

THE HIDDEN HARM OF LAW & ECONOMICS¹

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¹ Or Antidiseestablishmentculpability

² Prepared in part while the author was a Visiting Scholar at Yale Law School.

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INTRODUCTION

Law & Economics is a jurisprudential subdiscipline that holds social economic pragmatism to be the prime virtue of law exceeding even the search for justice in its capacity to label and sanction wrongdoing. This philosophy would wield law as a tool for social engineering predicated on a view of utopia as economic efficiency, stability, and harmony, not efficiency as the quickest path to some higher goal but as the very goal itself. It vacates the hope that law moves towards the perfectibility of man, and, replaces it with the conscious well-greasing of the flow of resources. Indeed, this orientation interferes with the on-going evolution of enlightened personal behavior known as civilization. As such it is misguided if not downright iniquitous.

The main danger presented by this philosophy is that by concentrating on the measurable it, of necessity, rejects the intangible and the incalculable even when these latter concerns are traditionally considered vastly more important than the former. We shall examine the inherent deficiencies of Law & Economics by revisiting the psychological roots of human behavior to which mechanism mere economic pressure is inconsequential.

The economically optimal resolution of disputes necessarily omits considerations of guilt. It is literally and unabashedly amoral and scruple-free. We shall reestablish the necessity for preserving guilt and shame (which we shall distinguish) as the cornerstones for the development of superior human behavior. We shall examine whether the guiltlessness inherent in this applied mathematical model of dispute settlement may actually lead to severely dysfunctional changes in society.

To achieve this analysis we build a basis of understanding of what it is that motivates human behavior. The attempt to govern behavior through inducements, absent a theory of the motivation of behavior, is manifestly deficient. Economic efficiency may provide a model for the motivation of corporate behavior, but despite the legal fiction that corporations and people

are often interchangeable, this orientation does not reach the theater of human motivation. To have recourse to this we must enter the realm of the mind.³

Proponents of Law and Economics believe that the economic approach to tort law can dispense with the language and notion of causation and replace it with economic compulsions and disincentives.⁴ Even if this system does work to avoid a repetition of one specialized harm it teaches no generalizable lesson and can be accompanied by unsuspected injury it itself induces.

The law, among other functions, serves to codify the principles to which man must adapt if he is to be a fit member of society. This adaptation is above all a psychic process, and when law becomes abstracted to principles of jurisprudence such as those of Law & Economics the correct setting for the analysis of those principles is psychology.⁵ Here we present a psychoanalytic explanation of the dangers and harms that are invisible to the ideology of Law & Economics and are therefore never balanced against the advantages of its application.

We shall begin by identifying the subject matter of our discourse by offering a paradigm that summarizes this philosophy and the advantage it bestows. We then construct an analytic platform which will serve as our basis of concern. We revisit the paradigm under the light of our analysis and uncover problems. Lastly we consider whether these problems can be cured by minor modifications – they cannot. Hence we advocate keeping the fault-based assessment for loss for the sake of intrapersonal perfectibility and the continued progress of civilization.

³ Since a corporation is but a collection of people and since humans in the aggregate often act somewhat as if they are governed by the psychology of one individual, the concepts of shame and guilt which we discuss herein may even apply to them, albeit in a diluted fashion worthy of further investigation.

⁴ See, e.g., William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J.LEGAL STUD. 109 (1983) Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U.CHILL.REV. 69, 105 (1975).

⁵ Ferenczi, Sandor Medical Jurisprudence and Religion in Further Contributions to the Theory and Technique of Psycho-Analysis at 424, Brunner/Mazel Classics in Psychoanalysis No. 6 (1926, reprinted 1980, J. I. Suttie trans.)

THE PARADIGMATIC CASE

Law and Economics, hereinafter referred to as L&E, describes a panoply of jurisprudential philosophies guided by the general principle of assessing the loss due to various harms on the head of the cheapest future cost-avoider without regard to traditional principles of tortfeasance, fault, wrongdoing, or justice⁶. In so doing the law may prevent a repetition of the particular harm not by making the relevant actors “better” but by inducing a private actor to police the situation through law-induced ad hoc self-interest. This is a form of social engineering through pragmatism.

We illustrate this philosophy with the following paradigmatic exemplar from tort law called the “Toaster and the Bad Mother.”

It is a well-known danger inherent in inexpensive simple toasters that slices of bread sometimes stick inside when done toasting instead of popping out. A child may then become tempted to extract such a slice with a metal fork exposing herself to possible electrocution.

We posit that manufacturer, Maker, builds a toaster with interior electrical wires concealed as much as possible consistent with the going range of the cost of such an appliance. On the box, in large letters, in many languages, is the warning: “Beware; inserting a fork into this mechanism while in operation may cause electrocution. Keep out of reach of children. Unplug when not in use.” The same warning is affixed to both sides of the toaster itself in large letters accompanied by a harrowing skull and crossbones.

A bad Mother sticks two slices of bread into the toaster, starts the operation, and irresponsibly departs her house leaving her nine-year-old Child alone. Child inserts a fork into toaster, gets electrocuted, and sues Maker for some form of wrongful death.

⁶ See, Calabresi, Guido, The Costs of Accidents, (New Haven, 1970)

By the principle we call L&E, in the case of Child v. Maker, Child must prevail on the general understanding that mothers cannot reliably be made to become competent at any imaginable cost while Maker, if sufficiently motivated by many harsh pay-outs, can be induced to invent, produce, and distribute the electrocution-proof toaster. The cost to Maker of such current settlement and future production presumably will be distributed among all future product purchasers as well as its current share holders. Thereby a repetition of the harm of child toaster-electrocution is avoided at the most efficient cost to society.

It is never implied that Maker was in any way guilty of any wrongdoing in the marketing the former toaster, nor that Mother's behavior is socially acceptable. It need only be observed that by exerting sufficient economic pressure on Maker, society will eventually be spared a repetition of this particular disaster. Theoretically, if it were ever the case that assessing a great sum against the Bronx Zoo would provoke them to develop the electrocution-proof toaster at a cheaper total cost then L&E would advise rearranging the legal system to do just that.

THE ORIGINS OF GUILT

There are two origins of the sense of guilt; one arising from the fear of external authority and the other from the fear of the disapproval of one's own superego. External authorities are satisfied by our forbearance of evil deeds such as incest and murder. The superego is harder to placate since it knows whether these forbidden desires even lurk in our minds. It may then punish us for yet unperformed sins.

Freud defines conscience as the judgment and censorship of the ego by the superego.⁷ The pleasure principle makes each individual understand the need to integrate into and adapt to a

7. This whole paragraph is a paraphrase of Civilization and Its Discontents (1930), in particular Parts VII and VII Std. Ed. Vol. XXI p. 123ff. (James Strachey trans.)

human community. The urge towards inner happiness is egoistic, while the urge toward union with others in the community is often labeled altruistic.

It is common in psychoanalytic practice to use the term "guilt" for the phrases "sense of guilt" or "feelings of guilt." Guilt itself is a phenomenon occurring in the unconscious (in the superego) while what is experienced consciously is the concomitant anxiety. Guilt must not be confused with apprehension that is the fear of being caught, or with the realistic fear of impending punishment. There is, though, an inter-connection. "It may be stated here in an oversimplified fashion that no one develops a sense of guilt without a punitive parent image, the latter being based either on historical reality or projective imagination."⁸

The creation of the superego and the creation of conscience and guilt stem from an "internalizing" of the commands of parental authorities. This process works as follows. The child exhibits many behaviors that must be changed: breast biting, bed-wetting, cruelty towards siblings, etc. Because of fear of loss of love and/or fear of punishment the child must modify her actions, but if she concedes this regulation she must abandon her (natural and healthy) megalomaniacal belief in omnipotence. One compromise is to internalize the educator and pretend that these instructions are in fact her own wishes. She denounces naughtiness both to retain the delusion of free will and to identify with the powerful educator. The aspect of conscience that emerges from fear of loss of love and/or fear of punishment comes from the superego while the aspect that emerges from the internalization of the educator comes from the development of a construct called the ego ideal (cf *infra*). We shall see that ego divergence from these two aspects of conscience create guilt and shame respectively.

SUPEREGO CONSTRUCTS

⁸. Piers, G. M. B. Singer Shame and Guilt Norton 1971 at 17.

The superego employs two mechanisms to keep our antisocial tendencies from manifesting themselves in our thoughts, behavior and conscious desires: repression and sublimation.

Repression forces these drives, unwanted ideas or affects into our unconscious and makes us unaware of their very existence. This method is faulty since it loses the psychic energy these drives engender and consumes additional energy to maintain the repression. This causes neurotic symptoms. Repression is also slipshod in that when a drive is repressed a considerable amount of useful material is submerged with it. Typically any memory that may recall the unwanted material must also be made inaccessible to the conscious mind. One example of this is amnesia for a performed or witnessed sinful act.⁹

Sublimation acts by rechanneling the energy of the antisocial (or inopportune) instincts into socially useful ends. Childhood curiosity about bodies can be converted into adult scientific investigation. The purely instinctual gratification is thus replaced by a non-instinctual but societally approved one. Some examples of this are when an aggressive or cruel child becomes a football player or a surgeon.

One defense mechanism similar to sublimation is the "reaction formation" which transforms instinctive impulses into their exact opposites, such as the inversion of sexual drives into disgust and shame. This opposite is firmly held in the ego and carries exaggerated affect. One example of this is the mother of an unwanted child who becomes overprotective to "prove" that she is a good mother. This can be confused with superego generated protective neuroses. For another example, a case of agoraphobia (fear of the outdoors) may be rationalized¹⁰ by the ego as a fear of muggers, a fear of traffic, a fear of the sun etc., but it may have actually derived from the id-wish for exhibitionism through the conversion process of reaction formation. The superego

⁹. Cf. Freud Papers on Metapsychology. Repression (1915, Std. Ed. Vol. XIV at 141ff) and Inhibitions, Symptoms and Anxiety (1926, Std. Ed. Vol XX at 77ff).

¹⁰ When the ego realizes a feeling it has no explanation for it constructs a reasonable artificial one called a rationalization.

thus prevents the manifestation of the unacceptable drive by a restriction of normal life. Consequently, unconscious guilt is paid for in unhappiness.

In general, sublimation is the most satisfactory resolution of the problem of improper desires in that it is more economical of psychic energy and less self-destructive of memory.¹¹ It is also profitable for society.

In “obsessional neurosis” hatred and feelings of cruelty toward another individual (often a parent) are metamorphosed into a system of superstitious self-restrictions concerning the hated person and objects associated with him. Violation of one of these self-restrictions must be atoned for by sacrifices such as loss of money, self-inflicted pain, or bizarre behaviors such as the metaphoric Pilate/Macbeth obsessive hand washing.

The punishment of a criminal is often explained as a matter of correction or deterrence but it is primarily based (as can be seen from an analysis of the roots of penal systems, especially in primitive societies) on a desire for vengeance against the one who dared to do that which we may have desired but have had to eschew ourselves. In some part, criminals are isolated because of the fear that their bad example is infectious.¹²

PSYCHOPATHOLOGY

¹¹. Sublimation is term whose psychological use was invented by Freud from an older word meaning to make sublime. In Freud it originally denoted the transformation and desexualization of repressed phallic and pregenital libidinous wishes into approved actions. In Future of an Illusion (1927, Std. Ed. Vol XXI at 40) Freud shows how religion is a substitute for rationality and in Civilization and its Discontents (1930, Std. Ed. Vol. XXI at 74) he shows how man copes with unhappiness through diversion, substitution and intoxication. "Sublimization of instinct is an especially conspicuous feature of cultural evolution; that it is that makes it possible for the higher mental operations, scientific, artistic, ideological activities to play such an important part in civilized lives."

¹². The logical extension of this idea is that prisons should be replaced by mandatory therapy. This idea is so clear that its resistance demonstrated the essential primitiveness of our society. This topic is not completely divorced from the one at hand but it is so important that it requires a separate investigation.

In some individuals the superego never internalizes the controls of society (commands and rewards of discipline) and so these people feel no pangs of conscience. They experience no sense of guilt only fear of external punishment. Such individuals with diminished self-critical faculties are called psychopaths. Their behavior is characterized by impulsiveness, irresponsibility, intense but labile emotional states, and superficial love relationships. They live for the moment, are intensely self-destructive, have poor tolerance for pain, typically abuse alcohol and drugs, and often exhibit polymorphous sexual perversions. They were originally described as "moral imbeciles."¹³

Phyllis Greenacre characterizes psychopaths as having a negative narcissistic relation to their parents. She explains that this can arise when a child is overly attached to its parents, particularly the mother, but the parents regard the child with shame and as evidence of some experienced guilt. The child then rebels against this guilt and against the mechanism of guilt in general. Often this appears when the father harbors doubts as to whether the child is actually his. In such cases we may find an exaggerated paternal authoritative figure which is "inconsistent in its rightness, and feared rather than respected."¹⁴

Helen Deutsch finds that in such patients the "emptiness and ... lack of individuality so evident in the emotional life appear also in the moral structure."¹⁵ She found that the ideals and convictions of such patients were only the reflections of another person and were thus remote and unusable.

¹³. This description is adapted from Greenacre, P. "Conscience in the Psychopath" 15 Am. J. of Orthopsych. (No. 3, 1945) reprinted in Trauma, Growth, and Personality Norton (1952).

¹⁴. Id. at 184.

¹⁵. Deutsch, H. "Some forms of emotional disturbance and their relationship to schizophrenia" 2 Psych. Quart. (1942) quoted in Greenacre *supra* at 184.

The inability to feel guilt is therefore a debilitating mental disease causing self-destructive practices¹⁶. A society that undervalues and/or undermines the importance of guilt destabilizes the healthy mind's response to the guilt that would independently occur at certain situations. The results can be pathology, neuroses, or, at best, simple unhappiness.

SHAME VS. GUILT

The word “shame” is often taken as a synonym for “guilt” although it has two distinct uses. Shame can be an emotion, like fear, or a character trait, like modesty. Freud uses the term as meaning specifically disgust at sexual exhibitionism, “the force which opposes the voyeuristic drive.”¹⁷ This usage of shame as a reaction formation against exhibitionism is not universal.

Piers and Singer employ shame in a different way. They differentiate between shame and guilt on the basis of the disappointed mechanism. Guilt is generated whenever a boundary set up by the superego is transgressed, while shame occurs when a goal generated by the ego is not reached. Goals established by the ego are called “ego ideals” in contradistinction to the prohibitions of the superego¹⁸. The ego ideal develops later, is aware of the ego's potentials, represents positive identifications with parental images and is attuned to and changes with society.

We shall follow this usage as the distinction will be helpful in our evaluation of the mathematicalization of law. Guilt comes from transgression whereas shame comes from failure. Guilt is the fear of the wrath of parental images, the fear of annihilation or bodily harm (called

¹⁶ “Or extraordinary success.” Comment added by Prof. Bruce Ackerman, Yale Law School.

¹⁷ Three Contributions to the Theory of Sex a.k.a. Three Essays on the Theory of Sexuality (1905, Std. Ed. Vol VII p. 136).

¹⁸ Despite the fact that this very phrase was used by Freud to denote one aspect of the superego, this concept of ego ideal is a later historical development..

castration anxiety in either sex); shame is the fear of contempt and abandonment (emotional starvation).

"Both shame and guilt are highly important mechanisms to insure socialization of the individual. Guilt transfers the demands of society through the early primitive parental images. Social conformity achieved through guilt will be essentially one of submission. Shame can be brought to the individual more readily in the process of comparing and competing with peers (siblings, schoolmates, gang, professional group, social class, etc.). Social conformity achieved through shame will be essentially one of identification."¹⁹

How is one then to become socialized absent guilt and shame? Luckily L&E covers only the domain of law and does not attempt to govern the raising of children. Still, not all socialization is achieved before an age at which the undermining of guilt and shame by amoral pragmatism might derail the process. Also, adult behavior is ever in flux and socialization may be unlearned through example and pressure.

In Western culture before the Reformation the main emphasis on moral behavior was on guilt. After the Reformation the emphasis shifted towards shame. Before the beggar was still an equal soul in the eyes of God; after, he is an object of shame, an unelected. L&E seeks to establish a utopia in which "goodness" is established without recourse to either the guilt/punishment or the shame/competition archetypes. However, the psychological consequences of achieving this misguided effort are dire and totally unknown to those advocates who so blindly push us toward the brink of moral distortion.

Margaret Mead divided societies into two categories based on the types of sanctions they employed to maintain desired behavior and prevent undesired behavior.²⁰ Cultures depending primarily on external sanctions she called shame cultures while those depending on internal

¹⁹. Piers supra at 53.

²⁰. Mead, M. Cooperation and Competition among Primitive Peoples (19xx at 493).

sanctions she called guilt cultures. Mead draws the distinction that shame requires an audience whereas to her guilt, which can include fear of shame, remains entirely within the mind. To be consistent we must therefore insist that guilt and shame are both internal sanctions and that her “shame”-based societies be called something else (“external-sanction societies” is a fine term for this purpose).

Her conclusion that guilt-based societies are more advanced is then not in conflict with our prior analysis of shame vs. guilt since it allows that in our meaning guilt-based is more primitive than shame-based and both are more advanced than external-punishment-based.

NEUROTIC ANTIDOTES AGAINST GUILT²¹

The two mechanisms described below, cynicism and hypocrisy, are representative of the numerous futile attempts to assuage guilt.

When authority assails the individual the best defense is often seen to be a good counter-attacking offense. This produces the cynic. As Wilde said, "Who is a cynic? A man who knows the price of everything, and the value of nothing."²² The cynic turns the tables on the superego. Instead of the superego being an internal representation of external authority he makes the external world the representative for his own superego. His assault on the world is an assault on the severity of his own superego which his conscious mind cannot fathom (save in superego-generated guilt). As Bergler puts it, “The cynic always attacks authority or opinions accepted by the majority. Intra-psychically he still fights his neurotic battle with authorities in childhood: his parents.”²³

²¹. The title of this section, and most of its contents are taken from Chapter IX of Bergler, E. The Battle of the Conscience (1948 at 150).

²². Lady Windermere's Fan Act III (1892).

²³. Id. at 151.

The cynic derives gratification in several ways. By uttering blasphemies publicly he satisfies voyeuristic and exhibitionistic tendencies. If he is successful at surviving the image of *enfant terrible*, he derives pleasure from infantile megalomania. He releases the energy of compensatory aggression though he himself is usually passive.

The hypocrite presents a different mechanism. His ego is narcissistic and weak yet cunning. The authority figures on which he bases his superego are interested only in the results of behavior, in compliance rather than acceptance. The ego can then fool the superego by a pseudo-submission -- formal compliance without conviction. This mockery of the superego gives the ego narcissistic pleasure. This system originates with the fooling of the parents. When the outer authority figures are internalized the superego is fooled correspondingly.

This duping of the superego carries over to a behavior pattern toward the outer world. The fight against the superego is projected on others who are therefore also duped.

Neither of these strategies leads to the desired resolution, i.e. the relief of the guilt anxiety engendered by the superego. Below we shall analyze a method similar to these two -- similar in that it tries to alleviate guilt through war with the superego as represented in society and also similar in that it fails. The new deficient mechanism will be Law & Economics.

VIRTUE AND HOW TO GET IT

Under the influence of Piaget's theories of cognitive development in children, Lawrence Kohlberg²⁴ described a model for the development of morality in individuals. The steps progress from self-interest, to desire for social approval, and then to abstract ideals. We paraphrase this sequence of reasons for "being good" in order of increasing sophistication as:

²⁴ KOHLBERG, L. THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE, HARPER COLLINS, JAN1984.

to avoid physical/economic punishment,
to gain physical/economic rewards,
to avert the withdrawal of love,
to gain the love of others,
to avoid shame (i.e. to maintain the respect of society)
to avoid guilt (i.e. to avoid self-disapproval).

The fact that we have discussed this as if it were all a matter for psychology does not mean that the legal structure of society is irrelevant. We have seen that shame is a changing sense based on the ego ideal that is sensitive to the legal structure and norms of the surrounding society. Even the generation of guilt is influenced by the legal mores through their influence on the educational figures that are internalized in to the superego. The fact that virtue is psychological does not mean that the legal system of the surrounding society is irrelevant; quite the contrary.

This is not to say that we have agreed with the culturally relative definition of virtue. We have emphasized that virtue is an evaluation of the process by which an individual judges his own acts, not the evaluation of the acts themselves. If this process is punishment-based, the virtue is minimal. If this process is shame-based, the virtue is more. If this process is guilt-based and if the individual can satisfy the demands of his own superego to the extent that he can love and work, then we have the highest form of virtue, the healthy man. The presumption is that he will act justly and kindly and meet all rational moral demands of society because his pleasure principle has been replaced by the reality principle.

Plato in Protagoras and Meno has Socrates debate whether virtue can be taught. It cannot be taught because the application of any particular isolated taught-principle may be unjust in some situations. If virtue cannot be taught then it is not simply knowledge. In the Republic it seems that virtue is justice and that justice is “the performance of one's proper function.” Our view that virtue is a method instead of a list of golden rules is consistent with Plato, even to the point

of identifying the goal of life as proper functioning. We leave proper functioning to the conscience of the individual without endorsing the orientation of super-achievement or of total conformity, or of any other conviction.

Psychoanalysis is the study of the human mental processes in conflict. Law is the resolution of conflict among people. What is a more natural tool for law than psychoanalysis?

We do not have to be cultural relativists, or absolutists, or liberal progressives (of either Mill or Rawls variety) to conclude that whatever else laws do they should not cause man's superego to be more severe than his ego can accommodate nor less demanding than necessary for proper functioning (whatever that may entail in the relevant society).

As opposed to sidestepping the issue of what is virtue we have confronted it directly but only partially. Let us give one concrete example of the meaning and significance of our position:

Perhaps it is true that morality includes the precept that all should be treated equally, but this is not our business here. We are happy enough to assert that if "all should be treated equally" is a precept the law wishes to teach, then the law should endeavor to inculcate it through the mechanisms of shame and guilt and not through the mechanism of fear of punishment and not through the mechanism of seeking rewards such as economic advantage.

It shall be our claim below that the classical structure of tort law had its weaknesses and inaccuracies but it bore along with them a natural law sense of shame and guilt for wrongful acts that is being abandoned by the advocates of L&E. We shall further maintain that whatever economic advantages this "scientific policy making" approach may have, the destruction that it wreaks on the senses of shame and guilt more than negates its merits.

We are not evaluating what is IS (apologies to Bill Clinton) or what ought to be OUGHT. Our entire premise is that by consideration of psychoanalytic theory we understand that appeals to fear of punishment and economic greed are inferior to appeals to shame and guilt. Inferior three

ways: less ingrained, less generalizable, and less secure. They are also less humane but that is not a pragmatic consideration. No more need be established about virtue.

MORALS

A short word is appropriate here about our position on Kant's categorical imperative and Rawls' concept of reflective equilibrium.

Kant asks us to act as we would want all human beings to act, if they were in our position. To us this has no meaning. To be in our position would require being under the strictures of our superego. Our superego says, "Do not lie to Mommy," so we don't. We may or may not want others to act in a similar way in the unlikely case that they live under the same superego directions. It is probable that we really don't care and are disinterestedly neutral as to how others live with their conscience. Are we really concerned if others lie to their mothers? It is not necessarily even true that we would want their superegos to contain similar injunctions. It may profit us if others are caught stealing from the office. The possibility of someone else ever being in our precise guilt-set position is unfathomable. It makes grammatical sense but not psychological sense. If we are reduced to gutting Kant's imperative to "follow the dictates of your superego as you would have others follow theirs" it becomes valueless as an objective²⁵ guidance-criterion for our behavior.

This same problem occurs in Rawls' theory.²⁶ If we select a principle of justice so fair that we would tolerate being any of the actors governed by that principle we must assume that we could meaningfully imagine being someone other than who we are. Suppose that X believes that the smart deserve a larger share of the pie than the dumb. Rawls then says to X, "But would you

²⁵ More accurately the categorical imperative is only semi-objective. The way I would want others ... may be known to me to be different from the way you would want others ...

²⁶ Rawls, J. A Theory of Justice (Belknap Pr. Revised ed. 1999).

still adhere to that principle if you were one of the dumb?" This question makes no sense to X since to be one of the dumb would not be to be internally-him and he cannot project his feelings into such a circumstance.²⁷ When one fantasizes living in another's place one imagines assuming the other person's body and social position but still with his original mind. It is the same ghost in a new machine. One might say, "If I became that movie star I would have his looks but I would never be that dumb."²⁸

Let us take the example of cutting the cake. One cuts and the other chooses. Mathematically both parties should agree to the fairness of this process. Psychologically speaking, this is not necessarily so. There is an obvious extra burden on being the one to make the cut -- any inaccuracy can be exploited by the other party, or be seen as ineptitude, or a shameful attempt to cheat. What is worse is that once the chooser has the larger piece the cutter will have no one to blame but himself -- adding insult to injury. There are Choosers who would feel guilty exploiting Cutter's inaccuracy and so would voluntarily opt for the smaller piece; and there are Cutters who know who these are.

Beyond assuming that there is a mathematical minimax²⁹ strategy to every situation and that roles are equally difficult to play we must further assume that the anxiety level in performing each role is equivalent, or at least the differences are preknowable. These assumptions make this model totally unrealistic. Rawls' theory is inadequate to treat psychological issues and so has no meaning for us here since it cannot constitute a realistic model interactive with guilt, shame, or

²⁷ The astute will observe that the editorial we has been singularized for a portion of this paragraph. All who cannot abide this need read no further.

²⁸ Tevye the dairyman speculates that if he were the Tsar he would be richer than the Tsar because if he were the Tsar he would have all the Tsar's wealth and make extra delivering milk on the side. (Aleichem S. Tevye's Daughters. Crown Publishers Inc. New York, 1949). This is what happens when we put ourselves in another's place. Let us attempt a Rawlsean analysis of the proposition, "a man may take any occupation he can obtain if he wishes so long as it hurts no one else" and apply this to the self-hating man who wishes to be a slave. If I were in his position as a would-be slave I would be equally happy with that role as I would be in the role master assumed by a would-be master. Therefore for those people slavery is moral. Balderdash. This illustrates that being equally happy starting with unequal superegos is meaningless.

²⁹ A concept invented by John von Neumann which says that in certain two-person games the least A can guarantee to expect to win is also the most B can guarantee to expect to lose, so with perfect play this will be the expected result. Cf. von Neumann J. and Oskar Morgenstern *Theory Of Games And Economic Behavior* (Princeton Univ. Pr., 1980).

the way human behavior is in truth motivated³⁰. If we try to correct for the drawbacks in Rawls by stipulating that every man have the same universal superego we are talking nonsense.

THE PSYCHOLOGICAL CONSEQUENCES OF AN L&E HOLDING

Law has always been interested in economic issues, what is new about the movement called Law & Economics is that the problems it approaches are not so much economic in their substance as in their analysis. Torts, crimes, legal procedure, etc. are the ends to be resolved, economic pressure is the means.³¹

Now, if we assume that people are rational maximizers of their satisfactions, and if we assume that they allocate their budget among the available goods and services so that the marginal dollar spent on each item yields the same satisfaction, and if we also assume that all voluntary exchanges are permitted, then all resources will gravitate toward their most valuable uses and justice will reign.

"Satisfaction" presents the same difficulty that we met in Rawls. Perhaps paradoxically, people do not desire satisfaction equally. How do we satisfy the self-destructive? Arguably all people are self-destructive from time to time. To Freud life is a constant struggle between our life instinct, Eros, and our death instinct, Thanatos. Eros constantly tries to deflect the energy from Thanatos onto other pursuits but sometimes Thanatos prevails and we light up another cigarette, drink one for the road, or simply oversleep and miss an important appointment.

³⁰ Many bright people could get away with bank robbery but are obviously not actually motivated by maximizing economic profit alone.

³¹ Though, it must be said, that, if the legal system were indefinitely flexible, L&E could advocate putting the CEO of Maker in jail if that would spur the development of the better toaster at lesser total cost to society. Perhaps L&E must yield its pragmatic perch to Law & Flogging when the latter is more sure-fire cost-effective.

What does it mean to presume that all “rational” behavior demands we act in our own best interests, or even that we act to maximize our satisfaction? One thing that it certainly means is that such a person’s ego is immune from the dictates of his superego. Our superego is the agent of our mind that insists that instead of pursuing pleasure and satisfaction we must do what is “right” as defined by and learned from our parental/educator figures. Or more exactly, that we avoid doing that which is “wrong,” as previously defined by persons perhaps no longer alive. Are we then put in the position of saying that the self-denial of satisfaction is sometimes itself another satisfaction? What, then, of the denial of that satisfaction. What of the one who wishes to deny herself the satisfaction of self-denial, e.g. the intentional overeater?

There is an eternal war being waged between the restrictions inculcated in childhood and the rebellion for independence that characterizes every mature mind. The situation is too dynamic and volatile for there to ever exist some concept as simple and stolid as “satisfaction” for both combatants that comprise each individual.

If we define satisfaction as ego-satisfaction then we are undermining the effects of shame and guilt which have been established supra as the highest motivating forces of civilized man. What happens if we allow L&E to define satisfaction as superego-satisfaction?

In the superego all the laws of microeconomics are off. An increase in price will not make substitutes more attractive since the superego cares for the price of nothing. It preaches virtue at all cost. If the price of a votive candle were to quintuple the superego would insist on purchasing just as many. The superego may insist on throwing money away on anonymous charitable contributions, on expensive presents for despised close relatives, on books that are painful to read, etc. Two socio-economically similarly situated rational persons may have superegos that point in diametrically opposite directions.

The phrase “no-fault” has both an economic/legal and a psychological meaning. Economically it may allow us to assign the cost of a loss to the cheapest future cost avoider but psychologically it means that the one penalized is not necessarily the one who committed the wrong, if wrong

there be, or the one who strongly feels she committed the wrong. What is the effect on the one who knows psycho-emotionally that she did a wrong whose consequences the law made someone else pay for? This is then, possibly, to her superego a second infraction. In our paradigm, Mother's superego realizes her negligence harmed Child, on top of which her lawsuit now harms Maker (and by extension all society).

The superego will punish all misdeeds, and those that are not expiated and atoned will be punished by harsher and more severe inner sanctions than society would otherwise impose. It is far better to pay the two dollars than to suffer the extra anxiety and neuroses.

To avoid the pain of her guilt she will become cynical and hypocritical. She will be induced to evade her superego and act only out of the basest of human motivations: avoidance of punishment and desire for reward.

If the Pareto optimal solution to a problem of allocation of resources based on fear and greed is different from the result generated by considerations of conscience, then a legal system assuming that everyone "rational" acts out of fear and greed will emerge that disadvantages the more moral (higher motivated) actor³². L&E thus seeks to destroy these higher motivations by handicapping the more civilized man. Worse yet, it may send a psychological message that will eventually create economic disadvantages to the society. The Wild West was a society run primarily on penalty-avoidance but it was not a good climate for doing business.

What then is the prognosis for the traditionally-guilty who escapes sanction by virtue of an L&E based court ruling? She is quite possibly condemned to become a hypocritical, narcissistic, exhibitionistic, megalomaniacal, guilt-ridden, anxious cynic in a desperate but futile struggle against her own unforgiving superego. This cannot be good for the rest of us.

³² A Pareto Optimal outcome, named after Vilfredo Pareto, is a distribution of winnings in a game that has the property that all other feasible distributions have at least person worse off. The reason L&E might wrongly think that it has found a Pareto Optimum is that it fails to include the psychological harm concomitant to some of its allocations. By limiting its sensitivity to economics it hinders its ability to appraise payoffs fully accurately, and they may include distributions with unrealized detrimental psychological impacts whose economic consequences may be profound at a later time.

THE TOASTER REVISITED

Returning to the example of the toaster we note that the act of unnecessarily leaving a child unattended is a far riskier activity causing much more total harm to society than the manufacture of supervision-needing toasters. Under the dispassionate analysis of L&E, Maker will not exactly be “punished” for making the original toaster, but they will be nudged in the direction of product improvement, perhaps a bit faster than they had foreseen. So what can be the harm in this? Two things, as delineated below.

The first is that Mother’s bad behavior is reinforced. She will be awarded a sum of money that, in the parlance of legal fiction, will make her whole for the loss of Child and on top of that she will collect the penalty damages assessed against Maker – a sum necessarily large enough to make a giant corporation wince.

The goal of social engineering should be both to improve product safety and to improve human behavior. If the pressure of money can sway behavior, which is an underlying assumption of L&E, Mother, and those similarly situated, will only be encouraged in their neglectfulness. While society is buying better toasters it is also buying worse mothers.

It is repugnant to continue in this line of reasoning to the speculation that a mother of many when strapped for money would rationally be induced into the oxymoronic “intentional negligence” situation, i.e., frequently leaving her children alone in the hope that some misfortune might befall them for which she could collect “super-compensatory” damages. Repugnant but not impossible. However, in a less extreme situation, where life is not threatened, this is not unthinkable.

Huge sums can be collected for spilling hot coffee on oneself from holding the cup between one's legs³³. An unscrupulous but rational mother might send a child to deliver such coffee to the table in a self-service establishment with the conscious thought that either nothing remiss will happen to the child, or her future college education will be financed. These thoughts are far less foreign to the hypocritical, cynical, narcissistic, anxiety-ridden Mother that L&E produces than we would hope.

We are each protected by the superego of others. We undermine this psychic mechanism at our own peril.

One obvious resolution to this dilemma is to reform the tort system into one in which penalties could be assessed to Maker that would not unjustly enrich Mother, and, perhaps, even sanction her as well. But in the case of Child v. Maker as constituted today in law, what one side loses the other collects, minus 30% to the movers of the transaction.

If we were to modify the damage settlement to read, “consequential damages to the prevailing party and penalty damages to the State” we would induce society-beneficial behavior in Maker without risking suggesting society-detrimental behavior to Mother. That would be psychologically better but still be a dangerous direction as shown by the next objection.

The second drawback of the L&E resolution alluded to above is that the decision on whether it truly is in society's best interest to induce Maker to develop and market the more expensive electrocution-proof toaster is left in the hands of a jury of non-experts who receive information provided to them only relevant to the case at hand. These are L&E's adventitious engineers of social change. What price toaster is the best for the market place may be a more subtle question than they are prepared to grapple with successfully.

³³ Liebeck v. McDonald's Restaurants, 1995 WL 360309 (DNM Aug. 18, 1994).

Toasters are dispensable luxuries but what about medications? The unfortunate Patient who suffers a side effect from a medication, even if caused by not properly following the directions on the bottle, could similarly sue Drug Company. By reasoning analogous to Child v. Maker, the jury might attach a penalty award to the damages in Patient v. Drug Company in order to induce the development, production, and marketing of the fool-proof side effect-free drug. However, this new, more expensive product might easily be placed out of reach of many needy purchasers. What then? Let Medicare pay \$100 per pill that used to cost \$1 just to avoid the possibility of the odd rare minor unpleasant side effect? Market only the \$100 pill not covered by insurance making the cure de facto-available only to the affluent? Allow Drug Company to market the \$1 risky pill along with the \$100 safe pill and estop further suits by side effect sufferers under a doctrine similar to assumption of risk, thereby affecting a two tier healthcare system? These alternatives seem unsatisfactory.

This example is hardly far-fetched. There are often alternate prescribable medications, even more dissimilar than brand name vs. generic, which a careful physician chooses between for an uninsured patient with the consideration of compliance in mind.

Again the problem arises of who is to decide whether Drug Company should be induced to withdraw the semi-risky pill from circulation while awaiting the speculative discovery of the wished-for side-effect-free pill to be marketed at some unestimateable ferocious price? Are the social engineers deciding this ticklish question for us to be the random jury from Patient v. Drug Company?

A young patient received an eye examination from an ophthalmologist who did not test for glaucoma, a condition that could presumably have been treated successfully only by early discovery. The patient sued and won as the court held that if ophthalmologists wished to protect themselves from such suits in the future, they need only modify their behavior to always

give each patient the two-minute glaucoma test.³⁴ When focusing only on glaucoma, this seems like wisdom. However, the incidence of glaucoma in patients under 40 was figured to be 1 in 25,000. There could easily be hundreds of other similarly rare conditions each discoverable through an additional two-minute test. Does society wish to coerce ophthalmologists to expand each eye examination to three hours in order to avoid potential malpractice suits? The number of ophthalmologists the country would then require to maintain eye care would increase tenfold. Extrapolating to every other medical specialty we could calculate³⁵ that 300% of the population need become doctors.

The decision of what should constitute an eye examination for healthy young patients would be better left to some panel of the informed rather than any one particular indiscriminate precedent-setting judge and jury, even when they are the beneficiaries of a smattering of twenty-minute testimonies of contradicting paid-experts.

COGNITIVE DISSONANCE

A significant reversal in public policy should emerge cautiously and with public knowledge of the debate for two reasons: (1) so that the democratic process of public participation in the determination of what is “the good” will legitimize the majority-opinion’s ability to constrain the minority view, and (2) to avoid shocking the moral sense of a law-abiding citizen into disorientation. Guilt and shame can emerge from the perspective of having violated a societal directive no matter how new. The law cannot act *ex post facto* but shame and guilt are not governed by the Constitution. Violent inner tension can accompany the realization that long-held standards are being abandoned by society.

³⁴ *Helling v. Carey* 83 Wn.2d 514 (S.Ct.WA, 1974). This case is a famous eyesore, cf. Restatement (Second) of Torts §§ 295A, 299A (1965); W. Prosser, Handbook Of The Law Of Torts, § 32 at 161-63 (4th ed. 1971).

³⁵ This “calculation” is spurious but instructive.

“Cognitive dissonance” is defined as the discomfort felt at the discrepancy between firmly held beliefs and new received information or interpretation.³⁶ This term was introduced by Leon Festinger to describe what happened to members of a religious cult when they discovered that a predicted catastrophic flood did not arrive. Their psychic discomfort was intolerable. Individuals alleviated this discomfort through three mechanisms: (1) they reduced the importance of the old beliefs, (2) they added value to those old beliefs that remained unchallenged by fact to create reassurance, and (3) they reinterpreted the dissonant beliefs to make them less inconsistent with reality.

Thus the dissonance sufferers alleviated their unbearable tension by changing either their beliefs or their behavior.

In our paradigm the toaster law suit creates a dissonance for Maker between his belief that he was acting appropriately and the fact that he is held liable for his behavior. But the suit also creates a cognitive dissonance for Mother. She knows in her heart that she was fatally neglectful yet the court awards her a fortune for the outcome. L&E assumes that Maker relieves his dissonance by changing his behavior but it ignores the possibility that Mother will relieve her dissonance by changing her beliefs.

Worse again, the possibility arises that other mothers will be thrown into cognitive dissonance between what their superego tells them about the role of parent, i.e. that Mother was bad and should be punished, and what the toaster-court tells them is the public stance on the mater, i.e. that Mother is rewarded. If mothers were to abandon their sense of guilt at the prospect of child neglect to relieve this court-induced dissonance it would not be efficacious for society. Mother and observers may experience anxiety at what seems like “official” approval of behavior that they know was wrong. Like the cultists they may respond to this unbearable dissonance by reassessing their thinking to conclude that parental neglect is not such a bad thing after all, particularly when the surrounding dangers come from products manufactured by corporate

³⁶ Festinger, L. (1957) A Theory of Cognitive Dissonance, Stanford, CA. Stanford University Press.

giants. For corporations to absorb the loss allows the guilt and shame of individual actors to disappear between the lines. More than better toasters society-engineers should dispose towards better parents. L&E forgot to include this downside into their equation³⁷.

The public shock at Roe v. Wade³⁸ included many women and men who were confused and distressed by the abandonment of an established superego imperative. The upheaval in society extending till today over the abortion issue may be explained in large part by the shock waves of cognitive dissonance yet to be satisfactorily dispelled.

SUMMARY

Replacing considerations of wrongfulness by assessment of future-correctional utility in the determination of which party must absorb the loss in a tort case, focuses solely on rectifying the one harm at issue in any given action and cannot weigh in the psychological message sent to individuals by a result running contra to moral intuition. This may undermine the power of the mechanisms of personal guilt and shame to hold the baser instincts of man in check in a wider range of potentially harmful situations. Even when guilt escapes legal sanction it cannot evade superego-generated anxiety leading to cynicism and hypocrisy. The dissonance between the party one feels is at fault and the decision of the court may lead to a weakening of the entire set of values inculcated in the child during superego formation. The choice of behavior may cease to be based on principles of properness but narcissistic opportunism and entitlement, thus undermining the inherent respect for law government requires.

Deliberately abandoning the doctrines of negligence, recklessness, and wantonness, is a poor incentive for the improvement of the behavior of the public at large. Replacing such guiding principles with economic ones deprives the public of the ability to be informed in advance of

³⁷ "Equation" is used metaphorically and idiomatically. It is mathematically only an inequality.

³⁸ 410 US 113 (1973).

what is currently considered good behavior in an ever-changing world. Those who desire to be “correct” and pursue the path of virtue should not be disadvantaged for doing so, especially when this runs contrary to their justifiable expectation. Furthermore, before a court indulges in what is tantamount to grandiose social engineering alterations it should look at a larger set of consequences to society than the myopic facts of the one case adventitiously before it. Otherwise severe damage, perhaps even economic as well as psychological may result.

The tacit agenda of the monotonic progression towards the perfection of man by means of law suffers from the abandonment of personal responsibility. This thereby undermines the very adhesion of civilization.

To paraphrase Michael Douglas as Gordon Gecco in the film *Wall Street*³⁹, guilt is good. Let us not abandon it.

POSTSCRIPT: CATASTROPHE THEORY

The system of awarding damages in tort cases is fragile at its best. Otherwise straightforward cases might hinge on the exclusion or concealing of a bit of crucial evidence, unconvincing-yet-truthful expert testimony negated by well-acted purchased deceptions, judicial incompetence, bungling representation, jury prejudice, etc. If we dispense with justice-seeking doctrines such as last clear chance, contributory negligence, assumption of risk, and other responsibility-based considerations in favor of the L&E style no-fault social-engineering pay-outs, the result could enter the realm of mathematical Catastrophe Theory.⁴⁰ This is a discipline which deals with situations so precarious that a slight perturbation of the input data could dictate a radically different course of action, like a drop of rain falling near the Continental Divide.

³⁹ Twentieth Century Fox. Produced by E. R. Pressman in association with Amercent Films and American Entertainment Partners LP. Written by Stanley Weiser and Oliver Stone. Directed by Oliver Stone (1987).

⁴⁰ Introduced by Rene Thom in *Structural Stability and Morphogenesis*, (1972), also issued by Perseus Publishing (1989).

The moment a new invention or medical treatment hits society the market scrambles and the cost of avoiding a specific harm in the future (which was never accurately calculable by Mother in the first place) can change so radically that L&E could then dictate a different trial outcome, only to have that one overthrown in turn by another technological innovation. Since the data inputted in any given case is so non-robust as to be haphazard, the attempt to use each lawsuit as a potentially radical public policy re-write is unwise. The total reversal of the cost assessment swinging on factors not under the control, or perhaps even knowledge, of the actors, where in an instant winners become losers, is an instance of a mathematical Catastrophe. For example, Mother might tomorrow be found at fault for her negligence based on the Toaster Workers Union getting a dime raise, thereby tilting the scale against her. Thus her choice of actions, presumed to be liability-avoidant rather than duty-based, is dictated by the impossible challenge of knowing the entire economy of the nation rather than simply doing her motherly obligation. This is a more difficult society in which to make decisions than one governed by simple rules of common sense, decency and personal accountability, where misbehavior is clear whether based on neglect of established duty or malicious intent.

To let liability fall from the sky based on rapidly shifting economic and technological factors, is to create a world of caprice and bewildering dangers. What we “presumably” had been striving for was a world wherein if all just did “the right thing” based on standard models for behavior governed only by information locally available, all would be as safe as possible. This presumption is based on the heuristic perception that the progress of civilization manifests in the evolution of the human spirit as well as in bread-heating technology. L&E tampers with this advancement by introducing instability of unknowable magnitudes.

Since the data inputted in any given case is so non-robust as to be haphazard, as well as open to unpredictable modification, the attempt to use each lawsuit as a potentially radical public policy

rewrite is unwise. “Prudence dictates that governments long established should not be changed for light and transient causes...”⁴¹

⁴¹ Jefferson T., The Declaration Of Independence., Philadelphia 1776