LEIBNIZ AND THE BEHAVIORAL ECONOMIC APPROACH TO CONFUSING A LAW REVIEW EDITOR INTO INFECTING HIS JOURNAL WITH YOUR WORK

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Like many wannabe scholars, whose visions of Harvard, Yale, or even Cornell have faded into a numbed gratitude for a degree from a public law school, I persist in my quest to one day teach law at an underfunded community college by publishing articles with any journal goodly enough to accept them. For my brothers and sisters who join me in our bizarre refusal to subjugate our dreams to the reality of our demonstrated ability—these humble suggestions are intended to assist you pray on the lack of intellectual interest, the absence of the time necessary to ensure basic competence, and the infestation of the logical heuristics characteristic of the 2Ls and 3Ls that hold our futures in their Bluebook-perfectionist hands. For alas, at the *Florida State University Law Review*, probably due to a total collapse of common sense and good judgment, I served as Article Selection Editor, Associate Editor, and lost an election for Editor-in-Chief by one vote to a colleague who began her campaign speech with "I will not be available to edit the Summer issue."[2] So for those of you who have already supplemented a mediocre J.D. education with the obligatory $50,000 NYU LL.M., and currently justify your debasing

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[2] The societal damage caused by those placements has been further exasperated by the Florida Bar Association's apparent joke in appointing me to the Editorial Board of the Florida Bar Journal.

low-paid public interest job as "prestigious" in cover letters, I dispense the following experienced advice:

1. When Selecting Your Title, Be Sure to Include the Phrase "Economic Approach."

Do not worry if you have no background in economics, require a graphing calculator to determine the ten percent tip on a ten dollar tab, or reckon Game Theory an invention of the Milton Bradley Company—to charade your way passed all but the *University of Chicago Law Review*—you merely need note what advocates of Law and Economics assume as their theoretical axioms.

- All people are perfectly rational all of the time.
- All people act on perfect information all of the time.
- All people are perfectly selfish all of the time.[3]

These simple truths, supplemented with basic addition, subtraction, and only for the obsessed and energetic—remedial Algebra, are all that is necessary for you to craft a thought-experiment paradigm which will result with a logically reasoned public policy proposal devoid of all human decency and completely unworkable in our Judea-Christian American democracy. As you weave your tapestry with this existentially non-existent thread you will feel pangs of consciousness and an innate desire to produce something practical and valuable to the real world and its irrational, undereducated, and occasionally

[3] RICHARD A. POSNER, ECONOMIC ANALYSIS OF **LAW** *3-4* (5th ed. 1998).

unselfish inhabitants. Resist this urge at all costs. Pragmatism and intellectual honesty will doom you to our practitioner periodicals. Unless you seek mere wealth, fulfillment, and social progress, stick to the arcane needs of academia.

As a compromise for the incorrigible inner-hipster, however, trailblazer Cass Sunstein has made it morally acceptable to append the word "behavioral" to the phrase "economic approach."[4] This groundbreaking theory hypothesizes a nightmare world lacking cognitive and economic equality. It even allows for an abstract possibility of misguided attempts at altruism. Creating your thought-experiment under these guidelines merely requires you to inject the effects of basic psychology into your equations.

This discussion ties nicely to my second piece of advice.

2. To Disguise Your Research as Empirical, Include Mathematical Formulas Even Though Otherwise Unnecessary.

For example, examine the doctrines' differing approaches to deterrence theory. Though deterrence theory encompasses an array of applications, for purposes of familiarity, I limit this application to the deterrence of criminal conduct.

The law and economic approach assumes that an individual will be deterred from committing a criminal act if the harm caused by the punishment, when multiplied by the

[4]Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1997-1998).

probability of receiving that punishment, is greater than the benefit received through the act's commission.

Mathematically, this could be expressed as:

$$H \times P > B$$

As you may have surmised, H = harm caused by the punishment; P = probability of receiving the punishment; and B = benefit gained by the illicit behavior.

Now enters the courageous leap of logic which apparently assumes that the rules of math apply to formulas intended merely to describe an economic theory through symbols—the axioms of equality. Mathematically, if H and P were numbers rather than interdependent value variables which inherently effect each other when altered, it would not matter if H had a value of 2 and P had a value of 3 or if H had a value of 3 and P had a value of 2.

Mathematically, both:

$$3 \times 2 \text{ or } 2 \times 3 = 5^{5}$$

Therefore, assumes the law and economist, the actual values of the harm caused or probability of it being caused are interchangeable. For example, whether you maximize the harm caused and minimize the probability of capture, or minimize the harm caused

[5] Uh, I meant 6.

and maximize the probability of capture, you have a model which maximizes the criminal deterrence effect. After all, a really high number multiplied by 1 equals the really high number whichever value you ascribe to the respective variable.[6]

This is therefore the law and economist's advice to policy makers: Since you get the same deterrence effect by maximizing punishment and minimizing enforcement, as you would by minimizing punishment and maximizing enforcement, and since maximizing enforcement is really expensive while maximizing punishment for the 1 indigent caught of the 100,000 culprits is far less expensive—you should institute ludicrously hefty penalties that are almost completely unenforced for optimal maximum deterrence of criminal conduct!

The proliferation and inexplicable acceptance of this libertarian nugget throughout much of the world may explain why Singapore requires judicial caning for car vandalism and

[6] Of course, in this case, the law and economist is multiplying fractions. This is because their theory assumes values which necessarily must exist on a spectrum between 0% and 100%. Maximizing or minimizing harm, for example, assumes a value that has limits. You do not need to know what those limits are for valuation purposes provided your valuation is premised upon relativity—as in, the maximum possible harm is 100% and the minimum possible harm is 0%. A mathematician would generally express these values by creating a spectrum between 1 and 0. Because the law and economist is using variables which actually represent fractions their formula falls apart. Assuming that there must be both at least some harm and some probability of capture (we all know that anything multiplied by 0 is 0, after all) the calculated maximum harm would be something like .99 and the accompanying minimum enforcement value would be something like .01. The sum of .99 x .01 is not .99, it is instead .0099. (*i.e.* there is almost no deterrence effect by maximizing harm and minimizing enforcement, maximum deterrence only occurs when both are maximized. The only way to avoid this result is to cheat by multiplying the variables by 100.

$$(H \times 100)\ (P \times 100) > B \times 100$$

Then, to return your answer to the desired fraction, you must divide the sums by 100.

$$\frac{((H \times 100)(P \times 100))}{100} > \frac{(B \times 100)}{100}$$

Now that I have run through this principle fully, we shall completely ignore it in the future.

mandatory execution for possessing half a kilo of pot—yet in my time living there I saw maybe five uniformed police officers.

Now, for those malcontents who believe a system of justice which commands the strictest of punishments for those dumb enough, poor enough, or politically unpopular enough to be among the few arrested, tried, and convicted of common crime is antithesis to the satiric rhetoric extolled by the Constitution or our fundamental notions of equality—the behavioral economic methodology might render a more palatable, albeit less predictive, approach.

This discussion requires my third piece of advice.

3. Pretend to be a Qualified Cognitive Psychologist.

The first theoretical modification of the behavioral economic paradigm is wonderful, because while very simple in concept, when expressed as a mathematical formula, the reader will be instilled with the fervent belief you received at least a solid B+ in Pre-Calculus. (As discussed below, this is important because as you make innumerable mistakes in calculation, the reader will just assume that they do not understand your level of mathematical ability, and armed with this lack of self-confidence, will just blanket-assume your results are accurate.) The first modification is this: add the words "subject's perceived" before the words "harm," "probability," and "benefit."

Also note that this has the additional benefit of creating a hopelessly cumbersome syntax of compound-complex sentences impenetrable by even the most advanced reading comprehension. While advocates and judges may believe they should understand the meaning of a sentence after breezing through it once, a law review editor will assume that if he has invested ten minutes in trying to decipher a sentence, then it must really be something worth reading.

Thus modified, our new formula has that confused look that projects believability.

Where y = perception:

$$y(H)y(P) > y(B)$$

Understand that mathematically this makes no sense as it is currently stated because perception is not itself a stable value. For example, y would likely have different values depending upon whether it was perceived harm, probability, or benefit. This is because our perceptions of harm, probability, or benefit are likely controlled by different phenomena. So, for our purposes, y arguably equals H + e, P + e, B + e, where e = the value of the phenomena's effect on either reducing or increasing the subject's perceived harm, probability, and benefit from the actual harm, probability, or benefit.

Stated more complexly:

$$((H + e)(H))((P + e)(P)) > (B + e)(B)$$

Or to really dazzle:

$$(H^2 + e \times H)(P^2 + e \times P) > B^2 + e \times B$$

You could argue this, but you would not be correct. This is because e also changes depending upon the phenomena being analyzed, each of which requires a separate variable. All this dalliance has just been a "proof" used to connect the logic in a coherent way. Note that the preferred way of doing this is to ignore the temporary lack of logic at several steps during the logic proof provided the ultimate result makes sense to a distinctive voiced wheelchair-bound fellow in Cambridge. Know your audience.

Instead of trying to empirically isolate and identify the individual causes of the perception's distortion of reality, the behavioral law and economic approach measures that there is a difference and proceeds to offer a plausible, or at least non-disprovable, theory to explain it. In its approach to deterrence theory, the hypothesis takes the form of an overoptimism effect.[7] The overoptimism effect is one proposed explanation for the phenomenon that people behave in a way that suggests that they systemically underestimate their odds of being punished for illicit conduct. They may also

[7] Neil D. Weinstein, Unrealistic Optimism About Future Life Events, 39 J. PERSONALITY & SOC. PSYCHOL. **806** (1980); Neil **D.** Weinstein, Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample, 10 J. BEHAV. MED. 481 (1987) *as analyzed in* 3 note *supra at* 1537.

overestimate the benefit and underestimate the harm, though a thorough scouring of the scholarly research posted on Wikipedia does not suggest that it is to the same degree.

The practical upshot is this: if you could calculate the actual value of the overoptimism effect's diminishment of perception from reality, you would be able to calculate the perception, and therefore partially correct or explain why the law and economic formula predicts experientially inaccurate results almost all of the time. The problem, of course, is that you cannot do this.

Experimental social psychology is centuries away from providing us with the empirical data required to prove the specificities necessary to accurately calculate a subject's diminished perception of reality caused by the overoptimism effect. The fact that all people are different does not help either.

If it could however, where O = the diminishing value of the overoptimism effect, dependent to whether it is relating to H, P, or B, as illustrated by the appropriate subscript, our final equation would be this:

$$(H - O_H)(P - O_P) > (B - O_B)$$

We have now achieved a formula which is both purely accurate and empty of all meaning.

In sum, if you wish to make an inaccurate prediction your work should utilize an economic approach, while if you wish to conjecture a non-disprovable explanation for why a law and economic prediction is not accurate, your work should utilize a behavioral economic approach. Be assured that either approach renders the desired public policy platform devoid of sound premises, exploding with folksy heuristic, and deadening to the sensibilities of our society. You will, therefore, not risk offending a law review editor.

Though do note that some reviews have a preference for standard law and economics as, for the unwary, the word "behavioral" can evoke the scary ideals of "empiricism" and the "scientific method." They will learn in time that it should not.

So far, this example has assumed that reality exists. It assumes that our perceptions are mechanical and comprehendible through phenomena and formula.

To adapt these formulas to a world in which subjective perceptions are not assumed miscalculations of a single magic "objective reality," but are instead independent end-products created by an amoral multiplicity of interrelating, ever-evolving stimuli, matter, and processes, it will be necessary to introduce my forth piece of advice.

4. Even if Utterly Bizarre, Confidently Inject Philosophy Into Your Argument.

This audience is already aware that if a writer peppers a paragraph with the four key words: "Plato," "cave," "shadow," and "color" that readers are going to assume it to be

drafted by a scholar who really knows his dialogues from his *Definitions*. Indeed, according to Lexis Nexis, the *Yale Law Journal* has published 83 articles quoting Plato since 1983.[8]

In today's postmodern deconstructionist phantasmagoria, however, morphing Aristotle, Socrates, Machiavelli, and (as a benevolent nod of existence to four billion Asians and their own ancient philosophies) Confucius, into adjectives is no longer sufficient. Even the successful usage of "Cartesian" is inadequate. Today's editors are edgier in their insatiable thirst for esoterica. For us to con them into believing our casual name-dropping indicates our mastery of even the most obscure nuggets of philosophy, guided research is necessary.

Step one: Google the phrase "obscure philosophers."

Step two: Click on the first link that seems to have a promising summary or name—in this case, "The Guide to Philosophy on the Internet."

Step three: Scroll down until you see a phrase that reads roughly "comparatively obscure," or "lesser known." In *The Guide*, I am excited to find the promising fragment: "relatively obscure philosophers such as Arnold Geulincx and Robert Grosseteste."[9] (If

[8] That is not a typo, YLJ has published 83 articles since '83. Interestingly, submissions mentioning the names of prominent economists appear far less successful. John Maynard Keynes gets 15 shout-outs in the *Harvard Law Review*. His predecessor Adam Smith fares better with 36. I do not like Milton Freedman, and therefore refuse to search for his name at all.

[9] http://www.buzzle.com/editorials/6-8-2005-71277.asp (last visited on August 19, 2011).

your spell check does not challenge the veracity of the surname, he or she is probably not obscure enough for law review purposes.)

Step four: Google "Arnold Geulincx."

Step five: Search for any relationship to information you recognize. For the purposes of this Essay, I see that the Flemish, alleged Spinozist,[10] was a student of Descartes, who The Simpsons once told me uttered "I think therefore I am." Apparently Mr. Geulincx did a follow-up with the somewhat-less catchy "'Ita est, ergo ita sit," ("it exists, therefore it is so'").[11] Further examination nearly knocks me off the chair. I spot the word "optimism." Apparently he was bested by someone named Gottfried Leibniz, who better expressed Geulincx's ideas—yada, yada, yada—seven principles—yada, yada, yada—of which Optimism Principle and Plentitude Principle give us reasons to think that we live in the most perfect possible world. I now must merely find an unsuspicious point, as I continue to evolve our formula, to connect Sunstein's overoptimism effect with Leibniz's Optimism Principle to seem the well-rounded legal warrior-scholar indeed. Three minutes further research dredges further treasures—he was a mathematician specializing in Probability Theory, the very area which will justify the evolution of our mere equation into an intimidating matrix or—fingers crossed—fractal. Therefore, his casual reference will symbolize an ambiguous greater meaning on at least two, arguably three, levels. If framed as a joke it could be the Holy Grail of law review literature—the triple entendre.

[10] Whatever the hell that is. . . . Wow, further research indicates I should be deeply ashamed I was unaware of the alarmingly prolific influence of Baruch Spinoza in my daily life and way of thinking.
[11] Thanks again, Wikipedia! http://en.wikipedia.org/wiki/Arnold_Geulincx (last visited on August 19, 2011).

One way to do this is to inexplicably place his name in the title of your work. It does not matter if you fail to follow up on the reference as the reader is more than capable of internally rationalizing a reason for its inclusion. Moreover, if your audience is comprised of philosophers, the meaning they decipher from your Rorschach of words and symbols will be far greater, more complex, and on the whole—intrinsically personalized—than anything you could contrive. Just nod with ambiguous brooding gravity if a reader confronts you with his interpretation.

Some ne'er-do-wells may object to the above seasoned advice on the grounds that it is artifice--a charlatanic trick that exploits the imperfections of the weary intransigent vulnerables of this world. They may claim that all material success derived from such quackery is superficial—that it therefore does not really count. Such inflexible integrity can only be greeted with depression, poverty, and—if originating from a place of love and non-judgment—self-actualization.

This concludes with my final piece of advice:

5. Even Though Totally Unsupported By Your Previous Argument, End Your Work With Abrupt Uplifting Redemption.

This is where you can set yourself apart. Most authors who have advanced several pages of well cited cynicism masquerading as humored deprecation will fall into the trap of concluding with something relevant to the evidence presented. While this approach may

be tantalizing to those who believe that criminal conduct is rational, and therefore can be deterred rationally, it is less satisfying to those who refuse to be surprised that a child kept in a dog cage, used as a prop for dad's special parties through prepubescence, then abandoned to the streets as a broken illiterate teenager, may be predictably prone to throwing acid in the faces of prostitutes as a young adult. For if you are of the dangerous mindset of believing that life and the universe are complicated and that there is a tactile difference between a reason and an excuse, then math wheedles itself into a near useless tool for deterring criminal conduct. With behaviorism too nescient, and philosophy perhaps too arcane, there is one approach left before a final retch at a genocidal Atlas shrug.

Practice humanism.

Carl Rogers had the unusual notion that making people feel better about themselves might be a neat idea. If prisons, extra-judicial beatings, relaxed rules of evidence, express-lane executions, and mandatory life sentences for a third petit theft conviction are unable to make a person already divested from society feel included, then maybe compassion, attempts at understanding, and a hug are in order.

It can be very difficult for an individual to suspend judgment upon another person's conduct—particularly when he is aware that he either has engaged, or fears he may one day engage, in that very same conduct. Some of the wilier in the psychological community even suggest that it is our own self-doubt that projects itself onto others. The

human vengeful impulse to locate the pitch-forks and torches while others gather the village people is a desperate cry that we and our own shortcomings hide from public notice.

We therefore have a primal need to believe that maximum punishment and minimal enforcement is necessary for the deterrence of criminal conduct. (From this vantage it is possible for us to judge others harshly for their wrongdoing while knowing there is sparse chance we will ever be punished for our own bad behavior.) When one needs to believe in something—gays are unhealthy, the unemployed are lazy, transgressors of law deserve any physical or emotional punishment they get—one need not have compelling evidence to maintain that belief. Any evidence will do—even empty theories derived from obviously false premises expressed through mediocre math.

Paradoxically, humans seem to be preprogrammed to forgive the transgressions—no matter how morally blameworthy—of those they love. Perhaps the first step toward a humanist approach to the deterrence of criminal conduct is this: while always striving to be better people, humans should accept themselves and their limitations as unconditionally as they accept the limitations of those they love. This may make it easier for humans to take a more balanced approach to the deterrence of criminal conduct—where there can be shared empathy for both victim and offender in a very irrational, undereducated, occasionally unselfish, but almost always unfair, existence.

Humans helping humans throughout our collective sufferings and joys, penalties tethered to actual moral blameworthiness rather than contrived notions of punishment for the sake of validating the value of society's loss, and relaxed discretion in enforcement, may indeed be our best deterrence of criminal conduct.

Pity the math doesn't work out.