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Why the Bad Man Obeys the Law: Richard A. Posner's Economic Theory of Punishment

Dlaczego zły człowiek przestrzega prawa. Ekonomiczna teoria kary Richarda A. Posnera

ABSTRACT

This article examines the problem of justifying punishment for murder, which is a new perspective that merges anthropological economic analysis with traditional legal discourse. The central focus of the study was Richard A. Posner's theory of punishment. The main thesis contends that Posner's concept, analysed from the perspective of legal anthropology, reveals shortcomings in the theory of punishment from a theoretical and legal standpoint. Previous studies, which question the economic justifications for self-defence and the incommensurability of value in murder verdicts, serve as examples. Legal norms should concentrate on economic consequences rather than moral considerations. The analysis of Posner's concept points to a new direction for the study of punishment, which uncovers the essence of the pragmatic approach of American law. As Posner aptly emphasizes, this law emerged to restrain the "bad man" from breaking it. As the analysis of the Dudley case indicates, punishment in the case of killing a person will never be commensurate from the perspective of the law in a moral sense. If a person is "bad", they may refrain from committing a crime if they cannot afford it. The research methodology is based on literature analysis and case study. The originality of the research findings lies in offering an alternative viewpoint on the problem of punishment, which can serve as a basis for further interdisciplinary discussions, thereby giving the article an international scope.

Keywords: criminal law; economic theory of law; death penalty; moral judgment

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INTRODUCTION

Richard A. Posner, in his economic reflections on law, presents a controversial thesis of "useful punishment". This concept is based on the idea that common law, as a distinct system, has a strong economic dimension. Economic efficiency is posited as an overarching principle guiding both the application and creation of law. The direct implementation of this postulate involves an economic interpretation of existing legal provisions. According to Posner, common law is underpinned by economic principles. Morality, in his view, is an empty concept, absent from the operation and purpose of law.[1] Guided by economics and the philosophy of utilitarianism within the context of liberal economic theory, Posner seeks to establish a universal standard for the economic imposition of punishment.

This article examines Posner's economic analysis of punishment within the framework of American law's anthropocentric orientation. Posner's approach reflects a pragmatic, human-centered legal philosophy that distinguishes legal norms from moral principles while emphasizing the economic efficiency of punitive measures. The article employs a case study methodology, supported by an in-depth literature analysis, which integrates practical examples with the theoretical framework of Posner's economic theory of punishment. According to Posner, the primary objective of punishment is deterrence, most effectively achieved through substantial monetary penalties. While not aiming to resolve the ethical questions surrounding punishment, the article frames it as a complex phenomenon situated at the intersection of law, economics, and human nature. One of the most challenging issues in this area is determining the appropriate penalty for taking a human life.[2] This decision represents one of the most complex and ethically charged judgments a judge must face, inherently involving moral considerations. However, in the legal-naturalist perspective prevalent in American common law, punishment cannot simply result from translating moral judgments into measures such as monetary fines or years of imprisonment. In cases potentially involving the death penalty, this creates a challenge in measuring values and introduces ambiguity regarding the basis on which judges should impose sentences for murder.

According to Posner, an economic analysis of criminal law is feasible, but it should not rely on the moral nature of the offense. Instead, punishment should focus on the economic consequences of the act, which can be evaluated through an economic lens. Posner argues that applying economic reasoning to the substantive aspects of criminal law neither devalues legal norms nor critiques the inefficiency of

[1] R.A. Posner, *The Problematics of Moral and Legal Theory*, "Harvard Law Review" 1998, vol. 111(7), pp. VII–VIII.

[2] See idem, *The Ethics of Wealth Maximization: Reply to Malloy*, "Kansas Law Review" 1988, vol. 36, pp. 261–265.

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punishment. On the contrary, economic analysis reveals deficiencies in legal design that ignore market logic. Posner maintains that neglecting market-based incentives in shaping the principles of criminal law results in inefficiency and ultimately in diminished deterrent effects.[3]

REGINA V DUDLEY AND STEPHENS (1884)

The issue of determining punishment for murder is one of the central problems in legal scholarship. It encompasses reflections on the role of law, punishment, and morality. This issue is typically not associated with the economic analysis of punishment. However, in Posner's framework, there exists a domain of punishment that is so disproportionate to the committed act that no sanction – even one appearing to be the most just – can be deemed adequate. Despite the controversies surrounding his approach, Posner proposes a utilitarian framework for punishment that he believes can be applied in cases of incommensurability between the act and the punishment, particularly in situations where the act transgresses all moral boundaries. To elucidate Posner's intellectual framework, it is pertinent to examine an illustrative case rooted in English common law. This case serves as an academic paradigm for exploring the interplay between law and morality, prompting an inquiry into how it might be adjudicated under Posner's utilitarian paradigm.

In 1884, four men – Captain Tom Dudley, First Mate Edwin Stephens, sailor Edmund Brooks, and 17-year-old cabin boy Richard Parker – found themselves adrift in a lifeboat after the yacht Mignonette sank. They drifted on the open sea for 20 days with insufficient food and water. Facing starvation and dehydration, Dudley and Stephens decided to kill the weakened Parker to ensure their survival, doing so without his consent. They subsequently consumed his body. Brooks, though not involved in the killing, also partook in eating Parker's remains. A few days later, they were rescued. In *Regina v Dudley and Stephens* (1884), the court convicted Dudley and Stephens of murder, ruling that necessity could not justify the murder of an innocent person, even under extreme circumstances of hunger and survival. This case serves as a classic example of the analysis of moral and legal boundaries in extreme situations where human life faces the most difficult and life-threatening choices. Additionally, it explores the possibility of an economic justification for permitting the defense of necessity, particularly in circumstances

[3] Posner refers to the Hand formula of negligence, which states that $B < PL$, where B represents the burden of taking precautions, P is the probability of an accident occurring if precautions are not taken, and L is the magnitude of the potential loss. According to this formula, if B is less than $P \times L$, then taking precautions is cost-justified; failure to do so constitutes negligence. See idem, *An Economic Theory of the Criminal Law*, "Columbia Law Review" 1985, vol. 85(6), p. 1206.

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where a contract would otherwise require fulfilment. Assuming that the crew members, anticipating the vessel's tragic fate, had entered into an agreement stipulating that, in the event of an emergency, one life would be sacrificed to preserve the remainder of the crew, this scenario raises important questions regarding the extent to which economic efficiency might inform the development of criminal law doctrine. There exists some limited jurisprudential support for the notion that the killing and consumption of an individual under conditions of extreme necessity could be legally justified – provided that a fair mechanism, such as drawing lots, was employed to determine the individual to be sacrificed. The question is, what would Richard Posner say about punishment in this case? In Posner's concept of punishment, payment is not a value for the crime committed. A payment is not a value if it results from a so-called coerced transaction. A coerced transaction is aimed at obtaining a consensual substitute. In other words, the value that gives efficiency derives only from consensual transactions. Posner argues that although it may seem morally questionable, the role of punishment can be meaningfully analysed from an economic efficiency perspective. The fundamental function of punishment is, after all, to deter individuals from committing crimes. As mentioned, one such tool could be a high compensatory fine. However, when establishing punishments during the legislative process, their effectiveness should be the primary consideration. After all, the goal of society is to prevent murders from occurring. What may deter a potential murderer is a sufficiently high financial penalty.[4] However, it should be emphasized that the problem with the economic analysis of criminal law is not that it is incomplete or lacks rigorous philosophical foundations, though it is and does, but that the economic analysts have yet to tackle the principal concepts that trouble legal analysts of the field-such concepts as attempt, conspiracy, diminished responsibility, provocation, insanity, strict criminal liability, reck lessness, compulsion or necessity, and premeditation.[5] The punishments provided for under substantive criminal law are often ineffective because they do not conceptualize the relationship between offender and victim in market terms. If we accept that every act committed in violation of criminal law establishes a financial obligation of the offender towards the victim – akin to a market transaction – then the offender, burdened with a financial liability, will be more quickly discouraged from committing the crime. For example, a thief who steals a car does so for gain. If the sanction for car theft included a high financial compensation for the victim, the thief would be more likely to refrain from stealing. In this case, if the thief is caught, the theft would be economically inefficient, whereas the punishment would be efficient. Of course, one must acknowledge that compensatory penalties may

[4] idem, *Judicial Behavior and Performance: An Economic Approach*, "Florida State University Law Review" 2005, vol. 32(4), pp. 1259–1280.

[5] idem, *An Economic Theory…*, p. 1194.

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not always be effective, particularly in cases of crimes of passion. An example – according to Posner – is a hate crime murder. Such an act would not involve the offender calculating any transactional cost before committing the crime. Instead, emotions – specifically hatred – would prevail.[6] However, according to Posner, the law allows for the imposition of fines in any case, including cases involving the deprivation of life of another human being. Punishment, as a coercive payment, balances accountability to society and is the equivalent of justice ("just value"), with sanctions supposed to be the optimal compromise.[7] The question is, how to find this just value? The answer should be sought in the concept of the "Bad Man" which Posner implies in his theory of punishment.

THE BAD MAN

The old educational method called "carrot and stick" is an example of how to stimulate desirable human attitudes. The strategy of the carrot is expressed in the use of the threat of harsh and very severe criminal responsibility, while at the same time the "strategy of the carrot" is noticeably weakened, that is, those solutions that are designed to shape appropriate behavior at a more subtle level than harsh criminal punishment is effective.[8] An analysis of the assumptions underlying Posner's economic theory of punishment also reveals a conceptual connection with Oliver W. Holmes's "bad man".[9] The "bad man" "cares nothing for an ethical rule which is believed and practiced by his neighbors".[10] This individual is concerned only with the material consequences he will suffer by breaking a law he knows. The "bad man" obeys the law due to financial considerations; despite lacking moral motives, he still complies with the law without becoming a criminal.[11] Holmes introduced the concept of the

[6] See G.S. Becker, *A Treatise on the Family*, Cambridge 1981.

[7] R.A. Posner, *An Economic Theory…*, pp. 1193–1231.

[8] See R. Kokot, *Szczególna odpowiedzialność karna za przestępstwo ciągłe w świetle propozycji zmian dotyczących ustawowego i sądowego wymiaru kary w projekcie nowelizacji kodeksu karnego z 25 stycznia 2019 roku*, "Przegląd Prawa i Administracji" 2019, vol. 116, pp. 37–52.

[9] O.W. Holmes, *The Path of the Law*, "Harvard Law Review" 1997, vol. 10, pp. 991–993; G.S. Becker, *Crime and Punishment: An Economic Approach*, [in:] *Essays in the Economics of Crime and Punishment*, ed. G.S. Becker, W.M. Landes, New York 1974, pp. 1–54.

[10] J.I. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, "Fordham Law Review" 2006, vol. 75, p. 1595.

[11] As O.W. Holmes (*op. cit.*, p. 5) famously stated, "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reason for conduct (…) in the vaguer sanctions of inner conscience. (…) The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else".

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"bad man" as a lens through which to understand the law.[12] From this perspective, law does not function primarily as a tool for regulating morality or ethics but rather as a mechanism for imposing financial or punitive consequences on those who violate its rules. From the standpoint of the "bad man", the law is not a system of normative obligations but a predictive framework – essentially, a set of consequences that follow from specific actions. The "bad man" is contrasted with the "good man", who behaves according to his inner conscience, as understood through H.L.A. Hart's concept of duty. In other words, the "good man" obeys the law out of a sense of duty, which functions as his internal moral compass.[13] The "bad man", understood in economic terms, becomes a driving metaphor. His actions, strategically planned for personal benefit, are not morally condemned but rather pragmatically appreciated, despite the fact that such behavior may be considered pathological.[14] However, Holmes's "bad man" knows that what is not forbidden is permitted.[15]

Ronald Dworkin, who criticizes Posner, believes that in the concept of efficient distribution of wealth, which is part of a society striving for prosperity, the value individuals have of the goods that are important to them can be measured by the amount of money. This amount an individual would be willing to spend on these goods. The prosperity of society, on the other hand, can be built by entrusting goods to those who would spend more on them than anyone else. This is what the inference of law is all about, using the utilitarian argument. However, the utilitarian argument does not prevail in case law. According to Dworkin, this is exemplified by cases in which judges have upheld provisions on employer liability for injuries caused by an employee.[16] This provision, had Posner's concept of value prevailed, would have been overturned. The judges did not do so, as they were guided by the principle of justice, not utility. The error of the anthropological thesis dictates to think that the judges rejected universal morality, universal beliefs about the rights of individuals and legal entities to well-being. On the other hand, such an inference may prove that the recognition of justice is due to the adoption of universal positions on the welfare of society, which reflects the idea of individual rights. Such an inference leads to a misunderstanding of the essence of the anthropological thesis, which is supposed to belong to utilitarian arguments that reject the argument from universal justice.[17] Meanwhile, according to Dworkin, Posner's thesis does not exclude the anthropological thesis properly understood; it only complements it. Indeed, if one

[12] See W. Twining, *Other People's Power: The Bad Man and English Positivism 1897–1997*, "Brooklyn Law Review" 1997, vol. 63(1), pp. 189–223.

[13] See M. Beermann, *Holmes's Good Man: A Comment on Levinson and Balkin*, "Boston University Law Review" 1988, vol. 78(3), pp. 937–957.

[14] J. Bakan, *The Corporation: The Pathological Pursuit of Profit and Power*, Toronto 2004.

[15] J.I. Fisch, *op. cit.*, pp. 1593–1614.

[16] R. Dworkin, *Taking Rights Seriously*, Cambridge 1977, p. 186.

[17] *Ibidem*, pp. 186–188.

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accepts that Posner is correct that judges use an economic sense, then at the core of this sense are also individual rights. This is the sense of value that judges may be guided by when justifying a decision. However, they make it on the basis of anthropological theory, not on the basis of economic analysis. There is no doubt that the economic test by Learned Hand performed on the theory of negligence, in *United States v Carroll Towing Co*, analyzing whether the defendant could have avoided the accident at a cost less than the foreseeable cost to the plaintiff in the event of an accident, was correct.[18] The jurisprudential thesis forged in that case, constituting the concept of "negligence", states that if the burden of the failure to take precautions (the cost of avoiding the risk) is less than the magnitude of the risk (the probability of a dangerous event occurring) and the severity of the damage,[19] the economic test will focus on policy arguments, determining whether collective welfare would be better served by allowing an event to occur or incurring the costs necessary to avoid it.

Another critical point presents Jill E. Fisch, who focuses on the conception of the "bad man". The concept of the "bad man" is used in corporate law to characterize actions generally viewed as immoral, high-risk, and bordering on illegality or corporate pathology. In this sense, the behavior of the bad man is called "Icarus behavior", referring to the mythological figure Icarus, who became emblematic of reckless ambition after flying too close to the sun in pursuit of his dreams.[20] In the context of corporate regulation, the Icarus metaphor is used to describe the rise and collapse of corporations involved in major scandals.[21] Fisch claims that the "bad man" takes into account the likelihood that he can avoid punishment for violating the law or he consents to it knowingly. The solution to the problem proposed by Fisch is to increase the punishment for noncompliance with the law, to a level high enough to minimize the desire to break it. Society should also introduce alternative, additional, compensatory penalties for willful violations of legal obligations. From the point of view of a bad person, careless driving that can lead to an accident if it is not too costly, is permissible. In the same way, a supplier can break a contract if he can sell his product at a higher price, provided he is willing to pay compensation to the first buyer.[22] Posner said that the problem with the economic analysis of criminal law is not that it is incomplete or lacks rigorous philosophical foundations, though it is and does, but that the economic analysts have yet to tackle the

[18] *Ibidem*.

[19] See K. Greenfield, J.E. Nilsson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, "Brooklyn Law Review" 1997, vol. 63, pp. 799–850.

[20] J. Bakan, *op. cit*.

[21] D.A. Skeel, *Icarus and American Corporate Regulation*, "Business Lawyer" 2005, vol. 61, pp. 155–159.

[22] J.I. Fisch, *op. cit.*, pp. 1593–1614.

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principal concepts that trouble legal analysts of the field-such concepts as attempt, conspiracy, diminished responsibility, provocation, insanity, strict criminal liability, reck lessness, compulsion or necessity, and premeditation.[23]

The above analysis will not allow for a full answer to the question of how Posner would have ruled in the Dudley case, but it demonstrates the essence of the problem of value incommensurability in constructing a penalty for intentional deprivation of human life.

INCOMMENSURABILITY

In the case of economic analysis of punishment, the judge should deal with the concept of incommensurability of values. There are no objective, universal, rational, or moral convictions consistent across all of humanity and judges. Judgment in a case involving the deprivation of another's life will always be subjective. Therefore, Posner's concept partially becomes acceptable. The reason for this acceptance is the desire to regulate difficult cases in which judges reach too diverse moral judgments, the source of which lies in their understanding of human nature. According to Cass R. Sunstein, Daniel Kahneman, David Schkade, and Ilana Ritov, it is possible to use the theory of the "rational agent" in difficult cases. In *Predictably Incoherent Judgments*, they consider institutional reforms that might overcome the problem of predictably incoherent judgments. Connections are also drawn to several issues in legal theory, including valuation of life, incommensurability, and the aspiration to global coherence in adjudication. People lack confident judgments about how to rank cases from different categories, and their judgments on this point are not widely shared. Recall the difficulty of comparing a case of tax fraud with an occupational safety and health violation, or of ranking a case of outrageous commercial fraud with one involving a relatively minor physical injury. For those using ordinary intuitions, there is no readily available metric by which to make the relevant comparisons.[24] "Rational agent" theories in social sciences, and much important theorizing in the domain of law, rest on the assumption that human agents are endowed with coherent systems of beliefs and preferences, and define coherence as the principal criterion of rationality. An influential definition of rationality avoids any normative evaluation of the specific contents of beliefs and choices, and refers neither to the truth of beliefs nor to the consequences of

[23] R.A. Posner, *Comment on "On the Economic Theory of Crime"*, [in:] *Criminal Justice: Nomos XXVII*, eds. J. Pennock, J. Chapman, New York 1984, pp. 310–311.

[24] They claim that economics can overcome the incommensurability problem in the hard cases by using the metric of dollars. See C.R. Sunstein, D. Kahneman, D. Schkade, I. Ritov, *Predictably Incoherent Judgments*, "University of Chicago Law & Economics. Online Working Paper" 2001, no. 131, p. 52.

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choices. Only internal consistency matters. In modern economic thinking, and in the economic analysis of law in particular, coherence is considered a touchstone of rationality. The preferences of the idealized rational agent provide a coherent ordering of possible states of affairs, and the beliefs of that agent permit an ordering of events by their probabilities. Furthermore, the dispositions to form new beliefs in the light of evidence, or to make choices when new options are offered, are also assumed to belong to the same coherent structure.[25]

Another problem is determining what category of damage we are dealing with. Harms from different categories may seem "incommensurable" because they cannot easily be described in terms of the same dimensions: the question of how many animals died, e.g., is relevant in one of these situations but not in the other. As an example, Sunstein, Kahneman, Schkade, and Ritov give the following dependencies: "There is substantial consensus on the ranking of categories, including those created or used by the law. People agree, for example, that murder is worse than rape, that rape is worse than assault, and that assault is worse than libel. We suspect, however, that there is less social agreement on the ranking of categories than on the ranking of cases within categories. In spite of the difficulties of comparing categories of cases and cases across categories, there is in many cases sufficient consensus to permit a test of coherence, which examines whether judgments made in isolation are still retained when explicitly compared".[26]

CONCLUSIONS

Punishment, in theoretical and legal terms, is usually associated with the concepts of guilt, atonement, and, in the moral sphere, with the sense of duty, or sin, in theological sciences. With the development of moral relativism, different concepts of punishment from the traditional ones have emerged in philosophy, and utilitarian currents proposing a vision of the nature of man that is quite different from the Catholic one can be considered as their main source. In a general sense, we can say that they are dominated by views of "useful good". Something is good, and we do good, because it is useful or it is pleasant. The problem of morality is based on the assumption that human beings occupy a central position in legal analysis. The anthropocentric orientation of American law has consequently led to an ongoing study of human nature and its implications for the theory and function of legal systems. Posner argues that although the law overlaps with moral principles, there is a considerable difference between the two. The law does not enforce many moral principles, and, at the same time, the law prohibits or attaches sanctions to

[25] *Ibidem*, p. 10.
[26] *Ibidem*, p. 7.

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a great deal of morally indifferent conduct.[27] Economic analyses do not touch the issue of the meaning of the concept of punishment, dealing with problems, such as the optimal trade-off between certainty and severity of punishment, comparing the economic characteristics of fines and imprisonment, the economics of law enforcement and criminal procedure, or the effects of criminal punishment, as well as the effects of the death penalty.[28] According to Posner, the development of the concept of punishment, in economic terms, will have an overwhelming impact on the understanding of values in society.[29]

Posner adopts Holmes's "bad man" conception of law and also Becker's concept of optimization, rejecting theoretical and normative questions about the nature of law and instead approaching it pragmatically. He argues that the optimization of punishment depends on factors such as the costs associated with apprehending and convicting offenders, the nature of the punishment imposed (whether monetary fines or imprisonment), and the offenders' behavioral responses to changes in law enforcement and sanctioning practices. Becker, who served as an inspiration for Posner, claims that the economic approach to punishment, distancing itself from the shortcomings of psychological theories of punishment, allows for an expansion of the range of possible sanctions. Becker, in an effort to identify the optimal way to combat crime, developed an economic model that incorporates behavioral relationships into the category of criminal behavior. At the same time, he considers as crime any behavior threatened with punishment. He divides criminal behavior into five categories:

- the number of crimes, called "offenses" in this essay, and the cost of offenses;
- the number of offenses and the punishments meted out;
- the number of offenses, arrests, and convictions and the public expenditures on police and courts;
- the number of convictions and the costs of imprisonments or other kinds of punishments; and
- the number of offenses and the private expenditures on protection and apprehension.[30]

Posner believes that by using the stick method in the form of a high financial penalty, a bad person can be deterred from committing a crime. He contends that, notwithstanding potential moral objections, the function of punishment can be legitimately examined through the framework of economic theory, with particular emphasis on its deterrent efficacy. The primary objective of punishment, in this view,

[27] R.A. Posner, *An Economic Theory…*, pp. 1230–1231.

[28] *Ibidem*, pp. 1203–1207.

[29] See L. Balcerowicz, *Wprowadzenie*, [w:] G.S. Becker, R.A. Posner, *Imperializm ekonomiczny. Ekonomiczne podejście do zachowań człowieka*, Warszawa 2013, pp. 11–12.

[30] See G.S. Becker, *Crime and Punishment…*

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is to dissuade individuals from engaging in criminal conduct. Posner asserts that one potentially effective mechanism of deterrence is the imposition of substantial compensatory fines. However, in the legislative design of punitive measures, considerations of deterrent efficacy must remain paramount. Ultimately, the collective aim of society is to prevent the commission of serious crimes, such as homicide, and the threat of a significant financial sanction may serve as an effective means of dissuading potential offenders. Posner emphasizes that his economic analysis of the substantive part of criminal law is not intended to undermine the values of the law nor to criticize the ineffectiveness of punishment. Rather, his goal is to demonstrate that neglecting market values when formulating criminal law rules leads to economic inefficiency. Value, in the sense used by economic analysis, does not constitute payment for a committed crime. Payment does not represent value if it results from what is known as a coerced transaction. An efficient transaction aims to achieve a consensual substitute. In other words, value that generates efficiency arises only from consensual transactions.

Finally, it is worth emphasizing that although Posner's proposal to pay for a crime seems far from moral solutions, the idea of introducing high penalties, as in the case of Hand's rule, may be applicable in jurisprudence. A necessary condition for its development, however, is the admission that there is a category of "bad people" for whom only a high cost can discourage them from committing an act. Let's imagine that on the Mignonette ship mentioned, the crew knows that for killing a crew member, they will pay a financial cost, greater than they will earn in their entire life. With this knowledge, would they kill and eat a crew member or try to survive? This question suggests that the problem of human nature, despite centuries of scientific analysis, is not sufficiently developed. The conception of the "bad man" shows that problem of the nature of man thus becomes multidimensional and concerns the sphere of duty considered both in ethics and philosophy. It seems that from this conceptual contradiction, it is difficult to assess unequivocally whether the "bad man" is opposed to ethics. Posner's research draws attention to the essential fact that the foundation that separates the views of utilitarians from moralists is a view of anthropological optimism and pessimism. As the research conducted so far shows, the above criteria have influenced the development of a new field of legal science, which is the anthropology of law. It is worth adding in conclusion that, according to Wiesław Lang and Jerzy Wróblewski, the objective of Posner and his economic analysis is not to effect profound social changes but to highlight a universal economic value. Posner does not develop a philosophy of law; rather, he aims to formulate specific *de lege ferenda* and *de sententia ferenda* postulates, which stem from an economic analysis of law grounded in the philosophy of utilitarianism.[31]

[31] W. Lang, J. Wróblewski, *Amerykańska teoria i filozofia prawa*, [in:] *Zarys prawa Stanów Zjednoczonych*, ed. J. Głuchowski, vol. 1, Toruń 1988, p. 272.

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In conclusion, trying to answer the question – can Posner's concept be used in practice – it should be noted that if Posner were to construct a punishment in the aforementioned Dudley case, it would be disproportionate to anthropologically understood morality. This punishment would have to be excessively high to deter potential killers. The crew members would have to be so terrified that they would prefer to starve to death rather than kill and eat Parker. I believe that despite successful attempts to apply this theory of punishment in compensation cases involving the deprivation of human life, Posner's punishment would be more cruel than that proposed by Hammurabi, who advocated an eye for an eye, a tooth for a tooth. Therefore, it cannot be applied in difficult cases, even if the rules of disproportionality permit it. However, given the strong theoretical foundations of useful punishment, which are built on Judge Holmes's concept of the "bad man", one must agree with Posner's view that punishment should deter the "bad man" from breaking the law. In other words, a "useful punishment" is one that causes the bad man to obey the law.

In prior studies on the economic and behavioral analysis of law, no works have appeared in which Posner and Sunstein jointly defended a single concept.[32] Rather, they have been mutual critics. Considering the analyses of their views presented in the article – particularly Posner's positions on the foundations of law and the principles of punishment derived therefrom, to which Sunstein raises no objections – one may conclude that what unites the thought of these two pioneers and founders of American jurisprudence is their acceptance of Holmes's thesis concerning the "bad man". Judge Holmes's concept has shaped the direction of both the economic and behavioral analysis of American law. Consequently, Posner and Sunstein do not dispute methods of punishment; instead, they accept that in cases where one person deprives another of life, the only value suitable for calibrating the penalty is incommensurability.[33]

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ABSTRAKT

W artykule analizowany jest problem uzasadnienia kary za zabójstwo. Wprowadzono nową perspektywę, która łączy antropologiczną analizę ekonomiczną z tradycyjnym dyskursem prawnym. Przedmiotem badań była teoria kary Richarda A. Posnera. Według głównej tezy pracy koncepcja Posnera, analizowana z perspektywy antropologii prawa, ujawnia braki w teorii kary z punktu widzenia teoretyczno-prawnego. Przykładem są wcześniejsze badania, które kwestionują ekonomiczne uzasadnienia obrony koniecznej oraz wskazują na niewspółmierność wartości w wyrokach za morderstwo. Normy prawne powinny koncentrować się na konsekwencjach ekonomicznych, a nie mo-

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ralnych. Analiza koncepcji Posnera wskazuje na nowy kierunek badań nad karą, który odsłania istotę pragmatycznego podejścia prawa amerykańskiego. Jak trafnie podkreśla Posner, prawo to powstało po to, by powstrzymać „złego człowieka" przed jego łamaniem. Z analizy sprawy Dudleya wynika, że kara w przypadku zabicia człowieka nigdy nie będzie współmierna z punktu widzenia prawa w sensie moralnym. Jeśli człowiek jest „zły", może powstrzymać się od popełnienia przestępstwa, jeśli go na to nie stać. Metodologia badawcza opiera się na analizie literatury i studium przypadku. Oryginalność wyników badań polega na zaproponowaniu alternatywnego spojrzenia na problem kary, które może posłużyć jako podstawa do dalszych dyskusji interdyscyplinarnych, nadając tym samym artykułowi zasięg międzynarodowy.

Słowa kluczowe: prawo karne; ekonomiczna teoria prawa; kara śmierci; ocena moralna

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