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Allocating Risks and Suffering: Some Hidden Traps

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I

In his first lectures on jurisprudence, Adam Smith told his students that the imperfect rights which are the subject of distributive justice do not properly belong to jurisprudence. For they fall not under the jurisdiction of the laws but rather under "a system of morals." "We are therefore in what follows to confine ourselves entirely to the perfect rights, and what is called commutative justice."[1] Of course, he did not in fact confine himself to commutative justice, but discoursed broadly on the foundations of government, on family and slavery, and on the wealth of nations ("national opulence" as he then called it) which can meet the natural wants of mankind by a division of labor based on the industry of the people and proportioned to an appropriately regulated system of commerce. All this as Jurisprudence (and for students aged from 14 to 16)!

His *The Theory of the Moral Sentiments*, published three years earlier in 1759, convincingly demonstrates Adam Smith's real familiarity with the classics. Yet when he speaks of "distributive justice," to dismiss it from Jurisprudence, he uses the term quite differently from Aristotle.[2] For Aristotle, distributive justice concerns the problem of allocating the community's *common stock* of resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and other burdens. In Adam Smith's formal treatments of justice, this whole problem has disappeared, along with the corresponding virtue of Aristotelian distributive justice. Smith's "distributive justice" — and hereabouts he wishes to be relying on Grotius, Pufendorf and his own Scottish philosophical mentor Hutcheson, as well as his admired friend David Hume — concerns only such matters as the weak, imperfect and metaphorical "right" of brilliant or learned people to be praised, or the right of beggars to seek other people's charity (which is not a right to be given anything, nor indeed an *enforceable* right even to beg).

Adam Smith's jurisprudence is crippled by inattention to distributive justice, to the allocation of the common stock of goods and roles (with the risks incident to them). But in our day jurisprudence not only risks forgetting commutative justice, but also risks misunderstanding (and mislocating the rationality of) the principles for resolving the problems of distributive justice.

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[1] A. SMITH, LECTURES ON JURISPRUDENCE 9 (R. Meek, D. Raphael, & P. Stein eds. 1978).

[2] A. SMITH, THE THEORY OF THE MORAL SENTIMENTS pt. VII, § ii, ch.1, 436 (West ed. 1976) [hereinafter A. SMITH].

II

The economic analysis of which Adam Smith is a principal founder is helpful in practical reasoning about problems of justice precisely insofar as it systematically calls attention to the side-effects of individual choices and actions and behavior. Adam Smith's interest in side-effects is intense and pointed even in his *Theory of the Moral Sentiments*, published 17 years before his *The Wealth of Nations*. In a brilliant chapter of the earlier treatise he identifies the way in which admiration for technical accomplishment and potential utility overwhelms reasonableness in human action — the way in which people, in my jargon, confuse capabilities and attainments in the fourth order with reasonable goals and fulfillments in the third.[3] Anticipating the age of mail-order electronic gadgetry, gentlemen of his time could be found with "their pockets stuffed with little conveniences." "How many people ruin themselves by laying out money on trinkets of frivolous utility? What pleases these lovers of toys, is not so much the utility as the aptness of the machines which are fitted to promote it."[4] And in this sort of confusion and misdirection of sentiment and of purpose, Adam Smith sees something which is "often the secret motive of the most serious and important pursuits of both private and public life"[5] — Seen without the distorting influence of this confusion, power and riches are nothing but "enormous and operose machines contrived to produce a few trifling conveniences to the body . . ."[6] But it is good that nature induces in us this sort of confusion. For "It is this deception which arouses and keeps in continual motion the industry of mankind."[7] For, from the heap of wealth produced by this industry in the deluded pursuit of riches and power,

> the rich only select . . . what is most precious and agreeable. They consume little more than the poor; and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labors of all the thousands whom they employ be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are *led by an invisible hand* to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants; and thus, *without intending it, without knowing it*, advance the interest of the society . . . When providence divided the earth among a few lordly masters, it neither forgot nor abandoned those who had been left out of the partition. These, too, enjoy their share of all that it produces. In what constitutes

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[3] On the four orders of reality in which human life is lived, *see* Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 8-9 (1990).

[4] A. SMITH, *supra* note 2, at pt. IV, ch.1, 299.

[5] *Id.* This use of "motive" is not to be confused with reasons which motivate by entering into conscious deliberation and choice.

[6] *Id.* at 302.

[7] *Id.* at 303.

> the real happiness of human life, they are in no respect inferior to those who would seem so much above them.[8]

Here the invisible hand accomplishes what might have been the work of the missing distributive justice. In *The Wealth of Nations*, the same or a similar "hand" accomplishes rather the initial productive work of enhancing (domestic, national) wealth: the individual engaging in or, rather, directing production "intends only his own gain," but "he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention."[9] In this later, more famous passage, Adam Smith has qualified the reference to unawareness of the side-effects ("without knowing it" is replaced by: not knowing "how much he is promoting it"); he now focuses rather on what is essential: the contrast with intention. A side-effect, as I use the term, simply is an effect not intended — not chosen either as end or as means — however much it may have been foreseen by the one who intends, chooses and acts.

But you will have noticed Adam Smith's optimistic partiality in attending to the side-effects of production. Not only is he sublimely optimistic about the automaticity of the trickle-down benefits to the poor. He is also entirely inattentive to the question of *harmful* side-effects of the processes of production, distribution and consumption by the "vain and insatiable" wealthy. Doubtless this inattention is little more than one aspect of Adam Smith's failure to anticipate certain important aspects of the impending industrial revolution. Still, it is notable. If providence, without human attention or intention, is allocating to the poor a share in the wealth produced at the direction of the rich, it is also allocating to them an abundant share in the environmental degradation and risk of environmental catastrophe engendered by the economic and security policies of the rich(er).

The brilliance of Adam Smith's first account of the invisible hand consists in his transformation of the classical reasons for denying that wealth and power are the point of human existence. Without rejecting the classical critique of confusing mere means with intrinsic ends, Smith deepens it by identifying the attraction of these means as an admiration for excellence — "aptness" — but excellence in an order (I call it the technical) which is not to be confused with the existential order of human choices oriented by intrinsic human goods. But the irony is this: Adam Smith's own account, at least in this work, falls prey to the very fascination with the technical which it denounces. Captivated by his genuine and fruitful mastery of a new technique — let us call it economic(s) — the technique of identifying causal systems created and constituted by the side-effects of human choices whose intentions lie quite elsewhere, Smith neglects to subordinate the technique to the ends and principles of reasonable human existence, ends and principles which would have directed him to an impartial survey of the risks and suffering engendered by the same invisible hand of the economic system he misleadingly styles "providence."

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[8] *Id.* at 304-305 (emphasis added).

[9] A. SMITH, THE WEALTH OF NATIONS pt. IV, § ii, ch. 10, at 476 (Campbell & Skinner eds. 1976).

Of course, the developed analytical art of economics is well able and used to make such an even-handed survey. And that, I repeat, is its true utility as a help-mate for ethics and political theory and thus for jurisprudence. Still, it would be a mistake to conclude that we need only a more adequate account of the benefits and burdens up for distribution or allocation by those responsible for the common good or general fate. We need also to bear in mind what Smith did not forget and what economics does not comprehend, the requirements of commutative justice. To see this, we may look at one of the economic and security policies of the rich which was developed in England in the half-century after Adam Smith's flourishing: the policy of laying hidden traps.

III

These mantraps were, typically, spring-guns: heavily loaded shot-guns, with triggers attached to springs and wires arranged in hidden lines along which the blast of shot would travel when anybody tripped them. They were set in woods and gardens to deter, disable and punish poachers, who under the law of the day were no more than trespassers.

The ground of principle on which such lethal outdoor mantraps were eventually prohibited by law is clearly stated by Holmes giving the majority judgment of the Supreme Court in 1921 in *United Zinc & Chemical Co. v. Britt*: "The liability for spring guns and mantraps arises from the fact that the defendant has not rested in [the] assumption [that trespassers would obey the law and not trespass], but on the contrary has expected the trespasser and *prepared an injury* which is no more justified than if he had held the gun and fired it."[10] In other words, shooting trespasser, who is engaged in no act of violence against oneself or another, is simply killing *with intent to kill*, i.e. murder, or at least with *intent* to do serious bodily harm; and setting a spring gun is just arranging to do the same "without personally firing the shot."[11] What one lawfully cannot, with intent, accomplish "directly" (in person) one cannot, with the same intent, accomplish "indirectly" (mechanically).

It is embarrassing to have to say that when this argument was squarely put before a strong Court of King's Bench in 1820 it was unanimously rejected.[12] The arguments employed by the English judges to distinguish shooting by machine from shooting in person are weak and of little interest. Of greater interest is the preliminary argument employed in the first two of the four judgments, an argument to which Holmes is responding when he says that the defendant landowner has not been content to assume that trespassers will not trespass but has expected the trespasser

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[10] 258 U.S. 268 at 275 (1922) (emphasis added).

[11] *Addie v. Dumbreck*, A.C. 358, 376, 98 L.J.P.C. 119 (H.L. 1929).

[12] Ilott v. Wilkes, 3 B. & Ald. 304, 311, 106 Eng. Rep. 674 (K.B. 1820). See the opening sentences of the argument of counsel for the plaintiff-respondent. *Id.* at 307, 106 Eng. Rep. at 676.

and "prepared for him an injury." The argument is one you sometimes hear today when Christians try to defend the public policy of nuclear deterrence against the well-grounded charge that it involves, willy nilly, an intent to kill non-combatants.[13]

Abbott C.J. puts it thus:

> I believe that many persons who cause engines of this description to be placed on their grounds do not do so with the intention of injuring any one, but really believe that the notices they give of such engines being there, will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to expose himself to the perilous consequence likely to ensue from his trespass.[14]

Unless he is supposing a high degree of ignorance or self-deception about the frequent[15] "accidents" involving spring guns (such as the accident to the nutgatherer in *Ilott v. Wilkes*), Abbott C.J. is clearly confusing hope with intention. Bayley J's confusions are between ends and means ("motive" and "intention," in a common legal jargon; "further" and "proximate" intention), and between intention and emotions such as enthusiasm or vindictiveness, or *ex ante* reluctance and *ex post* regret:

> Such instruments may be undoubtedly placed without any intention of doing injury, and for the mere purpose of protecting property by means of terror; and it is extremely probable that the defendant in this case will feel as much regret as any man for the injury which the plaintiff has sustained . . . .[16]

These confusions about that central legal and jurisprudential concept, intention, were mercilessly exposed in two great articles in the *Edinburgh Review* in 1821 by the famous publicist Sydney Smith. About Abbott's argument, for example, Smith said:

> But if this be the real belief of the engineer — if he think that mere notice will keep people away — then he must think it a mere inutility that guns should be placed at all: if he think that many will be deterred, and few come, then he must mean to shoot those few.[17]

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[13] *See* J. FINNIS, J. BOYLE & G. GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM 124 (1987) regarding an argument of Gerard Hughes SJ.

[14] Ilott v. Wilkes, at 309, 106 Eng. Rep. at 676.

[15] *See* HANSARD, PARLIAMENTARY DEBATES 23 March 1827, H.C., cols. 19, 26 (the Home Secretary, Robert Peel, here speaks of the "daily accidents and misfortunes arising from the use of them").

[16] Ilott v. Wilkes, 3 B. & Ald. 304, 310, 106 Eng. Rep. 674, 677 (K. B. 1820).

[17] S. SMITH, WORKS 316 (1854); *see* Evatt, *The Judges and the Teachers of Public Law*, 53 HARV. L. REV. 1145, 1151-52 (1940).

And then Smith pressed home the argument which had failed in the hands of counsel in *Ilott* but was to prevail in Parliament in 1827 and in the eventual American position summarized by Holmes in 1921 and by the Supreme Court of Ohio in 1938.[18]

Why were the King's Bench judges of 1820 so anxious to find that setting spring guns need involve no intention to hurt or kill? They wanted to get into a position to dispose of the issue (precisely: liability to one injured by a spring gun with notice of the hidden presence of spring guns) on the twin bases of assumption of risk (*volenti non fit injuria*) and the general utility of protecting property, encouraging residence by land-owners, suppressing crime, and so forth. So, likewise, even Lord Ellenborough (the rising young politician son of the late Lord Chief Justice Ellenborough), making the very last and most brutally frank, or frankly brutal, of the parliamentary speeches in defense of spring guns, felt the need to veil the immediate intention by confusing it with motive (further intention):

> The object of setting Spring-guns [is] not personal injury to any one, but to deter from the commission of theft; and that object [is] as completely obtained by hitting an innocent man as a guilty one. [T]he bill [is] contrary to that principle of the English law, which [gives] a man protection for his property, in proportion to the difficulty with which it would be protected by the ordinary means . . . .[19]

The veil is here truly diaphanous — see-through — for the argument tacitly concedes that the deterrent object will be attained only by an at least occasional injury or death to a trespasser, innocent or culpable; such injury or death is thus intended as a means to achieving the deterrent object. In the fundamental structure of the common law, as of sound jurisprudence, one private person's killing or injuring another with intent to kill or injure is simply a commutative injustice, whatever the killer's further purposes, objects, or motives. It is the sort of conduct, of transaction between persons, which is simply excluded from justification whether by assumption of risk, fear of future greater harm, or any considerations of distributive or allocative justice as between landowners, game consumers, poachers and nut-gatherers like the unlucky Ilott.

But what about self-defense? Well, when defending oneself or another against immediate personal violence, one's real intent need not be to do

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[18] State v. Childers, 133 Ohio St. 508, 514-15, 14 N.E.2d 767, 770 (1938). "[B]y the overwhelming weight of authority, a person is not justified in taking human life or inflicting bodily harm upon the person of another by means of traps . . . unless, as a matter of law, he would have been justified had he been personally present and had taken the life or inflicted the bodily harm with his own hands."

[19] HANSARD, PARLIMENTARY DEBATES 9 April 1827, H.L., col. 296 (substituting direct for indirect speech).

harm to the assailant for the sake of some further object such as deterrence, or disablement from some future revenge attack, or satisfying one's desire to get one's own back. One's intent can and should be simply to *stop this attack* by whatever means of stopping it are at hand. Thus, all the harm to the assailant can be a side-effect, unintended. But are not the side-effects of one's actions within one's responsibility? Certainly. And are they not subject to moral assessment and possible condemnation? Certainly; the very point of this paper is to reflect on some possible jurisprudential implications of our moral responsibility for our actions' side-effects. So, if it can be fair and in all other ways reasonable to take measures to stop an assailant, knowing that those measures may or will be death-dealing, might it not also be fair and reasonable to take death-dealing measures against mere trespassers and poachers, intending not their death or injury as such, but simply to stop them in their current unlawful entry? No. To do so, or think so, would be to confuse the intrinsic personal good of human life with the merely instrumental good of property. And it would be to depart from the Golden (and rational) Rule of impartiality; for though a gentleman who found himself being homicidally attacked by one of his own family or house guests might defend himself with even a shotgun if nothing else lay to hand, no gentleman, nobody, would use a shotgun and blow away one of his own family or house guests whom he spotted making off with one of his pheasants. That one should do nothing to others, and impose on them no harmful side-effects, which one would not be willing to do to or impose upon oneself and one's nearest and dearest is the most significant of those norms of reasonableness, and thus of morality, which govern the creation of risk and suffering as the unintended effects of one's choices and actions.

But, as young Lord Ellenborough's frankness made plain, the purpose of laying spring guns was, often enough, precisely to *do harm*, as a deterrent *means* of stopping poaching, not merely to impose the risk of harm as a side-effect of stopping poaching. Take the facts in *Bird v. Holbrook*,[20] in which, a year after Parliament had outlawed outdoor spring guns, the Court of Common Pleas — its chief justice doubtless ruefully mindful of the public denunciation which, as junior justice in the Court of Kings Bench in *Ilott v. Wilkes*, he himself had received in 1821 at the hands of Sydney Smith—ingloriously announced that what Parliament had just enacted had all along been the common law in relation to spring guns laid *without notice*. In this case, concerned with events before the Act of 1827, the defendant tulip gardener's reason for not posting notices was that he wanted to catch the tulip thieves, *by injuring them*. (Instead, of course, he mutilated only young Bird, who was trying, in broad daylight, to help a neighbor by recapturing a peahen which had strayed into Holbrook's booby trapped garden.)

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[20] 4 Bing. 628, 130 E.R. 911 (C.P. 1828).

IV

Richard Posner made *Bird v. Holbrook* the centerpiece of his earliest published exposition of the implications of economic analysis for the common law.[21] Indeed, this is the one case which Posner cites in his textbook treatment of the category of intentional torts.[22] Disclaiming (at that point) any normative purpose, and offering only to "explain" the law's "pattern", Posner says that the issue in the case "involved two legitimate activities, raising tulips and keeping peahens".[23] Spring guns may be the most cost-effective means of protecting tulips in an era of negligible police protection; but they discourage the owners of domestic animals from pursuing them onto other people's property and so increase the costs (enclosure costs or straying costs) of keeping animals.[24] The challenge was "to design a rule of liability that maximized the (joint) value of both activities, net of any protective or other costs (including personal injuries)."[25]

With a stroke, the whole question of intention to injure is swept from view; not only are the "personal injuries" homogenized into the other costs of keeping peacocks, but the fact that *these* injuries were done by one who *intended* to injure a human being (albeit not anticipated to be a mere peacock-pursuer) is treated as wholly irrelevant. The argument which had prevailed in Parliament is treated as of no consequence. And explicitly so: "intentionality is neither here nor there," says Posner.[26] Why not? The answer is a paradigm of the *non sequitur*:

> It is surely not correct to say that society never permits the sacrifice of human lives on behalf of substantial economic values. Automobile driving is an example of the many deadly activities that cannot be justified as saving more lives than they take. Nor can the motoring example be distinguished from the spring-gun case on the ground that the one who sets a spring-gun intends to kill or wound. In both cases, a risk of death is created that could be avoided by substituting other methods of achieving one's ends (walking instead of driving); in both cases the actor normally hopes the risk will not materialize.[27]

In short, for Posner, intending death and carelessly risking causing death are equivalent because both involve creating the risk of death; A is equivalent to B if A includes what is important about B. There is no need to dwell on this fallacy. It is more profitable to notice some of the other equivocations in this passage.

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[21] Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. LAW & ECON. 201, 209 (1971) [hereinafter Posner].

[22] R. POSNER, ECONOMIC ANALYSIS OF LAW 119-22 (2d ed. 1977) [hereinafter ECONOMIC ANALYSIS].

[23] Posner, *supra* note 21, at 209.

[24] Posner, *supra* note 21, at 209-211.

[25] Posner, *supra* note 21, at 210.

[26] *Id.* at 206.

[27] *Id.*

First, the equivocation on "sacrifice." Posner's use of the phrase "sacrifice of human lives" treats as equivalent the decision to build a skyscraper, expecting that about three construction workers will fall off and be killed, and the decision to kill three construction workers to encourage the others to meet their performance targets.

Second, the equivocation on "hopes." Posner's claim that both in carelessly and in intentionally killing, "the actor normally hopes the risk will not materialize" involves a double confusion. (i) The careless driver hopes there will be no collision *and* that if there is, no-one will be killed; the man-trapper hopes that no-one will invade his property but that anyone who does *will* be shot. (ii) Many murders, perhaps most, are done with great emotional reluctance and repugnance (if only for fear of detection and punishment). Like Bayley J. in *Ilott v. Wilkes*, Posner has confused emotion with will and willingness — i.e. with intention.

Posner's writings on intention are, indeed, a feast of fallacies. To prove that the distinction between intentional and unintentional torts is "confusing and unnecessary", his textbook, for example, begins:

> Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions. The element of intention is unmistakable when the tortfeasor is an enterprise that can predict from past experience that it will inflict a certain number of accidental injuries every year.[28]

This argument is even less acceptable than the earlier proof that "intentionality is neither here nor there". For now we have, not the claim that intention is irrelevant to economic and legal analysis, but a claim that intention is actually the same as foresight, and that the intentional is just a version of the accidental. This is tantamount to saying that those who fly the Atlantic, foreseeing jet-lag, intend to get jet-lag, that those who walk intend to wear out their shoes — what one may call the "pseudo-masochistic" theory of intention.

It is tempting to dwell on the corrupting potential of this conception of intention. Since, for example, one can foresee that lecturing and writing on difficult topics is certain to confuse some of one's audience, one may as well (I don't suggest that Posner himself does) throw in a few deliberate falsehoods when convenient for attaining one's goals — providing one sets out with the *hope* that one will not "have to" resort to those measures, and resorts to them with feelings of reluctance and regret.

But for present purposes it is enough to insist, against Posner, that those who intend a result, whether for its own sake or as a means to something else, are not merely creating a risk of that result. Rather, in their own self-understanding, they are trying (however reluctantly) to bring it about; they are not trying to create a risk of a result but trying to create that result. They are not content to leave things to chance, i.e.

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[28] ECONOMIC ANALYSIS, *supra* note 22, at 119.

to hazard or to risk, but are intervening to achieve what they intend. The only risk they will acknowledge is — not the risk of that result happening — but: the risk of that result *not* happening. That risk is just an inevitable side-effect of their intention, choice and action, since none of us have the divine capacity of making things be the case simply by willing them to be the case.

V

Someone will object: Posner and the whole school of Economic Analysis of Law who follow him in this[29] are not concerned with the point of view, the self-understanding, of agents, but with states of affairs in the world, particularly states of affairs to which monetizable value can be attributed. And, whatever one's school, one may say that it is far from clear why a paper on allocating risks should be dwelling for so long on intention — particularly a paper which insists that the intending in torts and crimes of intention is a case neither of *allocating* (distributing a common stock) nor, properly speaking, of creating a *risk* of harm. Let me address both these objections together.

People say they are interested in states of affairs, not in the content of the state of mind of the one who, whether deliberately or accidentally, brings those states of affairs about. Very well. But they overlook the fact that *choices last.* To intend something is to choose it, either for its own sake or as a means; and to choose is to adopt a proposal (a proposal generated by and in one's own deliberation). Once adopted, the proposal, together with the reasoning which in one's deliberation made that proposal intelligently attractive, *remains*, persists, in one's will, one's disposition to act. The proposal is, so to speak, synthesized into one's will, one's practical orientation and stance in the world. This is a real, empirical (though "spiritual") effect — side-effect — of one's adopting a proposal.

Now, whatever consequences lie outside one's proposal, whatever results of one's choice are not included in the proposal because neither wanted for their own sake nor needed as a means, are not synthesized into one's will. Though one may foresee these results, and accept that one will be causing them, or the risk of them, one is not adopting them. They are side-effects, incidental risks. One may be culpable in accepting them. But the ground of culpability will not be that one intended them, but that one wrongly, e.g. unfairly, accepted them as incidents of what one did intend. And just as one is never trying to achieve them — not even reluctantly trying — so one's character is not changed or shaped by one's acceptance of them, in the manner it is shaped by forming and pursuing an intention.

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[29] *See, e.g.*, Calabresi and Melamed's discussion of spring-guns. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, at 1126 n. 71 (1972).

Next we must notice that when one intends some harm to (an)other human person or persons — when one's proposal includes, however reluctantly, some destruction of or damage to some basic aspect of their personhood, e.g. their bodily integrity, or their participation in knowledge of reality — whether one intends that harm for its own sake, as in revenge, or as a means, as in killing or maiming *pour encourager les autres* or in deception for the sake of fraud or in perjury for the sake of justice, one is shaping oneself as one who, in the most radical way, exploits others. The reality and the fulfillment of those others is radically subjected to one's own reality and fulfillment, or to the reality and fulfillment of some other group of persons. In *intending* harm, one precisely makes their loss one's gain, or the gain of some others; one to that extent uses them up, treats them as material, as a resource for a good that no longer includes their own.

In Economic Analysis of Law, this exploitativeness is especially drastic and especially unreasonable. For, as Lewis Kornhauser points out, the Economic Analysis of Law "applies neoclassical microeconomic theory to the analysis of . . . legal systems" (rather than applying the classical theory of e.g. Adam Smith), and "neoclassical microeconomics assumes that individuals always act in their own, fixed, immutable self-interest" and precisely by doing so are "completely rational".[30] Kornhauser will not, I think, object if I say that this use of the term "rationality" — however widespread it may be in economics, game theory, public choice theory, and the like — is profoundly misleading.[31] And the theories of human behavior which employ it, if taken as *sufficient* guides to real choices and actions, are exemplary instances of the folly denounced (as we saw) by Adam Smith, the folly of thinking that an ingenious gadget which might sometime be useful for something is therefore a good thing to have, to work for, to be concerned with.

For, in reality, the very first insight of human practical understanding is that human goods and harms, as intelligible objects of intelligent wanting or avoidance, *have no proper names attached to them.* Intelligent human motivation is not egoistic. It responds to the value of human flourishing, in its diverse aspects and diverse personal subjects, whoever they may be. One can *choose* to be an egoist. But then one is following, not reason, but *feelings* of self-preference. (The way one then pursues one's self-interest may be cunning or in some other way intelligent, but this will not make one's egoistic self-preference an intelligent motivation.) And one is also overlooking or mislocating and mutilating the intelligible human good of community, of harmony between persons in a mutual sharing in fulfillment — a harmony which is a basic human good, intelligibly valuable for its own sake.

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[30] Kornhauser, *Economic Analysis of Law*, 16 MATERIALI PER UNA STORIA DELLA CULTURA JURIDICA 233, 234 (1986).

[31] *See* Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J. OF L., ETHICS AND PUB. POL. 115, 121-33 (1984).

In short, what neoclassical economics calls "rational" is rational only within the project (and resulting technique) of being a successful egoist. But the project of being an egoist is a paradigmatic form of irrationality, or practical unreasonableness.[32]

In its execution, of course, Economic Analysis of Law always looks to some community wider than the ego. (It would have no audience if it did not.) But its identification of the community whose self-interest is to be advanced, whose wealth is to be maximized, is always as little the work of a maximizing reason as is Posner's arbitrary declaration that the issue in *Bird v. Holbrook* was not whether one subject of the law can intentionally kill or maim another subject of the law, but whether laying spring guns increases the costs of peacock rearing more than it diminishes the costs of tulip growing. If one really cares for one's own interests, or if one's community and its government and law attend only to the interests of its current members, one will, of course, attend not at all to the interests of future generations. (And thus the very intelligibility of "a community" will be lost, somewhat as the intelligibility of motion is lost (as Zeno observed) if one tries to reduce it to a sequence of points; for people are being born into and dying out of the community at every moment: Which momentary community, then, is to count in assessing efficiency, whether productive or allocative?)

The inability of Economic Analysis of Law to handle, with its own conceptual resources, the problem of future generations — generations which, or rather who, start right now — is obvious enough.[33] Similarly, economistically-minded governments, such as the United Kingdom's, recommend a discount rate to be used in cost-benefit analyses of social projects; the rate reflects the time preferences of British adults today, for jam today as opposed to a little more jam tomorrow.[34] But the whole approach overlooks the fact that "the people today are not the same as the people tomorrow. Discounting wealth accrued tomorrow therefore disadvantages later generations."[35] And the U.K. government's discount rate renders negligible the costs of latent deaths from current risk-producing activities if those deaths are delayed for as little as 30 years.[36] Our judgment that this is unreasonable cannot be supported, or undermined, by any *economic* principle.

What might support such a judgment? I return to the apparently different topic of intention and intentional harm. The principle that one must never choose (intend) harm to the person of any human individual both expresses and preserves the judgment that each human individual

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[32] *See* Grisez, Boyle, and Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURISP. (1987) 99, 101, 114-15 (1987).

[33] It is patiently and helpfully explored in Kornhauser, *A Guide to the Perplexed Claims of Efficiency in Law* 8 HOFSTRA L. REV. 591, 614-16 (1980).

[34] Health and Safety Executive, THE TOLERABILITY OF RISK FROM NUCLEAR POWER STATIONS 34 (H.M.S.O., London, 1988).

[35] Kornhauser, *supra* note 33, at 615.

[36] Health and Safety Executive, *supra* note 34.

is more than just a locus of utility or wealth (to be measured at some arbitrarily *chosen* future moment), or a channel or conduit for maximizing that wealth or utility (again, a maximum as measured at some chosen future moment). It expresses and preserves each individual person's *density*, so to speak, or *dignity*, if you will, as an equal of *everyone* else in basic rights. To choose harm is the paradigmatic wrong, the exemplary instance of denial of right.

When the techniques of neoclassical economics are allied to the doctrines of legal positivism, one gets Economic Analysis of Law as it is practiced by Posner, Calabresi, and others. The function of law is then conceived as: to allocate entitlements with a view to future maximizing of wealth. The fact that one person has in the past — just a moment ago — been intentionally harmed and thus wronged by another is "neither here nor there", except insofar as a law may have been *made* to bestow on the injured party, or on someone else, a remedy in the interests of maximizing social wealth by deterring and thus minimizing waste in transactions and dealings between persons.

In another jurisprudential perspective, however, a primordial and always primary (though not the only primary) function of government and law is to rectify this commutative injustice by ensuring that the injurer does the injured the commutative justice of reparation. (There was reason for the Roman jurists to treat Delict under the heading of Obligations.) No doubt there is a distributive, allocative aspect to this activity of government and legal system. From a common stock of possible activities to be undertaken, costs incurred and individual responsibilities to be drawn upon and distributed, the government and the law assign some part to this task of underwriting and guaranteeing commutative justice. Doing so is an act of distributive justice, but is ancillary to the prior, identifiable relationship of commutative injustice and potential commutative, reparative justice between the individuals. In this perspective, again, the dignity of the individuals, each ends in themselves (and in each basic aspect of their reality and potentiality as persons), is again expressed and preserved. A judge who tried to decide *Bird v. Holbrook* by the method commended by Posner — comparing costs of tulip growing with costs of peacock rearing — would be gravely violating his duty.

And government and law, in that act of reparative justice, can be seen to have a role quite distinct from achieving any future "end-state" state of affairs. The political community, unlike a one-project firm which must account to its shareholders at the end of the project, has no *goal*. Its success in fulfilling its responsibilities cannot be measured by any technique comparable to accounting. Success and failure are measured by quite other norms. Is everyone protected from intentional harm and every (other) form of exploitation by anyone else? Is the whole stock of natural resources made available to all — not by a naive communistic distribution and continual redistribution to ensure steady equal shares for all current members of the community, but by a system of appropriation and husbandry which will preserve the interests of future members of the community by encouraging fair distribution between "life tenant", heirs,

employees and other present dependents, and future remaindermen and reversioners, in a sustainable economy in a sustainable world?

VI

This is not the place to continue sketching the requirements of justice in political community. But I should say a little more about how intention and intentional wrong is related to the vast problem of harmful side-effects (including latent and long-term side-effects in environmental degradation of every kind).

Moral responsibility and consequent legal liability for intentional infliction of harm are paradigmatic, exemplary. Avoiding such wrongs is only a necessary, not a sufficient condition of acting justly. But the same respect for each individual whom one might have harmed as a means to an end carries over into, and informs, the quite different principle of fairness. Here one encounters the quite different type of commutative injustice involved in imposing harmful side-effects without complying with rational principles such as the Golden Rule, and without attending to truths such as that no-one has an *a priori* superior claim on the earth's resources and no-one, therefore, has unqualified dominion over any part of them.

The Golden Rule in its application involves a discernment of feelings and then a dispassionate rational adherence to the standard of care established by one's feelings. To what I have said in my other paper,[37] let me add that, without denying the peculiar and strategic importance of intention, legal thought can and does reasonably find criteria of fairness and unfairness in *analogies to the intentional.*

So the prohibition on spring-guns (or at least on unnotified spring-guns) laid with intent to wound extends to identify as unjust the omissions of those who inherit already-laid spring-guns and retain them without such intent to wound; or who allow similarly lethal and concealed conditions to persist on their land when they know that what disguises the lethality also exercises a fatal attraction or allurement to innocent strangers, including trespassers. But the range of the analogy must be controlled not by verbal or "conceptual" considerations — puns on "trap", "entrapment", etc. — but by considerations of fairness: how one wishes others to behave to oneself and one's friends; how one would behave when one's friends or children strayed from the straight and narrow. If one would not, even for a substantial reward, bury bombs accessibly under the surface of one's land with warning notices likely to disappear (without replacement) in one's children's lifetime, then one should not, I suggest, regard it as right to accumulate and bury lethal wastes whose lethality will far outlast any likely duration of one's warning notices.

This conception of the fairness which informs commutative justice is not, to use Adam Smith's title, a theory of *moral* sentiments. But it is a theory of the proper role of sentiments in giving content and application to a moral principle which itself is simply rational. The normal form in

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[37] *See* Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990).

which these sentiments make their presence felt in jurisprudence and legal reasoning, of course, is in the form of conventions,[38] customs, the far from bloodless life of the reasonable person — a life fit for use as a jurisprudential and judicial reference-point only if purified, however, of those self-deceptions, dishonesties, evasions, and pragmatic machiavellianisms which give us the idiomatic pejorative sense of "practical": "let's be practical about this" — a thinly veiled invitation to unfairness or some other form of injustice.[39]

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[38] *See* Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. ___ (1990) [Due to space limitations, this article will be appearing in the next issue of the CLEVELAND STATE LAW REVIEW - Editor's note.].

[39] *See* Tushnet, *A Critical Legal Studies Perspective* 38 CLEV. ST. L. REV. 137, sec. II (1990).