# WHAT WOULD BURKE THINK OF LAW AND ECONOMICS?

STEPHEN B. PRESSER*

Our ostensible topic is how judges should go about using economics. Frankly, I haven't a clue, and I would not presume to advise judges of the caliber of David Sentelle, Stephen Williams, or Frank Easterbrook even if I did. So I will follow the advice of my great corporations teacher, Louis Loss. He said if you cannot win your case, argue someone else's. So I will argue something else. I will argue that the whole notion that judges should use economics is misconceived. Gary Lawson told me that I was invited because I was the last person left in the academy who was a traditional legal conservative, so I will give you that view. Traditional conservatives follow Edmund Burke, and I have entitled these comments "What Would Burke Think of Law and Economics?"

The answer, I think, is "not much." Not only did Burke expressly rail against "sophisters, oeconomists, and calculators" in his *Reflections*,[1] but the basic premises of the law-and-economics approach are antithetical to his own. Posnerian microeconomics, at least, posits human beings as rational wealth-maximizers, whose purpose in life is to exercise freedom of choice in furthering their idiosyncratic desires.[2] This does not seem too horrible to libertarians, I suspect, but not too much reflection is necessary to see that this is the same worldview that currently passes for "liberalism." Indeed, it is identical to the notorious "mystery passage" in *Planned Parenthood v. Casey*,[3] a decision that makes *Dred Scott*[4] look like *Marbury v. Madison*.[5]

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* Raoul Berger Professor of Legal History, Northwestern University School of Law.

1. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 170 (Conor Cruise O'Brien ed., Penguin Books 1982) (1790).

2. *See, e.g.*, Arthur Allen Leff, *Commentary: Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

3. 505 U.S. 833 (1992) (striking down part of Pennsylvania law restricting abortion).

4. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (striking down Missouri Compromise on substantive due process grounds).

That passage reads as follows: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[6]

So what is wrong with this? What is wrong with individuals working out the mystery of life for themselves? From at least the time of Greeks and Romans until about 1937, the dominant view was that the law was about rather more than that. The law, as I will elaborate in a moment, was supposed to be about what binds us together—about what is shared in the human condition, and even about our shared participation in the divine. This was not the view, however, of legal realism, which in the late 1930s captured many of the most promising legal academics and judges. While for our present purposes it is important to understand that legal realism is responsible for law and economics, its more immediate result was the New Deal and the great judicial "revolution" of 1937 in *Jones & Laughlin*[7] and *West Coast Hotel*.[8]

These were made possible because the New Deal lawyers had imbibed the view of legal realism, expressed most cogently in Jerome Frank's *Law and the Modern Mind*[9] and attributed by Frank to Oliver Wendell Holmes, Jr., that there are no hard and fast legal principles, that no one knows what the law is until the judge pronounces it, and that the clever judge will realize the incredible discretion he has and use it wisely and technocratically to create pragmatic solutions for the social problems with which he is confronted. Judges must inevitably

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5. 5 U.S. (1 Cranch) 137 (1803) (invalidating Section 13 of the Judiciary Act of 1789, which purported to expand the original jurisdiction of the Supreme Court).

6. *Casey*, 505 U.S. at 851. Another commentator has argued recently that the thesis of this "mystery passage" is false, because

> [p]eople simply are not existentially capable of setting up their own worlds. Besides, if there is any validity to the new classical theory of practical reason then there is no escaping from a structure of principles governing all deliberation about what to do. The *Casey* mystery passage . . . stays aloft only by obscuring inescapable truths about practical reason from the practical reasoner. Persons simply would not know what they are doing.

Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of Making Men Moral*, 71 NOTRE DAME L. REV. 671, 686-87 (1996).

7. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act against Commerce Clause challenge).

8. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (rejecting substantive due process challenge to state law fixing minimum wages for women and children).

9. JEROME FRANK, LAW AND THE MODERN MIND (1930).

legislate, Frank (and perhaps Holmes) believed, and ought to embrace the prospect with relish.[10] It is easy to see that this gives license to judges to adopt the view that the Constitution is a malleable document, and thus permits justices to change course in the way the Court did in 1937. Not much harder to see is that Frank's articulation of Holmes's idea of great judicial discretion also encourages judges to indulge in their own weighing and balancing of economic factors in particular cases, in order to reach results the judges regard as efficient. If this isn't the kind of cost-benefit analysis favored by Posnerians, then Richard Posner didn't edit the best recent one-volume collection of the thought of Holmes.[11]

The younger people among you cannot possibly imagine the harm and destruction wrought by Jerome Frank and legal realism with the help of the Harvard Law School. For example, when those of us in the class of 1971 were given a reading list of about twenty books about the law in the summer before law school, Jerome Frank's *Law and the Modern Mind* led the list. Because we all ran out of energy and interest early, it was the only book many of us read. Thinking that Harvard would not send us any books to read that were not true, a whole generation probably went through law school believing that Jerome Frank got it right, and that Harvard endorsed that view. It has taken me twenty-five years or so to realize that that is not the only possible view of law, and that maybe Frank got it all wrong and Harvard was just teasing us. But if legal realism is not the answer, what is?

For Burke, and even for Holmes in his more balanced moments, the law was not just about expediency or pragmatism or convenience or efficiency or wealth maximization. It was about the music of the spheres, or at least an "echo of the infinite."[12] In James Wilson's description of the law of nations, it was "of aspect eternal and of origin divine."[13] When one was doing law, one was quite literally doing the Lord's work.

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10. *See id.* at 3-11, 14-19, 253-60.

11. *See* OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES (Richard A. Posner ed., 1992).

12. Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* HOLMES, *supra* note 11, at 160, 177.

13. For Wilson's words, see, e.g., STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 180-81 (2d ed. 1989) (quoting from Wilson's charge to the Grand Jury for the Middle Circuit in Philadelphia, July 1793).

Furthermore, my friends, legal work was not to be that of the money-changers in the temple. Rather, law aspired to the moral heights of the Sermon on the Mount.

What can this possibly mean, you must now be asking, and what does it have to do with our topic? Let's go back to Burke. According to Burke's most thorough, inspired and exciting latter-day expounder, the late, great Russell Kirk, Burke believed that any serious government worth the name ought to embrace a very few key principles.[14] My version of them includes the following:

1. This temporal sphere is not (*Casey* notwithstanding) an end in itself. There is a power greater than us that has a purpose for us, and that power—call it divinity, call it "Providence" like the Framers,[15] or call it God if you like—ought to be recognized and, to a certain extent, consciously incorporated into the workings of the polity.

2. We are not all created equal. There is on earth an incredible variety of people and things, nations, races and cultures, each with different attributes, different qualities, different needs, and perhaps even different rights, privileges, and responsibilities.

3. This difference in human beings leads to several other interesting postulates. First, one ought to recognize that hierarchies are inevitable, that in any society some must exercise more authority than others. Some sort of aristocracy is inevitable as well, whether it is Britain's hereditary aristocracy or Jefferson's natural aristocracy, and while aristocrats might be able to claim particular privileges in order effectively to rule, they must never act in an arbitrary manner nor advance their purely personal ambitions over those of their people. As Jefferson suggested in his *Notes*, true happiness does not lie in social climbing or ambition, but in making the most out of the condition in which you find yourself in society.[16]

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14. *See* RUSSELL KIRK, THE CONSERVATIVE MIND FROM BURKE TO ELIOT 8-9 (7th rev. ed. 1986) (setting forth "six canons of conservative thought").

15. *See, e.g.*, THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961) (stating that "Providence has been pleased to give this one connected country to one united people").

16. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 147 (William Peden ed., Univ. of N. Carolina Press 1955) (1787).

4. Related to the previous point, while all men and women are equal in the sight of God, and ought to be equal before the law, that is the only equality that ought to be forced on them. Attempts to bring us all to the same social and economic level are dangerous dystopian fantasies, and ought to be resisted by right-thinking persons.

5. All change is not progress, and we are not trapped in some diale.ctical historical process that will inevitably lead us to the unfolding of truth, justice, and true democracy. Here I pick up where John McGinnis left off at the Fourteenth Annual National Student Federalist Society Symposium on Law and Public Policy in 1995. Professor McGinnis remarked that none of us had adequately come to grips with the events of 1989, which powerfully and unexpectedly demonstrated that the world is not moving inexorably to the left, and that we can, in fact, turn back the clock.[17]

At this point I should say one of the lessons that I draw from the collapse of the Soviet empire and the withering away of European communism, besides the fact that you *can* turn back the clock, is a bit different from that most commentators in America seem to have stressed. The conventional wisdom among those who look back to these events (and few do, by the way) is that the combined force of democratic idealism and free market ideology defeated Marxism and won the Cold War. This is true up to a point, but ignores a third, spiritual element in the process that destroyed what Ronald Reagan called "the Evil Empire." Were it not for the role of the Catholic Church in alliance with Solidarity, for example, the Polish people would not have had the courage or the faith to perform in the way they did.

And that brings me back to my starting point, to my first Burkean principle, and to what I think is desperately missing from law, jurisprudence, and judging as we now know it. I refer to the odious attempt to sever spirituality, religion, Christianity, even mysticism from the law and the Constitution. Human beings, as it turns out, are not rational wealthmaximizers, and are not even particularly rational. They are persons of faith, and

17. *See* John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251, 255-56 (1996) (arguing that the victory of "New Deal consitutionalism" was caused by a perverted view of human nature, but that recent developments indicate a return to the Framers' view of human nature and constitutional originalism).

they need spiritual nourishment to realize that we are all linked in the kind of partnership among the living, the dead, and those yet to be born that Burke celebrated.[18]

We should be honest, even if honesty exposes us to the ridicule of the cynical realist. To the extent that we really do believe in the rule of law, in the notion of a government of laws and not of men, we have made what Dean Carrington and others have referred to as a leap of faith, a Romantic move, and we have embraced a sort of mysticism.[19] After all, if ours is a government of laws and not of men, it cannot be men who made the laws. It must be either disembodied reason, or more likely, to borrow from the Declaration—Nature or Nature's God.[20]

Not for nothing did Dwight Eisenhower, a good Federalist President, add the words "under God" to our pledge of allegiance. I argued in my recent polemical book[21] that we ought to return to the view that we cannot have a system of laws without officially acknowledging our debt to our Creator. I maintained, for example, that the decisions outlawing school prayer not only flew in the face of this basic truth, but failed to understand that given the inevitable class divisions in society, it might be the lower classes that were most damaged by this misguided attempt to remove spirituality from public education.[22]

I wonder sometimes whether those who try to impose secular humanism as the only acceptable public creed—usually so they can tutor their children in their own particular sectarian beliefs or the ostensible lack thereof—demonstrate at some level a real fear that their own beliefs are not strong enough to withstand their children's exposure to an orthodox, maybe even a

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18. *See* BURKE, *supra* note 1, at 194-95.

19. For Dean Carrington's suggestion that we lawyers must make a "romantic" leap of "faith," see Paul Carrington, *Of Law and the River*, quoted in PRESSER & ZAINALDIN, *supra* note 12, at 992, 998 ("For those university law teachers able to keep the faith of the secular religion [that law restrains the lash of power in society], let there be no shame in the romantic innocence with which they approach the ultimate issue of their profession." Making the "mysticism" point, Carrington continues, "We love law not because reason requires it, but because our commitment to our discipline serves the needs of the public to whom, and for whom we are responsible.").

20. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (referring to "the separate and equal station to which the Laws of Nature and of Nature's God" entitle the American people).

21. *See* STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED (1994).

22. *See id.* at xii, 168-69.

Christian creed. I have always been impressed by Felix Frankfurter's bold and self-consciously Jewish expression in *Barnette*[23] of the argument that the state ought to be free to impose religious values through its schools. I have been impressed by the power of his faith that he thereby demonstrated, and by the correct interpretation of the First Amendment (the view beginning to be known as the "Federalism" interpretation of the First Amendment[24]) that Frankfurter embraced.[25] So I end at the point at which I began. Another occasion will be the time to elaborate, but for now I will merely assert: judges should not do economics; they should do *religion.*

23. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting).

24. On the emerging appreciation of the Bill of Rights as designed to preserve "Federalism," see, e.g., STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995) (indicating that any theory of the First Amendment that does not take into account its roots in "Federalism," that is, the notion of dual sovereignty, is misguided).

25. *See Barnette,* 319 U.S. at 646-71 (arguing that state law requiring flag salute in public schools is constitutional).