Journal of Libertarian Studies
Volume 22 (2011): 399-436

Two Irreconcilable Theories of Justice: Social Engineering vs. Ethics of Property

Laurent Carnis

If economics is understood as being the science of the implications of voluntary and monetary exchanges among different people (Mises, 1985),[1] the terminology "economics of crime" is a contradiction in terms. Indeed the economic exchange consists in voluntary and peaceful cooperation, whereas crime refers to concepts of violence and coercion (Mises, 1983).[2] The contrast is then more marked between the notion of economics that refers to a process of collaboration and cooperation, and that of criminal activity, which is associated with the invasion of property

---

Laurent Carnis is a transport economist and traffic safety expert. The author is also an associate researcher at the LAEP, University of Paris 1. The usual caveats apply. A previous version of this paper was delivered for the 40th anniversary symposium in honor of Murray N. Rothbard's *Man, Economy and State* in Auburn, Alabama, 13th March 2003 with the title *Economic Approach of Crime, Mainstream Economics vs. Rothbard*. The author wishes to thank an anonymous referee, Professor Hülsmann and Gabriel Gimenez-Roche for their assistance with this article.

[1] Mises (Von) Ludwig (1985), *L'action humaine*, traité d'économie, Presses Universitaires de France, pp. 2-3. We are aware that this is the definition of economics in its narrower sense. A broader definition is proposed by Mises with praxeology. "Economics is a theoretical science and as such does not tell man what values he should prefer and what ends he should aim at. It does not establish ultimate ends. This is not the task of the thinking man but that of the acting man" see Mises (Von) Ludwig (1983), *Bureaucracy*, Libertarian Press, p. 89. For a similar statement defining praxeology as a general theory of action, see Mises (Von) Ludwig (1985), *L'action humaine*, *traité d'économie*, Presses Universitaires de France, p. 4.

[2] Mises (Von) Ludwig (1983), *Bureaucracy*, Libertarian Press, p. 91: "Economics deals with the operation of the whole system of social cooperation, with the interplay of all its determinants, and with the interdependence of the various branches of production."

(Rothbard, 1991 [1970]).[3] In this sense, we have to deal with a logical impossibility and consequently the economics of crime becomes meaningless. More fruitful is the idea of applying the tools of the economist to understanding the behavior of individuals in the allocation of their resources to obey or to violate the law and to protect themselves against violence.

The study of criminal activity can consist in the elaboration of a free-market system for the activities of protection. Some investigations on the possible mechanisms of a market order could undoubtedly yield insights into the working and the necessary rules of a free or an anarcho-capitalist society (Rothbard, 1996 [1978][1973]).[4] Criminal activity also represents significant stakes in terms of the difficulties implied by restitution (Barnett and Hagel, 1977[5]; Rothbard, 1982)[6] or the problems relating to the proportionality of punishment. However, the aim of this article is a comparison between the contributions on crime by mainstream economists and Rothbard's, an understanding of the radical differences among these authors and a summarizing of their implications. This article also seeks to stress that there is not a single economic approach to crime. The differences of approach are crucial for liberty and they imply important practical considerations.

---

[3] Rothbard, Murray N. (1991 [1970]), *Freedom, Inequality, Primitivism and the Division of Labor*, The Ludwig Von Mises Institute, p. 27.

[4] Rothbard, Murray N. (1996, [1978] [1973]), *For a New Liberty, The Libertarian Manifesto*, Fox and Wilkes, chapter 12.

[5] The restorative movement constitutes an attempt to make the victim whole. However, the bureaucracies of the judicial system can manipulate the restitution process. The "goal displacement" of organization is a well-known effect. The initial objective of making the victim whole would be progressively replaced by personal goals of bureaucrats. Moreover, restitution can present different meanings, which can imply different public policies. See William F. McDonald, "The role of Victim in America", pp. 295-307, Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice", pp. 349-383 and Burt Gallaway, "Restitution as in Integrative Punishment", pp. 331-347, in Randy E. Barnett and John Hagel III (eds.), (1977), *Assessing the Criminal, Restitution, Retribution, and the Legal Process*, Ballinger Publishing Company, pp. 303. See Burt Gallaway, "Restitution as an Integrative Punishment", pp. 331-347.

[6] Rothbard, Murray N. (1982), *The Ethics of Liberty*, Humanities Press, chapter 13.

First, we stress the divergences between the mainstream economists and Rothbard about the conception of law. The mainstream approach defends a *relativistic* or historical[7] approach to rights. These conditional depend on the ability of government to define them correctly and then to enforce the law. Rothbard puts forward a theory of *just* rights, based on absolutes deduced from a theory of appropriation and exchange. The second main difference results from the "conception" of punishment and the meaning of *justice*. The mainstream analysis considers justice as an outcome of the allocation of resources in order to produce an optimal level of deterrence. For Rothbard, justice consists in restoring the victim rights. Deterrence is only an indirect consequence of justice and not the ultimate goal. Finally, we discuss the role given to the State and the implications for the enforcement of law.

Legal positivism versus ethics

To analyze the foundations of law proposed by each theory constitutes one means of apprehending the radical differences between the mainstream approach and Rothbard's relative to the economic approach to crime. For the neoclassical school and its proponents, law[8] is what is defined by the State (McChesney 2003).[9] The State establishes the frontier of illegality. It plays the role of a definer of property rights. This position is stamped with legal positivism.

Barnett showed clearly the consequences of legal positivism. "On the positivist view, whatever the State (following all the correct political procedures) says is law, is *law*; hence, whatever the State makes a crime is a crime." (Barnett, 1977)[10] Cooter and Ulen, two

---

[7] This depends on the empirical considerations of the moment.

[8] The concept of law is a twofold affair for the mainstream economists. It refers either to custom—the law emerging from the people, the rules of just conduct—or to the law of legislation, which results from rent-seeking behaviors, influence of lobbies the political redistribution. *For a general introduction to these topics, see Charles K. Rowley (1992), The Right to Justice, The Political Economy of Legal Services in the United States*, The Locke Institute and Dennis C. Mueller (1989) and *Public Choice II, A Revised Edition of Public Choice*, Cambridge University Press. For a critic of the confusion on the notion of law, see F. A. Hayek (1968), The Confusion of Language on Political Thought, *IEA Occasional Papers* 20, pp. 14-18.

[9] Fred S. McChesnay (2003), "Government as Definer of Property Rights" in Terry L. Anderson and Fred S. McChesnay (eds.), *Property Rights, Cooperation, Conflict, and Law*, Princeton University Press, p. 225.

[10] Op. Cit., pp. 382.

proponents of the law and economics movement, defend a similar conception of law: "A law is an obligation backed by a State sanction." (Cooter and Ulen, 1997)[11]

This conception entails significant consequences because some acts yielded by a voluntary exchange between parties could be punishable. For instance, some individuals could be condemned for having special sexual intercourse (Hamowy, 1977).[12] Prostitution is prohibited, though the prostitute supplies a valuable commercial service (Block, 1993).[13] In other situations, some acts are permitted, yet they constitute a clear violation of a property right. For instance, farmers can sometimes be expropriated to permit the building of a public highway (Carnis, 2001).[14]

For Alchian and Demsetz, law is conceived as a means of reducing the amount of externalities (Alchian and Demsetz, 1973[15]; Demsetz, 1967).[16] Externalities are perceived as unnecessary costs, which could be avoided or reduced by a clear definition of rights. Law is then the outcome of a rational trade-off between benefits and costs. The definition and enforcement of a right imply the acceptance of the burden of some costs that simultaneously permit the obtaining of certain benefits bound to the exercise of a right. Law is a means of internalizing externalities. Consequently, it is the outcome of a trade-off and the rights are not absolute. They are also defined by a specific computation. The possibility of measuring benefits and costs enables an objective basis for defining the frontier between legal and illegal acts, for demarcating crimes from peaceful exchanges. In fact, the terminology of peaceful exchange and crime is not important *per se* and can be easily replaced by voluntary and involuntary transactions

---

[11] Cooter Robert and Thomas Ulen (1997), *Law and Economics*, 2nd edition, Addison-Wesley, p.3.

[12] Hamowy Ronald (1977), "Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America" in Randy E. Barnett and John Hagel III (eds.), *Assessing the Criminal, Restitution, Retribution, and the Legal Process*, Ballinger Publishing Company, pp. 35-97.

[13] Block, Walter (1993), *Défendre les indéfendables*, Les Belles Lettres, pp. 21-26.

[14] Carnis Laurent (2001), "The Case for Road Privatization: A Defense by Restitution", *Journal des Economistes et des Etudes Humaines*, March 2003, (13)1: 95-116.

[15] Alchian A. and H. Demsetz (1973), "The Property Right Paradigm", *Journal of Economic History*, (43): 21.

[16] Demsetz Harold (1967), "Toward a Theory of Property Rights", *American Economic Review*, 57: 348-349.

(Posner, 1992).[17] Obviously their respective fields—and consequently that which is illegal—can be modified by the evolution of costs, a change in the amount of benefits, or a combination of both these elements.

The traditional analysis of the economics of crime, which appears in a more formalized approach in the seminal works of Becker, rests upon these foundations. Becker asserts:

> "The main purpose of this essay it to answer normative questions, namely, how many resources, and how much punishment *should* be used to enforce different kinds of legislation? Put equivalently, although more strangely, how many offenses *should* be permitted and how many offenders *should* go unpunished."[18] (Becker, 1968)[19]

According to Becker, defining the numbers of offenders is the same thing as determining the numbers of individuals who will be left unpunished. The right is not absolute, but relative to empirical conditions.

Moreover for the mainstream economists, there exists not only an optimal level of rights assignment, but also an optimal level of enforcement of these rights. Again we could quote Becker:

> "The optimal amount of enforcement is shown to depend on, among other things, the cost of catching and convicting offenders, the nature of punishments, whether they are fines or prison terms, and the responses of offenders to change in enforcement." (Becker, 1968)[20]

Put another way, if the costs of enforcing the rights are higher than the benefits obtained by the crimes ignored, then these rights must not be enforced. And if the right can be not enforced, we have to deduce logically that it is a conditional right, in the sense that a criminal who could find an advantage in committing it, can violate it. Consequently, in the neoclassical approach, a criminal act can be optimal from the point of view of society. It permits a better allocation of resources. In this way, it would be possible to define optimal crimes (Friedman, 1996).[21]

To suppose a quantity of optimal crimes for a particular society suggests the ability to determine the process for establishing it. The

---

[17] Op. Cit., p.15.

[18] My italics.

[19] Op. Cit., p.170.

[20] Op. Cit., p. 170.

[21] Friedman David (1996), *Hidden Order, The Economics of Everyday Life, Harper Business*, pp. 298 -316.

criterion of the maximization of social wealth enables reaching the optimal solution. More accurately, it consists in minimizing the social cost or the social losses associated with criminal acts. If the number of crimes is lower than the optimal one, it has to be deduced that the policy is too repressive in that it has prevented the realization of some optimal crimes. Consequently, costs are incurred by the forgone benefits of the non-realized acts. Moreover, a number of crimes higher than this level are also non-optimal. The policy is too permissive in that it makes possible the committing of non-optimal crimes. Society could find some benefits in reducing its social losses by a higher level of spending for detection and punishment. However, these additional costs would be lower than those incurred by non-optimal crimes.

The neoclassical approach of law is characterized by an absence of a theory of justice (Rothbard, 2000 [1974]).[22] Law is only the outcome of a social and historical compromise. This is shown clearly by the extension of Becker's model proposed by Harris. "The point of this paper is that the legal framework need not be taken as constant but is itself subject to policy choice" (Harris, 1970).[23] The definition and enforcement of rights is only a technical problem. So Harris can conclude his analysis in these terms:

> "Optimal levels of the policy variables depend on how various losses are perceived. It is clear that these losses will be perceived differently among social and economic groups within any society. The political process will determine how the interests of various groups will be reconciled or which groups will be able to impose their will on the rest of the society" (Ibid. p. 171).

In Rothbard's works, crime is clearly defined. The separation between the legal and illegal acts relies upon an ethic of property. The Rothbard approach can be summed up in a few words. Criminality is an invasion of somebody's property, of tangible goods to which the owner has a *just* property right, or of his own body (self-ownership) (Rothbard 1982).[24]

> "Crime" can then be defined and properly analyzed as a violent aggression against the just property of another individual (including his property in his own person). The positive theory of liberty

---

[22] Rothbard, Murray N. (2000 [1974]), *Egalitarianism as a Revolt Against Nature, and Other Essays*, Ludwig Von Mises Institute, p. 92.

[23] Harris John R. (1970), "On the Economics of Law and Order", *Journal of Political Economy*, (78), p. 165.

[24] Op. Cit., p.45.

> then becomes an analysis of what can be considered property rights and therefore what can be considered crimes." (Ibid.)[25]

In this framework, the crucial criterion rests on the definition of just or legitimate titles of property. With a clear and correct definition, it becomes possible to irrefutably define criminal acts and legal ones. According to Rothbard, *just* ownership is the outcome either of self-ownership (a person's ownership of his own body), or of the homesteading principle (the first user of a *thing* becomes the just owner of the *good*). The other forms of legal ownership derive from these first principles: the production and exchange of a good (Ibid.).[26] For Rothbard, a just right implies that the unjust establishment and transfer of this property right through time are not proved.[27]

> "To sum up, all existing property titles may be considered just under the homestead principle, *provided*: (a) that there may never be any property in people; (b) that the existing property owner did not himself steal the property; and particularly (c) that any identifiable just owner (the original victim of theft or his heir) must be accorded his property." (Rothbard, 2000 (1974)[28]

All forms of invasion or aggression against a *just* property constitute a crime. Henceforth, there is an *objective* basis for determining what crime is and what legal ownership is.

What are the implications of such an analysis? First, certain actions, which are considered as criminal, have to be legalized. Henceforth, prostitution and drug-dealing must become perfectly legal activities (Block 1983).[29] Second, certain acts which are considered legal constitute in

---

[25] Op. Cit., p. vi.

[26] Op. Cit., p. 37 and 59. The production of a good with raw materials not legally owned does not grant a legal property right on the outcome. Similarly, the exchange of a good previously stolen does not constitute a legal or a *just* transfer.

[27] The burden of proof rests with the person who contests the right of the present owner. She has to prove that she is the true owner. The true question is which kind and which level of proof can be accepted when the unjust owner has used all possible means of making previous property titles disappear. For alternative propositions see also Laurent Carnis (2003) "The Case for Road Privatization: A Defense by Restitution", *Journal des Economistes et des Etudes Humaines*, mars, (13)1: 95-11, and Hans Herman Hoppe (1991) "De-Socialization in a United Germany", *The Review of Austrian Economics*, (6)2: 77-104.

[28] Op. Cit., p. 113.

[29] Op. Cit.

fact true violations of rights: seizure of property, forced redistribution of revenues between population categories, etc. These false rights must be prohibited. Third, the prohibition of certain activities must be considered as violating the liberty of certain persons (outlawing of selling alcohol on Sundays, or drug and alcohol prohibition for instance). The Rothbard analysis suggests a new and significant arrangement of property rights for today's societies. It highlights simultaneously numerous current violations of rights and the unjust attribution of "false" rights.

Because all form of invasion of a justly-held property right constitutes a crime, Rothbard sees no difference between civil and criminal law cases. By contrast, the mainstream position distinguishes civil harm or tort from the public offense. Civil torts are resolved by the definition of rules of liability or the definition of regulation. Public harm concerns the field of public order and implies the intervention of government, which defines punishment. The separation between civil and criminal torts depends on "the difference in knowledge about risky activities as between private parties and a regulatory authority", the solvability of the tort-doer or the incapability "of paying for the full magnitude of harm done", the ability of identifying the liable person, and the relative administrative costs of private and public systems of solving tort (Shavell 1984).[30] In the Rothbard framework, there is no room for such a distinction. The illegitimate existence of the State and the approval of free society imply that such public wrongs are meaningless. There are only private conflicts that need private solutions. Consequently the distinction between private and public wrongs is not necessary.[31]

---

[30] Steven Shavell (1984), "Liability for Harm Versus Regulation of Safety", *Journal of Legal Studies*, June, (XIII), pp. 360-364; See also for a different interpretation Donald C. Keenan and Paul H. Rubin (1982), "Criminal Violations and Civil Violations", *Journal of Legal Studies*, June, (XI): pp. 365-368.

[31] Benson's book, To Serve and Protect, presents clearly the progressive appearance of the public wrong with breaches of the king's peace. The book explains the process of the emergence of monopoly control of criminal activity. Bruce Benson (1998), *To Serve and Protect: Privatization and Community in Criminal Justice*, Independent Institute and New York University Press. For a commentary on this approach, see Laurent Carnis (1999), "To Serve and Protect: Privatization and Community in Criminal Justice, Independent Institute and New York University Press, by Bruce Benson", Book Review, *Quarterly Journal of Austrian Economics*, winter 2(4):89-93.

The Rothbard position also raises other interesting issues. Rothbard stresses that a legal act supposes the exercise by the legitimate owner of his *just* property right. From this proposition, he is able to deduce that there is an absolute basis for defending his property rights and his exercise of them. Firstly, to refute this proposition is self-contradictory (Hoppe, 1989).[32] Secondly, to impose constraints on the exercise of a *just* right constitutes a crime. The *just* owner sees the exercise of his *just* right infringed on by a violent action. The perpetrator of such an *unjust* act becomes a criminal, whatever his intention. However the exercise of a *just* right does not mean the person has "absolute" power to exercise his right. Let's suppose Jones owns a handgun. Jones can decide to have fun firing at his house. In that situation, there is no particular problem. The damage done concerns his *just* property. The means used are *just* ones. But let's suppose now Jones decides to fire towards Paul's house. Then he commits a criminal act. He aggresses Paul's property. Consequently, the only limit to the exercise of a just right is the deprivation of the just right of another person. A free society is the one in which "no man's property in his person or in tangibles is molested, violated or interfered with by anyone else" (Rothbard, 1982).[33] We must deduce that the exercise of a *just* right supposes that the initiator of the action uses his *own* just means and that the consequences of that action imply only his *own* just property. The freedom of another person must not be taken away. The freedom is absolute in the sense that everyone can use his property as he desires and in the manner he wants (nobody has a right to interfere with this use) on condition that he does not commit violations of the property of others (property defined by the different criterion mentioned above).

> "We then see clearly that a supposed 'freedom to steal or assault'—in short, to aggress, would not be a state of freedom at all, because it would permit someone, the victim of an assault, to be deprived of his right to person and property—in short, to have his liberty violated." (Ibid)[34]

Another major implication of the Rothbard approach is dissociation of law from morality. For Rothbard, law and morality do not

---

[32] Hoppe, Hans-Hermann (1989), *A Theory of Socialism and Capitalism*, Kluwer Academic Publishing, p.132.

[33] Op. Cit., p. 41.

[34] Op. Cit.

merge. However, law can be conceived of as a subset of morality,[35] provided it is based on the criteria of appropriation defined above. Rothbard uses Sadowsky's distinction (Sadowsky 1974).[36] The exercise of a *just* right is one thing; moral judgment on the way it is exercised is another. Consequently, we must deduce logically that a person can exercise his right of property in the manner he desires, independently of all moral considerations, unless it deprives someone else of his right. In some ways, morality is highly subjective, and specific to each individual. We could find examples in consumption of alcohol and tobacco, the broadcasting of pornographic movies on private TV channels or Marilyn Manson's songs: in these instances individuals disagree and display different preferences. For this reason, morality is not a good reason for restraining the exercise of a right. On the contrary, it can constitute an open door to greater interventionism and more violations of property rights in people's daily lives.

Moreover, the immoral position is the one which prevents the free exercise of the property right by its legitimate owner. "When we say that one has the right to do certain things we mean this and only this, that it would be immoral for another, alone or in combination, to stop him from doing this by the use of physical force or the threat thereof" (Sadowsky quoted by Rothbard, 1982).[37] Rothbard asserts that in fact the morality criterion is valid only for the means of attaining ends and not the ends[38] themselves. Consequently, the only moral position is respect and defense of *just* property rights while allowing individuals to fullfil their own goals. "Can force advance morality?" (Rothbard, 1977 [1970]).[39] The answer is clearly negative. "There is no sense to any concept of morality, regardless of the particular moral action one favors, if a man is not free to do the *immoral* as well as the moral thing. If a man is not free to choose, if he is compelled by force to do the moral thing, then on the contrary, *he is being*

---

[35] I am indebted to the referee for drawing my attention to this point. It would seem Hazlitt signals a similar point of view and mentions in his *Foundation of Morality* that Bentham and Jellinek developed similar considerations.

[36] James Sadowsky S. J. (1974), *Private Property and Collective Ownership*, pp. 120-123, in Tibor R. Machan (editor), *The Libertarian Alternative, Essays in Social and Political Philosophy*, Neslon Hall Company- Chicago.

[37] Op. Cit., p. 24.

[38] However the just property rights of the others must not be violated.

[39] Op. Cit., p. 209.

deprived of the opportunity of being moral" (Ibid.).[40] The use of force in order to impose a specific set of values on a person constitutes a violation of his rights and a violation of human nature in that it prevents the free exercise of reason to attain personal goals (Rothbard, 1982).[41] For that, such acts must be condemned.

The Rothbard framework also highlights the different conceptions of law: law based on the customs of a community or a tribe or an organization, positive law, and natural law. The first conception is the outcome of history and of common practices: it results from interactions between individuals (Rothbard, 1982).[42] It can be reduced to the two other forms. If it is based on the respect of property rights, we can consider that the customs explicitly traduce natural law. Otherwise it can be considered as being a coercive means or a political tool for imposing a specific set of values. Some members of the population can be entitled to special rights (income transfers or social benefits), whereas other individuals are compelled to finance these transfers via their own property. Sometimes positive law expresses superiority for some people, by giving them the power to impose their own choices on other, supposedly inferior persons. For instance, a dictator or a political majority can impose their own set of values on the population. Rothbard's approach rests on natural law, which is reached through reason. Because it is the outcome of reason, it allows definition of an objective right, which is equally applied. It is a universal rule in conformity with human nature. This law is valid for every period and for every person, whatever his color, age, or gender, and the type of society. It is an absolute theory of justice. Therefore not only do Rothbard's insights enable definition of a clear framework for justice and law, also they constitute a clear condemnation of the present legal system.

It follows from the previous argument that the State has no role in the definition of law. Law is the outcome of reason. Complex calculations for defining rights and their enforcement is useless and meaningless. The Rothbard framework stresses the non-realistic character of the neoclassical approach. Consequently, to build a continuum between voluntary transactions and involuntary ones makes no sense. On the contrary, the criminal act and legal action reflect two radically opposed orders. The first can be termed political order or hegemonic order if we use Oppenheimer's terminology (Rothbard,

---

[40] Op. Cit., p. 209. My italics.

[41] Op. Cit., pp. 3-15.

[42] Op. Cit., p. 17.

1977 [1970], 1982).[43] It is characterized by violence, aggression against the body or tangible goods of some person, invasion, exploitation, and seizure of property, murder, predatory behaviors, and the power of men over other men. The second order is the economic one, based on voluntary agreements, peaceful cooperation, respect of property rights, mutual harmony and benefits, satisfaction of wants, power of men over nature. Both these orders obey two different and irreconcilable logics.

ECONOMIC ORDER	HEGEMONIC OR POLITICAL ORDER
Peaceful cooperation	Invasion and aggression
Mutual benefits	Exploitation, seizure
Harmony	Predatory behaviors
Voluntary agreements	Power of men over other men
Respect of property rights	Violation of property rights

THE DIFFERENCES BETWEEN THE ECONOMIC ORDER AND THE HEGEMONIC ORDER

How to enforce the Law?: Process of social engineering versus justice

One main characteristic of the neoclassical school is its utilitarist approach,[44] which recommends a goal of minimization of the social cost (Becker, 1968).[45]

> "The approach economists have taken toward these choices has generally been based on a 'public interest' criterion: the law enforcement authority seeks to maximize social welfare by minimizing the losses from crime, including the costs of law enforcement and crime control." (Ehrlich, 1996)[46]

[43] Rothbard, Murray N. (1977 [1970]), *Power and Market, Government and the Economy*, Sheed Andrews and McMeel, Inc., p.263 and (1982), *The Ethics of Liberty*, Humanities Press, p. 49.

[44] We will not discuss this point. For a sound critique, see J.G. Hülsmann, "Economic Science and Neoclassicism" and W. Block, "Austrian Theorizing: Recalling the Foundations", *Quarterly Journal of Austrian Economics*, winter 1999, (2)4.

[45] Op. Cit., p. 170

[46] Ehrlich Isaac (1996), "Crime, Punishment, and Market for Offences", *Journal of Economic Perspectives*, winter, (10)1, p. 50.

How can the decider reach the optimal situation? He has to define a social cost function, which takes into account the marginal costs of deterrence, the monetary value of the marginal net damages borne by the victims and the gains obtained from the deterrence of criminals. The process of maximization yields the optimal number of crimes for a particular society (Becker, 1968).[47] This approach firstly implies, if there are no net marginal damages at the society level, that the State has no interest in enforcing the law. And secondly that the level of enforcement of the law depends on the costs of enforcement. The more difficult (or costly) it is to enforce a law, the less the law will be enforced. The cost of enforcement implies partial application of the law. Thirdly, if the criminals show a strong inclination to disobey the law, it means it will cost more money to change these behaviors and this too implies a partial enforcement of the law.[48] Consequently, enforcement of law depends on a benefit-cost calculus at society level.

When the government decides on the need to enforce a law, it then has to define its policy. Concretely, it has to choose conjointly a level of detection (a probability of detection) and determine a level of punishment (severity of sanction in terms of monetary units or prison terms). Becker shows that the choice in both regards depends on the respective costs of devices and their respective elasticity, which represent an indication of the potential gains associated with an increase of one supplementary unit of detection or of sanction. This is an approximation of the deterrent effect (crimes forgone). Consequently, the government can initiate an increase of the level of detection in spite of relative higher costs rather than increase the severity of punishment. This is considered rational, because the gains balance out the difference in costs. The objective of the State is to produce the higher level of deterrence with a particular budget or, to put it another way, to minimize the budget for a certain level of deterrence. This optimal policy of deterrence determines a number of offences or crimes for which the social losses are minimal.

Cooter and Ulen's analysis illustrates this trade-off process. For their demonstration, they make use of two relations. The first is the budget relation (or the frontier of production for deterrence). It represents the different possible combinations of probability of detection and of severity of punishment which it is possible to reach for

[47] Op. Cit., p. 182.

[48] If the government does not decide to enforce the law, the behavior is in practice legalized.

the same budget. (Cooter and Ulen, 1997).[49] It could be also interpreted as the different levels of deterrence, which are available for a same amount of resources. The second relation is the curve of iso-punition or iso-deterrence. This curve indicates the different possible combinations of detection and punishment that provide the same level of deterrence. The point of contact between both curves (A) determines the optimal situation. The optimal combination yields at the same time the higher possible level of deterrence while respecting the budgetary constraints (chart 1).

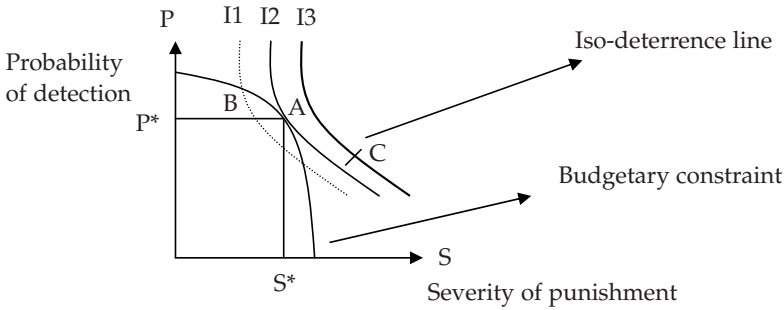

CHART 1: THE OPTIMAL POLICY FOR DETERRENCE[50]

This approach presents some defects. First, the budgetary constraint and the iso-deterrence curve are represented as being continuous lines, which supposes two prerequisites. The first is a fine-tuning public policy which would make it possible to modulate very accurately the level of detection and the severity of punishment. The second is perfect flexibility and reversibility of the process of deterrence production. Two examples will show the unrealistic character of this approach. First, let's suppose the State decides to impose prison terms to face up to an increase in criminality. This policy

[49] Op. Cit., pp. 383-407.

[50] Using chart 1, it is easily shown that the point (*B*) and (*C*) are not optimal. Although (*B*) respects the budgetary constraint, the level of deterrence associated (*I1*) is a lower than the one given by (*I2*). For the same budget, the State could increase the level of deterrence by decreasing the level of detection and by increasing the severity of punishment. Although (*C*) means a higher level of deterrence (*I3*>*I2*), it is not possible to reach this situation because of insufficient resources. It needs a higher budget than the allocated (optimal) one.

implies the building of new prisons and the hire of new guards. If for the next following period higher fines are the more appropriate solution, it appears that some guardians and some prisons will be partially employed or unused. To change the policy takes time, which implies that the process of production is not perfectly reversible. Another illustration with traffic policing can also show that the process is not perfectly continuous. If a highway police force decides to increase the probability of detection of speed offenders and at the same time radars are used to their maximal capacity, this implies buying more radars.[51] But these new radars will not automatically be used at maximal capacity. Concretely, an optimal policy can require the use of 10 radars and 10% capacity of an eleventh. But in practice, it is not possible to buy 10.1 radars: the authorities must buy 11 radars.[52] It implies a budget larger than the optimal one. Then the choice is not between an optimal policy and sub-optimal one, but, in this concrete case, between two sub-optimal policies.

The authorities must solve another problem related to information processing. Certainly, sound accounting and the analysis of information yielded by the market process make it possible for the State to know roughly how much it costs to implement a specific policy. But is this really the case when the issue is what possible combinations of detection and punishment produce the same level of deterrence? Is it acceptable to consider that the State holds all the required information for determining the different levels of deterrence associated with all the possible combinations? Another obstacle arises when numerous models with different hypotheses lead to opposite recommendations for public policy. One model (*A*) can recommend use of the detection device, whereas another model (*B*) requires the same device but at a lower use rate or an emphasis on punishment. In this case, how does the State choose between two opposite recommendations? The choice of one alternative can finally be a non-optimal solution. Then the State is faced with an insoluble situation. In fact, the mainstream economists suppose an omniscient government to solve the problem of information. However, Mises has clearly shown this as impossible because of the nature of such

[51] It is supposed there are sufficient skilled policemen to do the job.

[52] Some radars can be rented on an hourly basis. But again the "lumpiness" problem does not disappear. The hourly price of a rented radar can be sufficiently high for the marginal gains to be lower than the marginal costs. Most certainly the rental of radars can alleviate the problem of imperfect continuity but does not constitute the true solution. The possibility of reaching a sufficiently accurate decision, consistent with the model, is the real issue here.

organizations, which are bureaucracies. The result is that judicial and police organizations, like government departments, cannot use the price mechanism to allocate resources. Consequently there are inherent characteristics that make it impossible to reach efficiency.

> "The objectives of public administration cannot be measured in money terms and cannot be checked by accountancy methods. Take a nation-wide police system like the FBI. There is no yardstick available that could establish whether the expenses incurred by one of its regional or local branches were not excessive." (Mises 1983)[53]

More crucial is the manner with which the punishment is determined. In this framework, the sanction depends on the damage done to the victim (Cooter and Ulen, 1987),[54] (Cooter, 1982).[55] If the gravity of damage increases (for an identical probability of detection), the punishment must also increase. By rearranging the terms, the relationship between the damage and the punishment can take the following expression: $f = \frac{h}{p}$.[56] If the hypothesis of risk neutrality[57] is accepted, then it becomes possible to determine numerous combinations of p and f, which are equal to a level of harm. Finally, a relationship of proportionality can be established. Consequently, if the product of the level of detection by the severity of punishment could be considered as being a *potential*[58] punishment, this one is proportional to the

---

[53] Op. Cit., p. 50. On the contrary, Mises stresses the tendency of bureaucracies to expand their own budgets. "If the head of the whole Bureau were to leave his subordinate station chiefs a free hand with regard to money expenditure, the result would be a large increase in costs as every one of them would be zealous to improve the service of his branch as much as possible. It would become impossible for the top executive to keep the expenditures within the appropriations allocated by the representatives of the people or within any limits whatever." (Ibid. p. 50-51).

[54] Op. Cit.

[55] Cooter Robert D. (1982), "Economic Analysis of Punitive Damages", *Southern California Law Review*, (56)79.

[56] Where p is the probability of detection, f the amount of punishment and h the harm done.

[57] This hypothesis is largely used in the economic literature on criminality. It is suitable because it permits to change the levels of detection and punishment symmetrically. If the agents are not risk neutral, it means that the changes of different levels require to be less or more than proportionally.

[58] We must distinguish the *potential punishment*, which results from the product of the probability of detection and the severity of punishment and the *actual punishment* which is the penalty given by the judge.

level of damage. Because the determination of punishment and of detection depends on their relative costs and the relative deterrent effects on criminal activity, the relationship of proportionality between damage and punishment is in fact indirect. Consequently it becomes possible to have different levels of punishment for the same crime, although the damage is the same. Let's take the following example where Jones broke James's bicycle. The value of the bicycle is 100 dollars. If the probability of detection is 0.8, then the optimal punishment is 100/0.8 = 125 dollars. If the probability of detection is 0.4 (because nobody knows who broke the bicycle and it requires an investigation to identify the culprit), the punishment has to be 250 dollars. Again it is possible for each case to determine a relation of proportionality between the damage done and the punishment, but this relation is not constant. It depends on the ability to detect the offender. It follows from this analysis that if the probability of detection is very small for a specific crime (because the criminal is very smart and elusive or because the cost of detection is very high), the punishment must be very large in order to fit the crime, and this independently of the harm done. "The hanging of horse thieves in the nineteenth-century American West is another example of a penalty whose great severity reflects the low probability of punishment more than the high social cost of the crime" (Posner, 1985).[59]

This conception can lead to situations in which more serious crimes can be punished less severely than moderate ones (Friedman and Sjostrom, 1993).[60] Let us take the example of the theft of two bottles of alcohol (2x15 dollars = 30 dollars) or of one apple (1 dollar). Because the shopkeeper bought a video surveillance system to deter the criminals, the probability of detection is assumed to be 0.90. It is possible to identify the face of the thief. However the apples are displayed on an outside stall and the number of pedestrians makes it very difficult to detect the robber. The probability of detection is estimated at 0.01. So if we follow the mainstream reasoning, the optimal punishment has to be 33.33 dollars for the theft of the two bottles of alcohol, whereas it has to be 100 dollars for an apple. Consequently, the theft of alcohol worth 30 dollars, thirty times more than the apple, has to be punished less severely. In this particular case, roughly three times less. The engineering conception of justice leads

---

[59] Posner Richard (1985), "An Economic Theory of the Criminal Law", *Columbia Law Review*, (6), p.1212

[60] Friedman David and William Sjostrom (1993), "Hanged for a Sheep/The Economics of Marginal Deterrence", *Journal of Legal Studies*, (XXII)2, June, p.263.

to particular disruptions in the treatment of criminals. A more serious crime can be punished less severely than a minor one. Consequently, the mainstream approach to crime is a source of injustice. Indeed, this approach seeks to maximize social welfare, whereas fairness implies proportionality for punishment (Kaplow and Shavell, 2002).[61] However, for Kaplow and Shavell, the rule of proportionality constitutes roughly a proxy. The probability of detection and the severity of punishment play a significant part, as the previous example showed.

> "However, setting the punishment in proportion to the gravity of an offense is but one factor relevant to setting punishment so as to promote the individual's well-being. We have emphasized that the proportionality of detecting and punishing a type of act is important as well." (Ibid.)[62]

In fact, the contribution of both these authors constitutes a strong attack against the retributivist theory of justice. In the interests of maximizing well-being, it becomes possible to inflict harsher punishment on the less harmful acts or to condemn certain innocent parties. "Under welfare economics, some punishment of the innocent may be tolerated in order to reduce the harm to other innocent individuals caused by wrongful acts" (Ibid.).[63]

Another objective of mainstream economists is to supply a complete set of policies against criminality. Some have refined their arguments by integrating the problem of solvency of the criminal, that is to say, how to achieve deterrence if the criminal is unable to pay his fine (Cooter and Ulen, 1987).[64] Other authors deal with the problem of determining the adapted sanction (prison term or monetary sanction or a mix of both) (Shavell, 1987 (a) and (b)),[65] (Polinsky and Shavell, 1984), the imperfection of information on criminals, and different levels of wealth among the criminal population (Ben Sahar,

---

[61] Louis Kaplow and Steven Shavell, *Fairness versus Welfare*, Harvard University Press, pp. 316 and following.

[62] Op. Cit., p. 329.

[63] Op. Cit., pp. 342.

[64] Op. Cit., pp. 402-403.

[65] Shavell Steven (1987 (a)), "A Model of Optimal Incapacitation", *American Economic Review, A.E.A. Papers and Proceedings*, (77)2; Shavell Steven [1987 (b)], "The Optimal Use of Nonmonetary Sanctions as a Deterrent", *American Economic Review*, September, (77)4.

1997)[66], (Garoupa, 1998),[67] (Polinsky and Shavell, 1992),[68] (Bebchuk and Kaplow, 1993, 1992), (Lott 1987).[69] Other works take into account the problem of recidivating offenders (Boadway, Marceau and Marchand, 1996),[70] (Burnovski and Safra, 1994),[71] (Polinsky and Rubinfeld, 1991).[72] Finally, the propensity to commit crimes was also investigated by integrating the behavior with respect to moral and risk dimensions (Block and Heineke, 1975).[73] However all these investigations do not facilitate public decision-making. On the contrary, the diversity of results and a validity limited to specific situations makes it impossible to know which kinds of tools must be used to reach the optimal situation. The public decider is then lost amid details and spurious hypotheses that are the unavoidable outcome of the positive methodology of such approaches. Nonetheless, these different studies share the common point of an engineering approach to determining the optimal level of deterrence by integrating different hypotheses about criminal behavior, conceived as constraints for the public policy. These approaches consider the problem of crime and justice only in terms of deterrence and the finding of the *efficient*

---

[66] Ben Sahar Omri (1997), "Playing without a Rule Book: Optimal Enforcement when Individuals Learn the Penalty only by Committing the Crime", *International Review of Law and Economics*, (517).

[67] Garoupa Nino (1998), "Optimal Law Enforcement and Imperfect Information when Wealth Varies among Individuals", *Economica*, (65).

[68] Polinsky A. Mitchell and Steven Shavell (1992), "A Note on Optimal Fines when Wealth Varies among Individuals", *American Economic Review*, June, (82)3.

[69] Bebchuk Lucian Arye and Louis Kaplow (1993), "Optimal Sanctions and Differences in Individuals' Likelihood of Avoiding Detection", *International Review of Law and Economics*, (13); (1992), "Optimal Sanctions When Individuals are Imperfectly Informed about the Probability of Apprehension", *Journal of Legal Studies, June*, (XXI); John R. Lott Jr. (1987), "Should the Wealthy Be Able to "Buy Justice"?", *Journal of Political Economy*, (95): 6, p. 1312.

[70] Boadway Robin, Nicolas Marceau and Maurice Marchand (1996), "Time-Consistent Criminal Sanctions", *Public Finance*, (51)2.

[71] Burnovski, Moshe and Zvi, Safra (1994), "Deterrence Effects of Sequential Punishment Policies: Should Repeat Offenders be more Severely Punished?", *International Review of Law and Economics*, (14).

[72] Polinsky A. Mitchell and Daniel L. Rubinfeld (1991), "A Model of Optimal Fines for Repeat Offenders", *Journal of Public Economics*, (46).

[73] Block M. and J. M. Heineke (1975),"A Labor Theoretic Analysis of the Criminal Choice", *American Economic Review*, (65)3.

solution to a particular problem of social engineering.[74] Justice is then reduced to a problem of social efficiency.

Rothbard built his analysis on the deprivation of the right of the victim. For him "every man has the absolute right to his justly-held property—to defend it by violence against violent invasion" (Rothbard, 1982).[75] This owner has a right to defend himself and his property, or to hire the services of a specialized agency or to be helped by neighbors. Whatever the means used to protect and to defend property, the retaliation must be directed toward the true aggressor and in a proportionate manner. If the action is misdirected toward an innocent person, the author of this action becomes an aggressor and must be punished for his criminal act. Because of risks[76] implied by such an activity and the competitive advantage of firms providing private security services on the market, it is in the victim's interest to hire specialists. "In the libertarian, purely free-market society, however, the victim will generally find it more convenient to entrust the task to the police and court agencies." (Ibid.).[77] On the free market, the level of service (the scope of rights protected) and the amount of protection (level of detection) depend on customers' willingness to pay (Rothbard 1996).[78] The services are supplied on a competitive market by different firms, which strive for efficiency and seek to minimize losses by avoiding the use of violence and by solving conflicts via peaceful cooperation (Ibid).[79]

Rothbard's theory of punishment is based on the important concept of proportionality (Rothbard, 1982; 1977).[80] The amount of punishment depends on the extent of the initial violation or invasion of a *just* right. By committing his act, the criminal loses his right to the same extent as he has deprived the victim of his own *just* right. A criminal act implies then a violation of a person's just *right* and the

---

[74] I am indebted to Professor Block for having stressed this important characteristic and drawn my attention to this particular point during a long discussion at the Rothbard seminar (Auburn 2002).

[75] Op. Cit., p. 77.

[76] This activity is dangerous because it could bring physical damage for the person who desires to take justice in his own hands (the wrongdoer can be stronger than him) and because the victim can himself become the author of a crime against another innocent person.

[77] Op. Cit., p. 89.

[78] Op. Cit., p. 216.

[79] In his *For a New Liberty*, chapter 12, Rothbard deals clearly with this issue.

[80] Rothbard (1982), Op. Cit., p. 85 and Rothbard (1977), Op. Cit., p. 262.

loss of his right to the same extent for the author of the violation. Consequently, the damage done constitutes the upper limit of the punishment that can be legally imposed. To go beyond this threshold with the imposition of a higher punishment would constitute a violation of the criminal's rights.

The rule of proportionality represents a clear limit for the amount of punishment imposed on the criminal. Contrary to the results advanced by the neoclassical approach, justice requires a defined amount of punishment. The sanction cannot be modulated according the costs of detection. In Rothbard's framework, there is only one kind of punishment: a just, rightfully imposed one (Rothbard, 1982).[81] The optimal punishment defined by the mainstream economists becomes meaningless. The only outcome of such an analysis is problems with the application of justice. Another crucial difference with the mainstream approach is the meaning of proportionality. For Rothbard, the theory of proportionality is a direct relationship between the damage done and the punishment ($H \Rightarrow F$) with equivalence between both terms ($H = F$). In this framework, the probability of detection is not taken into account, whereas for the neoclassical analysis, the severity of punishment is determined simultaneously with the probability of detection $\frac{P}{F} \Rightarrow H$.

Rothbard defends also the idea that the damage done is composed not only of the loss of some rights, but also of the difficulties the victim has to face against his will: a situation of fear and of uncertainty. Consequently, Rothbard proposes a penalty matching the extent to which the criminal has violated the rights of the victim. The penalty must restore the victim's rights and compensate him for all the distress incurred. It could seem contradictory to assert that firstly the punishment must be determined according to the harm done and secondly it has to take into account a psychic cost borne by the victim. In fact, this contradiction is spurious in the sense that it depends on how the harm and its extent are defined. For Rothbard, the harm must be understood as including a "tangible" component (*H1*) (a broken window, bodily harm, stolen TV set..) and an intangible part (*H2*) (fear, uncertainty, nervous disorder...)[82] The harm must be understood as being composed of two different dimensions for it to

[81] Op. Cit., p.86.

[82] It is not the object of this paper to discuss the possibility of measuring with accuracy the different components of harm to a victim.

be established: H = H1 + H2. Consequently, Rothbard proposes to at least double the punishment.

> "But the penalty levied on A is fixed and determined and certain in advance, thus putting A in far better shape than was his original victim. So that for proportionate punishment to be levied we would also to add more than *double* so as to compensate the victim in some way for the uncertain and fearful aspects of his particular ordeal." (Rothbard, 1982)[83]

To reach this conclusion, Rothbard implicitly assumes the existence of another relationship of proportionality between the tangible and the intangible harm: H2 ≈ a x H1. The intangible part could be evaluated via the tangible component. This is not meaningless because the psychic consequences derive from the physical invasion.

A possible objection to the Rothbard approach is the fact that the intangible component is related to a psychic dimension, and so is very difficult or practically impossible to determine. Rothbard is aware of such a limit, which is valid for the neoclassical analysis as well (Ibid.). Nevertheless, Rothbard specifies that a ≈ 2. This figure comes from a logical analysis based on principles of justice and is consistent with his previous analysis. Indeed, Rothbard considers the criminal has to make reparation by compensating the amount of harm done to the victim or by giving a monetary equivalent,[84] but must also pay the same amount again because he loses his own right to the same extent. We have here a logical explanation of this figure.[85] But how does the victim deal with an insolvent party? In this case, amends cannot be made. There are, however, different degrees of insolvency. First, if the criminal temporarily has no money, he will later repay the victim the amount of damages plus the interests. Second, if the criminal has no job and no wealth, the only solution is enslavement until repayment is complete. "The ideal solution, then, puts the criminal frankly into a state of *enslavement*[86] to his victim, the criminal continuing in that condition of just slavery until he has redressed the grievance of the man he has wronged." (Rothbard

---

[83] Op. Cit., p.88

[84] Obviously, there is some practical impossibility for cases of rape, murder… Nevertheless, Rothbard enounces a rule of justice and tries to attain this goal.

[85] In fact Rothbard justifies twice the punishment: firstly for the intangible component the harm done to the victim, secondly for the loss of criminal's right to the same extent. He stresses here the importance of the principle of restitution: the criminal has to pay for the victim.

[86] Author's Italic.

1982).[87] The latter case refers to the situation where the criminal dies before restitution, partial or total, is effected. The victim has to bear the damage and has no alternative in terms of restitution of his rights. Nor is it possible to claim compensation paid for by taxpayers, because such a solution in a libertarian world would involve a violation of the rights of an innocent third party. The violation of property rights does not constitute a means of making reparation.

Rothbard's approach is radically different from the neoclassical economists' one. The goal of justice is not deterrence, but compensation of the victim by *just* means. The restitution criterion constitutes a guide towards attaining justice: an imperfect guide but the best one we have. Indeed, reparation implies the *potential* use of a coercion whose boundaries are clearly established. If the criminal agrees to make reparation, coercion becomes pointless. Coercion is necessary and unavoidable when the criminal refuses to make reparation. Here the victim can resort to the tool of *just* coercion.

Rothbard gives a clear critic of the utilitarist approach that he considers as being unjust and a regression in terms of justice.

> "Deterrence was the principle put forth by utilitarism, as part of its aggressive dismissal of principles of justice and natural law, and the replacement of these allegedly metaphysical principles by hard practicality. The practical goal of punishment was then supposed to be to deter further crime, either by the criminal himself or by other members of society. But this criterion of deterrence implies schemas of punishment, which almost everyone would consider grossly unjust." (Rothbard, 1982)[88]

However, in his radical critic of the theory of deterrence, it seems to me, Rothbard is guilty of two misinterpretations. He asserts that if deterrence is the only goal, then this theory must lead to very high penalties for petty thievery: capital punishment for the theft of a bubblegum for example. If we follow this line of reasoning, we must also deduce that this will be the case for all criminal acts. In fact, the utilitarist approach specifies clearly that punishments are marginal penalties. Indeed, if you punish a bank robber with capital punishment, it will be in his interest to rob the bank but also to kill all the customers who could testify against him. Then if the bubblegum theft is punished by the same penalty, its author will be prompted to commit a bank robbery, because he could gain *more* for the same risk. This is why mainstream economists propose defining marginal and

[87] Op. Cit., p. 86.

[88] Op. Cit., pp. 90-91.

progressive penalties as a way of avoiding such perverse effects (Cooter and Ulen, 1997).[89] Consequently, the critique made by Rothbard on this point is not valid. Rothbard is right in asserting that neoclassical theory can lead to higher penalties than justice would justify. But this theory could also lead to lower penalties than justice would require, if it were assumed that the crime committed was of significant value. Some crimes could be exempted from punishment, if they offer society more than they cost. The best example is crimes justified by "reasons of State". It becomes possible to kill an innocent person if this insures increased security for the State.

Second, the objective of the utilitarist approach is not to produce the highest level of deterrence, as Rothbard seems to assert, but to obtain the highest level of deterrence by taking into account the costs for society. This is why this approach uses a wealth maximization criterion. The penalty depends on the harm done, the costs of punishing and detecting, and the relative effects in terms of deterrence. In fact, the crucial point is how to estimate the damage done and identify the victims who bear this damage. History provides examples of minor acts attracting significant punishment. A king can put a count in jail when the latter displays greater wealth than he does. The punishment is justified because the harm done is considerable: discredit for the king among the other kings of Europe, weak treaty-negotiation status, etc. So the true problem comes from how the damage is valued.

Consequently it is impossible to raise the previous argument of very severe, unjust punishment. Indeed, it is not obvious that the neoclassical model would justify such a punishment. On this point, it seems Rothbard misses the target. The true point, in fact, is the existence of damage and how to define the relation of proportionality between harm and punishment. It remains that Rothbard agrees with progressive penalties. This progressiveness is established according to the damage done, whereas for the neoclassical economists it is established for obtaining results in terms of deterrence. On this point, the two rationales rest on radically different frameworks.

It is clear that opposite aims are involved here: a search for justice for Rothbard and a search for efficient deterrence for the neoclassical economists. The goals are not similar and the means are unrelated. However, it is difficult to deny the deterrent effect of imposing punishment. Rothbard does not develop this point. But if we suppose that the individuals are able to establish priorities and make

[89] Op. Cit., p.190.

choices, and that these choices can be influenced by certain incentives, we can logically and rightly assert that penalties and the level of detection constitute incentives which can influence the realization of individual plans. Consequently, whatever the criteria used to determine the penalty, the deterrence of some individuals from committing some acts is undeniable. Then the neoclassical economists want to attain the objective of minimizing the social cost or the social losses by efficient use of the different deterrence-producing devices. In the Rothbard framework, the ultimate goal is justice for the victim through compensation and respect for a rule of proportionality. The deterrent effect is the central mechanism for reaching the optimal situation for the utilitarist, whereas the deterrent effect is a secondary or corollary effect for Rothbard. It can be considered as being a positive indirect effect of the process of justice.

The critiques of the rehabilitation criterion point out a similar divergence. For Becker, the choice between committing or not committing the crime is only a matter of arbitration between costs and benefits, and not the result of mental illness, which necessitates special rehabilitation programs. The economic approach to crime appears clearly as an alternate means of understanding criminal behavior. "It is suggested, for example, that a useful theory of criminal behavior can dispense with special theories of anomie, psychological inadequacies, or inheritance of special traits and simply extend the economist's usual analysis of choice." (Becker, 1968)[90] A different approach considers rehabilitation programs as being very costly and difficult to achieve (Ehrlich, 1981).[91] Ehrlich reasons in terms of efficiency and deterrence. He shows that rehabilitation produces a positive effect in terms of deterrence (professional skills to facilitate integration into the labor market), but also counter-productive effects by constituting a subsidy for the criminal.

> "But the effect of rehabilitation on the equilibrium frequency of offenses is even more complex. The reason is that successful rehabilitation confers an implicit subsidy on potential of offenders by offering training and employment at public expense. … Put differently, the rehabilitation benefits provided to actual offenders ex post produce a counter-deterrent effect on potential offenders ex ante." (Ibid.).

---

[90] Op. Cit., p.170.

[91] Ehrlich Isaac (1981), "On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence", *The American Economic Review*, June, (71)3, pp. 314-315.

The rehabilitation programs constitute a decrease in the costs borne by the criminals. They reduce the net penalties and lead to a supplementary quantity of criminality. Consequently, the neoclassical approach condemns rehabilitation in two ways. The first insists on the logic of the criminal behavior (costs and benefits analysis), the second argues in terms of ineffective deterrence.

Rothbard adopts another line consistent with his theory of property rights. Though he criticizes rehabilitation programs, he does not reason in terms of efficiency or deterrence. For Rothbard, the criminal has to be deprived of his rights to the extent he violated those of the victim. Thus rehabilitation programs constitute a violation of the criminal's rights. For Rothbard, the implementation of such policies is a criminal activity: a form of slavery in which the criminal must submit therapy unlimited in time. Rothbard advances four reasons for which this punishment is a parody of justice and, in fact, a veritable injustice. Firsly, the therapy requires taxpayers' money. Some victims have borne the damage and then have to pay again for therapy. Indeed the funding rests upon the violation of rights of the forced contributor.[92] Money is extracted for "humanitarian" considerations. Secondly, the punishment can have no relation to the extent or gravity of the crime. Doctors and psychiatrists are illegally appropriating resources. "According to the logic of the principle, he must stay incarcerated indefinitely, perhaps for the rest of his life, for while the crime was negligible he continues to remain outside the influence of his 'humanitarian' mentors." (Rothbard, 1982)[93] Sometimes a criminal can be condemned for a long period to psychological influences and violence bearing no relation to his crime (Hamowy, 1977)[94] (Szasz, 1977).[95] In this way, medicine becomes a major ally of internment. The same procedure was used under Stalin's regime (Fitzpatrick, 2002).[96] The rule of proportionality is no more respected and justice is not dispensed. Thirdly, the victim is not taken into consideration. The administration fails in its action of compensating the

[92] To know more about taxation, the reader can turn to Rothbard's books (1982; 1977 [1970]).

[93] Op. Cit., p.92.

[94] Op. Cit.

[95] Szasz, Thomas S. (1977), "Psychiatric Diversion in the Criminal Justice System: A Critique" in Randy E. Barnett and John Hagel III (eds.), *Assessing the Criminal, Restitution, Retribution, and the Legal Process*, Ballinger Company, pp. 99-120.

[96] Fitzpatrick, Sheila (2002), *Everyday Stalinism: Ordinary Life in Extraordinary Times: Russia in the 1930s*, Oxford University Press, 2000.

victim and of making him whole. Under such a system, the victim is society and its values and not the person who suffered the damage. Again the person has no right per se: he belongs to a social aggregation called society. Fourthly, doctors and psychiatrists given the opportunity to impose whatever remedies they like define in fact what is mental illness and good (mental) health. This is an open door for tyranny and oppressive actions against individuality and individuals. Then therapy, psychological treatment and prohibition would be justified independently of the existence of a violation of rights. Similar justifications were advanced against alcohol consumption, drug absorption or smoking activities (Thornton, 1991).[97]

The State: protector or aggressor?

Another distinction between the neoclassical and the Rothbard approaches derives from analysis and the scope given to the State to prevent criminality. Becker begins his paper with a clear explanation.

> "The State no longer merely protects against violations of person and property through murder, rape, or burglary, but also restricts 'discrimination' against certain minorities, collusive business arrangements, 'jaywalking', travel, the materials used in construction, and thousands of other activities" (Becker, 1968).[98]

For Becker, the State must intervene in numerous fields. The only limit to its interventionism is the balance of costs and gains of its interventions. Although Becker is aware of the fact that private expenditures help in reducing the crime levels, the State is conceived of as the key actor (Ibid. p. 171). This is why his analysis focuses only on the effects of public policy and gives a central place to the State.[99] Becker's model implies in fact that only the State produces true deterrence. Private efforts only reinforce only government ones, but they are not the central phenomenon. Although private punishments

---

[97] Thornton, Mark (1991), *The Economics of Prohibition*, University of Utah Press, Salt Lake City.

[98] Op. Cit., p. 169.

[99] Among his roughly 50-page article, only 2 pages are dedicated to the private expenditures against crime. It seems strange, especially when Becker quotes some figures, estimations about the different expenditures, where the private component represents roughly one third of the total expenditures at the moment the article was published. Consequently, private deterrence is not an unimportant phenomenon, which cannot be taken into account. Becker agrees these expenditures are underestimated (Ibid. p. 200).

do exist (exclusion of some customers from some areas, mechanisms of reputation and private mechanisms to fight illegal behaviors, norms and rules) (Posner, 2000), Becker does not deal with them. So the fight against criminality is essentially an attribute of the State that justifies giving it a central role.

However, how does Becker justify the central attention given to the public expenditures for protection? A first explanation could be that the public expenditures represent the desired level of protection of society as a whole, that is to say an approximation of expenditures individuals are ready to consent to. But if there were such consent, there would be no need of government intervention. A second explanation would be that the government is in charge of protection against crime, because there would be a market failure to insure security. How then are we to understand the simultaneous existence of a private component for protection? Indeed, the existence of private expenditure shows not only that private protection measures are not impossible, but also that the level of public expenditure is not optimal. Indeed, for public intervention to be optimal as Becker asserts, there would be no reason for such private expenditures to exist. Consequently, there is a contradiction in Becker's model. For these reasons, this model is not satisfactory.

There are similarities to be found in Cooter and Ulen's approach. These authors do not explicitly use the term government or State for the mechanisms of justice. They prefer the systemic notion of criminal or civil process, and legal institutions. They deal with the notion of responsibility, proceedings or "neutral" concepts as a theory of property rights, enforcement and punishment. The important actors are the judges, the criminals and the victims. This is a means of avoiding discussion of a private system of enforcement. In fact, the public enforcement to which they refer is a governmental intervention. Two factors permit us to assert they situate their analysis in the current public system of deterrence. In chapter 3 of their book they elaborate on the mechanisms of the present legal institutions (Cooter and Ulen, 1997).[100] The second argument is based on a "thought experiment" derived from game theory and the importance of "transaction costs". For the authors, the state of nature is characterized by a default of cooperation. It is not an optimal situation, because the different inputs could be used in different ways to provide a higher output (Ibid. p. 76). A better situation would be yielded by a public monopoly on law enforcement.

[100] Op. Cit., p. 67.

The existence of economies of scale would explain the situation of a natural monopoly on force[101] and allows these authors to defend a centralized system of law enforcement, monopolized by the State. We note a similar argument in Becker's contribution when he considers an objective and unique function of intervention or when he proposes to minimize the social cost function at society level. However, this view of things is faced with factual contradictions when certain State Police forces combine with federal police, and judicial systems with state police and justice organizations. In California for instance, the numerous enforcement agencies (California Highway Patrol, Sheriffs, City Police Departments, etc.) work in different jurisdictions. In countries where the political traditions are Jacobin, as in France, the police forces are not characterized by a natural monopoly. They are numerous and very often their actions are not coordinated. In other countries, the authorities decided to give more autonomy and accountability to the regional level. In New South Wales since the beginning of the 80's, the police service decided to reorganize its structure through five different autonomous regions. The headquarters proposes overall strategy and general action. The regional forces are in charge of the operations and adapt their actions by taking into account the features of their jurisdiction. Moreover some empirical research shows the existence of scale diseconomies proving that the monopoly situation is not an efficient one (Finney 1997; Gyimah-Brempong 1987).[102] Although the hypothesis of the natural monopoly is doubtful, it constitutes a justification for a government intervention.

The natural monopoly argument would be also justified by the reduction of transaction costs it would permit. The problematic of transaction costs is also used to show the impracticability of a private system. For Cooter and Ulen, there is a threshold for the transaction costs beyond which, it is not efficient to let the market work (Ibid. p. 87-88). The authors use the typical Coasean argument to define the property rights. Because of the impossibility of private solutions to

[101] I will not discuss the validity of this argument here. For a critique, see Rothbard (1982), particularly his critiques of Nozick's theory justifying the State (pp. 231-232).

[102] Miles Finney (1997), "Scales Economies and Police Department from Los Angeles", *Contemporary Economic Policy*, January (XV): 121-127; Kwabena Gyimah-Brempong (1987), "Economies of Scale in Municipal Police Departments: The Case of Florida", *The Review of Economics and Statistics*, 69(2): 352-356.

solve situations characterized by high transaction costs, the governmental interventions find new justifications. It is the market failure argument. Friedman shares a common conclusion but for other reasons (Friedman, 2000).[103] A private system would be unable to deal with specific offenses, the negative price offenses with anonymous victims.

> "So private enforcement…could work for all offenses that sell at a positive price, offenses for which the amount collected from convicted offenders is, on average, more than the cost of catching and convicting them. …It does not work for offenses that sell at a negative price for which deterrence cannot be made a private good because the offender does not know enough about the victim to be deterred—anonymous victim offense. These were the sort of offenses—highway robbery, for example—that provided a special problem for the system of private enforcement of criminal law in eighteenth-century England." (Friedman, 2000)[104]

The main lesson of this approach is the justification of government intervention in the justice field. Government would be the unique agent able to deal with specific cases of crime. Its existence hinges on effectively dealing with disputes between individuals, because of its centralized character and subsequent ability to gather the necessary information for its activities. It would permit better allocation of resources and efficient protection of rights. Then individuals would benefit from an increase in their wealth. However, the promoters of these ideas does not prove that the transaction costs of creating a government is less important than those attributed to market functioning. There is also no proof that such inabilities attributed to the market can be solved by government action.

Rothbard's point of view on the State is radically different. Rothbard sees in the apparatus of State a tremendous concentration of power. The State has arrogated to itself numerous compulsory monopolies on the creation of money, the use of force and violence, the provision of law and its enforcement. It owns most of the land, can seize the properties it wants, and insure the provision of streets, roads, etc. It controls the military forces and police services. It has a privileged position compared to that of the people. But who can guard the people from intrusive actions by the guardians? Where the neoclassical economists conceive the State as being a means of reducing transaction costs and enabling an optimal allocation of resources,

---

[103] Friedman, David (2000), *Law's Order: What Economics has to Do with Law and Why it Matters*, Princeton University Press, p. 295.

[104] Op. Cit., p. 295.

Rothbard points out the position of force in which the State stands. Unlike the typical conception of State as a protector for liberty, Rothbard interprets its preponderant presence as a terrible threat for the individual liberties. To justify his position, Rothbard stresses the means by which the State finances its intervention. One of them is taxation, that is to say extraction of resources from the population against its will. The State uses coercion to appropriate the resource it needs for its functioning.

If we take the distinction made by Oppenheimer, there exist only two means of obtaining wealth: one involves voluntary exchange and peaceful cooperation within a free market, called economic means; the second involves expropriation, violence and theft, called political means (Rothbard, 1982).[105] It it clear that the State is an organization which uses political means to obtain wealth. Consequently, there is a contradiction in asserting that its role is to promote the creation of wealth on the one hand, and then concluding that its only means of survival is violation of certain property rights, that is to say a nuisance for the creation of wealth, on the other hand. For Rothbard the State does not only not insure the protection of liberties, it also represents more than a simple threat to them, because its existence presupposes violation of the law. The State does not provide protection, and actually means theft. "Taxation is theft, purely and simply, even though it is theft on a grand and colossal scale which no acknowledged criminals could hope to match. It is a compulsory seizure of the property of the State's inhabitants, or subjects" (Rothbard, 1982).[106]

In Rothbard's theory, the State presents another particularity. It is not a simple or common thief or criminal. In fact, it is a collective criminal organization, financed by a large-scale system of extortion and theft. Its strength is based on the possibility of easily financing its expenditures by a high level of extraction of resources or by using inflation. Its actions are facilitated and reinforced by an intelligentsia, an apparatus of intellectuals who are paid to diffuse theories, expand doctrines, ideologies and arguments, and to justify its interventions (Hoppe, 1995;[107] Rothbard, 1982).[108] The resources are also used to reward the people who form a coalition to help in maintaining this

[105] Op. Cit., p. 166.

[106] Op. Cit., p. 163.

[107] Hoppe Hans-Hermann (1995), *Natural Elites, Intellectuals and the State*, Ludwig Von Mises Institute.

[108] Op. Cit., p. 167.

system. Their efforts are remunerated by a part of the plunder that the members of this organization succeeded in extracting by force. Finally, they have a monopoly of the use of force and try systematically to eliminate all possibly threatening competitors. In fact, contrary to Weber's view, the State has not the monopoly of the legitimate use of force, but an illegitimate one or a monopoly of a broad, systematic form of criminal activity. The simple existence of government constitutes a sign of violence, depredation of *just* property rights, extortion and exploitation of men by other men. This situation is particularly dangerous in that there is no appropriate check and balance to control this total power. The technical constraints of the extortion and the behavioral reactions of the oppressed people to this seizure constitute the only limit.

In this sense, these positions are irreconcilable. Moreover, the Rothbard theory shows that the neoclassical theory is not only incorrect, but also belongs to the apparatus of the State. By building their theories, the neoclassicists work for the justification of violation of property rights on a large scale. This may explain the recurrent confusion about the language used by its proponents in assimilating the notion of a price to a fine or a punishment and the market process to the criminal process. By stressing such similarities, these theories can attain terrible goals by letting people think there is no true difference between the action of an entrepreneur and the acts of a criminal. If there is no difference, profit appears as illegitimate as the plunder of a criminal. Consequently, if it is a good for society to control or eliminate a harmful criminal, there is also a case for controlling business activity to avoid what are considered as "illegitimate" gains.

Because the State has its own internal contradictions, the activities of justice and protection cannot be left to it. That the State insures the enforcement of justice is simply a contradiction in terms. The State prohibits theft, but steals from its own citizens. "But in doing so the State violates its own laws that it sets down for its subjects." (Rothbard, 1982)[109] This is the result of an absence of a correct theory of law. It is impossible to reconcile the economic principle and the hegemonic one. "Thus, an economist cannot fully analyze the exchange structure of the free market without setting forth the theory of property rights, of justice, in property, they would have to obtain in a free market society" (Rothbard, 1977 [1970]).[110]

The solution is to let the market work. In chapter 12 of his book, *For a New Liberty: the Libertarian Manifesto*, Rothbard defines how

[109] Op. Cit., p. 179

[110] Op. Cit., p. 1.

such a system could work. To know what exactly such a system would be is not the goal of this paper. More important is the principle on which it is built. The services of defense, as all other services, would be furnished and obtained on pure freely basis, that is to say by free exchanges on the market. These activities would be, consequently, marketable. The competition among suppliers and demanders would insure a product of quality for the best price it is possible to reach. The checks and balances would be the outcome of competition between the different bidders. These activities would not be coercive, but the outcome of a rationale of cooperation. The punishment would fit the crime. For Rothbard, protection against criminality is a consequence of liberty. Protection would be only supplied by the private sector. "That type of security, then, which is open to every man in society, is not only compatible with, but is a corollary to, perfect freedom. Freedom and security against aggression are two sides of the same coin." (Rothbard, 1977, [1970])[111] In the Rothbard framework, there is no place for State intervention.

CONCLUSION

The differences between the neoclassical school and the Rothbard approach are radical. I proposed in this article three means of analyzing these divergences. The conception of law, the role attributed to punishment and the place of the State show clearly two irreconcilable ways of thinking about justice. For the neoclassical economists, the question is one of allocation of resources, of social engineering. Rothbard bases his reasoning on the definition of *just* property rights.

For the mainstream, the overall situation can be grasped via an objective valuation. Minimization of losses draws up the rules a society must follow. The rights reflect only what the State, acting as a central planner, sees as rights. In that sense, the people hold only conditional property rights, which could be withdrawn under certain circumstances. This conception leads to some contradictions. On the one hand, the State reduces uncertainty and protects against individuals who could behave like wolves against other wolves. On the other hand, it creates uncertainty by placing individuals in a situation of having only conditional property rights and by itself behaving as a wolf. Considering that the market can only work under the protection of the State implies another contradiction. This places the

[111] Op. Cit., p. 218.

State in a privileged position, with the authorities holding all the necessary information and knowing what is best for the people. But if the authorities are in a superior position, how can we justify the existence of the market?

Rothbard's position seem a more rigorous one. It clearly defines *just* property rights whose violation constitutes a crime. Then justice means to make amends to the victim and to restore his property when this is possible. The criminal also defines by his act the extension of his just loss of his own property rights. By defining a basis for assessment of damage and reparation, Rothbard lays down limits for avoiding extreme and unjust punishments. In the Rothbard framework, it becomes possible to understand why the State can be considered criminal. It also becomes possible to imagine a purely private system of protection and justice. Here we have the foundations for a radical order within which law and justice have their roots in ethics.

Bibliography

Anderson Terry L. and Fred S. McChesney (eds.) [2003], *Property Rights, Cooperation, Conflict and Law*, Princeton University Press.

Alchian A and H Demsetz (1973), "The Property Right Paradigm", *Journal of Economic History*, (43): 16-27.

Barnett Randy E. (1977), "Restitution: A New Paradigm of Criminal", in Barnett R. and J. Hagel III (eds.), *Assessing the Criminal: Restitution, Retribution and the Legal Process*, Ballinger Publishing Company, pp. 349-383.

Barnett Randy E. and John Hagel III (eds.), (1977), *Assessing the Criminal, Restitution, Retribution, and the Legal Process*, Ballinger Publishing Company.

Bebchuk Lucian Arye and Louis Kaplow (1993), "Optimal Sanctions and Differences in Individuals' Likelihood of Avoiding Detection", *International Review of Law and Economics*, (13): 217-224.

Bebchuk Lucian Arye and Louis Kaplow (1992), "Optimal Sanctions When Individuals are Imperfectly Informed about the Probability of Apprehension", *Journal of Legal Studies*, June, (XXI): 365-370.

Becker Gary S. (1968), " Crime and Punishment: An Economic Approach", *Journal of Political Economy*, march-April, (78):169-217.

Benson Bruce (1998), *To Serve and Protect: Privatization and Community in Criminal Justice*, Independent Institute and New York University Press.

Ben Sahar Omri (1997), "Playing without a Rule Book: Optimal Enforcement when Individuals Learn the Penalty only by Committing the Crime", *International Review of Law and Economics*, (517): 409-421.

Block M. and J. M. Heineke (1975),"A Labor Theoretic Analysis of the Criminal Choice", *American Economic Review*, (65)3: 314-325.

Block Walter (1993), *Défendre les indéfendables* (proxénètes, vendeurs d'héroïne, prostituées, maîtres chanteurs, faux-monnayeurs et autres boucs émissaires de notre société), Les Belles Lettres, 274 pages.

Boadway Robin, Nicolas Marceau and Maurice Marchand (1996), "Time-Consistent Criminal Sanctions", *Public Finance*, (51)2: 149-165.

Burnovski Moshe and Zvi Safra (1994), "Deterrence Effects of Sequential Punishment Policies: Should Repeat Offenders be more Severely Punished?" *International Review of Law and Economics*, (14): 341-350.

Carnis Laurent (2003), "The Case for Road Privatization: A Defense by Restitution", *Journal des Economistes et des Etudes Humaines*, mars, (13)1: 95-116.

Carnis Laurent (1999), "To Serve and Protect: Privatization and Community in Criminal Justice, Independent Institute and New York University Press, by Bruce Benson", book Review, *Quarterly Journal of Austrian Economics*, winter 2(4):89-93.

Cooter Robert D. (1984), "Prices and Sanctions", *Columbia Law Review*, (84)1523: 1523-1560.

Cooter Robert D. (1982), "Economic Analysis of Punitive Damages", *Southern California Law Review*, (56)79: 79-101.

Cooter Robert and Thomas Ulen (1997), *Law and Economics*, 2nd Edition, Addison Wesley.

Demsetz Harold (1967), "Toward a Theory of Property Rights", *American Economic Review*, 57: 347-359.

Ehrlich Isaac (1996), "Crime, Punishment, and Market for Offences", *Journal of Economic Perspectives*, winter, (10)1: 43-67.

Ehrlich Isaac (1981), "On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence", *The American Economic Review*, June, (71)3: 307-322.

Finney Miles (1997), "Scales Economies and Police Department from Los Angeles", *Contemporary Economic Policy*, january (XV): 121-127

Fitzpatrick Sheila (2002), *Everyday Stalinism: Ordinary Life in Extraordinary Times: Russia in the 1930s*, Oxford University Press, 2000.

Friedman David D. (2000), *Law's Order, What Economics has to Do with Law and Why it Matters*, Princeton University Press.

Friedman David D. (1996), *Hidden Order, The Economics of Every day Life*, HarperBusiness.

Friedman David and William Sjostrom (1993), "Hanged for a Sheep / The Economics of Marginal Deterrence", *Journal of Legal Studies*, (XXII)2: 345-366, June.

Gallaway Burt (1977) "Restitution as in Integrative Punishment", pp. 331-347, in Randy E. Barnett and John Hagel III (eds.), *Assessing the Criminal, Restitution, Retribution, and the Legal Process*, Ballinger Publishing Company, pp. 331-347.

Garoupa Nino (1998), "Optimal Law Enforcement and Imperfect Information when Wealth Varies among Individuals", *Economica*, (65): 479-490.

Gyimah-Brempong Kwabena (1987), "Economies of Scale in Municipal Police Departments: The Case of Florida", *The Review of Economics and Statistics*, 69(2): 352-356.

Hayek F. A. (1968), "The Confusion of Language in Political Thought with some Suggestions for Remedying It", *Occasional Paper* 20, Institute of Economic Affairs, 36 pages.

Hayek Friedrich A. (1937), "Economics and Knowledge", *Economica*, (4): 33-54.

Hamowy Ronald (1977), "Preventive Medicine in the Criminalization of Sexual Immorality in Nineteenth" in Barnett R. and J. Hagel III (eds.), *Assessing the Criminal: Restitution, Retribution and the Legal Process*, Ballinger Publishing Company, pp. 35-97.

Harris John R. (1970), "On the Economics of Law and Order", *Journal of Political Economy*, January - February, (78)1: 165-174.

Hoppe Hans Hermann (1998-1999), "The Private Production of Defense," *The Journal of Libertarian Studies*, (14)1: 27-52.

Hoppe Hans Hermann (1995), *Natural Elites, Intellectuals and the State*, Ludwig Von Mises Institute.

Hoppe Hans-Hermann (1989), *A Theory of Socialism and Capitalism*, Kluwer Academic Publishing.

Hülsmann Jorg Guido (1999), "Economic Science and Neoclassicism", *The Quarterly Journal of Austrian Economics*, (2)4: 3-20, winter.

Kaplow Louis and Steven Shavell (2002), *Fairness versus Welfare*, Harvard University Press.

Keenan Donald C. and Paul H. Rubin (1982), "Criminal Violations and Civil Violations", *Journal of Legal Studies*, june, (XI): 365-368.

Lott John R. Jr. (1987), "Should the Wealthy Be Able to "Buy Justice"?", *Journal of Political Economy*, (95)6: 1307-1316.

McChesnay Fred S. (2003), "Government as Definer of Property Rights" in Terry L. Anderson and Fred S. McChesnay (eds.), *Property Rights, Cooperation, Conflict, and Law*, Princeton University Press.

McChesnay Fred S. (1993), "Boxed In: Economists and Benefits from Crime", *International Review of Law and Economics*, (13): 225-231.

McDonald William F., "The role of Victim in America", in Barnett R. and J. Hagel III (eds.), *Assessing the Criminal: Restitution, Retribution and the Legal Process*, Ballinger Publishing Company, pp. 349-383.

p. 295-307.

Mises (von) Ludwig (1990), *Economic Calculation in the Socialist Commonwealth*, Ludwig Von Mises Institute, Auburn, Alabama, 72 pages.

Mises (von) Ludwig (1985), *L'action humaine*, Presses Universitaires de France.

Mises (von) Ludwig (1983), *Bureaucracy*, Libertarian Press.

Mueller Dennis C. (1989), *Public Choice II, A Revised Edition of Public Choice*, Cambridge University Press.

Polinsky A. Mitchell (1989), *An Introduction to Law and Economics*, Boston Little Brown, 2nd Edition,153 pages.

Polinsky A. Mitchell and Daniel L. Rubinfeld (1991), "A Model of Optimal Fines for Repeat Offenders", *Journal of Public Economics*, (46): 291-306.

Polinsky A. Mitchell and Steven Shavell (1992), "A Note on Optimal Fines when Wealth Varies among Individuals", *American Economic Review*, June, (82)3: 618-621.

Polinsky A. Mitchell. and Steven Shavell (1984), "The Optimal Use of Fines and Imprisonment", *Journal of Public Economics*, (24): 89-99.

Posner Eric (2000), *Law and Social Norms*, Harvard University Press.

Posner Richard (1992), *Economic Analysis of Law*, 4th edition, Little, Brown and Company.

Posner Richard (1985), "An Economic Theory of the Criminal Law", *Columbia Law Review*, (6): 1193-1231.

Rothbard Murray N. (2000 [1974]), *Egalitarianism as a Revolt Against Nature and Other Essays*, The Ludwig Von Mises Institute.

Rothbard Murray N. (1996 [1978, 1973]), *For a New Liberty, The Libertarian Manifesto*, Revised Edition, Fox and Wilkes.

Rothbard Murray N. (1991 [1970]), *Freedom, Inequality, Primitivism and the Division of Labor*, The Ludwig Von Mises Institute.

Rothbard Murray N. (1982), *The Ethics of Liberty*, Humanities Press.

Rothbard Murray N. (1977 [1970]), *Power and Market, Government and the Economy*, Sheed Andrews and McMeel, Inc.

Rothbard Murray N.(1977), "Punishment and Proportionality", in Barnett R. and J. Hagel III (eds.), *Assessing the Criminal: Restitution, Retribution and the Legal Process*, Ballinger Publishing Company, pp. 259-272.

Rowley Charles K. (1992), *The Right to the Justice, The Political Economy of Legal Services in the United States*, The Locke Institute;

Sadowsky James S. J. (1974), "Private Porperty and Collective Ownership", p. 120-123, in Tibor R. Machan (editor), *The Libertarian Alternative, Essays in Social and Political Philosophy*, Neslon Hall Company- Chicago.

Shavell Steven (1991), "Specific versus General Enforcement of Law", *Journal of Political Economy*, (99)5: 1088-1108.

Shavell Steven (1987 (a)), "A Model of Optimal Incapacitation", *American Economic Review, A.E.A. Papers and Proceedings*, (77)2: 107-110.

Shavell Steven (1987 (b)), "The Optimal Use of Nonmonetary Sanctions as a Deterrent", *American Economic Review*, September, (77)4: 584-592.

Shavell Steven (1985), "Criminal Law and the Optimal Use of Nonmonetary Sanctions a Deterrent, *Columbia Law Review*, (85)1232: 1232-1262.

Shavell Steven (1984), "Liability for Harm Versus Regulation of Safety", *Journal of Legal Studies*, june, (XIII), pp. 360-364.

Szasz Thomas S. (1977), "Psychiatric Diversion in the Criminal Justice", in Barnett R. and J. Hagel III (eds.), *Assessing the Criminal: Restitution, Retribution and the Legal Process*, Ballinger Publishing Company, pp. 99-120.

Thornton Mark (1991), *The Economics of Prohibition*, University of Utah Press, Salt Lake City.

Tullock Gordon (1967), "The Welfare Costs of Tariffs, Monopolies and Theft", *Western Economic Journal*, (V)3: 224-232.