs, the original assignment of entitlements does not affect the allocation of resources to production in circumstances of conflict in resource use (Coase, 1960). In addition to the basic assumptions about human nature, both of these analyses posited that the paramount criterion of evaluation of human interaction is efficiency, implicitly defined as putting resources to the most valuable use in production. And both of these analyses posit, implicitly or expressly, that the prior definition of a pattern of individual entitlements to resources makes possible market action that guides the allocation of these resources toward efficiency.

Other early work describes the adjudication of private disputes in a common law system as an efficient process. This occurs because parties to a conflict have an incentive to litigate prior doctrinal rules that are inefficient, which in turn tends to induce the judiciary to replace these rules with efficient rules. The result is a tendency for the substance of judicial doctrine to evolve toward a body of efficient rules (Goodman, 1978; Landes and Posner, 1987; Priest, 1977; Rubin, 1977).

Public choice analysis takes as its focus the political process and the processes of governmental institutions (Farber and Frickey, 1991), characterizing itself as a descriptive, rather than a normative, enterprise. (Brennan and Buchanan, 1988). Public choice analysis applies 'economic analysis to political decision making, including theories of the state, voting rules and voting behavior, apathy, party politics, logrolling, bureaucratic choice, policy analysis, and regulation' (Mercurio and Medema, 1997, p. 84). Early public choice analysis describes the legislative process as a market for political action, in which individuals, whether constituents or lobbyists, express their demand in self-interested terms and legislators supply political action on the same basis (Downs, 1957; Buchanan and Tullock, 1962). Other work analyzes other elements of the political process in the same way, such as voting generally (Black, 1958), bureaucratic action specifically (Niskanen, 1971), and the public processes of governance generally (Bartlett, 1973).

The mainstream of descriptive discourse thus proceeds from a small number of particular principles. Human nature is posited in terms of the self-interested, utility-maximizing *homo economicus*. The market is posited as the paradigm of human interaction, whether the subject of exchange is goods and services or it is public action. The criterion for the evaluation of human interaction is efficiency in the allocation of resources to productive activity. And the general mode of analysis adopts the static, equilibrium model of neoclassic microeconomics, with a tacit presumption of a relatively

fixed endowment of resources to be allocated, and of individuals participating in market activity with relatively fixed, rationally ordered utility schedules (Ackerman, 1989).

Institutional analysis takes an alternative approach to deriving models to explain human interaction by looking to institutions rather than markets as the milieu of activity (Mercurio and Medema, 1997, pp. 101-156). Institutions are defined as 'widely followed habits of thought and the practices which prevail in any given period' (Veblen, 1899). This approach posits that human action is relational and interdependent, in contrast to the atomistic character of human action in the neoclassic market model (Schmid, 1989). There is mutual feedback between economic action and institutions, with each shaping the nature of the other; thus, in contrast to the neoclassic model that posits a process moving toward equilibrium, institutional analysis posits a process of ongoing evolution (Schmid, 1989). It describes economic action in terms of conflict rather than in terms of the resultant cooperation that is described as the consequence of action within a market model; and institutions are understood as the means for controlling this inherent conflict (Mercurio and Medema, 1997, p. 107) The criterion of evaluation is the efficacy of institutions in minimizing the transaction costs inherent in economic action, thereby serving to maximize wealth (Coase, 1988).

3. Prescriptive Discourse

The substantive content of the materials of the law - constitutional provisions, legislative enactments and judicial doctrine - is a principal focus of prescriptive law and economics discourse. This aspect of the discourse seeks to prescribe the substantive basis for choices made in legal processes, particularly in the judicial process. This discourse presents several different sets of underlying values. Three of these lie in the mainstream of prescriptive discourse; others provide minor, though substantial, themes in the flow of discourse.

In the general understanding, law and economics discourse is identified with what has come to be called the Chicago School (Mercurio and Medema, 1997, pp. 51-83). Chicago School analysis is not, however, homogeneous, either in terms of the prescriptions that it offers or in terms of its underlying values. One substantial element of Chicago School proceeds from a particular set of principles - private property is a right that emerges spontaneously from interactions among individuals because cooperation tends to increase individual welfare (Benson, 1993). Thus, private property occupies a paramount position in the scheme of social values; the preferred method for resource allocation is the free market in goods and services; the

role of the state is taken to be minimal, principally, the protection of antecedent rights; wealth distribution is determined according to individual attributes; and the principal criterion of evaluation is Pareto efficiency (Malloy, 1990a, pp. 86-92).

According to this approach, the individual entitlement to property is to be given maximum protection from the encroachment of other individuals, and governmental action that erodes its use-value can occur only with full compensation (Epstein, 1985). In the law of tort, the basic determinant of liability is the liberty-based protection of the right to bodily integrity. (Cooter, 1987). In the law of bargain, classic contract law applies - broad freedom of alienation, strict enforcement against breach, and minimal judicial policing of the substance of contract terms (Campbell, 1996; Gray, 1989).

The philosophical underpinnings of this approach are captured by Robert Nozick's concept of the 'night watchman' state (Nozick, 1974; Epstein, 1995). This approach is based on the values of Individualism. The autonomy of the individual is the highest political and social value. By nature, humans seek to maximize their individual welfare and cannot be changed in a fundamental way by the action of coercive institutions. Economic resources are a source of plenty, to be developed through the trial and error process of individual action. The optimal social arrangement establishes the maximal freedom of individual action; and public institutions are properly confined to the function of protection of individual autonomy (Thompson et al., 1990).

A different element of Chicago School analysis proceeds from a different set of principles - it posits aggregate societal wealth maximization as the highest good; it rejects the concept of natural or inherent rights; it approves of market action as a second-order value that serves the primary goal of the maximization of aggregate societal wealth; and it adopts cost-benefit analysis as a basic analytical technique (Malloy, 1990a, pp. 60-68; Medema, 1993). This approach is most closely identified with the work of Richard Posner (Posner, 1981a, 1998). Collective institutions, both public (governmental) and private (large-scale capitalist enterprise) have a substantial role in achieving wealth maximization. Entitlements to resources are contingent, rather than a protected right of the individual holder; thus, resources are to be directed, whether by market action or by the supervening action of collective institutions, to the most productive user (Kaplow and Shavell, 1996). The function of the judicial process, under this approach, is to mimic the market in the resolution of disputes (Medema, 1993; Calabresi and Melamed, 1972). In consequence, the pattern of the distribution of wealth is analytically irrelevant.

Thus, in the law of tort, the basis of liability is the minimization of costs associated with instances of harm (Calabresi, 1970). In the law of bargain, efficient breach, although it destabilizes the entitlement distribution effected by an executory contract, is approved because it shifts resources to the higher

valuing user (Goetz and Scott, 1977). In the law of property, least cost avoider analysis justifies shifting entitlements to the more productive user (Polinsky, 1989; Posner, 1998).

This element of Chicago School analysis is based on hierarchical values. The paramount criterion of evaluation is aggregate societal wealth. Collective institutions, both private and public, have a substantial role in directing resources toward wealth-producing activities. Entitlements are not protected from erosion or transfer in order to shift resources to more productive users, thereby subordinating individual rights to the social good. A substantial spread in the distribution of power and wealth is acceptable in order to achieve the maximization of aggregate wealth (Riley, 1989; Thompson et al., 1990).

A third mainstream approach, identified with Yale Law School, also rejects the concept of natural or inherent rights (Mercurio and Medema, 1997, pp. 79-83; Malloy, 1990, pp. 69-75). Although this approach accords a substantial role to both public and private collective institutions, public institutions have a paramount role. These institutions provide a milieu of discourse by which the paramount values of society are determined, and have a substantial role in directing economic and social arrangements to advance the realization of these values (Ackerman, 1980, 1984; Rose-Ackerman, 1992). Because these ends are collective rather than individualistic in nature, then this approach, like the second branch of Chicago School analysis, is substantially hierarchical in character. This approach, however, is unlike the hierarchical branch of Chicago School analysis in two respects. It tends to prefer more qualitative utility concepts of social welfare over more quantitative measures of aggregate wealth (Brownsword, 1997). And it treats the pattern of the distribution of wealth as a highly relevant consideration in the determination of social welfare (Rose-Ackerman, 1985).

By way of summary, the mainstream of law and economics prescriptive discourse is dominated by approaches that are grounded either in individualist values or in hierarchical values. These values are, however, mutually inconsistent. Thus, mainstream discourse is properly characterized more as a debate than as a collective enterprise refining a unitary social scientific model under the aegis of a monolithic set of values.

As this discourse has matured, other voices, based on other values, have entered the debate. A prominent alternative is the discourse of critical legal studies, which itself is considerably heterogeneous (Unger, 1986; Kelman, 1987). Moreover, it has tended to be reactive in nature, in the sense of seeking to reveal, and to criticize, the tendency of mainstream academic discourse and judicial doctrine to advance hierarchical values behind a rhetoric of individual values. Thus, there has been a tendency in a

substantial body of critical legal studies discourse not to offer a coherent prescription for an alternative conceptualization of the substance and processes of the law.

Notwithstanding this tendency, one approach with a distinctive character has emerged (Unger, 1976, 1984). This approach posits that values are properly chosen in a social milieu, and that the proper milieu for this choice is the immediate community. The law, according to this approach, ought to encourage the altruistic and cooperative tendencies of human nature over its self-interested and competitive tendencies. And the distribution of wealth ought to tend toward equality, thereby creating a social order that is relational in nature rather than hierarchical or transactional.

Thus, the proper determinant of the use of property is not the self-interest of the title-holder but instead the emergent values of the community in which it is located. In the law of harms, liability is based on a breach of a duty of care toward the physical and psychic integrity of others rather than on a failure to exercise economic rationality in pursuing wealth-increasing personal gain. And the process of exchange ought to be relational - an interactive process for seeking mutual benefit and for seeking synergism in the creation of common benefit (MacNeil, 1980; Brownsword, 1997; Campbell, 1996, 1997). This approach is based on the values of communality. Consistently with these values, the character of human interaction is relational, rather than hierarchical, transactional, or competitive. Wealth is distributed so as to tend toward equality. And the relational milieu serves as a bulwark against the exploitation of the individual by others seeking to enhance their self-interest or hierarchical institutions seeking to amass and exercise power. A 'Social Law and Economics', similarly based in the egalitarian values of communality, emphasizes the equitable distribution of wealth, the broad assurance of human dignity, and solidarity (Medema, 1993; Veljanovski, 1981b).

There is, as well, another distinct set of values that emerges from law and economics discourse. Although much of the work of Richard Posner is grounded in hierarchical values, he has also offered an extended account of human action based on his concept of bioeconomics (Posner, 1992). According to this account, human action is determined, driven by natural appetites and attributes embedded in human nature. Human action, in this view, is the consequence of the individual engaging in the rational maximization of the satisfaction of these drives. Because it posits that human action is determined, this approach carries a strong affinity to the natural law tradition.

Other approaches offer a mix of values. A 'classic liberal' approach is based on the two paramount values of individual liberty and human dignity (Malloy, 1990a, pp. 93-101, 1990b, 1988). Under this approach, the free market is an important institution through which individuals exercise their entitlement to liberty. The State, as well, plays an important economic role -

protecting and advancing human dignity by protecting the entitlements of individuals from erosion by private action or by the action of collective institutions, and maintaining individuals in the holding of a minimum level of wealth. This approach thereby combines values derived from both individuality and hierarchy.

John Rawls's *A Theory of Justice* presents a noted example of a mixed approach (Rawls, 1971). His concept of the priority of liberty rests on an Individualist foundation. The presumption in favor of an equal distribution of wealth and the substantial role of the State both in maintaining a system of liberties and in intervening in the pattern of wealth distribution rest on a hierarchist foundation.

Margaret Jane Radin has developed another example of a mixed approach by her concept of 'property for personhood' (Radin, 1982, 1987, 1989). That certain kinds of property, central to the definition of the individual, are protected from private alienation or public expropriation rests on individualist values. That the definition of the individual, and thus the specification of which particular property has the required nexus with personhood, takes place in a social process rests on communitarian values, as does the egalitarian thrust of the concept that certain property provides a presumptively inalienable individual endowment.

4. Mutual Critique

Because law and economics discourse is underlain by a heterogeneity of values, this discourse takes on the character of debate - the offering of particular approaches to analysis and prescription, and the mutual critique of these approaches.

4.1 Explanatory Discourse

A foundational assumption of explanatory discourse is that the primal agent of economic action is *homo economicus* - the self-interested, competitive, rational, utility-maximizing actor. This model comes under challenge as failing to account for the capacity of individuals to exhibit egalitarian altruism, to seek and achieve social solidarity, and to give their loyalty to hierarchical organizations (Campbell, 1997; Huang and Wu, 1994; Kelman, 1983; Leff, 1974; Morse, 1997; Sen, 1977). Another basic assumption posits that individual action in a free market will, with minimal administrative cost, continuously move resources to the highest valuing users, thereby achieving an efficient allocation of resources to production. The appeal to an efficiency criterion comes under critique on the ground that, even under the approach of neoclassic analysis, there is no unique efficiency point; instead,

there are different efficiency points corresponding to different patterns in the distribution of wealth (Dworkin, 1980b; White, 1987b). The proposition that individual action in a free market tends toward efficiency is challenged on the grounds that, because of inevitable distortions, the market instead yields a path-dependent stream of suboptimal goods and services (Eastman, 1996).

The proposition that legal rules ought to be chosen for their efficiency comes under critique on the grounds that their efficiency consequences cannot be determined - if analyzed on a partial equilibrium basis, they can lead to general inefficiency; and general equilibrium analysis entails insuperable information costs (Rizzo, 1980; White, 1987b). A similar critique is made of the use of judicial remedies to provide incentives to engage in efficient action that can lead to distortion if the distinction between prices and sanctions is not taken into account (Nance, 1997). And the account of common law adjudication as a process that generates efficient rules comes under critique on the grounds that systemic bias in the selection of disputes that come before courts prevents the development of efficient rules for the various classes of disputes that can arise (Hadfield, 1992), and that the pursuit of self-interest by the parties to litigation creates a tendency toward the development of inefficient rules (Cooter and Kornhauser, 1980).

Another aspect of explanatory discourse is the tendency to adopt a numerate approach to the enterprise of evaluation and, in general, to advance law and economics discourse as a scientific enterprise (Horwitz, 1980). Although this approach is well grounded in enlightenment rationalism (Toulmin, 1990), in law and economics discourse it proceeds in part from the problem that interpersonal comparisons of utility cannot be made because utility itself cannot be measured by a transitive scale of evaluation (Kaldor, 1939). To assess instead the state of social welfare in terms of wealth, a factor that is susceptible to measurement, however, is to adopt a criterion of aggregate economic welfare that is considerably narrower than utility (Weinrib, 1980; Hicks, 1939). Moreover, a numerate approach tends to accept the results of measuring those factors that are susceptible to measurement as the proper order of things (McCloskey, 1988), thereby implicitly engaging in the is-ought fallacy.

The use of cost-benefit analysis as a means to assess the wealth impact of a legislative measure or judicial decision follows the Kaldor-Hicks Test derived from the classic papers published by Nicholas Kaldor and John R. Hicks (Kaldor, 1939; Hicks, 1939). Because this test does not require compensation in the aftermath of decisions that redistribute the entitlement to resources, it can be shown that, because of the effects of changes in utility positions and schedules in the absence of compensation, the test does not accurately determine whether a welfare improvement has occurred (Scitovsky, 1941; Mishan, 1969; Coleman, 1980b). In addition, the test itself

does not accurately capture the views expressed by Professors Kaldor and Hicks, who took the position that wealth distribution is a relevant consideration for the political decision maker, and that, on the assumption of declining marginal utility in consumption, the principle of utility maximization entails a presumption of relative equality in the distribution of wealth, offset by a degree of inequality in order to provide an incentive to produce (Kaldor, 1939).

An alternative approach to the dominant, neoclassic model conceptualizes economic action in dynamic terms, tending toward disequilibrium as technology, resource endowments, and perceptions of utility change (Klein, 1977; Malloy, 1994). Producers can be seen as possessing the power to create and manipulate demand, and not simply react to demand (Bartlett, 1973), and the ultimate productive resource is human intelligence and human inventiveness (Schultz, 1981; Reich, 1983, 1991). Because human capacity is susceptible to enhancement by the investment of maintenance and education, then wealth maximization can be understood more in terms of a dynamic process of investment in human capital than in the efficient allocation of material resources.

4.2 Prescriptive Discourse

Individualist and hierarchical approaches have tended to dominate prescriptive discourse. Thus, the discourse of critical analysis as well has tended to address the values that underlie these approaches. Also, the thrust of this analysis has tended to take an expectable form - the critique of the consequences of the realization of a particular approach from the standpoint of the values of another particular approach.

The individualist value of the paramount importance of the self-interested, atomistic individual comes under critique on the basis that its implementation will fail to serve the values of efficient resource allocation and wealth maximization (Campbell, 1996). This failure is especially acute in the efficient production of public goods (White, 1987; Olson, 1971). It also comes under critique because it precludes other-directed individual action, to the exclusion of both organizational action and egalitarian altruism (Radin, 1989; Sunstein, 1989). This, in turn, will prevent the formation of the hierarchically directed organizations necessary to achieve aggregate wealth maximization. It will also preclude the altruistic action necessary to achieve a relatively equal distribution of wealth required for broadly realized utility maximization and for participation in the economic action that generates particular economic values on a sufficiently broad basis (Kelman, 1983). And the transactional nature of the individualist approach comes under critique because it leads to conceptually unrestricted

commodification, which leads in turn to the destruction of the integrity of persons and particular kinds of objects (Radin, 1989; Sunstein, 1989).

The hierarchist principle of aggregate wealth maximization comes under a multifarious critique. It is criticized as incoherent in terms of the specification of what counts as wealth (Dworkin, 1980a; Rizzo, 1980), that its maximization does not necessarily correspond to an efficient allocation of resources (White, 1987a), and that it provides a criterion of social welfare that is substantially inferior either to utility (Baker, 1975, 1980; Dworkin, 1980a) or to collective values (Driesen, 1997). It also comes under critique because it treats the pattern of distribution of wealth as irrelevant (Schwartz, 1979). Because wealth distribution is irrelevant under the hierarchical approach, the pursuit of wealth maximization can generate a wide disparity in the distribution of wealth (Baker, 1975; Kennedy, 1981; Kronman, 1980; MacPherson, 1985; Weinrib, 1980). Because the lack of wealth precludes an individual from expressing her utility preferences in the market, a wide disparity in the distribution of wealth leads to a distortion in the efficiency point that the market can generate (Leff, 1974). Also, the primacy of the principle of wealth maximization has the effect of eroding individual entitlements to resources, rendering these entitlements contingent rather than vested (Chapman, 1982; Kronman, 1980; Reich, 1996; White, 1987). One of the principal proponents of a cost minimization, wealth maximization approach to the law of tort, Guido Calabresi, has been careful to assert that the wealth maximization principle ought to be subordinate to other principles, such as utility maximization, equity in the distribution of wealth, and security in the holding by individuals of entitlements to resources (Calabresi, 1980).

5. Summary

By way of summary, a rich array of values underlies the discourse of law and economics. Descriptive models of economic action and the working of the legal and political processes offer a mix of approaches to the explanation of the phenomena of economic action. The dominant discourse presents models that are numerate in character and that adopt the equilibrium approach of neoclassic microeconomics. A minor theme in this discourse presents models that are more qualitative in character and that adopt an alternative dynamic approach.

The array of values that underlies prescriptive discourse is similarly heterogeneous. The dominant discourse offers approaches based on competing individualist and hierarchical values. Minor themes in this discourse offer approaches based on the values of communality and

naturalism. And the discourse of critique proceeds as an implicit debate over these alternative sets of values.

B. Theory

6. Theory

Related to the substance of the values that underlie law and economics discourse and the heterogeneity of these values is the matter of the cause of this heterogeneity - the question whether this conflict might be a consequence of the particular natures of the categories of economics and of law, or the inevitable nature of a discourse that takes place across the boundary between distinct areas of intellectual endeavor or, perhaps, the particular way in which this discourse has proceeded.

That this heterogeneity of values falls into a particular pattern in law and economics discourse is replicated in other areas of discourse. Jurisprudential theories can be understood as falling into a pattern of hierarchical positivism and formalism, individualistic classical law, natural law, and communitarian Marxist theory (Barry, 1988; Epstein, 1988; Peller, 1988). On a more particular level, judicial doctrine in United States courts, rather than developing, as the formalist account might predict, toward an ever more complete structure of rules and principles, can be mapped onto this same pattern of underlying values. This pattern can be seen in the different conceptualizations of ownership of land that implicitly determine the outcomes in particular cases - ownership as 'sole and despotic dominion' (Blackstone, 1765/69:2), a vested entitlement of the individual protected from State interference [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)]; ownership as the nexus by which the individual is lodged in a hierarchical order, in which the State holds the power to impose substantial limits on the right to use [*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)]; ownership as a right subordinate to the natural biotic webs that define the physical and biological order of the natural environment [*Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972)]; and ownership as the nexus by which the individual is lodged in a local community, in which the always emergent matrix of communal values determines the limits on individual use [*Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)]. In the criminal law as well, doctrine can be categorized in terms of the conceptualization of criminality - subjective criminality, harmful consequences and manifest criminality (Fletcher, 1978), underlain by, respectively, individualist, hierarchical, and communitarian values.

The political ideologies manifested in the deliberations and actions of legislative bodies and in public political discourse can be mapped onto a

similar pattern. The libertarian ideology embraces the values of individualism. The moderate conservatism of business enterprise and the social welfare values of left of center ideology embrace the values of hierarchy. Interest group pluralism advances the values of communality. And 'Green' blocs and religious fundamentalists embrace the values of naturalism.

The related social science of anthropology offers an explanation of this phenomenon of values heterogeneity and the patterns into which values fall. In anthropological discourse, a cosmology is defined in terms of bias:

Anything whatsoever that is perceived at all must pass by perceptual controls. In the sifting process something is admitted, something rejected and something supplemented to make the event cognizable. The process is largely cultural. A cultural bias puts moral problems under a particular light. Once shaped, the individual choices come catalogued according to the structuring of consciousness, which is far from being a private affair. (Douglas, 1982, p. 1)

A bias is necessarily based on values. Particular sets of values make up a cosmology. And, there is no single master cosmology; there are only alternatives that are available for choice - particular cosmologies based on the values of individuality, hierarchy, communality and naturalism (Douglas, 1978; 1982; Thompson et al., 1990). Consciousness, the mental world that distinguishes human beings from the rest of biological organisms, must be organized around some set of deep values. The individual comes to adopt a particular cosmology in the ongoing process of socialization that is the milieu of human existence. And from this cosmology the individual goes about the necessary function of constructing a mental world.

A critic of contemporary economic thinking, remarking on what he sees as its 'poverty', has asserted:

The study of who gets what and why, unlike the study of plants or planets, cannot help being an ideologically charged undertaking. Despite the laborious techniques and scientific pretension, most brands of economics are covertly ideological. Marxian economics, with its labor theory of value, assumes the inevitability of class conflict, and hence the necessity of class struggle, Keynesianism, with its conviction that industrial capitalism is systematically unstable, offers an equally 'scientific' rationale for government intervention. Neoclassical economics, with its reliance on the efficiency of markets, is a lavishly embroidered brief for laissez-faire. (Kuttner, 1985)

Economics, and the academic enterprise of law and economics discourse, are not, however, impoverished by the heterogeneity of their underlying values. Instead, this heterogeneity enriches the discourse. Economics and

law are, fundamentally, intellectual enterprises that address the deep question of how, and on what values, humans shall organize the mental worlds that they create. Law and economics discourse would be impoverished only if it failed to reflect the full variety of values-based ways in which humans create their worlds.

Law and economics discourse cannot accurately be considered to have failed because it has not evolved toward values-homogeneity. Values-heterogeneity is a consequence of its nature as an intellectual enterprise - it comprises an ongoing debate over essentially contested concepts (Gallie, 1956).

C. Debate

7. Debate

A final matter is the function of values in law and economics discourse. Not only are these values heterogeneous in character but also they can be advanced for a heterogeneity of purposes. Values can serve as the focus of theoretical debate over whether a unifying set of values can emerge within a particular culture. Such a debate would conform to the methods of systematic philosophy and its foundationalist project (Rorty, 1979). Alternatively, values can provide the means for refining a particular conceptualization of economic action in legal processes. Such an enterprise would conform to the methods of normal science (Kuhn, 1970). Additionally, values provide the deep basis for advocacy - the enterprise of achieving consensus, whether in academic discourse, political discourse or discourse in the judicial process. Finally, values are a necessary ingredient to the quasi-foundationalist enterprise of the pragmatic method, in which discourse is directed toward the 'cash value' of employing one or another set of values in order to solve a particular problem in the arena of human action (Cotter, 1996; James, 1987).

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